B.O., Applicant v. CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 59 and CITY OF SASKATOON, Respondents

LRB File No. 035-99; January 10, 2001
Vice-Chairperson, James Seibel; Members: Ron Asher and Bruce McDonald

For the Applicant: B.O. and Keith Morvick
For the Union: Sharon Lockwood

Duty of fair representation – Scope of duty – Employee suffering from mental illness tendered and subsequently sought to rescind resignation – Union conscientiously considered medical information and obtained legal advice before concluding that no basis for grievance – Board determines that, while union's handling of situation not perfect, union did not breach duty of fair representation.

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

REASONS FOR DECISION

Background and Evidence

[1] **James Seibel, Vice-Chairperson:** Canadian Union of Public Employees, Local 59 (the "Union") is designated as the bargaining agent for a unit of employees of the City of Saskatoon (the "City"). B.O. is a member of the bargaining unit. He filed this application which alleged that the Union was in breach of the duty to represent him fairly pursuant to 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.*

[2] More specifically, B.O., who suffers from a mental illness, alleged that the Union should have grieved the refusal by the City to reinstate him to his employment after he resigned and then attempted to retract his resignation.

[3] At the hearing, B.O. was represented by Keith Morvick, a former City employee and shop steward. The evidence regarding B.O.'s employment history and the events surrounding this matter was largely undisputed. In addition to B.O. and himself, Mr. Morvick called Dr. M. S. Renuka-Prasad, a psychiatrist, to testify. Called to testify on behalf of the Union were: Dave Taylor, local Union president; Matt Baraniecke, B.O.'s former supervisor; Lynda Farwell, B.O.'s last supervisor; Lois Lamon, local Union vice-president; Deb Hopkins, legal counsel; Judy Schlechte and Barry Horkoff, labour relations officers in the City's human resources department. Due to the sensitive and highly personal nature of B.O.'s medical history the hearing was conducted *in camera.*

[4] B.O. began working for the City's parks and recreation department as a summer seasonal labourer in 1979. According to Mr. Baraniecke and Ms. Farwell, he was a good worker and got along well with his co-workers. His employment ended on June 12, 1997, when he submitted a letter of resignation. He had resigned from his employment with the City on two prior occasions – June, 1989 and April, 1996 – but was reinstated each time with the intervention and assistance of the Union.

[5] On June 26, 1989, B.O. tendered a written resignation to the City that said he was resigning immediately. Three days later he requested to be reinstated. He told Ms. Schlechte that he had some physical and psychological problems that he was working through, but did not elaborate. The Union discussed the situation with the City and B.O. was reinstated within a few days. At the time, he had not indicated to the Union or the City that he was suffering from any mental illness that made him feel incapable of performing his job, and performed his duties satisfactorily and without incident each season thereafter.

[6] In the spring of 1994, B.O. was diagnosed as suffering from severe depressive illness by psychiatrist, Dr. K.E. Oberdieck. He was hospitalized for treatment for 10 days during March and April of 1994. He remained in Dr. Oberdieck's care until April, 1997. He returned to work for the City during the 1994 season. In the fall of 1994, he moved to Outlook, Saskatchewan. B.O. testified that, during the winter of 1994-95, he convinced himself that returning to his job with the City in the spring would not be good for him. In early April, 1995, he advised the City that he would not be returning to work. However, his foreman called him almost immediately and suggested he take sick leave instead. B.O. took this advice and returned to work at the end of May, 1995. He worked the balance of that season, but went on sick leave again near the end of the season.

[7] B.O. testified that his negative thoughts about his job returned during the off season of 1995-96. He claimed that his medications were not very effective in controlling his self-defeating thinking. Although he felt very depressed about the thought of returning to work, he did report for work on April 16, 1996. However, he tendered his written resignation to Ms. Schlechte the next day. The letter specified the reason as "ongoing health problems." Ms. Schlechte asked B.O. if he was sure about his decision and he replied affirmatively. He told her that the commute to work from Outlook to Saskatoon was detrimental to his health.

[8] No one at the City or the Union heard from B.O. until, in a letter dated July 20, 1996, to Mr. Taylor, B.O. advised him that he believed he had made a mistake in resigning. He said that he had believed that his job was the cause of his depression, but now that he was thinking more clearly wondered whether there was any basis for reinstatement. B.O. provided Mr. Taylor with a letter from Dr. Oberdieck confirming that B.O. was suffering from depression and had been under his care since 1994. Mr. Taylor sought an opinion directly from Dr. Oberdieck. In a letter to Mr. Taylor dated September 25, 1996, Dr. Oberdieck expressed the opinion that B.O.'s depression had interfered with his judgment in deciding to resign, that he did not appreciate the nature and consequences of his decision at the time, and that he was presently able to return to work.

[9] Mr. Taylor approached Jim Cowan, the City's director of human resources, with a view to securing B.O.'s reinstatement. According to Mr. Taylor, the City was extremely reluctant to accede to the request. Negotiations continued for several months and eventually resulted in reinstatement on conditions contained in an agreement between the City and the Union dated January 2, 1997 (the "Reinstatement Agreement"). Mr. Taylor described the arrangement as a "last chance agreement," and explained that if it was breached by B.O. the City could terminate his employment and the Union could not grieve the action. The Reinstatement Agreement provided as follows:

> *Whereas B.O. having resigned from employment with the City of Saskatoon on 1996-04-17, wishes to rescind his resignation, and*
>
> *Whereas B.O. was not capable of regular attendance to work before his resignation, and*
> *Notwithstanding the collective agreement between the parties, the parties agree as follows:*

> *1. B.O.'s resignation is rescinded and his employee status immediately preceding his resignation is reinstated. B.O. shall be considered to have been on layoff since 1996-04-17 and shall continue to be considered as being on layoff until he is recalled to work.*
>
> *2. B.O.'s continuing employment is conditional upon his regular attendance to work satisfactory to the City of Saskatoon for a period of six (6) months following his return to work from layoff.*
>
> *3. If during the aforementioned six (6) month period The City of Saskatoon determines that B.O.'s attendance to work is not satisfactory he may be terminated from employment without recourse to the grievance procedure of the collective agreement.*
>
> *This agreement is without prejudice and will not be used, produced, or referred to by either party on behalf of this employee or any other employee at any future grievance, arbitration, or any other matters undertaken by the parties subsequent to this date, except for the purposes of enforcing this agreement.*

[10] Mr. Taylor indicated that the Union felt constrained to agree to the terms demanded by the City because of an article in the collective agreement that provided as follows:

> *Article 15. NOTICE OF TERMINATION*
>
> *15.1 Upon termination of employment, the Employer or the employee agrees to provide the following written notice:*
>
> *Permanent Employees – one (1) month's notice*
> *All Other Employees – one (1) week's notice*
>
> *15.2 Notwithstanding the foregoing, either such notice may be waived or modified by mutual agreement between the City and the employee concerned.*

[11] He said that the article was interpreted to include instances of voluntary resignation. Since B.O. resigned in writing, and the City accepted this, he had waived the required period of notice. He said the Union sought legal advice and, as a result, concluded that it did not have any grounds for a grievance. He explained that the Union employed the assistance of legal counsel during its negotiations with the City concerning B.O. He described how the Union had entered into similar "last chance" agreements with respect to other employees, most commonly in situations involving alcoholism.

[12] Mr. Taylor testified that, once the terms of the reinstatement agreement had been worked out in principle, he, along with Ms. Lamon and Ms. Hopkins, met with B.O. at the Union's office on December 2 or 3, 1996, at which time the terms were described to him in detail. He said that they explained to B.O. that the situation was serious, and that a breach of the terms would have grave consequences. Mr. Taylor said that B.O. was counselled to contact the Union immediately if he ever again felt that he could not attend work. In his testimony, B.O. denied having any recollection of such a meeting or of having been apprised of the Union's intention to enter into the Reinstatement Agreement or of the terms thereof. However, in their testimony, both Ms. Lamon and Ms. Hopkins corroborated Mr. Taylor's description of the meeting. They each stated that, in their own opinion, B.O. clearly understood the terms of the Reinstatement Agreement and the advice they gave him. Ms. Hopkins said that she knew they had to have B.O.'s agreement before the Union could make the deal. In cross-examination, B.O. agreed that he was aware of the terms under which he returned to work on April 1, 1997.

[13] B.O. worked from April 1 to June 8, 1997, without incident. However, on June 9, 1997, he asked Ms. Farwell to be relieved from the operation of motorized equipment and he was placed on straight labourer work. On June 10, 1997, he approached Ms. Farwell and said he could not continue working. She testified that she suggested to him that he take sick leave. He was allowed to go home. He did not attend work on June 11, 1997. He returned on June 12, 1997 to deliver a written notice of resignation. He met with Ms. Schlechte, who asked him if he was certain about his action. She testified that he responded that while he had not been in a proper state of mind when he resigned in 1996, he was thinking clearly this time. She said that B.O. insisted on resigning. Ms. Schlechte contacted Mr. Taylor. B.O. testified that Mr. Taylor called him on June 13, 1997, to discuss the situation. B.O. confirmed that he told Mr. Taylor he was feeling fine and did not ask that the Union take any action on his behalf.

[14] Mr. Taylor testified that he contacted Ms. Hopkins for advice and, as a result, determined that the Union did not have grounds for a grievance. Mr. Taylor said that as Union local president he had the final authority to determine whether a grievance would be filed. He called B.O. on June 19, 1997,and explained to him that the Union would not intercede or file a grievance regarding this situation.

[15] Mr. Taylor did not hear from B.O. until October, 1997, when he received a letter asking if there was any chance of being reinstated once again. In the letter, B.O. explained that he had been seeing a new psychiatrist, Dr. Renuka-Prasad, since April, 1997, and, although on medication, he suffered from panic attacks while at work. The letter stated that B.O. had told Dr. Renuka-Prasad how the Union had obtained his reinstatement the year before, and the doctor had advised him to consult with him if he felt like resigning again. B.O. stated that he was now on different, more effective, medication. The letter concluded with the statement: "This is the last time I will make this request one way or the other. If the Union and/or the City deny it, then I can move on."

[16] Mr. Taylor said he contacted B.O. to tell him the Union could not do anything in the circumstances as there was no basis for a grievance. He advised B.O. to submit an application for employment to the City. Mr. Taylor said that in or about December, 1997, he received a telephone call from a lawyer calling on B.O.'s behalf. He said he described the entire situation, explained the Union's position and did not hear further from the lawyer.

[17] In December, 1997, the City's human resources department received a copy of B.O.'s October, 1997 letter to Mr. Taylor. In April, 1998, B.O. submitted an application for employment to the City and wrote to Mr. Cowan describing his personal situation in detail and requesting a meeting. Mr. Horkoff testified that he met with B.O. in July, 1998, and advised him that the City would not reinstate him.

[18] Dr. Renuka-Prasad explained that B.O. suffered from a schizo-affective disorder characterized by depression, certain paranoid delusions and panic attacks. He described the medication B.O. was prescribed to control the condition. He confirmed that B.O. had refused his advice to take sick leave in the spring of 1997 if he did not feel well at work. He said that it was possible that B.O. did not understand the consequences of his resignation at the time, but since October, 1997, B.O.'s condition had improved substantially. However, he said the condition was unpredictable and B.O. could suffer a relapse.

Argument

[19] Mr. Morvick, on behalf of B.O., argued that the Union had violated s. 25.1 of the *Act* and its duty to fairly represent B.O. by neglecting to take adequate steps to investigate the circumstances of his resignation in June, 1997. He also asserted that the Union had discriminated against B.O. because of his mental illness. He said it was wrong for the Union to enter into the Reinstatement Agreement in view of B.O.'s condition.

[20] Ms. Lockwood, on behalf of the Union, argued that the Reinstatement Agreement was the best that the Union could obtain for B.O. She indicated that B.O.'s situation was weak because he had actually resigned in writing, rather than having been terminated for excessive absence. She compared his situation to that described in the Board's decision in *K. H. v. Communications, Energy and Paperworkers Union, Local 1-S and SaskTel*, [1997] Sask. L.R.B.R. 476, LRB File No. 015-97, where an employee suffering from mental illness had been suspended several times and was eventually terminated. She asserted that in the present case the Union had relied upon legal advice and had acted honestly and in good faith in concluding that it could not grieve the refusal by the City to waive B.O.'s written resignation and reinstate him to his employment.

Analysis and Decision

[21] The basic principles governing the duty of fair representation as enunciated by the Supreme Court of Canada in *Canadian Merchant Services Guild v. Gagnon*, [1984] 84 C.L.L.C. 14,043, have been reiterated and relied upon by the Board in numerous decisions, at 12,188:

> *The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.*
>
> > *1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*
> >
> > *2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*

> *3. This discretion must be exercised in good faith, objectively and honestly after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*
>
> *4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*
>
> *5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.*

[22] In *K. H., supra*, the Board described the interpretation that labour relations boards have generally used when applying these principles to practical situations. The Board remarked, at 495:

> *As this and other labour relations boards have often remarked, whatever obligations are imposed upon a trade union by the duty of fair representation must leave considerable latitude for the kind of decision-making which is peculiar to the collective bargaining context. On the one hand, the duty of fair representation has its roots in a recognition that, since trade unions are granted exclusive authority to represent employees in respect of their vital workplace interests - and employees have no recourse other than the trade union for the representation of these interests -there must be some vehicle for assuring that employees are represented even-handedly and conscientiously by their trade unions.*
>
> *On the other hand, trade unions function in a complex environment in which they must attempt to reconcile interests which are not always compatible, estimate what gains can be made through collective bargaining, pit their strength against that of their employer, and administer their resources in an effective way. In assessing the manner in which they carry out these functions, it must be remembered that trade unions are democratic organizations, and organizations in which elected representatives may play an important role.*
>
> *Given these characteristics of trade union representation, labour relations boards have concluded that it would be unreasonable to impose upon trade unions a standard analogous to that expected of the professions, or to second-guess excessively the multi-polar decision-making in which they must engage.*

[23] In *Gilbert Radke v. Canadian Paperworkers' Union*, [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92, the Board described the nature and scope of the responsibility shouldered by union officials in discharging the duty of fair representation, at 64:

> *What is expected of trade union officials in their representation of employees is that they will act honestly, conscientiously and without prejudgment or favouritism. Within the scope of these criteria, they may be guilty of honest errors or even some laxity in the pursuit of the interests of those they represent. In making decisions about how or whether to pursue certain issues on behalf of employees, they should certainly be alert to the significance for those employees of the interests which may be at stake. Given the importance of the employee interests the union has the responsibility to pursue, they should also carry out their duties seriously and carefully. The ultimate decision made or strategy adopted, however, may take into account other factors than the personal preferences or views of an individual employee.*

[24] The *K. H.* case, *supra*, is the only prior decision where the Board has interpreted s. 25.1 of the *Act* with respect to an employee suffering from a mental illness that affected the employee's judgment regarding his behaviour at work. In K. H., *supra*, the Union filed several grievances of disciplinary action, but ultimately withdrew them. While the Board found that it did not have to consider whether the union had acted arbitrarily or in bad faith in the handling of the grievances, it did find that the union had discriminated against K. H. in applying its ordinary policies, procedures and considerations to an employee with special needs and particular limitations. The Board's decision was rooted in the notion of discrimination through a failure to reasonably accommodate the employee. The Board held that use of the term "discrimination" in s. 25.1 of the *Act* must be interpreted in light of s. 18 of *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1 (the "*Human Rights Code*"), which provides as follows:

> *18. No trade union shall exclude any person from full membership or expel, suspend or otherwise discriminate against any of its members, or discriminate against any person in regard to employment by any employer, because of the race, creed, religion, colour, sex, sexual orientation, family status, marital status, disability, age, nationality, ancestry or place of origin of that person or member or the receipt of public assistance by that person or member.*

[25] Finding that the duty to accommodate is considered in the concept of discrimination under s. 25.1 of the *Act*, the Board opined that a trade union must make adjustments to its normal procedures or policies in handling grievances if such policies have a discriminatory impact upon members that fall within the classes of persons specified in s. 18 of the *Human Rights Code*. The Board stated, at 500-01:

> *If this is the case, then the duty to accommodate may be relevant in determining whether there is an expectation that a trade union will make adjustments in procedures or policies normally followed in order to prevent the discriminatory impact which their typical operation would have on members of classes enumerated in the Code. The question in this connection is not whether there is something the Union could or should*

have done to prevent discriminatory action on the part of the Employer - though this might be a relevant question in a different context - but whether the Union is required to adopt a differential approach to some employees in order to avoid discriminating against them.

[26] In the *K. H.* case, *supra*, the Board found that the union had failed to make appropriate allowances for the fact that K. H. was a disabled person. The Board stated, at 502:

In this respect, though the process they followed might have been more than sufficient to satisfy their duty to represent employees fairly, it was inadequate to address the particular situation of K.H., and had a differential impact on him which must be considered to constitute discrimination.

K.H. was subjected to a rapid and escalating sequence of disciplinary actions against him, culminating in his termination. Representatives of the Union investigated the events which had led to each of these instances of discipline, and in each case found K.H. to have conducted himself in the way alleged by the Employer. Indeed, he never denied having carried out these actions. Though the grievances were on occasion dealt with in combination, as when there was discussion of the two suspension grievances at the same fourth step meeting, the general approach was to regard them as discrete and separate issues, rather than as an interrelated series of events which must be viewed against the backdrop of the disability suffered by K.H.

[27] And further, at 504:

The Union also seems to have accepted that the paradigm of "progressive discipline" which provided the framework for the actions taken against K.H. constituted an acceptable way of addressing his conduct. They did not raise the question of whether this whole framework was irrelevant to someone with a mental disability of the kind suffered by K.H.

[28] The Board concluded that it was in this manner that the union had discriminated against K.H., stating, at 505:

> *The Union may have handled the grievances diligently from the point of view of the normal operation of the grievance procedure. An ordinary employee might have little to complain of. Nonetheless, by limiting the scope of the grievance process to the normal sequence of investigation and discussion, by accepting the framework of progressive discipline, by, in effect, allowing the medical opinion of Dr. Barootes to govern what happened to K.H., the Union used the grievance procedure in a way which had a discriminatory effect on K.H. because of his mental disability.*

[29] While we approve of the Board's approach in *K. H., supra*, in our opinion, the present situation is very different. In the present case, there was no evident discipline or discharge imposed by the City upon B.O. upon which the Union felt it could base a grievance. Recognizing the situation as particularly unusual in the Union's experience and one rife with legal considerations, the Union employed legal counsel through the entire period it dealt with B.O.'s situation from his resignation in 1996. Whether it was a wise decision or an imprudent one for the Union to enter into the Reinstatement Agreement is an issue that is irrelevant to the present inquiry. The City did not terminate B.O. pursuant to the Reinstatement Agreement. B.O. tendered his resignation and the City accepted it. The issue for us to decide is whether the Union's conduct as a whole after B.O. left work in June, 1997, was a violation of its duty of fair representation.

[30] We find that the Union did not act in a manner that was arbitrary, discriminatory or in bad faith. It did not apply its usual procedures and policies to the consideration of how to handle a grievance without considering B.O.'s position as a disabled person. Indeed, Mr. Taylor conscientiously considered the medical information at hand and the advice of legal counsel. He concluded that there was no basis for filing a grievance. We are not in a position to second-guess that decision, even if we might have come to a different conclusion.

[31] We do not say that the Union's handling of the situation was perfect, but the standard of performance under s. 25.1 of the *Act* is not one of strict liability. It must be considered in view of the fact that union locals usually have limited resources and their officers are often volunteers without legal training who must allow for considerations that impact the membership as a whole. A union has limited ability to change or ameliorate an employer's workplace practices that do not, in its view, constitute violations of the collective agreement.

[32] However, neither should we be taken to have concluded that we approve of the City's handling of B.O.'s situation. It appears, at the least, to demonstrate a profound lack of sensitivity, which, it is to be hoped, was not intentional, but it is not our duty or place to suggest what alternatives, if any, B.O. may have to seek redress.

[33] While we empathize with B.O., the application is dismissed.

WADE LEHNER, Applicant v. CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 3736 and NORTH SASK LAUNDRY & SUPPORT SERVICES LTD., Respondents

LRB File No.075-99; January 10, 2001
Vice-Chairperson, James Seibel; Members: Gerry Caudle and Leo Lancaster

For the Applicant: Tom Lehner and Rupert Parent
For the Union: Harold Johnson
For the Employer: James Watchman

Duty of fair representation – Scope of duty – Union accompanied member when discipline imposed, filed grievance quickly, met with employer and investigated circumstances, discussed meeting and investigation with member and fully analyzed facts to determine whether credible defence could be mounted – Member advised of right to appeal decision not to pursue grievance, but did not avail himself of right – Board dismisses application.

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

REASONS FOR DECISION

Background

[1] James Seibel, Vice-Chairperson: Canadian Union of Public Employees, Local 3736 (the "Union") is certified as the bargaining agent for a group of employees of North Sask Laundry & Support Services Ltd. (the "Employer"). Wade Lehner is a member of the bargaining unit. He filed this application which alleged that the Union was in breach of the duty to fairly represent him with respect to the grievance of his dismissal from employment on January 6, 1999. Section 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (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

[2] At the hearing Wade Lehner was represented by his father, Tom Lehner. Wade Lehner commenced employment with the Employer in January, 1997, as a casual laundry aide. He testified that he received a written reprimand on December 1, 1998, as a result of alleged work problems and improper conduct towards co-workers. Accompanied by Karl Henry, local Union president and shop steward, Wade Lenher was counseled by Layne Reid, production supervisor. On December 4, 1999, Wade Lenher was involved in a confrontation with a co-worker. As a result he received a three day suspension without pay on December 7, 1998 and the other employee received a verbal reprimand. Again, Mr. Henry accompanied Wade Lehner when Mr. Reid counseled him. He served the suspension without objection at the time. No grievance was filed regarding the reprimand or the suspension. Wade Lehner said Mr. Reid terminated him on January 6, 1999, after one of the shipping staff complained about the manner in which he had packaged goods for shipping. The Employer took the position that the termination was for just cause.

[3] On January 9, 1999, Wade Lehner obtained a copy of the collective agreement from Mr. Henry. He understood that Mr. Henry would be filing a grievance of his termination. On January 12, 1999, Wade Lehner went on vacation for a few weeks. The Union filed a grievance on January 15, 1999.

[4] Wade Lehner testified that a meeting between himself and Mr. Henry had been arranged for the afternoon of February 1, 1999, to discuss his situation in advance of a meeting with the Employer on February 3, 1999, but that Mr. Henry was unable to attend. They then arranged to meet February 2, 1999, but Mr. Henry, or his nominee, failed to show up. Wade Lehner said that he attended at the workplace, accompanied by his brother and a friend, for the meeting with the Employer on February 3, 1999 at 9:30 a.m. They arrived before Mr. Henry. Wade Lehner said that, when Mr. Reid advised him that he could not have his brother and friend at the meeting, they left to find someone from the Union. Eventually, they spoke with Brian Brotzel, a national union staff representative, who told Wade Lehner that by leaving he had missed the meeting.

[5] Mr. Henry testified that after the grievance was filed, he requested and obtained the Employer's agreement to extend the time for a grievance meeting because Wade Lehner was on

vacation. Mr. Henry said he attended at the arranged time and place on February 1, 1999 for a meeting with Wade Lehner, but that Wade Lehner did not arrive. He said he arranged for another shop steward to meet with Wade Lehner on February 2, 1999, but Wade Lehner again missed the meeting. Mr. Henry said he attended the meeting with Mr. Reid on February 3, 1999, accompanied by two other Union officials, but Wade Lehner had already left. He testified that at the meeting Mr. Reid reviewed Wade Lehner's disciplinary record, going back about a year, and the Employer's reasons for his termination. After the meeting, Mr. Reid summarized his comments in a letter to Mr. Henry dated February 8, 1999. Mr. Henry said he met again with Mr. Reid to discuss his letter. He said that he, Mr. Brotzel and two other members of the Union executive then met with Wade Lehner on February 8, 1999, to review the results of the meeting and Mr. Reid's letter. He said that Wade Lehner admitted the truth of the majority of the contents of the letter. Mr. Henry said that he reviewed the steps regarding a grievance as outlined in the collective agreement and the Union's bylaws with Wade Lehner, and asked him to provide any additional information that might be helpful in making a case on his behalf.

[6] Mr. Henry testified that, on February 9, 1999, the Union sought and obtained an extension of the time to refer the grievance to arbitration. The Union's grievance committee needed time to assess the viability of a defence to the termination and whether to proceed further with the grievance. On February 23, 1999, Mr. Henry and four members of the grievance committee met with Wade Lehner, who was accompanied by his brother, and advised him that there was no viable defence to the termination and that the grievance committee had decided that the Union would not proceed to arbitration of the grievance. He said that he further advised Wade Lehner that the Employer was willing to reinstate him on the condition that he would be placed on probation for a period of three years. Wade Lehner was upset and indicated that he did not think that was fair and that he would not agree to such a condition. Mr. Henry told him that he could attempt to plead his case with the Employer for unconditional reinstatement.

[7] By a letter dated March 2, 1999, Mr. Henry advised Wade Lehner that the grievance committee had met and determined not to proceed further with the grievance. The letter also advised him of his options. It read as follows:

> *Please be advised that the grievance committee has met and decided not to carry on with the grievance. You still have the option to appeal the decision to the membership at our next meeting which will be held on March 9, 1999. You can also accept the decision made by the grievance committee or you can ask the management at North Sask Laundry for a meeting with the grievance committee and try to have them give you one last chance. Please let me know what decision you have made by March 8, 1999.*

[8] By letter dated March 8, 1999, Wade Lehner replied to the Union as follows:

> *This is to inform the union that I am not satisfied with the representation I did not receive, and I am filing a complaint with the Saskatchewan Labour Board against my union CUPE Local 3736.*

[9] Wade Lehner did not avail himself of the opportunity to appeal the decision of the grievance committee at the membership meeting.

Argument

[10] Tom Lehner argued that Wade Lehner's mistrust of the Union dated back to the incident of December 4, 1999, when he felt he was not properly supported. He said that subsequent events caused him to lose all faith in the Union to represent his interests. He asserted the position that Wade Lehner should be reinstated.

[11] Mr. Johnson, on behalf of the Union, argued that while Wade Lehner might disagree with the Union's decision not to proceed with the grievance, he had not demonstrated any failure by the Union to discharge its duty to represent him fairly pursuant to s. 25.1 of the *Act*. He asserted that the Union had given the matter due consideration and followed its bylaws in handling the grievance. He said that Wade Lehner was either included in the discussions with the Employer, but had elected not to attend, or had been kept informed of discussions held in his absence. He pointed out that, although he had been advised of his right to do so, Wade Lehner had failed to exercise his right to appeal the decision of the grievance committee.

Analysis and Decision

[12] The Board has relied upon the following basic principles governing the duty of fair representation set out by the Supreme Court of Canada in *Canadian Merchant Services Guild v. Gagnon*, [1984] 84 C.L.L.C. 14,043, at 12,188:

> *The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.*
>
> *1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*
>
> *2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*
>
> *3. This discretion must be exercised in good faith, objectively and honestly after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.*
>
> *4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.*
>
> *5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.*

[13] In *Gilbert Radke v. Canadian Paperworkers' Union*, [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92, the Board summarized the nature and scope of the responsibility shouldered by union officials in discharging the duty of fair representation, at 64:

> *What is expected of trade union officials in their representation of employees is that they will act honestly, conscientiously and without prejudgment or favouritism. Within the scope of these criteria, they may be guilty of honest errors or even some laxity in the pursuit of the interests of those they represent. In making decisions about how or whether to pursue certain issues on behalf of employees, they should certainly be alert to the significance for those employees of the interests which may be at stake. Given the importance of the employee interests the union has the responsibility to pursue, they should also carry out their duties seriously and carefully. The ultimate decision made or strategy adopted, however, may take into account other factors than the personal preferences or views of an individual employee.*

[14] We find that the Union is not guilty of a violation of its duty under s. 25.1 of the *Act*. Mr. Henry, in his capacity as shop steward, accompanied Wade Lehner when the Employer imposed final discipline. The grievance was filed quickly in order to preserve time while Wade Lehner was on vacation. The grievance meeting with the Employer was postponed until his return. It is unfortunate that Wade Lehner chose not to attend the meeting. Mr. Henry described how the Union investigated the circumstances of the termination by meeting and discussing the situation with Wade Lehner and with Mr. Reid on two occasions. The Union obtained an extension of time to proceed to the next step of the grievance procedure in order to more fully analyze the facts and to determine whether a credible defence could be mounted. The grievance committee met with Wade Lehner to describe its decision, to explain the rationale for the decision and to advise him of certain options. The Union advised Wade Lehner of his right, and the process by which, to appeal the decision of the grievance committee. He did not avail himself of the right to appeal and chose instead to reject any assistance the Union could offer in brokering his return to work.

[15] There is nothing in the evidence that would cause us to upset the decision by the Union not to proceed to arbitration of the grievance. The Union did not act arbitrarily, in bad faith or in a discriminatory manner in dealing with Wade Lehner in all of the circumstances. For the foregoing reasons, the application is dismissed.

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 342, Applicant v. CITY OF YORKTON, Respondent

LRB File Nos. 279-99, 280-99 & 281-99; January 12, 2001
Vice-Chairperson, James Seibel; Members: Gloria Cymbalisty and Don Bell

For the Applicant: Harold Johnson
For the Respondent: Randy Kachur

Unfair labour practice – Burden of proof – Discharge – Several days after union advised employer that it represented majority of employees, employer terminated employee – Employer's reasons for termination not coherent or credible – Board finds violation of s. 11(1)(a) and/or s. 11(1)(e) of *The Trade Union Act*.

***The Trade Union Act*, ss. 11(1)(a) and 11(1)(e).**

REASONS FOR DECISION

Background

[1] James Seibel, Vice-Chairperson: The Canadian Union of Public Employees, Local 342 (the "Union") is certified as the bargaining agent for a unit of employees of the city of Yorkton (the "Employer"). The Union filed an application which alleged that the Employer committed unfair labour practices in violation of ss. 11(1) (a), (c), (e) and (m) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), by terminating the employment of Ken Starger. The Union also applied to reinstate Mr. Starger and for payment for monetary loss pursuant to ss. 5 (f) and (g) of the *Act*.

[2] During the fall of 1999 the Union engaged in an organizing drive to add employees at the Yorkton Parkland Agriplex Arena (the "Agriplex") to the bargaining unit. Mr. Starger, an employee at the Agriplex for approximately 12 years, was among the group of employees sought to be added. In LRB File No. 295-99, reported at [2000] Sask. L.R.B.R. 420, the certification Order was amended to include those employees.

[3] On September 28, 1999, the Employer gave Mr. Starger a termination notice effective March 31, 2000. On November 5, 1999, the Union advised the Employer that it represented a majority of employees at the Agriplex, and requested that the Employer commence remittance of union dues on

their behalf. On November 9, 1999, the Employer advised Mr. Starger that the termination of his employment was effective that day. This was confirmed in a letter dated November 15, 1999, forwarded along with cheques for sums equivalent to the wages and vacation pay he would have earned to March 31, 2000.

[4] The Union alleged that Mr. Starger was terminated because of union activity and that the termination was intended to intimidate the employees. The Employer denied the allegations and alleged that the reason for Mr. Starger's termination on September 28, 1999, was "poor work habits and insubordination."

Evidence

[5] Jerry Bulitz, Agriplex manager and Mr. Starger's direct supervisor, testified on behalf of the Employer. He said that, on September 28, 1999, he hand delivered a letter to Mr. Starger that read as follows:

> *Re: Notice of Termination*
>
> *Effective March 31, 2000, you will be terminated from your position as an Arena Labourer II with the City of Yorkton (Parkland Agriplex).*

[6] Mr. Bulitz testified that, at a meeting on November 9, 1999, with himself and Laurie Rusnak, Director of Personnel, Mr. Starger was told not to report for work any longer. On November 15, 1999, Ms. Rusnak sent the following letter to Mr. Starger:

> *Re: Notice of Termination*
>
> *This letter is further to a letter dated September 28, 1999 as well as our meeting on November 9, 1999.*
>
> *As management indicated to you at our said meeting, we continue to find that your work habits and your dealings with persons utilizing the Parkland Agriplex are not satisfactory. Since the Parkland Agriplex is a multi-use facility catering to the public at large the employees of the City of Yorkton who work at the Agriplex must be able to get along, not only with management, but also with various user groups. Since you have shown an unwillingness to carry out management's instructions in this regard, the City of Yorkton has no alternative but to terminate your employment, as Arena Labourer II effective immediately.*

In accordance with the Notice of Termination dated September 28, 1999, you will receive payment until March 31, 2000. In this regard enclosed please find a cheque in the amount of $6,517.72, which represents your regular wages to March 31, 2000, minus appropriate deductions. Also enclosed is a cheque for $856.21 paying out your lieu time and vacation pay.

[7] In his testimony, Mr. Bulitz outlined those events in Mr. Starger's work history that led to Mr. Bulitz's decision to provide Mr. Starger with the September 28, 1999, termination notice:

- In 1993, Mr. Bulitz held a meeting with the Agriplex employees to discuss employee attitudes and conduct towards Agriplex user groups. The meeting was prompted by a conversation that Mr. Starger allegedly had with a member of the local exhibition board in which he criticized the lack of assistance that Agriplex employees received from exhibition personnel during a recent function. However, Mr. Starger was not disciplined in respect of this alleged indiscretion.

- In a memorandum dated October 25, 1996 from Mr. Bulitz, Mr. Starger was reminded of the need to provide pleasant customer service and was advised that his performance in this regard would be monitored. The memorandum was prompted by a letter from the representative of a user group who complained about "grumpy employees" of the Agriplex at a recent function. The copy of the letter of complaint exhibited at the Board hearing does not personally identify Mr. Starger as an alleged offender.

- In a memorandum dated January 27, 1999 from Mr. Bulitz, Mr. Starger was reprimanded for certain alleged lapses of duty on January 23, 1999. The memo was copied to Ms. Rusnak and to Gerry McGregor, Agriplex maintenance manager. The alleged lapses by Mr. Starger were: (a) failing to remove waste when requested to do so by concession staff, with the result that Mr. McGregor had to attend to it. Mr. Bulitz testified that, although the concession is operated by a contractor, it was the policy of the Agriplex to have its employees assist concession staff with this task; and (b) exhibiting his displeasure to a representative of the curling club user group over the fact

that they had contacted Mr. Bulitz at home for instructions as to the steps to be taken to remedy an electrical problem after Mr. Starger had allegedly been made aware of the problem but had failed to remedy it.

- February 1, 1999, Mr. Starger wrote a letter to the Mayor of Yorkton to complain about the contents of the January 27, 1999 memorandum from Mr. Bulitz and deny Mr. Bulitz's version of events. The letter was critical of Mr. Bulitz. In a memorandum dated February 4, 1999, Mr. Bulitz imposed a two-day suspension without pay upon Mr. Starger. The memo provided, in part, as follows:

  Your letter of February 1, 1999 addressed to Mayor Ben Weber has been redirected to Administration as it pertains solely to a personnel matter. Your letter clearly demonstrates a lack of respect, responsibility and insubordination. As a result of this, effective immediately you are suspended for two days without pay and you are not to return to work until Tuesday, February 9th, 1999, at 4:00 p.m.

  My memorandum of January 27, 1999 respecting your poor response in assisting your co-workers and leasees of our facilities directly relates to the duties and responsibilities that you are required to perform as Agriplex Arena Labourer.

  The City finds your attitude unacceptable and therefore recommends a referral to the Employee and Family Assistance Program. You are required to follow my direction, as Agriplex Manager, and I must remind you that this is a public facility providing service to the residents of our community. As such, it is imperative that we demonstrate outstanding service to the users of our facility.

  In addition to this, it is necessary for you to work as a co-operative team member with the concession staff and the rest of your co-workers in order for us to maintain an efficient operation. You are required to address these concerns and future occurrences of this nature will result in future disciplinary action and/or termination.

- Mr. Bulitz said that, in September, 1999, he received a letter from Ruth McPhee, one of the principals of a company that provided catering services for functions at the Agriplex, in which she complained generally about Mr. Starger's rudeness and lack of co-operation. The letter did not refer to any specific instance.

[8] Mr. Bulitz testified that it was after his conversation with Ms. McPhee that he decided that Mr. Starger should be terminated. In cross-examination, Mr. Bulitz confirmed that there had been no other specific infractions by Mr. Starger since the February suspension, nor had Mr. Starger been otherwise disciplined. He also admitted that he did not raise the matter of Ms. McPhee's letter with Mr. Starger before he gave him the September 28, 1999 termination notice. Mr. Bulitz said that, shortly after he gave Mr. Starger the notice, Mr. Starger requested an opportunity to address the Agriplex management board, but was refused.

[9] Mr. Bulitz testified that, after September 28, 1999, there were certain incidents involving Mr. Starger that led to the decision to terminate Mr. Starger from the workplace before March 1, 2000. These incidents were as follows:

- Mr. Starger was asked to secure a door on one of the buildings as it was banging in the wind. Mr. Bulitz had closed the door himself and propped it shut with a piece of pipe. His assumption was that Mr. Starger would better secure it with a piece of wire. Mr. Bulitz said that, although Mr. Starger had entered in the logbook that he had completed the task, on checking the door he found it still held shut only with the pipe. He told Mr. Starger to use a piece of wire but he did not check whether Mr. Starger did so. Later the same day he told Mr. Starger to wait for the next shift to come in to move a pallet of supplies. He found that Mr. Starger had moved the materials by himself, however, he did not bring the matter to Mr. Starger's attention.

- Mr. Bulitz alleged that, on November 6, 1999, Mr. Starger failed to check the freezer equipment and complete the appropriate checklist. However, in cross-examination, he admitted that he had not inquired of Mr. Starger as to whether he had actually carried out the check.

- Mr. Bulitz said that, on November 6, 1999, he noticed that Mr. Starger was not carrying the cell phone provided for weekend Agriplex maintenance staff. However, in cross-examination, he admitted that he did not raise this issue with him either.

[10] Mr. Bulitz claimed that he first learned that the Union was organizing the Agriplex employees from Ms. Rusnak when she phoned him first thing in the morning on November 8, 1999. He testified that he could not recall the details of their conversation but he told her he would be over to her office later in the morning. He said he contacted the chairperson of the Agriplex management board to advise him of the Union's activity. He attended at Ms. Rusnak's office and, together, they made the decision to accelerate the effective date of Mr. Starger's termination to the next day. They met with Mr. Starger on November 9, 1999 to advise him of the decision.

[11] In his testimony, Mr. Starger dealt with each of the more recent matters referred to by Mr. Bulitz as outlined above:

- With respect to the matters raised by Mr. Bulitz in the memo of January 27, 1999, Mr. Starger said: (a) that he had been extremely busy that day flooding the ice surface every half hour in preparation for a hockey tournament and had not attended to the concession waste by the time Mr. McGregor did it; and (b) that he had tried to fix the curling rink electrical problem, but when he did not succeed in doing so, the club president advised him that he would contact the usual electrical contractor. He did not realize that the club president had contacted Mr. Bulitz, until Mr. Bulitz called him and told him to find a contractor.

- Mr. Starger testified that he sent his letter of January 29, 1999 to the Mayor in order to explain his side of the story. The Mayor is a member of the Agriplex management board. Mr. Starger admitted that he was upset with Mr. Bulitz because he had not been given any opportunity to provide an explanation. He said that before he sent the letter he showed it to Mr. McGregor who expressed no reservations about it.

- With respect to securing the building door Mr. Starger testified that, after Mr. Bulitz told him about the door, he checked it and found it secured by the pipe, which he believed to be satisfactory. He said that, after Mr. Bulitz specifically told him to wire the door, he did so. With respect to moving the pallet of supplies, Mr. Starger said that he felt their location was hazardous so he moved them himself.

- With respect to the freezer check on November 6, 1999, he said that he had performed the check, but had not completed the checklist that day as he had not been up to the office.

- With respect to not using the cell phone on November 6, 1999, he said the phone was kept in the employees' coffee room and that he had not been there since the start of his shift so did not have it with him. He also said that the phone only worked properly outside and he had been working inside the building.

- With respect to the September, 1999 letter and complaint of Ms. McPhee, Mr. Starger confirmed that it had not been brought to his attention before the hearing at the Board.

[12] Mr. Starger said that soon after he received the termination notice he spoke to several of his co-workers about joining a union. He then contacted a lawyer, who put him in contact with the Union. The signing of cards in support of the Union commenced on October 17, 1999.

Argument

[13] Mr. Kachur, on behalf of the Employer, filed a written brief. He emphasized that there was no evidence of any union activity before Mr. Starger was given the termination notice. Mr. Kachur argued that the termination was complete on September 28, 1999, although Mr. Starger was required to finish out his "working notice" until March 31, 2000. In support of this proposition, Mr. Kachur referred to excerpts from David Harris, *Wrongful Dismissal*, (Toronto: Carswell, 1990) which reads, in part, as follows, at 3-3:

> *Dismissal is a matter of substance, not form. It is effective when it leaves no reasonable doubt in the mind of the employee that his or her employment has already come to an end or will end on a set date.*

And, at 3-12:

An employer is not liable for wrongful dismissal if it gives an employee adequate "working notice" or provides an adequate severance package. "Working notice" requires the employee to continue working until the end of the period.

[14] Mr. Kachur said that there was evidence that Mr. Starger had committed several work infractions after September 28, 1999, that justified not requiring him to attend at work after November 9, 1999. He argued that any order for reinstatement or monetary loss should not extend beyond March 31, 2000, as there was just cause for his dismissal.

[15] Mr. Johnson, on behalf of the Union, also filed a written argument. He argued that if termination is a matter of substance and not form, Mr. Starger was not terminated until November 9, 1999, up until which time he continued to enjoy coverage under employee benefits plans, contribution and accrual to the pension plan and the opportunity for overtime. Mr. Johnson said the Employer had failed to demonstrate that the termination of Mr. Starger was not motivated by anti-union animus.

[16] Mr. Johnson asserted that the Employer's actions in moving up the effective date of the termination were intended to intimidate the Agriplex employees.

[17] Mr. Johnson did not argue that there had been any violation of s. 11(1)(c) or s. 11(1)(m) of the *Act*.

Relevant Statutory Provisions

[18] 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; ...

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;

(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 an 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;

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;

Analysis and Decision

[19] The Employer has hinged a significant part of its defence on the timing of Mr. Starger's termination: if he was terminated on September 28, 1999, his termination could not have been in violation of the *Act* because there was no union activity until after that date.

[20] We accept that, in order to be effective, termination notices must be clear and whether a termination notice bears these characteristics is determined case by case. The latter notion is based upon the standard of a reasonable employee who receives such a termination notice, rather than upon the intention of the employer who gives the termination notice. The underlying rationale for these principles is to ensure that the employee has clear knowledge of exactly when his or her work is to end so that he or she can make the necessary preparations.

[21] And, while at common law, an employer may provide so-called "working notice" of termination of employment, in the absence of an employment contract specifying a period of notice, such notice is void unless it is reasonable. If it is not reasonable, the employer is disentitled to the protection of having given "working notice"; that is, the notice is not effective to terminate the contract of employment.

[22] When the Employer provided the termination notice it cited no cause. On an objective assessment a reasonable employee would accept that there was no cause for termination and that he was required to provide his services until March 31, 2000, at which time the termination of his employment would be "effective." However, in our opinion, a reasonable employee would also believe that, at any time before that date, the Employer could rescind altogether the decision to terminate his employment, and that he would be entitled to all normal wages, benefits and incidents of employment and terms and conditions of work until that date.

[23] We express no opinion as to whether the period of "working notice" was reasonable. That issue is irrelevant because the situation did not take that course. On November 9, 1999, the Employer terminated Mr. Starger's employment "effective immediately" and, purportedly, for just cause. The letter of November 15, 1999, referred to unsatisfactory work habits and relations with facility users, and says that the Employer "has no alternative but to terminate your employment." In our opinion, the Employer rescinded the notice of September 28, 1999, and substituted a new termination notice based upon different grounds on November 9, 1999. The latter date is the actual date of termination.

[24] The Employer not only unilaterally changed the rules of the game, but tried to play both ends against the middle, resulting in an economic loss to the employee. The payments provided to Mr. Starger with the letter of November 15, 1999 were substantial and inconsistent with a dismissal for cause. Notwithstanding that the payments might be characterized as either gratuitous or as a pre-payment of damages for wrongful dismissal, they still represent a loss compared to what Mr. Starger would have enjoyed and received had he been required to continue working until March 31, 2000. After November 9, 1999 he lost the opportunity for overtime work; coverage under employee benefit plans; any enhancements to wages and benefits that might have accrued to his classification during that period; the ability to apply for or bid upon other jobs with the City as an existing employee rather than as an outside applicant; and, the opportunity to seek other work with the status of an employed person rather than with the stigma of one who has been summarily fired.

[25] We find that the termination of Mr. Starger, for the purposes of the *Act,* occurred on November 9, 1999. Even if we had accepted that the date of termination was September 28, 1999, the Employer does not necessarily escape a finding that it has breached the *Act*. The application alleged that Mr. Starger was terminated with a view to discouraging union activity and also alleged that the Employer's conduct as a whole was intended to interfere with the rights exercised by the employees and this could include actions taken subsequent to the September 28, 1999 notice to Mr. Starger. That is, had we found that September 28, 1999, was the date of termination, then s. 11(1)(e) of the *Act* might not apply, but it would not preclude the application of s. 11(1)(a) of the *Act* based on subsequent events.

[26] That being said, why did the Employer provide the notice of November 9, 1999? The evidence revealed that what Mr. Bulitz perceived to be Mr. Starger's failings and neglect at work after September 28, 1999 were extremely petty. If they were considered to be of importance, why were they not brought to Mr. Starger's attention and why was he not given the opportunity to provide an explanation?

[27] The Board is often called upon to determine whether an employer has terminated an employee in circumstances that constitute a violation of s. 11(1)(e) of the *Act*. The principles applied to, and the rationale underlying, such determinations were summarized in the Board's decision 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.*

[28] The foregoing comments have been relied upon by the Board in numerous subsequent decisions including *International Union of Operating Engineers v. Quality Molded Plastics Ltd.*, [1997] Sask. L.R.B.R. 356, LRB File Nos. 371-96, 372-96 & 373-96, at 371-74.

[29] On this type of application we are not concerned with assessing whether the employee was terminated 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.*

[30] When specifically asked to describe what happened subsequent to the suspension of Mr. Starger in February, 1999, the only matter that Mr. Bulitz related in evidence was the general complaint by Ms. McPhee. Mr. Bulitz did not bring the complaint to Mr. Starger's attention, nor did he ask Mr. Starger for any comment. Instead, Mr. Bulitz provided Mr. Starger with the termination notice of September 28, 1999. Following this were a few incidents that are either without merit altogether, or are vague in terms of any responsibility.

[31] What did happen of major importance after September 28, 1999 is that Mr. Starger initiated the Union's organizing drive of the Agriplex employees. On November 8, 1999, Ms. Rusnak and Mr. Bulitz decided to terminate Mr. Starger on November 9, 1999, instead of letting him work through the original notice period. And what was the basis for this urgent change in plans? The four alleged infractions related above, two of which (the cell phone and the freezer checklist) allegedly occurred

on November 6, 1999, the day after the Union advised the Employer that it represented the employees.

[32] Although Ms. Rusnak participated in the decision to terminate Mr. Starger, she was not called to testify. It is open to us to draw the inference that her testimony would not have advanced the Employer's case.

[33] On the whole of the evidence, we find that the Employer has not discharged the onus upon it under s. 11(1)(e) of the *Act* to demonstrate that Mr. Starger's termination was not based on union activity. The explanation offered by the Employer does not establish a coherent and credible basis for the termination, nor does it demonstrate good and sufficient reason for the action.

[34] Accordingly, we find that the Employer has committed an unfair labour practice in violation of s. 11(1)(e) of the *Act.*

[35] We also find that the Employer has committed an unfair labour practice in violation of s. 11(1)(a) of the *Act*. The conduct of the Employer in terminating Mr. Starger effective November 9, 1999, regardless of whether the termination date is November 9, 1999, as we have found, or is September 28, 1999 as asserted by the Employer, was, in all of the circumstances of the case, designed to interfere with, restrain, intimidate or coerce the Agriplex employees. Mr. Starger initiated the organization by the Union; the Employer terminated him. A reasonable employee would likely feel intimidated and under pressure as a result of such action.

[36] An Order will issue as follows:

1. The Employer shall refrain from further violation of the *Act*;

2. Mr. Starger shall be reinstated to his position as Labourer II at the Agriplex within 30 days of the Order, without loss of seniority, as if he had continued to be employed from November 9, 1999;

3. The Employer shall make Mr. Starger whole for all monetary loss suffered as a result of the termination, taking into account the monies he has already received and any other income earned during the period from November 9, 1999, to the date of reinstatement. If the parties are unable to agree upon the amount to be paid within 30 days of the Order, the Board shall remain seized to determine the amount payable on the application of either party.

MARY FUNK, Applicant v. CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 4254, and SASKATOON (WEST) SCHOOL DIVISION No. 42, Respondents

LRB File No. 098-99; January 22, 2001
Vice-Chairperson, James Seibel; Members: Ron Asher and Gerry Caudle

For the Applicant: Mary Funk
For the Union: Bill Robb

Religious exclusions – Test – Applicant objects to all trade unions on basis of religious beliefs – Objection specifically rooted in interpretation of biblical scripture and relates to applicant's perception of man's relationship with God – Board grants religious exclusion.

***The Trade Union Act*, s. 5(l).**

REASONS FOR DECISION

Background

[1] James Seibel, Vice-Chairperson: The Canadian Union of Public Employees, Local 4254 (the "Union") was certified as the bargaining agent for a group of employees of Saskatoon (West) School Division No. 42 (the "Employer") by an Order of the Board dated January 21, 1999. Mary Funk applied to be excluded from the bargaining unit and relieved of paying dues to the Union under the religious beliefs exemption in s. 5(l) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), which 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;*

Evidence

[2] Ms. Funk has been employed by the Employer since 1979 as a clerical person. Her position is within the scope of the bargaining unit. She said that when the Union advised her that she must pay union dues she asked whether she might pay them to a charitable organization. Bill Robb, a national union representative, advised her that while the Union would not agree, she could apply to the Board for exemption.

[3] Ms. Funk testified that she has been a Mennonite protestant since childhood, and has been a member of a denomination affiliated with the Mennonite Fellowship of Evangelical Bible Churches since 1974. She said that she believes that the process of collective bargaining and the potential for job action are contrary to her religious beliefs, primarily because of her perception that such activities are confrontational and may involve disharmony between individuals. She was unable to say whether the Mennonite Fellowship itself was formally opposed to trade union membership in general, but cited several passages of scripture to illustrate the foundation for her belief, including, Acts 5:29; 1 Peter 2:18; Romans 12:18, 14:12; Ephesians 6:5-8; Titus 2:15-3:1; and, Colossians 3:22. Ms. Funk asserted that the sentiments of obedience to authority and living peaceably with all apply to all of her associations in the world, whether it be in the home, the community or the workplace.

[4] She admitted in cross-examination that for a period of time in the early 1980's union dues were remitted on her behalf, but she had requested that they be paid to a charitable organization. Ms. Funk was somewhat unsure, however, whether her request was honoured. She said that she was not aware that it was possible to apply for an exemption under the *Act* until she was so advised by Mr. Robb.

[5] Mr. Robb testified as to the particulars of the certification Order, the collective agreement with the Employer and the request for union security.

Argument

[6] Ms. Funk made assertions to the effect that, while she believes that the Union means well, because of her religious beliefs she does not agree with the methods that unions use in collective bargaining and job action in the event of industrial conflict.

[7] Mr. Robb, on behalf of the Union, emphasized that the Board must be cautious when considering applications for exemption of this kind. He pointed out that Ms. Funk is not required to join the Union, although she will otherwise be required to pay dues. He also pointed out that she had in fact paid union dues in the distant past, even though she testified that her religious beliefs have been consistent since childhood.

[8] Mr. Robb cited the Board's decision in *Olsen v. Service Employees International Union, Local 333 and Birch Hills & District Nursing Home Inc.*, [1986] Dec. Sask. Labour Rep. 39, LRB File No.183-86, as being parallel to the present case. In the *Olsen* case, *supra*, he said the Board refused to grant the applicant an exemption from paying union dues on the grounds that it was not convinced that her religious beliefs formed the basis for her objection. In support of his argument, Mr. Robb also referred to the decisions of the Board in *Neufeld v. Canadian Union of Public Employees, Local 1949 and Saskatchewan Legal Aid Commission*, [1986] Dec. Sask. Labour Rep. 33, LRB File No. 089-86, and *Drever v. Canadian Union of Public Employees, Local 4162, and Maple Creek School Division No. 17*, [1998] Sask. L.R.B.R. 311, LRB File Nos. 031-98 & 032-98.

Analysis & Decision

[9] The Board exercises a great measure of caution when considering applications for exclusion under s. 5(l) of the *Act*. As the Board stated in *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 conform 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.*

[10] The paramount consideration in such cases is to determine whether the objection to trade union involvement asserted by the employee is genuinely grounded in religious belief. To assist in this determination the Board has considered the evidence according to the following criteria set out 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.*

[11] In the present case, we are satisfied that Ms. Funk has met the criteria outlined above. She objects to all trade unions, not just the respondent Union, on the basis of her religious beliefs and bears no ill-will towards the Union. Ms. Funk has convinced us that, while she could not demonstrate that her objection is based upon specific tenets of the Mennonite Fellowship to which she belongs, they are nonetheless specifically rooted in interpretation of biblical scripture. In our opinion, there is no question that her beliefs relate to her perception of man's relationship with God and we do not doubt her sincerity in the least. It is with respect to the latter two findings, in particular, that the present case departs from the *Olsen* case, *supra*.

[12] In the *Olsen* case, *supra*, the applicant had actively participated in union affairs by attending meetings and participating in the vote to ratify a first collective agreement. The Board was not convinced that objection to the payment of union dues was rooted in firmly and sincerely held religious beliefs. The basis for the applicant's objection lacked apparent consistency and appeared to be rather recent. In contrast, Ms. Funk presented herself as a person with deep religious convictions of long standing.

[13] The Board will grant the application. Ms. Funk shall be excluded from the bargaining unit and the union dues and assessments that otherwise would be payable by her will be forwarded by the Employer to a charity mutually agreed to by the Union and Ms. Funk. In the event they are unable to agree to a charity, the Board will remain seized to determine the issue. We wish to thank both Ms. Funk and Mr. Robb for the courteous presentation of the case to the Board.

TEMPLE GARDENS MINERAL SPA INC., Applicant v. SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Respondent

LRB File No. 303-00; January 25, 2001
Chairperson, Gwen Gray; Members: Mike Geravelis and Mike Carr

For the Applicant: Larry LeBlanc, Q.C.
For the Respondent: Larry Kowalchuk

Remedy – Interim order – Criteria – In order to obtain interim order enjoining anticipatory breach of *The Trade Union Act*, some evidence should be presented that the alleged unlawful activity will occur – Fact that union intends to discuss strike activity not sufficient to establish that strike will occur – Board declines to grant interim order.

***The Trade Union Act*, ss. 5.3 and 11(2)(d).**

REASONS FOR DECISION

[1] **Gwen Gray, Chairperson:** Temple Gardens Mineral Spa Inc. (the "Employer") sought an interim order to restrain Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Union") from engaging in strike activity. The Employer alleged that the Union conducted an improper strike vote in July, 2000 by conducting a vote among all employees of the Employer at one time instead of conducting separate votes for employees at the spa and employees at the restaurant.

[2] The Union obtained an "all employee" certification Order in relation to the Employer on September 15, 1999. At that time, the restaurant was owned by Crescent Venture Capital Corporation (CVCC) and was certified by the Union on September 30, 1999. In December, 1999, the Employer acquired the restaurant business from CVCC and accepted that the Union held bargaining rights for this group of workers. The parties have been negotiating a collective bargaining agreement to cover all employees at the spa and restaurant for many months and have several applications pending before the Board.

[3] The Union disputed that it acted improperly by conducting a strike vote among all employees of the Employer. It argued that the employees are covered by the Union's "all employee" bargaining unit. The vote was conducted among all employees who are affected by the collective bargaining.

[4] The Employer brought this interim application after it learned that the Union had conducted only one strike vote among employees. Ms. Thorn, Chief Executive Officer, deposed in her affidavit that she was not aware that only one vote had been conducted until the matter was raised in evidence by the Union at a Board hearing in November, 2000. Recently, the Union posted notice of a union meeting which indicated that "strike action vote" was an agenda item for the meeting. The Employer wants the Board to restrain the Union from conducting strike activity based on its July "merged" vote.

[5] There is nothing improper or illegal about the Union meeting to discuss strike activity or to conduct a strike vote. There is no suggestion in the materials that the Union is preparing to commence a strike or that it would engage in strike activity when matters are pending before the Board. It conducted the original strike vote in July, 2000 and has not acted on it to this date.

[6] The Board finds that the factual basis for obtaining an interim order does not exist in this case. While the Board may have jurisdiction to issue an interim order in the case of an anticipatory breach of the statute, there is no factual basis for making such an order in this case. There is no indication in the materials filed that the Union intends to commence strike activity. The Board is of the view that in order to obtain the extraordinary remedy of an order enjoining an anticipatory breach of the statute, some evidence should be presented that would lead the Board to conclude that the action that is alleged to be unlawful will occur. The fact that the Union intends to discuss strike vote activity at its union meeting is not sufficient to establish that a strike, which may be unlawful, is about to take place.

[7] The Board makes no ruling on the other issues raised in argument, including the status of the Employer to bring the application under s. 11(2)(d) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") or the merits of the Employer's arguments under s. 11(2)(d) of the *Act*.

[8] The application for an interim order is dismissed.

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA), Applicant and SASKATCHEWAN INDIAN GAMING AUTHORITY INC., Respondent

LRB File No. 092-00; January 25, 2001
Chairperson, Gwen Gray; Members: Brenda Cuthbert and Bob Todd

For the Applicant: Rick Engel
For the Respondent: Larry Seiferling, Q.C.
For the Intervenors: Dean Head

Collective agreement – First collective agreement – Where application for first agreement assistance pending at time that application for rescission filed, Board will suspend vote on rescission application until first agreement application concluded.

Collective agreement – First collective agreement – Board permits parties to use s. 24 of *The Trade Union Act* as part of agreement to waive pre-conditions for application under s. 26.5(1) of *The Trade Union Act*.

Collective agreement – First collective agreement – Employer argues that application for first collective agreement assistance premature – Board defers to Board agent on question of whether parties can achieve collective agreement on their own without assistance – Board makes usual order appointing agent.

***The Trade Union Act*, ss. 24 and 26.5.**

REASONS FOR DECISION

Background and Facts

[1] **Gwen Gray, Chairperson:** National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (the "Union") was certified to represent employees of Saskatchewan Indian Gaming Authority Inc. ("SIGA") at Northern Lights Casino in Prince Albert on November 30, 1999. According to the Union, the parties met for the purpose of bargaining a collective agreement on March 14, 2000 and March 28, 2000 prior to the filing of this application.

[2] The Union applied to the Board for assistance in concluding its first collective agreement on March 30, 2000. Around the same time, the Union filed an unfair labour practice application with the Board (LRB File No. 052-00) in which it alleged that SIGA had tainted the workplace by supporting the Northern Lights Casino Employees' Association (the "Association"). The Union also complained that SIGA had failed to provide certain information to the Union. SIGA also filed an unfair labour practice against the Union claiming that certain of its statements constituted an unfair labour practice. (LRB File No. 087-00)

[3] In its reply, SIGA noted that the Union did not seek bargaining dates in the first two weeks of February, 2000. SIGA indicated that it met for bargaining with the Union on March 15, 2000 at which time the Union presented a comprehensive proposal package. SIGA and the Union agreed to discuss non-monetary items before discussing monetary items. According to SIGA, the parties met again on March 24, 2000 at which time SIGA presented its proposals for clauses relating to fundamental principles. At the end of the meeting, the Union presented its proposals on a general wage increase. At this time, the Union and SIGA also agreed to a block of dates to resume collective bargaining. SIGA replied that the application was premature as bargaining had barely begun. SIGA noted that, in another First Nations' institution, collective bargaining extended over a four year period prior to reaching a first agreement. SIGA asserted that the prolonged process was due in part to issues that are unique to First Nations' institutions. SIGA denied that it had engaged in any behavior contrary to *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") and noted that it had allowed the Union to have access to the workplace to meet with employees and to conduct elections for its bargaining committee. SIGA noted that it also permitted some employees to use a meeting space in the Casino. Some of these employees are opposed to the Union but SIGA denied that it had bargained with or approved of the dissident group.

[4] On May 1, 2000, the parties met and settled the unfair labour practice applications and entered into an agreement as follows:

Agreement between

SASKATCHEWAN INDIAN GAMING AUTHORITY
and

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKER'S UNION OF CANADA (CAW-CANADA)

PREAMBLE:

WHEREAS the parties had filed unfair labour practice charges against each other which were to be heard before the Saskatchewan Labour Relations Board on May 1, 2000; and,

WHEREAS the parties are inclined to settle these matters without going to a formal hearing, the parties have agreed on a without prejudice basis as follows:

AGREEMENT:

1) The parties agree to meet in collective bargaining on May 11, 12, 16, 17 and 18, 2000. The Employer agrees to provide the Union with its proposals prior to May 11, 2000. The parties will be assisted by a conciliator from the Saskatchewan Department of Labour during these aforementioned dates. The parties have agreed to pre-schedule dates for the Union's First Contract Application, which shall be on June 14, and 15, 2000, in the event an agreement is not reached. Pursuant to Section 24 of The Trade Union Act the parties agree that the preconditions for first contract legislation as outlined in Section 26.5(1) shall be waived. The parties may argue the need for first contract assistance.

2) The Employer shall convene a compulsory staff meeting to be held on May 14th or 21st 2000, with wages to be paid for attendance. At the meeting the Union will have no less than (1) one hour to address the employees on matters concerning collective bargaining, and the Employee Association. The Employer, namely Sharon Agecoutay, shall read a statement prepared by the Union; which shall advise the Employee Association has no jurisdiction in the Casino. Also in attendance will be a Labour Board Officer (Terry Stevens, if available) who will explain the concept of "sole bargaining agent."

3) On or before May 7, 2000 the Union will prepare a notice to be posted on all bulletin boards in the Casino for a period of no less than three weeks from the date of posting. The notice will primarily read that the Employees Association has no jurisdiction within the Casino and that the Employer will not recognize Employees Association on any matter. The notice will be jointly signed by the Union and Vice President Human Resources Sharon Agecoutay.

4) The Unfair Labour Practices as filed by both the employer and the Union, will be held in abeyance until the foregoing provisions have been met.

5) The agreement shall be filed with the Saskatchewan Labour Relations Board on this date.

Signed this "1" day of May, "2000", in the city of Saskatoon, in the province of Saskatchewan.

"Larry Seiferling"	*"Rick Engel"*
For the Employer	*Witness*
"Doug Olshewski"	*"Rick Engel"*
For the Union	*Witness*

[5] The parties resumed bargaining in accordance with the agreement with the assistance of a conciliator from the Labour Relations, Mediation and Conciliation Branch of Saskatchewan Labour. On September 28, 2000 the Union filed supplementary material in support of its application for assistance in concluding its first collective agreement. In this material, the Union requested that the Board schedule the first contract application and asked the Board to appoint a Board officer to investigate the application. The Union noted in its supplementary material that the parties had met for the purpose of collective bargaining on seven dates. The Union filed SIGA's proposed agreement and noted that a number of the items remained in dispute. The Union also asserted that, on the issue of wages and classifications, SIGA's bargaining team lacked authority to negotiate.

[6] In its reply to the supplementary material, SIGA asserted that the waiver of the pre-conditions for a first contract application, which was contained in the agreement outlined above, applied only for the purpose of the first collective agreement application that was scheduled for hearing on June 14 and 15, 2000. SIGA argued that the Union, by filing its supplementary statement, was attempting to substitute an entirely new application for the one filed on March 30, 2000.

[7] SIGA also outlined the steps it had taken to comply with the agreement reached with the Union on May 1, 2000 including holding a compulsory staff meeting for the purpose of permitting the Union to address employees on the matter of collective bargaining and the role of the Union in relation to the workplace. SIGA also posted notices in the workplace indicating that the Association,

which opposes the Union, had no jurisdiction within the Casino and that SIGA did not recognize the Association.

[8] SIGA also asserted that the Union has not complied with the requirements of s. 26.5 of the *Act* as it did not provide the Board with a statement of its last offer on the issues that remain in dispute. SIGA remained of the view that the application was premature; that it is not a proper application; and that the conditions of bargaining do not warrant Board intervention at this point.

[9] On November 23, 2000, the Union provided the Board with a list of the disputed issues and set out its last offer on each issue. The disputed issues pertain to union security, management rights, union representation, seniority, hours of work, bulletining and filling of positions, no discrimination, gratuities, leaves of absence, general holidays, grievance procedure, wages and classifications, paid education leave and duration of the agreement. In its material, the Union asserted that SIGA's bargaining committee presented a partial wage proposal on May 11, 2000 but on September 25, 2000 withdrew its proposal and advised the Union that it had no mandate to negotiate wages.

[10] Prior to the hearing of this matter, the Board received a request from Dean Head, counsel for certain SIGA employees who have filed an application seeking rescission of the Union's certification Order, to make representations to the Board. Counsel for SIGA also filed a request asking for the rescission application to be heard prior to the first agreement application.

[11] A hearing was held in Saskatoon on December 18, 2000.

Argument

[12] Mr. Engel, counsel for the Union, asked the Board to follow its regular procedure of hearing cases in the order in which they are filed. In addition, counsel asked the Board to appoint a Board agent to investigate the differences between the parties on the first collective agreement and to report to the Board as to whether the Board should intervene by way of imposing a first collective agreement.

[13] Mr. Seiferling, Q.C., counsel for SIGA, argued that the rescission application should be heard and determined prior to the application for first contract assistance. Mr. Seiferling referred the Board to its recent proposed policy regarding the hearing of applications for rescission in a more

timely manner and argued that this policy respects the rights of employees to choose or not choose a trade union. Counsel argued that the rescission application should be heard and determined prior to the first contract assistance application as a method of saving time and expense. Counsel referred the Board to *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 the cases cited therein for the proposition that the Board should not impose a first collective agreement in circumstances where the employees no longer wish to be represented by the union.

[14] Counsel also argued that the application for first contract assistance was improperly before the Board as the application had been substantially changed by the supplementary material filed by the Union. In addition, counsel argued that the Union had failed to set out its position on the items in dispute and had not complied with ss. 26.5(3) and (4) of the *Act.* Counsel referred the Board to *International Union of Bricklayers v. Eckl Ceramics (1978) Ltd. et al.*, [1983] Apr. Sask. Labour Rep. 69, LRB File No. 562-82 and *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Yorkton Co-operative Assoc. Limited,* [1985] Dec. Sask. Labour Rep. 60, LRB File No. 248-85 for the proposition that s. 19 of the *Act* cannot be used to permit a party to use the Board's amendment powers to substitute a new application for the one originally filed. Counsel argued that the Board policy restricting evidence to matters that existed at the time an application is filed with the Board should be applied to the present application. Counsel also referred the Board to *International Brotherhood of Electrical Workers Local 2067 v. SaskPower,* [2000] Sask. L.R.B.R. 17, LRB File No. 162-99 for the proposition that failure to comply with statutory or regulatory procedures will invalidate an application.

[15] Mr. Seiferling also argued that, on the merits of the application, it was premature and the Board should not intervene when bargaining is ongoing and the parties are making progress on their own without Board assistance. Counsel referred the Board to *Vancouver Island Publishing Co. Ltd. v. Vancouver Typographical Union, Local No. 226,* [1976] B.C.L.R.B.R. No. 32/76; *Prairie Micro-Tech Ltd., supra, United Food and Commercial Workers, Local 1400 v. Madison Development Group Inc. et al.,* [1997] Sask. L.R.B.R. 68, LRB File No. 053-96; *Retail Clerks International Union, Local 206 v. Maclean-Hunter Cable T.V. Limited,* [1981] 1 Can LRBR 454 (C.L.R.B.); *Saxum Canada Inc.*, [1999] O.L.R.B. No. 1511; *Atway Transport Inc.,* [1991] OLRB Rep. April 425; *United Food and Commercial Workers, Local 1400 v. Remai Investment Corp.,* [1996] Sask. L.R.B.R. 132, LRB File No. 004-96.

[16] Mr. Head, counsel for the intervenors, sought to have the Board determine the rescission application prior to hearing and determining the application for assistance on the first contract. Counsel argued that the granting of the first contract would give an advantage to the Union on the rescission application.

Relevant Statutory Provisions

[17] The application raises issues with respect to ss. 24 and 26.5 of the *Act* which read as follows:

> *24. A trade union representing the majority of employees in a unit of employees may enter into an agreement with an employer to refer a dispute or disputes or a class of disputes to the board and the board shall hear and determine any dispute referred to it by either party pursuant to such agreement and the finding of the board shall be final and conclusive and shall in regard to all matters within the legislative jurisdiction of the Legislature of Saskatchewan be binding upon the parties and enforceable as an order the board made in accordance with this Act.*
>
> *26.5(1) Either party may apply to the board for assistance in the conclusion of a first collective bargaining agreement, and the board may provide assistance pursuant to subsection (6), if:*
>
> > *(a) the board has made an order pursuant to clause 5(a), (b) or (c);*
> >
> > *(b) the trade union and an employer have bargained collectively and have failed to conclude a first collective bargaining agreement; and*
> >
> > *(c) any of the following circumstances exist:*
> >
> > > *(i) the trade union has taken a strike vote and the majority of those employees who voted have voted for a strike;*
> > >
> > > *(ii) the employer has commenced a lock-out; or*
> > >
> > > *(iii) the board has made a determination pursuant to clause 11(1)(c) or 11(2)(c) and, in the opinion of the board, it is appropriate to assist the parties in the conclusion of a first collective bargaining agreement pursuant to subsection (6).*
>
> *(2) If an application is made pursuant to subsection (1), an employee shall not strike or continue to strike, and the employer shall not lock out or continue to lock out the employees.*

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

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

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

> *(a) file with the board a list of the issues in dispute and a statement of the position of that party on those issues, including that party's last offer on those issues; and*
>
> *(b) serve on the applicant a copy of the list and statement.*

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

> *(a) the board may require the parties to submit the matter to conciliation if they have not already done so; and*
>
> *(b) if the parties have submitted the matter to conciliation or 120 days have elapsed since the appointment of a conciliator, the board may do any of the following:*
>
> > *(i) conclude, within 45 days after undertaking to do so, any term of terms of a first collective bargaining agreement between the parties;*
> >
> > *(ii) order arbitration by a single arbitrator to conclude, within 45 days after the date of the order, any term or terms of the first collective bargaining agreement.*

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

> *(a) evidence adduced relating to the parties' positions on disputed issues; and*
>
> *(b) argument by the parties or their counsel.*

(8) Notwithstanding section 33 but subject to subsections (9) and (10), the expiry date of a collective bargaining agreement concluded pursuant to this section is deemed to be two years from its effective date or any other date that the parties agree on.

> *(9) Notwithstanding section 33 not less than 30 days or more than 60 days before the expiry date of a collective bargaining agreement concluded pursuant to this section, either party may give notice in writing to terminate the agreement or to negotiate a revision of the agreement.*
>
> *(10) Where a notice is given pursuant to subsection (9), the parties shall immediately bargain collectively with a view to the renewal or revision of the agreement or the conclusion of a new agreement.*

Background to First Agreement Applications

[18] In many newly certified bargaining units it is difficult for the parties to achieve a first collective agreement. The change from common law rules governing employment relationships to the collective bargaining setting is significant. All issues related to employment are open for negotiations and there is no common framework for the employer and union to apply in order to focus their discussions and negotiations. In addition, the relationship between the union and the employer is in a developmental stage and may be characterized more by mistrust and suspicion rather than trust and an honest exchange of views.

[19] The time frame set out in the *Act* for reviewing the representative status of the certified trade union also contributes to the difficulty in reaching a first collective agreement. Section 5(k) of the *Act* permits the bringing of an application for rescission in the eleventh month following the issuing of a certification order, whether or not a collective bargaining agreement has been reached. Unions generally attempt to structure negotiations in order that a collective agreement can be achieved in the first year after certification.

[20] On occasion, employers are also aware of the open period and will structure negotiations with the union to ensure that no agreement is reached prior to the open period at which time an employee or group of employees may bring a rescission application to the Board to terminate the union's representation rights. The employer's bargaining conduct can be described as negotiating to rescission. Traditionally, the union's bargaining strength was tested by its ability to achieve a first collective agreement either through the traditional mechanism of strikes or its ability to resist a lock-out.

[21] In recognition of the difficulties facing unions and employers in first agreement settings, the *Act* was amended in 1994 to empower the Board to assist the parties in achieving a first collective

agreement: see s. 26.5 of the *Act* above. In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Prairie Micro-Tech Inc., supra,* the Board considered the broad purpose of such provisions by surveying similar provisions in other labour relations statutes. The Board noted that, initially, collective agreement powers, which first appeared in the British Columbia Labour Code in 1973, were applied in circumstances where employers were engaged in bad faith bargaining tactics or surface bargaining. The remedy of imposing a first collective agreement was viewed as an extraordinary remedy. In *Miscellaneous Workers', Wholesale and Retail Delivery Drivers and Helpers Union v. London Drugs,* [1974] 1 Canadian LRBR 140 at 142-143, the British Columbia Board described the general scenario that develops when the employer is a recalcitrant participant in collective bargaining and the circumstances in which the Board would impose a first collective agreement:

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

[22] The Board summarized the three goals of the British Columbia Board as including: the resolution of specific disputes; the institution of a period of "trial marriage" which would allow a collective bargaining relationship which was off to an inauspicious start to become stable and mature; and the prevention of activity on the part of recalcitrant employers which is aimed at undermining the effectiveness of a trade union: *Prairie Micro-Tech Inc., supra,* at 40-41.

[23] Subsequently, the British Columbia Board shifted the focus of the first agreement power from the "bad faith/exceptional remedy" model to a "mediation/breakdown" model. The shift was brought about in part by legislative changes to the respective provisions.

[24] In *Prairie Micro-Tech Inc., supra,* the Board summarized the overall conclusions that can be drawn from the experience in other jurisdictions with first collective agreement provisions as follows, at 47:

> *A number of features can be identified, however, from examining the experience in other jurisdictions than our own. We can see, for example, that all of the legislative initiatives which have been put in place represent an acknowledgement of the peculiar problems which can arise in the context of an infant collective bargaining relationship. A review of the jurisprudence shows that the problem which most often gives rise to the use of first contract arbitration is the obduracy or illegal conduct of an employer who is determined to thwart or ignore the trade union. Other problems may also threaten to destroy the relationship, such as, for example, the emergence of an insoluble industrial dispute, or roadblocks created by the incompetence or inexperience of negotiators on either side.*
>
> *We can also discern in the experience of other jurisdictions a continuing effort to draw a sustainable balance between the underlying objective of promoting healthy and independent bargaining by the parties themselves, and that of avoiding a situation where the bargaining process is exposed to the risk of damage or destruction because of the conduct or inexperience of the parties. In attempting to draw this balance, legislatures have adopted one of two general models - one which requires some determination of the necessity for first contract arbitration, and one which allows the parties themselves to decide when to avail themselves of this mechanism. The former model is exemplified by the legislation in British Columbia, Ontario, Newfoundland and the federal jurisdiction, and the latter by the Manitoba and Quebec statutes.*
>
> *In this context, tribunals and commentators in all jurisdictions have laid great stress on the proposition that first contract arbitration is not intended to replace bargaining between the parties, but to foster and support it.*

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

[25] Our Board interpreted s.26.5 of the *Act* as permitting Board intervention in a first collective agreement setting when negotiations have broken down. The Board stressed that "the overall purpose of the provision is to intervene, where the situation warrants it, in an attempt to preserve the collective bargaining relationship, and the ability of the trade union to continue to represent employees": see *Prairie Micro-Tech Inc., supra*, at 49.

[26] The mechanism for intervention that has been developed by the Board relies on the use of trained conciliators as Board agents to intervene in the process for the purpose of assisting the parties to achieve a first agreement. Failing agreement, the Board agent reports to the Board on two questions: first, should the Board intervene in the dispute or should the parties be left to their own devices; and second, if the Board agent concludes that the Board should intervene, what terms should the Board impose on the parties. The majority of applications for first collective agreement are resolved with the assistance of the Board agent. When the matters are not resolved and are forwarded to the Board with a report, the Board will conduct a hearing to determine if it should intervene and if so, on what terms. At this stage of the proceedings the parties are asked to address the matters raised in the Board agent's report and to indicate their agreement or disagreement with the proposals contained in the report. Most frequently, the Board imposes the provisions recommended by the Board agent as they best reflect the agreement that would have been reached by the parties on their own accord without Board intervention.

[27] We have set out this discussion of the difficulty of reaching first collective agreements and the policies the Board has developed in interpreting and applying the first collective agreement provisions contained in s. 26.5 of the *Act* to provide a background and understanding of the principles the Board relies on in coming to its decision in this instance.

Order of Proceeding

[28] The first question that we are required to address is whether the Union's application for first collective agreement assistance should be heard and determined prior to the Board hearing and

determining the rescission application, which was filed subsequent to the first agreement application. The simple and straightforward answer to this question is that, generally, the Board hears and determines applications of this nature in the order they are received. In the context of first agreement applications and rescission applications, the Board has specifically addressed this matter in *Glas v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Loraas Disposal Services Ltd.*, [1999] Sask. L.R.B.R. 123, LRB File No. 031-99, and held as follows, at 126:

> *The timing of an application for the imposition of a first collective agreement is largely in the hands of the Union once the statutory requirements for filing have been met. The Union would generally be aware of any "open period" under s. 5(k)(ii) of the Act during which time an application for rescission may be filed. If the Employer is unduly delaying the negotiation of a first agreement, the Union must act with relative haste to have the Board consider whether or not it will consider an application for first collective agreement before the Union may be faced with a rescission application.*

[29] This policy encourages the resolution of the first collective agreement in the first year following the certification Order, which is consistent with the rescission provisions contained in s. 5(k) of the *Act* and with the reasonable expectations of employees.

[30] The application of the first in – first out rule in the present case would require the Board to hear and determine the first collective agreement application, then the rescission application. This may seem like a waste of time if the rescission application is ultimately successful. However, there are strong policy reasons flowing from the discussion outlined above for allowing the first collective agreement to come to a resolution prior to conducting a vote on a rescission application. When employees join a trade union and apply to the Board to be certified to be represented by the trade union, they expect that the representation will result in a collective agreement. There are many factors that will prevent the conclusion of a first agreement within the first ten month period following the certification of the Union and not all factors will result in an application to the Board for the imposition of a first agreement or for rescission. However, where an application for first collective agreement assistance is made, the Board must keep in mind that the employees in question have not benefited from their initial decision to join a trade union. They have no collective agreement results from which they can assess the quality of the representation by the trade union or to assess their level of satisfaction with union representation as opposed to their former position as employees in a non-union setting. The proof is in the pudding and the pudding is the first agreement.

[31] In our view, a vote on a rescission application that occurs prior to the conclusion of the first agreement, where first collective agreement assistance has been sought, is premature as the employees are being asked to choose between representation and no representation without the benefit of knowing what the union might be able to achieve for them in collective bargaining. In these circumstances where an application for first agreement assistance is pending at the time an application for rescission is made, it is appropriate to follow the path set out by the Board in *Choponis v. Madison Development Group Inc. (Madison Inn) and United Food and Commercial Workers, Local 1400,* [1996] Sask. L.R.B.R. 511, LRB File No. 226-95 where the Board suspended the vote on a rescission application pending the conclusion of the first collective agreement application. This policy is in keeping with the goals for first collective agreement applications as set out by the Board in the *Prairie Micro-Tech Inc.* case, *supra* – that is, to attempt to preserve the collective bargaining relationship and the ability of the trade union to continue to represent employees. It also prevents the practice of bargaining to the open period and is supportive of the overall goals of the *Act* to encourage and foster collective bargaining.

[32] For these reasons, the Board will hear and determine the application for first collective agreement assistance before determining the rescission application. The rescission application may be heard prior to the final conclusion of the first agreement application but any vote that may be ordered will be postponed pending the resolution of the first collective agreement application.

Nature of the Application before the Board

[33] This application comes to the Board in a form that is somewhat unusual. Section 26.5 of the *Act* requires that certain conditions be met before the Board may act to impose a first collective agreement. These conditions are set out above in clause (1) of s. 26.5 of the *Act* and include the taking of a strike vote, the commencement of a lock-out, or a determination made by the Board of bad faith bargaining against one or both parties. In all events, the Board is required to determine that it is appropriate to assist the parties in the conclusion of a first collective agreement once the bare-bone requirements are met.

[34] In this case, the Union filed an unfair labour practice against SIGA in which it asserted that SIGA had violated s. 11(1)(c) of the *Act* – the bad faith bargaining provision. SIGA also filed an application for an unfair labour practice against the Union alleging a violation of s. 11(2)(c) of the *Act*: see LRB File Nos. 052-00 and 087-00. These matters were resolved by agreement between the parties

on May 1, 2000 that is set out above. Part of the resolution of the matters is to agree that the preconditions set out in s. 26.5(1) of the *Act* were waived by the parties, except that the parties retained the right to argue the need for first contract assistance. The agreement went on to set out a date for hearing of the first contract application, if needed, and set out the parties' agreement to access the services of Saskatchewan Labour conciliators.

[35] The parties referred to s. 24 of the *Act* when waiving the preconditions. Section 24 of the *Act* permits the parties to refer any dispute to the Board for determination. We conclude from the agreement reached between the parties that they intended to allow the Union to proceed with its application for first agreement assistance, if required, as a reference of dispute under s. 24 of the *Act* without requiring the Union to meet the preconditions set out in s. 26.5 of the *Act*. In our view, this is a permissible use of s. 24 of the *Act* and demonstrates positive and creative problem solving. Time and expense were spared by settling the unfair labour practice applications without a hearing; the parties resumed collective bargaining with the assistance of a conciliator from Saskatchewan Labour; and the Union's right to seek Board assistance, if needed, to conclude the collective agreement was preserved through the vehicle of s. 24 of the *Act*. The agreement clearly contemplated that the parties would continue bargaining toward agreement even though it was recognized that the Union might ultimately rely on its application to ask the Board for assistance in concluding the first collective agreement.

[36] SIGA argued that the Union had changed its application and had, in effect, substituted a new application for the earlier application, through the supplementary material filed in September, 2000. Counsel referred to *Eckl Ceramics, supra* and *Yorkton Co-operative Assoc. Ltd., supra,* as support for the proposition that the Board will not permit the amendment powers contained in s. 19 of the *Act* to be used to substitute one application for an entirely different application.

[37] In our view, the Union's submission in September, 2000 does not offend the rule set out in the *Eckl* and *Yorkton Co-operative* cases, *supra.* The Union originally filed an application under s. 26.5 of the *Act* seeking Board assistance in the conclusion of a collective agreement. Over the course of time, the parties have met and agreed to a number of provisions that initially were in dispute between the parties. In their May 1, 2000 settlement agreement, the parties contemplated that negotiations would be ongoing and that the Union could, at some point in the future, bring its application back to the Board for determination. In the ordinary course of a s. 26.5 of the *Act* application, the negotiating

process continues along with the appointment of a Board agent until such time as the agent renders his report to the Board. The final matters in dispute to refer to the Board will be contained in the Board agent's report which hopefully will contain fewer items in dispute than existed either at the time the application was filed or at the time of this hearing. The underlying application, however, remains the same, that is, the Union requests Board intervention in settling the first collective agreement. The September, 2000 submissions do not alter the nature of the application but merely narrow the areas of dispute between the parties by identifying which of the initial areas of dispute remain in dispute. There would be little reason for the Board to start hearing all the matters that were in dispute at the time the application was filed if some of those matters have been resolved by the parties themselves in the course of negotiation. For these reasons, we do not find that the Union has improperly substituted a new application for the initial application.

[38] In addition, SIGA argued that the Union failed to follow the procedures set out in s. 26.5 of the *Act* by failing to set out its position on the matters in dispute and by failing to serve the documents on SIGA in accordance with s. 26.5(3) and (4) of the *Act*. We understand that this complaint is made in relation to the September materials filed by the Union. The original application was filed with the Board and a copy was provided to Mr. Seiferling. In the application, the Union set forth its bargaining position and indicated that all matters were in dispute, except for the inclusion of the union security provisions set out in s. 36 of the *Act*. We find that the original application met the requirements set out in s. 26.5(3) and (4) of the *Act*. There is no direction contained in the *Act* or Regulations relating to the filing of additional or more up-to-date information. The process used by the Union in this instance is acceptable as it provides the Board with the most current information on the state of bargaining.

[39] We would note that SIGA has yet to state its position on the collective agreement matters that remain unresolved. In *United Food and Commercial Workers, Local 1400 v. Remai Investment Corporation (Corona Regency Inn),* [1996] Sask. L.R.B.R. 132, LRB File No. 004-96, the Board asked that such statements be filed even in situations where the Employer takes the position that the application is premature. The material assists the Board in assessing the preliminary issue set out in s. 26.5 of the *Act* – that is, is it appropriate to assist the parties in the conclusion of a first collective agreement. In this case, SIGA's last bargaining offer is contained in the Union's materials filed on September 28, 2000 and we will assume that it contains an accurate reflection of SIGA's position at the date of this hearing.

Is the Application for First Contract Assistance Premature?

[40] As we have set out above, the Board's normal procedure on receipt of an application for first collective agreement assistance is to appoint a Board agent who is asked to assist the parties in concluding a first agreement, and failing which, to report to the Board on (1) whether the Board should intervene in the collective bargaining process by imposing a collective agreement, and (2) if so, what terms should be imposed. In making these assessments, the Board agent must assess if the parties can achieve a collective agreement if left to their own devices. This is a version of the question raised by SIGA in these proceedings. In our view, it is best left to the Board agent to assess and to report back to the Board in due course.

Order

[41] The Board will grant its usual order appointing a Board agent for the purpose of assisting the parties to achieve a first agreement, and failing agreement, to report to the Board on two questions: (1) should the Board intervene in the dispute or should the parties be left to their own devices; and (2) if the Board agent concludes that the Board ought to intervene, what terms should the Board impose on the parties. The Board agent will be granted a period of 60 days from the date of this Order to provide his or her report to the Board. If further time is required to resolve the matter, the Board agent may seek an extension of time from the Chairperson of the Board.

SASKATCHEWAN PROVINCIAL BUILDING AND CONSTRUCTION TRADES COUNCIL, Applicant v. CENTRAL MILL CONSTRUCTION LTD., WESTWOOD ELECTRIC LTD., WEYERHAEUSER SASKATCHEWAN LTD. and INDUSTRIAL WOOD AND ALLIED WORKERS OF CANADA, LOCAL 1-417, Respondents

LRB File No. 250-00; February 14, 2001
Chairperson, Gwen Gray; Members: Duane Siemens and Leo Lancaster

For the Applicant: Drew Plaxton
For Central Mill Construction Ltd. and Westwood Electric Ltd.: Larry Seiferling, Q.C. and Clint Weiland
For Weyerhaeuser Saskatchewan Ltd.: Larry LeBlanc, Q.C.
For Industrial Wood and Allied Workers of Canada, Local 1-417: Ted Koskie and Mary Helms
For Construction Labour Relations Association of Saskatchewan Inc.: Alan McIntyre
For Attorney General of Saskatchewan: Thomson Irvine

Construction industry – Collective agreement – Voluntary recognition – Employer entered into voluntary recognition agreement with non-designated trade union for construction project – Voluntary recognition agreement does not affect position of designated craft unions who may still apply for certification or request voluntary recognition – Employer did not violate s. 27 of *The Construction Industry Labour Relations Act, 1992* – Ruling does not give voluntary recognition agreement status under *The Trade Union Act* or *The Construction Industry Labour Relations Act, 1992.*

***The Trade Union Act*, ss. 3, 11(1)(a), 11(1)(c), 11(1)(e), 11(1)(f), 12 and 36.**
***The Construction Industry Labour Relations Act*, 1992, ss. 2(s), 4, 9, 14, 15 and 27.**

REASONS FOR DECISION

Background

[1] Gwen Gray, Chairperson: The Saskatchewan Provincial Building & Construction Trades Council, in its own right, and on behalf of its affiliates, fourteen international construction trade unions, (the "Applicants") brought an unfair labour practice against Central Mill Construction Ltd. ("Central Mill"), Westwood Electric Ltd. ("Westwood") and Weyerhaeuser Saskatchewan Ltd. ("Weyerhaeuser"). The Applicants allege that Central Mill, Westwood and Weyerhaeuser violated ss. 3, 11(1)(a), 11(1)(c), 11(1)(e), 11(1)(f), 12 and 36 of *The Trade Union Act,* R.S.S. 1978, c. T-17 ("*TUA*") and s. 27(b) of *The Construction Industry Labour Relations Act 1992,* S.S. 1992, c. C-29.11 ("*CILRA*") by entering into voluntary recognition agreements with Industrial Wood and Allied

Workers of Canada, Local 1-417 ("IWA") of Kamloops, British Columbia for the construction of a sawmill at Big River, Saskatchewan and by failing to work under the collective agreements entered into between the Applicants and the Construction Labour Relations Association of Saskatchewan Inc. ("CLR"), in accordance with the *CILRA*. The Applicants claimed a variety of remedies related to the alleged unfair labour practices. At the hearing, the Board permitted the Applicants to amend the application by adding s. 5(g) to its remedial arsenal.

[2] Notice of the application was provided to Central Mill, Westwood and Weyerhaeuser as well as to IWA and CLR as interested parties. The Attorney General of Saskatchewan was served notice under *The Constitutional Questions Act*, R.S.S. 1978, c. C-29 by IWA and appeared at the hearing. Constitutional issues were deferred by the Board at the hearing to a future time.

[3] Westwood and Central Mill filed identical replies to the application. They asserted that (1) the arrangement between themselves and the IWA did not make them "unionized employers" under the *CILRA*; (2) the Applicants have no status to bring the applications; and (3) there is no illegality in the arrangement between IWA, Central Mill and Westwood. Westwood and Central Mill attacked the validity of Ministerial determinations relating to trade divisions pursuant to s. 9 of the *CILRA* both under the *CILRA* and with respect to the freedom of association rights contained in the *Charter of Rights and Freedoms* (the "*Charter*").

[4] Weyerhaeuser asserted that it did not aid and abet Central Mill and Westwood in committing unfair labour practices and asserted that (1) none of the Applicants have obtained certification orders or voluntary recognition agreements from Central Mill or Westwood; (2) Central Mill and Westwood are not "unionized employers" under the *CILRA*; (3) Central Mill and Westwood are not bound by the provincial agreements entered into between the Applicants and the CLR under the *CILRA*; (4) no facts are pleaded that would disclose any violation of the *TUA* or *CILRA* by Weyerhaeuser.

[5] In its reply, IWA asserted that (1) none of the Applicants has a certification order or voluntary recognition agreement with Westwood or Central Mill; (2) neither Central Mill nor Westwood is a "unionized employer" under the *CILRA*; (3) neither Central Mill nor Westwood is bound by provincial collective agreements; and (4) the bargaining scheme established under the

CILRA and the Minister's designations made pursuant to s. 9 of the *CILRA* violate various *Charter* provisions.

[6] The Board convened a hearing of this matter on January 17 and 18, 2001 in Saskatoon.

Facts

[7] The facts of this case are relatively straightforward although they give rise to complex issues under the *CILRA* and the *TUA*. Weyerhaeuser is constructing a new sawmill facility at Big River. In the spring of 2000, it awarded construction contracts to Central Mill for civil, structural and mechanical work and to Westwood for electrical work. Work commenced on the site in the spring and will be completed in March, 2001.

[8] Westwood and Central Mill entered into voluntary recognition agreements with IWA, which is not certified in Saskatchewan for Westwood or Central Mill.

[9] The voluntary recognition agreement between IWA and Westwood is dated May 4, 2000 and is entitled "Project Construction Agreement – Westwood Project #70616 – Weyerhaeuser Big River, Saskatchewan." The agreement sets out wage rates for foremen, journeymen and apprentices, daily travel allowances, travel to and from project, turnarounds, living out allowances, seniority lists, work week, hours of work, health and welfare, and a variety of other conditions. Seniority is provided to "regular employees" only. Project employees, employees who are hired for this project only, are not granted seniority. It is understood that regular employees are members of IWA and primarily reside in British Columbia. The unit of employees covered by this agreement all work in the electrical trade.

[10] The voluntary recognition agreement between IWA and Central Mill is dated May 23, 2000 and relates to the Weyerhaeuser Big River site only. The agreement incorporates by reference the collective agreement between IWA and Inland Forest Construction Group, with certain amendments. The amendments changed the living out allowance, travel to out of town projects, daily travel allowance, travel when on out of town project, turn arounds, project employees, wages, and hours of work. The agreement covers all trades who would be engaged in the civil, structural and mechanical

trades. The agreement is referred to as a "wall-to-wall" or "all employee" agreement. Employees are required to join IWA when they are hired on by Central Mill. A good number of employees are residents of British Columbia. Again, a distinction is made in the seniority provisions between "regular" employees, who are defined as "all employees from British Columbia" and "project" employees, who are defined as "all employees from other provinces." Under the terms of this collective agreement, only regular employees retain seniority after the conclusion of the project.

[11] In British Columbia, IWA has a construction agreement with a consortium of employers who bargain through a structure known as the Inland Forest Construction Group. The master collective agreement and its amendments set out the terms of work agreed to for construction projects involving members of the Inland Forest Construction Group and IWA. IWA and the contractors involved in this application have extended their arrangements to the Weyerhaeuser project in Saskatchewan.

[12] The Applicants operate under provincial agreements negotiated with the representative employers' organization that has been designated for their trade divisions under *CILRA*. The Applicants hold craft certifications with employers in Saskatchewan and do not operate on a "wall-to-wall" basis in the construction industry. Most trades bargain with CLR and negotiate many common items at a large bargaining table. All agreements reached between CLR and the Applicants have common expiry dates.

[13] When the Applicants became aware of the Big River sawmill project, they wrote to Westwood and Central Mill to demand that the work be performed in accordance with the collective agreements concluded under the framework of the *CILRA*. This would include the hiring hall and union security provisions which assign work within a trade division to a single construction trade union. Westwood and Central Mill denied that they fell under the framework of the *CILRA*.

[14] The Applicants complained that IWA's voluntary recognition agreement prevents them from effectively organizing the workers at the sawmill as the majority of workers are regular members of IWA from British Columbia who depend on Westwood and Central Mill for their regular employment.

[15] The Applicants were aware of one other instance of Westwood operating in Saskatchewan using IWA members. The project involved the construction of the Wapawekka sawmill close to Prince Albert. Bert Royer, President, Saskatchewan Provincial Building and Construction Trades Council and business agent for the Ironworkers' Union, testified that many jobs of this nature were small and difficult to organize because the work would be complete by the time the Union became aware of it.

Relevant statutory provisions

[16] *The CILRA provides as follows:*

> *2 In this Act:*
>
> > *(s) "unionized employer" means an employer in a trade division with respect to whom a trade union has established the right to bargain collectively on behalf of the unionized employees in that trade division:*
> >
> > > *(i) pursuant to an order of the board made pursuant to clause 5(a), (b) or (c) of The Trade Union Act; or*
> > >
> > > *(ii) as a result of the employer's having recognized the trade union as the agent to bargain collectively on behalf of those unionized employees.*
>
> . . .
>
> *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.*
>
> . . .
>
> *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.

15(1) Where an employers' organization is designated or determined to be the representative employers' organization with respect to a trade division, clauses 14(a) to (d) apply to:

(a) an employer who subsequently becomes a unionized employer in that trade division; or

(b) a unionized employer who subsequently becomes engaged in the construction industry in that trade division.

15(2) Where subsection (1) applies, the unionized employer is bound by the terms and conditions of any collective bargaining agreement then in effect between the representative employers' organization and a trade union with respect to that trade division.

. . .

27 Subject to section 31, where an employers' organization is designated or determined to be the representative employers' organization with respect to a trade division, it is an unfair labour practice:

(a) for a trade union or any person acting on behalf of a trade union to bargain collectively with any person or organization other than the representative employers' organization with respect to unionized employees in the trade division;

(b) for a unionized employer or any person acting on behalf of a unionized employer in the trade division to bargain collectively with a trade union with respect to the unionized employees employed by the unionized employer other than through the representative employers' organization.

Argument

[17] Mr. Plaxton, counsel for the Applicants, argued that the Board set standard bargaining units in the construction industry in *Construction and General Workers' Local No. 890 v. International Erectors & Riggers, A Division of Newbery Energy Ltd.*, [1979] Sept. Sask. Labour Rep. 37, LRB File No. 114-79, and rejected wall-to-wall bargaining units in this industry: *International Union of Operating Engineers, Hoisting, Portable and Stationary, Local 870 v. KACR et al.*, [1983] Sept. Sask. Labour Rep. 37, LRB File No. 106-83.

[18] Counsel also relied on the Board's decision in *Canadian Iron, Steel and Industrial Workers Union, Local #3 v. Emerald Oilfield Construction Ltd.*, [1994] 2nd Quarter Sask. Labour Rep. 105, LRB File Nos. 019-94, 020-94 & 021-94, aff'd [1995] 7 W.W.R. 331 (Sask. Q.B.) where the Board held that the scheme of the *CILRA* permitted only one trade union to be certified for each trade division. Mr. Plaxton argued that the voluntary recognition agreements entered into between IWA and Westwood and IWA and Central Mill have the effect of bringing Westwood and Central Mill within the definition of "unionized employer" set out in s. 2(r) of the *CILRA*. According to counsel, Central Mill and Westwood are employers with whom a trade union has established the right to bargain collectively through a voluntary recognition agreement. At the same time, Mr. Plaxton argued that the voluntary recognition agreements between IWA and Westwood and IWA and Central Mill are void pursuant to ss. 14 and 27 of the *CILRA*. Counsel argued that Westwood and Central Mill must abide by the terms of the collective agreements negotiated between the Applicants and the CLR, including the hiring hall provisions that require unionized contractors to obtain tradespeople through each applicant union's hiring hall. The Applicants sought damages for the alleged breaches of the *CILRA*, including lost wages, union dues and the like.

[19] Counsel argued that ss. 14 and 27 of the *CILRA* have the effect of rendering the negotiation of a voluntary recognition agreement between a trade union and construction employer an unfair labour practice if it is conducted outside of the scheme established by the *CILRA*. Mr. Plaxton argued that there are strong policy reasons for preventing construction employers from shopping for unions that will keep them outside of the *CILRA* system. Following the principles set down in *Emerald Oilfield, supra,* counsel argued that the Board should uphold the exclusive model of

representation in the construction industry and not permit employers to avoid the system by establishing a voluntary recognition agreement of the type negotiated between IWA and Westwood and IWA and Central Mill.

[20] In addition to the cases already mentioned, Mr. Plaxton referred the Board to *TNL Industrial Contractors Ltd.*, [1996] Alta. L.R.B.R. 497; *Construction Labour Relations Association of Saskatchewan Inc. v. Delta Catalytic Industrial Services Ltd.*, [1995] 1st Quarter Sask. Labour Rep. 226, LRB File No. 232-94; *Saskatchewan Construction Labour Relations Council v. Construction Labour Relations Association,* [1997] Sask. L.R.B.R. 159, LRB File Nos. 023-94 & 039-95; *Construction and Allied Workers Union, Local 154 v. 360 cayer ltee et al.,* N.S. Labour Relations Board – Construction Panel, November 3, 2000.

[21] Mr. Seiferling, counsel for Westwood and Central Mill, advanced three main arguments. First, Westwood and Central Mill challenged the status of the Applicants to bring the present application as they have not established an interest in Westwood or Central Mill. Counsel referred the Board to *Merit Contractors Association Inc. v. Provincial Building & Construction Trades Council et al.*, [1996] Sask. L.R.B.R. 119, LRB File No. 098-95.

[22] Counsel also argued that IWA is entitled under the scheme of the *TUA* and the *CILRA* to represent a "wall-to-wall" bargaining unit in the construction industry. According to Mr. Seiferling, the *Emerald Oilfield* case, *supra,* only prevents trade unions from applying for certification of craft bargaining units. Counsel argued that "all employee" bargaining units are available under s. 5(a) of the *TUA* and have been the subject of certification orders in the construction industry. Counsel noted that maintenance work performed by tradespeople in various industrial plants, municipalities, hospitals and the like are represented by such "all employee" bargaining units. According to this approach, the Board's decision in *Emerald Oilfield, supra* would only prevent trade unions, who have not been named in a Ministerial designation pursuant to s. 9 of the *CIRLA,* from applying to be certified for a craft bargaining unit.

[23] Counsel referred the Board to the *TNL Industrial Contractors Ltd., supra; Duron Ontario Limited,* [1976] OLRB Rep. 734; *Clarence H. Graham Construction,* [1981] OLRB Rep. August 1195; *Stone Container (Canada) Inc.,* [1996] N.B.L.E.B.D. No. 62. Counsel argued that this

approach best integrates the provisions of the *TUA* and the *CILRA* and respects the rights of employees to be represented by a trade union of their own choosing, which is set out as a guiding principle in s. 3 of the *TUA*. Counsel argued that this interpretation of the interplay between the statutes was also in accordance with the general principle that statutes should be interpreted in light of values expressed in the *Charter*, in this case, the value of freedom of association.

[24] Counsel also argued that if "all employee" bargaining units are not permitted in construction, then work that is now performed in industrial, municipal and health care sectors by tradespeople will be swept into the *CILRA*. Counsel referred to the Board's interpretation of "construction industry" in *Sheet Metal Workers' International Association, Local 296 v. Atlas Industries Ltd.*, [1998] Sask. L.R.B.R. 51, LRB File No. 011-97 in support of his argument.

[25] Based on this analysis, Westwood and Central Mill would not be "unionized employers" within the meaning of the *CILRA* because they are not certified and have not granted voluntary recognition to a trade union that is named in a s. 9 (of the *CILRA*) designation by the Minister of Labour. Counsel argued that the *CILRA*'s purpose was to establish a mechanism for permitting employers to bargain with the traditional trade unions as a group on a provincial basis – it was not intended to apply to all construction in the province.

[26] Mr. Seiferling noted that the Applicants are both relying on the voluntary recognition agreement and denying that the agreement has any validity under the *CILRA*. Counsel argued that if the voluntary recognition agreement is void, that is the end of the matter. There is no voluntary recognition agreement that brings Westwood and Central Mill within the definition of "unionized employer" in the *CILRA*. The Board was referred to *Labourers International Union of North America, Local 1081 v. Rockwall Concrete Forming (London) Limited,* [1988] OLRB Rep. September 963, where an argument similar to the one made by the Applicants in this case was rejected by the Ontario Labour Relations Board.

[27] As an alternative argument, Mr. Seiferling challenged the designations made pursuant to s. 9 of the *CILRA* by the Minister of Labour as being *ultra vires* the legislation. Counsel argued that the *CILRA* does not provide the Minister with the express authority to limit the choice of employees to construction trade unions. In support of this position, counsel referred the Board to *Construction and*

General Workers' Union, Local 602 v. British Columbia (Attorney General), [1996] B.C.J. No. 517 (B.C.S.C.).

[28] In addition, counsel challenged the constitutionality of the Ministerial designations under freedom of association and freedom of mobility. These arguments were deferred to a later hearing, if required.

[29] Mr. LeBlanc, counsel for Weyerhaeuser, argued that Central Mill and Westwood are not "unionized employers" within the meaning of the *CILRA*. Counsel asserted that the position put forward by the Applicants misapplied the principles set out in *Emerald Oilfield, supra* in which the Board refused to certify the Canadian Iron, Steel and Industrial Workers Union ("CISIWU") for craft units in the construction industry. According to counsel, the case does not stand for the proposition that a voluntary recognition agreement will bring an employer under the umbrella of the *CILRA* if the voluntary recognition agreement is entered into with a trade union that is not designated by the Minister in a trade division under s. 9 of the *CILRA*. On this approach to *Emerald Oilfield, supra*, IWA is not entitled to be certified by the Board for a construction bargaining unit. Mr. LeBlanc argued that the voluntary recognition agreement could not lead to the conclusion that Westwood and Central Mill are unionized employers as IWA is not capable of establishing bargaining rights in the construction industry in Saskatchewan.

[30] Counsel relied on *Rockwall Concrete Forming (London) Limited, supra,* to support the view that the Applicants cannot argue that Westwood and Central Mill are "unionized employers," while maintaining that the voluntary recognition agreements, which imbue Westwood and Central Mill with status as "unionized employer," are void.

[31] Counsel also argued that there are no grounds for any of the unfair labour practices filed against it or Central Mill and Westwood.

[32] Mr. Koskie, counsel for IWA, made the same arguments as counsel for Weyerhaeuser regarding the status of Westwood and Central Mill as "unionized employers" under the *CILRA*. Counsel also argued that the Applicants lacked status to bring the application citing *Merit Contractors Association, supra.*

[33] Mr. McIntyre, counsel for CLR, argued in support of the application. Mr. McIntyre argued that the purpose of the *CILRA* is to establish province-wide collective bargaining agreements between construction employers and construction trade unions for each trade division. The goal is to achieve one system for collective bargaining, not multiple or parallel systems. Counsel argued that if voluntary recognition agreements are permitted between construction employers and non-designated unions, a parallel system will develop and create chaos in the industry. Mr. McIntyre noted that IWA is attempting to do indirectly what it would not be permitted to do directly – that is, represent construction workers. According to counsel, the *CILRA* sets up an exclusive jurisdiction for trade unions that are designated by the Minister of Labour pursuant to s. 9 of the *CILRA*.

Analysis and decision

[34] Although much of the argument presented in this case focused on the legal rights or lack thereof of IWA to obtain a certification order under the *TUA*, the actual issues raised by the Applicants are quite different. We are asked to find that Westwood and Central Mill committed various unfair labour practices by entering into voluntary collective agreements with IWA. The Applicants allege that this skirting of the *CILRA* scheme is a violation of ss. 11(1)(a), (c), (e), (f), 12 and 36 of the *TUA* and s. 27(b) of the *CILRA*. The Applicants tie Weyerhaeuser in as a facilitating party. IWA itself is not named as an offending party.

[35] The main issues that the Board is asked to consider include:

A. Do the Applicants have standing to bring this application?

B. Did Westwood and Central Mill enter into a collective agreement with IWA in contravention of s. 27 of the *CILRA*?

C. Do the voluntary recognition agreements between IWA and Westwood and IWA and Central Mill or any aspect of the arrangements constitute interference with the exercise of an employee's rights under the *TUA*?

D. Have Westwood and Central Mill failed to bargain collectively with the Applicants under s. 11(1)(c) of the *TUA*?

E. Have Westwood and Central Mill discriminated against employees with a view to encouraging or discouraging membership in or activity on behalf of a labour organization contrary to s. 11(1)(e) of the *TUA*?

F. Have Westwood and Central Mill required as a condition of employment that any person abstain from joining or assisting a trade union or from exercising a right under the Act contrary to s. 11(1)(f) of the *TUA*?

G. Did Weyerhaeuser aid and abet Westwood and Central Mill in the commission of any violation of the *TUA*?

H. Did Westwood and Central Mill violate the union security provisions set out in s. 36 of the *TUA*?

[36] We have set out the questions posed by the application to keep the focus of the case on the issues – both legal and evidentiary – that are before the Board. The parties raised several matters in argument that may not be resolved in these Reasons.

A. Do the Applicants have standing to bring this application?

[37] The question of "status" to bring an application seldom arises because it is obvious that the applicant has raised a matter that falls under the *TUA* or *CILRA* and has a direct interest in the outcome of the decision. The question of status does not require the Board to assess the likelihood of success of the application; rather, we must assess whether the applicant has any rights or interests under the *TUA* or *CILRA* to protect.

[38] In *Merit Contractors, supra,* the Board was asked by a group of non-union contractors to declare the Crown Construction Tendering Agreement ("CCTA") to be illegal. The CCTA was entered into between construction employers, trade unions and Crown corporations and, as its name suggests, related to the terms on which construction work in Crown corporations would be tendered. The Board found that Merit Contractors Association ("Merit") had no rights or interests that it could assert within the framework of the *TUA* and *CILRA* to challenge the validity of the CCTA.

Specifically, the Board held that Merit could not assert rights that are intended to benefit employees or trade unions, for instance, s. 11(1)(a) of the *TUA* or freedom of association for employees to the extent provided by the *Charter*. Similarly, a hiring formula would not automatically result in the commission of an unfair labour practice under s. 11(1)(e) of the *TUA* by requiring contractors to hire a certain number of employees from union hiring halls. The payment of union dues was similarly not automatically a violation of s. 11(1)(b) of the *TUA* where the purpose of the agreement was to place union and non-union contractors on the same financial footing in Crown tendering. The Board found that Merit's main objections related to tendering rules, which are not governed by the provisions of the *TUA* or the *CILRA*.

[39] In the present case, the Applicants have framed their arguments in such a manner as to assert an interest in the outcome by seeking a declaration that Westwood and Central Mill fall under the *CILRA* by virtue of their voluntary recognition agreements with IWA and are thereby obligated to abide by the terms of the collective agreements negotiated between CLR and the Applicants. This is one possible effect of a finding that s. 27 of the *CILRA* has been violated. To this extent, the Applicants have a real and tangible interest in the matter and one that will give them standing. This permits the Applicants to argue points B, D, and G above.

[40] On several other aspects of the Applicants' claims, however, the Board does not agree that the Applicants have standing to assert the rights that they claim have been violated by the Respondents. The Applicants are not engaged in an organizing campaign at the Big River sawmill. They did not claim that their attempts to organize were being hindered or interfered with by the relationship between IWA and Westwood and Central Mill. The Applicants did not claim to represent any employees of either contractor although some employees are members of the Applicants. In this environment, we do not think that the Applicants can bring a public interest type of application to protect the rights of employees who are otherwise not complaining about the voluntary recognition agreements entered into between IWA and Westwood and IWA and Central Mill.

[41] This is not a situation such as was described by the Alberta Labour Relations Board in *Miscellaneous Employees Teamsters Local Union No. 987 of Alberta v. United Food and Commercial Workers, Local No. 401 and Westfair Foods Ltd.*, [1992] Alta. L.R.B.R. 274, where the

Alberta Labour Relations Board found that a voluntary recognition arrangement did violate various provisions of the Alberta Labour Code in an environment where two unions were competing for membership. In that case, the United Food and Commercial Workers, Local 401 was engaged in an organizing attempt at Superstore in Lloydminster. Its application for certification was opposed by the Teamsters Union, which held its voluntary agreement with Westfair Foods Ltd. up as a time bar to the certification attempt. In the context of competing representational claims, the Alberta Labour Relations Board considered the effect of a voluntary recognition agreement in the overall scheme set out in the Alberta Labour Code. Other cases of a similar nature are referred to in the *Westfair Foods Ltd.* decision, including the Alberta Board's earlier decision in *Sie-Mac et al. v. Labourers, 1111 et al.* [1991] Alta. L.R.B.R. 847 and the British Columbia Labour Relations Board decision in *Delta Hospital v. Hospital Employees Union, Local 180,* [1978] 1 Canadian LRBR 356.

[42] Our Board has dealt with competing representation claims in similar circumstances in the construction sector in *International Union of Operating Engineers, Construction and General Workers, General Workers of Canada – Local #1 v. Henuset Pipeline Construction Ltd.*, [1991] 4th Quarter Sask. Labour Rep. 64, LRB File Nos. 146-91, 188-91 & 195-91 where the Board set the following standards for determining the validity of a voluntary recognition agreement, at 69:

> *Where a union has been certified pursuant to the provisions of the Act, all of the threshold questions with respect to the appropriateness of the unit or employee support are, by definition, answered by the certification order. However, in voluntary recognition situations those questions remain open and, when raised, the Board should not invoke the provisions of The Trade Union Act to provide protection for a voluntarily recognized bargaining relationship which cannot meet the fundamental requirements of section 3. This does not mean that voluntary agreements that do not meet these standards are ineffectual. Rather, it means that if a union wishes to rely on voluntary recognition, and the consequent collective bargaining agreement, as a section 33(5) shield to counter the certification application of another union, it must, at a minimum, show that the agreement upon which it relies has the support of the "majority of employees" in "the appropriate unit of employees" as referred to in section 33(5).*

[43] There may be many issues to consider in relation to the voluntary recognition agreements entered into between IWA and Westwood and Central Mill, not the least of which would be IWA's representative status to enter into such agreements. However, except to the extent that the representational status of IWA is challenged under the *CILRA*, the Applicants have not brought an

application to directly challenge the representational status of IWA under the *TUA*. The Applicants' claims for representational rights are made as a matter of statutory entitlement under the *CILRA*. Outside of the *CILRA* scheme, however, the Applicants stand as strangers to the employees of Westwood and Central Mill.

[44] At the hearing, the Applicants complained that the arrangement between IWA and Central Mill and IWA and Westwood effectively prevented a successful organizing campaign because IWA members from British Columbia formed the bulk of the crew hired by Westwood and Central Mill. The Applicants assumed that the employees would not be interested in joining the Applicants as the main source of their work comes from the contracts that IWA negotiates in the wood products industry. In our view, however, the Applicants face this difficulty in organizing any contractor who arrives with its own crew. The loyalty of employees generally rests with the source of their work, particularly in the construction industry. The circumstances of a voluntary recognition do not elevate the problem into one which can be addressed by the Board acting under the *TUA* without some indication that the Applicants have attempted to organize the workplace and been thwarted through means that violate the provisions of the *TUA*.

[45] In our view, in the absence of a representational contest between the Applicants and IWA under the terms of the *TUA*, the Applicants have no standing to argue points C, E, F and H above.

B. ***Did Westwood and Central Mill enter into a collective agreement with IWA in contravention of s. 27 of the CILRA?***

D. ***Have Westwood and Central Mill failed to bargain collectively with the Applicants under s. 11(1)(c) of the TUA?***

G. ***Did Weyerhaeuser aid and abet Westwood and Central Mill in the commission of any violation of the TUA?***

[46] The Applicants' central argument rests on the conclusion that Westwood and Central Mill are "unionized employers" within the meaning of the *CILRA* as a result of having entered into the voluntary recognition agreements with IWA. At the same time, the Applicants argued that the

voluntary recognition agreements are void pursuant to s. 14(d) of the *CILRA* and that Westwood and Central Mill must abide by the collective agreements negotiated between the Applicants and the CLR in accordance with the *CILRA*. This would mean that Central Mill and Westwood would be required to employ members of the Applicants through their hiring halls.

[47] This argument invites an examination of the scheme established for collective bargaining in the construction industry in Saskatchewan. The principal purpose of the *CILRA* is "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." Under s. 9 of the *CILRA*, the Minister of Labour is required to determine trade divisions. On December 2, 1992, the Minister issued trade division designations that defined trade divisions by reference to the bargaining rights held by the tradition craft unions in certain sectors of the construction industry. For instance, the operating engineer trade division is defined as consisting of "all unionized employers in respect of whom the trade union, the International Union of Operating Engineers, Hoisting, Portable and Stationary has established the right, in the Province of Saskatchewan, to bargain collectively on behalf of the unionized employees in the sectors."

[48] In *Emerald Oilfield, supra,* the Board considered the combined effect of s. 4 of the *CILRA* and the Ministerial designations made pursuant to s. 9 of the *CILRA*. In that case, CISIWU applied to be certified for three craft bargaining units in the pipeline sector of the construction industry. CISIWU was not named in a Ministerial designation under s. 9 of the *CILRA* and traditional craft unions challenged its ability to be certified to represent employees in the construction sector. The Board agreed that the *CILRA* has the effect of limiting representational rights in the construction industry to those trade unions who are designated in trade division designations by the Minister under s. 9 of the *CILRA*. As such, CISIWU was not granted certification orders for bargaining units in the construction industry.

[49] In arriving at its decision, the Board considered the overall scheme and purpose of the *CILRA* and its interplay with the rights contained in the *TUA* as follows, at 111:

> *It is also clear, however, that the purpose of the legislature in passing The Construction Industry Labour Relations Act, 1992 was to create a unique system for collective bargaining in the construction sector, and that this system departs in important ways from the collective bargaining structures contemplated under The*

Trade Union Act. From the point of view of this Board, perhaps the most important source of guidance in interpreting this statute is contained in Section 4:

. . .

Much of the statute addresses the creation and operation of the "representative employers' organization" which is within the scheme of the statute the sole entity through which bargaining is to be conducted on behalf of unionized employers in a trade division. It is important, however, to note that Section 4 refers not only to "an employers' organization" but also to "a trade union" as the parties which are to take part in collective bargaining in a trade division.

In reading this and the other provisions alluded to earlier, particularly in the context of The Construction Industry Labour Relations Act, 1992 as a whole, it is difficult not to come to the conclusion that the scheme intended in the statute is one in which a single bargaining voice is to be heard on each side in the collective bargaining relationship in a trade division. The statute contemplates that the traditional characteristics of the construction industry - a multiplicity of parties, transient involvement in collective bargaining relationships, frequent and complicated industrial disputes - are to be modified by the introduction of a bargaining system in which a number of employers and their employees determine the terms and conditions of their relationship at one stable bargaining table.

There are other models which may be adopted for creating a more orderly bargaining environment in the construction industry. In British Columbia, for example, a provision in the Labour Relations Code allows the Labour Relations Board to recognize a group of trade unions as the bargaining agent for employees:

> *4(1) To secure and maintain industrial peace and promote conditions favourable to settlement of disputes, the minister may, on application by one or more trade unions or on his or her own motion, and after the investigation considered necessary or advisable, direct the board to consider... whether in a particular case a council of trade unions would be an appropriate bargaining agent for a unit.*

In Ontario, as well, the Labour Relations Act gives to the Labour Relations Board an opportunity to direct that bargaining be conducted by a consortium of unions representing employees in a particular sector of the construction industry.

It is clear from the provisions of the Saskatchewan Act that the legislature has not seen fit to adopt the model according to which bargaining may be conducted through a council of trade unions. Though the legislation does, as we have seen, contemplate the possibility that locals of a single trade union will join together to bargain with the representative employers' organization, this is consistent with an overall scheme in which it is clearly envisioned that all of the unionized employees in a trade division will be represented by a single union.

There is a price to be paid for whatever stability and effectiveness is achieved by means of this new system. On the employer side, individual unionized contractors are relieved of the responsibility of securing an agreement with their own employees, but

> *they are also bound by the provisions of agreements which are arrived at through a process in which their involvement may be limited and their control negligible.*
>
> *For employees, the objective of The Construction Industry Labour Relations Act, 1992 is to provide greater stability for bargaining and to ensure that the power employees are able to exercise through the bargaining agents which represent them is sufficient to put them on an equal footing with the collective organizations representing unionized employers.*
>
> *In the case of employees, the price for this seems to be a loss of total freedom of choice with respect to representation by one of a range of trade unions. In our view, the intent underlying the Act is that one trade union is to be identified as the representative of employees in a particular trade division, and that the scheme does not provide room for additional trade unions to participate in bargaining, with the possible exception of a circumstance where a Designation Order provides for representation of employees by more than one trade union.*

[50] Under the *Emerald Oilfield* ruling, IWA would not be entitled to apply for and obtain a certification order under s. 5(a), (b) and (c) of the *TUA* for a bargaining unit in the construction industry as it is not named in a s. 9 designation. In other words, in order to be entitled to apply for certification in the construction industry, IWA would first need to apply for and obtain a s. 9 designation.

[51] Westwood and Central Mill argued that *Emerald Oilfield, supra*, applies only to applications for craft bargaining units, not to applications for "wall-to-wall" or "all employee" bargaining units. Counsel argued that this would be more consistent with the rights set out in s. 3 of the *TUA* and with *Charter* values relating to freedom of association.

[52] In our view, this argument cannot be sustained. There is no dispute in this case that the construction of the sawmill in question falls within the definition of "construction industry" in the *CILRA*. The Board has ruled in earlier cases that craft units are the preferred bargaining units in the construction industry: see *Newbery Energy Ltd., supra,* where the Board set standard craft bargaining units for the industry. In *K.A.C.R., supra,* the Board examined the relationship between the *TUA* and the *CILRA* and rejected wall-to-wall bargaining units in the construction industry as follows, at 42:

> *It is only after a trade union has been certified to bargain collectively in a trade that unionized employers in that trade acquire the rights set forth under Section 5 of the Construction Industry Labour Relations Act. The Board's discretion to determine the appropriateness of the unit applied for under Section 5(a) of The Trade Union*

> *Act remains intact. In considering whether or not a proposed unit of employees is appropriate for the purpose of bargaining collectively, the Board will consider any factors that may be relevant. Those factors include, among other things, the spirit and intent of the Construction Industry Labour Relations Act and the scheme of collective bargaining which it contemplates.*
>
> . . .
>
> *The CILRA clearly contemplates province-wide collective bargaining between all unionized employers in a trade division and an established construction craft union, and certification by craft units corresponds with the Act's spirit and intent. Any other form of representation would be disruptive of the overall scheme of province-wide collective bargaining.*

[53] There are sound reasons for funneling all unionized construction work into the *CILRA* scheme. Some of these reasons were identified by the Nova Scotia Labour Relations Board in its recent decision in *Construction and Allied Workers Union, Local 154 ("CLAC") v. 360 cayer ltee, supra.* In that case, the Nova Scotia Labour Relations Board was asked to consider if CLAC was entitled to represent employees in craft bargaining units in the construction industry under the particular wording of the *Trade Union Act,* R.S.N.S. 1989, c. C-475. The Board referred to the report of the Commission of Inquiry into Industrial Relations in the Nova Scotia Construction Industry (the "Woods Report") and summarized the conditions that existed prior to the creation of accredited employers' associations and the establishment of broader based bargaining structures in the construction industry, at para. 32, as follows:

> *To explain the model of accreditation actually reflected in Sections 94 – 99 both inclusive of the 1972 Act, we start with a definition. Accreditation is the unionization of construction industry employers working in a sector as defined by then, in Section 89(h) of the 1972 Act [now Section 92(h)]. It is the mirror image of the unionization of employees and, paradoxically, has the same purpose. Workers organized, traditionally, as a means of countering the superior legal "power" and economic might of employers by banding together (in unity there is strength) and using the threat, or the reality, of a strike to achieve some semblance of equivalent "clout" economically speaking and, because of statutory protection of the right to organize, legally speaking too. In an illustration of the "worm turning", it became obvious to all – participants and legislators alike – that, in the construction industry, the strength gained by the trade unions, through the threat and use of the strike weapon and through the ability to use the tactics of "whipsawing" and "leap frogging", had created an unhealthy imbalance of power. This dysfunction was continent-wide rather than restricted to Cape Breton Island or Nova Scotia generally either in nature or breadth or seriousness of the problems. Accreditation,*

> *which was an "Ontario" concept in Canada, was seen as one solution because it would create a rough equivalence in power between employers, on the one hand, and construction industry trade unions, on the other.*

[54] This Board addressed the underlying purpose of the *CILRA* in similar terms in *Emerald Oilfield, supra,* at 109:

> *By providing that there will be one authoritative body speaking for employers, and one for employees, the statutes have sought to provide a stable environment in which terms and conditions of employment can be set. The legislation further addresses the difficulties created by a fragmented system in which a multiplicity of industrial disputes between small groups of employees and single employers can cause maximum disruption to the industry.*

[55] The stabilization goal of accreditation laws would be compromised if the Board permitted "wall-to-wall" bargaining in the construction industry. Complex patterns of collective bargaining would replace province-wide trade negotiations. Multiple bargaining tables, each with their own right to strike and lock-out on any construction project, would replace single province-wide trade tables. In the construction industry, the existence of a picket line at the gates to a large project can have the effect of shutting down the entire project because of the principles of union solidarity that are typically practised by construction workers. This potential for chaos is the harm that was sought to be avoided in the enactment of the construction industry labour relations laws throughout the country. In our view, the certification of "wall-to-wall" bargaining units and the acceptance of such units as being outside the scope of the *CILRA* scheme would undermine the overall purpose of the *CILRA*. The Board would run the risk of returning the industry to the state described by Chairperson Darby in the *CLAC* case, *supra.*

[56] Do the restrictions imposed by the Board and the *CILRA* on organizing in the construction industry violate *Charter* values? In *Emerald Oilfield, supra*, the Board discussed the competing goals of the *TUA* and the *CILRA* and held, in essence, that the framework established under the *CILRA* for bargaining in the construction industry trumped employees' rights to bargain collectively through a trade union of their own choosing. Legislative preference for specific bargaining agents, specific bargaining regimes, or specific limitations on who is permitted to bargain collectively have all survived *Charter* challenges. In *Professional Institute of the Public Service of Canada v.*

Northwest Territories (Commissioner), [1990] 2 S.C.R. 367 (S.C.C.) the Supreme Court upheld legislative action which restricted employee choice of bargaining agents to trade unions incorporated by the legislative body. In *Saskatchewan Government Employees' Union ("SGEU") v. Saskatchewan,* [1997] 4 W.W.R. 41 (Sask. Q.B.), Pritchard J., dealing with the statutory bargaining scheme set up under *The Health Labour Relations Reorganization Act* and *Regulations,* held that the *Charter* does not guarantee a right to collective bargaining nor any particular statutory regime of collective bargaining. As such, the legislation and regulations were upheld: see also the Saskatchewan Court of Appeal's decision which adopted Pritchard J.'s reasons: [1997] 6 W.W.R. 605 (Sask. C.A.). In *Delisle v. Canada,* [1999] 2 S.C.R. 989 (S.C.C.), the Supreme Court held that the exclusion of RCMP officers from the benefits of *The Public Service Staff Relations Act* and its system of collective bargaining did not violate s. 2(d) of the *Charter.* In our view, these decisions do not provide any assistance in arriving at the proper interpretation of the *CILRA* and s. 3 of the *Trade Union Act*. Clearly the "freedom of association" value expressed in the *Charter* does not extend to collective bargaining.

[57] Westwood and Central Mill also argued that if "wall-to-wall" bargaining units are not permitted, then many existing industrial agreements will be swept into the *CILRA* scheme. This argument assumes that the Board will define the term "construction industry" to include work performed by employers who are not engaged in the construction industry, such as hospitals, municipalities and the like. Counsel for Westwood and Central Mill argued that this interpretation is made necessary as a result of the Board's decision in *Atlas Industries Ltd., supra.* We do not agree with this interpretation. However, the scope of the term "construction industry" is not raised on the facts of this application and would better be addressed on a case where the issue is raised directly.

[58] In summary, if IWA applied to be certified for the employees who are covered by the voluntary recognition agreements with Central Mill and Westwood, it would face two obstacles – first, it is not a trade union designated by the Minister under s. 9 of the *CILRA,* and second, the bargaining units are not described in craft terms.

[59] Do these obstacles prevent IWA from entering into a voluntary recognition agreement in the construction sector for a craft or "wall to wall" bargaining unit? In our view, the *Emerald Oilfield* case, *supra*, along with the Board's decisions in *Newbery, supra,* and *K.A.C.R., supra*, would prevent

IWA, Central Mill or Westwood from asserting a contract bar based on the voluntary recognition agreement against an application for certification made under the *TUA* by one of the Applicants. In this sense, a voluntary recognition agreement entered into by a trade union that is not otherwise entitled under the *CILRA* to represent employees in the particular industry could not survive a direct attack. The Board would treat the employees as though they were not presently represented by a trade union. The considerations for determining the validity of a voluntary recognition agreement as set out in the *Henuset* decision, *supra,* that is – requiring IWA to establish its representative capacity – could not be met as it is not legally entitled under the *CILRA* scheme to represent employees in the construction industry. The same result would occur under *The Health Labour Relations Reorganization Act* and *Regulations* if trade unions that are not designated in the *Regulations* as bargaining agents entered into voluntary recognition agreements with health care employers who fall under *The Health Labour Relations Reorganization Act*.

[60] In addition, the voluntary recognition agreements between IWA and Westwood and IWA and Central Mill may not survive a general attack brought by employees or trade unions representing such employees, under various provisions set out in ss. 11(1) and (2) of the *TUA*. In *Sunrise Paving,* [1972] 72 CLLC 16,060, the Ontario Labour Relations Board considered whether a employer violated the *Labour Relations Act* by entering into a voluntary recognition agreement with a trade union. The complaint alleged that the employer provided improper support to the voluntarily recognized union, contrary to provisions similar to ss. 11(1)(b) and (g) of the *TUA*.

[61] Outside of a representational contest or an employee complaint, the Board has no jurisdiction to comment on the arrangements entered into between IWA and Westwood and IWA and Central Mill other than to say that the agreements exist outside the confines of the *TUA* and *CILRA*.

[62] The Applicants argued that the voluntary recognition agreements bring Westwood and Central Mill under the definition of "unionized employers" in the *CILRA*. In our view, the agreements between IWA and Westwood and IWA and Central Mill do not have this effect. Section 2(s) of the *CILRA* defines "unionized employer" to mean "an employer in a trade division . . . " Trade divisions are defined in the Ministerial designation by reference to the bargaining rights of specified trade unions. The combined effect of the definition of "unionized employer" and the actual wording of the trade division designations makes it clear that only those employers who are required

- either by virtue of a certification order or a voluntary recognition agreement - to bargain with unions named in s. 9 (of the *CILRA*) designations, are "unionized employers" under the *CILRA*. Westwood and Central Mill do not have such a relationship with any of the Applicants and as such, are not "unionized employers" under the *CILRA*.

[63] In relation to the Applicants, Westwood and Central Mill stand in the same position as non-union contractors. They are performing work in the construction industry and the Applicants can seek to bring the work under the umbrella of the *CILRA* either through certification orders or voluntary recognition agreements with Central Mill and Westwood. The voluntary recognition agreements entered into between IWA and Central Mill and IWA and Westwood do not affect the position of the Applicants. The Applicants do not gain rights that they did not acquire through the two mechanisms recognized in the *CILRA* – that is, by certification order or voluntary recognition. Neither are they denied the opportunity and right that they possess under the *TUA* and *CILRA* to obtain a certification order or request voluntary recognition.

[64] On this view of the *CILRA,* the Board does not find that Westwood and Central Mill violated s. 27 of the *CILRA* by entering into voluntary recognition agreements with IWA. Section 27 of the *CILRA* pertains to a "unionized employer" and neither employer in this instance falls within that definition. Central Mill and Westwood are not required to bargain through a representative employers' organization until they are certified or have a voluntary recognition agreement with a union designated under s. 9 of the *CILRA*. However, this finding does not mean that the voluntary recognition agreements with IWA have any status under either the *TUA* or the *CILRA* for the reasons we have outlined above.

[65] For similar reasons, we do not find that Central Mill and Westwood failed to bargain collectively with the Applicants. Again, there is no bargaining relationship between the contractors and the Applicants that gives rise to the duty to bargain in good faith.

[66] As there are no findings of a violation of the *CILRA* or *TUA* by Westwood or Central Mill, Weyerhaeuser cannot be found to have aided or abetted in the commission of any unfair labour practice or violation.

[67] In the written brief filed on behalf of Central Mill and Westwood, the Ministerial designations made under s. 9 of the *CILRA* were challenged as being *ultra vires* the *CILRA*. A similar argument was made on the application to judicially review the decision of the Board in the *Emerald Oilfield* case, *supra.* Barclay J. held at para. 15 that the Minister cannot be impugned by a collateral attack and indicated that the proper method for determining if the designations are *ultra vires* is to apply by way of judicial review for an order to quash the designations. We agree with these comments and will not go behind the Ministerial designations in this application.

[68] For the reasons stated, the application is dismissed.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1985, Applicant v. ALPINE INTERIOR SYSTEMS LTD. (formerly, ALPINE DRYWALL AND PLASTERING (SASKATOON) LTD.) and ALPINE DRYWALL AND PLASTERING (REGINA) LTD. (formerly ALPINE DRYWALL AND PLASTERING (SASK.) LTD.), Respondents

LRB File No. 335-99; February 14, 2001
Vice-Chairperson, James Seibel; Members: Judy Bell and Bruce McDonald

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

Successorship – Transfer of business – Test – Board reviews relevant factors which might indicate whether one company successor to another and makes determination on assessment of relative weight of listed factors and where balance falls – Board concludes that no successorship has occurred in circumstances of case.

The Trade Union Act, s. 37.

REASONS FOR DECISION

Background

[1] James Seibel, Vice-Chairperson: By a certification Order dated July 14, 1975 (LRB File No. 149-75), United Brotherhood of Carpenters and Joiners of America, Local 1985 (the "Union") was designated as the bargaining agent for a unit of employees of Alpine Drywall and Plastering (Sask.) Ltd. ("Alpine-Sask") comprising those working in the carpentry and acoustical application (drywall and acoustic) trades. The name was then changed to Alpine Drywall and Plastering (Regina) Ltd. ("Alpine-Regina").

[2] The Union filed an application which alleged that Alpine Interior Systems Ltd. (formerly Alpine Drywall and Plastering (Saskatoon) Ltd.) ("Alpine-Saskatoon")[1] is the successor to Alpine-

[1] The Union had originally named Alpine Drywall and Plastering (Saskatoon) Ltd. as a respondent. However, during the course of the hearing the company changed its name to Alpine Interior Systems Ltd. The Union's application also originally named Alpine Drywall and Plastering (Sask.) Ltd. as a respondent. The style of cause has been amended to reflect the respective changes to the respondents' names.

Regina pursuant to s. 37(1) of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the "*Act*"), which provides as follows:

> *37(1) Where a business or part thereof is sold, leased, transferred or otherwise disposed of, the person acquiring the business or part thereof shall be bound by all orders of the board and all proceedings had and taken before the board before the acquisition, and the orders and proceedings shall continue as if the business or part thereof had not been disposed of, and, without limiting the generality of the foregoing, if before the disposal a trade union was determined by an order of the board as representing, for the purpose of bargaining collectively, any of the employees affected by the disposal or any collective bargaining agreement affecting any of such employees was in force the terms of that order or agreement, as the case may be, shall, unless the board otherwise orders, be deemed to apply to the person acquiring the business or part thereof to the same extent as if the order had originally applied to him or the agreement had been signed by him.*

[3] The Union also alleged that Alpine-Saskatoon has committed an unfair labour practice by refusing to recognize the Union and honour its request for the application of Union security provisions in s. 36 of the *Act*. This refusal, it alleged, constituted further unfair labour practices in violation of ss. 11(1)(a) and 11(1)(b) of the *Act*.

[4] The Union's position was that, after it was granted the certification for Alpine-Regina, Alpine-Regina disposed of all or part of its business to Alpine-Saskatoon. The Union served Alpine-Saskatoon with a request for union security. In its reply, Alpine-Saskatoon denied that it had acquired any part of a business from an employer subject to a certification order under the *Act*.

[5] Alpine-Saskatoon took the position that, if it is determined that it is a successor to Alpine-Regina, the Union abandoned any right to represent its employees because of the inordinate length of time – some 24 years from the incorporation of Alpine-Saskatoon to filing the application.

[6] At the hearing Alpine-Regina and Alpine-Saskatoon also joined issue as to whether Alpine-Saskatoon is a unionized employer pursuant to *The Construction Industry Labour Relations Act, 1992*, S.S. 1992, c. C-29.11, and subject to the provincial collective agreements for the carpenter trade division[2]. Alpine-Saskatoon had, from time to time, voluntarily recognized the Union as the bargaining agent for Union members who were employees of Alpine-Saskatoon. However, the

[2] The carpenter trade division also includes persons working in scaffolding, drywall and acoustical application.

Union, Alpine-Regina and Alpine-Saskatoon all requested that the Board not undertake to determine the issue regarding voluntary recognition. Accordingly, the only issues for us to determine are those relating to the alleged successorship.

Evidence

[7] Alpine-Sask was the result of a change of corporate name by Modern Lathing (Sask.) Ltd. in 1973. On September 22, 1976, Alpine-Sask. changed its corporate name to Alpine-Regina. In 1992, Alpine-Regina amalgamated with Feist Holdings Ltd. but retained the Alpine-Regina name.

[8] Alpine-Saskatoon was incorporated April 15, 1976. In September, 1999, it amalgamated with Alpine Interior Systems (B.C.) Ltd. The amalgamated company retained the Alpine-Saskatoon name.

[9] The first directors of Alpine-Saskatoon were Clarence Wagenaar, Jeremy Weeks and O. Nauta. The common shareholdings were as follows:

Clarence Wagenaar	25%	Art Hinger	10%
Roy Wunderlich	20%	O. Nauta	5%
Michael Trudgian	20%	Jeremy Weeks	20%

[10] The present directors are Michael Trudgian and Fraser Sutherland. The shares are presently held equally by their respective holding companies.

[11] At the time that Alpine-Saskatoon was incorporated, the directors of Alpine-Regina were Mr. Wagenaar, Mr. Weeks and Mr. Nauta. The common shareholdings of Alpine-Regina were as follows:

Clarence Wagenaar	28%	Jeremy Weeks	25%
Don Feist	28%	Chris Alberts	5%
O. Nauta	5%	Roy Wunderlich	10%

[12] The present directors and shareholders of Alpine-Regina are Don Feist and Jeanette Feist.

[13] Mr. Trudgian is the president of Alpine-Saskatoon. He has been a director and shareholder

since it was incorporated. He testified that he was employed as a drywaller in Alberta with an Alberta drywall contractor bearing a form of the "Alpine" name ("Alpine-Alberta") from sometime in the 1960's until 1976.

[14] Mr. Trudgian said that he began to weary of the travel involved in working for Alpine-Alberta. He said that when Mr. Wagenaar, who was then a partner in both Alpine-Alberta and Alpine-Regina, offered him the chance to participate as an owner in a yet to be formed drywall contracting company in Saskatoon, he saw it as an opportunity to settle his family in one place and decrease his travel. He said that he joined up with Mr. Hinger – neither had any business management experience and they would do all the hands-on drywall work for the new company.

[15] Mr. Trudgian and Mr. Hinger put money into Alpine-Saskatoon in order to acquire equipment and tools. They had 30 per cent of the shareholdings at start up. Mr. Trudgian testified that they paid nothing to, and acquired absolutely nothing from, Alpine-Regina. He was unaware of the existence of Alpine-Regina when he first came to Saskatoon. Mr. Trudgian and Mr. Hinger first worked out of Mr. Trudgian's house in Saskatoon until they moved to separate premises in 1979. They acquired all of their own work and received no referrals from Alpine-Regina. While Alpine-Regina and Alpine-Saskatoon for the most part have not crossed paths over the years, they have competed for tenders from time to time. Alpine-Saskatoon mainly bid on jobs in the north half of the province because the travel costs are financially prohibitive to further distances.

[16] Mr. Trudgian indicated that, in the beginning, Mr. Weeks prepared tender submissions for Alpine-Saskatoon, Mr. Wuderlich provided general management advice and Mr. Wagenaar provided some financial advice. They were paid out of the profits according to their shareholdings. However, Mr. Nauta, who did the payroll and books, was paid on a fee-for-service basis. His shares were later acquired by Mr. Saunders. Mr. Trudgian said that Mr. Weeks, Mr. Wunderlich and Mr. Wagenaar had little to do with the operation of Alpine-Saskatoon after the first year. He and Mr. Hinger gradually increased the business to the point where they had 20 or 25 employees. Mr. Sutherland acquired an interest in Alpine-Saskatoon in 1979. He was recruited by Mr. Trudgian because of his acoustical application expertise.

[17] In 1981, Mr. Trudgian joined with Mr. Sutherland to acquire the rest of Alpine-Saskatoon's shareholdings. At the time of the share acquisition, he and Mr. Sutherland arrived at an

"understanding" with Mr. Wagenaar and Mr. Wunderlich that Alpine-Saskatoon would bid work north of Davidson and Alpine-Regina would bid work south of that town.

[18] Mr. Trudgian confirmed that Alpine-Saskatoon operated like a unionized contractor until the repeal of the legislation in the 1980's by voluntarily recognizing the Union from time to time, securing workers from the Union's hiring hall and adhering to the trade division collective agreements. For a time, he served on the trade division's pension trustee board.

[19] Mr. Sutherland testified that he joined Alpine-Saskatoon in 1979. He also acquired shares in Alpine-Regina at the same time but did not work for Alpine-Regina. In 1981 he and Mr. Trudgian acquired all of the shares of Alpine-Saskatoon and he disposed of his interest in Alpine-Regina some time later. He was paid as an employee of Alpine-Saskatoon, but received only a profit distribution from Alpine-Regina. Mr. Sutherland said that he first became aware of the certification Order held by the Union for Alpine-Regina at a meeting of contractors in 1985, and that the Union's letter of October, 2000 was the first indication that it alleged that Alpine-Saskatoon was bound by the Alpine-Regina certification Order.

Argument

[20] Mr. Plaxton, counsel for the Union, argued that there had been a disposition of both name and expertise from Alpine-Regina to Alpine-Saskatoon at the time that Alpine-Saskatoon was incorporated. He said this was evidenced by the fact that Alpine-Regina and Alpine-Saskatoon had four common shareholders and the same three directors. With his contribution on the startup of Alpine-Saskatoon, Mr. Trudgian purchased the right to use the Alpine name and to enjoy the benefit of the management experience of Alpine-Regina for the start-up period. Counsel pointed out that Mr. Weeks prepared the bid documents for Alpine-Saskatoon.

[21] Mr. Plaxton said that the fact that Alpine-Regina as an entity received no money or value from Alpine-Saskatoon was not determinative of the issue and that s. 37 of the *Act* was broad enough to recognize that the consideration received by Mr. Wagenaar, Mr. Wunderlich and Mr. Weeks for their services to, and as profits on their shares in, Alpine-Saskatoon was for value received from Alpine-Regina.

[22] Mr. Plaxton referred to the decision of the Board in *United Brotherhood of Carpenters and Joiners of America, Locals 1805 and 1990 v. Cana Construction Ltd., et al.*, [1985] Feb. Sask. Labour Rep. 29, LRB File Nos. 199-84, 201-84, 202-84 and 204-84, in support of his argument. In that case, the union had held a certification order for Cana granted in 1971. Cana ceased to actively carry on construction activity in Saskatchewan as it could not compete with non-union contractors. However, it maintained offices in Saskatoon and Calgary which it shared with Pan-Western Construction Ltd., which operated non-union. Certain individuals were shareholders in holding companies that held shares in both Cana and Pan-Western. Cana supplied Pan-Western with all its management and bidding services, including the preparation of estimates and tenders, supervision of on-site activity and acquiring subcontractors. Cana project superintendents were contracted to be project superintendents for Pan-Western. Certain officers of Cana exercised day-to-day operational control over both companies. Cana was reimbursed on a fee-for-service basis plus a small amount for overhead. Cana also leased heavy equipment to Pan-Western at competitive rates. The union alleged that Pan-Western was a successor to Cana under s. 37 of the *Act* and was bound by the Cana certification order. In finding that Pan-Western was bound by the Cana certification order, the Board held that, at 43:

> *... Pan-Western acquired more than a mere collection of assets from Cana – it acquired a business or part of a business in the form of an active, severable and coherent part of a functional economic vehicle. In our view the knowledge, experience, and abilities acquired by Pan-Western from Cana's management group, together with other tangible and intangible elements of a business acquired from Cana, gave Pan-Western its economic life.*

[23] Mr. Plaxton also cited *International Brotherhood of Electrical Workers, Local 529 v. Mudjatik Thyssen Mining Joint Venture*, [2000] Sask. L.R.B.R. 332, LRB File No. 140-99, in support of the Union's position.

[24] Mr. Seiferling, counsel for Alpine-Regina and Alpine-Saskatoon, said that there was no evidence to support a finding of successorship in the present case -- Alpine-Regina disposed of nothing to Alpine-Saskatoon which, in turn, obtained nothing from Alpine-Regina. He said there had been no disposition and corresponding acquisition of a "functional economic vehicle." He said that the decision of the Supreme Court of Canada in *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740 v. W.W. Lester (1978) Ltd., et al.*, [1990] 3

S.C.R. 644 (S.C.C.), is authority for the proposition that corporate interrelationship, without some evidence of disposition, is not enough to found successorship, even if it might lead to a finding that the entities are common employers. Counsel opined that there might be some evidence relevant to a determination as to whether Alpine-Regina and Alpine-Saskatoon were "related or common employers" under s. 37.3 of the *Act*, but that had not been alleged by the Union.

[25] Counsel also relied upon the following decisions in support of the contention that there was no successorship in this case: *United Steelworkers of America v. VicWest Steel Inc.*, [1988] Jan. Sask. Labour Rep. 33, LRB File No. 128-87; *International Woodworkers of America, Local 1-184 v. Regina Design Millwork Ltd.*, [1981] May Sask. Labour Rep. 42, LRB File No. 344-80; *Hotel Employees and Restaurant Employees, Local 767 v. JKT Holdings Ltd.*, [1990] Spring Sask. Labour Rep. 66 LRB File NO. 149-89; *Saskatchewan Joint Board Retail, Wholesale and Department Store Union v. Diogenes Investments Ltd.*, [1983] July Sask. Labour Rep. 40, LRB File No. 072-83; *International Union of Operating Engineers, Locals 968 & 968B v. Marriott Corporation of Canada Ltd.* (1998), 98 CLLC 220-058 (Nova Scotia L.R.B.); *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 71 v. Rivard Mechanical, et al.* (1981), 81 CLLC 16,111 (Ontario L.R.B.).

[26] Because of the conclusion that we have arrived at in this case, we have not outlined the arguments advanced by counsel with respect to the issue of abandonment of bargaining rights.

Analysis and Decision

[27] The purpose of s. 37 of the *Act* is to protect employees from losing the right of union representation when a business, or part thereof, is disposed of by any means from one employer to another.

[28] In *Cana Construction, supra,* the Board enunciated the test for determining if an employer is a successor employer under s. 37 of the *Act,* as follows, at 37-38:

> *In order to determine whether there has been a sale, lease, transfer or other disposition of a business or part thereof, the Board will not be concerned with the technical legal form of the transaction but instead will look to see whether there is a discernable continuity in the business or part of the business formerly carried on by the predecessor employer and now being carried on by the successor employer. The Trade Union Act does not contain a statutory definition of "business" and the Board*

recognizes that it is not a precise legal concept but rather an economic activity which can be conducted through a variety of legal vehicles or arrangements. It has given the term "business" a meaning consistent with the comments of the Ontario Labour Relations Board in Canadian Union of Public Employees v. Metropolitan Parking Inc., [1980] 1 Can. L.R.B.R. 197, at 208:

> *A business is a combination of physical assets and human initiative. In a sense, it is more than the sum of its parts. It is a dynamic activity, a "going concern", something which is "carried on". A business is an organization about which one has sense of life, movement and vigour. It is for this reason that one can meaningfully ascribe organic qualities to it. However intangible this dynamic quality, it is what distinguishes a "business" from an idle collection of assets. This notion is implicit in the remarks of Widjery, J. in Kenmir v. Frizzel et al., [1968] 1 All E.R. 414 . . .*
>
> *Widjery, J. took the same approach as that adopted by this Board, concentrating on substance rather than form, and stressing the importance of considering the transaction in its totality. The vital consideration for both Widjery, J. and the Board is whether the transferee has acquired from the transferror a functional economic vehicle.*
>
> *In determining whether a "business" has been transferred, the Board has frequently found it useful to consider whether the various elements of the predecessor's business can be traced into the hands of the alleged successor business; that is, whether there has been an apparent continuation of the business - albeit with a change in the nominal owner.*

[29] In applying the test to a transfer in the construction industry, the Board commented as follows, at 41:

> *In the Board's opinion, the "economic life" of a construction company may therefore depend upon the availability of a combination of component parts at a cost the market will bear and which include, among other things, the availability of skilled labour, managerial expertise, ownership of or access to necessary equipment, and (especially in the commercial, institutional and industrial sector) sufficient capital and financial stability.*

[30] This test was applied by the Board in *Mudjatik Thyssen, supra*, in finding that the joint venture was the successor to Thyssen Mining Construction of Canada Ltd., which had been certified by the union some years earlier. In both that case and in *Cana Construction, supra*, the Board engaged in a review of the factors that it deemed relevant as indicating whether one company was a

successor to the other, and then made its determination on an assessment of the relative weight of the listed factors and where the balance fell. However, a key finding in both cases was the provision of key personnel from the predecessor to the successor company in all areas of operation from tendering to actual construction, including management of the worksite. In addition, practical operational control of the successor resided with the predecessor.

[31] The following factors indicated that there may have been a disposition of a business or part thereof from Alpine-Regina to Alpine-Saskatoon:

- From 1976 to 1981, Alpine-Regina's and Alpine-Saskatoon's common shareholders owned a majority of the shares in each of the companies;

- From 1976 to 1981, Alpine-Regina and Alpine-Saskatoon had the same directors in common;

- A common shareholder and director did the bid preparation for, and other common shareholders and/or directors provided management expertise and accounting services to Alpine-Saskatoon for a time after it commenced business; and

- Alpine-Regina and Alpine-Saskatoon have not competed for business to any significant degree.

[32] However, certain other factors would indicate that there has been no disposition:

- Alpine-Saskatoon has never received any hard assets from Alpine-Regina in any form, including equipment and materials, nor any contracts, work-in-progress or any work or administrative systems and procedures. They have never worked together nor have they shared any key day-to-day operational personnel or labour. Practical operational control has resided with Mr. Trudgian and Mr. Hinger or Mr. Sutherland;
- Alpine-Regina and Alpine-Saskatoon have not referred work to each other. Mr. Trudgian, Mr. Hinger and/or Mr. Sutherland secured all their own

- contracts and with the help of employees or piece-work subcontractors performed all of the hands-on work;

- Alpine-Regina and Alpine-Saskatoon have competed from time to time, but the costs of travel have naturally restricted their respective usual geographic ranges of operation;

- No consideration or sharing of profits has occurred between Alpine-Regina and Alpine-Saskatoon;

- There is no evidence that Alpine-Saskatoon obtained any work at the expense of Alpine-Regina but for the benefit of the common shareholders.

[33] In our opinion there is no evidence that Alpine-Regina disposed of anything to Alpine-Saskatoon. In *Cana Construction*, *supra*, the integration of the two companies was much deeper and more complete, leading the Board to conclude that Pan-Western had acquired " knowledge, experience, and abilities...together with other intangible and intangible elements of a business" from Cana, comprising "an active, severable and coherent part of a functional economic vehicle" such as gave Pan-Western its "economic life."

[34] If anything, Alpine-Regina and Alpine-Saskatoon had an independent relationship with Alpine-Alberta. With no intention on our part to cast any aspersion, the apparent *modus operandi* of Alpine-Alberta was to obtain or start up centres in Regina and Saskatoon using minority local partners who would do all the hard labour, with minimum continuing effort on their own part. Once the business was built up Alpine-Alberta would sell their interests to the active minority partner for, what may be assumed to be, a profit.

[35] We are of the opinion that there has been no disposition of a business or part of a business by Alpine-Regina to Alpine-Saskatoon within the meaning of s. 37 of the *Act*. There has been no transfer of a severable part of Alpine-Regina's economic organization that gave Alpine-Saskatoon its economic life. The application is dismissed.

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 1318, Applicant v. SOUTH SASKATCHEWAN 911, Respondent

LRB File No. 332-99; February 19, 2001
Chairperson, Gwen Gray; Members: Patricia Gallagher and Ken Hutchinson

For the Applicant: Gerry Huget
For the Respondent: Murray Walter, Q.C.

Reconsideration – Natural justice – In initial hearing Board refused to permit employer to lead evidence about tentative collective agreement – As result of reconsideration, Board concludes that employer should be permitted to tender evidence, although Board disagrees as to issues to which tentative agreement relevant.

***The Trade Union Act,* s. 13.**

REASONS FOR DECISION

Reconsideration

[1] Gwen Gray, Chairperson: South Saskatchewan 911 (the "Employer") seeks reconsideration of the Board's decision reported at [2000] Sask. L.R.B.R. 547, LRB File No. 332-99, on the basic ground that the Board failed to permit the Employer to call evidence related to collective bargaining in its defence to the application. The Employer argues that the Board's ruling constitutes a breach of natural justice and seeks to have the decision reviewed by the Board on this application.

[2] The International Association of Fire Fighters, Local 1318 (the "Union") complained in its unfair labour practice application that the Employer introduced a new classification called "call taker" and established a two tier wage structure for call taking and dispatch without negotiating the same with the Union contrary to s. 11(1)(m) of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the "*Act*"). The evidence indicated that the Employer introduced the change after bargaining had commenced with the Union but before any tentative agreement was concluded with the Union.

[3] During the original hearing, the Employer attempted to tender into evidence a tentative collective agreement that was concluded between the parties, but was not ratified by the Union's

membership. The Board ruled that the agreement could not be tendered as evidence in the proceedings for two reasons: first, it was entered into on a "without prejudice" basis and, second, it was not relevant to the issues at hand in the hearing.

[4] In this application, we are asked to reconsider this evidentiary ruling and permit the Employer to tender the evidence in question. For reasons stated below, we agree with the Employer that the Board made an improper ruling with respect to the evidentiary issue in dispute and will permit the Employer to call evidence relating to the tentative agreement. We agree with the Employer that the tentative agreement may be relevant to an issue in the hearing. We disagree with the Employer, however, over the issue to which the tentative agreement may be relevant.

[5] In the earlier hearing, the Board found that the tentative agreement was not relevant to the issues raised on the application because the agreement was concluded after the Employer introduced the position of "call taker." The cases on s. 11(1)(m) indicate that an employer is not permitted to introduce a change in terms or conditions of work without "bargaining collectively" with the trade union with respect to the change. In the context of s. 11(1)(m), "collective bargaining" means something more than merely discussing the matter with the trade union in the course of bargaining. The Employer and the Union must discuss the matter to a point of impasse. This concept was examined by the Board 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 at 152 as follows:

> *We have concluded, as noted above, that an employer must be able to show that the decision to implement unilaterally new terms and conditions of employment occurred when the bargaining process had reached an intractable and fruitless stage. In our view, this must amount to something more than the unproductive bargaining sessions, the hairpin bends, the successive "last words" and "final offers", the threats of more drastic action, the namecalling and the tensions which fall within the range of everyday bargaining. In Saskatchewan Joint Board Retail, Wholesale and Department Store Union v. Westfair Foods Limited, operating a Division of Western Grocers, LRB File No. 157-93, the Board characterized bargaining in the following way:*
>
> > *There are, as we have intimated earlier, no rules for the bargaining process as such. Though the parties may have expectations, based on their past experience, that issues will be discussed in a particular sequence, or that there will be a particular proportionality between proposal and counterproposal, or that one party or the other can always expect to achieve improvements in its favour, there are no sanctions attached to deviations from the anticipated course. The*

> *parties may be required to adjust their expectations according to changed conditions or changes in their relative bargaining strength. They may apply any combination of rational persuasion, deployment of economic power, or other inducements which is sanctioned by the law. Each of the parties may combine and recombine their own proposals and those put forward by the other party in an attempt to find the formula which will lead to an agreement. This process may be messy, it may be unscientific, it may be unpredictable, it may on occasion be brutal, but it is bargaining.*
>
> *Bargaining is a process which may be punctuated by rational exchange, although that is not generally its chief feature. Both parties may experience serious and frequent frustration with the perceived irrationality of the other. One party may present information in an attempt to persuade the other party; the other party may respond by presenting alternative information, by denying that the information is relevant, or by questioning the validity of the information. Both parties may adopt a rigid and uncompromising position on any or all issues. There may be talk, as there was here, of industrial action, of resort to the principals of the two negotiating committees for further instructions, of the pressing urgency of various bargaining items, of the need to bring bargaining to a conclusion. None of this will necessarily allow an employer to declare that bargaining is at an impasse, or is of no further use, and to proceed without further ado to implement the changes it has been trying to achieve at the bargaining table. To allow employers such easy recourse to unilateral change would provide an incentive to give up too easily on the bargaining process and to interpret every frustration or rebuff as grounds for proceeding to attain what they have been unable to gain through the process.*

[6] In the context of s. 11(1)(m), the fact that a tentative agreement was concluded with the Union after the new classification was unilaterally introduced by the Employer does not address the question of whether the Employer had bargained collectively with the Union with respect to the change prior to its unilateral introduction. If anything, the existence of the tentative agreement established that bargaining with the Union had not reached an impasse at the time the Employer introduced the new classification. Employers are not permitted under s. 11(1)(m) to introduce change then bargain collectively with respect to the matter with the Union. Section 11(1)(m) requires the parties to negotiate an issue to the point of impasse before unilateral implementation is allowed and the onus is on the Employer to establish a genuine impasse in bargaining. Strictly from a temporal point of view, the evidence of the tentative agreement could not assist the Employer in establishing that collective bargaining had taken place with the Union prior to the introduction of the new classification.

[7] We find, however, that on the issue of remedy, the tentative agreement may be relevant. There is an issue as to whether collective bargaining did reach a point of impasse when the tentative agreement was signed such that the Employer may have been entitled to unilaterally implement the change. We are in agreement that the Employer is entitled to make this argument on the remedial portion of the hearing. The tentative agreement is relevant for this purpose.

[8] The Union requested that the Board finalize the remedial Order on this matter. A further hearing will be scheduled by the Registrar to hear evidence and arguments with respect to the remedial Order. The Employer may, at that time, introduce evidence relating to the tentative collective agreement.

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 1318, Applicant v. SOUTH SASKATCHEWAN 911, Respondent

LRB File No. 037-01; February 23, 2001
Chairperson, Gwen Gray; Members: Judy Bell and Bruce McDonald

For the Union: Angela Zborosky
For the Employer: Murray Walter, Q.C.

Remedy – Interim order – Technological change – Employer about to cease business for economic reasons - Board finds arguable case of technological change and concludes that balance of labour relations harm favours union – Board orders parties to bargain collectively, orders employer to continue to pay employees until final application disposed of and orders expedited hearing of final application.

***The Trade Union Act*, ss. 5.3 and 43.**

REASONS FOR DECISION

Application for Interim Order

[1] **Gwen Gray, Chairperson:** The International Association of Fire Fighters, Local 1318 (the "Union") was certified to represent all employees of South Saskatchewan 911 (the "Employer") on June 23, 1999. The parties have appeared before the Board on an unfair labour practice application and an application for Board assistance in concluding a first agreement. Both applications remain pending before the Board. This application seeks various interim orders under ss. 43(5), 43(6) and 5.3 of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the "*Act*"), in relation to the proposed removal of call-taking and dispatch functions of the Employer.

[2] The Employer advised the Union on February 9, 2001 that the Employer's operations were being removed from the Employer to Prince Albert and Regina effective March 12, 2001 and all call-taking and dispatch operations would cease at the Employer on that date. Thirteen employees at the Employer's dispatch centre were given four weeks working notice and any additional pay in lieu of notice as required (presumably under *The Labour Standards Act*, R.S.S. 1978, c. L-1). Counseling services were offered to employees, along with assistance in obtaining job interviews with other

dispatching centres. On the same day, the Employer gave written notice of group layoff to the Minister of Labour and the Union pursuant to s. 44 of *The Labour Standards Act,* R.S.S. 1978, c.L-1.

[3] The Employer was under contract with the Department of Municipal Government to provide 9-1-1 services for the southern portion of Saskatchewan. On February 9, 2001, the Employer provided the Department with notice that it would no longer perform work under the contract. As a consequence, the Department arranged for the removal of work from the Employer to Prince Albert Communication Centre on an interim basis effective February 20, 2001. The Employer was under contract, as well, with various health boards to provide medical dispatch services, which work is now being transferred to Regina Emergency Medical Services effective on or about February 27, 2001. The Employer was also under contract with various municipalities to dispatch fire calls, which work is now being transferred to Prince Albert Communications Centre effective February 27, 2001. Ron Hilton, Director of Finance for the Employer, deposed in the Reply filed by the Employer that "on February 8, 2001, the Employer made a decision to cease business as it could no longer afford to continue." The Reply also indicated that "the rate of payment as determined by the Province was not sufficient to allow the Employer to continue to do business."

[4] The Union claims that the removal of work from the Employer to the Prince Albert Communication Centre and to Regina Emergency Medical Services constitutes a "technological change" within the meaning of s. 43(1)(c) of the *Act.* Under s. 43, the Employer is obligated to provide notice of technological change ninety (90) days prior to the date on which the technological change is to be effected and to provide notice in writing indicating the nature of the change, the date it is proposed to occur, the number and type of employees who will be affected, and effect of the change on the terms and conditions of work. The Union requests an order pursuant to ss. 43(4) and (5) and the interim order powers of the Board in s. 5.3 to restrain the Employer from implementing the change until a final hearing of the application.

[5] The Employer takes the view that the removal of the work does not constitute a technological change under s. 43(1)(c) of the *Act.* It argued that the Union would suffer no irreparable harm if the change is allowed to occur prior to a final hearing of this matter.

[6] The test to be applied under the Board's interim order powers set out in s. 5.3 requires the Board to determine (a) whether the main application reflects an arguable case under the *Act*, and (b) 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 *Hotel Employees and Restaurant Employees Union, Local 206 v. Canadian Hotels Income Properties Real Estate Investment Trust #19 Operations Ltd. (o/s Regina Inn Hotel and Convention Centre),* [1999] Sask. L.R.B.R. 109, LRB File No. 131-99.

[7] There is no doubt in the present case that the application presents an arguable case. The Board has extensively considered the interpretation to be placed on s. 43(1)(c) in the trilogy of cases starting with *Acme Video Inc.,* [1995] 4th Quarter Sask. Labour Rep. 134, LRB File Nos. 179-95 to 182-95, *Regina Exhibition Association Limited,* [1997] Sask. L.R.B.R. 749, LRB File No. 266-97, and *Loraas Disposal Services Ltd.,* [1998] Sask. L.R.B.R. 1, LRB File Nos. 207-97 to 227-97, 234-97 to 239-97 applying the technological change requirements to closure. Past cases have also applied the provisions to the relocation of work from one enterprise to another: see, for example, *Macdonald's Consolidated,* [1991] 2nd Quarter Sask. Labour Rep. 48, LRB File No. 078-91.

[8] The balancing of labour relations harm in this instance is also relatively straightforward. The employees are facing permanent job loss. They applied in 1999 to join the Union. They have no collective agreement in place. There are also unresolved pay issues remaining from their earlier unfair labour practice application. All of these issues are now rendered more difficult and complex by the Employer's decision to transfer its business. Section 43 provides the employees, through the vehicle of their Union, to bargain with the Employer in regard to all of these issues. The Employer is also currently obligated to bargain the first collective agreement under its general duty to bargain set out in s. 5(c) of the *Act.* Any harm that will result to the Employer may be tempered by conducting an early final hearing.

[9] As a result, the Board will issue an interim Order in the following terms:

(a) The Board Registrar is directed to set the application for hearing prior to March 12, 2001;

(b) The Union and the Employer are directed to meet with Mr. George Wall, senior labour relations officer, Labour Relations, Mediation and Conciliation Branch,

Saskatchewan Labour, and to attend all meetings scheduled by Mr. Wall for the purpose of collective bargaining;

(c) The Employer shall continue to pay wages and benefits to all employees affected by the removal of the work until the final determination of the application;

(d) The Employer shall post a copy of these Reasons in a workplace location that is accessible to employees and where the Reasons can be read by employees.

GRAIN SERVICES UNION, LOCAL 1450, Applicant v. BEAR HILLS PORK PRODUCERS LIMITED PARTNERSHIP, Respondent

LRB File No. 146-00; February 26, 2001
Chairperson, Gwen Gray; Members: Mike Geravelis and Judy Bell

For the Applicant: Hugh Wagner and Larry Hubick
For the Respondent: Dennis Ball, Q.C.

Collective agreement – First collective agreement – Parties agreed that Board agent's report formed basis for appropriate settlement – Union negotiator prepared draft agreement and misled employer negotiator as to nature of agreement – Board directs implementation of Board agent's report with certain specified exceptions.

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

REASONS FOR DECISION

Background and Facts

[1] Gwen Gray, Chairperson: The Grain Services Union, Local 1450 (the "Union") filed an application for Board assistance in concluding a first collective agreement on May 12, 2000. On September 5, 2000, the Board appointed Terry Stevens, Executive Director, Labour Relations, Mediation and Conciliation Branch, Saskatchewan Labour, to assist in the resolution of the first agreement, or failing which, to report to this Board on the terms to be included in a first collective agreement. The Board agent filed his report with the Board on October 23, 2000 listing his recommendations with respect to a final agreement. There is now a dispute over whether the terms proposed by Mr. Stevens were agreed to by the parties.

[2] Following the receipt of the Board agent's report, Mr. Hubick, the Union negotiator, wrote to Dale Hallson, negotiator for Bear Hills Pork Producers Limited Partnership (the "Employer"), and suggested that the Union was interested in settling the dispute on the terms set out in the Board agent's report. Mr. Hubick noted that the parties would need to get together to put the necessary wording in the appropriate form for inclusion in the agreement and to tie up any loose ends. Mr. Hallson agreed to meet to finalize the agreement. On October 31, 2000, Mr. Hubick wrote Mr. Hallson to arrange a time for meeting. In the course of his letter he indicated as follows:

This will respond to your e-mail message of October 31, 2000 wherein you agreed that the parties should meet to put together the necessary wording implementing Mr. Steven's recommendations into a first collective agreement covering employees of Bear Hills Pork Producers Limited. . . .

. . .

Accordingly, perhaps we should send a joint letter to the Board advising that the parties are going to attempt to incorporate the recommendations into a collective agreement for ratification by our respective parties. Further, that we request that the Board remain seized of its jurisdiction to resolve any problems (and/or issues) which we are not able to conclude in our discussions to be scheduled forthwith. Finally, that we make the joint request that the deadline for submissions be extended until November 15, 2000.

[3] The parties then jointly sent the following letter to the Board:

The parties have agreed to meet to put together the necessary wording implementing Mr. Stevens' recommendations into a first collective agreement covering employees of Bear Hills Pork Producers Limited. We request that the Board remain seized of its jurisdiction to resolve any matter that the parties are unable to resolve.

The parties jointly request that the deadline for filing statements in response to the Board agent's recommendations be extended to November 15, 2000.

[4] One of the main issues in contention between the parties during this labour dispute has been the issue of hours of work. The Board agent's report noted that Article 19 – hours of work and overtime – had been agreed to by the parties with the exception of the attached schedules. The schedules set out six shift rotations for employees in the operation.

[5] In addition, the Board agent recommended in Article 30 – Effective date of Agreement – that the wages recommended in the document become effective May 1, 2000 while the other provisions become effective on the date of the Board Order. An expiry date of April 30, 2002 was set for the agreement.

[6] Mr. Hubick prepared a draft collective agreement, which Mr. Hallson understood as implementing the recommendations of the Board agent. Mr. Hubick pointed out language that he had changed from the Board agent's report. He did not indicate to Mr. Hallson that the effective date of the agreement would be changed from the report. In the draft collective agreement, the effective date provision (article 27) was placed in collective agreement language as follows:

This Agreement shall be effective from the 1st day of May 2000 and shall be valid until the 30th day of April, 2002 and thereafter from year to year unless a written notice is given by either party not less than thirty (30) days nor more than sixty (60) days prior to April 30th in any year, of their desire to terminate this Agreement and/or negotiate revisions thereof, in which case this Agreement shall remain in effect without prejudice to any retroactive clause of a new Agreement until negotiations for revision or amendment hereto have been concluded and a new agreement superseding this Agreement has been duly executed.

The wages for all employees shall be as set out in the attached Schedule A and shall become effective May 1, 2000.

As per the attached Salary Grid (Schedule A). The effective date shall be May 1, 2000. Effective May 1, 2001 the rates of pay in the attached Salary Grid shall be increased by $25.00 per month, across the board.

A one-time retroactive payment of $500.00 per employee shall be paid to employees who were on the payroll as of date of certification (February 4, 1999). This payment is to be prorated for those employees who have either left the Company, or began their employment with the Company between February 4, 1999 and May 1, 2000.

[7] Mr. Hallson and Mr. Hubick met to discuss a number of issues related to the conclusion of collective bargaining. They discussed where individual employees would be placed on the wage grid and corrected the language in a few areas. Mr. Hallson and Mr. Hubick did not discuss retroactivity in relation to any of the provisions. Mr. Hallson assumed that the Board agent's report would stand and that retroactivity would only apply to the new wage rates set out in the agreement. The parties signed off on the collective agreement provisions November 10, 2000.

[8] On November 13, 2000, Mr. Hubick e-mailed Mr. Hallson advising him that the membership had ratified the collective agreement. He used the e-mail to alert Mr. Hallson to the Union's claim for retroactivity as follows:

Acknowledging that the collective agreement is effective and retroactive to May 1, 2000, I request that the company proceed with calculation of signing bonuses, retroactive back pay, retroactive overtime and retroactive statutory pay for payment to all affected employees by the December 15th, 2000 pay period.

[9] Mr. Hallson responded that the Employer was prepared to make retroactive payments of wages but would not implement the remaining provisions for overtime or general holidays, in accordance with the Employer's understanding of the effect of the Board agent's report.

[10] Mr. Hubick pressed the matter further exhorting Mr. Hallson to read Article 27 of the agreement and to live up to its terms and threatening an unfair labour practice if Mr. Hallson declined to do so.

[11] On November 15, 2000, the Union requested that the Board schedule a hearing to deal with the Employer's change of heart. The Union claimed the Board has jurisdiction to consider the matter because it had retained jurisdiction over the first collective agreement application.

[12] Counsel for the Employer also wrote the Board and asked the Board to clarify any ambiguities in the Board agent's report. Several other letters were exchanged between the parties all indicating their fundamental dispute over the implementation of the Board agent's report in the form signed off by the parties on November 10, 2000.

[13] The Union called no evidence on the application.

Argument

[14] Mr. Ball, Q.C., counsel for the Employer, argued that the Board should exercise its jurisdiction under s. 26.5 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "Act") to ensure that the Board agent's recommendations are implemented. The Employer agreed to the terms, along with the Union. But for the sharp practice of the Union negotiator, the collective agreement would be settled in accordance with the Board agent's report. Counsel asked the Board to impose a duration clause that accords with the one proposed by the Board agent. In addition, counsel requested that paragraph 2 of Appendix II be amended to remove the words "by mutual agreement between the union's members and the Local Barn Management" to make it clear that the work schedule changes would be implemented on December 1, 2000.

[15] Mr. Wagner, for the Union, argued that the collective agreement has been signed off by the parties and the Board should exercise its retained jurisdiction to impose the agreement that was already signed off by the parties. The Union asked the Board not to condone the practice of allowing a party to conclude an agreement and then come back to the Board for changes. The Union pointed out that, if

Board intervention is required, it should address the attempt by the Employer to remove seniority rights for striking employees.

Analysis

[16] The parties to this application have had a difficult time achieving a first collective agreement. They faced unusually complex issues in relation to hours of work and other matters. Both parties endured a strike and lock-out for many months before seeking Board assistance. We are pleased that the efforts of Mr. Stevens were successful in moving the parties closer to agreement.

[17] In a normal collective bargaining situation, the Board may require an employer's negotiator, who signed off on a collective agreement in error, to take the union's draft agreement to the employer's Board of Directors' for ratification. Presumably, as a result of the error, the Board of Directors would not ratify the agreement. At this stage, then, the employer's negotiator and the union would be required to negotiate the matter further in order to achieve an agreement. This process of resolving the issue through the collective bargaining process is preferable to seeking Board assistance. Parties ordinarily cannot come to the Board to complain that they signed off on an agreement in error. They must exercise diligence in the performance of their responsibilities as negotiators.

[18] In this case, however, the Board is of the opinion that it is preferable to intervene to settle the retroactivity issue in order that the parties can end the first contract dispute and begin to work co-operatively under the collective agreement. Both parties agree that the Board retained its jurisdiction under s. 26.5 of the *Act* to assist the parties to conclude a first collective agreement. The dispute has been protracted and we do not feel that it would serve any useful purpose to ask the parties to return to the bargaining table to attempt to reach agreement on this outstanding issue. The Board can exercise its jurisdiction under s. 26.5 to intervene in these unusual circumstances.

[19] The Union and the Employer agreed that the Stevens report formed the basis of an acceptable settlement. The report provided the Union with clear benefits in terms of the hours of work and scheduling issues. Both parties indicated their acceptance of the terms recommended by the Board agent and, at no point, did the Union raise the issue of changing the duration provision to make the hours of work, holidays and other provisions retroactive.

[20] Mr. Hallson can be criticized for not paying better attention to the draft agreement and for not intuiting from the wording used in the duration clause that Mr. Hubick had changed the intent of the duration clause. Perhaps Mr. Hallson should have been more astute in his dealings with Mr. Hubick (we are certain he will be in the future). Nevertheless, Mr. Hallson understood that Mr. Hubick accepted the Stevens report. There was nothing unreasonable in Mr. Hallson's view. Mr. Hubick indicated in writing to Mr. Hallson that the Stevens' report was acceptable to the Union; he did not raise any issue relating to retroactivity; and he did not point out to Mr. Hallson that his draft of the duration clause was intended to change the duration of various provisions in the collective agreement. In our view, Mr. Hubick's conduct caused Mr. Hallson to be misled concerning the nature of the Union's agreement.

[21] The Board agent came very close to settling all issues between the parties. We are confident that his recommendations are balanced and fair. His recommendation concerning retroactivity is a normal provision. Non-monetary items commonly are not implemented until the agreement is ratified. Work schedules and different hours of work cannot be implemented retrospectively. In our view, the Board agent's recommendation to delay their implementation to the date of the Board's Order was a practical term.

[22] For these reasons, we direct the implementation of the Board agent's report, with such amendments as were agreed between the parties on November 9, 2000 with the following exceptions:

(a) Article 27 – Effective Date and Duration of Agreement shall be amended to read as follows:

> *The wages set out in Schedule A to this agreement shall become effective May 1, 2000. Effective May 1, 2001 the wages set out in Schedule A shall be increased by $25.00 per month across the board. A one-time retroactive payment of $500.00 per employee shall be paid to employees who were on the payroll on the certification date (February 4, 1999). This payment will be prorated for those employees who have either left the Company, or began their employment with the Company between February 4, 1999 and May 1, 2000.*

All other provisions contained in this agreement shall be effective March 1, 2001 unless otherwise stated in the provision. The agreement shall expire on April 30, 2002.

Either party may give notice to terminate or renegotiate this agreement in accordance with s. 26.5(9) of The Trade Union Act.

(b) Appendix II – Letter of Understanding on Hours of Work – Three, Five and Ten Week Rotations - Clause (2) is amended to clarify the commencement date of the new work schedules:

2. Any of the above arrangements shall commence effective December 1, 2000.

(c) In relation to the question of seniority accrual during the strike, the parties are referred to s. 46(6) of the *Act* for guidance in calculating the placement on the wage grid system of employees who were on strike and any replacement workers. If further guidance is required in this matter, the parties can refer the issue back to the Board. We will retain jurisdiction under s. 26.5 to address the issue in the agreement if needed.

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW – CANADA), Applicant v. UNITED CABS LIMITED and UNITED CABS LIMITED O/A UNITED CABS AND BLUE LINE CABS, Respondents

LRB File No. 236-00; February 28, 2001
Chairperson, Gwen Gray; Members: Bob Todd and Mike Carr

For the Applicant: Neil McLeod, Q.C.
For the Respondent: Larry Seiferling, Q.C. and Scott Wickenden

Bargaining unit – Appropriate bargaining unit – Community of interest – Relationship between single taxi franchise owners/lessees and taxi drivers not so fraught with potential conflicts that two groups need to be placed in separate bargaining units -- Bargaining unit including both groups appropriate.

Employee – Definition – Board finds rental drivers to be employees of taxi company, not of taxi franchise owner/lessee – Rental drivers are properly included on statement of employment.

Certification – Representation vote – Management interference – Multiple taxi franchise owner involved in earlier organizing drive – Employer argues that earlier involvement taints support for present application and vote required – No evidence that individual involved with garnering support for present application – Board declines to order representation vote.

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

REASONS FOR DECISION

Background

[1] Gwen Gray, Chairperson: On August 29, 2000, the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW – Canada) (the "Union") applied to be certified for a bargaining unit composed of "all taxi drivers employed by United Cabs Limited and United Cabs Limited operating as United Cabs and Blue Line Cabs, except dispatchers, office personnel, garage staff, gas bar staff, employees of Atomic Motors, supervisors and management above the rank of supervisors, limousine drivers, and further excluding those persons who own or control two or more taxi cabs."

[2] On September 29, 2000, United Cabs Limited and United Cabs Limited o/a United Cabs and Blue Line Cabs (the "Employer" or "United Cabs") filed a statement of employment and reply. In its reply, the Employer questioned whether the support filed by the Union was tainted by owners of taxis who do not fall within the proposed bargaining unit. The Employer claimed that a secret ballot was required to overcome the improper influence. In addition, the Employer challenged certain names on the statement of employment.

[3] A hearing was held on December 20 and 21, 2000. At that time, the parties agreed that the following names should be removed from the statement of employment: Bill Johnson, Francis Kutas, Merv Sawchyn, Vasile Surdu, and the first nine handwritten names on page 9 of the statement of employment. Markoz Mestrovic, whose name appears on page 9, is to remain on the list.

[4] At the hearing, the Employer raised the issue of the appropriateness of the proposed bargaining unit and argued that franchise owners/lessees should be placed in a separate bargaining unit from rental drivers because they lack a community of interest. In addition, the Employer argued that employees of multiple franchise owners/lessees should be removed from the statement of employment as they are employees of the franchise owners/lessees, not United Cabs. The Employer also pursued its argument on tainted support cards. The Union initially raised an objection relating to the raising of new issues at the hearing, however, before the Board ruled on the objection, the Union withdrew the matter.

[5] There have been two other attempted certifications of this bargaining unit. In LRB File No. 115-95, Retail Wholesale Canada, A Division of the United Steelworkers of America (the "Steelworkers") applied unsuccessfully to be certified for a similar bargaining unit: see [1996] Sask. L.R.B.R. 337. The Saskatoon Taxi Drivers Association, Inc. (the "Association") applied to be certified for a broader bargaining unit of drivers and franchise owners. This application was withdrawn by the Association after the issue of its status as a trade union was raised by the Board in hearing: LRB File 042-00.

Facts

[6] United Cabs has not changed in any significant manner from the Board's description of its operation in LRB File No. 115-95. There are a number of taxi franchises issued by the city of

Saskatoon. These franchises are held by individual owners, many of whom treat the license as an investment. United Cabs acts as a broker and arranges to lease the taxi franchise to individual lessees at the flat rate of $152 per week. Most of the lessees are single operators who run one taxi and earn their income primarily from driving taxi. Some lease more than one franchise and will operate more than one taxi using rental drivers to perform driving work. The multiple franchise lessees may earn their income both from driving taxi and from renting their taxis to other drivers on a shift rental basis. These drivers are called rental drivers. They do not own or lease a taxi franchise and simply work as drivers. They pay the franchise owner/lessee a flat fee per shift or split their shift earnings on a 50:50 basis. The shift rental fees are agreed to between the franchise owner/lessee and the rental driver.

[7] United Cabs performs a number of functions in the management of the business. As indicated above, it acts as a broker for franchise owners and arranges leases between owners and lessees. In this role, it also collects rental payments and forwards the same to franchise owners/lessees less a five percent collection fee.

[8] United Cabs also recruits and trains drivers. After training, drivers are provided with a letter from United Cabs indicating that they will be offered work as a taxi driver with one of the franchise owners/lessees. Drivers are then required to undergo a police screening before being issued a number by United Cabs. This number then permits the driver to operate a taxi for a franchise owner/lessee. Drivers are subject to discipline if they violate the drivers' rules set out by United Cabs and its drivers' committee. Rental drivers can be suspended if they owe money to a franchise owner/lessee. When a dispute arises between rental drivers and franchise owners/lessees, United Cabs tries to mediate the matter and achieve a resolution. If no resolution is possible, United Cabs will attempt to find another driving opportunity for the rental driver with a different franchise owner/lessee.

[9] Key to the overall success of the business is United Cabs' role in obtaining business. United Cabs has entered into agreements with the airport, Canadian National Railway, potash mines and other companies or institutions to provide taxi services. United Cabs allows customers to set up charge accounts. It also permits customers to pay by way of credit card and administers the use of both charge accounts and credit card accounts for the drivers. United Cabs has hired a marketing employee to obtain work for the business.

[10] In addition, United Cabs functions as the dispatcher to the drivers. Franchise owners/lessees are required to equip their taxis with computers which they purchase through United Cabs. Each taxi pays United Cabs a flat fee of $123 per week for dispatch and other services provided.

[11] The Union applied to include rental drivers and single franchise owners/lessees in its bargaining unit. It excluded the multiple franchise owners/lessees from the bargaining unit on the theory that such persons earn income from driving and from leasing shifts to rental drivers. They are more "entrepreneurial" than single franchise owners/lessees.

[12] Most franchise owners/lessees engage rental drivers to operate their taxis. The single franchise owner/lessee may choose to lease his taxi on a shift rental basis in order to keep the taxi running for more hours in a day than he is able to operate on his own. This reduces the capital costs involved in owning a taxi and provides additional income to the franchise owner/lessee through the payment of shift rentals. Each franchise owner/lessee has final say over the persons who are permitted to drive his or her taxi. They may also terminate this relationship. No wages are paid by the franchise owners/lessees to rental drivers, nor are standard deductions made from those wages for Canada Pension Plan, Employment Insurance, income tax and the like.

[13] There are, on occasion, disputes that arise between franchise owners/lessees and rental drivers. Tony Rosina, General Manager, testified that recently a dispute arose over who should obtain a rebate on gas sold through United Cabs' garage. Rental drivers argued that they should receive the rebate in proportion to the amount of gas they purchased while some franchise owners/lessees thought the amounts should be paid to them. The matter was resolved by United Cabs. On occasion, franchise owners/lessees will ask United Cabs to suspend a rental driver from the dispatch as a result of non-payment of rental amounts. Similar disputes can arise as a result of damage to the taxi and the like. Many of these matters are dealt with in the drivers' rules. All drivers are governed by the same rules.

[14] David Galbraith was called as a witness by the Employer. Mr. Galbraith acted as the secretary of the Association. Mr. Galbraith owns two taxi plates and one vehicle. He also leases a limousine license from United Cabs and operates a van used for transporting persons with disabilities. Under the proposed bargaining unit, Mr. Galbraith is excluded as he owns two or more franchises.

[15] Mr. Galbraith testified that the Board told the Association that it would need to amend its constitution in order to proceed with its application to be certified for the drivers at United Cabs. As a result, the Association decided to seek representation from the applicant Union and invited the Union to a meeting with its executive members. The Association recommended the Union to its members. Mr. Galbraith testified that, at this point, he withdrew from any organizing activities as the Union made it clear to him that he could not be part of the bargaining unit.

[16] Mr. Galbraith did acknowledge that prior to the organizing campaign that led to the making of this application, he did make public statements in support of the unionization of drivers. He denied, however, having participated in any manner in garnering support or encouraging drivers to join the Union.

[17] Mr. Rosina testified that he understood that Mr. Galbraith was active in forming the Association and understood that the Association represented all drivers, including franchise owners/lessees. Mr. Rosina said that the Employer did not oppose the application for certification brought by the Association because he assumed that the Association was merely being formalized as the representative of the drivers. At that point, United Cabs did not take the position that it could not bargain collectively with a bargaining unit that included all drivers, including those who owned two or more taxis.

[18] Mohammed Alsadi testified on behalf of the Union. Mr. Alsadi is an organizer for the Union and was previously an organizer for the Steelworkers and was involved in the previous organizing attempt. He has extensive experience in organizing the taxi industry.

[19] Mr. Alsadi pointed out that the Ontario Labour Relations Board has certified bargaining units in the industry that include franchise owners/lessees and rental drivers. He referred to various certification orders and collective agreements that have been reached in the industry. In Mr. Alsadi's experience, the inclusion of the three types of drivers – franchise owners, franchise lessees and rental drivers – does not give rise to insurmountable conflicts in collective bargaining. He testified that the three types of drivers included in the bargaining unit have a community of interest in matters that they can bargain with their employer, including dispatch issues, discipline, rates and fees paid by drivers for services provided by the employer, and representation in dealing with civic government,

police and similar regulatory agencies. Mr. Alsadi noted that the Union is the only organization that is permitted to seek a rate increase in the city of Ottawa. It has a similar influence over the placement of taxi stands in Ottawa.

[20] In relation to issues that may arise between franchise owners/lessees and rental drivers, Mr. Alsadi noted that collective agreements in the industry deal with this type of dispute by referring the matter to a union-management committee. Mr. Alsadi testified that such a mechanism has been successful.

[21] On cross-examination, Mr. Alsadi acknowledged that there is no binding mechanism for resolving disputes that may arise between franchise owners/lessees and rental drivers other than the referral of their dispute to a committee composed of management and the union. He noted, however, that there are not many examples of such problems, perhaps one or two instances each year.

[22] In relation to one collective agreement, Mr. Alsadi acknowledged that fleet owners are parties to the collective agreement and attend bargaining sessions on the management side of the table, along with the taxi company. He was unaware if the owners' group was made party to the certification order by an order of a labour relations board. Mr. Alsadi did not agree that rental drivers have an employment relationship with the franchise owner/lessee whose car they drive. He described the relationship as more akin to a car rental situation where the rental driver rents shifts from a franchise owner/lessee. If the relationship breaks down, the rental driver seeks other driving opportunities from other franchise owners or lessees. The main relationship, according to Mr. Alsadi, is between drivers and United Cabs which controls most aspects of the drivers' work including discipline for rule infractions.

Relevant Statutory Provisions

[23] "Employee" is defined in s. 2(f) of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the "*Act*") in the following terms:

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;

[24] "Appropriate unit" is defined in s. 2(a) as follows:

2. *In this Act:*

(a) "appropriate unit" means a unit of employees appropriate for the purpose of bargaining collectively;

Argument

[25] Mr. Seiferling, counsel for the Employer, argued that the bargaining unit applied for was inappropriate because it includes groups of persons whose interests may conflict. In particular, United Cabs is concerned with the inclusion of franchise owners/lessees with rental drivers. There are opportunities for conflicts between these groups. On this basis, counsel submitted that there should be two bargaining units. Mr. Seiferling referred to *Hamilton Yellow Cab Company Limited,* [1989] OLRB Rep. Feb. 144, aff'd [1990] OLRB Rep. Nov. 1199 (Ont. Ct. of Justice) and *U-Need-A Cab Limited,* [1989] OLRB Rep. Dec. 1275 in support of his argument.

[26] The second argument advanced by Mr. Seiferling related to the inclusion of rental drivers who drive for multiple franchise owners/lessees. Counsel argued that the multiple franchise owners/lessees are excluded from the bargaining unit because they are independent business people and not employees within the meaning of the *Act.* Counsel argued that the rental drivers who drive for multiple franchise owners/lessees are employees of the franchise owner/lessee, not employees of United Cabs. Counsel argued that in the absence of an application under the related employer provisions of the *Act*, the rental drivers cannot be included in the bargaining unit and their names should be removed from the statement of employment. Counsel referred the Board to *E.M. Carpentry (1982) Limited,* [1989] OLRB Rep. Aug. 829.

[27] The final argument put forward by counsel questioned Mr. Galbraith's involvement in the organization of the Union. Counsel argued that Mr. Galbraith's involvement in the organizing campaign related to the Association's application to the Board and his public statements improperly interfered with or influenced the choice to be made by drivers in the bargaining unit. Mr. Galbraith is comparable to a manager or owner in the view of the Employer. Counsel referred the Board to *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Remai Investments Corp.* [1997] Sask. L.R.B.R. 303, LRB File No. 014-97 & 019-97.

[28] Mr. McLeod, counsel for the Union, argued that the issue of the appropriateness of the proposed bargaining unit was decided in LRB File No. 115-95. Counsel argued that the onus was on United Cabs to establish that the competing interests between rental drivers and franchise owners/lessees were sufficiently strong to justify separate bargaining units. Counsel noted that Mr.

Galbraith testified that setting of shift rental rates between franchise owners/lessees and rental drivers did not involve much negotiation as the rate was set by the market. There was no evidence that would suggest that there is a compelling need for a grievance or arbitration system for disputes arising between franchise owners/lessees and rental drivers. This relationship existed in the same form as in LRB File No. 115-95 where the Board found that a bargaining unit comprising franchise owners/lessees and rental drivers was an appropriate bargaining unit. Counsel argued that the relationship between franchise owners/lessees and rental drivers is more akin to a partnership where both share common interests. Counsel pointed out that United Cabs plays a significant role in the hiring and training of new drivers and has an important interest in the question of who drives for United Cabs. United Cabs exerts control over recruitment, training and retention of drivers. In the Union's view, United Cabs places undue emphasis on the relationship between the franchise owner/lessee and the rental drivers.

[29] Mr. McLeod argued that there is no dispute that single franchise owners/lessees who drive taxi are dependent contractors. Counsel pointed out the ways in which United Cabs controls the income and work of all three types of drivers, including the charges for dispatch, setting up of accounts and charges for accounts, advertising, obtaining business, and the like. Through these mechanisms, the drivers in the proposed bargaining unit are dependent upon United Cabs for their livelihood. The Board considered this issue in the earlier case, as have other labour relations boards in issuing similar certification orders in this sector.

[30] Counsel also argued that United Cabs already sets rules governing many aspects of the relationship between the franchise owners/lessees and rental drivers and these rules could be the subject of collective bargaining. The Union pointed to the driver rules which permit United Cabs to suspend rental drivers who owe money to a franchise owner/lessee and require drivers to take a one-hour break in each 12 hour shift and to accept Visa, Mastercard and company charge accounts. Mr. McLeod also pointed to the obligation placed on drivers by the driver rules to pay for the repair or replacement of personal property of customers that may become damaged due to the improper loading or negligence of the driver, the requirement to pay the deductible on any accident in which they are involved, and the right of franchise owners/lessees to seek damages from drivers if they are negligent in the operation of the taxi. Counsel argued that collective bargaining over issues involving the relationship of rental drivers to franchise owners/lessees would not be substantially

different from the system of the drivers committee that currently is in place and is assigned the task of developing work rules.

[31] Mr. McLeod also pointed out that United Cabs did not oppose the bargaining unit proposed by the Association which was more inclusive than the bargaining unit proposed in this application.

[32] Counsel argued that there is no dispute on this application that the drivers included in the bargaining unit description are employees of United Cabs. Counsel noted that the bargaining unit proposed is the same as was approved by the Board on the earlier application and that the issue of the inclusion of drivers of multiple franchise owners/lessees was dealt with on the last application. According to the Union, multiple franchise owners/lessees are not "employees" or "employers" under the *Act.*

[33] Mr. McLeod also argued that there was no evidence that Mr. Galbraith had participated in the Union's organizing campaign or that his previous remarks favouring the formation of a trade union had influenced the outcome of this application.

Appropriateness of the proposed bargaining unit

[34] In LRB File No. 115-95 the Board held that a bargaining unit composed of drivers who own or lease a single franchise and rental drivers was an appropriate bargaining unit. The Board reviewed the nature of the relationship between rental drivers and owners as follows, at 358-359:

> *The other major issue which was presented by the parties for determination at this time was the question of whether the bargaining unit described by the Union in the application is an appropriate one. The Union is proposing to represent all drivers, full-time and part-time, with the exception of franchise owners or lease operators who have control over more than one vehicle. This group would include lease operators and franchise owners who drive, but have control, through ownership or lease of a license, over only one car, as well as the drivers who lease cars on a per-shift basis.*
>
> *In this connection, we agree with the underlying premise of this description, which is that both franchise owners and lease operators who drive, and the drivers who enter into leasing arrangements with them, are employees within the meaning of The Trade Union Act. In the Hamilton Yellow Cab case,[(1987) 17 CLRBR (NS) 129], the Ontario Labour Relations Board addressed this point:*

> *In the taxi business, the owner-operator does not engage a replacement driver to "profit from his labour" in any material sense, but rather to fill in for the times when he cannot work for Yellow, so that he can "make ends meet", and to preserve the continuity of his commitment to the Yellow organization. The owner-operator is an "employer" in form only, for the meaningful lines of accountability still run between Yellow and the working driver, who remains, on the job, subject to Yellow's rules direction and control. The economic relationship between the owner-operator and driver is largely confined to agreeing on the split of the revenue derived from serving Yellow's customers and is either a flat fee or some percentage of the total. Like the owner-operator, the driver derives his income from the name, goodwill, and dispatch service of Yellow, and he is subject to the same rules of behaviour and disciplinary regimen. In this regard the terminology of "leasing a shift" is quite accurate. The driver is not so much being "employed" by the owner-operator, as being permitted, for a fee, to work for Yellow. Yellow can tolerate such substitution because anyone working in its system must conform to Yellow's detailed prescriptions about the way things must be done, and Yellow always retains the residual right to discipline or terminate any driver that does not meet those norms. In this regard Yellow is not unlike a construction industry employer who will be content with whomever is referred from the union hiring hall so long as s/he confirms to the prescribed standards of performance.*

Counsel for United Cabs Ltd. argued that, if lease operators and franchise owners who have control over one vehicle can be considered employees for this purpose, then it is impossible to exclude lease operators and franchise owners who have control over more than one car.

We have described the positions of those persons who are clearly employees, without any of the characteristics of an independent contractor, and those persons who are genuinely independent entrepreneurs, as being at opposite ends of a continuum. In between these polar positions, there are persons who may have some of the characteristics of both in varying degrees. As counsel for the Union put it, any line drawn between persons on this continuum is bound to be an arbitrary one in some respects.

This is true of the notional boundary between lease operators and franchise owners who are responsible for one car, and those who control more than one.

There were examples in the evidence given by witnesses at the hearing of situations which are some distance apart on this continuum. Mr. Merv Sawchyn owns a franchise, and drives the taxicab which is connected to that franchise. When he is not driving it, his wife or his stepson drive it. Mr. Sawchyn has made an investment in the taxi business, in the sense that he bought a vehicle and leased a franchise, but his own income is derived largely from driving the taxicab.

The position of Mr. Sawchyn may be contrasted with that of Mr. Neil Farries, who currently leases six franchises. Mr. Farries has at other times owned a number of franchises, and has leased up to ten franchises at a time. At the time of the hearing, he was still driving part-time, and was also engaged in a number of other business activities. At the time the application was filed, Mr. Farries had hired twelve drivers, in addition to himself. It is clear that someone like Mr. Farries displays many more of the risk-taking characteristics of the entrepreneur than Mr. Sawchyn.

In between these two situations, there are various degrees of risk, responsibility, independence and obligation, and it is difficult to state with precision where the line has been crossed which would justify regarding an individual as an employee rather than an independent contractor. In their application, the Union has chosen to draw the line between those who own or control one car, and those who own or control two. It may be that the line would be more realistically drawn between two and three, or three and four. It may be that at some future time, a more appropriate unit would be created by the inclusion of those who own or control two cars or three, should the Board decide that they, too, have more of the characteristics of employees than of independent contractors.

For the purposes of this application, however, we are satisfied that the standard suggested by the Union is as defensible as any. It provides a clear basis for distinguishing persons inside the bargaining unit from those without. Beyond the line they suggest, the franchise owners and lease operators have responsibilities for at least one car which they do not drive, in which they presumably have an interest of a more purely entrepreneurial nature. In our view, the bargaining unit which the Union has proposed is in this respect an appropriate one.

[35] While the Board focused its primary inquiry on the dependent contractor nature of the single franchise owner/lessee, it did consider in the quote from the *Hamilton Yellow Cab* case, *supra*, the relationship between single franchise owner/lessees and drivers, and concluded that a bargaining unit comprising the three types of drivers was an appropriate bargaining unit.

[36] We agree with the Board's earlier determination of the appropriateness of the bargaining unit and do not conclude from the evidence on this case that the relationship between single franchise owner/lessees and drivers is so fraught with potential conflicts that they be placed in two separate bargaining units. The evidence demonstrated that United Cabs controls the key features of the work lives of single franchise owner/lessee and rental drivers. They work under the same rules and are subject to the same forms of discipline. They benefit from the advertising and marketing efforts of United Cabs. They are also subject to the same financial arrangements respecting the payment of charge accounts and credit cards. Rental drivers are indirectly affected by the fees charged by United Cabs for dispatch and office fees and any changes in these fees could affect their rental payments.

Primary control over the three groups of drivers rests with United Cabs. The Board also noted that the parties are currently engaged in negotiations through the drivers' committee. Although there are areas of conflict between rental drivers and franchise owners/lessees, we do not find that these conflicts are so great as to render the inclusion of both groups in one bargaining unit inappropriate.

[37] Counsel for the Employer referred the Board to the reconsideration decision in *Hamilton Yellow Cab, supra*, where the Ontario Labour Relations Board approved the assignment of owner operator/dependent contractors in a separate bargaining unit from "pure drivers." In that instance, the Ontario Labour Relations Board was required to comply with s. 6(5) of the *Labour Relations Act* which provided as follows:

> *(5) A bargaining unit consisting solely of dependent contractors shall be deemed by the Board to be a unit of employees appropriate for collective bargaining but the Board may include dependent contractors in a bargaining unit with other employees if the Board is satisfied that a majority of such dependent contractors wish to be included in such bargaining unit.*

[38] The Ontario Labour Relations Board held that s. 6(5) of the *Labour Relations Act* required a separate bargaining unit for dependent contractors unless there was evidence before the Board of the desire of dependent contractors to be included in a broader employee bargaining unit. The *Act* does not contain a similar provision and there is no indication, in any event, before this Board that franchise owners/lessees and rental drivers want to be placed in separate bargaining units.

Inclusion of drivers of multiple franchise owners/lessees

[39] United Cabs objected to the inclusion on the statement of employment of rental drivers who drive for franchise owners/lessees. The theory of this argument is that rental drivers are the employees of the franchise owner/lessee and are not employees of United Cabs. United Cabs argued that, without an application for a related employer order, these drivers cannot be included in the United Cabs bargaining unit.

[40] In our view, this matter was determined by the Board in LRB File No. 115-95 when the Board held that rental drivers were "employees" of United Cabs within the meaning of s. 2(f) of the *Act*. No distinction was drawn between rental drivers who drive for a single franchise owner/lessee

or rental drivers who drive for a multiple franchise owner/lessee. On the evidence before this Board, there was no distinction to be made between the two classes of rental drivers. As described in *Hamilton Yellow Cabs, supra*, "the owner-operator is an 'employer' in form only, for the meaningful lines of accountability still run between Yellow and the working driver, who remains, on the job, subject to Yellow's rules, direction and control." Rental drivers are not engaged by franchise owners/lessees to work on an hourly basis. United Cabs regulates their work conditions and their income results overall from the efforts of United Cabs in attracting business, providing contracts and contacts for business.

[41] The exclusion of franchise owners/lessees from the bargaining unit on the theory that they are independent, not dependent, contractors, does not automatically render their relationship with rental drivers one of employment. In our view, the analysis set forth in the *Hamilton Yellow Cabs, supra*, is an accurate description of the relationship of all rental drivers with franchise owners/lessees whether they have single or multiple franchises. We find, therefore, that United Cabs is the employer of all such rental drivers and it is not necessary for the Union to bring an application under the related employer provisions of the *Act* to include such drivers in the bargaining unit.

[42] Counsel for the Employer referred the Board to *E.M. Carpentry, supra,* where the Ontario Labour Relations Board excluded the helpers employed by pieceworkers on carpentry projects. The Ontario Labour Relations Board summarized the factual circumstances as follows, at 33:

> *In reviewing the evidence in the Reports concerning those pieceworkers with two or more helpers, the Board is satisfied that these pieceworkers are engaged in an entrepreneurial activity of the sort which more closely resembles that of an independent contractor rather than that of an employee. The more helpers a pieceworker has, the greater the opportunity to increase his profitability. The pieceworker in this situation is clearly profiting from the labour of others and is very much the master of his own business. To use the language in Canada Crushed Stone [1977] OLRB Rep. Dec. 806, the pieceworkers with two or more helpers are employers in substance as well as form. Their power to hire, fire, discipline and to set the terms and conditions of employment of their helpers, even though the pieceworkers are economically dependent on a carpentry contractor, indicate that the pieceworkers with more than one helper more closely resemble an independent contractor and are entities which are not entitled to the benefits and protections of the Act. Accordingly, for the reasons set out above, the Board finds that a pieceworker with more than one helper working for E. M. or Westroyal is an employer and independent contractor and that these pieceworkers and their helpers are not employees falling within either the E.M. or Westroyal bargaining unit for purposes of the E.M. or Westroyal applications.*

[43] In our view, this case can be distinguished from the present case on the basis that franchise owners/lessees do not engage rental drivers as "employees." They do not pay them on an hourly basis, they do not set hours of work and they do not control the manner or method of performing the work. To some extent, franchise owners/lessees at United Cabs demonstrate fewer characteristics of "independent contractors" than the piecework carpenters with helpers in the *E.M. Carpentry* case, *supra,* as they are not employers "in substance as well as form." However, the Union's proposed cut-off is accepted by the Board as a reasonable dividing line on the continuum between "pure driver" and "independent contractor." The entrepreneurial aspect of the franchise owner/lessee's business arises from the lease of taxis to rental drivers. Profits are made off the labour of the franchise owner/lessee and from the shift rentals. In other settings, the entrepreneurial aspect derives from the profits generated from the labour of employees attached to the contractor, such as was the case in *E.M. Carpentry, supra.*

[44] The Board reviewed a number of dependent contractors cases and referred to the "enterprise control test" set out by the Canada Board in *Canada Post Corporation v. Canadian Postmasters and Assistants Association* (1990), 5 C.L.R.B.R. (2d) 79, as a more detailed method of assessing if a contractor is a dependent, or independent, contractor. In *Saskatchewan Joint Board, Retail Wholesale and Department Store Union v. McGavin Foods Limited,* [1997] Sask. L.R.B.R. 210, LRB File No. 173-96, the Board found that the employment of hourly paid drivers by a contractor on more than a casual relief basis would be evidence of the entrepreneurial nature of the contractor's work. Various factors drawn from *Algonquin Tavern v. Canadian Labour Congress, Chartered Local 1689,* [1981] 3 Can LRBR 337, were considered including: (1) use of or right to use replacements; (2) ownership of instrumentalities, tools, equipment or supply of materials; (3) evidence of entrepreneurial activity; (4) the selling of one's services to the market generally; (5) economic mobility or independence; (6) variation in fees charged; (7) integration with the purported employer's business; (8) degrees of specialization; (9) control over the manner of performing the work; (10) magnitude of the contract amount; and (11) whether the individual renders services or works under conditions which are similar to persons who are employees.

[45] In the *McGavin Foods* case, *supra*, the Board suggested that the *United Cabs* case (LRB File No. 115-95) was an example where the Board distinguished between franchise owners who employed others to perform work and those who perform the work personally, the former being

independent contractors while the latter are dependent contractors. While this, in a general way, describes the dividing line between single franchise owners/lessees and multiple franchise owners/lessees, it was not accurate in our view to describe the relationship between rental drivers and franchise owners/lessees as an employment relationship. As we indicated above, the entrepreneurial nature of the multiple franchise owners/lessees derives from the lease of more than one taxi, not the employment of regular drivers. If there was evidence that the multiple franchise owners/lessees engaged rental drivers to work for an hourly wage, the Board would be faced with a situation similar to *E.M. Carpentry, supra.*

[46] The Ontario Labour Relations Board appeared to come to the same conclusion in the *Hamilton Yellow Cab* case, *supra.*

[47] For these reasons, the Board finds that rental drivers for multiple franchise owners/lessees are employees of United Cabs.

Management interference/influence in the application

[48] Mr. Galbraith's involvement in the Association's application to the Board for certification was unopposed by United Cabs, as was his inclusion in the proposed bargaining unit. In that case, the Board of its own motion inquired into the status of the Association as a trade union. It would seem to this Board that if it was improper for Mr. Galbraith to be involved in the organization of the Association's application, United Cabs should have raised the objection on the Association's application. United Cabs apparently did not object to the role played by Mr. Galbraith in the formation of the Association.

[49] The *Remai* case, *supra,* referred to the *Bo-Peep* decision of the Board. In that case, the Board noted that the board of directors of Bo-Peep had no knowledge of the role of its director in the organization of the union. In this case, United Cabs was aware of the role of Mr. Galbraith in the formation of the Association and its attempt to become certified. Nevertheless, it is asking the Board to rely on the fact of such purported interference or influence to require a vote. Such a policy would surely encourage employers to send managers or agents into the fray of an organizing campaign for the purpose of obtaining a vote direction based on interference from the Board. This does not make

labour relations sense. Employers who are concerned about the role of their agents or managerial personnel in support of an organizing campaign must take positive steps to direct the agent or manager to remain neutral in the certification process. If the employer fails to take such steps, the Board will be hard pressed to accede to a request from the employer to order a vote.

[50] In any event, there is no evidence that Mr. Galbraith was involved with garnering support for the application. In addition, the Board has found that Mr. Galbraith is not an employer, as asserted by United Cabs, and his involvement, if it had occurred, would not necessarily have tainted the support evidence.

Decision on the certification application

[51] The bargaining unit applied for by the Union is an appropriate bargaining unit. The statement of employment is accepted as amended by agreement of the parties as set out at the hearing of the matter. The Union has filed support of a majority of the employees on the statement of employment. As a result, the Board will issue a Certification Order to the Union for the proposed bargaining unit.

[52] Mr. Carr dissents from these Reasons for Decision.

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1400, Applicant and HERITAGE INN, Respondent

LRB File Nos. 056-01, 057-01 & 058-01; March 7, 2001
Chairperson, Gwen Gray; Members: Mike Geravelis and Leo Lancaster

For the Applicant: Dawn McBride
For the Respondent: Larry LeBlanc, Q.C.

Remedy – Interim order – Interference with organizing drive - Union supporter terminated by employer during organizing campaign – Board finds arguable case under s. 11(1)(e) of *The Trade Union Act* and concludes that potential harm to union's campaign greater than potential harm to employer should employee be reinstated – Board orders interim reinstatement of union supporter – Board declines to order further interim relief under circumstances of case.

***The Trade Union Act*, ss. 5.3 and 11(1)(e).**

REASONS FOR DECISION ON INTERIM APPLICATION

Background

[1] Gwen Gray, Chairperson: The United Food and Commercial Workers Union, Local 1400 (the "Union") filed applications for an unfair labour practice, reinstatement and monetary loss relating to events surrounding its organization of employees at Heritage Inn (the "Employer") in Moose Jaw. An application seeking interim relief was filed with the Board on March 1, 2001. In support of the interim application, the Union filed affidavits of Glenn Stewart, Richard Dombowsky and Barb Bell.

[2] The Union filed an application for certification of the employees of the Employer, which was received by the Board on February 26, 2001.

[3] In response to the interim application, the Employer filed affidavits of Lori Schneider, Kandy Denne, Tim Schneider, Tracy Rodland, and Andreas Rauscher.

[4] A hearing of the interim application took place in Regina, on March 6, 2001.

Affidavit Material

[5] Mr. Stewart's affidavit deposed that the Union initiated an organizing drive at the Employer's hotel in Moose Jaw on February 10, 2001. A meeting was scheduled for February 11, 2001 and three employees, namely Hazel Hack, Barb Bell and Richard Dombowsky, agreed to distribute the notice of meeting to employees at the workplace, which they did on February 10, 2001. According to Mr. Stewart's affidavit, a number of employees attended the meeting, cards were signed and the Union filed for certification with the Board on February 26, 2001.

[6] Ms. Bell was fired from her position as a banquet server on February 14, 2001. In her affidavit, Ms. Bell asserted that she had no prior disciplinary record. She deposed that her supervisor, Kandy Denne, the banquet manager, called her into her office on February 14, 2001, which was Ms. Bell's first day back to work after handing out the notice of the Union meeting. Ms. Denne provided two reasons for termination to Ms. Bell. The first reason was that Ms. Bell had gone drinking and phoned in sick the next day, and second, that she had been rude toward the banquet chef on February10, 2001. Ms. Bell denied both incidents.

[7] Ms. Denne deposed that the sick leave incident occurred on January 29, 2001 and February 1, 2001. Ms. Denne also deposed that there were other incidents that she relied on in deciding to terminate Ms. Bell, which included prior complaints from customers. She was aware at the time of terminating Ms. Bell's employment that Ms. Bell had distributed union leaflets at the workplace but she denied that this activity played any role in her decision to terminate Ms. Bell's employment. The Employer filed an affidavit in support of Ms. Denne from Tim Schneider, banquet chef and bar manager.

[8] Mr. Stewart asserted in his affidavit that Hazel Heck, another employee who assisted in the distribution of union leaflets, had her hours of work cut by the Employer. Tracy Rodland, office manager, deposed in her affidavit, that Ms. Heck had informed Ms. Rodland that she would be unable to work the shifts that Ms. Rodland had scheduled for her in March and Ms. Rodland rearranged the schedule accordingly. Ms. Heck did not file an affidavit in these proceedings.

[9] Mr. Dombowsky, hotel employee, deposed that he assisted in the distribution of union leaflets at the workplace on February 10, 2001. On February 14, 2001, Mr. Dombowsky was told by Andreas Rauscher, assistant general manager, that he was not allowed to attend at the bar called "Watts on Main" on off-duty hours due to his conduct in approaching employees to sign union cards during their work hours. Mr. Dombowsky deposed further that he was requested to leave the bar by Tim Schneider, bar manager, on February 21, 2001. Mr. Dombowsky complained that employees are encouraged by the Employer to frequent the bar and he is being treated different from other employees as a result of his union activity.

[10] In response to Mr. Dombowsky's affidavit, the Employer filed an affidavit from Laurie Schneider in which she deposed that Mr. Dombowsky approached her in the bar on work time to sign a union card. The method used by Mr. Dombowsky was described during the hearing by counsel for the Employer as "rude, sexist and disruptive." Andreas Rauscher also deposed that he had told Mr. Dombowsky that he was not permitted to be on the property when he was off-duty. He explained that "we are not stupid and know that he harassed at least one employee about signing a union card while she was trying to work."

Analysis

[11] An interim order is available to an applicant before the Board in circumstances where (1) the main application reflects an arguable case under *The Trade Union Act,* R.S.S. 1978, c. T-17 (the "*Act*"); and (2) the labour relations harm of not granting an interim order exceeds the labour relations harm of granting such an order: see *Hotel Employees and Restaurant Employees Union, Local 206 v. Canadian Hotels Income Properties Real Estate Investment Trust #19 Operations Ltd. (O/A Regina Inn)*, [1999] Sask. L.R.B.R. 190, LRB File No. 131-99, at 194.

[12] There is no doubt that the Union's application raises an arguable case. The application alleges various unfair labour practices against the Employer which are supported by the affidavit material filed. On the evidence presented, the Union has established a *prima facie* breach of s. 11(1)(e) – that is, the Union has established that Ms. Bell was engaged in union activity at the time of her termination. The onus of establishing "good and sufficient reason" for the discharge shifts to the Employer under the reverse onus provision contained in s. 11(1)(e).

[13] In previous decisions, the Board has recognized that the termination of an employee during an organizing campaign can have a chilling effect on the organizing campaign. The Union argues that the termination of a union supporter negatively affects the willingness of other employees to participate in the campaign or in the debate surrounding the choice of a trade union. An employer's decision to fire an active union supporter during an organizing drive sends a rather blunt message to other employees that their jobs may be in jeopardy if they choose to belong to the union. Section 3 of the *Act* gives employees the right to freely choose to belong to a trade union and the overall purpose of the *Act* is to ensure the workplace environment is free from interference and intimidation that would otherwise suppress the ability of employees to freely choose to belong to a trade union. In previous cases, the Board has found that the chilling effect extends to organizing efforts where support has been frozen by the filing of an application for certification if the possibility exists that a vote may be ordered on the certification application: see *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Watergroup Companies Inc.*, [1992] 1st Quarter Sask. Labour Rep. 68, LRB File No. 011-92; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Courtyard Inns Operations Ltd.*, [1996] Sask. L.R.B.R. 673, LRB File Nos. 154-96, 155-96 & 156-96; *National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) v. Landmark Inn,* [1996] Sask. L.R.B.R. 807, LRB File No. 367-96; *International Union of Bricklayers and Allied Craftmen v. Regal Flooring Ltd.*, [1996] Sask. L.R.B.R. 694, LRB File No. 175-96; and *Hotel Employees and Restaurant Employees Union, Local 206 v. Chelton Suites Hotel (1998) Ltd.,* [2000] Sask. L.R.B.R. 434, LRB File Nos. 091-00, 110-00, 125-00, 139-00, 144-00 & 145-00.

[14] The labour relations harm that arises for the Union is the dampening of employee interest in the Union's organizing drive. This loss is difficult to repair through the normal procedure of hearing an unfair labour practice application and issuing a final order. It exists in any organizing campaign even where the support evidence has been frozen as a result of the filing of the certification application. There is always the possibility that the Union will lack majority support and a vote will be required.

[15] The Employer's harm relates to the continuing damage it will incur by having to maintain an unsatisfactory employee on the payroll. If the Employer is correct in its assertion that it terminated the employment of Ms. Bell because of her attitude and treatment of other employees and customers

and her alleged abuse of sick leave, then the requirement to maintain her employment pending the hearing of the final application is not a pleasant prospect. It may result in workplace conflict and a reduction of workplace productivity.

[16] We are confident, however, that the potential harm to the Union's campaign is greater than the potential harm to the Employer's business resulting from the reinstatement of Ms. Bell on an interim basis. The Employer, according to its own affidavit evidence, has tolerated a degree of alleged misconduct on Ms. Bell's part since the end of January, 2001. Ms. Bell, by the nature of these proceedings, will be aware that her performance is being watched and will be the subject of further complaints in the final hearing should she engage in the kind of conduct that was alleged by the Employer in its affidavit materials.

[17] The Board will order the reinstatement of Ms. Bell effective Friday, March 9, 2001. Ms. Bell shall be scheduled to work in the same manner that she was scheduled to work in the period immediately preceding her termination for the same hours of work and at the same rate of pay. Ms. Bell's monetary loss shall be left for determination on the main application.

[18] With respect to the Union's other remedial requests, the Board is not satisfied that the additional remedies are required at this time. The Union's application for certification has been filed with the Board. Evidence of support is frozen at this time and no further evidence will be received by the Board. The Union did not claim that its organizing drive was stalled by the Employer's conduct. There has been no allegation of improper communication by the Employer with the employees in relation to their decision to unionize. The Employer's affidavit material sets forth serious allegations of misconduct against Ms. Bell and Mr. Dombowsky that, if true, would go some distance to justify their treatment by the Employer in the workplace. While we are not required to unravel fact from fiction on an interim application, we do not think that the circumstances of this case require the extraordinary remedies sought by the Union with the exception of the remedy of interim reinstatement of Ms. Bell.

[19] The Board orders as follows:

(1) The Employer shall reinstate Barb Bell to the position formerly occupied by her at the same rate of pay, same work schedule and hours of work as existed in the period immediately preceding her termination;

(2) The Employer shall reinstate Barb Bell effective Friday, March 9, 2001;

(3) The Employer shall post these Reasons and Order in the workplace at three locations where the Reasons and Order may be read by employees.

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 3990, Applicant and CORE COMMUNITY GROUP INC., Respondent

LRB File Nos. 017-00 to 022-00; March 8, 2001

Vice-Chairperson, James Seibel; Members: Judy Bell and Mike Geravelis

For the Applicant: Harold Johnson and Don Moran
For the Respondent: Daniel Tapp

Unfair labour practice – Dismissal for union activity – Definition – Board reviews principles applicable to proceeding under s. 11(1)(e) of *The Trade Union Act* – Board finds employer's explanation for terminations not credible or coherent and insufficient to satisfy onus of establishing good and sufficient reason – Employer committed unfair labour practice.

***The Trade Union Act*, ss. 5(d) and 11(1)(e).**

REASONS FOR DECISION

Background

[1] James Seibel, Vice-Chairperson: The Canadian Union of Public Employees (the "Union") is designated by the Board as the bargaining agent for a unit comprising all employees of Core Community Group Inc. (the "Employer") in a certification Order dated October 25, 2000 (LRB File No. 015-00). The application for certification was filed with the Board on January 17, 2000. On January 18, 2000, the Employer terminated the employment of its two employees, community development worker, Bob Bjerke, and office administrator, Tady Clarke. On January 21, 2000, the Union filed the present applications pursuant to ss 5(d) and 5(e) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), alleging that the Employer had committed unfair labour practices in violation of ss 11(1)(a) and 11(1)(e), and seeking the reinstatement of Mr. Bjerke and Ms. Clarke and compensation for monetary loss, pursuant to ss 5(f) and 5(g).

[2] In the reply to the application filed on behalf of the Employer, it is admitted that the Employer became aware of the Union's intention to apply for certification on January 14, 2000. The reply alleges that the employment of each of Mr. Bjerke and Ms. Clarke was terminated for just cause because of insubordination, acting against the Employer's interests and being absent without leave.

Evidence

[3] Bonnie Morton has been the Employer's president for the past four years and is a member of its board of directors. She testified that Mr. Bjerke and Ms. Clarke, who are husband and wife, were hired as a community development worker and office administrator in May, 1999 for a six month term to backfill a vacancy created by a full-time employee on leave of absence. Mr. Bjerke was hired on a 75% basis and Ms. Clarke on a 50% basis; the job functions were interchangeable between them. The basic duties were to initiate and supervise community development projects as directed by the board of directors. The letter of engagement dated May 11, 1999, provides, in part, as follows:

> *. . . both of you will work for the Core for the period 3 May – October 29, 1999, inclusive. This is a temporary contract position to fill a leave of absence.*
>
> . . .
>
> *As discussed in our meeting of last week, no holiday time will be allotted during this contract. Further, we ask that no more than three days of overtime (time-in-lieu) be accumulated at a time. Prior approval must be sought regarding any time off from the office (aside from external meetings and engagements) for either position. Office hours for both positions shall be posted on the main door of the Core offices at all times.*
>
> *Time away from the office for personal reasons, as previously discussed, will be made up based on a suggested schedule from both staff submitted to [the Employer's Staffing Committee] for approval.*
>
> *Supervision of and assistance for the positions will be administered by the Staffing Committee. Should any concerns or questions arise regarding your employment with this organization, please direct them to the Staffing Committee. We ask that*

both staff submit prompt weekly time sheets to the Staffing Committee mail slot, as well as written reports to each of the monthly Core Board meetings.

. . .

As per CCGI policy, a standard three month probationary period will begin on 11 May 1999. During this time, the Staffing Committee will monitor your ability to meet position requirements. A meeting will take place at the end of this time period to brief you on your evaluation.

[4] The letters of termination provided to each of Mr. Bjerke and Ms. Clarke, dated January 17, 2000, provided as follows:

This letter is to inform you that as of 9:00 a.m. January 18, 2000 your employment with the Core Community Group Inc. will be terminated, for the following reasons:

1) Insubordination;
2) Acting against the employer's best interest; and
3) Absences without leave.

You will be paid one month's severance pay. This pay will be sent to you by the end of January.

[5] In the reply filed on behalf of the Employer, the instances of insubordination alleged to justify the terminations of employment are summarized (in Schedule "A" to the reply) as follows:

6. The most important job duties of these employees were to keep the office open to the public at stipulated office hours, and to keep the books of account. On July, 1999, the office was closed and the telephone was not answered between 10:30 a.m. and 11:00 a.m. Bjerke was confronted about this matter.

7. On three (3) occasions between June, 1999 and January, 2000, the Board of Directors instructed the employees to change the employer's bank signing authorities. This request was not complied with.

8. The employees agreed not to work overtime without obtaining the approval of the Board, but did so, in contravention of the agreement.

9. In October, 1999, the employees threatened to close the office if overtime was not paid.

10. The employees were required to keep reasonably accurate records of their hours worked. Upon reviewing the time records, the employer discovered that the employees had significantly overstated their hours worked.

11. The employees were late in preparing and filing an important funding submission to the City of Regina, and falsely represented to the Board that it had been done.

12. The employees were absent from the office without permission.

[6] Ms. Morton testified that an evaluation was done at the end of the probationary period by board member, Pam Kapoor, who was also a member of the Employer's staffing committee, but she did not know what the evaluation concluded.

[7] Although it is not enumerated among those matters listed in the reply, above, Ms. Morton referred to an incident in June, 1999 involving the Employer's then vice-president. Mr. Bjerke had pointed out to her that the vice-president had purchased some building materials for the Employer, but had not accounted for them. She said the matter was discussed at the Employer's July 15, 1999 board meeting; it was determined that Mr. Bjerke should send a demand letter and, in consultation with the new vice-president, Brian Runge, commence a small claims court proceeding. Ms. Morton said that while Mr. Bjerke did send the demand letter, he did not follow through with the court action. In cross-examination, Ms. Morton agreed that when Mr. Bjerke spoke to her about the matter later in the year,

he told her that the former vice-president had provided the explanation that he did not owe anything because he had paid the debt in kind by working for a homeowners' co-operative established by the Employer, and that he, Mr. Bjerke, would have to investigate further with them. Later yet, she said, Mr. Bjerke told her that he had some concerns regarding the information he had received from the co-operative. Ms. Morton said the Employer's board did not follow up on the matter until after Mr. Bjerke's termination.

[8] While the engagement letter of May 11, 1999, did not specify the hours of work, according to Ms. Morton, it was understood that Mr. Bjerke and Ms. Clarke would not work more than 20 to 30 hours per week apiece, in accordance with the half-time and three-quarters time designations of their positions, and that any overtime would be taken as time-in-lieu. However, she testified that Mr. Bjerke and Ms. Clarke began accumulating overtime almost from the start. Although she was not present at the Employer's board meeting on September, 1999, Ms. Morton said the matter was discussed by the board, as reflected in an entry in the minutes of the meeting and, in an attempt to curtail the further accumulation of overtime and make up the time-in-lieu, the office was closed for two days a week for a period of time. However, Ms. Morton said Mr. Bjerke and Ms. Clarke nonetheless continued to accumulate overtime: between the two of them, it ran at the equivalent of about two weeks' time.

[9] Ms. Morton said she contacted the labour standards branch of Saskatchewan Labour in December, 1999, to find out what could be done about the accumulated overtime. As a result of that discussion, she said she told Mr. Bjerke, near the end of December, that there absolutely could be no more accumulation of overtime. Mr. Bjerke testified that he thought the issue was resolved at that time; the office was closed between Christmas and January 4, 2000 and Mr. Bjerke said that he worked no overtime after that. When asked in cross-examination whether any more overtime was accumulated after their conversation, Ms. Morton was not sure, nor did she know how much accumulated time was then still outstanding. She further admitted that the Employer never did pay Mr. Bjerke or Ms. Clarke for any overtime alleged to be outstanding.

[10] In cross-examination, Ms. Morton agreed that some of the accumulated overtime resulted from Ms. Clarke or Mr. Bjerke keeping the office open during the stipulated hours but having to attend meetings later in the evening. She also admitted that at some point Ms. Clarke was instructed to start an organization newsletter, and when she expressed the opinion that it would require that she work

additional hours, she was advised that was acceptable. Ms. Clarke was adamant that between January 5, 2000 and her termination on January 18, 2000 she did not work or put in for any overtime.

[11] Ms. Morton also testified that there were discrepancies in the recording of the hours worked by Ms. Clarke and Mr. Bjerke that led the staffing committee to be concerned that they were "padding" their records. At the January 5, 2000 meeting of the committee (then composed of Brian Runge as chair, Ms. Morton and John Marley) with Ms. Clarke and Mr. Bjerke, they were asked to hand over their diaries and the security system logs that would show entry and exit from the premises. Ms. Clarke and Mr. Bjerke gave over the documents without protest. Ms. Morton said that one of the discrepancies could have arisen from the fact that Mr. Bjerke said he was under the impression that he had a half hour paid lunch, whereas the staffing committee's position was that it was a one-hour unpaid lunch; the letter of engagement is silent on the issue. At the January 5, 2000 meeting, Ms. Morton said Ms. Clarke admitted that there could be isolated unintentional errors in the time sheets. Although Ms. Morton made much in her evidence in-chief of a "reconciliation" that was prepared between the security logs and the employees' timesheets, in cross-examination she agreed that there was only one passcode for the alarm system and that other people had access to the premises, including several board members and various groups that had booked the use of the premises for after-hours meetings. That is, while the security system log showed entry and exit from the premises, it did not identify who it was. She also agreed that the reconciliation was not put to Mr. Bjerke or Ms. Clarke and they were not afforded any opportunity to explain what she viewed as the discrepancies.

[12] Ms. Morton said that, after Ms. Clarke and Mr. Bjerke were terminated on January 18, 2000, she found their timesheets in the office desk, which had obviously been prepared in advance, indicating hours worked on January 18 through 21, 2000. She was of the opinion that this confirmed her suspicions that they had been padding their hours.

[13] Mr. Bjerke testified that the meeting of January 5, 2000 was the first time that he became aware that there were any concerns with the job he was doing.

[14] Ms. Clarke testified that the meeting with the staffing committee on January 5, 2000, was entirely impromptu and that Ms. Morton, Mr. Runge and Mr. Marley showed up at the office unannounced; she said that to that point she was entirely unaware that there was any concern that she

or Mr. Bjerke might be padding their hours. She said that at the meeting, the vice-president, Mr. Runge, called the situation a "misunderstanding" and said that the Employer's board had to accept half the blame. For example, she said, when they were going over the records together, one alleged instance of padding turned out to be when she was having a business lunch with Ms. Morton; another was when Mr. Bjerke was off for surgery and she worked his hours as well as her own. She said she suggested to the staffing committee members that they take all the records with them and raise any problems they discovered with she and Mr. Bjerke. No further concerns about their timekeeping were raised with them before they were terminated.

[15] Ms. Clarke said that when Mr. Runge and Mr. Marley came to the office on January 14, 2000 to sign bank authority documents they were very conciliatory and Mr. Runge apologized for not returning their diaries and calendars. Indeed, she said Mr. Runge told her that "our jobs were not on the line," and that he expressed some concern that she and Mr. Bjerke might quit. When they left, Ms. Clarke phoned Mr. Bjerke to discuss whether they should tell the directors that the Union was going to apply for certification; she indicated that they decided that to be fair and honest they should. She called Mr. Marley that evening and advised him; she said that he seemed surprised, but did not otherwise react negatively. Mr. Bjerke said that they also left a message advising Mr. Runge of the matter on his answering machine.

[16] Ms. Morton said that there were complaints that the Employer's office was not always open during posted office hours; the complaints were from a community resident and some members of the Employer's board who attended to do committee work. Ms. Morton said that it was brought to the attention of Mr. Bjerke and Ms. Clarke on several occasions, but no discipline was imposed.

[17] According to the testimony of Ms. Clarke, the office was closed from time to time during hours when it would usually have been open because of meetings that were held outside the office.

[18] Ms. Morton also said that Mr. Bjerke and Ms. Clarke took unauthorized time off from work. However, the only example she mentioned was when Mr. Bjerke allegedly took a small amount of time in August, 1999 to present his university thesis defence. In cross-examination, Ms. Morton admitted that she was aware of it at the time and that Mr. Bjerke was not reprimanded or disciplined. Upon

being questioned further by Board Member Bell, Ms. Morton said she "was not sure whether or not we were asked for permission for him to defend his thesis."

[19] Ms. Morton testified that Mr. Bjerke and Ms. Clarke were to prepare a funding proposal to the City of Regina that was due in January, 2000; they had received the appropriate forms a few months prior to the deadline. She agreed that in November, 1999 Mr. Bjerke and Ms. Clarke were trying to get the board committees to complete their "goals and objectives" reports so they could use them to prepare a portion of the proposal. According to Ms. Morton, the Employer's board had understood that the proposal was due at the end of the month and arranged to meet with Mr. Bjerke on January 21, 2000 to review the draft. The first part of the proposal was submitted to the City by Mr. Bjerke on January 10, 2000. However, Ms. Morton said she received a phone call from the supervising City official, Mr. Viala, on January 17, 2000, who advised her the first part of the proposal was satisfactory and further advised that the balance of the proposal – the financial section – was due at noon on January 21, 2000. Ms. Morton said that while the application was submitted on time, the board had to complete it.

[20] Ms. Clarke testified that the "goals and objectives" portion of the proposal was submitted to the City by the end of November, 1999, and during December she and Mr. Bjerke met with each board member and assembled the necessary financial information by January 10, 2000. She said she was still working on it at the time of the January 5, 2000 meeting with the staffing committee when she was told not to put in any more overtime. She said that she thought the purpose of January 10, 2000 meeting was going to be to discuss the draft proposal because it had to be submitted on January 21, 2000.

[21] Mr. Bjerke testified that he and Ms. Clarke had completed the funding proposal on January 8, 2000, with the exception of the individual committee reports, some of which he was still waiting for, and he faxed it to Mr. Viala at the City. He said that Mr. Viala left a message on the answering machine on January 10, 2000 to say that the draft was satisfactory. He said he so advised Ms. Morton, Mr. Runge and Mr. Marley at a meeting that day. He said the committee reports were all that was remaining to be appended to the application for submission by January 21, 2000.

[22] Ms. Morton said that the Employer's board had instructed Ms. Clarke to set up bank signing authority for the vice-president, Mr. Runge, at its November 18, 1999 meeting, but that by January she

had not done it. In cross-examination, Ms. Morton admitted that the idea of expanded signing authorities was proposed by Ms. Clarke so that it would save her time when having to find someone with authority to sign a cheque. She also admitted that it was necessary for Ms. Clarke to have signed copies of the board's motions in order to make the changes at the bank, and that Ms. Clarke brought the necessary signature cards to the Employer's January 10, 2000 board meeting.

[23] With respect to the same matter, Ms. Clarke testified that she had to wait until the minutes of the November board meeting authorizing the signing authority changes were ratified at the December meeting before she could get a certified copy of the motion for the bank; she brought the necessary cards to the January 10, 2000 meeting to be signed; Mr. Runge and Mr. Marley signed theirs on January 14, 2000; Ms. Clarke returned them to the bank that day.

[24] Despite the perception of the problems outlined above by Ms. Morton, the Employer's staffing committee (then composed of Bonnie Morton, Brian Runge and John Marley) advised Ms. Clarke and Mr. Bjerke at the impromptu meeting of January 5, 2000 that the Employer's board had decided to offer them new employment contracts. Ms. Morton said she met with Employer's counsel on January 9, 2000 to prepare draft memoranda of the employment contracts. At the meeting on January 10, 2000, which Ms. Clarke and Mr. Bjerke thought was to review the funding proposal, the staffing committee discussed the details of the employment contracts and presented a written memorandum for each of Ms. Clarke and Mr. Bjerke to sign. The memoranda were in the same form (except to reflect the difference between their respective half-time office administrator and three-quarters-time community development worker positions) as follows:

> *As per our meeting with you on Wednesday, January 5, 2000, we would like to present this letter as a confirmation of our discussions regarding the temporary contract for the position of Community Development Worker. This contract will remain in effect until a more inclusive contract can be put into place upon completion of the new Personnel Policy Handbook.*
>
> *The job portfolio as per the job description given to you on the above date serve as*

the outline of duties and responsibilities for the position of Community Development Worker.

. . .

As discussed, no overtime will be acceptable without approval of the entire CCGI Staffing Committee.

The Saskatchewan Labour Standards Act shall represent the guiding principles for this contract. One hour paid lunch breaks are required to be taken between the hours of 11:00 a.m. and 2:00 p.m. Coffee break periods as allowed must be taken during the workday and are not permissable [sic] to be taken as time off at the beginning, end or lunch break part of the work day.

Specific days and hours of work are to be co-ordinated with other staff member(s) with the approval of the CCGI Staffing Committee to ensure that the office remain open to the public, Monday through Friday inclusive between the hours of 9:00 a.m. to 5:30 p.m. Exceptions to accommodate meeting or activities outside of these hours shall maintain above stated office hours unless approved by the CCGI Staffing Committee.

Time taken off for holidays or other reasons must be requested one month in advance and shall be granted upon the approval of the CCGI Staffing Committee.

Daily detailed time sheets indicating work performed, telephone calls, meetings etc. shall be completed each day worked and submitted weekly to the CCGI Staffing Committee. Monthly written reports are to be submitted for each Core Board meeting.

[25] Ms. Morton said the memoranda were quite detailed regarding certain matters because the staffing committee felt that the problems being experienced with Mr. Bjerke and Ms. Clarke were as a result of misunderstandings; the committee felt that making the terms more explicit would help. She

said that Mr. Bjerke and Ms. Clarke were not uncooperative, but the accumulation of overtime had to cease. In cross-examination, Ms. Morton said that the staffing committee decided that if they were not going to sign the contracts, they should be fired. She said that when Mr. Bjerke and Ms. Clarke declined to sign the memoranda right then and there, expressing some reservations about provisions regarding overtime and banked time, she determined they should be dismissed, but nothing was said to them at the time.

[26] Ms. Clarke testified that she did not sign the memorandum on January 10, 2000 because she felt that certain matters, including the overtime issue, required more clarification. She said that at no time did she or Mr. Bjerke indicate that they were not prepared to sign the draft agreements, but that they wanted to consider some alternate language, particularly with respect to overtime authorization. She claimed that, in fact, there was to be the regular staffing committee meeting on January 12, 2000, and she felt the issues could be worked out and the contracts signed at that time.

[27] Mr. Bjerke testified that he phoned Mr. Marley on January 11, 2000 to explain that he felt that certain items in the memoranda should be clarified. He said that Mr. Marley responded that it would have to wait until Ms. Morton returned from her trip; because Ms. Morton was out of town until January 15, 2000 or so, Mr. Marley said the January 12, 2000 staffing committee meeting was cancelled. The next regular staffing committee meeting was January 19, 2000.

[28] Ms. Morton said she was out of town from January 10 to 15, 2000, when she received a telephone call from her husband on the evening of Friday, January 14, 2000 telling her to call Brian Runge "about something to do with a union." The next day, she spoke to Mr. Runge who told her that Ms. Clarke had told him that she and Mr. Bjerke were trying to establish union representation at the employer's office. On Monday, January 17, 2000, she and Mr. Runge arranged to meet with present counsel for the Employer, Mr. Tapp. Waiving solicitor and client privilege under questioning in-chief by Mr. Tapp, Ms. Morton said Mr. Tapp advised them that the Employer had grounds for immediate dismissal of Mr. Bjerke and Ms. Clarke. The matter of the pair's union activity was also discussed with counsel; she said that he told them they could not interfere with the formation of a union. An "emergency meeting" of the Employer's board was convened the same day (the regular meeting of the board was not until January 21, 2000) at which time it was determined to terminate Mr. Bjerke and

Ms. Clarke; by the time of the meeting, according to Ms. Morton, only two board members were unaware of the union's application for certification.

[29] With the assistance of counsel, Ms. Morton said she drafted the letters of termination dated January 17, 2000, set out above. She said that the reason Ms. Clarke and Mr. Bjerke were given one months' salary was "to be decent."

Statutory Provisions:

> 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;*
>
> *(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;

. . .

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;*

Argument

[30] Mr. Tapp, counsel for the Employer, argued that the terminations of Ms. Clarke and Mr. Runge had nothing to do with their union activity. He said the telephone conversation between Ms. Clarke and Mr. Marley on January 14, 2000, when she advised him of the union activity, showed the Employer is not anti-union.

[31] Mr. Tapp said he advised Ms. Morton and Mr. Runge that the Employer could not interfere with the formation of a union. He said that he told them they had the absolute right to terminate the employment of Mr. Bjerke and Ms. Clarke with reasonable notice or pay in lieu; he said that one month pay in lieu of notice was reasonable in the circumstances. He said the termination was the result of long-standing concerns going back to the start of the employment of Mr. Bjerke and Ms. Clarke.

[32] Mr. Johnson, counsel for the Union, argued that in the circumstances provided for in s. 11(1)(e) of the *Act* the Employer's common law rights of discharge were suspended. He said that the Employer became aware of union activity by the employees on the evening of January 14, 2000, consulted a lawyer first thing on Monday, January 17, 2000 and convened an emergency board meeting and terminated the employees the same day. In the circumstances, he said, the Employer had failed to satisfy the onus imposed upon it by s. 11(1)(e) to establish that it had good and sufficient reason to terminate Ms. Clarke and Mr. Bjerke unrelated to union activity.

Analysis and Decision

[33] There have been numerous proceedings over the years alleging violation of s. 11(1)(e) of the *Act* and the provision has been the subject of much comment by the Board. 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, the Board summarized the principles applicable to the determination as follows, at 583-85:

> *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 File Nos. 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.*

[34] On this type of application we are not concerned with assessing whether the employee was terminated for just cause, but rather, as stated 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 & 373-96, at 376:

> *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.*

[35] In the present case, the Employer alleges that it had good and sufficient reason to terminate

Ms. Clarke and Mr. Bjerke untainted by any anti-union sentiment. An examination of the evidence discloses, however, that the employees had never been disciplined for any workplace infraction or neglect of duty prior to being dismissed: they passed their initial probation, which would have been some time in August, 1999; they continued to work through the whole of the initial contract period; and, after the expiry of the fixed term of the initial contract, continued to work for an indefinite term until they were summarily dismissed. There is not the least mention of any unhappiness with the performance of either employee in the minutes of the meetings of the Employer's board for the entire period of their employment. Indeed, even if the meeting of January 5, 2000 with the Employer's staffing committee could be characterized as a verbal reprimand of sorts (and we do not say that it is), the Employer then formally offered them continuing employment. Such behaviour on the part of the Employer is not consistent with the perception averred to by Ms. Morton that the employees had been acting in an insubordinate manner and in neglect of certain duties for a long period of time.

[36] On Friday, January 14, 2000, Mr. Bjerke and Ms. Clarke advised two of the Employer's directors that they were in the process of unionizing. This information was deemed important enough by them to convey it to Ms. Morton that evening when she was away in Ottawa. She contacted Mr. Runge to discuss the matter the next day. The next business day, Monday, January 17, 2000, they attended for advice from the Employer's solicitor. Ms. Morton said that their purpose was to discuss the position of the Employer with respect to terminating the employment of Ms. Clarke and Mr. Bjerke for insubordination and work performance issues. However, she offered no explanation for the urgency of the meeting or the termination. Neither Mr. Runge nor Mr. Marley were called to rebut the evidence of Ms. Clarke that they were conciliatory just hours before being advised of the organization campaign. The letter confirming the meeting with counsel on January 17, 2000, from Mr. Tapp to Ms. Morton, dated January 18, 2000, notes among the "assumptions of fact" in arriving at counsel's opinion to the Employer that it had grounds for dismissal, that "the [Employer] was notified, informally, in January, 2000, that there may be a union organization drive underway." Clearly the fact of pending union activity was a subject of discussion at the meeting.

[37] Ms. Morton offered no credible explanation for what she termed an "emergency" meeting of the Employer's board that same day – the regular meeting was scheduled for just a couple of days hence. The haste with which Ms. Morton initiated the termination of the employees after being advised

of the organization drive, even though they had just been offered continued employment, belies her protestations that union activity had no part in the decision.

[38] On the whole of the evidence, we find that the Employer's reasons for terminating Ms. Clarke and Mr. Bjerke as related by Ms. Morton are simply not credible or coherent. There was no prior discipline of any kind; the terminations are inconsistent with the representations of Mr. Runge and Mr. Marley on January 14, 2000; the alleged incidents of insubordination and neglect relied on by the Employer are out of all proportion to a response in the nature of termination; and the timing of the response makes no sense unless the inference is drawn that it is related to union activity. The Employer has not satisfied the onus of establishing good and sufficient reasons for the terminations as required by s. 11(1)(e) of the *Act*.

[39] We find that the Employer has committed an unfair labour practice within the meaning of s. 11(1)(e) of the *Act*. The Board reserves its jurisdiction with respect to the applications for reinstatement and monetary loss. The Board Registrar is directed to schedule a pre-hearing meeting and a hearing of those issues.

SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, Applicant and SASKATCHEWAN LIQUOR AND GAMING AUTHORITY, Respondent and JUDY GREENSIDES, Intervenor (Store Managers)

LRB File No. 037-95; March 12, 2001
Chairperson, Gwen Gray; Members: Mike Geravelis and Ken Hutchinson

For the Applicant: Rick Engel
For the Respondent: Brian Kenny
For the Intervenor: Brian Barrington-Foote, Q.C.

Certification – Amendment – Addition of employees – Union applies to amend all employee certification order to include positions previously excluded from order – No evidence of support filed from group of employees to be included - Board reviews three reasons why positions or classifications might be excluded from certification orders – Board determines that positions at issue may be included in order without evidence of support.

Certification – Amendment – Addition of employees - Positions at issue were included in scope of original all employee order and were excluded when definition of employee in *The Trade Union Act* changed – When definition of employee in *The Trade Union Act* reverted to original definition, union applied to include positions again – Unit remains all employee unit and positions at issue are employees – Board determines that positions at issue may be returned to bargaining unit without evidence of support.

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

REASONS FOR DECISION

Background

[1] Gwen Gray, Chairperson: Saskatchewan Government and General Employees' Union ("SGEU") brought an application to amend its certification Order to change the name of the employer from Saskatchewan Liquor Board to Saskatchewan Liquor and Gaming Authority ("SLGA") and to update the exclusion list in the Order.

[2] The inclusion of the classification of liquor store managers in the bargaining unit is in dispute between the parties. In an earlier ruling ([1997] Sask. L.R.B.R. 836) the Board held that

liquor store managers do not perform work of a managerial nature and, as such, are "employees" within the definition of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*").

[3] In a subsequent ruling ([1998] Sask. L.R.B.R. 512), the Board held that a bargaining unit of "liquor store managers" was not an appropriate bargaining unit and it rejected an application for certification brought by the Saskatchewan Liquor Store Managers Association on this basis. In the course of its determination, the Board held that the classifications of store managers I, II, and III properly fell within the bargaining unit assigned to SGEU. It further held that liquor store managers IV, IVA and V were properly excluded from the SGEU bargaining unit based on the labour relations conflicts that might arise between these supervisory positions and members in the SGEU bargaining unit.

[4] On this branch of the application, the Board is asked to consider whether SGEU's certification Order can be amended by the Board pursuant to ss. 5(i), (j) and (k) of the *Act,* without proof of support from the employees whose positions SGEU seeks to include in its Order.

[5] Some store managers I, II and III (the "Intervenor") intervened to oppose the application.

History of SGEU's Certification Order

[6] Liquor agency employees of the government were first included in the general certification Order issued to the predecessor of SGEU in 1945. In LRB File No. 037-81, the Board considered an application brought by the Saskatchewan Liquor Board, the predecessor to SGLA, to exclude liquor store vendors (now called managers) III, IV, and IVA and traffic supervisor from SGEU's bargaining unit. The Board found that liquor store vendors did not exercise managerial functions and found that they were properly included in the bargaining unit. The position of traffic supervisor was excluded from the bargaining unit on managerial grounds: see *Liquor Board of Saskatchewan v Saskatchewan Government Employees' Union*, [1982] June Sask. Labour Rep. 64, LRB File No. 037-81. In October 1986, liquor store employees were assigned their own bargaining unit separate and apart from the general government bargaining unit.

[7] In LRB File No. 083-84, the Liquor Board again applied to exclude liquor store vendors from SGEU's bargaining unit. By then, the definition of "employee" contained in s. 2(f) of the *Act* had been amended on June 17, 1983 to read:

> 2. *In this Act:*
>
> *(f) "employee" means:*
>
> *(i) any person in the employ of an employer except any person whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character, any person who is an integral part of his employer's management or any person who is regularly acting in a confidential capacity in respect of the industrial relations of his employer.*
>
> *(Underlining denotes the amendment)*

[8] The Board held that the amended definition enlarged the group of individuals who "function as part of or are identified with a cohesive management group to the extent that it would be inappropriate to include them with employees in the bargaining unit." In relation to liquor store managers, the Board found that they exercised more managerial functions than they previously had performed, and that they were an integral part of the management team. All liquor store managers were excluded from SGEU's bargaining unit as a result of the Board's decision: see [1984] Nov. Sask. Labour Rep. 38, LRB File No. 083-84.

[9] In the earlier Reasons for Decision issued by the Board in this matter, the Board reversed the ruling in LRB File No. 083-84 and found that the work performed by liquor store managers does not remove them from the current definition of "employee" contained in s. 2(f) of the *Act*: [1998] Sask. L.R.B.R. 512. The *Act* was amended in 1994 and reverted back to the definition of "employee" contained in the 1972 *Act* by removing the "integral part of management" test. SGEU applied for the amendment to include "liquor store managers" in the first open period after the amendment.

[10] SGEU negotiated collective bargaining agreements on behalf of liquor store vendors while they were included in SGEU's bargaining unit. In this sense, the liquor store vendors or managers were not abandoned by the Union in negotiations with the employer. The movement of liquor store vendors came about as a result of the changes to the *Act* and the Board's application of the amended definition of "employee."

[11] There are approximately 700 members in SGEU's bargaining unit at SLGA and some 60 store managers in the store manager I to III classifications. The two groups comprise the proposed bargaining unit membership.

[12] The most recent certification Order for this group of employees reads:

> ORDER UNDER SECTION 5, CLAUSES (a), (b) and (c) OF THE TRADE UNION ACT:
>
> *The Labour Relations Board hereby makes an order:*
>
> *(a) determining that all employees employed by the Liquor Board of Saskatchewan except the following:*
>
> *Chairman*
> *Secretary to the Chairman*
> *Secretary to the General Manager*
> *Secretary to the Director of Finance and Administration*
> *Secretary to the Director of Retail Operations*
> *Secretary to the Director of Products and Distribution*
> *Secretary to the Employee Relations Manager*
> *Data Processing Manager*
> *Administration Manager*
> *Chief Accountant*
> *Personnel Administrator*
> *Assistant to the Chairman*
> *General Manager*
> *Director of Finance and Administration*
> *Director of Retail Operations*
> *Director of Products and Distribution*
> *Director of Information Systems*
> *Employee Relations Manager*
> *District Managers*
> *Products Manager*
> *Properties Manager*
> *Warehouse Manager*
> *Field Audit Manager*
> *Customer Services Manager*
> *Internal Audit Manager*
> *Traffic Supervisor*

Secretary to Personnel Administrator
Accounts Payable and Payroll Supervisor
Purchasing Supervisor
Planning Analysts
Liquor Store Mangers
Internal Audit Supervisor
General Ledger Supervisor
Computer Operations Supervisor
Senior Warehouse Foreman
Relief Store Managers
Field Auditors

are an appropriate unit of employees for the purpose of bargaining collectively;

(b) determining that the Saskatchewan Government Employees' Union, a trade union within the meaning of The Trade Union Act, represents a majority of employees in the appropriate unit of employees set out in paragraph (a);

(c) requiring the Liquor Board of Saskatchewan, 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).

DATED at Regina, Saskatchewan, on the 23rd day of October, 1986.

LABOUR RELATIONS BOARD

Per: "Dennis P. Ball, Chairman"

Argument

[13] Mr. Engel, counsel for SGEU, argued that an amendment to the managerial exclusions does not affect the nature of the bargaining unit and does not require SGEU to establish majority support in the bargaining unit. SGEU pointed out that at the time a certification Order covering the employees of the Saskatchewan Liquor Board was issued, liquor store vendors were canvassed for their support. The "all employee" unit continued in existence from 1945 to 1984. Liquor store

managers were excluded from the bargaining unit only as a result of a change in the definition of "employee" under the *Act,* which had the effect of removing liquor store managers from the definition of "employee" and hence, from the "all employee" bargaining unit.

[14] SGEU argued that the Board did not alter the bargaining unit description in its earlier Reasons for Decision in this case – it remains an "all employee" bargaining unit. In support of this argument, SGEU referred the Board to *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Raider Industries Inc.*, [1996] Sask. L.R.B.R. 297, LRB File No. 055-96, where the Board determined that all new job classifications which fall within the scope of an "all employee" bargaining unit are to be placed in the bargaining unit until such time as the Board makes a determination as to whether or not the persons are "employees" under s. 5(m) of the *Act.* Counsel argued that the application in this instance was a similar sort of application only in the reverse – that is, determining that an excluded person is an employee and therefore falls in the scope of the existing order. SGEU argued that the movement of positions in and out of scope because of their managerial as opposed to employee status, does not change the nature of the bargaining unit. It referred the Board to *Professional Association of Compensation Employees v. Ontario (Workers' Compensation Board),* [1997] OJ No. 4115 (Ont. Div. Ct.) and *Saskatchewan Government Employees' Union v. Wascana Rehabilitation Centre* [1991] 3rd Quarter Sask. Labour Rep. 56, LRB File Nos. 199-90 & 234-90 at 58-59.

[15] SGEU also referred the Board to *Retail, Wholesale and Department Store Union v. Sherwood Co-operative Association Ltd.,* unreported, LRB File No. 332-82, where the Board held that the inclusion of persons "who would have fallen within the scope of the original certification order if they had not been excluded by collective bargaining or by oversight" is not the type of change that attracts an assessment of majority support in the bargaining unit.

[16] SGEU noted that store managers (liquor store vendors) were included in the original certification Order and already were tested with respect to their desire to be represented by SGEU. Counsel recognized that the current employees were not the actual employees who provided support for the original certification Order; rather, he relied on the presumption of "continuance" that applies to orders of this nature.

[17] Counsel argued that if the Board determined that the present application must be decided in accordance with the principles set down in *University of Saskatchewan v. Saskatchewan (Labour Relations Board),* [1978] 2 S.C.R. 834 (S.C.C.), the Board should clarify various aspects of the tests established in that case. SGEU asserted that the tests set out by Bayda J.A., (as he then was) in dissent in the Court of Appeal Judgment [(1977), 22 N.R. 316 (Sask. C.A.)] which was adopted by the Supreme Court of Canada on appeal, required the Board to ask: (1) is a new bargaining unit created; and (2) if so, does the union enjoy majority support in the new bargaining unit? As indicated above, SGEU is of the view that the return of liquor store managers to its "all employee" bargaining unit does not create a "new" bargaining unit and, as such, there is no need to test majority support.

[18] SGLA did not make submissions on this aspect of the application.

[19] Mr. Barrington-Foote, Q.C., counsel for the Intervenor, argued that SGEU's application is covered by the principles set out in *University of Saskatchewan, supra,* and SGEU is therefore required to establish that a majority of employees in the group to be added to the bargaining unit support the application. Counsel noted that freedom of association is a cornerstone of the *Act* and should be applied in these circumstances to permit the liquor store managers who are affected by the application to have a say in whether or not they will be represented by SGEU.

[20] Counsel for the Intervenor referred the Board to *Saskatchewan Government Employees' Union v. Wascana Rehabilitation Centre,* [1993] 1st Quarter Sask. Labour Rep. 167, LRB File No. 236-92 in which the Board identified three methods of adding new employees to a bargaining unit: (a) through the union security provision in a collective agreement; (b) through the application of the existing scope clause in the certification order or collective agreement; and (c) through an application to amend the description of the bargaining unit. Counsel argued that the current application does not fall within (a) or (b) above as it entails the amendment of the certification Order to reflect the deletion of "liquor store managers" from the exclusions currently contained in the certification Order. As a result, counsel argued that the principles set out by the courts in *University of Saskatchewan, supra,* apply.

[21] Counsel for the Intervenor also referred the Board to *Saskatchewan Government Employees' Union v. Government of Saskatchewan and Canadian Association of Fire Bomber Pilots et al.,*

[1993] 1st Quarter Sask. Labour Rep. 202 and [1996] Sask. L.R.B.R. 539, LRB File No. 164-92 and drew parallels between the situation of fire bomber pilots and the liquor store managers.

[22] The Intervenor argued that any accretion to the bargaining unit requires proof of majority support, citing *Service Employees' International Union v. Shaunavon Union Hospital Board,* [1993] 2nd Quarter Sask. Labour Rep. 129, LRB File No. 295-91, where the Board rejected the union's argument that the addition of two previously excluded employees was not sufficiently significant to attract the rules set out in *University of Saskatchewan*. The Board was also referred to *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Sunnyland Poultry Products Ltd.*, [1993] 3rd Quarter Sask. Labour Rep. 213, LRB File No. 001-92 for the proposition that majority support must be demonstrated among the employees in the group to be added to the bargaining unit, not simply in the post-amendment group as a whole. In support of this proposition, the Intervenor also relied on *New Brunswick Broadcasting Co.*, 75 di 101 (CLRB). Counsel argued that this interpretation best accords with the objects and purposes of the *Act,* in particular, with s. 3 of the *Act.*

Analysis

[23] Before examining the issues in dispute in this application, it may be useful to clarify the form of certification orders that are issued by the Board. The Board generally defines the scope of a bargaining unit using language such as "all employees of X Corporation in City A, except [list of excluded positions]" or "all plant employees of Y Corporation in City B, except [list of excluded positions]."

[24] There are different reasons for excluding positions from a bargaining unit. Most exclusions relate to positions that are managerial in nature or confidential in relation to the employer's labour relations. Persons who occupy such positions are not "employees" within the meaning of s. 2(f) of the *Act* and, as such, they are not entitled to bargain collectively. In the jargon of labour relations, these positions are referred to as "out-of-scope" positions.

[25] The Board could issue certification orders without listing the persons excluded under the managerial and confidential tests because they are not "employees" within s. 2(f) of the *Act* and,

therefore, are not covered by an "all employee" order. In the present case, for instance, the Order could read simply "all employees of the SLGC." This order would have the same legal effect as an order that lists all of the managerial and confidential exclusions. However, the Board has developed the practice of listing the excluded managerial and confidential positions, which assists the parties by determining the boundaries between those persons who are "employees" and entitled to engage in collective bargaining and those who are not "employees" and therefore not entitled to participate in collective bargaining.

[26] The second reason for excluding positions in a certification order pertains to the issue of the appropriateness of the bargaining unit. In some certification orders, the scope of the union's bargaining rights does not extend to all employees of the employer. Craft bargaining units are an example of this type of order: e.g. "all journeymen carpenters, foremen and apprentices" or "all registered nurses." In addition to craft bargaining units, the Board may also certify departmental, plant or other smaller units under its broad power to determine appropriate bargaining units under s. 5(a) of the *Act:* see, for instance, *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Regina Exhibition Association Ltd.*, [1992] Sask. Labour Rep. 75, LRB File No. 182-92, *The Newspaper Guild Canada, Communication Workers of America v. Sterling Newspaper Group, A Division of Hollinger Inc.*, [1999] Sask. L.R.B.R. 5, LRB File No. 187-98 and *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Canadian Linen and Uniform Service Co.*, [1999] Sask. L.R.B.R. 173, LRB File No. 048-99.

[27] Although the Board attempts to ensure that a certification order accurately describes the unit that is subject to the order, the wording of an order is sometimes imprecise. For instance, a plant order in an industrial setting may read: "all employees of XYZ Corporation at City B, except [managerial, confidential exclusions] and office workers." In an order of this nature, the Board excludes both persons who are not "employees" under the *Act* (i.e. those who perform managerial or confidential functions and are excluded from the definition of "employee" in s. 2(f) of the *Act*) and persons who do fall within the definition of "employee"(i.e. "office workers"). The order does not identify the reason for excluding the various positions. However, the Board usually can decipher the reasons for the exclusion from the descriptive words used in the order. Generally, managerial and confidential exclusions are described by position, such as "department managers," while "employee"

exclusions are described by classification, such as salespersons, office staff, and the like. A better understanding of the order may also be gleaned from the original application, reply, statements of employment and the Board's original decision.

[28] The third type of exclusion is the exclusion of persons who are middle managers. These positions are considered "employees" within the meaning of the *Act,* but they are excluded from general bargaining units because they exercise supervisory functions over members of the general bargaining unit such that their inclusion in the general bargaining unit would give rise to a labour relations conflict. Middle managers are entitled to engage in collective bargaining, but in separate bargaining units from the employees whom they supervise. It is not possible to differentiate middle management exclusions from managerial exclusions in a certification order unless the accompanying decision examined the issue and set out the middle management exclusions. 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 to determining middle management bargaining units at 332 as follows:

> *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 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.*

[29] To summarize then, certification orders may exclude (1) persons who are not "employees" within the meaning of s. 2(f) of the *Act*; (2) persons who are "employees" within the meaning of the *Act* and are excluded on the grounds of appropriateness under s. 5(a) of the *Act*; and (3) middle managers, who are "employees" but who exercise supervisory authority over members of the

bargaining unit sufficient to create a labour relations conflict, which is a mixture of a s. 5(a) and a s. 2(f) determination. It is clear in the present case that the exclusion of liquor store managers from the certification Order falls within the first category. Liquor store managers were excluded in 1984 on the ground that they were not "employees" within the meaning of the *Act* and were not entitled to bargain collectively. The rulings with respect to their exclusion were based on the definition of "employee" in the *Act*, not on a determination of the appropriateness of the bargaining unit under s. 5(a).

[30] In this application, the Board must decide if liquor store managers I, II and III may be added to SGEU's bargaining unit without evidence that a majority of the liquor store managers choose SGEU as their bargaining agent. This question invites a review of past Board and court decisions.

[31] In *University of Saskatchewan, supra,* the Supreme Court of Canada, established a test for determining when membership support is required on an application to amend a certification order. In that case, the Canadian Union of Public Employees ("CUPE") held seven different certification orders described in occupational or departmental terms for employees at the University of Saskatchewan in which bargaining units were described as follows:

> (a) LRB File No. 016-45 – "the employees of the Power House of the University of Saskatchewan except the foreman";
>
> (b) LRB File No. 027-45 – "the employees of the University of Saskatchewan employed in the field husbandry and poultry departments and on the University Farm, excluding the superintendent";
>
> (c) LRB File No. 278-78 – "the employees employed by the University of Saskatchewan in the maintenance and servicing of the residents located in buildings formerly occupied by No. 4 S.F.T.S. of the R.C.A.F., excluding the superintendent, chief engineer and head cook";
>
> (d) LRB File No. 110-45 – "the employees employed by the University of Saskatchewan in the maintenance and servicing of the University residences, namely Qu'appelle Hall and Saskatchewan Hall";

(e) LRB File No. 121-45 – "the employees in the following classifications employed by the University of Saskatchewan . . .: all painters, blacksmiths, electricians, carpenters, machinists, instrument makers, mechanics, plumbers and other similar tradesmen, all truck drivers, janitors, cleaning women, night watchmen and employees looking after or assisting in looking after gardens, grounds or rinks and all stores clerks or other employees looking after or assisting in looking after stores other than the book-store, except employees in the said classifications who are employed in the Power House, on the University Farm or in the University Residences";

(f) LRB File No. 092-46 – "the technicians employed by the University of Saskatchewan, excluding academic staff and excluding also the employees in the foregoing classifications who are included in the units of employees heretobefore determined to be appropriate";

(g) LRB File No. 092-46 – "all clerical, secretarial and stenographic employees employed by the University of Saskatchewan excluding officers of the University, the private secretary to the President, the academic staff and all professional librarians, and excluding also such employees in the foregoing classifications who are included in the units of employees heretobefore determined to be appropriate" (as amended by LRB File No. 031-61).

[32] When CUPE's orders were amalgamated into an "all employee" order by the Board in LRB File No. 132-74, the amalgamating order had the effect of adding 169 employees, who previously had not been represented by CUPE, to its bargaining unit. Mr. Justice Bayda (as he then was), whose dissenting judgment in the Court of Appeal was adopted by the Supreme Court of Canada, held that the Board had acted improperly in issuing the amalgamation order without first determining employee support for the expanded bargaining unit. At 325, Bayda, J.A. stated:

If the scope of the new certification order containing the amendment is only to consolidate into one bargaining unit the previously established 7 bargaining units then the order is clearly within the jurisdiction of the Board. The validity of the

> *order in that case would not be affected by the procedure here adopted by the Board (rescission of the 7 previous orders and the making of a new certification order) to effect the amendment, (see Armadale Publishers Limited v. Roy Smith et ux – unreported decision of this Court, March 22, 1977). Nor would the validity be affected by an error on the part of the Board, either of law or fact, for, once jurisdiction is established (and maintained) error of law or fact cannot form the basis of an order of this Court quashing the Board's order, (Farrell et al v. Workmens' Compensation Board, [1962] S.C.R. 48).*
>
> *If, however, the scope of the order containing the amendment extends beyond a consolidation of bargaining units (or some like simple amendment) and embraces matters which properly fall under Section 5(a), (b) and (c) of the Act, then the Board has no jurisdiction to make that order on an application under Section 5(i) or 5(k) of the Act, unless the Board deals with the application as if it were one under Section 5(a), (b) and (c) and considers those matters which are relative to applications under s. 5(a), (b) and (c) of the Act.*

[33] The test to be applied to determine when an amendment attracted the requirement of support in the group of employees to be added to the bargaining unit was set out by Bayda, J.A. at 326:

> *The import of the provisions in sections 3 and 5 (b) of the Act, is such that where a new bargaining unit is established the employees in that unit have the right to choose the union they wish to represent them and the wishes of the majority of the employees in that unit shall prevail. These provisions impose a concomitant obligation upon the Board to ascertain those wishes before it can exercise its rights to determine what union, if any, represents the majority in that unit. The Board may use whatever evidence of those wishes it deems appropriate but evidence it must have.*

[34] Applying the test set out in *University of Saskatchewan, supra,* in order to decide if SGEU can amend its Order by removing the exclusion of liquor store managers without proof of support from the

group to be added to the bargaining unit, we must first determine if the bargaining unit applied for by SGEU is a "new" bargaining unit.

[35] One factor relied on by Bayda, J.A. in reaching his conclusion that CUPE's application resulted in the creation of a "new" bargaining unit was the size of the group to be added to the bargaining unit. In our view, the size of the group to be added to the bargaining unit cannot be a determining factor. Bargaining units may be increased through many different mechanisms, not all of which attract an evaluation of employee support. For instance, many new employees are added to existing bargaining units through the creation of new classifications. In "all employee" bargaining units, unions are not required to obtain majority support from employees in new classifications before they are entitled (and, we may add, required) to bargain on their behalf. Such additions to a bargaining unit can be significant. Nevertheless, the Board has directed that such positions be placed in the bargaining unit: see *Service Employees' International Union, Local 333 v. St. Paul's Hospital (Grey Nuns) Saskatoon and Health Sciences Association of Saskatchewan,* [1991] 2nd Quarter Sask. Labour Rep. 78, LRB File Nos. 130-90, 205-90, 003-91 & 004-91; *Saskatchewan Government Employees' Union v. Wascana Rehabilitation Centre,* [1991] 3rd Quarter Sask. Labour Rep. 56, LRB File Nos. 190-90 & 234-90; *Canadian Union of Public Employees, Local 21 v. City of Regina et al.,* [1998] Sask. L.R.B.R. 464, LRB File Nos. 023-95 & 037-96; *Canadian Union of Public Employees, Local 1975 v. University of Saskatchewan,* [2000] Sask. L.R.B.R. 83, LRB File No. 218-98.

[36] Bayda, J.A. also relied on the fact that part of the group of employees in question were represented in bargaining by an association and had engaged in voluntary collective bargaining with the university. This factor may or may not be relevant to the question. The employer, for instance, may have improperly excluded the group from the bargaining unit: see *Canadian Union of Public Employees, Local 1975 v. University of Saskatchewan et al.*, [2000] Sask. L.R.B.R. 207, LRB File No. 297-99. The Board would need to assess the significance of this factor in light of the history of the bargaining unit.

[37] In our view, in order to find that a "new" bargaining unit is created by an amendment to a certification order, the Board must examine the type of bargaining unit that was established by the original order and determine its intended scope. The scope of the original order sets out the boundaries

that the Board determined were appropriate for collective bargaining under s. 5(a) of the *Act*. The Board conducted such an analysis in *Sherwood Co-operative Association Limited, supra* and concluded that if the changes requested by the union did not alter the general scope and nature of the original certification order, then support was not required in the add-on group. The Board explained its reasons for not applying the test set out in the *University of Saskatchewan* case as follows:

> *In the opinion of the Board neither [University of Saskatchewan or Prince Albert Co-operative Association Limited] of the cases apply. In each of them the effect of the amendment would have been to include employees who did not fall into the ambit of the certification order. That is not the case here. In this case, in the thirty-five years that have passed since the issue of the certification order, the bargaining unit has expanded substantially and the employees who would be added by the amendment are employees who would have fallen within the scope of the original certification order if they had not been excluded by collective bargaining between the parties or by oversight.*
>
> *In the view of the Board, both the original order issued on December 10, 1947, and the Order requested by the amendment are orders of the same general scope and nature: an all employee unit. The application for amendment simply amounts to a request to review and to update the original order which is now thirty-five years old. Accordingly, the Board determines that it need not treat this application as an application for certification under Sections 5(a), (b) and (c) of The Trade Union Act, and that the union need not file proof of support of those employees who would be added to the unit if the amendment were granted.*

[38] Other Boards have adopted similar tests that focus on the original intended scope of the bargaining unit. The test originated in Quebec and was adopted by the Canada Labour Relations Board in *Telecommunications Union and Teleglobe Canada*, [1979] 3 Can LRBR 86 at 126:

> *In Quebec, the Labour Relations Board and its successor, the Tribunal du Travail, have developed a criterion for interpretation which is interesting in that it explores the concept of the "intended scope" of the original certification order. It is a concept which is unfortunately unknown outside that province.*

> *Faced with an application seeking to determine whether an employee or a group of them, or a classification, or a new location, belong or not, to the certified bargaining unit, the Tribunal du Travail identified first whether this application is truly a revision application or an application for an interpretation or whether it is a "disguised" application for certification. In order to reach a conclusion, it goes back to the origination of that certification and analyses in its archives what was the scope which both that union and the Tribunal intended to give to that initial certification. Since in Quebec an application for certification must statutorily be supported by the resolution adopted by the general meeting of the applicant union asking for such certification, the Tribunal studies the contents of that resolution. Further, it scrutinizes the list of employees submitted by the employer with the corresponding classification and the reactions of the union thereto. Finally, it verifies geographical factors, if there were any. With this data in hand, it compares them with the facts alleged in the review application and determines the inclusion or exclusion, without a representation vote, even if this determination means the addition of a number of employees to an existing bargaining unit.*

[39] This approach to additions that do not alter the intended scope of an order was recently confirmed in *BCT Telus,* [2000] C.I.R.B.D. No. 27, at para. 44 where the Canada Board concluded:

> *Furthermore, the Board does not see the inclusion of the telemarketing and the field sales positions in a bargaining unit, which encompasses all other positions of the two former companies, as radically and substantially changing the essential nature of the existing bargaining unit. The undisputed fact is that telemarketing and field sales positions were contained in two of the previous bargaining units being reviewed and consolidated. We do not see their functions as being so radically different from all others now so as to change the essential nature of the new bargaining unit. Consequently, the double majority rule does not come into play so as to require a demonstration of majority support of the incumbents in those positions. The Board is therefore of the view that the "double majority" rule in Teleglobe Canada, supra, does not apply in the circumstances.*

[40] The "double majority" rule refers to the manner of calculating support for an amendment that alters the intended scope of the original order. In such event, the Canada Industrial Relations Board requires proof of majority support both among the group to be added and among the existing bargaining unit. If the intended scope of the original order is unchanged, the Canada Industrial Relations Board simply requires proof that the addition of the new employees does not affect the Union's majority position in the overall unit without determining the support in the add-on group. In calculating the Union's support, the Board looks to the following factors:

> *The applicant would only have to show the Board, by way of exhibiting valid membership cards or by a Board ordered vote under Section 127(1) or by way of a union membership clause in a collective agreement, that it has overall majority support in the groups to be joined since, in reality, it is one homogeneous group. The Board, except in exceptional cases, will not take into account the wishes of the employees in the group to be added. [para. 141]*

[41] In *Sherwood Co-operative Association Limited*, this Board found that no check of union support was required if the orders requested are "orders of the same general scope and nature". In our view, this position is consistent with the normal operation of an "all employee" bargaining unit which can include new groups of employees without testing employee support either in the group to be added or overall in the bargaining unit. It would seem to us that to rule otherwise would be to treat the certification order as frozen in time, a view that has been rejected by courts and labour relations boards: see *Terra Nova Motor Inn Ltd. v. Beverage Dispensers & Culinary Workers Union, Local 835,* [1975] 2 S.C.R. 749 (S.C.C.) per Laskin C.J. in dissent.

[42] As we have pointed out above, some bargaining unit descriptions clearly contemplate the inclusion of new groups of employees. For instance, in the construction industry, the Board issues craft certifications on a province-wide basis. Future work at locations different than the location of work at the time of the certification order is thereby captured under the certification order.

[43] Similarly, bargaining rights can be secured in the industrial setting for a geographic area that will capture new plants or stores, and employees hired at the new location within the bargaining unit will automatically be included in the union's certification. In *Retail, Wholesale and Department Store Union, Local 454 v. Westfair Foods Ltd. and United Food and Commercial Workers, Local 1400,*

[1993] 1st Quarter Sask. Labour Rep. 102, LRB File Nos. 232-92, 233-92 & 096-92, the Board acknowledged that the choice of a broad geographic bargaining unit required the Board to balance the competing values of bargaining strength versus democratic choice in the selection of bargaining agents. At 109, the Board commented:

> *In a number of cases, this Board has accepted applications for consolidated bargaining units defined on a geographic basis. The rationale for this is that the collective bargaining relationship is strengthened if the union can rely on its ability to represent workers at new locations established by the Employer, and that the Employer will be less able to evade bargaining responsibilities if the consolidated bargaining unit is foreshadowed.*
>
> *There is no question that this does have the effect of presenting employees who come into the bargaining unit by this means with a fait accompli in terms of choice of bargaining representative, and may compromise the freedom they would enjoy if they had a totally blank slate to begin from. The trade-off of bargaining strength against categorical democratic choice must be considered by this Board in a variety of contexts under The Trade Union Act.*

[44] As discussed above, "all employee" orders also capture new positions and new employees and are not restricted to those positions which existed at the time the order was issued, nor to those employees who were then employed: see *Terra Nova Motor Inn Ltd., supra.* In most bargaining units, employees change frequently. New employees are hired, new classifications are added by the employer, new managerial classifications are created, and the like. However, these changes do not result in the creation of a "new" bargaining unit. It remains in the same form that was described in the original order, that is, as an "all employee" unit.

[45] Following the approach set out in *University of Saskatchewan, Sherwood Co-operative Association Limited* and *Teleglobe*, we would first ask if the group of employees to be added to the existing bargaining unit are covered by the intended scope of the certification Order. If the answer is yes, then they may be added without canvassing SGEU's support in the group of employees who will be included in the bargaining unit. If the group of employees to be added to the existing bargaining

unit are not covered by the intended scope of the certification Order, then SGEU is required to establish a double majority – that is, it must establish its support among the employees to be added to the bargaining unit, as well as in the existing bargaining unit. Employees who were excluded from the original bargaining unit on the appropriateness standard fall within the "double majority" rule.

[46] In the present case, it is clear that liquor store managers were included within the intended scope of the original "all employee" Order. They were covered by the certification Order and the collective agreements negotiated in relation to that Order until the Board ordered the exclusion of their positions from the bargaining unit as a result of a change in the statutory definition of "employee" under the *Act*. There was no determination made by the Board that it was inappropriate to exclude liquor store managers I, II and III's from the bargaining unit as a group of "employees."

[47] In *Professional Association of Compensation Employees v. Ontario (Workers Compensation Board)*, [1997] O.J. No. 4115, the Ontario Court of Justice came to a similar conclusion in relation to effect of an amendment of the definition of "employee" under relevant Ontario legislation on a bargaining unit. At para. 51, the Court concluded:

> *In my respectful view, the Board was correct in its decision concerning the application of s. 54 of the Act. It is Article 1.01 of the collective agreement that describes the bargaining unit. That description was not altered, under the Labour Relations Act or otherwise. It remained as it had been since the collective agreement of 1984-8, after the general statutory revision. The only change was in the composition of the constituency. There were more inclusions because there were fewer exclusions. The alteration was due to the removal of exclusions by C.E.C.B.A., 1993, hence the expansion of membership in the unit. The description of the unit remained the same. It was the legislative amendment which caused expansion of the number of persons in the unit, not any alteration of the description of the unit.*

[48] The situation in the present case is different from the situation considered in *University of Saskatchewan, supra.* In that case, the Board's order consolidated a number of occupational and department bargaining units into an "all employee" unit and, by doing so, added classifications that

had not been within the intended scope of any of the previous bargaining units. The employees who were included in the consolidating order had previously been excluded on the grounds of appropriateness, not managerial or confidential characteristics.

[49] *Wascana Rehabilitation Centre, supra,* is also an example of the original exclusion of a group of employees on grounds of appropriateness. Professional employees were permitted under the 1965 amendments to the *Act* to seek exclusion from a general bargaining unit and to establish separate bargaining units. The Board required SGEU to establish its support in the physical therapist group before it would amend the certification order to include the excluded group. In our view, this case is consistent with the principles established in *University of Saskatchewan* and *Sherwood Co-operative Association Limited.*

[50] In *Canadian Association of Fire Bomber Pilots et al. v. Government of Saskatchewan and Saskatchewan Government Employees' Union, supra*, fire bomber pilots were voluntarily excluded from the bargaining unit by the parties on appropriateness grounds, ie. as outside contractors. The *Fire Bomber Pilots* case is similar to *Automatic Electric (Canada) Ltd. v. Federation of Telephone Workers of B.C.*, [1976] 2 Can. L.R.B.R. 97 where the British Columbia Board held that a broad certification order, the scope of which had been altered through collective bargaining, could not be relied on by the trade union to add a group of employees who had voluntarily been excluded from collective bargaining by agreement between the union and the employer. The British Columbia Board treated the group of employees who were voluntarily excluded from collective agreements by both parties as though they were excluded by the original certification order on the grounds of appropriateness. As such, the double majority rule was applied by the British Columbia Board.

[51] The *Fire Bombers Pilots* case is somewhat at odds with the Board's decision in *Sherwood Co-operative Association Limited, supra,* where the Board held that positions that "had been excluded by collective bargaining between the parties or by oversight" could be returned to the bargaining unit without altering the scope of the original order or attracting the double majority rule set out in *University of Saskatchewan.* We do not find it necessary in these Reasons to determine the appropriate approach to voluntarily excluded positions as the issue does not arise in this case. It is sufficient to note that there was no conduct on the part of SGEU that led to the removal of the liquor store managers from collective bargaining and no abandonment of the positions by SGEU. Liquor store managers were not

excluded as an employee group based on any appropriateness argument; rather, their exclusion came about as a result of the Board finding that they were no longer "employees" within the meaning of the *Act.* SGEU acted in a timely fashion to seek their return to the bargaining unit and there is no suggestion in the evidence that SGEU voluntarily relinquished its collective bargaining rights in relation to this group of employees.

[52] In *Service Employees' Union, Local 336 v. Shaunavon Union Hospital Board, supra*, three groups of employees were excluded in the original order – x-ray technicians and x-ray and laboratory students. The Board held that the double majority rule applied to an application for their inclusion. Again, the exclusion was obviously made on the basis of appropriateness and was within the intent of the scope of the original order.

[53] *Sunnyland Poultry Products Ltd., supra,* raised issues similar to the *University of Saskatchewan* decision, *supra,* and the *Fire Bomber Pilots* case, *supra,* in that the union in that instance sought to expand its bargaining unit by including office employees who were covered by the scope of the original certification order, but who had been excluded through collective bargaining, and other groups of employees who were outside the geographic scope of the original certification order. The Board held that the double majority rule applied and the Union was required to demonstrate that it had the requisite support both in the groups to be added to the bargaining unit and the existing bargaining units. It was not sufficient for the union to demonstrate that it had support of a majority in the new bargaining unit. In our view, this case is consistent with *Sherwood Co-operative Association Limited.* The employees to be added to the bargaining unit (or, at least some of them) fell outside of the intended scope of the certification order. The remaining group fell outside the intended scope of the collective agreement and this group may be subject to some debate over whether they can be drawn back into a bargaining unit without support, as we noted above in our discussion of the *Fire Bombers Pilots* case.

[54] To summarize, it is our view that the intended scope of the original certification Order in this instance included liquor store managers. This is evident from the fact that such employees were included in the scope of the bargaining unit from 1945 to 1983. Liquor store managers were excluded from the bargaining unit based on the Board's assessment of their status as "employees" under the former s. 2(f). When the *Act* was amended to return to its pre-1983 definition, SGEU

applied in a timely fashion to return liquor store managers to the bargaining unit. Although we do not believe it is necessary to determine SGEU's support in the bargaining unit, as it remains an "all employee" unit, if we were required to determine SGEU's support under s. 5(b), we would do so on the basis set out in *Teleglobe*, *supra*, that is, by calculating SGEU's overall membership in the unit. In this case, SGEU has approximately 700 members in the bargaining unit. The additional 60 liquor store managers who are added to the bargaining unit will not upset SGEU's majority position.

[55] For these reasons, we will amend SGEU's Order to include liquor store managers I, II and III.

[56] We direct SGEU and SGLA to provide the Board with a draft order setting out their agreement on all other exclusions.

HAROLD REDDEKOPP, Applicant v. UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400 and NEWSWEST CORP. (SASKATOON DIVISION), Respondents

LRB File No. 278-00; March 14, 2001
Vice-Chairperson, James Seibel; Members: Ron Asher and Gerry Caudle

For the Applicant: Harold Reddekopp
For the Union: Drew Plaxton

Decertification – Interference – Board closely examines evidence due to certain anomalies and inconsistencies – Board also reviews evidence of basis, motivation and reasons behind rescission application - Board declines to exercise discretion to dismiss application on basis of employer influence pursuant to s. 9 of *The Trade Union Act* – Board orders vote.

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

REASONS FOR DECISION

Background

[1] **James Seibel, Vice-Chairperson:** United Food and Commercial Workers, Local 1400 (the "Union"), is certified as the bargaining agent for a unit of employees of NewsWest Corp. (Saskatoon Division) (the "Employer") by an Order of the Board dated July 20, 1998 (LRB File Nos. 339-97 & 352-97.) The Applicant, Harold Reddekopp, filed the present application for rescission of the certification Order, pursuant to s. 5(k)(i) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") on November 6, 2000. The Union opposed the application and argued that it ought to be dismissed, alleging that it had been made in whole or in part on the advice of, or as a result of, the influence of, or interference or intimidation by, the Employer or Employer's agent within the meaning of s. 9 of the *Act*.

[2] The predecessor employer, Mid Western News Agency Ltd., was originally certified by the Retail Clerks International Association on March 23, 1973 (LRB File No. 289-72); bargaining rights were later assigned to the Union in 1986 (LRB File No. 119-86.)

[3] The collective agreement, which was effective January 1, 1998, expired on December 31, 2000. The present application was filed within the open period specified by s. 5(k)(i) of the *Act*. The Union

agrees that the statement of employment filed by the Employer is accurate. Mr. Reddekopp filed evidence of support for the application from a majority of employees listed on the statement of employment.

[4] The application was heard at Saskatoon on February 15, 2001.

Evidence

[5] The Applicant, Harold Reddekopp, has been employed by the Employer, or its predecessor, for about 15 years. He is presently employed in the warehouse in Saskatoon. The Employer has other operations in at least Regina, Winnipeg and Calgary.

[6] Mr. Reddekopp testified that he is not satisfied with the representation the employees are receiving from the Union and that he would feel more comfortable negotiating the terms and conditions of his employment on his own behalf. Mr. Reddekopp detailed the reasons for his position. He alleged that during the negotiations for revision of the collective agreement the local Union representative and the negotiating committee had failed to keep the employees informed of the status of the negotiations and had neglected to advise the employees, or may even have misled them, as to the response by the Employer to the Union's last offer at the time. He said that, although the Union representative had advised a fellow employee that no response had yet been received from the Employer, when the response eventually came into their hands, it was apparent that certain items had been deleted from the copy divulged by the negotiating committee and that the Union representative had received it two or three days before his denial that any response had been received from the Employer.

[7] Mr. Reddekopp testified that his loss of confidence in the ability of the Union to adequately represent his interests and those of the other employees had been festering for some time. When the present Employer took over from the predecessor in 1996 or 1997 there had been a downsizing of the workforce. In the summer of 2000, the Employer initiated another considerable downsizing of its Saskatoon operation, in conjunction with a move of premises, from approximately 30 employees down to about ten employees. Although he was not affected, it was Mr. Reddekopp's perception that the Union was unfairly favouring senior employees in its negotiations with the Employer regarding the downsizing, and did not exert enough effort on behalf of less senior employees. He added that the employees had not received a wage increase for about six years although they had obtained modest (in

his opinion) signing bonuses with the last two contracts. He expressed the opinion that he thought he could achieve better results on his own.

[8] Mr. Plaxton intensively cross-examined Mr. Reddekopp in an effort to demonstrate that the Employer was somehow involved in his making the application for rescission. Mr. Reddekopp was adamant that he had never discussed anything to do with the Union or decertification with anyone in management. He said he consulted a lawyer by telephone at random from the Saskatoon telephone directory, but never met with him; he said the lawyer advised him to contact the Board Registrar to obtain the necessary forms and information as to the procedure to make the application. He said he prepared the application on his own. He admitted that he had prepared the blank support cards for his application on the warehouse computer at work after hours, but said that his supervisor, Steve Jacobs, who is resident at the Employer's Regina location, only visited Saskatoon periodically, and was not aware of these activities. He said he garnered all the employee support for the application, and, although he admitted some signatures were obtained during work hours coffee breaks, he denied that anyone in management was aware of this activity.

[9] Mr. Reddekopp knew that the bargaining unit at the Employer's Regina operation had been decertified in 1998, and he knew the individual who had filed that application, James Kothlow, the Employer's district sales manager, who also attended at the Saskatoon location periodically, but denied that he had ever discussed the matter of rescission with him.

[10] Mr. Kothlow was present at the hearing of this application. He was called to testify by Mr. Plaxton. Mr. Kothlow said that he had a few days off and decided to attend the hearing on his own. He denied that he was encouraged to do so by Mr. Jacobs, and said that, in fact, Mr. Jacobs would probably take a dim view of his attendance as he had been told not to get involved. He confirmed that he had neither assisted Mr. Reddekopp with the application nor discussed it with him.

Statutory Provisions

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.*
>
> ...

> *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.*

Argument

[11] Mr. Reddekopp argued that he was not motivated or assisted in any way by anyone in the management of the Employer to make the application for rescission. He reiterated his testimony as to his reasons for making the application and his belief that he could better represent his own employment interests than could the Union based on past experience as he perceived and interpreted it.

[12] Mr. Plaxton, on behalf of the Union, argued that the application ought to be dismissed on the basis of s. 9 of the *Act*. He said that Mr. Reddekopp's explanations as to the reasons and process of making the application were simply not plausible and should lead to the drawing of an adverse inference as to the involvement of the Employer in the making of the application. In support of this argument counsel cited the decision of the Board in *Poberznek v. International Union of Bricklayers and Allied Craftsmen, Local No. 3 and United Masonry Construction Ltd.*, [1984] Oct. Sask. Labour Rep. 35, LRB File No. 245-84.

[13] Mr. Plaxton pointed out that it is unusual for the employees in a workplace with a mature bargaining relationship of over 25 years to decertify the bargaining unit. In the absence of some culminating incident to explain this action the only rational explanation, he said, was that the Employer was somehow involved. He asserted as well that Mr. Reddekopp's evidence that it was wholly

coincidental that the lawyer he consulted at random is a prominent management labour lawyer is not to be believed, and that when this is coupled with the small workplace it is inconceivable that management was not aware of the intention of Mr. Reddekopp to make this application. Counsel argued that the presence of Mr. Kothlow at the hearing suggested that something was not right; the situation as a whole, he said, did not pass the "smell test." He further suggested that the fact that there had been a pay raise granted to the employees at the Regina operation since the decertification of that bargaining unit constituted a form of influence by the Employer.

Analysis and Decision

[14] It is a fact of labour relations life that instances of interference or influence by an employer or its agent in matters relating to applications for rescission of a certification order are not uncommon and are rarely overt. The case reports are rife with examples of the techniques that have been utilized by unscrupulous employers to initiate or lend support to a decision and action that is for the employees alone to make and undertake; some of these read like cloak and dagger scenarios, while others are much more subtle or psychological.

[15] There are certain anomalies and inconsistencies present in the instant case that have caused us to closely examine the evidence adduced. It certainly is not surprising, for example, that the Union finds it difficult to believe that Mr. Reddekopp happened to consult a well known management labour lawyer entirely by accident. And counsel is quite right when he points out that applications to rescind the certification order for a mature bargaining unit are relatively rare.

[16] However, on the whole of the evidence we find that there is little that would lead us to draw an adverse inference such as to cause us to exercise our discretion to dismiss the application on the basis that the application was made, in whole or in part, as a result of management influence pursuant to s. 9 of the *Act*. Mr. Reddekopp struck us as forthright and honest. While his choice of legal counsel may not have been wholly coincidental, it may simply be that he had heard the lawyer's name at some now indistinct and unremembered time in the distant past; and we believe Mr. Reddekopp that the lawyer provided him no assistance and simply directed him to the Board Registrar to obtain the requisite forms and summary of Board procedure.

[17] While an application for rescission in relation to a unit such as this is rare, we cannot say that Mr. Reddekopp's conviction as to the basis and motivation for his decision to make the application is not plausible. He was obviously sincere in his description of his reasons for the application. Whether his perception of the effectiveness of the Union is accurate, or the conclusion that he drew from the events he witnessed that the Union was not keeping the members fairly informed was the same conclusion shared by the Union's officials or counsel, is not the issue; it is our opinion that there is no evidence that his perceptions or conclusions were the result of influence by the Employer.

[18] As Mr. Reddekopp has filed evidence of majority support for his application, we direct that a vote be conducted among the members of the bargaining unit in the usual manner.

AMALGAMATED TRANSIT UNION, LOCAL 615, Applicant v. SASKATCHEWAN ABILITIES COUNCIL, TRANSPORTATION DIVISION, WAYNE BUS LTD. and BASE COMMUNICATIONS LTD. o/a TEL-J COMMUNICATIONS, Respondents

LRB File No. 057-99; March 15, 2001
Vice-Chairperson, James Seibel; Members: Gloria Cymbalisty and Leo Lancaster

For the Applicant:	Gary Bainbridge
For Wayne Bus Ltd.:	Kevin Wilson
For Tel-J Communications:	Frank Quennell
For Sask. Abilities Council:	N/A

Successorship – Transfer of business – Section 37 of *The Trade Union Act* – After former contractor decided not to seek renewal of contract, city entered into new contract for provision of special needs transportation service – There was no disposition of business or part of business from former contractor to new contractors – Board dismisses application.

The Trade Union Act, s. 37.

REASONS FOR DECISION

Background

[1] James Seibel, Vice-Chairperson: By an Order of the Board dated December 27, 1989, Amalgamated Transit Union, Local 615 ("the Union") was designated as the certified bargaining agent for all employees of Saskatchewan Abilities Council, Transportation Division ("SAC"). The Union filed an application, pursuant to s. 37 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") alleging that each of Wayne Bus Ltd. ("Wayne Bus") and Base Communications Ltd., operating as Tel-J Communications Answering and Dispatch Service ("Tel-J"), are successors to SAC and are bound by the certification Order and the collective bargaining agreement between the Union and SAC. The Union also alleges that Wayne Bus and Tel-J have refused to bargain collectively and have committed unfair labour practices in violation of s. 11(1)(c) of the *Act*.

[2] Beginning in the 1950's, SAC (or its predecessor, The Saskatchewan Council for Crippled Children and Adults) operated a special needs transportation service in Saskatoon. The service was funded privately until 1975, when certain urban municipalities, including the City of Saskatoon (the "City") and the Province entered into an agreement to cost-share the public funding of such services, including the acquisition of capital equipment and underwriting operating deficits. Effective December

31, 1998 SAC provided notice to the City that it would no longer provide the service. The Union alleges that, effective January 1, 1999, SAC or the City disposed of this business in two parts to Wayne Bus and Tel-J. Since that date, it is alleged, Wayne Bus has operated the equipment for the transportation of service users, while Tel-J has provided the booking and scheduling of trips and the dispatching of drivers, each using its own employees. According to the application, at the time of the alleged disposition, SAC had approximately 36 employees, none of whom were hired by Wayne Bus or Tel-J.

[3] The reply filed on behalf of Wayne Bus constitutes a simple denial of the allegations. In the reply filed on behalf of Tel-J, it is stated that Tel-J is a partnership of Base Communications Ltd. and APS Telecom Limited. It is admitted on behalf of Tel-J that none of its employees were formerly employed by SAC. It is further admitted on behalf of Tel-J that it provides certain dispatch communications for special needs transportation services under a contract with the City for an annual fee. However, it asserts that it dispatches only for non-contract and non-charter trips, which it says is approximately half the annual number of trips for which SAC had been providing its dispatch services to the City. The contract and charter portion of special needs transportation formerly provided by SAC is now provided by a welter of organizations such as service clubs, the school boards and the district health board. Tel-J further asserts that it acquired no hardware or software from SAC and uses its own equipment and dispatch system. Tel-J says that it is simply a new contractor to the City and it acquired no part of the business operated by SAC.

Evidence

[4] Dan Bichel, president of the Union since 1988, testified that the SAC bargaining unit comprises all full-time and part-time special needs transportation bus drivers ("operators") and dispatchers. The service operated both a public door-to-door service and a charter or subscription service. In the case of the former, individual users booked the service in advance for specific times; the latter case consisted of regularly contracted trips (e.g., from a care home to an activity centre) or a charter booking for a special event. The door-to-door service was provided under a contract with, and subsidized by, the City. The contract and charter services were provided under separate contracts with each client organization on a fee-for-service basis and were, therefore, open to competition by other transportation service providers.

[5] The 22-vehicle fleet used by SAC was owned by the City and the Province but, according to Mr. Bichel, the City was not involved in the day-to-day management of the service, which was performed by SAC managers. SAC leased vehicle storage and repair facilities from the City. Mr. Bichel said that the City public transportation budget has a separate item for special needs transportation, but its involvement in the management of the service was restricted to balancing the budget with the hours of service that could be provided and establishing the criteria for user eligibility; the actual booking of trips, dispatch of operators and operation of the buses was managed and provided by SAC employees.

[6] Mr. Bichel testified that in June, 1998 the Union learned that SAC had given notice to the City that it would cease to provide the service as of December 31, 1998. On November 3, 1998, the City issued a request for proposals to provide special needs transportation scheduling and dispatch and/or operations service. Later in the month the Union learned it would be provided by Tel-J and Wayne Bus. The most recent collective agreement between SAC and the Union was to expire December 31, 1998. In early December, citing s. 37 of the *Act*, the Union provided notices to negotiate revisions to the agreement to each of SAC, the City, Wayne Bus and Tel-J. Each of Wayne Bus and Tel-J refused to negotiate taking the position that there had been no successorship.

[7] In 1997, SAC provided 114,000 trips, 47% of which (approximately 54,000) were door-to-door trips and 53% of which were charter or contract trips. Following SAC's notice to the City, its charter work was slowly taken over by various other transportation service providers. According to Mr. Bichel, the bulk of the vehicles in the City-owned fleet were ageing and past their life expectancy. Under the request for proposals, bidders for the operations portion of the service were advised that they were to provide their own vehicle fleet, either by direct ownership or by lease from the City. All the vehicles in the SAC fleet were sold at auction; Wayne Bus did not acquire any vehicles formerly operated by SAC. When it was awarded the operations contract, Wayne Bus acquired a fleet of new vehicles; it maintains its own repair and storage facility.

[8] According to Mr. Bichel, the booking and dispatch service was provided by SAC from its premises on Kilborn Avenue using its own hardware and a software system provided by the City. Tel-J provides similar services from its own premises using its own equipment and systems. Mr. Bichel was not aware of whether any of SAC's hardware was acquired, or in use, by Tel-J.

[9] Tony Kocay, formerly employed by SAC as a vehicle operator from 1984 until December, 1999 testified on behalf of the Union. He outlined the history of the provision of special needs transportation by SAC. He said that most recently SAC had approximately 35 full and part-time employees: 6 dispatchers, 28 vehicle operators and one mechanic. He opined that the service provided by Tel-J and Wayne Bus is essentially the same as that provided by SAC, with the exception that vehicles are no longer assigned to a particular zone. While the SAC vehicles were painted in various colour schemes, the Wayne Bus vehicles bear uniform colours and signage. While the criteria for user eligibility was formerly applied and assessed by SAC, Mr. Kocay believed that it was now done by the health district.

[10] Mr. Kocay testified that Tel-J actually began to get involved in scheduling and dispatch sometime in December, 1998, when to smooth the transition, after a particular date, trip cancellations were directed to Tel-J.

[11] Georgina Davis was called to testify by the Union. She has been a user of the special needs transportation service for many years and is a member of the advocacy group, "The Voice of People with Disabilities." Ms. Davis described the similarities and differences in the service provided by Wayne Bus and Tel J as compared to that formerly provided by SAC from the perspective of a system user. With respect to the booking and dispatch procedure, she said that the only differences she has perceived are that the dispatch office is open for public calls somewhat longer hours and the dispatcher now asks the user for a callback telephone number. With respect to the transport service, the vehicles, operators and uniforms are different but the trip procedure and service procedures are the same.

[12] Carol Scott was formerly employed by SAC as a full-time dispatcher until December, 1998. She has also been a frequent user of the special needs transportation service since 1953. She testified on behalf of the Union, describing her duties as a dispatcher. Ms. Scott said that SAC used a manual booking, scheduling and dispatch system until 1995 when the conversion was made to a computerized system; however, even after the conversion, if an additional bus was required on short notice, the trip sheet was prepared manually. Charter trips and door-to-door bookings were entered into the system and trip sheets were generated for each operator. The dispatchers advised the operators of additional trips or cancellations by two-way radio. She confirmed that the City was not involved in the management or operation of the scheduling and dispatch functions.

[13] Ms. Scott said that Tel-J became involved in the dispatch function sometime in December, 1998 a short time prior to SAC ceasing its operation for the purposes of booking cancellations, which it would then forward to SAC by fax.

[14] It was Ms. Scott's opinion, from the perspective of a system user, that the transport portion of the system is exactly the same under Wayne Bus as it had been under SAC. The operators perform the same functions in the same manner; the fare is the same.

[15] Rollie Kuntz has been the general manager of Wayne Bus since 1995. He testified that the company has been in the bus transportation business since the 1960's, and in special needs transportation since 1995 in Regina. The buses for the Saskatoon service were acquired by Wayne Bus from a manufacturer in Quebec. According to Mr. Kuntz, Wayne Bus did not acquire any vehicles, equipment, materials or systems from SAC or the City, either directly or indirectly; neither did it acquire any training, orientation, assistance or advice from SAC. Mr. Kuntz said that Wayne Bus did not communicate with, or receive any information from, SAC before submitting its proposal to the City. It is remunerated by the City on an hourly rate per vehicle basis.

[16] Wayne Bus has 21 employees (including 13 full-time employees) dedicated to providing service under the contract with the City. All Wayne Bus operators wear a distinctive uniform bearing the company's trade dress and logo. Wayne Bus is responsible for the hiring, training, discipline and termination of its employees, and for all costs of fuel, repairs, maintenance, insurance and licensing of its vehicle fleet. It brings in a mechanic from its Regina operation as and when required; minor repairs are performed by its local manager. Wayne Bus leases storage premises for its fleet from a third party other than the City. Wayne Bus was required to provide a performance bond to the City.

[17] According to Mr. Kuntz, the City sets the fares, sells advance tickets, establishes the hours of operation, and determines the criteria for user eligibility. Tel-J takes the bookings and schedules the routes, which are sent to Wayne Bus by fax at the end of each day for the day following. Mr. Kuntz confirmed that to his knowledge Wayne Bus and Tel-J are not related in any way.

[18] Prior to the award of the contract by the City, Wayne Bus had no business operation or employees in Saskatoon. It used the services of an independent consulting firm to solicit applications for vehicle operators and perform initial interviews. Wayne Bus conducted the final interviews. Mr.

Kuntz was not aware whether any former SAC operators applied. He was also not aware of the operator qualifications required by SAC, but said that all Wayne Bus operators have at least a class 4 license and training in first aid.

[19] Mr. Kuntz said that some of the service changes that have been implemented by Wayne Bus include an increase in the time that a driver will wait from 3 minutes to 5 minutes and the "pick-up window" (the time that a user might have to wait) has been decreased from 15 minutes to 10 minutes.

[20] Dwayne Davis has been with Tel-J since it was formed in 1990 and has been its general manager for the past five years. He has been a registered special needs transportation service user since 1975 and uses it daily to get to work and back. He was formerly the user representative on the City's Special Needs Transportation Advisory Committee. Tel-J provides services for telephone answering, paging, alarm response, and dispatch for a diverse clientele including, among others, courier, security and towing companies.

[21] Mr. Davis said that, prior to December, 1998, Tel-J had a contract with SAC to provide back-up after-hours dispatch services in case an operator had any difficulty. Tel-J responded to the City's request for proposals to provide special needs transportation scheduling and dispatch services and was awarded the contract on December 9, 1998. He confirmed that Tel-J started taking calls at its own premises on December 21, 1998 for bookings starting January 1, 1999.

[22] Where SAC used a radio tracking station owned by the City, Mr. Davis said that Tel-J received no equipment or systems from SAC, and uses no communications infrastructure owned by either SAC or the City; instead, Tel-J uses its own "Clearnet" secure radio system using a number of private repeater stations. Where SAC used a computerized dispatch system, Tel-J uses its own manual system using current employees already familiar with its operations. Mr. Davis said that Tel-J has extended holiday coverage and the hours when trips may be booked to 11 p.m. seven days a week; and, a dispatcher remains on duty until the last bus is in the garage, even if that is after hours. Where SAC previously assessed user applications for service, Tel-J does not: the City provides it with a list of registered users.

Statutory Provisions

[23] Relevant provisions of the *Act* include:

> *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 or 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

(v) 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).

Argument

[24] Mr. Bainbridge, counsel for the Union, admitted that while there was no evidence of a lease or sale of anything by SAC to either Wayne Bus or Tel-J, part of SAC's public service dispatch and transport "business" had been transferred or otherwise disposed of to each of them within the meaning of s. 37 of the *Act*. Counsel argued that special needs transportation as a business was that of SAC and not that of the City and Province – a business, he said, is more than just the funding, but includes the physical plant, the employees, the goodwill and other intangibles. He said that SAC had been responsible for special needs transportation long before the City and Province took over the funding, and that although SAC reported to the City, all the ordinary elements of a business were handled by SAC. In 1975, he said, the City and Province did not take over the business, they just provided the

funding. Mr. Bainbridge argued that in the present case there had been a transfer of a tangible asset, being the service users themselves. Counsel asserted that this was not a case where one contractor had merely been substituted for another, which, he admitted, would not constitute a successorship. In support of this argument, counsel cited the often quoted decision of the Ontario Labour Relations Board in *Canadian Union of Public Employees v. Metropolitan Parking Inc.*, [1980] 1 Can. LRBR 197, and the decision of the Board in *Saskatchewan Government Employees Union v. Headway Ski Corporation*, [1987] Aug. Sask. Labour Rep. 48, LRB File No. 396-86.

[25] Mr. Bainbridge argued that there were three crucial elements in the present case that lead to a finding of successorship: (1) the nature of the work being performed by the alleged transferees is identical or substantially similar to that which was performed by the transferor; (2) there was no interruption in service; and, (3) the users of the service are the same and have no reasonably comparable alternative "product" choice. Counsel asserted that the following cases have recognized that where the work performed after the putative transfer is identical to that performed before, it is strong evidence that there has been a successorship: *R. v. Labour Relations Board, ex parte Lodum Holdings Ltd.*, [1969] 3 D.L.R. (3d) 41 (B.C.S.C.); *Retail Wholesale and Department Store Union v. Pauline Hnatiw*, [1981] 1 Can LRBR 489 (Sask. L.R.B.); and, *Metropolitan Parking, supra.*

[26] Counsel pointed out that there had been no hiatus in service, and that, indeed, Tel-J had started to perform at least part of the dispatch function in late December, overlapping with SAC. He referred to the decision of the Board 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, where, at 177-78, the Board approved of the following extensive list of relevant factors to be considered as enunciated by the Ontario Board in *Culverhouse Foods Ltd.*, [1976] OLRB Rep. Nov. 691:

> *In each case the decisive question is whether or not there is a continuation of the business... the cases offer a countless variety of factors which might assist the Board in its analysis; among other possibilities the presence or absence of the sale or actual transfer of goodwill, a logo or trademark, customer lists, accounts receivable, existing contracts, inventory, covenants not to compete, covenants to maintain a good name until closing or any other obligations to assist the successor in being able to effectively carry on the business may fruitfully be considered by the Board in deciding whether there is a continuation of the business. Additionally, the Board has found it helpful to*

> *look at whether or not a number of the same employees have continued to work for the successor and whether or not they are performing the same skills. The existence or non-existence of a hiatus in production as well as the service or lack of service of the customers of the predecessor have also been given weight. No list of significant considerations, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost importance to emphasize, however, that none of these possible considerations enjoys an independent life of its own none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same as it was before, i.e. whether there has been a continuation of the business.*

[27] Mr. Wilson, counsel on behalf of Wayne Bus, filed a written brief which we have read and considered. He argued that the present case is not an instance of successorship but the simple substitution of one contractor for another in the same manner as occurred in *Metropolitan Parking, supra*. He asserted that in each of the cases cited by counsel for the Union where it was found that the performance of the same work before and after the putative transfer was an important factor, it had also been found that there was a disposition of some kind from the predecessor to the successor. Counsel pointed out, for example, that in *Lodum Holdings, supra*, the predecessor had leased stores and sold inventory to the successor; in *Headway Ski, supra*, the business assets were transferred from the government to the new owner; in *Versa Services, supra*, a case involving the provision of cafeteria services to university students, where the labour had previously been performed by the university's employees, the university contracted those services to Versa to be performed at the same premises using the same equipment. Counsel pointed out that in the present case neither SAC nor the City provided anything to Wayne Bus and Wayne Bus was not performing any work previously done by the City's (i.e., the owner of the service) employees. Also the work contracted out by the City to Wayne Bus – the door-to-door service – was something less than half that previously performed by SAC. Mr. Wilson referred to the fact that when SAC itself contracted out backup night answering to Tel-J, the Union did not allege that was an instance of successorship.

[28] Mr. Wilson pointed out that in the present case it was not possible for Wayne Bus to make any substantial changes to the mode of service provided because the procedures and policies are established and user eligibility is determined by the City.

[29] Mr. Quennell, counsel for Tel-J, concurred with the arguments advanced by Mr. Wilson as they would apply to his client, emphasizing that there had been no transfer of assets from either SAC or the City to Tel-J. He stated that the argument advanced by counsel for the Union improperly equates the notion of "business" with that of "work"; the statute only applies to a transfer of the former. In support of his argument, counsel referred to the decision of the Board in *Canadian Union of Public Employees, Local 59 v. Saskatoon Regional Development Authority Inc. and The City of Saskatoon,* [1998] Sask. L.R.B.R. 376, LRB File No. 164-97. Mr. Quennell asserted that it was not surprising that there was no hiatus in service given the "political" considerations constraining the City in the provision of the service.

[30] In rebuttal, Mr. Bainbridge argued that the phrase "or otherwise disposed of" used in s. 37 discloses an intention by the legislature that the provision is intended to apply to a broader spectrum of business alienation than sale, lease or transfer, and includes the transactions that took place in the present situation.

Analysis and Decision

[31] The rationale for successorship legislation was described by the Ontario Board in *Metropolitan Parking, supra*, at 203, in the following terms:

> *The concept of successorship is an attempt to balance the interests and expectations of parties in the industrial community and preserve both collective bargaining stability and industrial peace. The employer retains his freedom to dispose of all or part of his business; but it is recognized that one cannot realistically expect that the interests of employees will be at the forefront of his negotiations. On the other hand, his employees may have recently struggled to become organized or to achieve a collective agreement. They expect that their statutory right to bargain collectively and their negotiated conditions of employment will have some permanence. Their expectations would be frustrated if a transfer of the business terminated both...*

[32] The essential purpose of s. 37 is to ensure that the employees' rights obtained and exercised under s. 3 of the *Act,* to be represented by a bargaining agent, are not defeated by an employer alienating its business. To this end the broad wording of s. 37 is intended to ensure that the form of the alienation

does not triumph over its substance to defeat the employees' rights. Given that the legislation is remedial in nature, it is necessary to ascribe it a liberal interpretation as opposed to too narrow a construction.

[33] But the determination as to whether there has been a successorship is not often easy. In *Versa Services, supra*, at 176-77, the Board described this difficulty and some of the concepts and considerations involved in its resolution:

> *If it is a fairly straightforward task to state a reason for the recognition of a continuing obligation on the part of the successor employer, it is much more difficult to articulate exact criteria for determining that a transfer has taken place within the meaning of Section 37. Time after time, labour relations boards faced with this task have fallen back defeated from the effort of arriving at a comprehensive portrait of a succession or a successor employer, deciding instead that the determination must be made in the context of the facts peculiar to the case before them.*
> *That the legislature intended to include a broad range of events within the sweep of the successorship provision is suggested by the language of the section itself. The circumstances under which the obligations of successorship may be found include not only the sale of a business in a technical sense, but extend to situations where the business (or part thereof) is "leased, transferred or otherwise disposed of." In the Metropolitan Parking case, the Board made the following observation on this point:*
>
> > *Little reliance is placed upon the legal form which a business disposition happens to take as between the old employer and its successor. The important factor, as far as collective bargaining law is concerned, is the relationship between the successor, the employees and the undertaking. Common law or commercial law analogies are of limited usefulness. It was the extension of these principles into the realm of collective bargaining law which gave rise to the successor rights problem in the first place and made remedial legislation necessary. Likewise, the meaning given to the terms "business" or "disposition" in other statutes is of limited assistance in determining their meaning in The Labour Relations Act.*

This Board made a similar comment in its decision in Saskatchewan Government Employees' Union v. Headway Ski Corporation, LRB File No. 396-86:

> *To determine whether there has been a sale, lease, transfer or other disposition of a business or part thereof, the Board is not concerned with the technical legal form of a transaction but instead looks to see whether there is a discernible continuity in the business or part of the business formerly carried on by the predecessor employer and now being carried on by the successor employer....*

In a number of cases, labour relations boards have tried to describe the essence or the spirit of the entity which is transferred through the various processes which may satisfy the definition above. Again, the Metropolitan Parking case provides a notable example:

> *A business is a combination of physical assets and human initiative. In a sense, it is more than the sum of its parts. It is a dynamic activity, a "going concern", something which is "carried on." A business is an organization about which one has a sense of life, movement and vigour. It is for this reason that one can meaningfully ascribe organic qualities to it. However intangible this dynamic quality, it is what distinguishes a "business" from an idle collection of assets....*

This description has been approved by this Board on a number of occasions: see, for example, Headway Ski Corporation, supra; Retail, Wholesale and Department Store Union v. Pauline Hnatiw, LRB File No. 190-80; Saskatchewan Joint Board Retail, Wholesale and Department Store Union v. Regina Exhibition Association Ltd., LRB File No. 075-90.

[34] In *Versa Services*, at 179-80, the Board commented, in *obiter*, on the situation where an entity currently contracting out certain functions changes contractors:

A related scenario is the situation where a contract of this kind moves from one contractor to another. In a number of such cases, a union has argued that there is a transfer of obligations under Section 37. The Board has found in these cases that the mere replacement of one contractor with another does not provide the necessary nexus between the two to constitute the transfer of a "business" within the meaning of Section 37. In one such case, Saskatchewan Joint Board Retail, Wholesale and Department Store Union v. Diogenes Investments Ltd., LRB File No. 072-83, the Board said that in order for a successorship to be found, "there must be more than a performance of a like function by another business entity." There must be something disposed of which is a "going concern" of the kind described in Metropolitan Parking; see also Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Marriott Canadian Management Ltd., LRB File No. 029-88; Hotel Employees and Restaurant Employees Union v. Beaver Foods Ltd., LRB File No. 002-89; Hotel Employees and Restaurant Employees v. JKT Holdings Ltd., LRB File No. 149-89.

. . . to establish that an employer is a successor in the sense envisaged by Section 37, it must be established that something of a coherent and dynamic nature, something which may enjoy a separate existence as a "business," was passed on from the original employer to the successor. To quote the Board in the Headway Ski case, we must look to whether there is "a discernible continuity in the business or part of the business formerly carried on by the predecessor and now being carried on by the successor."

[35] While the interpretation and application of s. 37 of the *Act* by the Board in *Versa Services* is generally insightful and instructive, it is of limited application in the present case because of the significant key factual differences upon which the Board relied in arriving at the determination that there had been a successorship in that case. Key among those factors were, as the Board said at 181, the case involved the passing of the performance of certain functions from the party from which the contract originated (i.e., the university) to the party taking over those functions and "the University was able to pass on to Versa Services Ltd. some elements essential to the business, namely, the unique space and captive consumers of the University community."

[36] In *Saskatoon Regional Economic Development Authority Inc. ("SREDA"), supra*, for some 30 years the City of Saskatoon had carried out economic development functions from an office that was a line department of the City. In 1992, it established a separate authority by bylaw under urban municipal

legislation to carry out economic development functions. The authority was composed of the mayor, two city councillors, the city commissioner and 13 other members appointed by council. The authority reported to the City and obtained its operating budget from the City. Three members of the City's former economic development office were seconded to the authority for a one year period. In 1996, SREDA was incorporated as a non-profit corporation, and the bylaw creating the authority was repealed. SREDA entered into a contract with the City whereby it performed economic development work for the City in exchange for a grant of money, and another agreement to transfer the assets of the former authority to SREDA. The City maintained four members on SREDA's board of directors. In determining that SREDA was not a successor to the previous authority, the Board held, at 381-82, as follows:

> *In our view, the cases establish that [s. 37 of the Act] 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., 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.*
>
> . . .
>
> *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 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".*

[37] In contrasting the situation with that in *Versa Services*, *supra*, the Board continued, at 383, as follows:

> *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 ...Versa Services...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.*

[38] In our view, while the present case is not on all fours with either *SREDA*, *supra,* or *Versa Services, supra,* it is more analogous to the situation under consideration in the former case. Special needs transportation is not a "profit centre"; it is a heavily subsidized public service that could never generate a profit. If the City charged the users a fare that covered its costs plus a profit, it would be far more than but a very few could afford, and the demise of the service would be assured. Unlike the situations in both *SREDA* or *Versa Services*, the City has never used its own employees to perform any of the functions contracted to Wayne Bus and Tel-J. And in the performance of those functions neither company uses any premises, equipment or materials that belonged to either the City or the former contractor.

[39] In the present case, the nature of the "captive consumers" and the service provided is fundamentally different from that in *Versa Services, supra.* Public special needs transportation is not an inherently profitable venture – the contractors do not derive their remuneration (and profit) by increasing ridership, as they are paid on an hours-of-service basis whether people use the system or not – they derive their profit by decreasing costs and increasing efficiency. In that context, the notion that the user list is an essential element of a business disposed of by either SAC or the City to Wayne Bus and Tel-J is rather preposterous. Neither contractor can change the composition of the list or the user eligibility requirements – whether the City makes changes to the list or eligibility requirements largely has no effect on the contractors who have simply agreed to provide a certain level of service for set hours of operation, for an hourly rate in the case of Wayne Bus, and for an annual fee in the case of Tel-J.

[40] One of the main reasons that SAC decided not to seek to renew its contract with the City was because the City was not replacing its ageing fleet; the City was able to circumvent those costs by awarding the contract to a contractor that would provide its own equipment. SAC did not dispose or impart of anything to any one, rather, it simply walked away, leaving the City to deal with its vehicles, communications station and software, and fleet storage premises. The City had no choice but to find a new contractor or operate the service themselves, an undertaking for which they had no personnel or expertise.

[41] There is no doubt that the circumstances of the present case are unique. Because the City's special needs transportation program is a public service delivered for the benefit of a vulnerable constituency, any hiatus in service, particularly in the depths of the winter months, would have been disastrous. Again, the City had no choice but to ensure that the transition was "seamless," not because of any profit motivation but out of public consideration. In these circumstances, the absence of a hiatus in the operation of the service is not significant.

[42] While we agree with the assertion that the language of s. 37 of the *Act* is intended to encompass alienation of a business, or part thereof, regardless of the form of the disposition, we do not find that there was a disposition of a business or part thereof in the present case to either of Tel-J or Wayne Bus. If there was a disposition, and we do not find that there was, it was not of a business but of work. We have concluded that neither Wayne Bus nor Tel-J is a successor employer to SAC or the City. There is simply no nexus between them as a predecessor and a successor.

[43] The application is dismissed.

SASKATCHEWAN INSTITUTE OF APPLIED SCIENCE AND TECHNOLOGY, Applicant v. SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, Respondent

LRB File No. 289-99; March 15, 2001
Vice-Chairperson, James Seibel; Members: Tom Davies and Bruce McDonald

For the Applicant: Rob Gibbings
For the Respondent: Gary Bartley and Barry Barber

Employee – Definition – Harassment prevention advisor will have authority to screen and investigate complaints under employer's harassment policy and to recommend and monitor remedial action – Harassment prevention advisor will also be routinely privy to management considerations bearing on industrial relations – Insoluble conflicts likely to arise if harassment prevention advisor placed in scope of bargaining unit - Board provisionally excludes harassment prevention advisor positions from bargaining unit.

The Trade Union Act, s. 2(f)

REASONS FOR DECISION

Background

[1] James Seibel, Vice-Chairperson: Saskatchewan Institute of Applied Science and Technology ("SIAST") is an adult education institution offering instruction in academic, scientific, trade, technical and vocational fields established pursuant to *The Saskatchewan Institute of Applied Science and Technology Act*, S.S. 1996, c. S-25.2. Saskatchewan Government and General Employees' Union (the "Union") is certified as the bargaining agent for two units of SIAST employees, one composed of academic employees and the other comprising administrative employees.

[2] SIAST offers courses at four main campuses and by extension. It has created the new classification of Harassment Prevention Advisor ("HPA") in its human resources division; initially, there are to be two staff positions. SIAST filed this application pursuant to s. 5(m) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") for a determination by the Board as to whether the persons occupying the HPA positions will be employees within the meaning of s. 2(f)(i) the *Act* or will they be excluded from the administrative bargaining unit on the grounds that their primary

responsibility is to actually exercise authority or perform functions that are of a managerial character and/or that they regularly act in a confidential capacity with respect to the industrial relations of SIAST.

Evidence

[3] Mr. Rene Roy, formerly an investigator with the Saskatchewan Human Rights Commission, has been a SIAST human resources advisor since 1998 overseeing SIAST's harassment prevention and employment equity policies, information coordination for the employee and family assistance programs and occupational health and safety generally. He is designated as the supervisor for the HPAs. In his testimony he compared the current SIAST harassment prevention policy, adopted in 1996, and guidelines and procedures, adopted in 1999, with the policies and procedures which were formerly in place.

[4] Although both policies and procedures refer to "harassment prevention advisors," under the former, the positions were not within the bargaining unit as they were staffed by employees acting in an unpaid volunteer capacity. These volunteers acted to provide general awareness about the policy, to answer questions, to assist in the resolution of concerns and as a conduit for making formal complaints under the policy to SIAST management. According to Mr. Roy, the majority of the volunteers were in the scope of the bargaining unit. The degree to which these "first generation" advisors were able to render assistance depended upon their individual skills and any training they might have acquired. They had limited authority. For example, an advisor might offer to mediate the complaint before it was made formally, but had no authority to "screen" the complaint or otherwise prevent it from going forward. They were not involved in any investigation, monitoring progress or implementation of remedies. A formal complaint was transmitted in writing to the principal or campus director who would establish an investigation panel.

[5] Mr. Roy said that the current policy applies to the students, faculty, in-scope and out-of-scope employees, the board of directors and some third parties such as student work placements. Under the current process the HPA classification is to be staffed by full-time paid individuals. The job posting requires, *inter alia*, two years of post-secondary education in a human relations field, a minimum training in dispute resolution and experience in mediation of workplace conflict. According to the job posting, the duties of an HPA include the following:

1. *Assist employees and students address harassment and respectful environment issues.*

2. *Develop and deliver awareness programs on harassment prevention to staff and students.*

3. *Assist with the resolution of conflicts including the mediation of disputes.*

4. *Assist with the administration of SIAST's policy on harassment prevention including the screening of complaints.*

5. *Deal with employees and students in a confidential manner.*

6. *Travel to various campus locations.*

[6] The position description describes the nature, scope and responsibilities of the position as follows:

GENERAL ACCOUNTABILITY

This position is responsible for assisting employees, students, supervisors and managers in dealing with concerns that relate to SIAST's Harassment Prevention Policy. This will include working towards the prevention of harassment and the resolution of specific concerns and complaints.

NATURE AND SCOPE

This position reports to the Human Resource Consultant (Equity). The Human Resource Consultant (Equity) reports to the Chief Human Resources Officer (CHRO).

The Harassment Prevention Advisor is expected to work closely with Human Resource offices and Student Services on assigned campuses.

This position has no subordinate positions reporting to it but must work closely with managers, supervisors, employees, union officials, students and student associations to achieve the goal of the position. This may include working with individuals and/or groups of people to resolve specific workplace concerns.

The Harassment Prevention Advisor is responsible for assisting all members of the SIAST community to address concerns that are or may become harassment issues. This includes acting as a contact for information on SIAST's Harassment Prevention Policy and assisting with the resolution of concerns that are identified.

RESPONSIBILITIES

Assist with the development of initiatives that prevent and eliminate harassing activities.

Assist with the development and deliver educational programs to promote awareness of both rights and responsibilities in the area of harassment.

Advise managers, supervisors, staff and students in the development of a respectful environment that is free of discrimination and harassment.

Initiate and use appropriate conflict resolution to assist with the resolution of issues and concerns.

Process formal complaints filed under SIAST's Policy on Harassment Prevention. This includes screening complaints to ensure applicability of the policy.

Deal with matters in a confidential manner.

Maintain the necessary records and files.

Assist with the monitoring of concerns and complaints to ensure that agreed upon resolutions are implemented.

Assist with the identification and development of active strategies to eliminate systemic problems.

Submit regular reports on activities to the Human Resources Consultant (Equity).

[7] The procedures and operating guidelines of the harassment prevention policy itself describe the duties and responsibilities of an HPA as follows:

- *act in an advisory capacity to the Campus Director, investigative panels and the SIAST-wide [harassment prevention] committee;*
- *act as resource person for students and employees;*
- *advise on the [harassment prevention] Policy and Procedures and Operating Guidelines;*
- *respond to harassment enquiries;*
- *facilitate the informal resolution process;*
- *screen and assess formal complaints;*
- *initiate the formal complaints process;*
- *consult with the Campus Director when intervention measures are required;*
- *provide awareness sessions as required;*
- *maintain confidential records;*
- *circulate a report of each investigation to the other HPA's for posting at the campus; and*

- *provide the SIAST-wide Harassment Prevention Committee with statistics for both the quarterly and annual reports.*

[8] According to Mr. Roy, the HPAs will have some discretion as to whether a complaint should go forward, will have some authority to conduct an initial investigation and can make recommendations to management. While Mr. Roy said that an HPA can prevent a complaint from being made by refusing to transmit it to the campus director, an individual aggrieved by that decision has an absolute right to appeal to a committee composed of representatives of management and the Union, and, if two students are involved, a student representative. The HPAs have the authority to conduct an investigation in order to arrive at a decision. Once a complaint goes forward, the HPA can instruct management on the operation and function of the guidelines and procedures and processes for resolution (e.g., mediation), and can make recommendations as to which route to follow. Mr. Roy said that the information gathered by an HPA under the current policy is held in confidence by him or her and is not shared except by permission of the complainant; if the matter goes to the formal complaint process, the information is held by the president's office for an investigation panel appointed by the campus director. The investigation panel may dismiss the complaint or uphold it and make a recommendation to management as to what remedial action ought to be taken. A complainant or respondent may appeal the decision and/or recommendation of the investigation panel. According to Mr. Roy, the range of remedies that may be recommended is broad and includes corrective discipline, dismissal and/or restitution. He said that the HPAs have a responsibility to monitor compliance with remedies, but have no authority to enforce them.

[9] Mr. Roy admitted that the SIAST harassment prevention policy procedure is only one avenue that a harassment complainant may pursue, either alternatively to, or concurrently with, a grievance procedure under a collective agreement or proceedings under human rights or occupational health and safety legislation or the general law; he expressed concern that the information gathered by an HPA for the purposes of SIAST's policy may be disclosed in the course of those other proceedings. Of particular concern to him was the almost certain fact that the HPAs would become privy to confidential information relating to managers, employees or in relation to SIAST's confidential labour relations strategies.

[10] Mr. Roy testified that the HPAs will report to him and he will monitor their performance and any personnel problems. Historically, he said, seven to ten harassment complaints proceed to a

formal process each year, although many more are resolved informally. He expressed the opinion that a labour relations conflict for the HPAs could arise in certain situations, for example, he said, if an issue is advanced as a harassment complaint that is really an industrial relations dispute. Also, he said, the consequences of advancing a complaint past screening by the HPAs to the formal process include a significant cost implication and the potential for disruption in the work area from which the complaint emanates. He said the main reason that indicates the function of the position is best served if it is out-of-scope of the bargaining unit is that many harassment complaints made against managers or in-scope supervisors are "tangled up with collective bargaining issues." As an example, he referred to the rejected applicant for a job posting who alleges harassment as a basis for his or her non-selection; in such a situation an HPA will have to discern whether there is in reality a harassment issue as opposed to a potential basis for a selection grievance. He also referred to the potential for conflict in situations where a complaint is made by a student against an in-scope employee or by an in-scope employee against a fellow in-scope employee.

[11] In cross-examination, Mr. Roy acknowledged that senior management could override the policy prescriptions and take alternate action if it was deemed that it would better fulfill the objectives of the policy. He admitted that the HPA complaint "screening" function has been the subject of criticism, and that there has never been a decision to reject a complaint because of cost implications. He confirmed that SIAST has in-scope security employees and supervisors.

[12] Mr. Gary Crawford has been a SIAST human resources advisor for five years with overall responsibility for staffing and other labour relations duties. Prior to this, he was an instructor for many years and a human resources advisor at the SIAST Kelsey campus. He testified that he had played a role in four rounds of collective bargaining between the Union and SIAST, two rounds on behalf of the Union and two on behalf of SIAST. He pointed out that, while previous collective agreements contained articles relating to harassment, the present agreements do not; he opined that this was because the Union balked at any reference to the current harassment prevention policy formulated by management. The policy was already in effect.

[13] Mr. Crawford expressed the further opinion that HPAs might be called upon by management to make recommendations on grievances that impact on the harassment process, and then might be called as witnesses in a subsequent grievance arbitration, although he did not describe whether or how this might occur.

Statutory Provisions

[14] Relevant provisions of the *Act* include the following:

> *2 In this Act:*
>
> *(f) "employee" means:*
>
> *(i) a person in the employ of an employer except:*
>
> *(A) a person whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character, or*
>
> *(B) a person who is regularly acting in a confidential capacity with respect to the industrial relations of his or her employer.*
>
> *(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.*

Argument

[15] Mr. Bartley, on behalf of the Union, argued that neither the position description nor the position posting describes any duties that could be considered as taking the HPA positions out of the definition of employee in s. 2(f)(i) of the *Act*. He argued that the positions do not include any independent decision-making authority in relation to managerial responsibilities, grievances or employee discipline, or have any ability to affect the terms and conditions of work of employees. He also asserted that the evidence does not indicate that the HPAs will act in a confidential capacity with respect to SIAST's industrial relations on a regular basis or at all. He pointed out that most of the present volunteer HPAs are in-scope of the Union and that the contemplated positions will report to an out-of-scope manager.

[16] Mr. Gibbings, on behalf of SIAST, filed a written brief that we have reviewed. He argued that the new positions will have a different function and scope of action and responsibilities than do the present volunteer HPAs; the primary difference, he said, will be the complaint screening function. Counsel asserted that the HPAs' unique responsibilities should exclude them from the definition of employee under both the managerial and confidential capacity arms of s. 2(f)(i) of the *Act*, but maintained that the primary basis for exclusion was the anticipated confidential responsibilities of the position.

[17] Mr. Gibbings argued that, because SIAST has the statutory duty to provide a harassment-free workplace and bears the ultimate risk and liability of a failure in that regard, it must have confidence that the persons charged with the discharge of that responsibility – the HPAs – are free from conflict with the members of the bargaining unit, and this can only be achieved if they are out-of-scope of the bargaining unit. He asserted that an example of when conflict would arise is when an HPA screens a complaint to go forward that might ultimately result in the discipline of an employee at the end of the formal process, or during the course of which the HPA might provide a recommendation for a remedy that includes discipline of an employee, whether or not that is the result. Counsel said that the insistence of the Union to remove the harassment provisions from the collective agreement is demonstrative of its position that the administration of the harassment policy is solely a function of management. Counsel referred to several decisions of the Board in relation to so-called "middle management" bargaining units, including *Saskatchewan Government Employees Union v. Saskatchewan Liquor and Gaming Authority and Saskatchewan Liquor Store Managers' Association v. Saskatchewan Liquor and Gaming Authority*, [1997] Sask. L.R.B.R. 836 and [1998] Sask. L.R.B.R. 512, LRB File Nos. 037-95 & 349-96, where the Board determined the issue of the exclusion of certain positions at the interface with the general employees' bargaining unit based upon a consideration of the potential for labour relations conflict with members of the latter unit. With respect to the principles that pertain to the consideration of confidential exclusions, counsel referred to the decisions of the Board in *Canadian Union of Public Employees, Local 882 v. City of Prince Albert*, [1996] Sask. L.R.B.R. 680, LRB File No. 095-96, *University of Regina v. Canadian Union of Public Employees, Local 1975*, [1995] 1st Quarter Sask. Labour Rep. 213, LRB File No. 266-94 and *Hillcrest Farms Ltd. v. Grain Services Union (ILWU-Canadian Area)*, [1997] Sask. L.R.B.R. 591, LRB File No. 145-97.

Analysis and Decision

[18] The decision as to whether a person who will occupy a newly created position will enjoy union representation and the benefits of collective bargaining is an important one. The expansive language of s. 3 of the *Act*, which expresses the legislative purpose of the *Act*, leads to the conclusion that the legislature intended that as wide a group of workers as possible should have access to collective bargaining. The stated exclusions from the definition of "employee" in s. 2(f) of the *Act* are restrictive and the determination must be approached carefully. In *United Food and Commercial*

Workers, Local 1400 v. PADC Holdings Ltd., [1994] 4th Quarter Sask. Labour Rep. 254, LRB File No. 281-93, the Board commented as follows, at p. 262:

> *This Board is aware that the determination as to whether particular persons fall within the definition of an "employee" in Section 2(f) is an important one, and one which must be made with care. The importance of this decision, and the complexities of drawing the line in many situations, were the subject of comment by the British Columbia Labour Relations Board in International Longshoremen's and Warehousemen's Union v. Vancouver Wharves Ltd., 74 C.L.L.C. 16, 118:*
>
> > *The reasons seem to this Board to be apparent. The current structures of industrial or commercial enterprises are such that what used to be easy has become very difficult when attempting to distinguish who has authority, who is employer and who is employee. The authority or managerial functions are spread over an ever increasing band of persons and further it varies in degree according to each enterprise's policy and also it varies regarding the individuals. When one looks at some of the most characteristic and true attributes of management, such as hiring and firing, promoting and demoting, planning the work and appointing people to do it, personally bargaining collectively, executing the provisions of a collective agreement or setting down independently or as a team the general policies of an enterprise, it becomes evident that all of these or any of them may be possessed by some in total, by others only partly and still by others, none at all and in all cases in varying degrees. Parliament, by the provisions of the Code has willed that it be the duty of this Board to analyse each case and decide what is the separation line between those who are management and those who are not. There is no dispute, the Board believes, with the recognition that the Canadian Parliament, together with the Provincial Legislatures is committed to the fundamental policy that collective bargaining must be facilitated and enhanced for as many people as possible. Collective bargaining rights are not a privilege, not a concession, not a favour, they are a basic right which*

will not be withdrawn from any employee unless there are very serious reasons.

[19] It is the Board's conclusion that the new HPA positions should provisionally be out-of-scope of the bargaining unit. While the former volunteer position bearing the same title was occupied by both in- and out-of-scope persons, the new position has significantly different functions and responsibilities. Formerly, incumbents in the role acted in a merely informational capacity with no investigative or complaint screening authority, or the ability to make recommendations on remedy that might include discipline or discharge of a bargaining unit member; investigation was a function of management. In its new incarnation, the role of an HPA has been significantly expanded to include not only the informational and educational functions of harassment prevention, but also to include initial investigation and complaint screening functions.

[20] The anticipated duties of the HPAs, in a broad sense, include the exercise of authority and functions that are managerial in character, in that the provision of a workplace free of harassment is the responsibility of SIAST. The initial investigation of any complaint that there has been a violation of SIAST's policy is a fundamental step in the discharge of SIAST's responsibility to provide a harassment-free workplace. However, such a characterization is not generally associated with the managerial exclusion in s. 2(f)(i)(A) of the *Act*, which refers most often to indicia that reflect the authority to affect the livelihood of members of the bargaining unit.

[21] The HPAs will be routinely privy to serious, perhaps disturbing, and certainly confidential allegations and facts and perhaps admissions and confessions, of a nature that might expose a respondent to a complaint to career-ending sanctions under SIAST's policy, and/or both the respondent to a complaint and SIAST to other legal processes and liability outside the purview of SIAST's policy. By virtue of the responsibility to recommend remedial action and monitor compliance, the HPAs will also routinely be privy to management considerations bearing upon industrial relations. For its part, the Union will shoulder some measure of responsibility for the representation of any member of the bargaining unit who is a respondent to such a complaint, particularly if the individual is subjected to discipline.

[22] The potential that the HPAs, if members of the bargaining unit, might find themselves in a situation that compromises their loyalty to the Union and/or fidelity to SIAST is beyond mere

speculation and approaches certainty. While this potential would not exist in the processing of a student/student complaint, it would almost inevitably arise on a regular basis in the context of student/instructor and in-scope employee/in-scope employee or in-scope employee/manager or executive complaints. The HPAs could be subject to tremendous pressure and personal anxiety in making decisions whether to move a complaint forward or in formulating a recommendation for remedy. Also, it is not inconceivable that some complaints will involve managerial or executive personnel; an in-scope HPA might experience difficulty in obtaining disclosure and co-operation from these persons. We are of the opinion that the conflicts that would likely arise also often would be insoluble and would place the HPAs in an untenable situation. Harassment prevention is too important a matter to risk its being emasculated by labour relations conflict within the bargaining unit.

[23] For the foregoing reasons, we have determined that the HPA positions shall be declared to be out of the scope of the bargaining unit for a period of one year from the date of the Order to issue with these Reasons. At the end of that period, if the Union does not object by bringing the matter back before the Board, the position shall become finally out-of-scope. SIAST may then apply under s. 5(k) of the *Act* during the open period to amend the certification Order, or the parties may jointly request the amendment under s. 5(j).

SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, Applicant v. SASKATOON OPEN DOOR SOCIETY INC., Respondent

LRB File No. 177-99; March 15, 2001
Vice-Chairperson, James Seibel; Members: Bruce McDonald and Leo Lancaster

For the Applicant: Tom McKnight
For the Respondent: Michael Hanna

Employee – Independent contractor – Board reviews approach to be taken to determine whether caretaker is employee or contractor – Board finds tenor of relationship between caretaker and organization more like principal/contractor relationship than employer/employee relationship – Caretaker not employee within meaning of *The Trade Union Act*.

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

REASONS FOR DECISION

Background

[1] James Seibel, Vice-Chairperson: Saskatchewan Government and General Employees' Union (the "Union") filed an application to be designated as the certified bargaining agent for a unit of employees of Saskatoon Open Door Society Inc. (the "Society"). The Board issued a certification Order dated September 7, 1999. The only issue remaining between the parties on the application was whether the position of caretaker should be included in the bargaining unit and a separate hearing was scheduled to determine the issue.

[2] The Society's position is that the incumbent is not an "employee" within the meaning of s. 2 (f) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), but an independent contractor.

Evidence

[3] The Society is a non-profit corporation providing counseling services, English language instruction, day care and other assistance to immigrants and refugees. It maintains an office in Saskatoon.

[4] The caretaker, Alen Gorges, agreed to provide a broad range of cleaning and maintenance services for a fixed period for a fixed sum paid every two weeks. The Society agreed to be responsible for the purchase of supplies and equipment identified by Mr. Gorges deemed necessary for the timely and efficient completion of the work. A brief written agreement embodies these terms.

[5] Mr. Gorges was called to testify by the Union. He averred that he has been doing the work for about three years and that his father, Adel Gorges, negotiated the contract between himself and the Society. His mother works for the Society. Mr. Gorges, who also attends school, said that the number of hours he works varies from week to week, but the average is approximately twenty-five; his father regularly assists him and he sometimes uses extra help. The work must be done outside of the Society's regular business hours. The Society often requests additional services over and above those specified by the contract, for which his father negotiates payment of an amount in addition to the bi-weekly sum fixed by the contract as required. Mr. Gorges said that he is responsible for deciding how the required work will be performed. If he chooses to hire additional or relief labour, he is responsible for setting their hours of work and paying their remuneration as well as the quality of their work.

[6] The Society owns the vacuum cleaners and implements that are used to perform the cleaning tasks and must approve the purchase of supplies. Mr. Gorges owns and maintains the tools used for the maintenance duties performed under the contract. No employment deductions are made from the payments under the contract. Mr. Gorges does not pay into employment insurance.

Statutory Provisions

[7] Relevant provisions of the *Act* include s. 2(f), which provides 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.*

Argument

[8] Mr. McKnight, on behalf of the Union argued that Mr. Gorges was an employee within the meaning of the *Act* and not an independent contractor. Referring to the decision of the Board in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. McGavin Foods Limited,* [1997] Sask. L.R.B.R.. 210, LRB File No. 173-96, Mr. McKnight asserted that the circumstances did not establish that Mr. Gorges is a contractor under the "economic control" test referred to in the *McGavin Foods* decision. He said that Mr. Gorges assumed no risk under the contract because the Society provided equipment and supplies, and, because there was a restriction as to when he could do the work, it was not in his discretion as to how to fulfill the duties required.

[9] Mr. Hanna, on behalf of the Society, argued that Mr. Gorges had full control of how to perform the work and when to perform it, with the restriction that it could not be done during the day care and language class hours. He pointed out that it was up to Mr. Gorges whether he did the work himself or used others whom he employed to do it.

Analysis and Decision

[10] In several cases in the past few years, the Board has had occasion to track the evolution of the approach by labour relations tribunals to the employee-contractor dichotomy from the seminal decision by the Privy Council in *Montreal v. The Montreal Locomotive Works Ltd., et al.*, [1947] 1 D.L.R. 161 (P.C.), which enunciated the well-known four-fold test, viz., (1) the degree of control over the method of providing goods and services; (2) ownership of the tools; (3) chance of profit; and, (4) risk of loss; through the "integration test" proposed by Lord Denning in *Stevenson Jordan & Harrison Ltd. v. MacDonald & Evans*, [1952] 1 TLR 101 (C.A.), which asks the question whether the work in issue is being done as an integral part of the employer's business and, therefore, whether the putative contractor is employed as part of the employer's business like other employees; to the addition of two tests to the *Montreal Locomotive* criteria by the Ontario Labour Relations Board in *International Woodworkers of America v. Livingston Transportation Ltd.*, [1972] OLRB Rep. 488, namely, (1) whether a party is carrying on business on his own behalf or for a superior; and, (2) the statutory purpose test. In *International Brotherhood of Electrical Workers, Local 2038 v. Tesco Electric Ltd.*, [1990] Summer Sask. Labour Rep. 57, LRB File No. 267-89, the Board described the statutory purpose test in the following terms:

> *... the statutory purpose of The Trade Union Act is to protect the rights of employees to organize in trade unions of their own choosing for the purpose of bargaining collectively with their employers. Accordingly, individuals should not be excluded from collective bargaining because the form of their relationship does not coincide with what is generally regarded as "employer-employee", when in substance, they might be just as controlled and dependent on the party using their services as an employee is in relation to his employer. If the substance of the relationship between the individual and the company is essentially similar to that occupied by an employee in relation to his employer, then the individual is in fact an "employee" within the meaning of Section 2(f) of the Act and will be so designated by the Board, notwithstanding the form or nomenclature attached to that relationship.*

[11] In an article entitled "Enterprise Control: The Servant Independent Contractor Distinction" (1987) 37 U.T.L.J. 25, Prof. Robert Flannigan formulated the enterprise control test which emphasized the risk-taking element of entrepreneurial activity as an essential characteristic of control over the enterprise.

[12] This latter test was referred to as the economic control test by the Canada Labour Relations Board in *Canada Post Corporation v. Canadian Postmasters and Assistants Association, et al.* (1990), 5 C.L.R.B.R. (2d) 79, which assessed its function as being,

> *. . . to update the concepts of the "fourfold test" and the "integration test" and reconstruct them to suit the modern business milieu. It focuses on the contractor's activities rather than on the employer's business. This is important for the Board as it administers the Code in today's ever-changing business world where corporate takeovers, mergers and practices such as "contracting out" and "privatization" are becoming commonplace.*

[13] The Board has subsequently approved of an economic control analysis as a fundamental part of the determination of employee-contractor status. In *Retail, Wholesale and Department Store Union, Locals 539 & 540 v. Federated Co-operatives Limited*, [1989] Fall Sask. Labour Rep. 60, LRB File No. 256-88, the Board stated:

> *. . . although it is not the only consideration, entrepreneurial independence or control, in the sense of the latitude to make decisions which determine the financial success or failure of the business, is the most important feature that distinguishes independent contractors from employees.*
>
> *This Board agrees with that analysis. An independent contractors is essentially a business person, an entrepreneur, a risk-taker, who takes chances in the marketplace with a view to making a profit. Success or failure of his enterprise depends upon how well he utilizes the capital and labour that he controls and how well he assesses the marketplace. Regardless of how inferior a businessman's bargaining power may be or how poor his bargain, he is not an employee within the meaning of the Act.*

[14] This approach has been adopted by the Board in several subsequent decisions including, *McGavin Foods, supra*; *United Food and Commercial Workers, Local 241-2 v. Beatrice Foods Ltd.*, [1994] 3rd Quarter Sask. Labour Rep. 302, LRB File No. 264-93; *Retail, Wholesale Canada, A Division of the United Steelworkers of America v. United Cabs Ltd.*, [1996] Sask. L.R.B.R. 337, LRB

File No.115-95; *Grain Services Union v. AgPro Grain Inc.*, [1996] Sask. L.R.B.R. 639, LRB File No. 111-96; *Regina Musicians Association, Local 446 v. Saskatchewan Gaming Corporation,* [1997] Sask. L.R.B.R. 273, LRB File No. 012-97. In the last decision, the Board looked to the following criteria previously identified by the Ontario Board in *Algonquin Tavern v. Canada Labour Congress*, [1981] 3 Can. LRBR 337, at 360 ff.:

1. *The use of, or right to use substitutes.*

   ...

2. *Ownership of instruments, tools, equipment, appliances, or the supply of materials.*

   ...

3. *Evidence of entrepreneurial activity.*

   ...

4. *The selling of one's services to the market generally.*

   ...

5. *Economic mobility or independence, including the freedom to reject job opportunities, or work when and where one wishes.*

   ...

6. *Evidence of some variation in the fees charged for the services rendered.*

   ...

7. *Whether the individual can be said to be carrying on an "independent business" on his own behalf rather than on behalf of an employer or, to put it another way, whether the individual has become an essential element which has been integrated into the operating organization of the employing unit.*

   ...

> *8. The degree of specialization, skill, expertise or creativity involved.*
>
> ...
>
> *9. Control of the manner and means of performing the work - especially if there is active interference with the activity.*
>
> ...
>
> *10. The magnitude of the contract amount, terms, and manner of payment.*
>
> ...
>
> *11. Whether the individual renders services or works under conditions which are similar to persons who are clearly employees.*

[15] Despite the fact that both the *Algonquin Tavern* and *Saskatchewan Gaming* cases defined and considered these criteria in the context of entertainers engaged to perform for the public ancillary to the respective principal's main business, the list, which is not exhaustive, is informative for other situations and industries involving the determination of employee-contractor status.

[16] While the particular facts of *McGavin Foods*, *supra*, are not particularly instructive in the present situation in that that case involved a plan by McGavin to franchise or contract out its distribution routes formerly serviced by bargaining unit employees using company-owned trucks to owner-operators, the Board's description of the operation of s. 2(f) of the *Act*, at 210, is beneficial:

> *Section 2(f)(i.1) of the Act sets out a purposive test for determining if the relationship between contractors, in the opinion of the Board, could be the subject of collective bargaining. Section 2(f)(iii) of the Act prevents the common law test of "vicarious liability" that was developed to determine the legal liability of a master for the acts of a servant from being determinative of employment status. In Retail Wholesale Canada, A Division of the United Steelworkers of America v. United Cabs Ltd., Johnson et al., [1996] Sask. L.R.B.R. 337, LRB File No. 115-95, the Board, at 345, held that the focus of the assessment under s. 2(f)(i.1) and (iii) of the Act is an attempt to "distinguish between persons who are genuinely operating in an entrepreneurial fashion*

> *independent of an "employer," and those who, whatever the form their relationship with that putative employer takes, are really employees whose access to the option of bargaining collectively should be protected."*

[17] In *McGavin Foods*, *supra*, the work to be performed by the franchisee was an integral part of McGavin's business. The distributorship agreement anticipated that the franchisee would be available to service customer accounts seven days a week and contained a restrictive covenant preventing the franchisee from working for a competitor. McGavin controlled the main customer list and the retail and wholesale prices of the products. The Board found that the use of employees by an owner-operator on a regular basis, as opposed to casual helpers or relief help, may be a "solid indicator of his or her entrepreneurial status in that it demonstrates that he or she will profit not only from his or her own labour, but also from the labour of others." The Board held that franchise distributors working as owner-operators of their own equipment were not independent contractors, but employees within the meaning of the *Act*; on the other hand, those distributors who employed others to drive franchised routes were held to be independent contractors. The decision is instructive in that it illustrates that one may be considered a contractor even though there is a degree of economic dependence on the principal. Determination of the employee-contractor issue really is a matter of degree; the cases that are obviously black and white rarely come before the Board. As the Board noted in *Beatrice Foods Ltd.*, *supra*, at 305:

> *There are many details of a relationship which will yield clues as to whether its essential character is closer to employment or contract. As the Ontario Labour Relations Board pointed out in the Livingston Transportation decision, supra, when a tribunal such as ours is asked to make the determination, it is often a sign that the line of demarcation is difficult to discern under the circumstances.*

[18] In the present case, Mr. Gorges is able to control the manner in which he will fulfill the contract, that is, by his own labour alone or with the assistance or complete use of his own employees; that is, nothing prevents him from subcontracting the work. He uses his father on a regular basis and other employees for extra work not covered by the main contract and for relief: he controls who will do the work. Mr. Gorges also controls when the work will be completed, except for some restriction practically dictated by the public interaction nature of the Society's activities; this is no different than any business owner dealing with the public (and which likely would include

most of them) who does not want cleaning and maintenance activities going on underfoot during regular business hours. In the context of the building cleaning trade such a restriction is not informative of anything one way or another as concerns the present issue.

[19] The ownership of the rather minimal equipment and tools required to complete the work or extra work is split between the Society and Mr. Gorges. The work Mr. Gorges performs under the contract with the Society is not a part of the business in which the Society is engaged; he does not work under conditions similar to those persons who have already been determined to be employees. He is not restricted from pursuing other business activities at any time; as a student, the flexibility allowed under the contract as to when and by whom he may determine the work will be performed is of significant value to him. He can accept it or reject extra work offered by the Society and negotiates separate remuneration for same, allowing further opportunity for potential profit. Mr. Gorges has assumed the risk of profit and loss; the fact that both are relatively minimal because of the modest size of the contract is not the salient point, rather it is the degree of such risk that is important. If he can perform the work efficiently, he stands to realize a profit; if he cannot, he may suffer a loss. The economic control over the cleaning and maintenance enterprise is in his hands.

[20] While the present case does not fit neatly into any notional box labeled either "employee" or "contractor" we find that in all of the circumstances of the present case, the tenor of the relationship between Alen Gorges and the Society is more like that of a principal and contractor than that of an employer and employee. We find that Mr. Gorges is not an "employee" within the meaning of the *Act* and the position of caretaker is excluded from the scope of the bargaining unit. An Order will issue accordingly.

THE NEWSPAPER GUILD CANADA / COMMUNICATIONS WORKERS OF AMERICA, CLC, AFL-CIO, IFJ, Applicant v. STERLING NEWSPAPERS GROUP, A DIVISION OF HOLLINGER INC., Respondent

LRB File No. 274-99; March 19, 2001
Chairperson, Gwen Gray; Members: Mike Geravelis and Tom Davies

For the Applicant: Drew Plaxton
For the Respondent: Dennis Ball, Q.C.

Collective agreement – First collective agreement – Parties able, with assistance of Board agent, to agree to terms of collective agreement, including duration – Union subsequently asks Board to extend duration of collective agreement to allow parties to operate under collective agreement for longer period before negotiating new agreement – Board declines to deviate from duration clause proposed by Board agent and agreed to by parties.

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

REASONS FOR DECISION

[1] **Gwen Gray, Chairperson:** The Newspaper Guild Canada / Communications Workers of America (the "Union") applied for Board assistance in concluding a collective agreement on March 15, 2000. The Board appointed Mr. Forseth as Board agent to assist the parties to reach a first agreement and failing which, to report to the Board. The parties were able with Mr. Forseth's assistance, to reach agreement on all but two matters. The outstanding issues were referred to the Board on March 16, 2001. At that time, the parties again were able to reach agreement on one of the outstanding matters. The parties are to be commended for their work in resolving the majority of the bargaining issues.

[2] The only matter that remains outstanding is the term of the collective agreement. The Board agent proposed a term from November 2, 1999 to November 1, 2001. This period coincided with wage increases that had previously been awarded to employees at the Leader-Post and it formed the basis on which the Board agent prepared his monetary recommendations. In addition, during their meetings with the Board agent, the parties agreed to the term set out above.

[3] Counsel for the Union asked the Board to consider if it would order a different term to allow the parties to operate under the collective agreement for a longer period before they are required to

negotiate a renewal agreement. Sterling Newspapers Group, a Division of Hollinger Inc., (the "Employer") opposed any extension of the agreement primarily because of the uncertainty it faces as the result of an unfair labour practice that the Union has filed in relation to bonuses paid to other employees during the negotiation of this first collective agreement.

[4] The Board has decided to impose a term from November 2, 1999 to November 1, 2001 in accordance with the agreement reached by the parties. We recognize that the term does not give the parties a great deal of time to operate under the first agreement prior to resuming negotiations for a new agreement. However, if we were to alter the dates of the agreement, the wage rates set by the Board agent (and accepted by both parties) would need to be altered to reflect the changed term. Without more information on wages and costs, this is a difficult proposition for the Board. In addition, we note that the Union agreed to the term and we are reluctant to open the doors to changes of mind once an item has been "signed off" in the process of negotiating the first collective agreement with a Board agent.

[5] For these reasons, the Board sets the term of the first collective agreement from November 2, 1999 to November 1, 2001. As indicated above, all other terms in the collective agreement have been agreed to by the parties and will not be set out by the Board in these Reasons for Decision.

CANADIAN UNION OF PUBLIC EMPLOYEES, Applicant v. BOARD OF EDUCATION OF THE KAMSACK SCHOOL DIVISION NO. 35 OF SASKATCHEWAN, Respondent

LRB File No. 298-00; March 28, 2001
Chairperson, Gwen Gray; Members: Don Bell and Mike Geravelis

For the Applicant: Aina Kagis
For the Respondent: LaVonne Black

Employee – Managerial exclusion – Maintenance worker/supervisor does not supervise members of bargaining unit and performs work similar to work performed by caretaking staff – Maintenance worker/supervisor provides important technical advice to employer but advice is not of labour relations nature – Maintenance worker/supervisor is employee within meaning of s. 2(f) of *The Trade Union Act*.

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

REASONS FOR DECISION

[1] Gwen Gray, Chairperson: Canadian Union of Public Employees (the "Union") applied to amalgamate two certification Orders and to add one new position, maintenance worker/supervisor, to its bargaining unit. Support evidence was filed with the application with respect to the position to be added. The Board of Education of the Kamsack School Division No. 35 of Saskatchewan (the "Employer") did not oppose the amalgamation of the bargaining unit, but it did oppose the inclusion of the maintenance worker/supervisor on the grounds that the duties of the position took it outside of the definition of employee as set out in s. 2(f) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*").

[2] The maintenance worker/supervisor is responsible for the up-keep and general maintenance of the school properties, which include three schools, an office and a shop. The duties include repair and maintenance of the mechanical systems, electrical, heating as well as plumbing and locksmithing. The current incumbent performs the bulk of this work on his own or with minor assistance from caretakers who are assigned to each school. Caretaking staff report to their head caretaker, or to the principal of their individual schools. The maintenance worker/supervisor does not supervise the day-to-day work of any other employees, except summer students. Summer students are not part of the bargaining unit.

[3] From the Employer's perspective, the maintenance worker/supervisor provides useful advice to the Director of Education regarding the need for major maintenance work. In essence, the Employer looks to the maintenance worker/supervisor to evaluate the need for various maintenance projects and to provide estimates related to the costs of each project. The maintenance worker/supervisor accompanies representatives of the Employer on an annual tour of the Employer's facilities to identify maintenance issues for the upcoming year.

[4] In argument, the Union noted that the Board has not ruled on the managerial status of the maintenance worker/supervisor in previous decisions involving the Union and the Employer. The caretaker certification Order simply does not mention the position, nor does the teacher aide Order. The Union urged the Board to apply the managerial test set out 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.

[5] The Employer argued that it would be hamstrung if the maintenance worker/supervisor was included in the bargaining unit. The Employer relies on the advice of the maintenance worker/supervisor to determine major spending in each year and it needs the position to remain out-of-scope. The Employer also pointed out that the position supervises a student in the summer and in the past supervised a maintenance worker.

[6] The Board has considered the evidence and arguments of the parties. In our view, the evidence demonstrates that the position of maintenance worker/supervisor is not a position that regularly entails the performance of managerial functions. In *Saskatchewan Liquor and Gaming Authority, supra,* the Board identified the major managerial functions as including the power to discipline and discharge, the ability to influence labour relations, and to a lesser extent, the power to hire, promote and demote.

[7] In this situation, the maintenance worker/supervisor does not supervise any members of the bargaining unit. He performs hands-on work in the maintenance field which is not significantly different from the work performed by the caretaking staff. His advice in relation to maintenance projects is important to the Employer and its ability to plan annual budgets, but this advice is of a technical, expert nature, not of a labour relations nature. In our view, the maintenance

worker/supervisor does not perform work of a managerial nature. We also find that he does share a community of interest with the caretaker staff and it is appropriate to include the position in the certification Order.

[8] For these reasons, the Board orders the amalgamation of the two bargaining units to conform to the unit agreed to by the parties in their last collective agreement. In addition, the maintenance worker/supervisor position will be included in the bargaining unit.

SASKATCHEWAN INDIAN FEDERATED COLLEGE INC., Applicant v. UNIVERSITY OF REGINA FACULTY ASSOCIATION, Respondent

LRB File No. 049-01; March 28, 2001
Chairperson, Gwen Gray; Members: Michael Geravelis and Leo Lancaster

For the Applicant: Greg Curtis
For the Respondent: Tom Waller

Employee – Status – New position - Employer seeks interim order excluding new position from scope of bargaining unit pending Board's determination in final application for exclusion – Board reviews general practice to be followed by employer seeking to have new position excluded from all employee bargaining unit – Board declines to grant interim order under circumstances of case.

***The Trade Union Act*, ss. 2(f), 5(m), 5.2 and 5.3**

REASONS FOR DECISION

[1] **Gwen Gray, Chairperson:** The Saskatchewan Indian Federated College Inc. (the "Employer") applied for an interim order under ss. 5.2 and 5.3 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), to permit it to fill the position of Development Consultant on an out-of-scope basis pending a final hearing of the main application. With its application, the Employer filed a Notice of Motion, Affidavit of Robin McKenzie, and Affidavit of Wes Stevenson.

[2] The University of Regina Faculty Association (the "Association") filed the affidavit of Debra Sagel in response to the Employer's materials on the interim application.

[3] A hearing was conducted by the Board in Regina, on March 6, 2001.

[4] The Employer argues that it requires an interim order placing the position of Development Consultant outside the scope of the Association's bargaining unit because it wants to fill the position prior to the end of April, 2001.

[5] The Association argues that the matter is not of an urgent nature and the effect of granting the interim order would be to determine the outcome of the final application.

[6] In the Board's view this is not a case that requires the issuing of an interim order pending the final hearing of the application. The Board requires employers to obtain the agreement of the union before assigning a position out-of-scope. In *Canadian Labour Congress, Local 481 v. Saskatchewan Government Employees' Association,* LRB File No. 192-78, Dec. 13, 1978, the Board commented on the appropriateness of unilaterally removing a classification from the scope of a bargaining unit by an employer as follows:

> *The employer reclassified a position and then took the position that it should be out of the scope of both the Certification Order and the Collective Agreement. The parties did bargain over the position and when agreement was not reached the Union suggested to the employer that it should apply to the Labour Relations Board to have the position excluded from Certification Order. The employer let the open period defined by Section 5(k) of The Trade Union Act pass by without making such application. Negotiations have now ended and the employer takes the position that the new classification is out of scope.*
>
> *It has been the policy of the Board, in cases of all employee units, where a new classification is created, to put the onus upon the employer to satisfy the Board that the occupant of the new classification is not an employee within the meaning of Section 2(f)(i) of The Trade Union Act and therefore should be excluded from the unit. The proper procedure for an employer in such circumstances is, if it cannot obtain Union agreement, to apply to the Board for an Order amending the Certification Order to exclude the new classification. The employer did not do so during the open period. Therefore its obligation to bargain with the Union with respect to whether or not the position should be in scope remains and the refusal of the employer to continue such negotiations constitutes an unfair labour practice. The Board makes no findings as to whether or not the new classification should be in scope or out of scope. Unfair labour practice proceedings before the Board are not a proper framework for determining such questions. There will be an Order finding the employer guilty of an unfair labour practice.*
>
> (emphasis added)

[7] In *Saskatchewan Government Employees' Union v. Wascana Rehabilitation Centre,* [1991] 3rd Quarter Sask. Labour Rep. 56, LRB File Nos. 199-90 & 234-90, the Board directed that all new positions be included in an "all employee" bargaining unit until they are excluded from the bargaining unit by order of the Board or agreement of the parties. If agreement is not reached, then an employer may apply for a provisional order under ss. 5(m) and 5.2 seeking the provisional exclusion of the position. The Board must make a determination on such a hearing that the position as it is currently proposed would not fall within the definition of "employee" as set out in s. 2(f) of the *Act.*

[8] We are concerned that if an interim order were granted in this case, the Employer would be able to offer employment on an out-of-scope basis to a new employee without regard for the collective agreement between the Association and the Employer. In the long run, the Board may well find that the position properly belongs in the bargaining unit. There would be some doubt then as to the status of the person appointed to the position and the Employer may be required to re-post the position and fill it in accordance with the collective agreement. This causes unnecessary problems for the incumbent employee and places the Association in the difficult position of requiring the termination of the incumbent. In our view, under the tests established for obtaining interim relief, the balance of labour relations harm rests with the Association on this application.

[9] In our view, it is best for the Employer to proceed to have the main application determined. If the position is filled prior to the determination of the matter, the incumbent must be hired in accordance with the provisions set down in the collective agreement between the Association and the Employer and must be treated as a member of the bargaining unit until such time as the main application is determined by the Board. Otherwise, the Employer may proceed on the main application and await the Board's provisional ruling before assigning a person to the position.

[10] The Employer may request that the main application be heard on an expedited basis.

SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION and GOVERNMENT OF SASKATCHEWAN, Co-applicants and VARIOUS INTERVENORS

LRB File No. 114-99; April 5, 2001
Chairperson, Gwen Gray; Members: Don Bell and Bob Todd

For S.G.E.U.:	Rick Engel
For the Govt. of Sask.:	Darryl Bogdasavich, Q.C.
For the Affected Employees:	Garret Wilson, Q.C., Brian Barrington-Foote, Q.C. and Lawrence Barber

Certification – Amendment – Addition of employees – Union and employer jointly apply to amend all employee certification order to include positions previously excluded from order – No evidence of support filed from group of employees to be included – Board determines that positions classified as part of management and professional plan were excluded on grounds that they performed functions of managerial or confidential nature in relation to employer's labour relations – Parties now agree that management and professional plan positions are "employees" within the meaning of *The Trade Union Act* - Board determines that management and professional plan positions may be included in order without evidence of majority support.

Certification – Amendment – Addition of employees – Union and employer jointly apply to amend all employee certification order to include engineers-in-training and geoscientists – Engineers and engineers-in-training previously excluded from certification order on appropriateness grounds – Board refuses to add engineers-in-training or geoscientists to bargaining unit without evidence of majority support.

***The Trade Union Act*, ss. 2(f), 5(i), 5(j) and 5(k)**

REASONS FOR DECISION

Background

[1] Gwen Gray, Chairperson: On April 30, 1999, Saskatchewan Government and General Employees' Union ("SGEU") and the Government of Saskatchewan (the "Government") jointly filed an application to amend the certification Order issued to SGEU to include 673 formerly excluded positions into SGEU's bargaining unit.

[2] A number of individuals opposed the amendment application. Mr. Barrington-Foote, Q.C. represented 127 individuals whose positions are affected by the application (the "Affected Employees"); and Mr. Wilson, Q.C. represented 28 members of the Association of Professional Engineers and Geoscientists of Saskatchewan who are affected by the application (the "Geoscientists"). In an earlier decision, the Board held that the Saskatchewan Government Managers' Association ("SGMA") did not have standing in these proceedings: see [1999] Sask. L.R.B.R. 404. Letters of intervention were also received from Lawrence Barber. The Board considered Mr. Barber's standing in the previous proceedings and held that he lacked standing to appear on this application. Letters of intervention were also received from Mary Martin-Smith, John Stevenson, Murray Selinger, Allan Schaan, Donald Ditson, and Drew Johnstone, all opposing their inclusion in SGEU's bargaining unit, and from a group of employees at Intergovernmental and Aboriginal Affairs who sought to be included in SGEU's bargaining unit. At the hearing of the matter, Mr. Barrington-Foote and Mr. Wilson appeared along with Mr. Ditson, who appeared on his own behalf. SGEU and the Government agreed to review Mr. Ditson's position and the issues raised by him were deferred to a further hearing, if required.

[3] Various orders for production of documents were also included in the Board's decision referred to above.

Facts

[4] SGEU was first certified to represent employees employed by the Government on August 19, 1945. The Board has amended the certification Order on several occasions. Various agencies were added to the Order over time, including the Liquor Licensing Commission on October 10, 1962; the Saskatchewan Medical Care Insurance Commission on December 3, 1964; the Saskatchewan Water Resources Commission on August 5, 1965; and the Alcoholism Commission of Saskatchewan on October 4, 1972. On June 3, 1974, the Board issued a revised Order in the general wording of an "all employee" order. The last amendment was made on October 21, 1987.

[5] Over the years, the Board has also made changes to the groups of employees excluded from the Order. The original Order excluded employees of the Department of Telephones and employees at the mental hospitals in Weyburn and North Battleford. At that time, those excluded employees were represented by other trade unions. Employees employed by Saskatchewan Power Commission

were excluded by an amendment dated October 26, 1948. On September 7, 1972 and October 4, 1972 respectively, the Board excluded employees of the Government at the Prince Albert Psychiatric Centre, Prince Albert, and at the Riverside Special Care Home, Battleford who were, at the same time, certified by the Canadian Union of Public Employees. On June 4, 1974, the exclusions were updated to include the following groups who were represented by other trade unions: Saskatchewan Hospital, North Battleford; Valley View Centre, Moose Jaw; North Park Centre, Prince Albert; Psychiatric Centres, Yorkton, Weyburn and Prince Albert; Souris Valley Extended Care Hospital, Weyburn; Riverside Special Care Home, Battleford; and Mental Retardation Division of CORE Services Administration. At the same time, a general exclusion of "all employees employed by the Government represented by any other bargaining agent and all employees excepted and excluded from such bargaining units" was added as an exclusion to the Order.

[6] On August 31, 1949, the list of exclusions in each department of Government was extensively enlarged from the original Order which excluded only department heads, permanent heads, private secretaries and division or branch heads. The exclusions were listed by department and by job title.

[7] Various applications were made to exclude professional employees commencing with an Order granted on February 22, 1957 where the Board excluded members of the Association of Professional Engineers of Saskatchewan: see *Burnett C. Laws and Ronald Earl Pelkey v. Saskatchewan Civil Service Association* (1957), 2 Dec. Sask. L.R.B. 20. On June 6, 1958, the Board excluded members of the Veterinary Association of Saskatchewan. Similarly, on September 6, 1967, members of the Saskatchewan Land Surveyors Association were excluded from the Order. On October 2, 1968, members of the Saskatchewan Physical Therapists Association employed at the South Saskatchewan Hospital Centre, Wascana Division, were excluded from the Order. Engineers-in-training were added to the exclusions on December 3, 1969. Members of the medical staff were excluded in the Order issued on June 4, 1974. At the same time, however, in *Professional Engineers Employees Association v. Government of Saskatchewan and Saskatchewan Government Employees' Union* (1974), 3 Dec. Sask. L.R.B. 446, the Board held that engineers alone did not constitute an appropriate bargaining unit.

[8] In the 1974 amendments, the Board granted a general exclusion for "incumbents of positions within a class as may from time to time be excluded by agreement between the parties." The Order also contained a long list of excluded positions.

[9] Updates to the list of excluded positions were granted by the Board on April 15, 1982 and September 5, 1984. In October, 1986, the Board revised the Order by establishing separate bargaining units for the employees of the Liquor Board of Saskatchewan, the Liquor Licensing Commission and the Workers' Compensation Board. As a result, the main SGEU Order was re-worded to remove references to the three agencies. The Saskatchewan Cancer Foundation was excluded from the main Order on October 21, 1987. A general updating of exclusions was granted in October, 1987.

[10] The present amendment application represents the culmination of a scope review process that began in 1982 when the parties negotiated Appendix "J" to their collective agreement which provided as follows:

> *The parties agree to undertake an interim review of the scope status of all positions and classes in the Public Service. Any agreed upon modifications to the current structure of included and excluded positions and classes shall be implemented as of the first day of the month following completion of the review.*
>
> *June 30, 1982*

[11] Dorian Hassard, chief negotiator for SGEU for the years 1990 to 1998 and a member of SGEU's bargaining committee from 1978 to 1981, testified that there had been a history of negotiating scope issues at the bargaining table. According to Mr. Hassard, SGEU was concerned that not enough attention was being paid to scope issues. As a result, in the 1981-82 negotiations, SGEU pressed for and received a commitment from the Government to enter into a scope review process. The intended review would consider the duties of the positions excluded from the bargaining unit against the criteria set by this Board for excluding persons from a bargaining unit. Appendix "J" remained in the collective agreement concluded February 1, 1983, the 1984-86 agreement, the 1988-91 agreement, the 1991-94 agreement and the 1994-97 agreement.

[12] No action appears to have been taken under Appendix "J" in the 1982-1984 collective agreement. In 1986, *The SGEU Disputes Settlement Act,* S.S. 1984-85-86, c. 111, statutorily imposed a collective agreement on SGEU for the term October 1, 1984 to September 30, 1986. *The SGEU Disputes Settlement Act* excluded from the collective agreement all positions in the Management and Professional classification plan (the "M & P Plan"). Mr. Hassard indicated that SGEU was concerned that the M & P Plan would have the effect of eroding its membership by moving more positions out-of-scope.

[13] Although the commitment to conduct a scope review remained in Appendix "J" to the collective agreement, it was not until the negotiation of the 1991-1994 agreement that the parties began to discuss the scope review with vigor. Mr. Hassard testified that SGEU wished to end the Government's practice of unilaterally reclassifying positions from the bargaining unit into the M & P Plan. SGEU presented a brief to the Public Service Commission during the 1991-94 round of bargaining and sought greater input into the determination of scope. As a result, the parties amended Article 2 of their collective agreement by adding the following exclusion to the scope clause:

> *2.1.12 ... and such other classes as the parties to this agreement may negotiate from time to time. Criteria for determining scope status shall be as set out in The Trade Union Act. The parties reserve the right to refer scope disputes to the Labour Relations Board for decision.*

[14] Appendix "J" was also amended to read as follows:

> *The criteria for determination of scope status shall be as set out in the Trade Union Act. The parties reserve the right to refer scope disputes to the Labour Relations Board for decision. This review will commence within 90 days of signing of the collective agreement. Positions will be reviewed in the following order:*
>
> - *the nine positions management requested in the current bargaining round;*
>
> - *those positions that were reclassified to the Management and Professional and Management Support Group classifications;*

- *all remaining positions in the Management and Professional and Management Support Group classifications subject to the scope provisions of Article 2.*

[15] The first action taken under the amended Appendix "J" was the establishment of a joint committee to review all new positions in government and to assign them appropriately on scope lines. This process addressed SGEU's concern that the Government was unilaterally assigning positions out-of-scope through the assignment of positions to the M & P Plan. The parties agreed to review whether or not new positions fell within the managerial and confidential exclusions set out in s. 2(f) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"). If they agreed that a position was not within the managerial or confidential exclusion set out in s. 2(f) of the *Act,* it would be assigned to SGEU's bargaining unit and would not be assigned to the M & P Plan.

[16] In July, 1995, the parties agreed in Letter of Understanding #245 to develop a wage scale for new positions where the assessment of the critical factors of knowledge, skill and ability (KSA's) resulted in a rating over and above the current rates in the negotiated wage schedules in SGEU's collective agreement but where the duties did not justify an out-of-scope designation based on the parties' understanding of current Board case law on managerial and confidential exclusions. The parties agreed to use the M & P Plan wages for the positions in question, but all other terms were set by the SGEU collective agreement.

[17] In addition, SGEU and the Government, represented by the Public Service Commission, formed a Joint Scope Review Committee. The Committee developed the criteria for assessing scope, which was based on the tests set by the Board for determining managerial and confidential exclusions. Meetings were held between members of the M & P Plan and the Joint Scope Review Committee to discuss the scope review process and to address concerns raised by members of the M & P Plan.

[18] Around September, 1996 agreement was reached between SGEU and the Government over the appropriate criteria to apply to evaluate the scope of M & P Plan positions. The process of evaluating the scope issue in relation to positions in the M & P Plan began in earnest through departmental committees. The criteria applied by the parties related solely to the issues of managerial or confidential exclusions to the definition of "employee" under s. 2(f) of the *Act.*

[19] The scope review process was in the final stages of completion in February, 1997, when the Professional Institute of the Public Service of Canada (PIPSC) applied to be certified for employees in Levels 1 to 9 of the M & P Plan. As a result of PIPSC's certification application, the Board ordered that the work related to the scope review be put on hold and ordered that no positions be transferred from the M & P Plan to SGEU's bargaining unit until PIPSC's certification application was heard by the Board: see *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 No. 018-97 & 031-97. In later reasons, the Board found, in general terms without deciding the exact parameters of either SGEU's bargaining unit or the bargaining unit proposed by PIPSC, that a bargaining unit composed of members of the M & P Plan could constitute an appropriate bargaining unit: see *Government of Saskatchewan,* [1997] Sask. L.R.B.R. 530, LRB File Nos. 018-97 & 031-97. PIPSC ultimately withdrew its application for certification. SGEU and the Government were able to resume work on the scope review in October, 1998.

[20] Over the course of the scope review, approximately 1700 positions were evaluated by the Joint Scope Review Committee. SGEU and the Government agreed to the inclusion of some 598 positions, and they referred disputes over the scope of 106 positions to Fred Cuddington, who acted as adjudicator in accordance with a Letter of Understanding entered into on March 8, 1999. As a result of the Cuddington adjudication, a further 75 positions were indicated for inclusion in SGEU's bargaining unit, for a total increment of 673 positions.

[21] Members of the M & P Plan opposed the scope review process for a variety of reasons. They expressed concern over issues such as the assignment of seniority for years worked in out-of-scope positions, pay, hours of work, benefit plans and the like. In order to address some of these concerns, SGEU and the Government entered into Letter of Understanding #99-1 on April 13, 1999. This Letter deals with the implementation of the scope review process and determines matters such as hours of work, protection of monthly salary, general wage increases, insured benefit plans, seniority, employee status as permanent or non-permanent, leaves of absence, classification, in-range salary adjustments, salary calculation on reclassification, temporary performance of higher duties, and allocation to the in-scope SGEU classification plan.

[22] In the last collective bargaining agreement negotiated between SGEU and the Government, the scope article was amended to restrict the exclusion of professional engineers to those who are

"required to act as engineers in their position." Engineers-in-training were returned to the bargaining unit by agreement of the parties. The parties also added the following provisions relating to the interpretation to be applied to the exclusion clauses and the commitment to the scope review process:

> *C. The parties agree to interpret scope exclusion clauses on the basis of the requirements of the position and not the association or education of the employee.*
>
> *D. The parties agree to undertake a review of the scope status of all out-of-scope positions and classes in the public service pursuant to LOU 98-8.*

[23] Generally, the significant collective bargaining achievement throughout this period was the commitment of the parties to restrict exclusions to those that are required by the *Act*. SGEU did not accept that all positions classified in the M & P Plan automatically fell outside the definition of "employee" in the *Act*. The scope review process developed a mechanism for joint decision-making on the scope issue and ended the practice of the Government automatically excluding positions from the bargaining unit based on their assignment to the M & P Plan.

[24] Wilfred Loewen, director of classification and compensation at the Public Service Commission, was called as a witness for the Affected Employees. Mr. Loewen explained the classification system in the public service, including the development of the M & P Plan. According to Mr. Loewen, the M & P Plan was implemented in September, 1985 and it consisted of positions that were then excluded from SGEU's bargaining unit. The overall effect of the M & P Plan was to consolidate some 270 different pay levels into a 12 level series. The two categories of employees in the M & P Plan included managerial employees and professional employees.

[25] Positions can be added to the M & P Plan when new positions are created or when the duties of an existing position are changed sufficiently to justify a reclassification to the M & P Plan. Prior to the 1991-94 collective agreement, the Public Service Commission determined the placement of a position by comparing the new position to positions under the old classification plan. Otherwise, there was no assessment of the scope issue. Mr. Loewen agreed that some positions in the M & P Plan do not perform supervisory or managerial functions; he also agreed that professional employees were found in both SGEU's bargaining unit and the M & P Plan. As a result of the 1991-1994 collective agreement, SGEU and the Public Service Commission jointly determined the scope

assignment of new positions, with rare exceptions. SGEU's 14 level pay scale is in the process of being negotiated up to 18 levels with a top salary of approximately $112,000.

[26] Gerald Schmidt is an employee whose position is slated to be included in the bargaining unit. Mr. Schmidt is classified as an ML4 and he has occupied his out-of-scope position since May, 1988. Mr. Schmidt opposes joining SGEU; he views his position as a member of the management team and finds the idea of being placed in-scope as an abhorrent idea. Mr. Schmidt was instrumental in forming the Saskatchewan Government Managers' Association ("SGMA") to oppose the amendment of SGEU's certification Order.

[27] Mr. Schmidt and other members of SGMA conducted a review of the 671 positions that are subject to this application from the Public Service Commission files provided to them pursuant to an earlier Order of this Board. The following table sets out the history of the positions as determined by Mr. Schmidt's file review:

1	Target positions identified by application	671
2	Position number files reviewed	617
3	Out-of-Scope allocated to M & P Plan on September 1, 1985	262
4	Out-of-Scope positions allocated to MSG Plan on April 1, 1987	36
5	Positions created out-of-scope	263
6	Positions which were in-scope and were moved out of scope due to reclassification	262
7	Order in council/labour service positions moved to classified M & P Plan	36
8	Temporary reclassifications	9
9	Positions where scope was changed without reclassification; i.e. classes and positions negotiated out-of-scope and errors	47

[28] Mr. Schmidt noted that there are a number of ways that positions become classified in the M & P Plan. After the plan was implemented, a number of positions were created and assigned to it. The Public Service Commission evaluated each position before assigning it to the M & P Plan.

Second, departments could use existing position numbers and assign them new duties that fell within the M & P Plan. Again, a classification action would be undertaken by the Public Service Commission to assign the position to the M & P Plan. The third mechanism for assigning positions to the M & P Plan was through reclassification actions where an existing position is reclassified by the Public Service Commission as a result of a change in duties assigned to the position. The fourth method was the movement of former positions in a bargaining unit represented by the Canadian Union of Public Employees to the M & P Plan. Labour service employees were similarly brought into the M & P Plan. Some temporary classifications were assigned to the M & P Plan and, in some instances, the only change was in the scope agreement between SGEU and the Government.

[29] Mr. Schmidt acknowledged that there was no way of assessing in most cases whether the duties of the positions assigned to the M & P Plan had previously been performed by in-scope personnel. However, in the 182 positions that were reclassified from the bargaining unit to the M & P Plan, the files indicate that job duties changed from those required of the in-scope position. Mr. Schmidt pointed out that, in 1986-87, forty-eight positions were reclassified from the bargaining unit to the M & P Plan as the result of reorganizations in the correctional centres and at land titles. In 1982-83, a number of clerical positions were moved out-of-scope as a result of changes in the scope clause of the collective agreement.

[30] Edward Wilson testified on behalf of the Geoscientists. He was the engineer-in-training who applied to the Board in 1969 to remove engineers-in-training from SGEU's bargaining unit. Mr. Wilson is a member of the Association of Professional Engineers and Geoscientists of Saskatchewan ("APEGS").

[31] In relation to geoscientists and engineers, Mr. Wilson testified that it is difficult to differentiate between the two disciplines in the area of mining and metallurgical work. He explained that the work of civil engineers, geochemists and geophysicists involves the same topics. Geoscientists were allowed to register as professional engineers from 1930 to 1996. At that time, *The Engineering and Geoscience Professions Act*, S.S. 1996, c. E-9.3, was enacted entitling members to register either as engineers or geoscientists. A number of members of APEGS are registered as both professional engineers and professional geoscientists. In relation to the positions that SGEU and the Government have agreed to include in the bargaining unit, some employees who work as geologists are registered as professional engineers, professional geoscientists or both. Geologists II,

III, IV and V were all excluded from the scope of SGEU's bargaining unit by agreement between the parties. The members of APEGS who are employed as geologists argue that they should be excluded from the bargaining unit as they are indistinguishable from professional engineers. They also seek the exclusion of engineers-in-training who must serve a four year apprenticeship before being eligible to obtain the full status of "professional engineer."

[32] The professions of engineering and geoscience are regulated by *The Engineering and Geoscience Professions Act*, which restricts persons who are not registered with APEGS from practicing as professional engineers and geoscientists.

Relevant Statutory Provisions

[33] The Board's powers to amend certification orders are set out in ss. 5(i), (j) and (k) of the *Act* as follows:

> *5 The board may make orders:*
>
> *(i) rescinding or amending an order or decision of the board made under clause (d), (e), (f), (g) or (h), or amending an order or decision of the board made under clause (a), (b) or (c) in the circumstances set out in clause (j) or (k), notwithstanding that a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;*
>
> *(j) amending an order of the board if:*
>
> *(i) the employer and the trade union agree to the amendment; or*
> *(ii) in the opinion of the board, the amendment is necessary;*
>
> *(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;*

Argument

[34] Mr. Engel, counsel for SGEU, argued that the Government and SGEU bargained collectively with respect to the scope of SGEU's bargaining unit and their agreement should form the basis of an amended order pursuant to s. 5(j) of the *Act.*

[35] Counsel noted that SGEU's bargaining unit is an "all employee" unit with certain historical exceptions. Counsel argued that the certification Orders issued to SGEU include three types of exclusions. The first type of exclusion related to the historical exclusion of groups of government employees who are represented by other bargaining agents, such as telephone workers, power workers and psychiatric hospital workers. The second type of exclusion related to professional employees, including engineers, land surveyors, physicians, dentists and veterinarians, and came about in the late 1950's and early 1960's as a result of recruiting and retention pressures, and an amendment to the *Act,* permitting professional exclusions. The third type of exclusion related to persons who functioned as managerial employees or confidential employees to the extent that they

were not "employees" within the meaning of the *Act* as amended over the history of the certification Order.

[36] SGEU argued that if scope can be negotiated in the first instance to exclude persons from the bargaining unit, there is no reason why it cannot be renegotiated to include those persons in the bargaining unit. Counsel pointed out that s. 5(j) contemplates the negotiation of scope issues when it provides that the Board may amend an order "if the employer and the trade union agree to the amendment." In these circumstances, SGEU argued that support among employees who are added to the bargaining unit is not required. Counsel noted that s. 5(j) does not require evidence of majority support prior to the Board issuing its amending order, as contrasted with ss. 5(a), (b) and (c). SGEU argued that a test of union support is not required under s. 5(j) because of the exclusive status of the union once certified as a result of the combined effect of ss. 3 and 5(a), (b) and (c).

[37] According to SGEU, the policy of the *Act* encourages parties to a collective bargaining agreement to negotiate the scope of their agreement. In support of this proposition, counsel for SGEU referred the Board to *Saskatchewan Government Employees' Union v. Wascana Rehabilitation Centre and Physical Therapists Association,* [1993] 1st Quarter Sask. Labour Rep. 167, LRB File No. 236-92; *Canadian Association of Fire Bomber Pilots and James Stockwell v. Saskatchewan Government Employees' Union and Government of Saskatchewan,* [1993] 1st Quarter Sask. Labour Rep. 202 and [1996] Sask. L.R.B.R. 539, LRB File 164-92; *Interprovincial Concrete Ltd.* (1989), 6 L.A.C. (4th) 137 (Hornung); *Construction and General Workers' Local Union No. 890 v. International Erectors & Riggers,* [1979] Sept, Sask. Labour Rep. 37, LRB File No. 114-79; *Saskatchewan Government Employees' Union v. Saskatchewan Liquor Board,* [1981] May Sask. Labour Rep. 37, LRB File No. 256-80; and *Saskatchewan Liquor Board v. Saskatchewan Government Employees' Union,* [1984] Nov. Sask. Labour Rep. 38, LRB File No. 083-84.

[38] SGEU also argued that the policy of encouraging the negotiation of a scope clause also corresponds to the Board's policy of requiring employers to include new positions in the bargaining unit until the scope of each new position is settled by agreement or by order of the Board. Counsel referred the Board to *CLC, Local 481 v. Saskatchewan Government Employees' Union,* December 13, 1978, LRB File No. 192-78 (unreported); *Saskatchewan Government Employees' Union v. Wascana Rehabilitation Centre,* [1991] 3rd Quarter Sask. Labour Rep. 56, LRB File Nos. 199-90 & 234-90; and *Retail, Wholesale Department Store Union v. Raider Industries, Inc.,* [1996] Sask.

L.R.B.R. 297, LRB File No. 005-96. SGEU argued that had the Government followed the policy set down in these cases, most of the currently excluded positions would have remained in the bargaining unit. The negotiation of the scope review provisions provides a method of implementing the policy set out in cases of this nature, which requires inclusion of positions in the bargaining unit until scope is settled either by agreement or by order of the Board.

[39] SGEU also referred to *Beverage Dispensers and Culinary Workers Local 835 v. Terra Nova Motor Inn,* [1975] 2 S.C.R. 749 (S.C.C.), where Chief Justice Laskin commented that an original certification Order is spent once a collective agreement is entered into between a union and employer. Counsel noted that the Ontario Labour Relations Board relies exclusively on the scope provisions in a collective agreement to determine the scope of a bargaining unit, citing *Burlington Northern Air Freight Canada Ltd.,* [1993] OLRB No. 945; *Cadillac Fairview Corp.*, [1997] OLRB No. 1780; *Knob Hill Farms Limited,* [1995] OLRB No. 992; *Accomodex Franchise Management Inc.*, [1993] OLRB Rep. April 281; *The Bay-Kingston,* [1993] OLRB Rep. December 1350.

[40] Counsel also referred the Board to *Automatic Electric (Canada) Ltd. v. Federation of Telephone Workers of B.C.,* [1976] 2 Canadian LRBR 97 (B.C.L.R.B.); *Telecommunication Workers Union,* [1999] BCLRBD No. 392, *British Colombia Hydro v. O.P.E.I.U. and I.B.E.W.,* [1997] BCLRBD No. 60; *UFCW, Local 373A v. Lucerne Foods Ltd.*, [1997] ALRBD No. 47; *Canadian Overseas Telecommunications Union v. Teleglobe Canada,* [1979] 3 Can LRBR 86; *British Columbia Telephone Company* (1977), 22 di 507; *Empire International Stevedores Ltd.,* [1998] CLRBD No. 20.

[41] SGEU distinguished the facts of this case from the accretion cases such as *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Sunnyland Poultry Products Ltd.* [1993] 3rd Quarter Sask. Labour Rep. 213, LRB File 001-92, where the union proposed that a group of employees, who were not contemplated in the scope of the original order, be included in the amended certification order without regard to their support for or against the union. Counsel argued that the rules that apply to accretion cases determined under s. 5(k) do not apply to applications under s. 5(j)(i). In the alternative, he argued that this case did not involve a change in the intended scope of the bargaining unit which remains an "all employee" unit.

[42] Mr. Barrington-Foote, Q.C., counsel for the Affected Employees, argued that the accretion cases apply to this application and SGEU is required to establish its support among the group to be added by applying the rule set down in the *University of Saskatchewan v. Saskatchewan (Labour Relations Board),* [1978] 2 S.C.R. 834 (S.C.C.), and in *Retail, Wholesale and Department Store Union, Local 496 v. Prince Albert Co-operative Association Ltd.,* [1982] May Sask. Labour Rep. 55, LRB File No. 535-81.

[43] Counsel argued that the M & P Plan represented a continuation of the scope agreement that was contained in pre-1983 collective agreements. Prior to 1983, the parties had agreed to a long list of excluded positions. The M & P Plan classified these positions into two series – management and professional – and assigned them to one of 12 levels in the management series or one of 9 levels in the professional series. The legislation enacting the 1994-1996 agreement referred to the M & P Plan in the list of excluded positions set forth in the collective agreement. Counsel argued that the M & P Plan merely reclassified existing out-of-scope positions and noted the evidence of Mr. Loewen that the Public Service Commission continued to refer to the job specifications that existed prior to the creation of the M & P Plan in order to assess whether a new position would be included in the out-of-scope M & P Plan. The evidence suggested that only those positions that formerly would be excluded from the bargaining unit were excluded under the M & P Plan. It was noted that SGEU had no right to bargain issues relating to the classification of positions as that matter is reserved for the Public Service Commission under *The Public Service Act,* S.S. 1998, c.P-42.

[44] Counsel also noted that, although the definition of "employee" was changed in the *Act* in 1983 to exclude "any person who is an integral part of the employer's management," there is no evidence to establish that this change impacted on the number of positions excluded through assignment to the M & P Plan. Under the old classification plan, positions were assigned to the bargaining unit by agreement between SGEU and the Government. The agreements were often incorporated into certification Orders.

[45] Counsel argued that the exclusions agreed to by SGEU included many positions in the policy, technical, professional and supervisory categories that were not necessarily excluded under the definition of "employee" in the *Act.* Counsel argued that these positions were excluded on the basis of "appropriateness."

[46] Counsel pointed out that SGEU's claim that it has a "wall-to-wall" bargaining unit was refuted in the Board's decision in *Canadian Association of Fire Bomber Pilots, supra.* Various groups of employees have always been excluded from SGEU's certification Order. Counsel argued that the list of excluded classifications was drawn on a much different basis than would have occurred had the parties referred scope issues to the Board. For instance, positions falling within the professional classification in the M & P Plan do not have line managerial authority, but are classified according to professional/technical expertise. Counsel concluded that the positions affected by this application were excluded from the bargaining unit by agreement between SGEU and the Government and by Order of the Board, and not by any improper activity by the Government.

[47] Counsel argued that the positions cannot be brought back into the bargaining unit without evidence of support from the employees who are affected by the application. Currently, the terms and conditions of employment for the M & P Plan members are set by *The Public Service Act* and *Regulations* to include matters like performance pay, unregulated hours of work, different benefit plans, different pay scales, and the like compared to those negotiated by SGEU. Affected employees will undergo many changes in their employment which should entitle them to vote on the issue of their inclusion in the bargaining unit.

[48] In support of this position, counsel referred the Board to *University of Saskatchewan, supra; Prince Albert Co-operative Association Ltd., supra; Sunnyland Poultry Products Ltd., supra; Saskatchewan Government Employees Union v. Wascana Rehabilitation Centre, supra; Canadian Association of Fire Bomber Pilots, supra; Service Employees' International Union v. Shaunavon Union Hospital Board,* [1993] 2nd Quarter Sask. Labour Rep. 129, LRB File No. 295-91; *New Brunswick Broadcasting Co.* (1990), 75 di 101; *CanWest Pacific Television Inc.* (1992), 82 di 54 (CLRB).

[49] In relation to the issue of the negotiated scope agreement, counsel argued that, although the Board will normally respect agreements reached between employers and unions with respect to the scope issue, the Board retains an overriding authority to determine the appropriateness of the bargaining unit and the employees' rights to representation. Counsel argued that the rights set out in s. 3 of the *Act* should be protected in the context of any accretion application citing the Canada Labour Relations Board decision in *New Brunswick Broadcasting Co., supra.*

[50] Mr. Wilson, Q.C., appearing on behalf of the Geoscientists, including engineers-in-training, noted that engineers were excluded by Board Order in 1957 while engineers-in-training were excluded by Order in 1969. Geologists II to V have always been excluded through collective bargaining while Geologist I positions were included in the scope of the bargaining unit.

[51] The Geoscientists argued that the Legislature has established a framework for regulating the practice of professional engineers and professional geoscientists. The decision as to whether a person is engaged in engineering or geoscience is one that is assigned to APEGS, and, on this theory, is not one that can be determined by the Government and SGEU, or by this Board. In support of this branch of their arguments, the Geoscientists relied on *St. Anne Nackawic Pulp and Paper Co. Ltd. v. Canadian Paperworkers Union, Local 219,* [1986] 1 S.C.R. 704 (S.C.C.); *Weber v. Ontario Hydro,* [1995] 2 S.C.R. 929 (S.C.C.) and *New Brunswick v. O'Leary,* [1995] 2 S.C.R. 967 (S.C.C.). Counsel argued that the proposed exclusion of only those employees who are required by their positions to act as professional engineers is improper because it would require the parties to the Order or the Board to determine whether a person is required to act in his or her position as a professional engineer.

[52] The Geoscientists also supported the arguments made by counsel for the Affected Employees. They argued that SGEU does not have a "wall-to-wall" agreement, nor is there any longstanding Board policy that SGEU should represent all government employees. Counsel referred the Board to *Professional Institute of the Public Service of Canada v. Government of Saskatchewan and Saskatchewan Government Employees' Union,* [1997] Sask. L.R.B.R. 530, LRB File Nos. 018-97 & 031-97. Counsel noted that SGEU has never represented any of the positions affected by this application. Given this state of affairs, the normal accretion rules apply and SGEU is required to obtain support from the group to be added to the bargaining unit. The Geologists relied on the same cases referred to by Mr. Barrington-Foote, Q.C. and to *General Teamsters v. Brinks Canada Limited,* February 27, 1996 (CLRB)*; Employees of the Regional Comptroller v. CNR* (1975), 75 CLLC 168,158 (CLRB); *I.B.E.W. v. Olivetti Canada Ltd.,* [1975] 1 Canadian L.R.B.R. 60 (B.C.L.R.B.).

[53] Counsel also argued that the British Columbia Labour Relations Board in *B.C. Hydro v. OPEIU,* [1997] B.C.L.R.B.D. No. 60, required proof of support among the group of employees to be added to a bargaining unit even where the employer agreed to the inclusion.

[54] Finally, counsel for the Geologists argued that it does not make labour relations sense to include engineers-in-training, while excluding engineers, and similarly, to include geologists while excluding engineers. All classifications have interests in common, perform similar work and are interchangeable to a high degree.

Analysis

[55] This application raises the question of the extent to which a union and employer can agree to alter the scope of the union's bargaining unit. SGEU and the Government do not have a history of referring scope issues to the Board for resolution and instead, have used the bargaining process to delineate the line between out-of-scope management and in-scope. In addition, over the years, the Board has ordered the exclusion of various groups of employees from the bargaining unit.

[56] The last amending Order issued by the Board was issued on October 21, 1987. The Order applies to "all employees of the Executive Branch of Government, all employees of all Corporations, Boards, Commissions and agencies of the Government whose employees are subject to *The Public Service Act,* and employees of those agencies set forth in schedules to the Order." The exclusions are extensive and they can be categorized as follows:

(a) other bargaining units (eg. Saskatchewan Cancer Foundation);
(b) general managerial exclusions (permanent heads, members of boards and commissions);
(c) positions excluded from *The Public Service Act* and Orders-in-Council;
(d) Board ordered exclusions – engineers, engineers-in-training, veterinarians, physical therapists, land surveyors;
(e) positions that may be excluded by agreement and are not enumerated; and
(f) positions excluded and enumerated in the Order.

[57] The last collective bargaining agreement (October 1, 1997 to September 30, 2000) contains a similar list of exclusions with the exception of the managerial exclusions, which are listed as "employees in positions currently assigned to the Management and Professional classes."

[58] The scope issue between SGEU and the Government was complicated by the legislated exclusion of the M & P Plan in *The SGEU Dispute Settlement Act*. Under *The Public Service Act,* the Public Service Commission is required to establish and implement class plans. As a result of the wholesale exclusion of the M & P Plan positions from the scope of the collective agreement, the assignment of positions to the M & P Plan by the Public Service Commission effectively determined the scope issue. Mr. Loewen testified that the Public Service Commission compared all newly created positions to the specifications for positions that previously had been excluded by agreement between the parties. By analogy with prior exclusions, new positions came to be assigned to the out-of-scope M & P Plan. However, no detailed assessment of the factors normally relied on to determine the issues under s. 2(f) of the Act was undertaken.

[59] This environment must be contrasted with the environment imposed on other employers. In *CLC, Local 481 v. Saskatchewan Government Employees' Associations, supra*, the Board commented on the appropriateness of unilaterally removing a classification from the scope of a bargaining unit by an employer as follows:

> *The employer reclassified a position and then took the position that it should be out of the scope of both the Certification Order and the Collective Agreement. The parties did bargain over the position and when agreement was not reached the Union suggested to the employer that it should apply to the Labour Relations Board to have the position excluded from Certification Order. The employer let the open period defined by Section 5(k) of The Trade Union Act pass by without making such application. Negotiations have now ended and the employer takes the position that the new classification is out of scope.*
> *It has been the policy of the Board, in cases of all employee units, where a new classification is created, to put the onus upon the employer to satisfy the Board that the occupant of the new classification is not an employee within the meaning of Section 2(f)(i) of The Trade Union Act and therefore should be excluded from the unit. The proper procedure for an employer in such circumstances is, if it cannot obtain Union agreement, to apply to the Board for an Order amending the Certification Order to exclude the new classification. The employer did not do so during the open period. Therefore its obligation to bargain with the Union with respect to whether or not the position should be in scope remains and the refusal of*

> *the employer to continue such negotiations constitutes an unfair labour practice. The Board makes no findings as to whether or not the new classification should be in scope or out of scope. Unfair labour practice proceedings before the Board are not a proper framework for determining such questions. There will be an Order finding the employer guilty of an unfair labour practice.*
>
> *(emphasis added)*

[60] Later, in *Saskatchewan Government Employees' Union v. Wascana Rehabilitation Centre, supra* , the Board directed that all new positions be included in an "all employee" bargaining unit until they are excluded from the bargaining unit by order of the Board or agreement of the parties. Unilateral placement of employees into one bargaining unit, as opposed to another bargaining unit, in a multi-bargaining unit setting is also discouraged: see *Canadian Union of Public Employees v. University of Saskatchewan and Administrative and Supervisory Personnel Association,* [2000] Sask. L.R.B.R. 83, LRB File No. 218-98.

[61] SGEU's efforts to bargain the scope question from 1982 onward were aimed at gaining some input into scope decisions. SGEU's position on the need for co-determination of scope issues was consistent with the rules established by the *Act* and Board policy. In the context of its large bargaining unit, the most practical method of co-determining scope issues was through the collective bargaining process. Although the matter could have been referred to the Board and dealt with on a job-by-job basis, the approach taken by SGEU and the Government to evaluate and assess the M & P Plan positions was more thorough and detailed in its analysis than would likely have occurred had the positions been referred to the Board for determination.

[62] The main question on this application is whether the parameters of the bargaining unit can be changed without any indication of support from the employees who are affected by the application.

[63] This issue was most recently addressed in *Saskatchewan Government and General Employees Union v. Saskatchewan Liquor and Gaming Authority et al.,* [2001] Sask. L.R.B.R. 152, LRB File No. 037-95 (the "*SLGA*" case). In its decision, the Board reviewed many of the cases cited by the Affected Employees and the Geoscientists in this case, and held as follows at 169:

Following the approach set out in University of Saskatchewan, Sherwood Co-operative Association Limited and Teleglobe, we would first ask if the group of employees to be added to the existing bargaining unit are covered by the intended scope of the certification Order. If the answer is yes, then they may be added without canvassing SGEU's support in the group of employees who will be included in the bargaining unit. If the group of employees to be added to the existing bargaining unit are not covered by the intended scope of the certification Order, then SGEU is required to establish a double majority – that is, it must establish its support among the employees to be added to the bargaining unit, as well as in the existing bargaining unit. Employees who were excluded from the original bargaining unit on the appropriateness standard fall within the "double majority" rule.

In the present case, it is clear that liquor store managers were included within the intended scope of the original "all employee" Order. They were covered by the certification Order and the collective agreements negotiated in relation to that Order until the Board ordered the exclusion of their positions from the bargaining unit as a result of a change in the statutory definition of "employee" under the Act. There was no determination made by the Board that it was inappropriate to exclude liquor store managers I, II and III's from the bargaining unit as a group of "employees."

[64] In the present case, the scope review has been a consensual undertaking between SGEU and the Government, unlike the application made in the *SLGA* case. Nevertheless, it would seem to us that similar principles can be applied.

[65] As the Board explained in the *SLGA* case, exclusions to bargaining units may take three basic forms. Persons can be excluded because they do not fall within the definition of "employee" as set out in s. 2(f) of the *Act* – that is, they exercise managerial authority or perform managerial functions, or they regularly act in a confidential capacity with respect to the employer's industrial relations. Persons may also be excluded on grounds of "appropriateness" – that is, they are employees, but they are not included in the bargaining unit because the Board has determined under s. 5(a) that their inclusion in the bargaining unit is not "appropriate." The last type of exclusion relates to middle

management personnel who may be excluded under a combination of ss. 2(f) and 5(a) – primarily relating to the labour relations conflict they would experience if placed in the primary bargaining unit. Except in rare cases, the middle management positions are not distinguishable from management exclusions.

[66] The *SLGA* case established that a bargaining unit is not substantially altered when employees are added to the bargaining unit as a result of a change in the approach to managerial and confidential exclusions. Such employees are captured by the "all employee" description once it is determined that they are "employees" under s. 2(f). As explained in the *SGLA* case, the Board is not required to enumerate managerial and confidential exclusions in a certification order because, by definition, persons who are not "employees" are not entitled to bargain collectively. However, the Board has adopted a practice of enumerating such excluded positions in order to assess the original support. At the time of certification, a complete list of employees must be established in order to determine majority support which, by necessity requires a listing and identification of those persons who are not "employees" and fall outside the bargaining unit.

[67] In addition, this Board has always been of the view that parties are free to negotiate with respect to scope. Chairman Sherstobitoff set out the policy reasons for encouraging negotiations over scope in the following terms in *Saskatchewan Government Employees Association v. Saskatchewan Liquor Board, supra*, LRB File No. 256-80, at 39 and 40:

> *There is before the Board a situation where a certification order of the Board has, in effect, been amended by putting certain persons out of scope through the collective bargaining process and the collective agreements reached thereby. The policy of this Board has been to accept such arrangements since the purpose of the legislation is to facilitate collective bargaining. The Board adopts the description of the effect of a certification order given by Chief Justice Laskin in his dissenting decision in Beverage Dispensers and Culinary Workers Union Local 835 v. Terra Nova Motor Inn (1975), 2 S.C.R. 749 at 752, 753:*
>
> > *Certification of a trade union as bargaining agent qualifies it to compel an employer to bargain collectively with it on behalf of employees for whom the union has been so certified. Those*

employees, collectively, form the "unit" in respect of which collective bargaining is compelled. In The Labour Relations Act, R.S.B.C. 1960, c. 205, "unit" is defined simply as meaning a "group of employees", sensibly so because what is central to the certification process is ensuring (as s. 10(1) of the Act specifies) that the "unit" is appropriate for collective bargaining. If a collective agreement results from the bargaining, it may cover additional or fewer classes of employees, as the parties may mutually decide; but, of course, each may insist that the bargaining be confined on behalf of, or be in relation to only that unit for which certification was obtained. Certainly, once a collective agreement has been negotiated, with its specification of employees covered thereby, they become the work force, whether in the same or larger numbers (according to business exigencies) around which the administration of the collective agreement proceeds; and subsequent renewal collective agreements may, as a result of employer business developments or union importunities, or both, vary the job categories which those agreements cover.

It must be kept in mind that the specification of a unit is generally by way of designating the job classifications or work categories in which the employees to be represented in collective bargaining are employed. Conceivably, there may be no work categories, but only a specification of "all employees of an employer", excluding those in a managerial capacity who may not be included in a bargaining unit. At the risk of being unnecessarily obvious, I must point out that the taking of a count of employees in order to satisfy certification requirements of proof that a majority are members of the applicant union does not mean that the certification and the union's status as bargaining agent continue to depend on the very employees remaining in the employer's employ. Fixing the number of employees as of a particular time to enable a count to be made does not mean that the certificate which a union may obtain on that

> *basis is tied to the identical employees or to that number. The subsequent enlargement or contraction of the work force does not alone affect the validity of the certification and indeed, once a collective agreement is negotiated the certificate has served its purpose and is, for all practical purposes, spent.*
>
> *There are two possible circumstances where the Board might refuse to recognize the definition of a bargaining unit reached by the parties in a collective bargaining agreement which differs from the bargaining unit defined in a Board order. The first is where the Board finds that the unit agreed to by the parties is not an appropriate unit. While, in the opinion of the Board, the unit agreed to in the collective bargaining agreement in this case may not be the most appropriate unit, the Board cannot say that it is not an appropriate unit. The second area where the Board might not recognize a unit voluntarily agreed to by the parties and differing from the unit defined by a Board order, is where the agreed unit violates the right of employees to be represented by a union within the unit defined by the Board. This objection would have to be raised by employees who felt their right to have representation by the union was violated. There is no suggestion that such circumstances prevail here.*

[68] "Appropriateness" may come into play if the parties to a collective agreement propose to add to or exclude from the bargaining unit groups of employees whom the Board has determined are either appropriately excluded from the bargaining unit or appropriately included in the bargaining unit. However, the policy set out in the *Saskatchewan Liquor Board* case, *supra,* would permit the scope line – or the line that separates employees from those who are not employees – to be the subject of negotiation. Overall, on an amendment application, the question of whether support evidence is required or not from the group to be included in the bargaining unit involves an assessment of whether the position would be included in the intended scope of the bargaining unit if it was found to fall within the definition of "employee" as set out in s. 2(f).

[69] This test was set out by the Board in *Retail, Wholesale and Department Store Union v. Sherwood Co-operative Association Limited,* unreported, November 4, 1982, LRB File No. 332-82

where the Board held that the applicant trade union was not required to file evidence of support from a group of employees it proposed to add to its bargaining unit for the following reasons:

> *In the opinion of the Board neither [Retail, Wholesale and Department Store Union, Local 496 and Prince Albert Co-operative Association Limited and University of Saskatchewan v. Canadian Union of Public Employees, Local 1975 (1978), 2 SCR 834)] apply. In each of them the effect of the amendment would have been to include employees who did not fall into the ambit of the certification order. This is not the case here. In this case, in the thirty-five years that have passed since the issue of the certification order, the bargaining unit has expanded substantially and the employees who would be added by the amendment are employees who would have fallen within the scope of the original certification order if they had not been excluded by collective bargaining between the parties or by oversight.*

[60] In this case, we must determine whether the positions in question on this application were formerly excluded on the ground of their managerial and confidential status or on the ground of appropriateness.

[61] In our view, positions in the M & P Plan were excluded on the grounds that they were not "employees" within the meaning of the *Act,* with one exception that we will discuss later. We come to this conclusion after considering the history of the certification Orders, the history of collective bargaining and previous Board decisions.

[62] The history of the certification Orders demonstrates that the list of excluded positions has evolved over the course of SGEU's certification Orders from a small list of managerial personnel to a large list of excluded positions that, on their face, appear to represent the managerial employees of executive government. The collective agreement lists the exclusions in a slightly different fashion than the certification Order by referring to the M & P Plan. When the document creating the M & P Plan is consulted, it describes the two categories covered by the M & P Plan in the following terms:

> *The Management and Professional Classification Plan consists of two broad categories:*

> *A Management Category which consists of 12 levels and which is comprised of positions which have, as their primary purpose, a responsibility and accountability for exercising line authority and for integrating various managerial functions and authorities.*
>
> *A Professional Category which consists of 9 levels and which is comprised of positions which have, as their primary purpose, a responsibility and accountability for utilizing a professional expertise in assisting agencies in the management process, including planning, development, implementation and integration of programs, policies, strategies and objectives.*

[63] In our view, it is significant to note that the M & P Plan came into being around the time that the definition of "employee" was changed in the *Act* to exclude "any person who is an integral part of his employer's management" (S.S. 1983, c. 81). In *Liquor Board of Saskatchewan, supra*, the Board described the effect of this amendment as follows at 40:

> *The addition of the words "any person who is an integral part of his employer's management" enlarged the group of individuals who, while not previously excluded by the managerial and confidential exclusions, function as part of or are identified with a cohesive management group to the extent that it would be inappropriate to include them with employees in the bargaining unit.*

[64] The Affected Employees argued that the professional category in the M & P Plan contained positions that clearly were not managerial or confidential in nature. From this assessment, it was argued that the exclusion must have been made by the Board on the basis of "appropriateness."

[65] In our view, however, the description of the professional category seemed designed to exclude those persons whose work was not strictly managerial in function, but would fall instead within the broad parameters of the "integral part of management" test. The main test for the professional category described the professional category as requiring "a responsibility and accountability for utilizing a professional expertise in assisting agencies in the management process."

At the time of the creation of the M & P Plan, the exclusion of the professional category was at least consistent with the exclusions then permitted under s. 2(f).

[66] It is not always possible to know with certainty the grounds on which positions were excluded unless the Board has actually heard evidence and ruled on the inclusion or exclusion of positions from the bargaining unit. There is always a great deal of give and take in the design of bargaining units, both at the time of certification and on amendment applications. In many amendment applications, the Board simply rubber stamps agreements reached between parties during collective bargaining. This is not to say that the Board does not take its overall duty for determining who is and is not an "employee" seriously; however, it does recognize the fluidity both of the definition of "employee" and the application of the definition to the facts of each work place.

[67] In this case, the method of enumerating the positions and up-dating them in successive certification Orders, their listing in the collective agreement and the titles used, all point to an understanding that the enumerated list referred to managerial and confidential employees. The list is typical of the types of descriptions used by the Board to define managerial and confidential positions. The line drawn between "employees" and "management" may not be the same line that would be drawn today by the Board. However, we do not draw the conclusion that positions were excluded on the basis of the appropriateness test simply on the basis that the demarcation line drawn by agreement between the parties was broader in scope on the managerial side than the Board would order today. The Board prefers and encourages the parties to a collective agreement to negotiate scope issues and, given this preference, the line drawn by the parties must be accepted unless there are other indications that the exclusion of positions relates to an issue of appropriateness.

[68] The enumerated positions may be contrasted as well with other exclusions in the certification order and collective agreement that do relate to questions of appropriateness under s. 5(a) of the *Act,* such as the Board's decisions to exclude engineers, engineers-in-training, veterinarians, physical therapists, and land surveyors. Although there is some overlap between the two types of exclusions (some excluded professionals are also managers), the certification Orders and the collective agreement identify the excluded professional groups separate and apart from the enumerated list of positions. Previous Board decisions also make it clear that the professional groups were excluded on the basis of the appropriateness test, as it was formulated at the time. As a result, we find that SGEU and the Government may agree to alter the list of excluded positions, the effect of which is to include

the 673 positions in the bargaining unit. The positions were originally excluded on grounds that they performed functions of a managerial or confidential basis in relation to the Government's labour relations. The parties now agree that the positions are "employees" under the *Act,* and, as such, they fall properly within the intended scope of the certification Order. Following the principles set out in the *SLGA* case, *supra,* support evidence from this group is not required as the additions do not vary the intended scope of the bargaining unit.

[69] There is one exception to this decision. The Board did exclude engineers-in-training on "appropriateness" grounds in its earlier decision [December 3, 1969]. In this situation, as there is no evidence of support from the group of engineers-in-training, we will not order their inclusion in the bargaining unit.

[70] We are also left with the anomaly of the continued exclusion of engineers and the proposed inclusion of geoscientists. The Geoscientist's evidence convinced the Board that there is no rational distinction to be drawn between engineers and geoscientists in relation to their job functions. It appears to be left to the luck of the draw as to whether a position will be excluded under the engineering ruling. In our view, the matter can be resolved by wording the exclusion in the following terms: "positions whose job functions require employees to be registered as engineers or geoscientists in accordance with *The Engineering and Geoscience Professions Act.*" This wording is intended to focus attention on the job functions actually performed by individuals, and not the simple fact of registration as an engineer or geoscientist. While this exclusion extends the former engineering exclusion to some extent, in our view, it is consistent with the intent of the earlier exclusion.

[71] The Board grants the amendment requested by the co-applicants with the exceptions noted above.

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1975, Applicant v CAMPUS COVE BILLIARDS & ENTERTAINMENT INC. o/a CAMPUS COVE, Respondent

LRB File No. 275-00; April 6, 2001
Vice-Chairperson, James Seibel; Members: Ron Asher and Gerry Caudle

For the Applicant: Jim Holmes and Glenn Ross
For the Respondent: Jeff Sander and Janie Hoffman

Certification – Representation Vote – Management interference – Former manager involved in obtaining support for union – No evidence that former manager solicited employees' support for union or acted as employer's agent or dominated or interfered in union's formation – Board declines to order representation vote under circumstances of case.

Certification – Membership – Evidence – Group of employees file letter with Board on day before hearing requesting that application for certification be discontinued – Board declines to depart from its longstanding policy and exercises its discretion pursuant to s. 10 of *The Trade Union Act* to reject evidence of lack of support filed after application for certification.

***The Trade Union Act*, ss. 5(a), 5(b), 5(c) and 10**

REASONS FOR DECISION

Background

[1] James Seibel, Vice-Chairperson: Canadian Union of Public Employees, Local 1975 (the "Union") has applied to be designated as the bargaining agent for a group of employees of Campus Cove Billiards & Entertainment Inc. operating as Campus Cove (the "Employer"), in the Place Riel Centre at the University of Saskatchewan in Saskatoon. The Union represents a large unit of employees at the University. The application filed November 1, 2000 proposes that a bargaining unit of all employees of the Employer except the manager is appropriate. The Employer, an Alberta company registered extra-provincially in Saskatchewan, which operates a games and amusement centre in Place Riel Centre, opposes the application alleging that the manager was a key organizer in garnering employee support for the application. The statement of employment lists nine employees including the manager. The Union does not take issue with the statement of employment.

[2] The application was heard on January 12, 2001. The day prior to the hearing, the Board received a letter purporting to be signed by six employees of the Employer requesting that the application be "discontinued" as they no longer wished to be unionized.

Evidence

[3] Glenn Ross is an employee of the University of Saskatchewan and, until recently, was the president of the local Union. He testified that, one evening in early July, 2000, he received a telephone call from Lisa Schiffman, who identified herself as a supervisor at the Employer's place of business seeking information about joining the Union. Mr. Ross said he explained the organizing process and a short time later dropped off membership cards to be used in obtaining support. A few days, later a number of completed cards, witnessed by Ms. Schiffman, were returned to the Union's office. Mr. Ross said he consulted with Jim Holmes, a Union representative, as he was concerned about Ms. Schiffman's involvement in obtaining support for the Union, given her status as employee supervisor. Out of caution they decided that the membership support cards should not be used to apply for certification. He obtained the name of a different contact person among the Employer's employees and provided them with another set of blank membership cards near the end of July, 2000.

[4] Mr. Ross said he heard nothing further about the Employer's employees until October, 2000, when he was approached by Ms. Schiffman while conducting an orientation seminar for new unionized employees of the University. She advised him that she was no longer employed by the Employer and was now an employee of the University of Saskatchewan. She went on to add that she was having a social gathering at her residence that weekend including a number of employees of the Employer. Ms. Schiffman agreed to see whether the employees were still interested in joining the Union and Mr. Ross gave her a number of blank membership cards. Signed cards, all dated in October, 2000, were returned to Mr. Ross.

[5] Janie Hoffman has been the Employer's manager since July 10, 2000 replacing Lisa Schiffman whose last day as manager was July 13, 2000.

Statutory Provisions

[6] Relevant provisions of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the "*Act*") include the following:

> *2 In this Act:*
>
> *(e) "company dominated organization" means a labour organization, the formation or administration of which an employer or employer's agent has dominated or interfered with or to which an employer or employer's agent has contributed financial or other support, except as permitted by this Act;*
>
> . . .
>
> *(h) "employer's agent" means:*
>
> *(i) a person or association acting on behalf of an employer;*
>
> *(ii) any officer, official, foreman or other representative or employee of an employer acting in any way on behalf of an employer with respect to the hiring or discharging or any of the terms or conditions of employment of the employees of the employer;*
>
> . . .
>
> *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.*

Argument

[7] Mr. Holmes, on behalf of the Union, argued that the evidence disclosed that in October, 2000 when Ms. Schiffman was involved in obtaining evidence of support for the Union, she was no longer employed by the Employer. Rather she was an employee of the University of Saskatchewan and a Union member herself. Obviously, he said, she was not acting on behalf of the Employer at the time and was not an employer's agent within the meaning of s. 2(h) of the *Act*. In any event, Mr. Holmes argued, there was no evidence that her involvement in organizing the employees of the Employer constituted domination or interference in the formation of the Union within the meaning of s. 2(e) of the *Act*. In support of his argument, Mr. Holmes referred to the decisions of the Board in *Canadian Union of Public Employees, Local 1902 v. Bo-Peep Co-operative Day Care Centre*, [1979] Feb. Sask. Labour Rep. 44, LRB File No. 189-78, and *Saskatchewan Government Employees Union v. Regina Native Women's Association,* [1986] July Sask. Labour Rep. 29, LRB File Nos. 335-85 to 342-85.

[8] On behalf of the Employer, Mr. Sander argued Ms. Schiffman was the Employer's manager at the time she originally solicited the employees' support for the Union, but admitted that she had not done so on behalf of the Employer or on its instruction. He said that combined with the sentiment expressed in the letter from some of the employees to the Board of January 11, 2001, the Board should order a vote.

Analysis and Decision

[9] The evidence clearly establishes that the cards evidencing support for the application were signed in October, 2000, several months after Ms. Schiffman left the employ of the Employer. In any event, there is no direct evidence that Ms. Schiffman solicited the employees' support for the Union in October. There is no evidence that leads us to draw an inference that the support evidence was signed in October as a result of Ms. Schiffman exerting influence as a former manager of the Employer. There is no evidence that Ms. Schiffman is an employer's agent or dominated or interfered in the formation of the Union within the meaning of the *Act*.

[10] The Board also finds that there is nothing about the present case that would lead us to depart from the long-standing policy of the Board to exercise its discretion pursuant to s. 10 of the *Act* to reject as evidence or decline to afford any weight to the letter of January 11, 2001 which was received long after the application was filed.

[11] The Union has filed evidence of support for the application on behalf of a majority of the employees. The application for certification is granted and an Order will issue accordingly.

CHAUFFEURS, TEAMSTERS AND HELPERS UNION, LOCAL 395, Applicant v. INCONVENIENCE PRODUCTIONS INC., REGINA MOTION PICTURE VIDEO & SOUND LTD. o/a MINDS EYE PICTURES, and TRIMARK PICTURES, INC., Respondents, and INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES AND CANADA, LOCAL 295, Intervenor

LRB File No. 144-98; April 9, 2001
Vice-Chairperson, James Seibel; Members: Marianne Hodgson and Gloria Cymbalisty

For the Applicant: Angela Zborosky
For the Respondents: Brian Kenny
For the Intervenor: Tom Waller, Q.C.
For Trimark Pictures: N/A

Bargaining unit – Appropriate bargaining unit – Film industry – Board reviews characteristics of film industry and notes similarities between film industry and construction industry – Board sets guidelines for organizing in film industry.

Bargaining unit – Appropriate bargaining unit – Film industry – Industry has historically been organized under broad craft lines – Board is reluctant to upset this rationalization of industry labour and concludes that to do so would destabilize industry – Board concludes that craft unit composed of technicians and transportation craft unit are both appropriate bargaining units.

Voluntary recognition – Status – Union with voluntary recognition argues that subsequent certification application by second union barred as not made during "open period" - Section 33(5) of *The Trade Union Act* does not constitute bar to certification application relating to unit of employees represented by uncertified bargaining agent.

***The Trade Union Act,* ss. 2(a), 3, 5(a), 5(b), 5(c) and 33(5)**

REASONS FOR DECISION

Background

[1] James Seibel, Vice-Chairperson: The Chauffeurs, Teamsters and Helpers Union, Local 395 ("Teamsters 395") has applied, 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 certified bargaining agent for a group of employees in the production of a motion picture titled *Inconvenienced.* At the commencement of the hearing before the Board, Teamsters 395 applied to amend the proposed bargaining unit, without objection by the other parties, to include:

"all employees employed by Inconvenience Productions Inc., Minds Eye Pictures, Regina Motion Picture Video and Sound Ltd., and/or Trimark Corporation, in the Province of Saskatchewan, who come within the jurisdiction of the International Brotherhood of Teamsters of America, namely all employees in the transportation department and related services namely boat wranglers, animal trainers and wrangler[1]...."

[2] It was estimated there were 11 employees in the proposed bargaining unit.

[3] International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada, Local 295 ("IATSE 295") filed a notice of intervention to the application which alleged that the unit proposed by Teamsters 395 was not an appropriate unit. IATSE 295 included its own application for certification of a more comprehensive proposed bargaining unit comprising "all theatrical stage employees, moving picture technicians, artists and allied crafts..." with 59 listed job classifications including: transportation co-ordinator, driver captain, and drivers of all license classes. The latter positions are within the description of the unit proposed by Teamsters 395.

[4] IATSE 295 estimated 45 employees in its proposed unit and alleged that they were either existing members of IATSE 295 subject to a voluntary recognition agreement between itself and the production company, Inconvenience Productions Inc., ("Inconvenience"), effective June 1, 1998, or had agreed in writing to be bound by the collective agreement if permitted to work by IATSE 295. However, subsequent to the hearing, the Saskatchewan District Council of the Directors Guild of Canada ("the Directors Guild") contacted the Board Registrar to advise that it desired to intervene in the application. The Directors Guild stated that it too had a voluntary recognition collective agreement with Inconvenience, and that pursuant to an agreement it had with IATSE 295 dated August 1, 1997 ("the IATSE/Directors Guild agreement") it had jurisdiction over three of the classifications that IATSE 295 claimed to represent, namely, production coordinator, production secretary and production assistant. During the hearing, the existence of an agreement designed to minimize jurisdictional conflict between IATSE 295 and the Directors Guild had been referred to

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[1] In the film production industry, and in the present case, the term "wrangler" denotes a person who transports, handles or trains livestock, domestic or wild animals.

incidentally, but neither was it tendered in evidence nor was there evidence of its specific contents. The Director's Guild sought to reopen the hearing and present evidence and argument with respect to the issue. The Board Registrar wrote to the parties advising of the position taken by the Directors Guild; the only reply received was from counsel for Teamsters 395 advising of her opinion that it did not affect the application by her client.

[5] The reply filed on behalf of Inconvenience stated that it voluntarily recognized IATSE 295 as the bargaining agent for the employees in the proposed unit described in the notice of intervention, and had a collective agreement with IATSE 295. Inconvenience also reiterated the allegation by IATSE 295 that the unit proposed by Teamsters 395 was not an appropriate unit. The first statement of employment filed on behalf of Inconvenience listed 17 persons in the unit description proposed by Teamsters 395, but alleged that the transportation coordinator and transportation captain should be excluded as they are not employees within the meaning of the *Act*. All of the employees listed are drivers. None are described as animal trainers, wranglers or boat wranglers.

[6] In an amended statement of employment filed in May, 1999, Inconvenience listed 39 employees as being in the unit proposed by Teamsters 395. Inconvenience stated that many persons omitted from the first statement were required to drive a vehicle as an integral part of their job duties[2]. The amended statement lists no exclusions, and includes the transportation coordinator and transportation captain positions for the purpose of determining support. At the hearing before the Board, counsel for Teamsters 395 and Inconvenience agreed that they are properly included in the proposed bargaining unit description. Teamsters 395 has filed evidence of majority support for its application based on the first statement of employment.

[7] The amended statement of employment omitted the names of two persons originally included as drivers on the first statement – Fred Moroz and Ryan Moroz; Teamsters 395 maintained that they should be included in the proposed unit for the purposes of determining support. If the amended

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[2] In addition to employees occupying the classifications of transport co-ordinator (1), transport captain (1), transport captain trainee (1) and driver (12), the amended statement of employment lists employees in the following classifications: third assistant director (2); third assistant director trainee (1); second assistant director (1); director's assistant trainee (1); construction co-ordinator (1); head carpenter (1); carpenter (1); location manager (1); locations production assistant (4); set production assistant (1); camera operator (1); stunt co-ordinator (1); scenic painter (1); best boy electrics (1); head wardrobe (1); art director (1); production designer (1); craft service (1); craft service assistant (1); and, cable puller (1). The number of persons said to be in each classification is in parentheses.

statement of employment were to be taken as accurate, Teamsters 395 would not have majority support for the application.

[8] IATSE 295 filed evidence of majority support for its proposed bargaining unit, whether or not the transportation department classifications are considered, and whether or not the three positions subsequently disputed by the Directors Guild are included.

[9] The issues raised on the application include the following:

1. Is the bargaining unit proposed by Teamsters 395 an appropriate unit?

2. Has Teamsters 395 filed evidence of majority support for the application? What is the composition of the statement of employment for the purposes of determining the level of support?

3. If the unit is appropriate and there is majority support, is the application by Teamsters 395 barred by s. 33(5) of the *Act* because it was not filed in the period defined by that section, given the voluntary recognition arrangement between Inconvenience and IATSE 295?

4. Should the Board exercise its discretion to grant certification to Teamsters 395 given the voluntary recognition arrangement?

5. Is the bargaining unit proposed by IATSE 295 an appropriate unit?

6. Has IATSE 295 filed evidence of majority support for its application?

7. Should a certification order or orders be granted as there are no longer any employees?

8. If a certification order or orders is (are) granted, who is (are) the employer(s)?

Evidence

[10] Kevin DeWalt is a director, a shareholder and president of Regina Motion Picture Video & Sound Ltd. (RMP). According to Mr. DeWalt the production of feature films in Canada may be either "indigenous productions" or "service productions." "Indigenous productions" are owned by a Canadian producer or a Canadian co-producer together with a producer from a country under treaty with Canada. They are commonly financed by groups of investors, federal or provincial government film production industry organizations, or a combination thereof. "Service productions" are owned and financed by a foreign producer, often a major American film production company, through a Canadian subsidiary (e.g., Paramount Pictures Corporation (Canada) Inc.) or a Canadian single-purpose production company incorporated specifically to produce a particular feature film. The production company tries to qualify for federal and provincial film production tax credits to reduce production costs. The tax credits are based substantially on the "Canadian content" in the production of the picture. The production company exists for the purposes of financing the production and the making of the specific picture – generally, investors invest in a specific film project, not an industry producer. The company exists as long as there are expenditures and/or revenues relating to the picture (this may be a period of many years, depending on how long the film is in distribution). Inconvenience is such a single-purpose company, incorporated specifically to produce the picture *Inconvenienced.*

[11] According to Mr. DeWalt, the feature film industry in Saskatchewan is quite small compared to some other provinces, notably British Columbia, Ontario, Quebec and Alberta, but the total value of film production expenditures has increased from approximately nine million dollars in 1992 to a high of some 58 million dollars in 1998. He estimated that this amount would decline to approximately 24 million dollars for 1999. Of this amount, approximately 15 per cent is service production and the balance is indigenous production. Where a film is made may be dependent as much upon the availability of production talent (i.e., experienced technicians and crew) and infrastructure (i.e., sound stage facilities) as upon location geography. While Saskatchewan has some special geography and a pool of technical talent, it has little infrastructure. British Columbia and Ontario, in particular, have sophisticated infrastructure.

[12] Mr. DeWalt testified that the supply of technical expertise and labour for feature film production is mostly according to a "hiring hall" concept for the various "crafts" involved, under

voluntary recognition collective agreements[3]. Producers of individual productions may negotiate changes to, or exemptions from, certain terms of the voluntary agreements by letters of variance. The production manager contacts the industry unions to provide qualified workers or "name hires" according to rules under the voluntary agreements, or engages outside help if union members are not available. The production manager interviews and hires, subject to the veto of the picture's owner, all crew and talent, except "key" production positions and "star" performers, which are usually provided by the picture owner. All persons hired by the production manager are required to sign a "deal memorandum" permitting them to work in accordance with a voluntary agreement. The deal memorandum contains basic information, such as the individual's wage rate, and authorizes the deduction of union dues. Persons who are not union members are required, by use of the deal memorandum, to become "permittees" of the appropriate union in order to work on the production. A majority of feature film and episodic television production (with the exception of smaller-budget projects, which are often made non-union) are carried on under such voluntary agreements. The large amounts of money invested in feature films, and the concentrated work performed in a relatively short time frame (typically, ten to 14 weeks) makes industrial peace imperative and formal union certification generally impractical – production would usually be completed before an application for certification would be heard and determined.

[13] IATSE 295, the Directors Guild and the Alliance of Canadian Cinema, Television and Radio Artists ("ACTRA") have standard basic collective agreements ("standard agreements") for motion picture production in Saskatchewan. Also, the Directors Guild and IATSE 295 apparently have an agreement regarding jurisdiction with respect to certain classifications to minimize conflict between them during production (see the reference to the IATSE/Directors Guild agreement, *supra*).

[14] The Directors Guild standard agreement covers classifications with functions generally described as direction (director, assistant director, trainee), production management (production manager, location manager, unit managers, production clerical, assistants, and trainees), production design (art director, set designer and assistants), production coordination (production coordinator, assistants), and picture and sound editing (editor and assistants), and includes those persons working in "second units[4]." The standard agreement recognizes that jurisdictional disputes may arise and the

[3] As described, *infra*, however, there are variations among provinces, with British Columbia having a formal system of sectoral bargaining for larger-budget productions.

[4] A "second unit" is a secondary film production unit filming part of the same picture as the primary unit, but at a different location. The second unit has its own crew, including a second unit director.

Directors Guild "agrees to cooperate in good faith with the producer and other organizations in the motion picture industry in resolving jurisdictional disputes."

[15] Under a national agreement recognized by the members of the Canadian Film and Television Production Association ("CFTPA"), ACTRA is the exclusive bargaining agent for all performers in independently produced English language recorded productions in Canada. The national agreement provides for minimum rates and working conditions. RMP is a member of CFTPA and recognizes the national agreement for the purpose of commercial productions only, but not for feature productions, except on a project by project basis by use of an "agreement of adherence" to the national agreement.

[16] The IATSE 295 standard agreement covers the classifications of all "technicians" involved in film production, including classifications in the transportation department as described earlier. Very roughly, it may be said that persons falling under the title of "technician" are those involved in the non-executive, non-artistic, and non-performing aspects of film production, including: set construction and decoration, art department, hair, makeup, wardrobe, continuity, electrical, lighting, sound, rigging, utilities, catering, camera operation, special effects, labourer work and transportation, including assistants and trainees. It overlaps with the Directors Guild standard agreement as to the production coordinator, secretary and assistants, and certain art department positions. It does not purport to cover animal wranglers, catering or security services.

[17] The IATSE 295 standard agreement sets minimum rates of pay for each classification and is often amended through negotiation with the individual production company to enhance the feasibility of the particular project (e.g., minimum crewing exemptions). Individual employees may negotiate a higher rate of pay (up to three times the scale rate), or other more favourable terms and conditions of employment, with the production manager. The negotiated terms are embodied in the individual deal memorandum. The standard agreement provides that any person working as a technician (including those hired on a daily basis ("dailies")) must be a member of IATSE 295 (or a sister local) or have a work permit from the union. Members pay dues of two per cent of gross wages; permit technicians pay work permit fees of five per cent of gross wages, while permit trainees pay two and one half per cent. The producer pays an additional administration fee to IATSE 295 of two per cent of total gross wages monthly. The producer also contributes a sum equal to four per cent of each member's gross pay to the IATSE 295 group RRSP plan. No contribution is made with respect to permit technicians. Under the standard agreement, the producer is required to post a cash bond for wages, benefits and contributions.

Film Production in British Columbia

[18] Evidence regarding the organization of labour in the film production industry in British Columbia was adduced through the testimony of Tom Milne, principal officer of Teamsters 155 in Vancouver and Motion Picture Director for the national Teamsters union, and of James Wood, Vice-President, IATSE International and Director of Canadian Affairs.

[19] Mr. Milne testified that the annual value of film production in British Columbia is nearly one billion dollars, more than 90 per cent of which expenditure is for service production by large American production companies for episodic television series and films, ranging from made-for-television movies (customarily referred to as "movies-of-the-week") with budgets of approximately one and one half million dollars to four million dollars, to feature films with budgets that may exceed 100 million dollars. The American producers are attracted by the favourable rate of the Canadian dollar, and federal and provincial film production credits. The mechanism for service production in British Columbia is similar to that described by Mr. DeWalt for Saskatchewan: the American studios produce series and films through Canadian subsidiaries or through single-purpose companies. Mr. Milne cited several different examples to illustrate the film production structure with respect to episodic television series, movies-of-the-week and feature film production.[5] While a feature film typically takes ten to 14 weeks to produce, a season television series of 22 episodes may take eight or nine months.

[20] Mr. Milne described transportation costs as the major "below-the-line" costs (i.e., labour and material) of film production, accounting for approximately 20 per cent of such costs, versus "above-the-line" costs (i.e., the remuneration of the producer, director, screenwriter and lead cast, and film distribution). The type of transportation that may be required is varied but involves the operation and maintenance of any motorized transport equipment in connection with film production. For example, it includes basic transportation and chauffeuring of people, animals, equipment, materials and goods, daily set-up, shoot, location movement, and dismantling phases of production, auto mechanics and bodywork, operation of animal-drawn vehicles, boom trucks and cranes, mobile camera vehicles ("camera cars"), boats, stunt vehicles, construction equipment, and specialized tractor trailer equipment constructed for wardrobe, make-up, hairdressing, set construction and decoration, water

[5] Production of episodic television series, television mini-series, "pilot" shows and movies-of-the-week commonly utilize single-purpose production companies in the same manner as feature films.

supply, electrical generation, dressing rooms ("star wagons"), living quarters and lavatory facilities ("honeywagons"). Some units are designed as "supertrucks," combining several of these facilities in one vehicle. According to Mr. Milne, several members of Teamsters 155 have invested large sums to acquire and operate their own specialized movie production support units. He also said that some have dangerous goods and hazardous waste handling certifications for the transportation and care of special products used in movie making, including explosives.

[21] Mr. Milne said that Teamsters 155 was chartered in 1988 to represent its members working as drivers and animal wranglers in the motion picture production industry in British Columbia. Prior to the charter of Teamsters 155, the majority of members working in the industry were members of Teamsters 213, which mainly supplied members to the heavy construction and pipeline industries. He said that for many years the industry unions relied upon voluntary recognition of their bargaining agencies, and formed *ad hoc* committees to resolve jurisdictional disputes. However, he referred to several historical instances where the production company failed to voluntarily recognize one or more of the unions and they sometimes obtained certification orders for the single-purpose company, but not the major American studio[6].

[22] With the rapid expansion of the industry this informal structure led to some friction between industry unions, resulting in grievances and disharmony. Mr. Milne said that by the mid-1990's Teamsters 155 had more than 70 voluntary agreements with producers. In 1995, the industry unions in British Columbia[7] applied to the Minister of Labour for a direction that the British Columbia

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[6] In one of the examples, Teamsters 155 obtained a certification order for a bargaining unit comprising "employees, including dependent contractors, in the transportation department and related services, including catering, security (exterior), boat wranglers, animal trainers and wranglers", while the Motion Picture Studio Production Technicians, IATSE Local 891, obtained a certification order regarding the same employer for a bargaining unit comprising "employees and dependent contractors engaged in accounting, art, construction, costume, first-aid/craft service, grips, greens, hair, lighting, make-up, painting, production office, props, publicity, script supervisors, security, set decorating, sound, special effects and video".

[7] I.e., International Photographers Guild of the Motion Picture and Television Industry, IATSE Local 669; Motion Picture Studio Production Technicians, IATSE Local 891; Teamsters Local 155; Union of B.C. Performers; Directors' Guild of Canada, B.C. District Council; Association of Canadian Film Craftspeople; Communications, Energy and Paperworkers Union; and, ACTRA-BC. The producers were represented by two associations, one of Canadian producers and one of American producers, and the Canadian Broadcasting Corporation.

Labour Relations Board consider whether the situation was appropriate for the formation of a bargaining council of trade unions for the industry.[8]

[23] Although the British Columbia Labour Relations Board determined that a council of trade unions in the film industry was an appropriate bargaining agent, it included only the three unions that traditionally provide labour towards the "below the line costs" referred to above – International Photographers Guild of the Motion Picture and Television Industry, IATSE 669; Motion Picture Studio Production Technicians, IATSE 891, and Teamsters 155 ("council members") – as consistent with the existing collective bargaining structure in the industry.[9] The decision had the overall effect of structuring collective bargaining in the industry in general. It provided council members with exclusive jurisdiction in two specific areas of production: feature films with a below-the-line labour cost of at least four million dollars, and one-hour dramatic productions for the three largest American television networks. Productions for other television networks, movies-of-the week, and those with below the line labour costs of four million dollars or less were not included in the area of exclusive jurisdiction. The associations of Canadian and American producers, parties to the application, were directed to negotiate a "master collective agreement" with an enabling clause that would permit individual council members to agree to amend the terms of the master agreement for a specific production. The British Columbia Labour Relations Board described the application of the master agreement to individual producers as follows, at 12:

> *The Council's Master does not bind the producers with whom it is negotiated and ratified: a producer is not an "employer". The Council has been found to be the only appropriate bargaining agent representing the only appropriate bargaining unit within the exclusive jurisdiction for the work of the trades it covers. The Master therefore will apply to all employers undertaking productions in the exclusive jurisdiction. The*

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[8] See, *British Columbia and Yukon Council of Film Unions, et al. v. Alliance of Motion Picture and Television Producers, et al.*, BCLRB No. B448/95, (December 15, 1995). Section 41 of the *Labour Relations Code*, R.S.B.C., provides, in part, that, upon the direction of the Minister, the B.C. Board may certify a council of trade unions as bargaining agent "to secure and maintain industrial peace and promote conditions favourable to settlement of disputes."

[9] In B.C., IATSE 669 is referred to as the "camera local" and IATSE 891 as the "technicians local." In general, IATSE 669 represents camera operators, photographers, photographic co-ordinators, assistants and trainees. IATSE 891 represents production technicians in the areas of art, construction, costume, lighting/electrics, make-up, painting, sound, publicity, editing, first aid, grip, greens, hair, set decoration, special effects, interior security and accounting. Teamsters 155 represents transportation co-ordinators, drivers of vehicles and equipment of all

> *automatic application of the Master to all employers in the exclusive jurisdiction does not automatically bind those employers in subsequent productions in the non-exclusive jurisdictional area. The [Labour] Code otherwise applies in all respects to the non-exclusive jurisdiction.*

[24] The council members were further requested to negotiate a "supplemental master agreement" with the producers for non-exclusive jurisdiction productions, again with an enabling provision for amendment, primarily for cost concessions based on a production's budget.[10] The supplemental master agreement also addressed issues of "minimum crewing" and employees who "cross-over" between two or more jobs on smaller-budget productions (e.g., erecting rigging one day and performing set decoration the next).

[25] Mr. Milne said that the production company signs a "letter of adherence" to the master collective agreement and negotiates any amendments with the individual council members. Under the master collective agreement the production company is allowed hall hires (on a seniority basis) and name hires at a 1:1 ratio, plus free picks for "captains." The master collective agreement provides that the council members provide job descriptions and contains a mechanism for settling jurisdictional issues between council members utilising an umpire appointed by the British Columbia Labour Relations Board.

[26] To Mr. Milne's knowledge, the present application is the first time that Teamsters 395 has applied for certification in the movie production industry in Saskatchewan. Nor has any Teamsters local ever entered into a voluntary agreement with an employer in the industry in Saskatchewan. He said members of Teamsters 155 often work on productions in other provinces, however, their deal memoranda routinely provide for the same wage rates and fringe benefits as would pertain if they were working under Teamsters 155 voluntary agreement. According to Mr. Milne, the Alberta Teamsters local has established a claim to an area of jurisdiction in the movie production industry in that province,

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kinds, stunt drivers, mechanics, autobody repairpersons, animal handlers and trainers, exterior security personnel, and catering personnel.

[10] While most "indigenous" production work would practically be excluded from the master agreement area of exclusive jurisdiction, it would generally be covered by the supplemental agreement. The non-exclusive jurisdiction is open to organizing by other unions. For example, the Association of Canadian Film Craftspeople ("ACFC") holds some certifications for employees in the transportation area in the non-exclusive jurisdiction. Mr. Milne noted that in the one dispute that had arisen in the non-exclusive jurisdiction, between Teamsters 155 and ACFC, the B.C. Board issued a "poly-party" certification. The B.C. Board also oversaw the construction of the Council's constitution and Bylaws, requiring that they provide that Council members would only work with other Council members on work performed in the area of exclusive jurisdiction.

and the Manitoba Teamsters local has worked on a small number of productions there, but the Ontario Teamsters locals have been lax in asserting any consistent claim to work in the industry in Ontario.

[27] Mr. Wood is the highest ranking IATSE official in Canada and, between 1988 and 1998, was a business agent for IATSE 873 in Toronto, which is composed of motion picture technicians. He agreed that Teamsters 362 has exclusive jurisdiction over transportation in the film industry in British Columbia. But IATSE is engaged in transportation in the industry in every other jurisdiction in Canada (albeit, not necessarily exclusively) except Quebec.

Film Production in Alberta

[28] Al Porter, Business Agent for Teamsters 362, was Teamsters 362 dispatcher for the film industry in Alberta. The corporate structure of feature film production in Alberta is similar to that in Saskatchewan and British Columbia in that it is primarily carried on through single-purpose production companies. He estimated the value of film production in Alberta for 1998 at approximately 90 million dollars, but said that it had burgeoned to almost 250 million dollars in 1999, of which he estimated 85 per cent is service production. He said that virtually all productions of any significance (he used a threshold of three million dollars) are made with union labour. In the last five years Teamsters 362 has obtained a voluntary agreement on every production but one. In that case it obtained a certification Order from the Alberta Labour Relations Board. He testified that Teamsters 362 created a motion picture division in 1987 and presently has about 250 members. Approximately 15 members own their own specialized equipment for movie production that they lease to the production company; they then contract their labour through a standard agreement. According to Mr. Porter, no union other than Teamsters 362 provides the heavier transportation services to the industry in Alberta.[11] He said that several members of Teamsters 362 also hold membership in the Directors Guild, ACTRA and/or IATSE 210 (Edmonton) or 212 (Calgary); and at times members also work in transportation outside the film industry.

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[11] Mr. Porter referred to an amendment to the standard form collective agreement made between Teamsters 362 and a production company in 1998, for a film made partially in the Calgary area and partially in the Edmonton area, that allowed IATSE 210 members to drive trucks of up to a certain size on the Edmonton phase of production "as per past practice". As well, persons involved in set construction, such as carpenters and electricians, operate their own service vehicles, and other members of the cast and crew may drive themselves to and from the location of filming.

[29] Mr. Porter described the jurisdiction claimed by Teamsters 362 by reference to the scope clause in a voluntary agreement that the union has with Paramount Pictures Corporation (Canada) Inc. This was derived from the agreement that Teamsters 399 had in the United States with the American Motion Picture and Television Association for many years. It includes, among other things, all driving except "in front of the camera situations." He said that concessions to the standard agreement are routinely negotiated for individual productions through "letters of adherence." Employees are paid by the production company, which also pays an amount to the union equal to a percentage of the gross earnings of all employees covered by the agreement for "administration expenses." Wage negotiations by the production company with individual employees are permitted through the use of deal memos.

[30] Mr. Porter described jurisdictional arguments between Teamsters 362 and IATSE 210 and IATSE 212 in the 1980's regarding transportation in film production when Teamsters 362 tried to enforce exclusive jurisdiction on one particular production.

[31] With the intervention of the Alberta Department of Labour, the dispute was resolved by an agreement that had the effect of admitting IATSE 210 and IATSE 212 drivers to Teamsters 362 membership, creating a common seniority list for motion picture driving and freezing the number of drivers on the list as at the date of the agreement ("1988 Agreement"). A letter from the business agents for the three unions to the Deputy Minister of Labour dated February 9, 1988, provided as follows:

> *... as of 18 January, 1988, the jurisdictional debate between the IATSE and the Teamsters regarding motion picture driving in Alberta is settled. Motion picture driving is now handled by the Teamsters. IATSE motion picture drivers are members of the Teamsters Local 362.*

[32] Under the 1988 Agreement, existing IATSE collective agreements with producers were amended to remove any specific mention of exclusive jurisdiction over driving. Teamsters 362 secured jurisdiction over wrangling and catering and IATSE 210 and IATSE 212 secured jurisdiction over security and craft services (on-set snack and refreshment services). However, other arguments between the unions have broken out which have been resolved on a piecemeal basis. According to Mr. Porter,

the general driving function is now split between Teamsters 362 and IATSE 210 and IATSE 212 based on the size of the truck: IATSE 210 and IATSE 212 have jurisdiction for units up to one-ton.[12]

[33] Mr. Porter referred to a series of certification orders issued by the Alberta Labour Relations Board in recent years that reflect the division of representation between Teamsters 362 and IATSE 210 and IATSE 212. For example, Teamsters 362 had applied for a unit of employees of Illusions Entertainment Corporation, the producer of a film titled *Silent Cradle*, described as, "all employees in the wrangling, catering and transportation departments." An investigation by the Alberta Board's officer revealed the following information:

> *The bargaining unit applied for ... appears to affect individuals employed by Illusions Entertainment Corporation as truck drivers, shuttle drivers and transportation coordinators. However, it does not appear that on or around the date of application, the employer employed any employees who were performing any work that could be considered either "wrangling" or "catering." In the first place ... the "Silent Cradle" project does not have any need for animals or livestock of any sort, and as such, no wranglers have been employed. In the second place ... all catering work is being carried out by Elizabethan caterers, of Spruce Grove, Alberta, who simply submit weekly invoices into Illusions Entertainment Corporation for their services.*

[34] The Alberta Labour Relations Board ultimately issued a certification Order to Teamsters 362 for a bargaining unit comprising "all drivers and transportation coordinators."

[35] Mr. Wood testified that the dispute between Teamsters 362 and IATSE 210 and IATSE 212 arose when Teamsters 362 attempted to enforce exclusive jurisdiction over transportation in the film production industry, which had been performed by IATSE 210 and IATSE 212 using Red Deer as the latitudinal divide for work jurisdiction. The dispute eventually involved the senior officials of the Teamsters and IATSE international unions because IATSE had a national agreement in the United States with the American producer making the production in Alberta, and the Teamsters generally represented transportation in the industry in the United States. Discussions between the international unions resulted in IATSE international encouraging IATSE 210 and IATSE 212 to agree to allow

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[12] See, f.n. 11, *supra*.

Teamsters 362 to share the driving function. However, Mr. Wood expressed his personal disagreement with this decision.

[36] Mr. Wood acknowledged that there had been some recent friction between IATSE 210 and IATSE 212 and the Directors Guild as IATSE filed an application to certify members of a production art department, functions historically performed by members of the Directors Guild. The application was subsequently withdrawn. In Saskatchewan, however, the art department functions are generally performed by IATSE 295 because the Directors Guild does not have sufficient qualified members.

Film Production in Ontario

[37] According to Mr. Wood there are separate IATSE locals in Ontario representing camera operators and other film production technicians. Historically, transportation in the Ontario film industry has been represented by IATSE 873. Following the resolution of the dispute in Alberta, the Teamsters in Ontario approached the IATSE international union seeking to represent drivers in the industry. The producers' community apparently objected and no formal changes to the driving jurisdiction resulted. Transportation is still provided to the Ontario industry by IATSE 873. However, the wrangling function is performed non-union or contracted out. He said that IATSE 873 does not encourage its members to perform work in other provinces, although some do.

The Production of *Inconvenienced*

[38] Ray Gergely is CEO and Secretary-Treasurer of Teamsters 395. He described it as a "miscellaneous local," representing transport drivers, and workers at concrete companies, humane societies, courier services, waste disposal companies, armoured car services and pipeline construction, some of whom are office or warehouse workers. Teamsters 395 has approximately 1000 members, the majority of whom are employed fulltime, and approximately 80 of whom are on a pipeline and construction dispatch board. Many members have specialized training and hold certificates for the operation of diverse equipment and the transportation of hazardous materials. He said that it is acceptable for Teamsters 395 members to hold membership in another union. He said that Teamsters 395 has well established health and welfare and pension plans for the benefit of its members.

[39] Mr. Gergely testified that a few years ago he was approached by an officer of IATSE 295 who, because of the continuing expansion of the film production industry in the province, was interested in negotiating a jurisdictional deal similar to that in Alberta, but nothing came of it. However, he said that the bargaining unit description in the application for certification in the present case was specifically modeled on the usual unit obtained by Teamsters 362, so that "no one would get their hackles up." He said that the standard agreement allows for non-Teamsters to perform driving incidental to their primary job functions.

[40] Mr. Porter assisted Mr. Gergely in organizing on the production of *Inconvenienced*. They each testified that while they knew at the time that some of the drivers working on the production were members of IATSE 295, others were members of Teamsters 395, and they did not know that IATSE 295 had a voluntary agreement with Inconvenience. Mr. Gergely said that *Inconvenienced* was the first movie production in Saskatchewan where Teamsters 395 applied to certify a bargaining unit. Teamsters 395 has since created a movie dispatch board.

[41] Mr. Gergely indicated that, with respect to movie production in Saskatchewan in general, and *Inconvenienced* in particular, Teamsters 395 seeks to represent employees whose job duties include the transportation of people or materials and equipment, but not those for whom driving is an incidental part of their job as reflected in the job classifications in the Teamsters 362 standard agreement.[13]

[42] RMP began by producing commercial advertising and promotional films for industrial clients. The shareholders of RMP include Mr. DeWalt, Rob King, Josh Miller, Kenneth Krawczyk, Zack Douglas and Saskatchewan Opportunities Corporation. Each of the individual shareholders is a director of the company.

[43] In 1989, RMP broadened its scope to include production of television programs and feature films, and registered "Minds Eye Pictures" as a business name associated with the service production of feature films. Minds Eye Pictures is still a registered business name. In 1993, Mr. DeWalt and others incorporated Minds Eye Productions Inc. ("Minds Eye") as a film production company to handle

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[13] While the scope clause in the Teamsters 362 standard basic agreement in Alberta includes agreement that "all vehicles...used in pre-production, production and post-production, *for any purpose whatsoever* must be driven by an employee who is subject to [the] agreement", the job classifications covered by the agreement include only transportation co-ordinator, driver captain, co-captain, driver, camera car driver, special equipment driver,

indigenous productions. The company's shareholders are Mr. DeWalt, Mr. King and Mr. Krawczyk; Mr. DeWalt and Mr. Krawczyk are also Minds Eye's directors.

[44] *Inconvenienced* was a service production made in Saskatchewan. With production costs of six million dollars, *Inconvenienced* was one of the largest productions ever undertaken in the province. Financed by Trimark Pictures, Inc. ("Trimark") a California corporation, it was produced by Inconvenience, a single-purpose production company owned by RMP and incorporated on May 28, 1998, concurrent with the effective date of the agreement entered into with Trimark (the "production agreement") to produce the film. The directors of *Inconvenienced* are Mr. DeWalt, Mr. King and Bill Wesley of Los Angeles, California. According to Mr. DeWalt, Minds Eye Pictures has formed 17 such companies for specific productions. With respect to *Inconvenienced*, Trimark hired a contractor to work with the director to search for a location to shoot the picture that would pass for Arizona. A site near Moose Jaw, Saskatchewan was one of the possible locations. It was not until after Mr. DeWalt convinced Trimark that Minds Eye Pictures was capable of producing the film that Inconvenience was incorporated and the production agreement entered into. While Inconvenience was the financing vehicle, it was the credibility lent by the association of Mr. DeWalt and RMP with Inconvenience that secured the contract with Trimark.

[45] Under the production agreement, Trimark financed the production of *Inconvenienced* and owns all rights to and property in the picture. For a fee based on a percentage of the tax credits, Inconvenience agreed to produce the picture so that the production would qualify for tax credits. Minds Eye Pictures guaranteed the performance of Inconvenience insofar as the tax credits were concerned. Inconvenience had a bank line of credit guaranteed by RMP. Inconvenience executed a general security agreement in favour of Trimark. Trimark, which was responsible for all business and creative decision-making in connection with the picture, engaged the "star" performers and a limited number of key production personnel, including the line producer, director, writer, production manager, production designer, director of photography, casting director, first assistant director, construction co-ordinator, editor, sound mixer and costume designer. Inconvenience, as service producer, was responsible for hiring the crew and minor performers necessary to produce and actually make the picture. It agreed that it would comply with the collective agreements of the film industry unions in Saskatchewan. Ms.

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dispatch/office, ramrod, wrangler gang boss, wrangler, licensed mechanic, unlicensed mechanic, bodyman, and painter.

Hyland-Lott, as production manager, handled the negotiations with the unions on behalf of Inconvenience.

[46] Inconvenience and Minds Eye Pictures entered into an agreement effective May 8, 1998, called a "loan-out agreement." For a fee, RMP provided Inconvenience with the services of five executive production, business affairs and accounting personnel. With the exception of Mr. DeWalt, whose services as executive producer were provided to Inconvenience on an exclusive basis under the agreement, the services of these persons were provided on a first-call basis. According to Mr. DeWalt, none of the crew and talent engaged by Inconvenience to make the picture were regular employees of RMP.

[47] The first move by Inconvenience was to hire the production manager, Ms. Hyland-Lott. Mr. DeWalt recommended and Trimark approved her hiring. She is a member of the Directors Guild and was covered by the collective agreement negotiated by its Saskatchewan District Council. It was part of Ms. Hyland-Lott's job to negotiate specific terms to the standard agreements with IATSE 295, the Directors Guild and ACTRA for the production of *Inconvenienced*, and to administer the budget. Another part of her job was to negotiate the deal memoranda for individual technicians and crew members, ensure that they held the appropriate union membership or permit, and recommend their being hired. Through its line producer, Jay Heit, Trimark retained the authority to approve or reject the hiring of any individual employees by Ms. Hyland-Lott. Employees, including Ms. Hyland-Lott and the "loan-out employees," were paid by Inconvenience.

[48] Inconvenience never owned any hard assets and did not use any assets of RMP to produce the picture. It leased or rented the necessary equipment and contracted out some services, such as catering, to independent suppliers.

[49] Set construction and shooting of the film took place from May until August, 1998, near Moose Jaw. During this time, Inconvenience maintained a production office in Moose Jaw to handle the accounting and administration functions associated with production.

[50] According to Ms. Hyland-Lott, she hired the entire crew, including Sheila Richards, Transportation Co-ordinator and member of IATSE 295. She said that together she and Ms. Richards hired everyone else who worked in the transportation department on the production of

Inconvenienced. She said that Mr. Heit only required that he approve the person hired by her as transport captain.

[51] Ms. Hyland-Lott testified about the job functions listed on the amended statement of employment in classifications other than those in the transportation department[14], as they related to the driving function:

- assistant directors – required to drive to scout and assess locations before production was moved there in order to ensure that any problems inherent to the site can be solved;

- director's assistant trainee – assigned a vehicle to chauffeur the director and the star of the film;

- third assistant director – spent as much as 70 per cent of his time driving for the purposes of scouting locations and chauffeuring the first assistant director;

- construction co-ordinator – assigned a light truck in order to courier materials to the sets or attend at the production office;

- head carpenter and carpenter – drove themselves and their tools to the site;

- scenic painter – transported his team to and from the set during pre-production and sometimes picked up materials in Regina and Moose Jaw;
- locations manager – the position involves a significant amount of driving in scouting potential sites, securing lease agreements with property owners and attending meetings with governmental authorities for various approvals;

- camera operator – sometimes chauffeured assistant directors to and from the set;

[14] The amended statement of employment listed the following persons in transportation department classifications: transportation co-ordinator, Sheila Richards; transport captain, Bill Lewis; transport captain trainee, Jason Richards; and drivers, Lorne Kurtz, Rennal Demmans, Wally McDonald, Tom Caldwell, Chuck Scorgie, Kevin McClusky, Danine Schlosser, Kyle Huffman, Heather Stelter, Gerard Demaer, Cathy Ehrlich, and Shanna-Marie Richards.

- set production assistant – would frequently courier documents between the set and the production office;

- stunt co-ordinator – transported the stunt team to and from the set and performed driving on camera;

- locations production assistants – had access to vehicles in order to travel to the points where it was necessary to direct traffic during filming, and for site cleanup and trash removal;

- head of wardrobe, art director, and production designer – these positions necessarily involved a lot of driving directly related to their integral job duties;

- third assistant director trainee – responsible for transporting mobile communications equipment to and from the set each day;

- cable puller – drove a rented truck to move around electrical supplies;

- craft services – shopped for provisions, and transported them to various locations for the supply of snacks and refreshments on the set (as opposed to meal catering which was contracted out).

[52] Ms. Hyland-Lott confirmed that the locations production assistants on the amended statement of employment are covered by the standard agreement with the Directors Guild under the production assistant classification, and that the stunt co-ordinator position was covered by the standard agreement with ACTRA.

[53] Ms. Hyland-Lott testified that the general duties of the employees in the transportation department on the production of *Inconvenienced* included the shuttling of cast and crew to and from the set and other destinations as required, courier services for documents, equipment and supplies, and on- and off-the-set coordination, positioning, parking and maintenance of production vehicles, including on-screen "picture" vehicles, camera cars, motorhomes, and equipment trucks and vans. She maintained that Fred Moroz and Ryan Moroz, who were listed on the first statement of

employment, and appear on the *Inconvenienced* "crew list" for July 10, 1998, as members of the transportation department were omitted from the second statement of employment because their job functions were dissimilar from those of the other members of the department. Fred Moroz owned and operated a hair/wardrobe/makeup/cast quarters supertruck while Ryan Moroz operated a honeywagon. Ms. Hyland-Lott said that once parked on location the bulk of the Moroz's time was spent cleaning, maintaining and managing the power and water requirements of their vehicles, and their only driving responsibilities were in connection with unit re-locations.

[54] Ms. Hyland-Lott confirmed that pursuant to their deal memoranda, Fred Moroz, Ryan Moroz and Chuck Scorgie, all members of Teamsters 155, were paid rates equivalent to those provided in the Teamsters 155 standard agreement in British Columbia, and dues would be remitted to that union on their behalf. She maintained that the balance of their terms and conditions of work were under the standard agreement between Inconvenience and IATSE 295.

[55] Ms. Hyland-Lott confirmed that although the stated occupational classification for Heather Stelter and Cathy Ehrlich on the amended statement of employment is that of "driver," their actual job duties consisted of cleaning motorhomes. Ms. Ehrlich's employment status was that of a "daily" and her payroll start slip indicated that she started work on July 11, 1998. Ms. Stelter's time sheet indicated that her first day of work was July 9, 1998. It appears that both did not commence work until after the application was filed by Teamsters 395 on July 7, 1998.

[56] In cross-examination, Ms. Hyland-Lott confirmed that a member of the transportation department initially brought the craft service vehicle to location and that various members of that department often went to obtain craft services supplies.

[57] Ms. Hyland-Lott agreed that Kyle Huffman should be deleted from the statements of employment because his first day of work was not until after the application was filed. Counsel for Teamsters 395 and Inconvenience agreed.

[58] Ms. Hyland-Lott confirmed that no wrangling, animal training or boat driving services were required in the production of *Inconvenienced* and that catering was subcontracted.

[59] Geoff Yates, business agent for film production with IATSE 295, has worked as a lighting and electronics technician, and in the "grip" department,[15] on over 30 film productions in western Canada. He testified that there are two IATSE locals in Saskatchewan, IATSE 295 in Regina and IATSE 300 in Saskatoon. He described IATSE 295 as a "mixed local" which is committed to organizing any workplace where entertainment is created or occurs, including film production, movie and stage theatres, casinos and amusement parks. According to Mr. Yates, IATSE 295 is divided into a stage and theatre side, and a movie production side, each with separate hiring rosters. The stage side dispatches according to seniority, while the movie side dispatches by name hire only. He indicated that the stage side has approximately 80 members, and the movie side approximately 50 members, of which perhaps six members are employed in transportation on a regular basis. Mr. Yates explained that IATSE movie side permittees may become members after working a minimum of 50 days on at least two different shows.

[60] Mr. Yates said that from 1993 to 1996 technicians in the industry in Saskatchewan were represented by the Association of Canadian Film Craftspeople ("ACFC"). In 1996, the ACFC merged with IATSE 295, the latter union assuming responsibility under extant ACFC agreements with producers. He confirmed that from 1996 until the time of the present application IATSE 295 had obtained the voluntary recognition of all producers on all productions where it sought to represent employees. He said IATSE 295 has represented the standard film production crafts, including transportation, on those productions.

[61] Mr. Yates maintained that prior to the production of *Inconvenienced* Teamsters 395 had no presence whatsoever in movie production in Saskatchewan. Up to that time there had never been more than one major production at a time, but the production of *Inconvenienced* overlapped with another big budget film, *Big Bear*, which stretched film technician resources in the province fairly thin. According to Mr. Yates, this resulted in there being a shortage of technicians in some departments and no IATSE 295 movie side drivers being available when production commenced on *Inconvenienced*. He suggested to Ms. Richards that she look for some technical people from the IATSE 295 stage side to fill the breach. Mr. Yates himself worked on *Inconvenienced* as a daily employee in the props department. He said that according to the July 10, 1998, crew list for

[15] "Grip" work involves anything to do with camera cranes and movement, rigging, and lighting construction and control.

Inconvenienced there were 67 employees in departments covered under the IATSE 295 collective agreement, including 15 in transportation.

[62] Mr. Yates explained that because of the short production time for feature films, it has not been practical for IATSE 295 to apply for certification, and IATSE 295 relied on voluntary recognition. In the case of *Inconvenienced*, Mr. Yates said that he negotiated a standard agreement with the line producer and production manager. The parties to the standard agreement are IATSE 295 and Inconvenience. Although the agreement was signed July 5, 1998, it is for a term from June 1, 1998 to December 31, 1998. Mr. Yates explained that this was so that it would apply to the pre-production, production and post-production phases of the project. The collective agreement is the standard IATSE 295 film production agreement, amended by a letter of amendment dated July 7, 1998.

[63] The collective agreement covers all technicians within specified classifications, including the following transportation department positions within the definition: transportation coordinator, driver captain, driver class 1A, 1, 2, 3, and driver class 4, 5. Under the agreement, Inconvenience agreed to engage only technicians who are members in good standing of IATSE 295, or who obtained a work permit issued by IATSE 295. He confirmed that the Directors Guild customarily represented persons associated with production management, such as the production manager, directors and assistant directors. The letter of amendment to the standard agreement contains a clause aimed at reducing any friction at the interface with the jurisdiction claimed by the Directors Guild as follows:

> *It is agreed by both parties that when the following positions are covered by The Directors Guild of Canada they will be excluded from the IATSE 295 collective agreement: Production Co-ordinator, Production Secretary, Production Assistants, Art Director, Graphic Artist, Assistant Art Director, Art Department Co-ordinator and Draftsperson.*

[64] Under the letter of amendment the producer could also obtain exclusions from the IATSE 295 bargaining unit "to avoid jurisdictional dispute."

[65] Mr. Yates confirmed that IATSE 295 does not presently have an insurance or health plan, but that it collects member contributions dedicated to eventually setting one up.

[66] Shortly after the application by Teamsters 395 was filed, Mr. Yates called a meeting of all IATSE 295 members and permittees then working for Inconvenience in order to garner support for the counter-application by IATSE 295. Members of the transportation department were not invited because Mr. Yates did not want to foster any rivalry. He confirmed that Wally McDonald has not since been called for any film work because he is viewed as a "difficult employee", both by himself and Ms. Richards.

[67] Mr. McDonald, a sound technician and member of IATSE 295, and a driver and member of Teamsters 395, was called to testify on behalf of Teamsters 395. He said that he worked as a sound technician for many years in the theatre and stage end of the production business. He obtained his Class 1A license with an air brake endorsement and has driven trucks and buses. He has a hazardous materials certificate that allows him to haul dangerous goods and explosives.

[68] Mr. McDonald said that he had never obtained any film production driving work through IATSE 295. He said that he had quit long-haul trucking shortly before he heard that drivers were needed for the production of *Inconvenienced.* He contacted Ms. Richards directly, confirmed that he was a member of IATSE 295, and was hired. It was the first movie production that he had worked on as a driver. He said that there were people working in transportation on the production of *Inconvenienced* as permittees of IATSE 295.

[69] Mr. McDonald was employed as a driver on the production for most of July, 1998, then left to work as a sound technician at the Regina Exhibition. During his time with *Inconvenienced* he drove cast and crew members from Regina to location and back in a large passenger van, but also did some minor mechanical repairs, servicing and cleaning of vehicles. He noted that other drivers also cleaned trailers and motorhomes. At one point he was required to drive a semi-trailer from Regina to Calgary and back to pick up equipment. During his tenure on the production there was no location move. He said that when he was not actually driving or servicing vehicles, he was on "standby." He said that while the transport of people requires a higher class of license than the ordinary Class 5, he believed many of the other drivers on the production did not have such a license, but were able to get away with it because they were designated as "personal attendants" for certain people.

[70] Mr. McDonald testified about the job positions listed on the amended statement of employment in the transportation department as he observed them. He essentially confirmed that persons did in fact work as drivers, with the exception of Ms. Stelter and Ms. Ehrlich, whom he did not know, and Shanna-Marie Richards, who cleaned vehicles. To his knowledge, only three of the 17 persons listed in the transportation department on the first statement of employment – himself, Sheila Richards and one other – were members of IATSE 295.

[71] Mr. McDonald said that at one point he was approached by Andrew Gordon, IATSE 295 shop steward, who urged him to sign a document that would have committed him to work only for movie production companies whose employees were represented by IATSE 295, but he refused. He claimed there was much "ballyhoo", as he put it, over his signing a Teamsters 395 card. Mr. Yates engaged him in a heated conversation and was critical of his obtaining membership in Teamsters 395. He said he has not been called by IATSE 295 for any film work since, and surmised that Sheila Richards, who had indicated to him her disagreement with Teamsters 395 representation, has probably refused to name hire him for other work. However, he has continued to work as a sound technician on the stage side of IATSE 295.

[72] Mr. Gordon was called to testify on behalf of IATSE 295. He has been involved in motion picture production in Saskatchewan as a producer, director, grip, and lighting and electronics technician, and was formerly a member of ACFC.

[73] Mr. Gordon said that in his position as best boy electric[16] on the production of *Inconvenienced* he worked all 30 days that the picture was in production. His duties required that he drive his personal vehicle to Moose Jaw or Regina up to several times a week to obtain specialized supplies. He described such task as customary to the best boy position. He agreed that it was his choice to use his own vehicle when no driver was available and that he was not reimbursed for his mileage under the IATSE 295 standard agreement. He said that he has a class 1 license with an airbrake endorsement and has driven many different vehicles on many productions. He also explained that the generator operator drove the electronics truck, the grip drove the grip truck, and the camera trainee, the camera truck.

[16] A "best boy" is the first assistant electrician.

[74] He explained that the IATSE 295 standard agreement rate schedule merely establishes a minimum and that individual employees may negotiate higher rates with the producer through their deal memorandum depending on their status in the industry.

Statutory Provisions

[75] Provisions of the *Act* relevant to this application include the following:

> *2. In this Act:*
>
> *(a) "appropriate unit" means a unit of employees appropriate for the purpose of bargaining collectively;*
>
> ...
>
> *(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;*
>
> ...
>
> *3. Employees have the right to organise 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.

...

33(5) A trade union claiming to represent a majority of employees in the appropriate unit of employees or any part thereof to which a collective bargaining agreement applies may, not less than 30 days or more than 60 days before the anniversary date of the agreement, apply to the board for an order determining it to be the trade union representing a majority of employees in the appropriate unit of employees to which the agreement applies, or in any part thereof, and if the board

makes such order the employer shall forthwith bargain collectively with that trade union and the former agreement shall be of no force or effect insofar as it applies to any unit of employees in which that trade union has been determined as representing a majority of the employees.

...

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.

Argument

[76] Each counsel filed written argument on behalf of their respective clients.

[77] Ms. Zborosky, on behalf of Teamsters 395, argued that the bargaining unit proposed by Teamsters 395 is an appropriate unit and that the first statement of employment filed by Inconvenience accurately reflects the employees performing work in the proposed bargaining unit on the date of the filing of the application. As she pointed out, the Board has described bargaining units claimed by Teamsters 395 in several previous certification orders using the phrase, "within the jurisdiction of the Teamsters Union." Many of these orders have been granted in relation to pipeline construction as in *Chauffeurs, Teamsters and Helpers Local Union No. 395 v. Summit Pipeline Services Ltd.*, [1997] Sask. L.R.B.R. 270, LRB File No. 332-96, where the Board agreed that work normally performed on a construction site by employees whose primary job is "the transportation of men, material and tools" to work sites is within the trade jurisdiction of the Teamsters' union.

[78] Ms. Zborosky asserted that both Inconvenience and IATSE 295 sought to have the bargaining unit more broadly defined than requested by Teamsters 395 for the purpose of determining the level of

support, based on the scope clauses in the Alberta and British Columbia standard agreements. But, she pointed out, those clauses were achieved through formal negotiation and bargaining. She said that Teamsters 395 seeks to represent those employees whose primary duties are driving or maintaining vehicles, and not those for whom driving tasks are incidental to the performance of their primary responsibilities. Counsel drew an analogy with the organization by craft in the construction industry where the Board looks at the main focus of an employee's work in order to determine the appropriate trade jurisdiction. She argued that the employees added to the amended statement of employment by Inconvenience performed driving tasks that were incidental to their primary duties (e.g., as assistant director, best boy electric, etc.), even if such tasks consumed a significant portion of their time. In support of her arguments, counsel cited the decisions of the Board in *International Union of Operating Engineers, Local 870 v. K.A.C.R., A Joint Venture,* [1983] Sept. Sask. Labour Rep. 37, LRB File No. 106-83, and *Operative Plasterers and Cement Masons, Local 442 v. Vector Construction Ltd.,* [1992] 2nd Quarter Sask. Labour Rep. 82, LRB File No. 307-91. Counsel noted that none of these persons were paid according to the rates for the transportation department classifications in the IATSE 295 standard agreement. She pointed out that IATSE 295 did not dispute that such incidental driving duties were performed by employees working under the Directors Guild standard agreement, even though the transportation department came within the scope of IATSE 295's standard agreement with Inconvenience.

[79] Ms. Zborosky argued that s. 5(a) of the *Act* permits appropriate units to take the form of "craft" units, but that it has been rare outside of the construction industry. However, she emphasized that the film production industry is a unique business with a long history of labour organization along craft lines. Counsel said that in *K.A.C.R., supra,* the Board recognized the long history of craft certification in the construction industry and refused to deviate from that model despite the employer's claim that its generically described "construction workers" were multi-skilled and performed work that crossed traditional craft lines. Counsel pointed out that the Board's decision in *Construction and General Workers, Local Union No. 890 v. International Erectors and Riggers, a Division of Newbery Energy Ltd.*, [1979] Sept. Sask. Labour Rep. 37, LRB File No. 114-79, where the Board developed standard unit descriptions based on craft lines in the construction industry, was made prior to the enactment of specialized labour legislation in that industry, and withstood the repeal of such legislation in the 1980's.

[80] Ms. Zborosky also referred to the labour organization of the health care and newspaper industries where the Board's decisions dealing with competing bargaining structures have reflected a

policy of selecting the structure that will best promote long-term industrial stability. Counsel referred to the criteria that has been applied by the Board in certifying "under-inclusive" bargaining units. Counsel asserted that because film production, like construction, is often of relatively short duration and dependent upon a diversity of highly specialized skills, it makes sense, both with respect to the historical organization of the industry and in the interests of long-term stability, to allow a craft type of organization. In the United States, she said, labour organization of the industry has been along such lines since the late 1940's. The timelines involved in film production, along with the use of single-purpose production companies, make extended jurisdictional squabbles impractical and formal certification inefficient if employees are going to be represented. In support of her arguments, counsel cited several prior Board decisions including, *Graphic Communications International Union, Local 75M v. Sterling Newspapers Group (a division of Hollinger Inc.)*, [1998] Sask. L.R.B.R. 770, LRB File No. 174-98; *The Newspaper Guild v. Sterling Newspapers Group (a division of Hollinger Inc.)*, [1999] Sask. L.R.B.R. 5, LRB File No. 187-98; *Health Sciences Association of Saskatchewan v. Board of Governors of the South Saskatchewan Hospital Centre (Plains Health Centre) and Canadian Union of Public Employees, Local 1838*, [1987] April Sask. Labour Rep. 48, LRB File Nos. 321-85 & 422-85; and, *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.

[81] Counsel pointed out that there are no prior certifications in the film production industry in Saskatchewan. She argued that a unit of employees in the "transportation department and related services" is an appropriate "craft" unit. The Teamsters have long demonstrated their ability to represent driving and operating professionals in other industries across Canada, and in film production in the United States, British Columbia and Alberta and can provide other driving work for its members when film production work is not available. Counsel contrasted this with the IATSE 295 movie side procedure where drivers are not dispatched on a name-hire basis rather than by seniority and only for film work. Counsel asserted that the evidence disclosed that only a few of the persons in the transportation department on *Inconvenienced* were IATSE 295 members, and that it was not until Teamsters 395 filed this application that any attempt was made by IATSE 295 to secure their membership. She said the drivers have a special community of interest in that they have specific work issues related to qualifications and training, safety, turnaround and standby time, vehicle maintenance and irregular hours of work that often extend beyond those of the other persons on the production.

[82] Counsel also asserted that it is appropriate to certify a province-wide unit because the geographic scope of a film production may encompass several locations across the province. In support of this contention, counsel referred to the Board's decision in *United Steelworkers of America v. Industrial Welding (1975) Limited*, [1986] Feb. Sask. Labour Rep. 45, LRB File No. 274-85.

[83] Ms. Zborosky took issue with the composition of the amended statement of employment, contending that the first statement was the accurate statement, with the exception of Kyle Huffman, Ms. Ehrlich and Ms. Stelter. Likewise, counsel argued that Gerard Demaer should be deleted from the statement as he worked only intermittently during the production period. And counsel said that Fred Moroz and Ryan Moroz should appear on the statement of employment. According to counsel, there should be 13 names on the statement of employment for the purpose of determining the level of support for the application by Teamsters 395, as follows:

Sheila Richards	Transport Co-ordinator
Bill Lewis	Transport Captain
Lorne Kurtz	Driver
Rennal Demmans	Driver
Jason Richards	Transport Captain Trainee
Wally McDonald	Driver
Tom Caldwell	Driver
Chuck Scorgie	Driver
Kevin McCluskey	Driver
Danne Schlosser	Driver
Shanna Marie Richards	Driver
Fred Moroz	Driver
Ryan Moroz	Driver

[84] With respect to the identification of the employer for the purposes of certification, Ms. Zborosky argued that, pursuant to s. 37.3 or s. 2(g)(iii) of the *Act*, and the Board's treatment of the issue of common employers in its decision in *Amalgamated Transit Union, Local 588 v. City of Regina and Wayne Bus Ltd.*, [1999] Sask. L.R.B.R. 238, LRB File No. 363-97, the corporate and organizational structures of the production of the film in the present case indicate that Inconvenience, Minds Eye

Pictures and Trimark (or some combination of two of the three) are related or common employers and a certification order should bind all the related entities. Counsel also argued that there is a labour relations interest that would be served by a common employer declaration. She said that if only Inconvenience is certified as the employer, given the short time lines in film production, certification of other Minds Eye Pictures or Trimark projects would be practically impossible. Counsel contended that certification promotes industrial stability, in contrast to attempts to secure voluntary recognition and continual jurisdictional arguments between unions.

[85] Finally, with respect to the issue of the effect of the voluntary recognition agreement between IATSE 295 and Inconvenience, Ms. Zborosky argued that it is not necessary to consider their arrangement because the standard agreement was not in force by the time Teamsters 395 had filed the present application, and IATSE 295 did not move to secure support for its own application until after that date. She also argued that IATSE 295 should not be granted status as an intervenor in the present application because it had not filed any evidence of support for its counter-application for certification of its proposed unit until after Teamsters 395 had filed its application.

[86] Ms. Zborosky also criticized the IATSE 295 movie side hiring procedure in its voluntary recognition arrangements, notably the lack of seniority dispatch rules, and the complete concession to name-hiring by employers, as not serving the interests of rank-and-file members and creating an environment that promotes "sweetheart" deals and the potential for a conflict of interest between such members and the working officers of the union. Counsel argued that voluntary recognition is a poor alternative to certification under the *Act*. Voluntary recognition is not expressly recognized by the statute and only certification compels the employer to bargain collectively. The union party to a voluntary recognition arrangement has no statutory status as the exclusive bargaining representative of the employees it seeks to represent. Counsel asserted that in *United Food and Commercial Workers, Local 1400 v. Canada Messenger Transportation Systems Inc.*, [1990] Fall Sask. Labour Rep. 93, LRB File No. 091-90, the Board rejected the contention that either voluntary recognition and/or s. 33(5) of the *Act* created a bar to certification. Counsel referred to *International Union of Operating Engineers v. Aluma Systems Canada Inc.*, [1996] Sask. L.R.B.R. 519, LRB File No. 002-96, as authority for the proposition that the right of employees under s. 3 of the *Act* to select the trade union of their choice to represent them supersedes any voluntary recognition arrangement.

[87] Mr. Waller, on behalf of IATSE 295, argued that the bargaining unit proposed by Teamsters 395 is not an appropriate unit within the meaning of s. 2(a) of the *Act*, and was tailored to fit the shape of its support. Counsel's argument was based upon the Board's general preference for fewer more-inclusive bargaining units. He reviewed the factors enunciated by the Board 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, which included: (1) the viability of the proposed unit and its effectiveness in a bargaining relationship; (2) the community of interest shared by the employees in the unit; (3) organizational difficulties in particular industries; (4) the promotion of industrial stability; (5) the effect of the bargaining structure on the employer's operation; (6) the historical pattern of organization in the industry; and, (7) the agreement of the parties.

[88] Mr. Waller asserted that: (1) the unit proposed by Teamsters 395 is too small to be viable in the long term, while the larger unit proposed by IATSE 295 does not share this weakness; (2) the entire group of technical employees represented by IATSE 295 in its voluntary recognition by Inconvenience, including the drivers, share a community of interest; (3) the organizational difficulties in the industry, resulting from the short periods of production work, have dictated that voluntary recognition of a single unit of technical employees has made practical sense; (4) the unit proposed by Teamsters 395 has the potential to foment industrial instability and inefficiency in bargaining; (5) a majority of the technical crew employees signed deal memos confirming their desire that IATSE 295 act as their bargaining agent; (6) the fragmentation that would result from the certification of the unit proposed by Teamsters 395 would cause significant difficulties for the employer, and may dissuade other producers from choosing Saskatchewan for their projects; and, (7) the historical pattern of labour organization in the industry in Saskatchewan has been the representation of all technical employees by IATSE 295.

[89] In referring to the principles iterated by the Board in the *Sterling Newspapers* decisions, *supra*, Mr. Waller argued that the present case did not warrant the certification of an under-inclusive bargaining unit. He opined that the granting of a certification order for the unit proposed by Teamsters 395 would cause chaos in the Saskatchewan film production industry, which has functioned well to date without the obtaining of certification orders from the Board. Counsel cautioned that the Board should not disrupt the industry past practice of voluntary recognition.

[90] Mr. Waller argued that an appropriate unit would properly include anyone who drives any vehicle for any purpose, rather than the unit restricted to employees in the transportation department of

Inconvenienced as applied for by Teamsters 395. Many crew members outside the transportation department, he said, perform a significant amount of driving in connection with their job duties.

[91] With respect to the determination of the employer for labour relations purposes, and the issue of related employers, Mr. Waller also relied upon the principles enunciated by the Board in *Wayne Bus Ltd.*, *supra*, but argued that on the evidence adduced they support the assertion that Inconvenience alone is the employer.

[92] Mr. Waller asserted that IATSE 295 has filed evidence of majority support for its application to certify its technicians' unit. He argued that execution of the deal memos by employees should be accepted as evidence of support, because although its language is unconventional that intent is clear on the face of the deal memo. He said further evidence of support in usual form was filed with the notice of intervention. The fact that it was obtained after Teamsters 395 filed its application should not disqualify its admissibility and it might be considered as merely an affirmation of the intention expressed by the employees in their deal memos. Although Mr. Waller acknowledged that the Board's general practice is not to consider evidence of support obtained after the filing of the initial certification application, the circumstances of the present case should lead the Board to conclude that this is an appropriate case in which to make an exception.

[93] In addressing the issue as to whether there is any labour relations purpose in issuing a certification order with respect to Inconvenience, which is unlikely to ever again have any employees, Mr. Waller pointed out that the Board has issued such orders in the context of the construction industry.[17] He said that IATSE 295 conceded that the issue in the present case was moot, but referred to the consideration of the doctrine of mootness discussed by Sopinka, J. in *Borowski v. A.-G. Canada*, [1989] 1 S.C.R. 342 (S.C.C.), as follows, at 353:

> *The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear*

[17] See, for example, *International Brotherhood of Electrical Workers, Local 529 v. Sparrow Electric Corp.*, [1993] 4th Quarter Sask. Labour Rep. 79, LRB File No 270-91, where the employer had been placed in bankruptcy and its assets disposed of after the application for certification was filed, but before it was determined.

> *the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declined to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.*

[94] With respect to the issue of voluntary recognition in the film industry in Saskatchewan, Mr. Waller pointed out that the introduction of compulsory collective bargaining legislation did not exclude voluntary recognition or voluntary bargaining, and that the definitions of "collective bargaining agreement" and "bargaining collectively" in the *Act* do not require that the trade union involved be certified as the bargaining agent. While he agreed that the status of a union that holds only voluntary recognition is somewhat tenuous, s. 33(5) of the *Act* affords some measure of protection where the union can demonstrate that the agreement upon which it relies has the support of the majority of employees in an appropriate unit. Mr. Waller urged the Board to give effect to the voluntary arrangement between IATSE 295 and the employer, and dismiss the application by Teamsters 395 as being barred because it was not filed during the period mandated by s. 33(5) of the *Act*.

[95] Mr. Kenny, on behalf of Inconvenience, RMP and Minds Eye Pictures, argued that while Trimark retained ultimate authority over all matters pertaining to this film project, provided the financing and the most senior management representative, each employee signed a deal memorandum clearly identifying Inconvenience as their employer, and Inconvenience exercised direction and control over their day-to-day activities and bore the burden of their remuneration. Counsel asserted that no evidence was adduced that suggests that RMP had any decision-making role in the making of the picture, pointing out that none of the individuals listed on the amended statement of employment have any relationship with RMP. Mr. Kenny pointed out that the overwhelming number of examples of certification orders granted in the industry in British Columbia and Alberta indicate that the respective labour boards of those provinces consider the single-purpose production company to be the employer for labour relations purposes.

[96] Mr. Kenny took issue with the reference to the "jurisdiction of the union" by Teamsters 395 in its description of its proposed bargaining unit, asserting that the phrase encompasses something broader than the transportation department of *Inconvenienced*. Counsel opined that the scope of representation sought by Teamsters 395 included any employee that drives as part of their job function. As such,

counsel argued that the amended statement of employment was the appropriate one for the purpose of the application.

[97] Mr. Kenny further argued that the unit proposed by Teamsters 395 was not an appropriate unit, referring to the Board's policy of preferring larger, more-inclusive bargaining units. He asserted that the present case was not an appropriate on in which to carve out the group proposed by Teamsters 395.

[98] In his argument, Mr. Kenny said there is no reason to make any certification order(s) in the present case because Inconvenience has no employees and will not likely ever have any again, and there would be no sense in ordering the employer to bargain collectively.

Analysis and Decision

[99] The issue was raised as to whether the applications should be considered and determined given that Inconvenience no longer had any employees by the time of the hearing and was unlikely to ever have any again. However, all parties to the applications are interested in the promotion of film production activity in the province. The availability of a pool of skilled technicians and the stability in the industry's labour relations are two of the keys to the attraction of that activity. The applications raise issues that are important to the future of labour relations in the industry. There is no more direct way in which to resolve these issues: it is unlikely that a situation of longer-term continuing employment might present itself in the near future. While the issues may have become "moot" in a strictly immediate sense, the same issues will arise again and again and the controversy will not go away. Accordingly, we have determined to exercise our discretion to decide certain aspects of the case.

[100] The effect of the voluntary recognition arrangement between IATSE 295 and Inconvenience is a threshold issue to the consideration of the certification application by Teamsters 395. IATSE 295 asserts that, pursuant to section 33(5) of the *Act*, the standard agreement constitutes a bar to Teamster 395's application unless it is filed during the "open" period referred to in this section.

[101] Clearly, a collective bargaining relationship and agreement can exist independently of, and do not depend upon, the existence of a Board order[18]. But, the issue raised in this case has been previously

[18] See, *Saskatchewan Government Employees Union v. Saskatchewan Institute of Applied Science and Technology*, [1989] Summer Sask. Labour Rep.51, LRB File No. 131-88.

determined by the Board and approved of in subsequent decisions. In *Canada Messenger Transportation Systems Inc., supra,* United Food and Commercial Workers, Local 1400 (UFCW) applied to be certified as the bargaining agent for the employees of Canada Messenger in Saskatoon. The Canadian Brotherhood of Railway Workers intervened on the grounds that it already represented the employees by virtue of a voluntary collective bargaining agreement with the employer, arguing that the agreement was a bar to the application by UFCW. It was admitted that the application by UFCW was not filed during the "open" period set forth in s. 33(5) of the *Act*. The Board accepted an alternative interpretation that s. 33(5) of the *Act* merely provides a conclusion to s. 6(2) of the *Act* respecting a "raid" application. That is, while s. 6(2) of the *Act* provides that such application by a competing union must be filed during the "open" period and a vote must be held (except in certain circumstances), it is silent on the status of the incumbent union's collective agreement in the event the application by the competing union is successful. Section 33(5) of the *Act* resolves the issue by declaring that the existing agreement is of no force and effect. The Board rejected the argument that s. 33(5) of the *Act* is broad enough to apply to the situation where the incumbent union is not certified. The Board stated, at 95:

> *Where genuine ambiguity exists, as it does here, over the meaning of some portion of The Trade Union Act, the Board's policy has always been to prefer that interpretation which is most in harmony with the objects of the Act. The objects of the Act, or at least one of the fundamental objects of the Act is to place into the hands of employees the right to choose whether or not they wish to be represented by a union and, if so, which union. Numerous provisions of the Act are also designed to prohibit any attempt by the employer to participate in the representation question. It would therefore be completely incongruous with those objects if the board interpreted section 33(5) in a manner that allowed unions and employers to completely bypass the wishes of employees, recognized the participation of the employer's bargaining representative and actually barred employees from exercising their right to bargain collectively through a union of their choice. This is not to suggest that voluntary recognition is prohibited by the Act, but only that much clearer language than is present in Section 33(5) would be necessary before it will be interpreted in the manner suggested by the intervenor.*

[102] The Board came to a similar conclusion in *International Union of Operating Engineers, Hoisting, Portable and Stationary, Local 870 and Construction and General Workers' Union, Local*

890 v. Henuset Pipeline Construction Ltd. and General Workers Union of Canada, Local No. 1, [1991] 4th Quarter Sask. Labour Rep. 64, LRB File Nos. 146-91, 188-91 & 195-91, stating as follows, at 69:

> *Where a union has been certified pursuant to the provisions of the Act, all of the threshold questions with respect to the appropriateness of the unit or employee support are, by definition, answered by the certification order. However, in voluntary recognition situations those questions remain open and, when raised, the Board should not invoke the provisions of The Trade Union Act to provide protection for a voluntarily recognized bargaining relationship which cannot meet the fundamental requirements of Section 3. This does not mean that voluntary agreements that do not meet these standards are ineffectual. Rather, it means that if a union wishes to rely on voluntary recognition, and the consequent collective bargaining agreement, as a Section 33(5) shield to counter the certification application of another union it must, at a minimum, show that the agreement upon which it relies has the support of the "majority of employees" in "the appropriate unit of employees" as referred to in Section 33(5).*
>
> *To interpret the provisions of Section 33(5) otherwise would be inconsistent with the intent of The Trade Union Act and would, in fact, leave the door open for employers and union representatives to bypass the statutory right of employees to be represented by a union of their own choosing in an appropriate unit.*

[103] More recently, in *Grain Services Union (ILWU – Canadian Area) v. Heartland Livestock*, [1996] Sask. L.R.B.R. 161, LRB File No. 287-95 the union sought to invoke union security under s. 36(1) of the *Act* in circumstances where its voluntary recognition collective agreement with the employer did not provide for same, the Board held that the presence of the agreement did not establish the union's representative capacity necessary to invoke union security under the provisions of the *Act*. With respect to the position of a trade union holding such status, the Board stated, at 169:

> *It can be concluded from the cases quoted [including Canada Messenger and Henuset, both supra] that the status of a trade union holding a voluntary recognition agreement is a tenuous one. While some rights in relation to that agreement may be enforceable under the provisions of The Trade Union Act, the right of the trade union to exclusively represent the employees is not statutorily guaranteed under s. 3 of the Act.*

[104] As the cases indicate, to accept that s. 33(5) of the *Act* necessarily constitutes a bar to an application to be certified as the bargaining agent for a unit of employees represented by an uncertified bargaining agent is contrary to the recognition of the fundamental right of employees in an appropriate unit to be represented by the trade union of their choice. For one thing, in the voluntary recognition situation it has not been determined whether the unit of employees represented by the uncertified bargaining agent is an appropriate unit. In the present case the situation has even more serious implications. It is common ground that active production lasted less than one year, and the collective agreement between IATSE 295 and Inconvenience was for a period of less than one year. Under the interpretation urged by counsel for IATSE 295, there would be no open period under s. 33(5) of the *Act* during which a competing union could apply for certification of an appropriate unit. The group of employees represented by Teamsters 395 would be precluded from asserting their statutory rights under the *Act*. While we do not in any way impute any improper motive to IATSE 295 or Inconvenience in agreeing to their arrangement in this case, it is easy to see how an unscrupulous union and employer acting in concert could defeat employees' fundamental statutory right to representation by a certified bargaining agent. Certainly, it was not intended by the legislature that s. 33(5) of the *Act* would result in such a potential source of abuse.

[105] Accordingly, we find that the application for certification by Teamsters 395 is not barred by s. 33(5) of the *Act* and the existence of the voluntary collective agreement between IATSE 295 and Inconvenience.

[106] Pursuant to s. 5(a) of the *Act*, the Board has exclusive jurisdiction to determine whether a proposed unit is appropriate for the purposes of collective bargaining. In referring to the fact that an appropriate unit may be "an employer unit, craft unit, plant unit or a subdivision thereof or some other unit," s. 5(a) of the *Act* recognizes that various types of bargaining units, including ones that may not fit established definitions, may be appropriate for different undertakings for a variety of reasons. Standardized craft units are the norm in the construction industry; modified craft units may pertain in the newspaper and health care industries; manufacturing and industrial plants may have more than one bargaining unit delineated along production and administration lines. Attempts to organize industries that are notoriously difficult to organise, such as the hospitality, retail and banking industries, often result in less than all-employee units or in single-outlet units. Different considerations may apply to initial unit certifications versus subsequent applications for certification.

[107] The fundamental objective in determining an "appropriate unit," as defined in s. 2(a) of the *Act*, is to establish viable and effective collective bargaining. In *Canadian Union of Public Employees and The Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, at 271, the Ontario Labour Relations Board described the purpose of the exercise as follows:

> *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. ...While the requisites for effective collective bargaining cannot always be defined with certainty, may necessitate a balance of competing collective bargaining values, and may, in any event, turn on factors beyond the Board's control, the discretion to frame the "appropriate" bargaining unit during the initial organizing phase provides the Board with an opportunity (albeit perhaps a limited one) to avoid subsequent labour relations problems.*

[108] However, these public policy objectives are numerous and not always easy to reconcile. For example, the objective of encouraging employees to freely choose collective bargaining is often in competition with that of the promotion of industrial stability. Accordingly, while the determination of an appropriate unit is simple in theory, it is complex in execution, and its consequences are potentially fundamental to the tenor of the collective bargaining relationship that follows. The Ontario Labour Relations Board described the challenge of the task as follows, in *International Brotherhood of Electrical Workers, Local 1687, and Kidd Creek Mines Ltd.*, [1984] OLRB Rep. March 481, at 494:

> *...the Board's determination is obviously of immense practical importance, not only for the immediate parties, but for the structure and performance of the collective bargaining system as a whole. The definition of the unit affects the bargaining power of the union and the point of balance it creates with that of the employer. It influences the potential scope and effectiveness of collective bargaining for dealing with different matters, and to some extent, even the substantive issues covered in the collective agreement. And, perhaps most important, the shape of the bargaining unit can*

> *profoundly influence the potential for industrial peace or collective bargaining discord. The more disparate are the interests enclosed within the unit, the more difficult it may be for the union to effectively represent the collectivity. Insufficient attention to these special interests generates internal strife, while too much attention to minorities may make it more difficult for a union to formulate a coherent package of proposals or make necessary concessions. On the other hand there are dangers at the other extreme...*
>
> *The point is that the concept of the appropriate bargaining unit is an instrument of public policy, and in fashioning bargaining units...the Board endeavours to accommodate potentially competing collective bargaining values – including the right to self-organization and the desirability of industrial harmony.*

[109] However, the appropriateness of a bargaining unit cannot be assessed with scientific precision – more than one configuration may be appropriate. The Board is not required to choose the more comprehensive unit, but to choose a unit structure that is appropriate for collective bargaining having particular regard to the facts of the case. IATSE 295 and Inconvenience argued that the unit proposed by Teamsters 395 is not appropriate, and that a more comprehensive unit comprising all "technical" employees is the only appropriate unit for the non-performing and non-management employees on a film production.

[110] In *British Columbia Council of Film Unions, supra*, which created the union council in the film industry in that province, the British Columbia Labour Relations Board referred to the making of films as a "fundamentally unique industry." The British Columbia Board stated, at 16:

> *It is an industry that bears little, if any, similarity to other sectors of the British Columbia economy. It is also an industry which has been having considerable labour relations difficulties in the recent past. Our decision is in the best interest of various parties in the industry itself and the economy of the Province of British Columbia.*

[111] We agree with the sentiment that film production is a singular undertaking. It has developed a unique form of organizing labour and bargaining structures outside the statutory framework of the *Act*.

The film industry shares certain similarities with the construction industry: for instance, employment is of relatively short duration; employees are hired according to their proficiency and experience in a particular craft, coming and going at various times depending on the stage of the production; technical employees are dispatched from a hiring hall; the industry unions have developed some rules for the resolution of jurisdictional disputes; industry unions have standard contracts; and employers seek, and may be granted, concessions to certain clauses in the standard contracts.

[112] In *Henuset Pipeline Construction Ltd.*, *supra*, the Board made the following observation in regard to craft organization in the construction industry, at 67:

> *Employees within a craft unit share a community of interest; they share skills, working conditions, training and union benefit provisions. The character of the employment relationship in construction is dramatically different from that in an industrial setting where all-employee units are typically harboured. In construction, there is no basis for the tenured status which employees enjoy under most collective agreements; there is no basis for the kind of enduring association which a group of employees can form in an all-employee industrial unit. A pipeline construction worker's job is at best fleeting and highly mobile across a wide geographic area; the structure and continuity in his working career necessarily comes from the craft union which represents him.*

[113] The same passage could pertain equally as appropriately to the film production industry. The British Columbia Industrial Relations Council noted the fleeting and highly mobile nature of the industry in *Teamsters Local Union 155, et al. v. Golden Spurs Productions, Limited*, BCIRC No. C145/90 (July 20, 1990):

> *The Teamsters and IATSE agree that the film industry does not lend itself to organizing through the certification process. A typical film shoot is of short duration, even shorter than many construction projects: about six weeks. It is simply impractical to wait until employees are working on the project, sign them up or present their membership cards as evidence of support to a labour relations tribunal, obtain certification, and then attempt to negotiate a collective agreement for the employees. A film production company and its employees have one focus during a film shoot, mainly, making the film; it would be impractical and counterproductive for them to consider a certification*

proceeding as well. Moreover, even of a certification could be granted during the six week shoot, Teamsters and IATSE witnesses testified that it would be impractical to negotiate a collective agreement in the traditional way during that time. The prospect of a work stoppage to obtain desired employment terms and conditions is just not acceptable in the film industry because if that happened, the film would not be made here: the producer would pack up and leave for a more convenient location elsewhere in the world. Moreover, British Columbia's reputation as a film location would sink, hurting Teamster and IATSE members in the long run.

Therefore, voluntary recognition agreements are entered into with a film producer before any employees are actually working on the production. A producer comes to the province, scouts locations, talks to the unions and negotiations begin in that way.

[114] While the Board's general policy prefers more comprehensive bargaining units to those that are less inclusive, the industry has organized itself along broad craft lines into direct, production, art, technical (which, in some jurisdictions, has sub-divided into separate locals representing camera operators and other technicians), and performing categories, in North American jurisdictions. In the United States, British Columbia and Alberta there is also a separate transportation and related services category represented by Teamster locals.[19] The ordinary and usual rules and policies applied by the Board relating to inclusive bargaining units do not fit with the film industry structure and practice, with its craft organization and use of single-purpose corporate vehicles similar to construction joint ventures.

[115] In construction, the impracticality of project-by-project certification, and the instability that the ordinary system entailed, led to sectoral bargaining between the industry unions and representative employers' organizations in Saskatchewan and elsewhere. In *British Columbia Council of Film Unions, supra*, the British Columbia Labour Relations Board found partial sectoral bargaining to be desirable in the film production industry. In Saskatchewan, sectoral bargaining in the construction industry is mandated by *The Construction Industry Labour Relations Act, 1992*, S.S. 1992, c. C-29.11, but there is no such scheme for the film production industry and this Board does not have the jurisdiction to institute such a system.

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[19] In *Golden Spurs Productions, supra,* the British Columbia Industrial Relations Council observed that the Teamsters have represented members in the North American movie industry since the late 1800's and in British Columbia since the early 1960's.

[116] The issue of the appropriateness of the bargaining units sought by Teamsters 395 and IATSE 295 is delicate and has ramifications beyond the immediate interests of the parties that may affect the future configuration of the organization of labour in the industry. Given the process of film production and its customary practice, the general agreement of the stakeholders, and the expectations of employers and workers in the industry, it would be destabilizing to alter the broad craft categories described above. The self-organization of the industry has operated with relative stability with the broad consensus of the parties involved. Accepting that a bargaining unit comprising technicians is appropriate we must decide whether the smaller unit proposed by Teamsters 395 is also an appropriate unit and for labour relations reasons should be certified.

[117] In *Hotel Employees and Restaurant Employees, Local 767 v. Courtyard Inns Ltd.*, [1988] Winter Sask. Labour Rep. 51, LRB File No. 116-88, the Board summarized some of the factors considered in determining whether a unit is appropriate, at 51:

> *...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.*

[118] As described earlier, the effect of the British Columbia Labour Relation Board's decision in *B.C. Council of Film Unions, supra*, was to create a council comprising three trade unions. It based its decision on the fact that other unions that were party to the application did not have a presence in big-budget film production, but it retained jurisdiction to amend the council's structure and the scope of its exclusive jurisdiction, recognizing that future adjustments might be necessary.

[119] The evidence established that Teamsters 155 represents the vehicle and equipment drivers, caterers, outside security, animal trainers and wranglers in B.C. Teamsters 362 represents employees performing the transportation and animal wrangling functions in Alberta. In Saskatchewan, IATSE 295 has represented most, if not all, technical employees including those performing transportation functions, in the south half of the province. It is not clear what the situation is in the north half of the province, or whether IATSE 295 has ever represented animal wranglers.

[120] The evidence also establishes that Teamster 395 has many members that are trained and licensed and have the demonstrated expertise to operate a variety of vehicles and equipment and to transport all manner of goods and materials (including dangerous goods and hazardous materials) and people. The specialization of its members has been recognized in many certification orders granted to Teamsters 395 bargaining units in construction and transportation. It now seeks to represent a unit of transportation employees in the film production industry, plus animal wranglers. Teamsters 395 periodically offers specialty and safety training courses for its members. It maintains a hiring hall and has established benefits programs for its members.

[121] IATSE 295 has represented film production transportation department employees since 1996. Although the evidence does not disclose the actual number of larger budget productions in the province, they appear to be relatively uncommon. When two such productions overlapped, there was a shortage of drivers that were IATSE members. Teamsters 155 members came to work and, although they were permitted by IATSE 295, they were paid British Columbia Teamster standard agreement rates and had their union dues submitted to Teamsters 155.

[122] The transportation department employees have a community of interest quite apart from that which they share with other film technicians, particularly respecting issues like hours of work, standby time, safety, training and the development of a pool of specialized equipment. The certification of similar units in British Columbia and Alberta has not led to "chaos in the industry." It may be argued that the formal rationalization of the technical employee bargaining units by the British Columbia and Alberta Labour Relations Boards has served to resolve jurisdictional issues between the unions and in turn nurtured a more harmonious labour environment attractive to industry producers. The unions have managed to overcome the problems that arise from time to time at their jurisdictional interfaces, just as IATSE and the Directors Guild have apparently done so in Saskatchewan.

[123] The viability of a transportation bargaining unit in the industry has been generally demonstrated by the experience in British Columbia and Alberta. It is not difficult to understand the bargaining power possessed by those employees that control the movement of most of the material and people necessary to a production. A rational and defensible boundary may be drawn around such a unit. To adopt the phrase used by the Board in *Construction and General Workers Union, Local 180 v.*

Saskatchewan Writers Guild, [1998] Sask. L.R.B.R. 107, LRB File No. 361-97, at 111, "the unit applied for is sufficiently appropriate to permit collective bargaining on a rational basis."

[124] We are of the opinion that a bargaining unit composed of transportation department employees on the production of *Inconvenienced* is appropriate for collective bargaining and a rational boundary can be drawn around it – that is, those employees whose primary responsibility is to operate, or to co-ordinate the operation, commissioning, maintenance, assignment and ancillary administration of, vehicles and transportation equipment for the movement and handling of goods, materials and people: transportation co-ordinator; transport captain, transport captain trainee and drivers (all classes). It does not include employees whose job duties are not primarily focused on such activity but who have some measure of driving to perform incidental to their main activity. There were no animal trainers, wranglers or boat wranglers employed on the production, and thus we decline to include those classifications in the unit description.

[125] It is also our opinion that a bargaining unit composed of all film technicians, except those in the transportation department as described above, is also an appropriate unit within the meaning of the *Act*.

[126] In relation to the transportation bargaining unit, we find that the first statement of employment is more accurate with certain exceptions. The parties agreed that Mr. Huffman should be removed. The employment records of Ms. Ehrlich and Ms. Stelter lead us to determine that neither was employed on the date that the application was filed. Their names will be deleted.

[127] Fred Moroz and Ryan Moroz are properly included on the statement of employment. They were listed on the initial statement as "drivers." The primary focus of their responsibilities was the movement and maintenance of their vehicles, and it is the longstanding custom in the industry that such trailer drivers come under the classifications and rates of drivers in the transportation department of a film production.

[128] We do not agree that Mr. Demaer should be removed from the statement of employment. While the time worked by Mr. Demaer was intermittent, he maintained a tangible employment connection with the production across the date the application was filed.

[129] Accordingly, there are 14 names on the statement of employment for the purposes of determining the level of support for the Teamsters 395 application, as follows:

Sheila Richards	Bill Lewis
Lorne Kurtz	Rennal Demmans
Jason Richards	Wally McDonald
Tom Caldwell	Chuck Scorgie
Kevin McCluskey	Danne Schlosser
Shanna Marie Richards	Fred Moroz
Ryan Moroz	Gerard Demaer

[130] Teamsters 395 has filed evidence of the support for its application of a majority of the employees in the appropriate unit.

[131] IATSE 295 filed a notice of intervention claiming that it represented the majority of employees in a proposed unit of film production technicians, including the employees in the bargaining unit proposed by Teamsters 395. At the same time, it filed evidence of support among the employees. While we have determined that a bargaining unit comprising all technicians, with the exception of those in the unit represented by Teamsters 395, is an appropriate unit, an issue has been raised by Teamsters 395 concerning the legitimacy of the evidence of support filed by IATSE 295 on its intervenor application. Another issue was raised by the Directors Guild which claims to represent persons in three of the classifications sought by IATSE 295, namely, production co-ordinator, production secretary and production assistant; while the letter of amendment to the IATSE 295 collective agreement with Inconvenience purports to exclude these positions from the scope of the agreement (see, para. 63, *supra*, and para. 134, *infra*) it did not seek to amend its application for certification to delete them.

[132] The objections to support evidence are made on two grounds: that the evidence of support should not be accepted as it was filed after Teamsters 395 filed its application for certification and in the alternative, that it is not sufficient in the sense that it is not in acceptable form. The first of these objections is rendered essentially inconsequential in that we have determined that the unit applied for by Teamsters 395 is an appropriate unit. However, on the basis of the decisions of the Board in *Construction and General Workers Union and Construction Workers Association (CLAC), Local 151 v. Salem Industries Canada Ltd.*, [1986] June Sask. Labour Rep. 69, LRB File Nos. 033-86 & 044-86;

International Union of Operating Engineers, Local 870 v. Penn-Co Construction Ltd. and Construction Workers Association, Local 151, [1990] Summer Sask. Labour Rep. 39, LRB File No. 187-89, we have determined that any evidence of support for the application by IATSE 295 from among those employees in the Teamsters 395 bargaining unit will not be considered in the determination of the level of support for the application by IATSE 295.

[133] The second ground raised a concern about the sufficiency of IATSE's support evidence. The evidence of support came in three basic forms. One form was for permittees of IATSE 295 and the other two forms were for full members of IATSE 295 or other IATSE locals. The objection was raised in regards to one of the membership forms which provided as follows:

> *I, _____, am a member in good standing with The International Alliance of Theatrical Stage Employees, Motion Picture Technicians, Artists and Allied Crafts of The United States and Canada, Local 295 (IATSE Local 295). And as such I have been a member since (Year)_____, (Month)_____. I hereby recognize IATSE Local 295 to be my only collective bargaining unit for the purpose of motion picture production within the jurisdictional and geographical limits of this local's constitutionally mandated area (Southern Saskatchewan). I hereby authorize IATSE Local 295 to act as my only collective bargaining unit for future employment provided by the following employers: (To include, but not limited by, the parent companies, subsidiary companies, corporate mergers, single-purpose production companies, off-shore service productions where the below listed production companies are the Saskatchewan producers, or any other production entity where the parent company has controlling interests in the said productions.)*
>
> (Follows, a list of companies, including "Mind's Eye Pictures").
>
> *I hereby acknowledge that this document expires July 31, 2000, however if I wish to no longer recognize IATSE Local 295 as my collective bargaining unit I will do so in writing and forward it to the IATSE 295 office by registered mail.*
>
> *"Signed and Dated"*

[134] It is unnecessary for us to determine whether this form is sufficient as evidence of support for the application by IATSE 295. Whether or not we accept any of the cards in this form, IATSE 295 has filed evidence of majority support for a unit of technicians including employees in the following classifications:

Department	Classification
Continuity	Script Supervisor
Construction	Construction Manager Head Carpenter Assistant Head Carpenter Carpenter Assistant Carpenter Construction Buyer Labourer
Craft services	Co-ordinator with First Aid Craft Services Assistant
Electric	Gaffer Best Boy Electric Generator Operator
Grip	Key/Rigging/Dolly Best Boy Grip Company Grip
Hair	Key Hairdresser Hairdresser SFX/Period/Prosthetics
Makeup	Key Makeup Makeup SFX/Period/Prosthetics
Props/Sets	Props Master/Maker Set decorator Lead Props/Buyer Lead Dresser/Buyer Picture Vehicle Co-ordinator Propsperson Set Dresser

Production	Production Co-ordinator Production Secretary Production Assistant (all categories)
Projection	Dailies Projectionist
Scenic Artists	Key Scenic Artist Scenic Artist Sign Painter Painter Assistant Painter
Sound	Production Mixer Boom Operator Cable Puller
Special Effects	Co-ordinator Key Special Effects 1st Assistant 2nd Assistant
Wardrobe	Designer Assistant Designer/Co-ordinator Cutter Set Supervisor Costumer Seamstress Dresser Breakdown Artist/Dyer

[135] In addition, IATSE 295 has filed evidence of majority support for a unit of technicians whether or not the persons in the classifications of production co-ordinator, production secretary and production assistant are considered. In view of the issue raised by the Directors Guild with respect to the representation by IATSE 295 of the persons in these classifications, the certification Order for a bargaining unit represented by IATSE 295 shall be an interim Order and shall not include these classifications. There will be a further hearing with respect to the status of the positions in dispute.

[136] It is common ground that film productions often change locations or shoot in more than one location simultaneously (i.e., second unit production). It is reasonable that the jurisdiction of a certification order should apply to the geographic jurisdiction of the union in Saskatchewan. In the case of Teamsters 395, this covers the whole province. In the case of IATSE 295, it is the area south of the 51st parallel.

[137] The issue of related or common employers in the film industry has not been the subject of a detailed published analysis by a labour board. In *British Columbia Council of Film Unions, supra*, at 12, the British Columbia Labour Relations Board states that while the major industry producers negotiate the master agreements with the council members they are not "employers" for labour relations purposes: the employers are the single-purpose production companies that sign a letter of adherence to the master agreement.

[138] In a case decided a year earlier, *ACTRA B.C. Performers Guild and Union of B.C. Performers v. Are We Having Fun Yet? Productions, Inc.*, [1994] BCLRB No. B227/94, the B.C. Board considered the application to certify three wholly owned British Columbia production shelf company subsidiaries of Republic Pictures Productions Inc., an American industry major producer. While the B.C. Board used the fact of common ownership and control by Republic to find that the subsidiaries were related for labour relations purposes, Republic itself was not included in the declaration. The B.C. Board noted that because Republic had no presence in British Columbia other than through the shelf companies it was not a "provincial employer" and could not be subject to the certification orders of the Board. The B.C. Board further noted that Republic was not an unscrupulous employer trying to defeat bargaining obligations and it does not appear to have been a party to the application in any event. But it is not clear from the decision whether the B.C. Board would have otherwise included Republic as an employer, and the Unions do not appear to have argued the point. Perhaps the lack of apparent issue regarding entities other than the production company vehicle as employers for labour relations purposes is because the industry unions have only been interested in securing work for their members and ensuring that they are paid for their labour. It seems that it is only in those uncommon instances where the major studio has not used the vehicle of a single-purpose production company that such entities directly enter into voluntary collective agreements. The industry unions, other than ACTRA and others representing on-camera performers, do not appear to have taken much of an interest in small budget productions.

[139] The customary system of utilizing a single-purpose production company facilitates productions by the major studios and producers who find the Canadian jurisdictions financially favourable. The more pictures made in Canada, the better for the industry unions and their members. Because of the concentrated effort and sometimes-enormous sums involved in major productions, work stoppage would be disastrous. Major producers are highly motivated to ensure their relationships with the unions are harmonious. The industry majors and the industry unions have a long history of relatively co-operative and mutually beneficial labour relations. There is no evidence that the single-purpose production

company vehicle has been used by the majors (and in the present case, RMP o/a Minds Eye Pictures) as a method to escape collective bargaining obligations. That is not to say that an unscrupulous employer could not attempt to do so, for, as was stated by the B.C. Board in *Are We Having Fun Yet? Productions, Inc., supra*, at 21, "employers do not suffer from a shortfall of imagination when it comes to corporate structures." But there is no evidence of any invidious motive in the present case.

[140] In this case, Inconvenience undertook the production of the film on a unionized basis. Inconvenience, not RMP, Mind's Eye Pictures, nor Trimark, negotiated and signed the collective agreements with IATSE 295, the Directors Guild and ACTRA. Inconvenience negotiated the individual deal memoranda with the employees. Inconvenience was paymaster and remitted the deductions for union dues and benefits plans, and paid the administrative fees and employer's benefit plan contributions. There is no doubt that there is considerable shareholder, director and administrative overlap between Inconvenience and RMP, and there is no doubt that Trimark retained ultimate financial and artistic control of the project. There are a number of factors that might tend to indicate that there is common control for labour relations purposes or that one or more of the companies is related within the meaning of the *Act*.

[141] However, no labour relations purpose was advanced by the unions in the present case for the designation of parties other than Inconvenience as the employer. There are no longer any employees connected with the production of *Inconvenienced*. No evidence was presented of an attempt to garner support from among the employees of RMP or Minds Eye Pictures that were not connected with the production of *Inconvenienced*. Trimark, like Republic Pictures in *Are We Having Fun Yet? Productions, Inc., supra*, is not an employer in Saskatchewan. It may be necessary, important or prudent in some future case to determine that entities other than the direct production vehicle are common or related employers but it is of no practical use in the present circumstances. Accordingly, the certification Order and interim certification Order to issue for the bargaining units represented respectively by Teamsters 395 and IATSE 295 will reflect simply that the employer is Inconvenience. The Board Registrar is directed to schedule a hearing of the issue raised by the Directors Guild regarding jurisdiction in relation to the production co-ordinator, production secretary and production assistant positions, and to arrange a pre-hearing meeting of the parties with respect to same.

[142] We thank counsel for all parties for their professional presentation of the case and the obvious effort devoted to their briefs which assisted us enormously in making our decision.

LESLIE MCCARTNEY, Applicant and CRESCENT VENTURE CAPITAL CORP. O/A HARWOODS RESTAURANT and SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Respondents

LRB File No. 235-00; April 10, 2001
Chairperson, Gwen Gray; Members: Leo Lancaster and Mike Geravelis

For the Applicant: Merv Nidesh, Q.C.
For the Employer: Larry LeBlanc, Q.C.
For the Union: Larry Kowalchuk

Decertification – Interference – Out-of-scope housekeeping supervisors played key role in obtaining support for rescission application – Housekeeping supervisors' conduct made it known to employees that employer supported application for rescission – Board dismisses application for rescission without ordering vote.

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

REASONS FOR DECISION

Background

[1] Gwen Gray, Chairperson: The Applicant, Leslie McCartney, is an employee in the restaurant known as Harwood's Restaurant (the "Restaurant") located in Temple Gardens Mineral Spa (the "Employer") in Moose Jaw. The Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Union") was certified to represent employees of Crescent Venture Capital Corporation (the "Corporation") which operated the Restaurant, on September 30, 1999. The Restaurant was eventually sold to the Employer, who acknowledges that it is the successor employer to the Corporation. Ms. McCartney's application seeks to rescind the certification Order issued to the Corporation in relation to the Restaurant.

[2] The Union is also certified for an "all employee" bargaining unit in relation to the Employer. It is engaged in first collective agreement bargaining with the Employer and currently has an application for assistance in achieving a first collective agreement pending before the Board (LRB File No. 193-00). The employees who are covered by the negotiations include the employees at the Restaurant.

[3] As a preliminary matter, the Union argued that the certification Order issued to the Union with respect to the Corporation no longer has any employees as they have been subsumed under the "all employee" Order issued to the Union with respect to the Employer. The Applicant and the Employer argued that the Order issued to the Corporation was still in existence but with a change in the name of the employer from Crescent Venture Capital Corporation to Temple Gardens Mineral Spa Inc., as a result of the successorship provisions contained in s. 37 of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the "*Act*").

[4] The Board reserved on the preliminary issue and heard evidence with respect to the application for rescission.

Facts

[5] Ms. McCartney testified that employees in the Restaurant were not satisfied with the Union. She complained that she did not see notices of meetings posted at the work place and was kept poorly informed by the Union. She did attend a meeting at which a strike vote was taken and a meeting to discuss wage proposals.

[6] Ms. McCartney acknowledged that she received a wage increase in August, 2000, as a result of a change in her duties from day line cook supervisor to night line cook supervisor in the kitchen. Ms. McCartney's supervisor explained to her that she received a wage increase in accordance with the Employer's wage proposals tabled in collective bargaining. This agreement had been voted on and rejected by the employees. The timing of the wage increase coincided with the filing of the application for rescission.

[7] The organizing campaign for the rescission application was initiated by an employee who works as a front desk clerk at the Spa. He is not a member of the bargaining unit under the certification Order issued to the Corporation. This employee prepared the cards and brought them to Ms. McCartney to circulate at the Restaurant. At first, the employees were attempting to file a rescission application for the Spa and the Restaurant and had employees signing support cards in relation to one large application for rescission. After receiving advice from their lawyer, however, they began to prepare for two rescission applications – one for the bargaining unit at the Restaurant

and one for the Spa. The same support cards were used for both rescission attempts. The Spa application did not take hold.

[8] Ms. McCartney acknowledged that Kim Ayers was involved in the rescission campaign committee. Ms. Ayers works in housekeeping.

[9] Ms. McCartney testified that she wanted to form an employees' association or join a different trade union.

[10] Ms. McCartney testified that she was the only employee on the Restaurant side who was active in the rescission campaign. She testified that she asked employees to sign cards in support of the application on their regular breaks. She indicates that she made a payment toward the cost of the lawyer and that employees are using bottle money and other funds to pay for their legal representation. The support cards were prepared by Spa employees and provided to Ms. McCartney.

[11] Mark Hollyoak, union representative, testified on behalf of the Union. Mr. Hollyoak is the chief negotiator for the Union at the Spa and Restaurant. He testified that the Union applied for first contract assistance from the Board on July 9 or 10, 2000. The application for rescission was filed on August 29, 2000, after the request for first contract assistance. The first contract application relates to all employees of the Employer, which, at this time, includes those employees at the Restaurant. The proposals exchanged by the parties make it clear that they intended the collective agreement in question to apply to both groups of employees. The Employer did not propose to negotiate two collective agreements.

[12] Mr. Hollyoak testified that Ms. McCartney was elected as a shop steward by the Restaurant employees. However, after some time, she resigned her position in the Union. The employees in the Restaurant were consulted with respect to their bargaining proposals and shop stewards from the Restaurant were involved in collective bargaining.

[13] Mr. Hollyoak testified that he had heard that the cooks wanted a wage increase and were pressuring Deb Thorn, the Employer's chief executive officer, for a wage increase. He testified that he wrote and spoke to Ms. Thorn in relation to her advice to the employees that she could not offer

them a wage increase because the Employer was in bargaining with the Union. Mr. Hollyoak indicated to Ms. Thorn that he would be willing to discuss wage increases for any employees. According to him, the Employer did not propose to the Union that any wage increases be implemented prior to the conclusion of collective bargaining. He noted that the rates paid to Ms. McCartney and the day line cook supervisor reflected the rates proposed by the Employer in June, 2000. The Union conducted a strike vote and the Employer's offer has not been accepted by the Union. Mr. Hollyoak became aware in September, 2000 that the Employer had provided some employees with wage increases. Prior to the commencement of the first collective agreement application, the Employer tabled a different wage proposal in which it reduced the three year rates of all positions from its earlier proposal except the night line cook supervisors.

[14] In relation to the Union's structure, Mr. Hollyoak testified that the Spa employees are part of a composite local of the Union that includes in its membership the employees of more than one employer in Moose Jaw. Meetings are held on a monthly basis and all members are welcome to attend. The steward structure at the Spa is based on the different departments. The Union attempts to find one representative for each department. The stewards are responsible for the bargaining proposals and the negotiation of the collective agreement. Mr. Hollyoak testified that the Spa and the Restaurant employees have bargained together right from the commencement of collective bargaining.

[15] Mr. Hollyoak also testified that the strike vote taken among the employees of the Spa and Restaurant was taken as one vote. Employees were not required to vote in their own bargaining unit. The overall totals were used to determine if the strike mandate was received.

[16] Corrine Hodgson also testified on behalf of the Union. Ms. Hodgson was a room attendant and laundry attendant at the Spa. She is no longer employed by the Spa. During the rescission campaign, Ms. Hodgson was approached by her supervisors, Jean Wright and Michelle Paul, to sign a rescission support card. Both supervisors hold out-of-scope positions and are considered to be on the management team.

[17] Ms. Hodgson testified that she discussed the rescission application and the impact it may have on herself with Joan Wright. Ms. Hodgson had some complaints in relation to her pay as a laundry attendant and she was told by Ms. Wright that if the Union was gone, she would go and

discuss the matter with Ms. Thorn. According to Ms. Hodgson, Ms. Wright picked up the support cards and gave them to Kim Ayers.

[18] Ms. Hodgson testified that once she signed the rescission support card, everything was fine between her and management. She testified that the Employer provided her with monetary assistance in the form of grocery certificates when she was in dire need. Ms. Hodgson did not relate this generosity with her support for the rescission application.

[19] Ms. Hodgson was not involved in the rescission application at the Restaurant. Her involvement was in relation to the Spa.

Relevant Statutory Provisions

[20] The relevant statutory provisions include the following:

> *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;

. . .

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.

Argument

[21] Mr. Nidesh, Q.C., counsel for the Applicant, argued that there was no evidence of employer interference or influence with respect to the gathering of support for the rescission application in the Restaurant. Counsel argued that the Applicant has complied with the requirements of the *Act* and the application ought to be granted by the Board.

[22] Mr. Kowalchuk, counsel for the Union, argued that the rescission application was filed out of time because the only effective order is the Order issued to the Employer, not the Order issued to the Corporation, which no longer employs any employees.

[23] The Union also alleges that the application is tainted by employer interference or influence because cards were printed by the Employer's management and distributed on work time by the Employer's management. Counsel noted that the Applicant considered herself part of the larger Employer bargaining unit at the time she began to work on the rescission campaign. Only when the larger campaign was unsuccessful did the applicant consider applying to rescind the Restaurant certification Order. The support cards name the Employer and indicate that the employee "supports the decertification of the RWDSU at the Temple Gardens Mineral Spa and Resort Hotel." Counsel argued that this indicates that the Restaurant campaign was part and parcel of the larger campaign to decertify the Union at the Spa.

[24] Counsel for the Union also argued that the Board should not grant the rescission application or direct that a vote be conducted with respect to the application when an application for first collective agreement is pending with respect to the bargaining unit.

Analysis

[25] We find that the certification Order issued for the Restaurant employees in relation to the Corporation remains in effect. The sale of the Restaurant has the effect of supplanting the original owner with the new owner, namely the Employer in accordance with s. 37 of the *Act.* It does not, however, have the effect of bringing the Restaurant workers in the scope of the "all employee" Order issued to the Union for employees at the Employer. The original Order issued to the Employer did not include the Restaurant staff as they were then employed by a different employer. The parties may agree to alter the bargaining unit description by negotiating one collective agreement for both groups of employees. At that time, the parties may wish to apply to the Board to amend the existing Orders to reflect the change in the bargaining unit description. In the meantime, however, the Restaurant Order remains intact: see *Vancouver Museum and Planetarium Association v. Vancouver Municipal and Regional Employees' Union,* [1990] B.C.L.R.B. No. C194/90.

[26] The Board finds that there is evidence that the Employer through its housekeeping supervisors improperly influenced or interfered with the present application. The evidence indicates that the housekeeping supervisors played a key role in obtaining support for the rescission application among staff in the Spa. The campaign to rescind the Union's certification Order was originally conducted among both groups of employees at the same time. The decision to apply for a separate rescission Order came after the campaign had begun and after the housekeeping supervisors had made it known to members of the staff that they were encouraging support for the rescission application. In our view, this conduct tainted the present application for rescission as well by making it known to employees that the Employer supported the application.

[27] For these reasons, the application for rescission is dismissed.

SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant and TEMPLE GARDENS MINERAL SPA INC., Respondent

LRB File Nos. 032-00 & 033-00; April 16, 2001
Chairperson, Gwen Gray; Members: Leo Lancaster and Mike Geravelis

For the Applicant: Larry Kowalchuk
For the Respondent: Larry LeBlanc, Q.C.

Unfair labour practice – Unilateral change – Reasonable expectation of employees – Employer implements change to pre-certification method of calculation of commissions paid to certain employees without negotiating change with union – Board concludes that employees had reasonable expectation that commissions would be calculated in same manner used by employer prior to certification – Board finds violation of s. 11(1)(m) of *The Trade Union Act*.

Unfair labour practice – Interference – Discipline – Employer imposed discipline on shop stewards for incidents that would not normally give rise to disciplinary warnings – Board finds absence of any sense of proportion between alleged offences and penalties imposed - Employer trying to send message to shop stewards to curtail enthusiasm for union – Board finds violations of s. 11(1)(e) of *The Trade Union Act*.

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

REASONS FOR DECISION

Facts

[1] Gwen Gray, Chairperson: Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Union") applied to the Board for various unfair labour practices. In these applications, the main assertions deal with three incidents of discipline imposed on members of the Union, a change in the manner that commissions are paid to spa therapists and the method of imposing discipline.

[2] The Union was certified to represent employees at Temple Gardens Mineral Spa Inc. (the "Employer") on September 15, 1999. Jeannine Lavallee, Al Coghill and Brad Moffatt were all involved in the certification drive on behalf of the Union and they all attended the certification hearing. Ms. Lavallee is a member of the housekeeping staff, Mr. Coghill is a member of the

maintenance staff, and Mr. Moffatt is a member of the spa staff. Each one was the subject of disciplinary action in the form of written warnings after the certification.

[3] Ms. Lavallee was given a written warning on October 27, 1999. The warning related three incidents of misconduct on Ms. Lavallee's part. The first related to an incident on June 22, 1999 where the Employer alleged that Ms. Lavallee and Mr. Coghill were found in a guest room by the executive housekeeper. Ms. Lavallee explained that she was performing her final check of the room and Mr. Coghill was present in the room to check on the air conditioning.

[4] The second incident occurred on October 17, 1999 when Ms. Lavallee asked Mr. Coghill to find her bed makers to assist her in completing her daily work. Ms. Lavallee explained that she was sick that day and required extra help in order to complete her housekeeping duties on time. According to her, she asked Mr. Coghill to find her some bed makers, which he did. Mr. Coghill explained in his evidence that Ms. Lavallee did not ask him to obtain bed makers. He recalled that Ms. Lavallee asked him if he had seen bed makers. When he did come across bed makers, he asked them if they had been to Ms. Lavallee's floor. He denied that he directed them to assist Ms. Lavallee and indicated that he had no authority to do so. Ms. Lavallee received a separate written warning for this incident from the head housekeeper.

[5] The third incident and the one giving rise to the disciplinary notice occurred on October 27, 1999. Ms. Lavallee and Mr. Coghill arranged to meet at the end of their shifts at 3:00 p.m. for coffee. On the way to coffee, they stopped at Room 327 to find Mr. Coghill's supervisor, Bob, as pre-arranged, to go for coffee. When they arrived at the room, they found the door open and Bob was not present in the room. Ms. Lavallee testified that Mr. Coghill entered the room to look for Bob but she remained at the door. She did notice, however, that the room had not been properly cleaned and restocked. She told Mr. Coghill to call the executive housekeeper and report the housekeeping issues to her. Mr. Coghill phoned his supervisor to report that the door to the unit was unsecured and that they were waiting for him to come for coffee. Bob told Mr. Coghill that he would be meet them at Room 327 shortly. Mr. Coghill also phoned Joan Wright, the executive housekeeper to report the housekeeping issues related to Room 327.

[6] Ms. Lavallee and Mr. Coghill left the area of Room 327 to go for coffee shortly after Mr. Coghill made the phone calls. They did not wait for Bob to join them as he was delayed in getting to

the room. After coffee, they returned to Room 327 to speak to Bob and tell him they had already gone for coffee. When they arrived at Room 327 they were met in the hallway by Bob and Ms. Wright who yelled at them for being in Room 327 when they were off duty. Ms. Lavallee also recalled Ms. Wright telling her that she didn't need Ms. Lavallee's assistance to do her job.

[7] Ms. Lavallee understood that employees are not permitted to be in guest rooms when they are off-duty. Mr. Coghill and Ms. Lavallee were dating at the time of the three incidents and Ms. Thorn, chief executive officer of the Employer, testified that the relationship between Ms. Lavallee and Mr. Coghill was causing problems in the housekeeping department because of the amount of assistance that Mr. Coghill was giving to Ms. Lavallee.

[8] Mr. Coghill received a written warning on October 27, 1999 for the incident related to Room 327. In the warning notice, reference was made to a previous discussion between Mr. Coghill, Bob, his supervisor and Ms. Wright, the executive housekeeper, concerning the amount of time Mr. Coghill was "hanging about Jeannine." The warning letter also referred to the facts of the June 22, 1999 incident involving Mr. Coghill and Ms. Lavallee in Room 402. The disciplinary form recorded that Mr. Coghill had received a verbal warning on that occasion. The third incident related in the document refers to a reprimand given by Ms. Thorn to Mr. Coghill for moving Ms. Lavallee's cart. The forth incident reported in the disciplinary document refers to a verbal reprimand given to Mr. Coghill for spending 30 minutes talking to Ms. Lavallee in the parking lot while he was on duty. The fifth incident referred to the time Mr. Coghill "redirected" housekeepers to Jeannine's floor. The document recalls that Mr. Coghill received a written warning in relation to this incident.

[9] Mr. Moffatt works as the reflexologist at the spa. He is active in the Union. During a staff meeting on September 29, 1999, one employee raised a problem with the type of comments being written in the spa's communication book. Ms. Thorn advised the spa staff that the communication book was meant to be a method of communicating operational information pertaining to the work and customers of the spa and was not meant for personal or other communications. She also warned staff at the meeting that the communication book would be monitored in the future to ensure its proper use.

[10] Subsequently, Mr. Moffatt used the communication book to criticize the Employer for changing the hours of operation of the spa. Mr. Moffatt set out some calculations that were intended

to indicate that therapists would lose money as a result of the change in hours. The Employer disputed Mr. Moffatt's assertions on a factual basis and it was also annoyed that he had used the communication book to "give a speech." Ms. Thorn thought that Mr. Moffatt should have raised his concerns through the proper channels. She also objected to the sarcastic tone of his message. As a result, Mr. Moffatt was written up and given a verbal warning for this incident.

[11] In relation to the discipline procedure used by the Employer, Ms. Thorn testified that the Employer had always used a form of progressive discipline in dealing with employees. The purpose of the discipline was to improve employee performance. After certification of the Union, the Employer decided to standardize its record keeping in relation to employee discipline by implementing an "employee warning notice." The notice contains a check list section to identify the nature of the problem, a section for explaining the incident being reviewed, a check list indicating the disciplinary action taken, a section setting out the written warning, and a section indicating the type of future action that will be taken if a further infraction occurs.

[12] Ms. Thorn testified that discipline has been imposed on employees other than the three under consideration in this application and she listed a number of employees who had been disciplined up to and including termination. One arbitration award was issued in relation to the termination of an employee post-certification. Ms. Thorn denied that Ms. Lavallee, Mr. Coghill or Mr. Moffatt were disciplined because of their union activity.

[13] Mr. Hollyoak, union representative, testified that he met with Ms. Thorn on October 14, 1999 to discuss various matters. He testified that, at that time, Ms. Thorn spoke to him about progressive discipline and was generally interested in the subject. Ms. Thorn proposed that the Union and Employer issue a joint statement to employees, which included a statement that the Union and Employer agreed that the work rules/ethics of the Employer are to be respected and that any violation of the rules would result in the imposition of progressive discipline on a "1-2-3 you're out" basis. Mr. Hollyoak testified that he did not agree to the system of discipline and he communicated his disapproval to Ms. Thorn. He also sent her information on progressive discipline in the collective bargaining setting to give her some understanding of the general approach to discipline in union settings. Mr. Hollyoak testified that he gleaned from his conversation with Ms. Thorn that the Employer had no system of progressive discipline in place prior to the certification of the Union.

Ms. Thorn admitted in cross-examination that she told Mr. Hollyoak that she was concerned that the shop stewards were trying to run the shop.

[14] In relation to the payment of commissions to therapists at the spa, Leah Harrod, a registered massage therapist, testified that commissions were introduced as the method of paying therapists in June, 1998. The contract between the Employer and therapists required the payment of 40% commission on gross service revenue. A base salary of $9.50 was established for non-registered therapists with a base salary of $12.00 for registered therapists. The commission system was introduced by the Employer after discussions with the therapists.

[15] In September, 1999, the floor manager of the spa advised therapists that there had been errors made in the calculation of their commission. As a result, adjustments were made to pay cheques back to September 1, 1999. The essential nature of the error related to the method of calculating commissions on services where the price was reduced on the service due to a promotional event. Commission payments were paid on the list price of the service as opposed to the actual charge to the customer. This resulted in the payment to therapists of a higher percentage of the gross revenues than the Employer had agreed.

[16] Ms. Thorn testified that a revised contract was entered into between therapists and the Employer in May, 1999. The commission rates were expressed in the same manner as the previous contract. The revised contract did not refer to the method of calculating gross revenues, nor did it refer to the term in the text of the contract. Ms. Thorn testified, however, that she mentioned to staff in staff meetings that if discounts are offered to various groups, the commission is calculated on the discount price, not the list price. Ms. Thorn was unaware that spa employees were receiving commissions calculated on the list price, as opposed to the discount price, until late summer in 1999. The issue came to Ms. Thorn's attention at a Board of Director's meeting where the labour costs in the spa area were questioned. As a result, Ms. Thorn directed that an audit be conducted to determine how the wage costs exceeded the anticipated costs based on the commission payments. Through the audit process, it came to her attention that spa staff were paid on the basis of the list price, as opposed to the discounted price. Ms. Thorn testified that it was never the intention of the Employer to pay on the list price. As a result, the Employer "corrected" the overpayment.

Relevant Statutory Provisions

[17] The Union alleges that the following provisions of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") have been violated by the Employer:

> *11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:*
>
> > *(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;*

Argument

[18] The Union argued that the change in the calculation of the commissions paid to spa therapists violated s. 11(1)(m). The Union noted that the payment had been based on list prices for over one year prior to the alleged "correction." Counsel argued that the implementation of the change in calculating the commission did not fall within the "business as before" or "reasonable expectation" tests set by the Board. The Union relied on *Canadian Union of Public Employees, Local 4152 v. Canadian Deafblind and Rubella Association,* [1999] Sask. L.R.B.R. 138, LRB File No. 095-98; *International Association of Firefighters, Local 1318 v. South Saskatchewan 9-1-1,* [2000] Sask. L.R.B.R. 547, LRB File No. 332-99; and *The Newspaper Guild Canada/Communication Workers of America v. Sterling Newspaper Group, A Division of Hollinger Inc. (Leader-Post),* [2000] Sask. L.R.B.R. 558, LRB File Nos. 272-98 & 003-00.

[19] Counsel argued that the Employer did not have a system of progressive discipline in place pre-certification whereby employees could be subject to termination after three disciplinary incidents. The

Union argued that the Employer would simply talk to employees and try to work things out. Terminations were reserved for unusual circumstances. Counsel relied on *Service Employees' International Union, Local 333 v. Metis Addictions Council of Saskatchewan Inc.*, [1994] 1st Quarter Sask. Labour Rep. 125, LRB File Nos. 196-93, 197-93, 198-93 & 224-93 for the proposition that the Employer was required to negotiate changes to its discipline policy with the Union.

[20] Counsel for the Union argued that the reasons given for disciplining the three employees do not hold water. Mr. Moffatt was not abusing the communication book by entering information that he obtained in his role as shop steward. Similarly, Ms. Lavallee and Mr. Coghill had not engaged in any improper behaviour that led to their disciplinary notices; they were the subject of innuendo and unfair treatment. Counsel argued that the Employer's motivation was to bring the shop stewards in line through the discipline process.

[21] In relation to the payment of the commission to therapists, the Employer argued that it merely corrected an error in the calculation of commissions. The intent of the parties was to pay commissions based on the revenues received, not on the list price. This intent was expressed to therapists in meetings with Ms. Thorn. Counsel argued that it was within the managerial rights of the Employer to correct the error in calculation. Errors made in favour of the Employer were also corrected.

[22] In relation to the discipline policy, the Employer argued that it did not change its policy of progressive discipline, but merely established a better system for recording disciplinary incidents. Counsel argued that the right to implement a new system fell within the Employer's managerial rights and did not constitute an unfair labour practice. Any matters that arise under the discipline system can be challenged under the collective agreement and are subject to normal arbitral standards.

[23] The Employer disputed that the discipline imposed on Ms. Lavallee, Mr. Coghill and Mr. Moffatt was related to their activity in the Union. Counsel argued that discipline was imposed in modest measure for clear breaches of employer rules, namely the rule prohibiting employees from being in guest rooms after hours and the rule relating to the use of the communication book in the spa.

Analysis

[24] In *Canadian Deafblind and Rubella Association, supra,* the Board examined the freeze provision contained in s. 11(1)(m) of the *Act* and set out the tests for determining if the freeze provision has been violated in the following terms:

> *The cases demonstrate that, in the past, this Board has given a broad, flexible and purposive interpretation to s. 11(1)(m) of the Act; what in Ontario might be considered to be "privileges" rather than "terms and conditions" of employment, in Saskatchewan appear to have been interpreted to be included within "other conditions of employment." Such items would be within what the Board in the Brekmar decision, supra, described as "a real, well-known and well-defined part of the labour relations fabric before certification." This "labour relations fabric" includes practices and policies that existed prior to certification as well as the terms, conditions and benefits of the relationship of the employees, and of each employee, with the employer. If the employees have come to expect these things it can only be because the employer has made them part of its "business as usual." It seems to us that the reasonable - and we emphasize the word "reasonable" - expectations of employees arise out of the employer's usual and customary way of conducting its operations and dealing with its employees. Strictly speaking, many of these items could not be legally enforced as being a term of an individual employment contract, (for example, the wage increases at issue in the Brekmar decision, supra), but there is no doubt that they are part of the "labour relations fabric" that existed prior to certification such that the employees have a reasonable expectation that they would continue until a collective agreement is reached.*
>
> *The "reasonable expectations" test does not expand the scope of the result of the application of the "business as before" test. However, it can be a useful tool to better clarify and more accurately identify what is encompassed within the pre-freeze pattern of business, and to assist in making a reasoned determination in instances of first time events. What is the reasonable expectation of employees, or an employee, is an objective standard, that can help to achieve the most accurate balancing of employers' and employees' rights prior to reaching a collective agreement; employees can place*

reliance in the fact that the pre-certification pattern of business is preserved, while an employer's ability to respond to changing conditions and new events is not abrogated.

[25] In the *Canadian Deafblind and Rubella Association* case, the Board found that the transfer of employees to different work sites constituted an improper unilateral change. In the *South Saskatchewan 9-1-1* decision, *supra,* the Board applied the "reasonable expectation of employees" test to find that the creation of a new, lower paid classification of call taker was an improper unilateral change as it fell outside the reasonable expectation of employees to have their communication technician positions split between call taking and dispatch.

[26] In this case, spa employees had received commission payments on the list price of services for a considerable period of time prior to the change implemented by the Employer in September, 1999. The Employer insists that the change corrected an error in the method of calculating commissions. From the therapists' point of view, however, the method of calculating their commissions has been substantially altered without any negotiation between the Union and the Employer.

[27] In our view, spa therapists had a reasonable expectation that the commission payments would be continued in the manner that had been used by the Employer in the period prior to certification. The change came about within days of the Union's certification at a time when the Employer may not have fully understood the need to discuss such matters with the Union before acting. However, once the certification Order issued, the Employer was obligated to bargain with the Union with respect to such changes. In our view, the Employer violated s. 11(1)(m) by implementing a change in the method of calculating the commissions paid to spa therapists. An Order will issue requiring the Employer to refrain from changing the pre-certification method of calculating such commission and directing the Employer to restore to the spa therapists any monies lost as a result of the implementation of the change. The matter must be taken by the Employer to the bargaining table and resolved in collective bargaining.

[28] In relation to the discipline policy, we do not find on the evidence that the Employer altered its approach to discipline other than through the instigation of a form for recording disciplinary events. This change is one that can be expected to occur in a unionized environment where discipline can be the subject of grievances and arbitration. We do not find a violation of s. 11(1)(m) by the implementation of the discipline form.

[29] The discipline imposed on Ms. Lavallee, Mr. Coghill and Mr. Moffatt appears petty in relationship to incidents that normally would give rise to disciplinary warnings. It would seem to the Board that the Employer was trying to send a message to these three union activists to curtail their enthusiasm for the Union. Mr. Moffatt's behaviour, in particular, while it may have been irritating to the Employer and unnecessarily sarcastic, fell within a reasonable view of the role of a shop steward. In a union environment, employees enjoy greater freedom to engage in critical discussion of employer decisions. While this may seem disrespectful to an employer who is not used to working in a union environment, it is not an improper role for a shop steward. In our view, while it was appropriate for the Employer to direct Mr. Moffatt not to engage in such discussion in the Employer's communication book, it was not legitimate for the Employer to impose discipline on the employee for such behaviour. It is directly related to his activity on part of the Union and is a violation of s. 11(1)(e). The Employer is directed to remove the disciplinary warning form dated November 3, 1999 from Mr. Moffatt's personnel file.

[30] In relation to the discipline imposed on Ms. Lavallee and Mr. Coghill, we must find that the Employer's disciplinary response to the October 27, 1999 incident was entirely unwarranted. Ms. Lavallee and Mr. Coghill came upon a situation that required them to act. The door to the room was left open by the facilities manager and the room had not been properly cleaned. Their response to the situation was entirely appropriate and it is difficult to understand the basis on which the Employer was critical of their response.

[31] The role of the Board is not to judge the "justness" of discipline. We are confined to determining whether the Employer was motivated by anti-union animus in imposing discipline on the employees in question. An absence of any sense of proportion between the alleged disciplinary offence and the penalty imposed can cause the Board to infer that the motivation for the discipline was related to the employees' activities in support of the Union. In this case, the Board concludes from the lack of merit surrounding the incident that the Employer was motivated by anti-union animus. Ms. Thorn was clearly concerned with the role of the shop stewards in the workplace as she had expressed to Mr. Hollyoak that they were trying to "run the shop." No doubt, there are some growing pains in the relationship between employees and the Employer in relation to their respective roles in the Union environment. Neither are totally blameless and we are sure that their relationship will mature over time. Nevertheless, the imposition of discipline in these circumstances violated s. 11(1)(e).

[32] The Board orders the Employer to remove the disciplinary warning form dated November 4, 1999 in relation to Ms. Lavallee and the disciplinary warning form dated November 7, 1999 in relation to Mr. Coghill from their respective personnel files.

[33] The Board will issue an Order in accordance with these Reasons.

TEMPLE GARDENS MINERAL SPA INC., Applicant and SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Respondent

LRB File No. 303-00; April 16, 2001
Chairperson, Gwen Gray; Members: Mike Geravelis and Mike Carr

For the Applicant: Larry Kowalchuk
For the Respondent: Larry LeBlanc, Q.C.

Vote – Strike vote – Employer and union agreed to one set of negotiations and one resulting collective agreement for two certified bargaining units – Union conducted strike vote in two units simultaneously – Employer argues that union had to conduct separate strike vote for each unit – Board finds that union required to conduct strike vote among group affected by collective bargaining, even if broader than certified unit – Board dismisses employer's application pursuant to s. 11(2)(d) of *The Trade Union Act*.

***The Trade Union Act*, ss. 2(a) and 11(2)(d)**

REASONS FOR DECISION

Background

[1] Gwen Gray, Chairperson: Temple Gardens Mineral Spa Inc. (the "Employer") applied to the Board for an unfair labour practice in which it alleged that the Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Union") conducted a strike vote contrary to s. 11(2)(d) of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the "*Act*"). In addition to the normal remedies sought in the application, the Employer also applied for an interim order to temporarily restrain the Union from acting on its strike vote pending the outcome of the main hearing.

[2] The interim application was dismissed with Reasons on January 25, 2001.

[3] On February 2, 2001, at the hearing of another application, the parties agreed that there was no dispute with respect to factual issues and the matter could be finally determined by the Board after the parties both had the opportunity to file written arguments.

Facts

[4] The Union was certified to represent all employees of the Employer on September 15, 1999. At that time, there was also a restaurant in the same facility known as Harwoods Restaurant that was owned by Crescent Venture Capital Corporation. The restaurant was certified by the Union on September 30, 1999. Effective December 19, 1999, the Employer acquired Harwoods Restaurant and accepted that it was a successor employer within the meaning of s. 37 of the *Act*.

[5] The parties have been engaged in collective bargaining for the purpose of reaching a first collective agreement. Negotiations that are taking place cover both the restaurant employees and the spa employees under one proposed collective agreement. The Union applied to the Board for assistance in concluding the first collective agreement and this application is currently pending before the Board (LRB File No. 193-00). The Employer has not insisted upon separate bargaining for the two groups of employees.

[6] During the hearing of an earlier unfair labour practice, it came to the attention of the Employer that the Union had conducted a strike vote among its employees as a group and had not separated the vote into two groups – namely, those employed at the restaurant and those employed at the spa.

[7] The Union does not dispute the factual allegations surrounding the manner of taking a strike vote, and argues that the employees of the restaurant are covered by the "all employee" certification Order relating to the Employer. On this theory, the vote was conducted in accordance with s. 11(2)(d).

[8] During hearings held subsequent to the hearing of this application, the parties agreed to up-date the certification Order issued by the Board in relation to the Employer without prejudice to this application. The exclusions referred to in the amended Order relate to the spa and hotel side of the business and do not refer to those exclusions contained in the restaurant certification.

[9] In addition, in LRB File No. 235-00, the Board found that the restaurant certification Order remains intact and could be the subject of a rescission application.

Relevant statutory provisions

[10] Section 11(2)(d) reads as follows:

> *11(2) It shall be an unfair labour practice for any employee, trade union or any other person:*
>
> > *(d) to declare, authorize or take part in a strike unless a strike vote is taken by secret ballot among the employees who are:*
> >
> > > *(i) in the appropriate unit concerned; and*
> >
> > > *(ii) affected by the collective bargaining;*
> >
> > *and unless a majority of the employees voting vote in favour of a strike, but no strike vote by secret ballot need be taken among employees in an appropriate unit consisting of two employees or fewer;*

Argument

[11] The Employer argued that the Union is prohibited from exercising its right to strike until it takes a secret ballot vote in both bargaining units and with a majority of employees in each bargaining unit voting in favour of strike activity. The Employer argued that the composite vote taken by the Union is invalid under s. 11(2)(d). The Employer points out that s. 37 continues the certification Order issued to Crescent Venture Capital Corporation "unless the Board otherwise orders." As a result, the Employer is the employer in two certification Orders – one governing the spa and hotel and one governing employees in the restaurant.

[12] In relation to s. 11(2)(d), the Employer argues that the provision requires a secret ballot strike vote among those who are (1) in the appropriate unit concerned; and (2) affected by the collective bargaining. The Employer argued that, until the parties have concluded a collective bargaining agreement setting forth a different bargaining unit, the original Orders remain intact.

[13] The Employer referred the Board to *Saskatchewan Government Employees' Union and Saskatchewan Liquor Board,* [1981] May Sask. Labour Rep. 37, LRB File No. 256-80 and *Canadian Union of Public Employees, Local 88 v. St. Elizabeth's Hospital,* [1995] 4th Quarter Sask. Labour Rep. 85, LRB File Nos. 260-94 & 032-95;

[14] The Employer also argued that it had standing to raise the issue of a proper strike vote as it is directly affected by the matter. Counsel referred to *W.C. Wells Construction Company Limited v. Sloney* (1968), 66 W.W.R. 65 (Sask. Q.B.) and *Saskatchewan Telecommunications and C.E.W.C.,* [1987] May Sask. Labour Rep. 55, LRB File No. 028-87 and a number of other cases where the courts have relied on breach of s. 11(2)(d) to issue injunctions prohibiting strike activity. The Employer argued that it could have brought the injunction application in court pursuant to the terms set down in *St. Anne Nakawic Pulp and Paper Co. Ltd. v. Canadian Paperworkers Union, Local 219,* [1986] 1 S.C.R. 704 (S.C.C.).

[15] Counsel also referred the Board to *Jacobson v. Anderson* (1962), 35 D.L.R. (2d) 746 (N.S.C.A.) for the proposition that where there are two separate bargaining units for one employer, the union cannot combine employees from the units for the purpose of one strike vote. In addition, the Employer relied on the Supreme Court decision in *Beverage Dispensers and Culinary Workers Union, Local 835 v. Terra Nova Motor Inn Ltd.,* [1975] 2 S.C.R. 749 (S.C.C.) and in *Canadian National Railway Co. and C.A.W.-Canada,* [1995] 27 C.L.R.B.R. (2d) 51 (CLRB).

[16] The Union argues that the restaurant employees fall within the scope of the Order issued on September 15, 1999 relating to the Employer and that no employees employed by Crescent Venture Capital Corporation voted on the strike vote. The restaurant employees are merely new employees in the existing spa bargaining unit and were properly included in the strike vote. The Union noted that bargaining had been undertaken on the basis of the restaurant employees being included in the collective agreement. The Employer did not insist that separate bargaining agreements be concluded for both groups. The Employer also consented to the first collective agreement application on the basis that the collective agreement would apply to both the spa and the restaurant employees.

[17] Counsel argued that the term "appropriate unit" which is defined in s. 2(a) of the *Act* does not refer to a certification Order. It means "a unit of employees appropriate for collective bargaining." Counsel argued that, by requiring the Union to conduct two strike votes, the Employer

would be requiring the Union to bargain in bad faith by reneging on its agreement to conclude one collective agreement for the entire operation, including the restaurant.

[18] The Union argued that the case law filed by the Employer supports the Union's arguments. In the *Terra Nova Motor Inn* case, *supra,* the Supreme Court would have found the combined strike vote among employees of two employers to be sufficient if both groups had engaged in concerted strike activity against both employers, not merely against one employer. In the *Saskatchewan Liquor Board* case, *supra,* the Board indicated it will recognize the agreement of parties to change the scope of their bargaining unit unless the unit is not appropriate (which is not argued here) or there are employees who are excluded against their wishes. Counsel argued that Justice Geatros in the *St. Elizabeth Hospital* case, *supra*, accepted the Board's approach in the *Saskatchewan Liquor Board* case. In *W.C. Wells, supra,* the court granted the injunction because people who were not affected by the strike voted in the strike vote. Counsel argued that this case is opposite to the situation presently before the Board. With regard to *Saskatchewan Telecommunications, supra,* counsel argued that the case required employees who are affected by bargaining to participate in the strike vote.

Analysis

[19] The Board has in earlier Reasons rejected the Union's position that the original certification Order issued in relation to "all employees" of the Employer included the restaurant employees. At the time the certification Order was issued, it did not apply to the restaurant employees because they were employed by another employer. Subsequently, they were certified by the Union as a separate bargaining unit. Until that Order is amended by the parties, it remains in effect: see *Vancouver Museum and Planetarium Association v. Vancouver Municipal and Regional Employees' Union,* [1980] B.C.L.R.B. No. C194/90.

[20] The question on this application is whether s. 11(2)(d) of the *Act* requires the Union to conduct a strike vote in each bargaining unit. There is no question that bargaining is taking place for employees of the spa and restaurant at one time and that the parties intend to conclude one collective agreement covering all employees.

[21] Section 11(2)(d) of the *Act* requires the Union to conduct a secret ballot vote among employees who are (i) in the appropriate unit concerned; and (ii) affected by the collective bargaining. Section 2(a) defines "appropriate unit" as "a unit of employees appropriate for the purposes of bargaining collectively." In *Westfair Foods Ltd. v. United Food and Commercial Workers, Local 1400,* [1983] Jan. Sask. Labour Rep. 38, LRB File No. 112-82, the certification Order included the employees of three stores, while the collective agreements were separately negotiated for each store. The Board found that a strike vote must be conducted among the employees who were covered by the collective agreement, not the certification Order. At 39, the Board commented:

> *The more serious question is the definition of those affected by the collective bargaining as required by section 11(2)(d)(ii): Does this require a vote amongst all employees covered by the certification order or does it mean only those employees employed by the Super Valu 8th Street store who are covered by a separate collective agreement. The Board considered this problem in LRB File No. 320-81 and 324-81, The Government of Saskatchewan v. Saskatchewan Government Employees' Union and Jim Hayes, Reasons for Decision dated September 22, 1981. In that case the Board found that to meet the requirements of section 11(2)(d)(ii), the vote had to be taken amongst those employees covered by the collective agreement in question. Applying that decision to this case, the vote was taken amongst the appropriate group of people: those covered by the collective agreement in question. The Board is mindful of the evidence that the provisions in the collective agreement covering this store with respect to the grievances in question are identical to those contained in the collective agreements covering the other stores and that one set of negotiations took place for all stores and that ratification votes were taken amongst employees in all stores (although divided between Saskatoon and Regina). None the less, in the opinion of the Board, since the parties saw fit to execute a separate collective agreement for this store, it cannot be said that any but the employees of the 8th street store were affected by the collective bargaining within the meaning of section 11(2)(d)(ii).*

[22] In *Westfair Foods Ltd., supra,* the Board required the vote to be conducted among the group that was covered by the terms of the collective agreement, even though it did not coincide with the bargaining unit described in the certification Order.

[23] In the *Government of Saskatchewan* case, referred to in *Westfair Foods Ltd.*, the Board found that a strike vote among employees in one office of government was inadequate. In that instance, the collective agreement in question applied to a larger group of employees (which was smaller that the appropriate bargaining unit described in the certification Order). The Board held that the strike vote had to be taken among all employees who were covered by the collective agreement in question. The Board did not extend the vote, however, to cover all employees who fell within the certified bargaining unit. At 4, the Board held:

> *There is no difficulty in identifying those employees to whom Clauses (i) and (iii) of Section 11(2)(d) pertain. The difficulty arises in identifying those covered by subclause (ii): "Affected by the collective bargaining". Resolution of grievances of employees is part of collective bargaining as defined by section 2(b) of the Act and the dispute above referred to and the resulting grievance were the only collective bargaining taking place between the employer and the union at all times material to this Application. The union argues that the dispute arose only in the Property Tax Rebate Office and the grievance was filed only with respect of those employees, and that, accordingly, that small group of employees were the only employees affected within the meaning of s. 11(2)(d)(ii) and that the strike vote need only be taken amongst them.*
>
> *The Board cannot accept that contention. The grievance itself demands abolition of use of the examination throughout the public service and would affect any other employees in the unit who might wish to move to positions to which Article 27 may apply. On the facts of this case, it is abundantly clear that the employees affected by the collective bargaining as defined by s. 11(2)(d) are all of the employees covered by the Public Service Agreement. The employees of the Liquor Board, Liquor Licensing Commission, and Workers' Compensation Board, since they are covered by different collective agreements, are not affected by the collective bargaining and they were correctly not invited to participate in the strike vote.*

[24] In *Pyne et al. v. Saskatchewan Government Employees' Union,* [1986] Sept. Sask. Labour Rep. 57, LRB File No. 056-86, the Board held that "the appropriate unit concerned" referred to the bargaining unit certified by the Board. At 61, the Board stated:

> *Counsel for the applicant submits that the "appropriate unit" referred to in s. 2(d)(i) of the Act is somehow different from the unit of employees found by the Board to be appropriate and described in the certification order issued on February 25, 1985. The Board does not agree. The term "appropriate unit" is specifically defined in s. 2(a) of the Act and its meaning does not change from one section of the Act to another. Once the Board determines that a unit of employees is appropriate for the purpose of bargaining collectively pursuant to s. 5(a) of the Act, that unit becomes "the appropriate unit" within the meaning of s. 11(2)(d)(i) of the Act.*

[25] In the *Pyne* case, *supra*, the Board did not require the trade union to conduct strike votes among a branch of government prior to conducting a strike of employees in that branch.

[26] There are no specific cases on all fours with the present application. The group of employees who are affected by the collective bargaining in this instance is larger than the bargaining unit certified by the Board. Subclause (ii) of s.11(2)(d) cannot be met by conducting a strike vote only among those employees employed in the spa bargaining unit or those employees employed in the restaurant bargaining unit. Although two separate votes could be conducted, the results of the vote could lead to some industrial relations chaos in the context of the method of collective bargaining that has been adopted by the parties. For instance, the restaurant workers could vote to strike while the spa workers vote not to strike and vote instead to ratify the collective agreement. The collective agreement, however, has been negotiated with both groups in mind as a whole, not as two separate collective agreements.

[27] In these circumstances, I do not find the Board analysis in the *Pyne* case above, to be useful. The phrase "in the appropriate unit concerned" can take into account the unit defined by the parties in their approach to collective bargaining. In this respect, the phrase can be interpreted as applying to a group broader than those included in the certification order should the parties elect to bargain one collective agreement for employees who are covered by more than one certification order.

[28] This case is similar to the facts under consideration by the Supreme Court of Canada in the *Terra Nova Motor Inn Ltd.* case, *supra.* In that case, two employers bargained at a common table with a trade union that was certified to represent the employees of both employers. The union took a strike vote among all employees affected by the collective bargaining but did not take separate strike votes for each bargaining unit. One employer settled the strike and its employees did not engage in strike activity. The other employer did not settle the dispute and its employees did engage in strike activity. The Court found that the strike was illegal because the Union did not conduct a separate vote among those employees who went on strike. Mr. Justice Spence, in the majority decision held at 759 as follows:

> *The problem, therefore, becomes one whether "a vote has been taken by secret ballot of the employees in the unit affected". The unit affected was "the employees of Terra Nova Motor Inn Ltd., 1001 Rossland Street, Trail, B.C." . . .*
>
> *There never has been a vote of the employees in that unit authorizing a strike at the Terra Nova Motor Inn. There had been a vote by the members of that unit and another unit similarly certified with the Crown Point Hotel authorizing a strike at both industries. So long as the two certified units, i.e. that certified for the Crown Point Hotel and that certified for the Terra Nova Motor Inn, acted in concert there could be no objection to a vote taken at a joint meeting of the two certified units with no separation of the members of the one certified unit or the other. The strike authorized at the vote of such general meeting never took place. The dispute with the Crown Point Hotel was settled and the members of the certified unit for that hotel entered into a new collective agreement with their employer.*
>
> *What was proposed and what commenced on July 6, 1973, was a different strike and was a strike of the employees who were members of the unit certified for bargaining with the Terra Nova Motor Inn Ltd.*
>
> . . .
>
> *It is surely perfectly proper to conduct multiple collective bargaining between the employers and the employees of many industries in the same field varying*

considerably in size but neither the smaller employer nor his workmen can be protected from the disturbing effects of a strike unless and until the employees of that smaller industry, being the unit "affected", themselves alone vote for or against a strike directed only against their own employer.

(emphasis added)

[29] Mr. Justice Beetz, agreeing with the majority but for different reasons, held at 761:

I concede that the strike vote taken on May 13, 1973 was a valid one. The question however is whether, with respect to the strike which effectively took place, that vote met the requirements of s. 25(1) of the Mediation Services Act. It was the vote of a unit which had been formed on a voluntary basis for the purpose of negotiating with two employers. In my view, this voluntary unit was voluntarily dissolved the moment the Crown Point Hotel, one of the two employers, and the union, on behalf of the employees of that hotel, entered into a separate collective agreement. What remained was the unit of the employees of the Terra Nova Motor Inn Limited. It was this unit which was affected by the strike and the employees in this unit had not voted on whether to strike or not to strike.

[30] Mr. Justice Dickson, in dissent, disagreed with the majority's interpretation that a strike vote that was acknowledged to be valid when it was taken could be rendered invalid by subsequent bargaining developments. At 764, Mr. Justice Dickson wrote:

At the outset, the meaning of the word "unit" in s. 25(1) of the Act must be determined. Does "unit" refer only to a group of employees in respect of which a trade union has been certified as bargaining agent? If it does, the vote is invalid and the strike is illegal, for it is common ground that the union, though certified for both groups of employees as separate units, was not certified for a unit comprising both groups. There is textual support in the totality of the Mediation Services Act and the Labour Relations Act of British Columbia, R.S.B.C. 1960, c. 205, which would seem to indicate that the work "unit" in the Mediation Services Act is restricted to a unit for which a trade union is certified, but I have come to the conclusion, not without hesitancy, that

the better view is that the word "unit" should not be held to be restricted within the context of s. 25(1) to a unit for which a trade union is certified. Section 2(1) of the Mediation Services Act defines "unit" as a group of employees on whose behalf a trade union is, or has been, engaged in collective bargaining". There is nothing in this definition nor in any other section of the Act specifically stating that the word "unit" be restricted in its application to a unit for which a union is the certified bargaining agent and it cannot be gainsaid that it was the composite group on whose behalf the union has been engaged at all times in collective bargaining. There is no evidence that at any material time the union conducted bargaining on behalf of the respondent's employees as a separate group.

In interpreting the phrase "affected as to whether to strike or not to strike" in relation to the facts of this case, I have no doubt that at the time of the vote on May 13, 1973, all of the employees who voted were employees affected as to whether to strike or not to strike. The vote gave the union the mandate, subject to compliance with the statutory requirement as to strike notice, to call out on strike all or any part of the employees comprising the composite group. The question then is whether the mandate became invalidated by ensuing developments. In my view, the proper time to determine the validity of a vote is at the time the vote is taken and not the time some of the employees affected by the vote actually go on strike. Validity should not depend upon the course of, or be invalidated by subsequent events.

[31] Chief Justice Laskin, also in dissent, made his oft-cited remarks at 743: "The subsequent enlargement or contraction of the work force does not alone affect the validity of the certificate and indeed, once a collective agreement is negotiated the certificate has served its purpose and is, for all practical purposes, spent." In the view of the dissenting Justices, the bargaining unit constructed on a voluntary basis between the union and the employers determined the "unit" for the purposes of conducting a strike vote. Section 25(1) of the *Mediation Services Act* prohibited strike activity unless "a vote has been taken by secret ballot of the employees in the unit affected as to whether to strike or not to strike and a majority of such employees who vote have voted in favour of a strike." Chief Justice Laskin held that the "unit" in these circumstances included the employees of both employers on whose behalf the union was engaged in collective bargaining.

[32] Applying the majority interpretation in *Terra Nova Motor Inn Ltd., supra,* to the present case, the Board can accept that a secret ballot vote held among the employees of both the restaurant and the spa as a group is a valid vote. Under the principles set out in *Terra Nova Motor Inn Ltd.,* the composite strike vote would only be invalid if there was evidence that the Union intended to use the strike vote to strike only the restaurant, while it settled the agreement with respect to the spa.

[33] The evidence indicates that the Union and the Employer intend to settle one collective agreement covering both groups of employees. There is nothing improper about such negotiations and they conform to the Board policy of permitting parties to amend the scope of their bargaining unit by agreement: see *Saskatchewan Liquor Board, supra.* There is no suggestion in this instance that the voluntarily agreed unit is inappropriate for collective bargaining and there is no suggestion that it excludes employees who otherwise have the right to engage in collective bargaining.

[34] In this instance, the Employer argues that a positive strike vote is required in both groups before either group can engage in strike activity. However, another possible consequence of the Employer's approach to the interpretation of the words "appropriate unit" in s. 11(2)(d)(i) would be to permit the Union to conduct a strike vote among employees in only one bargaining unit and to use strike activity in that unit to determine the outcome of collective bargaining for both certified bargaining units. In our view, the Employer's approach to s. 11(2)(d) would permit a small group of employees to hold up negotiations and settlement of a collective agreement regardless of the wishes of the larger group. This approach to the strike vote requirements in s. 11(2)(d) does not make labour relations sense.

[35] If the Employer in this instance had commenced bargaining by insisting on the separation of the two bargaining units, and proposed that the Union and it enter into two separate agreements, the Board would have acceded to the need for two separate strike votes. However, this is not the case. The Employer has agreed to bargain collectively with the Union to conclude one collective agreement for both groups.

[36] As a result, the Union is required to conduct the strike vote among the group that is affected by the collective bargaining. In our view, where the group "affected" by the collective bargaining is broader than the certified unit, the vote must take place among the group of employees on whose behalf

the collective agreement is being negotiated. This approach, in our view, is consistent with *Terra Nova Motor Inn Ltd., Westfair Foods Ltd.* and *Pyne,* all cited above and Board policy which permits parties to define their own bargaining structures subject to the requirements set out in *Saskatchewan Liquor Board, supra.*

[37] Accordingly, the unfair labour application brought by the Employer is dismissed.

SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant v. TEMPLE GARDENS MINERAL SPA INC., Respondent

LRB File No. 193-00; April 16, 2001
Chairperson, Gwen Gray; Members: Don Bell and Bruce McDonald

For the Applicant: Larry Kowalchuk
For the Respondent: Larry LeBlanc, Q.C.

Collective agreement – First collective agreement – Board agent recommends that parties be directed to continue bargaining and that Board not impose first collective agreement on parties – Board accepts recommendation of Board agent and dismisses application for first collective agreement assistance.

Unfair labour practice – Application pending – Board reviews circumstances under which application pending pursuant to ss. 11(2)(b) and 11(3)(a) of *The Trade Union Act* – Application pending after heard by Board and before Board renders decision.

***The Trade Union Act*, ss. 11(2)(b), 11(3)(a) and 26.5**

REASONS FOR DECISION

Background

[1] **Gwen Gray, Chairperson:** Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Union") was certified to represent employees of Temple Gardens Mineral Spa Inc. (the "Employer") on September 15, 1999 and the employees of Harwoods Restaurant on October 1, 1999. The Employer took over the operation of Harwoods Restaurant in December, 1999 and the parties have been bargaining collectively with respect to the employees covered by both Orders at one bargaining table. Collective bargaining commenced January 24, 2000. The Union applied for assistance from the Labour Relations, Mediation and Conciliation Branch, Saskatchewan Labour on June 2, 2000 and engaged in conciliation on a voluntary basis on June 22, 2000. The Union took a successful strike vote on July 6, 2000 and applied for Board assistance in concluding a first collective agreement on July 7, 2000.

[2] In its application, the Union included a copy of its bargaining proposals which indicated the provisions agreed to by the Employer, the Union's last position on other provisions and the provisions that had yet to be discussed with the Employer.

[3] The Employer's reply indicated that the Employer had tabled a comprehensive offer to the Union on June 22, 2000 and it filed this offer with the Board. The Employer indicated that the clauses it agreed to with the Union were conditional on the Union accepting the Employer's package in its entirety. The Employer argued that the Union ought to refer the comprehensive offer to its members for ratification prior to seeking Board assistance under s. 26.5 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*").

[4] The Board issued an Order on October 10, 2000 appointing a Board agent to assist in the resolution of the first collective agreement and to report to the Board. The Board agent met with the parties and reported back to the Board on November 27, 2000. The Board agent recommended the following:

> *In the matter of establishing a first collective agreement between RWDSU and Temple Gardens Mineral Spa, as agent for the Labour Relations Board, I met with the parties regarding matters remaining in dispute on October 26, 2000.*
>
> *At the conclusion of discussions on that date, there were about 7 articles left to address in addition to wages and benefits. The parties demonstrated a reluctance to bargain further based on their perceptions of whether the Labour Relations Board would accept or reject the forthcoming recommendations of its agent.*
>
> *Notwithstanding the positioning of the parties during the examination of outstanding issues, their collective bargaining relationship has not deteriorated so far as to preclude them from successfully reaching an agreement on their own. Accordingly, it is recommended that a first collective agreement should not be imposed in this case, and that the parties should be directed to continue bargaining using whatever tools are available to them to conclude the agreement.*

[5] A hearing was held before the Board on February 2, 2001 to hear representations from the parties in relation to the Board agent's report.

Union's Position

[6] The Union took the position that it was willing to accept the Board agent's report provided that it was permitted to engage in strike activity. At the time of the hearing, there were three applications pending before the Board involving these parties. The applications included a rescission application relating to Harwood's Restaurant (LRB File No. 235-00), unfair labour practice applications brought by the Union (LRB File Nos. 032-00, 033-00 & 172-00), and one unfair labour practice application brought by the Employer (LRB File No. 303-00). The Union was concerned that it was unable to conduct normal collective bargaining with the Employer, that is, by engaging in strike activity, while these applications were "pending" before the Board. The Union referred to s. 11(2)(b) of the *Act* which states:

> *11(2) It shall be an unfair labour practice for any employee, trade union or any other person:*
>
> > *(b) to commence to take part in or persuade an employee to take part in a strike while an application is pending before the board or any matter is pending before a board of conciliation or special mediator appointed under this Act;*

[7] The Union argued that if the Board was unable to give the Union the right to strike it should impose a first collective agreement.

Employer's Position

[8] The Employer accepted the Board agent's report and was prepared to return to collective bargaining and use the tools that are available to the parties to achieve a first collective agreement.

Decision

[9] The Board accepts the Board agent's report and returns the settlement of the first collective agreement to the parties to resolve through the ordinary exercise of their bargaining tools. There remains one application to the Board that has been heard and is awaiting the issuing of Reasons for

Decision (LRB File No. 308-00) and three applications that have yet to go to hearing (LRB File Nos. 172-00, 180-00 & 181-00). LRB File No. 308-00 is the only application that is "pending" before the Board as that phrase is defined in s. 11(3)(a) of the *Act*. A decision with respect to it is expected shortly. The Board has issued Reasons for Decision in the remaining cases. In particular, the Board dismissed the rescission application brought by Leslie McCartney in LRB File No. 235-00 and found that the Union had conducted a proper strike vote in LRB File No. 303-00.

[10] Given this environment and the report of the Board agent, the Board has determined to dismiss the Union's application for first collective agreement. The parties will be left to their own devices to achieve a settlement. The Board agent concluded that the parties were reluctant to settle because of their positioning for the first collective agreement application. It is essential for the first collective agreement process, that the parties engage in meaningful discussions with the Board agent and not withhold possible settlement proposals based on some perception that they may get a "better deal" from the Board. Section 26.5 of the *Act* is intended to assist parties achieve a first collective agreement and is not intended as a substitute for collective bargaining.

[11] We would recommend that the parties return to the bargaining table and continue their collective bargaining efforts with the assistance of the Labour Relations, Mediation and Conciliation Branch.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 2067, Applicant v. LUSCAR LTD., Respondent

LRB File No. 288-00; April 17, 2001
Chairperson, Gwen Gray; Members: Bob Todd and Judy Bell

For the Applicant: Ted Koskie
For the Respondent: Dennis Ball, Q.C.

Arbitration – Deferral to – Subject matter of application before Board identical in content to grievance – Board notes longstanding policy of deferring to grievance and arbitration provisions in collective agreement where matter raised involves interpretation or application of collective agreement term and where complete relief can be obtained through arbitration process – Board dismisses unfair labour practice application.

***The Trade Union Act*, s. 11(1)(c)**

REASONS FOR DECISION

Background

[1] **Gwen Gray, Chairperson:** The International Brotherhood of Electrical Workers, Local 2067 (the "Union") applied to the Board for an unfair labour practice alleging that Luscar Ltd. (the "Employer") failed to bargain in good faith with the Union by reason of having withheld information pertaining to dental plan policies and by not providing members of the Union with dental benefits as had been provided under the administration of a previous plan.

[2] At the hearing of this matter, the Employer raised the preliminary objection that the subject matter of the unfair labour practice was identical to a grievance that the Union had filed with the Employer and that was currently pending before an arbitration board. Shortly after the hearing, the Employer forwarded to the Board a copy of the arbitration award on the grievance in question.

[3] The Board heard argument from the parties on whether it should defer the unfair labour practice application to the arbitration process and reserved its decision. These Reasons relate to the preliminary objection.

Employer's Argument

[4] Mr. Ball, counsel for the Employer, advised the Board that all documents sought by the Union in relation to the benefit plans formerly in place and now in place with the Employer have been provided to the Union through the process of hearing the grievance. The Employer also took the position that the change in dental coverage was the subject matter of the arbitration. The Employer had made a request that the arbitrator dismiss the grievance without requiring the Employer to call evidence. This non-suit motion was pending before the arbitrator at the time of hearing this application. Subsequently, counsel for the Employer provided the Board with the final arbitration award issued by Robert Pelton, Q.C. in which Mr. Pelton granted the non-suit motion dismissing the Union's two grievances. Counsel for the Employer referred the Board to previous decisions establishing Board policy on deferral to arbitration.

Union's Argument

[5] Mr. Koskie, counsel for the Union, argued that the present application pertained to the commission of an unfair labour practice by the Employer failing to bargain in good faith. Counsel argued that if the information requested had been provided to the Union during negotiations it would have altered its bargaining position. The Union wants the opportunity to negotiate based on the information that was provided in the grievance arbitration.

Decision

[6] The Board agrees with Mr. Ball's submission that the subject matter of this application is identical in content to the grievance placed before Mr. Pelton as arbitrator and the Board must defer to the arbitration process. The Union has agreed that the Employer provided the information requested on the plans in dispute. This grievance was dropped by the Union and should not be allowed to be litigated again before this Board. In relation to the second matter, the arbitration board determined that the Union had received benefits for dental care in accordance with the terms set out in the collective agreement. This determination cannot now be challenged in these proceedings.

[7] The Board has a longstanding policy of deferring to the grievance and arbitration provisions in a collective agreement where the matter raised involves the interpretation or application of a term of the collective agreement and where complete relief can be obtained in respect to the alleged breach through the arbitration process: see *United Food and Commercial Workers, Local 248-P v. Star Egg Co. Ltd.,* [1997] Sask. L.R.B.R. 578, LRB File No. 024-97.

[8] As a result, the Union's application is dismissed.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 2067, Applicant and LUSCAR LTD., Respondent

LRB File No. 269-00; April 25, 2001
Chairperson, Gwen Gray; Members: Duane Siemens and Leo Lancaster

For the Applicant: Ted Koskie
For the Respondent: Dennis Ball, Q.C.
For Intervenor: Michael Griffin

Certification – Amendment – Practice and procedure – Parties ask Board to determine preliminary issue of whether applicant must file evidence of majority support from group of employees to be added to bargaining unit – Board reviews principles relating to when evidence of support required but concludes that it has insufficient information to determine issue at preliminary stage of proceedings – Board orders investigation and final hearing.

***The Trade Union Act*, s. 5(k)**

REASONS FOR DECISION

Background

[1] Gwen Gray, Chairperson: The International Brotherhood of Electrical Workers, Local 2067 (the "Union") applied to the Board to amend its certification Order by removing exclusions for maintenance supervisors, mine supervisors, warehouse supervisors, mine superintendents, material superintendent, loss control co-ordinator, junior engineer, intermediate engineer, electrical supervisor and maintenance co-ordinator.

[2] Luscar Ltd., (the "Employer") is a successor employer to Manalta Coal Ltd., Prairie Coal Ltd., Poplar River Coal Mining Partnership and Willowvan Mining Ltd. who were certified by the Union on May 15, 1987, all being successor employers to Saskatchewan Power Corporation. The certification Orders contain the following general wording:

All employees engaged in coal mining employed by [Employer] at [mine location] except:

- *office employees, clerical employees, cashiers, office equipment operators and meter readers;*
- *all drafting employees;*
- *all graduate and under-graduate engineers;*
- *all employees above the rank of foreman.*

[3] The Employer and the Union negotiated a renewal agreement with effective dates of December 1, 1998 to November 30, 2001. The amendment application was filed October 24, 2000, within the 30-60 day period before the anniversary of the effective date of the agreement as set out in s. 5(k) of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the *"Act").*

[4] The collective agreement between the parties sets out the scope of their agreement in the following terms:

1.01 This Agreement shall apply to those employees of the Company who are within the Bargaining unit defined in Orders issued by the Labour Relations Board of Saskatchewan (LRB File # 412-86) dated 1987 May 15th and who are employed in the classifications set forth in the Schedule to this Agreement.

Existing classifications may be excluded from or additional classifications may be added to the Bargaining Unit and schedules by either agreement between the Company and the Union, or by order of the Labour Relations Board of Saskatchewan.

[5] The Employer objected to the application on a variety of grounds, including the ground that the Union is attempting through the amendment application to add a group of employees to its bargaining unit. It raised the preliminary objection that the Union could not seek such an amendment without filing evidence of support from the employees in question. No support evidence was filed with the application. There are 19 employees who are affected by this amendment application.

[6] The Board heard argument from the parties with respect to the preliminary objection on February 9, 2001.

Analysis

[7] The Board finds that the preliminary issue is similar to issues raised and dealt with by the Board in *Saskatchewan Government and General Employees' Union v. Saskatchewan Liquor and Gaming Authority,* [2001] Sask. L.R.B.R. 152, LRB File No. 037-95 where the Board held that, in certain circumstances, a trade union could apply to include positions formerly excluded from a bargaining unit without establishing evidence of support from the employees in question. At paragraph 45, the Board described the test to be applied as follows:

> *Following the approach set out in University of Saskatchewan, Sherwood Co-operative Association Limited and Teleglobe, we would first ask if the group of employees to be added to the existing bargaining unit are covered by the intended scope of the certification Order. If the answer is yes, then they may be added without canvassing SGEU's support in the group of employees who will be included in the bargaining unit. If the group of employees to be added to the existing bargaining unit are not covered by the intended scope of the certification Order, then SGEU is required to establish a double majority – that is, it must establish its support among the employees to be added to the bargaining unit, as well as in the existing bargaining unit. Employees who were excluded from the original bargaining unit on the appropriateness standard fall within the "double majority" rule.*

[8] In the *Saskatchewan Liquor and Gaming Authority* case, *supra,* the Board found that liquor store managers could be brought within the "all employee" unit without evidence of support as they fell within the intended scope of the bargaining unit and no longer performed functions that were of a managerial or confidential nature with respect to the employer's labour relations. Liquor store managers had originally been included in the "all employee" bargaining unit and were excluded by Board order as a result of amendments made to the definition of "employee" in the *Act.*

[9] The Board distinguished the movement of managerial personnel, who are excluded because they are not "employees" within the meaning of the *Act,* from the movement of persons whose original exclusion was made on the basis of the "appropriateness" of the bargaining unit. In *Saskatchewan Government and General Employees' Union and Government of Saskatchewan,* [2001] Sask. L.R.B.R. 227, LRB File No. 114-99, the Board found that professional engineers were excluded from the certification Order issued to SGEU on the ground of appropriateness. As a result, they could not be brought back into the bargaining unit without an indication of support from a majority of the occupational group.

[10] In the present case, there is insufficient information before the Board to know if the exclusions that the Union seeks to reverse were made originally on the grounds of appropriateness or on the grounds that the persons occupy positions that entail managerial or confidential functions. Evidence pertaining to the history of the Orders is required to determine the "intended scope" of the original Orders. For those employees who are included within the intended scope, no evidence of support is required to move them across the scope boundary because, if they are employees, then the Order would apply to them. For employees who have been excluded on the ground of appropriateness, evidence of support is required in order for the Union to bring the positions within the scope of its bargaining unit.

[11] There was also an issue raised with respect to whether or not the Union, having entered into a collective agreement with the Employer, is required to bargain collectively with the Employer with respect to the change. Certainly, collective bargaining can result in changes to the positions that are excluded or included on the grounds that they perform (or do not perform) managerial duties or confidential duties in relation to the Employer's labour relations (see *Government of Saskatchewan, supra).* In *Saskatchewan Government Employees' Association v. Saskatchewan Liquor Board,* [1981] May Sask. Labour Rep. 37, LRB File No. 256-80, the Board accepted that the parties to a certification order could alter the scope of the bargaining unit through collective bargaining. Where such alterations occur, the Board requires the parties to negotiate any reversal of the changes made by agreement to the original order. At 41, the Board concluded:

> *The positions in issue are included in the certification order. It follows that the employer is required to bargain collectively in good faith with respect to those positions. The union has bargained these persons out of scope. It can only change*

> *this position by the collective bargaining process. Should the employer refuse to bargain collectively in good faith with respect to the positions in issue, it would be found guilty of an unfair labour practice. The Board has no power to amend a collective agreement which is what the union is in effect asking it to do in this case.*

[12] In the present case, the parties may or may not have an argument based on the principle set out in the *Saskatchewan Liquor Board* case. On its face, the collective agreement appears to replicate, but not change, the terms of the certification Order. If this is an accurate understanding of the collective agreement provision, then the Union would not be required to return to the bargaining table to push for its changes to the managerial exclusions. This matter will be left for the final hearing.

[13] As a result, the Board finds that it is unable based on the information available to it at this time to determine if the Union is required to demonstrate support evidence for any or all of the inclusions it seeks to its bargaining unit. The matter will be set for final hearing. At that time, the parties should proceed to bring evidence to address the following issues:

> *(1) **Are the persons who are sought to be included "employees" within the meaning of s. 2(f) of the Act?***
>
> *(2) **If so, were they originally excluded on the ground that they were not "employees" or were they excluded on the appropriateness test?***
>
> *(3) **Were the employees in question included in the certification Order but excluded from the bargaining unit by agreement between the parties?***

[14] The Employer expressed some concern over its ability to make the 19 employees in question available for hearing while maintaining the proper functioning of its operation. The Board is of the view that the managerial or employee status of the positions can be the subject of an investigation by the Board's investigating officer. The investigating officer will conduct such an investigation and report back to the Board within 30 days of the Board's Order, accompanying these Reasons for

Decision. The parties will be provided copies of the report by fax and will required to indicate their agreement or disagreement with the investigating officer's report to the Board and the other parties within 48 hours of their receipt of the report. At that time, the need for a further hearing will be assessed by the Board.

[15] Mr. Griffin appeared on behalf of the professional engineers who are the subject matter of this application. Leave is granted to the engineers to file an intervention in these proceedings.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1985, Applicant and HIPPERSON CONSTRUCTION COMPANY (1996) LIMITED and HIPPERSON CONSTRUCTION COMPANY LIMITED, Respondents

LRB File No. 237-00; April 30, 2001
Chairperson, Gwen Gray; Members: Michael Geravelis and Tom Davies

For the Applicant: Drew Plaxton
For the Respondent: Jim Garden

Successorship – Transfer of business – Section 37 of *The Trade Union Act* – Board finds only connection between certified employer and alleged successor is family name and family financial assistance for alleged successor's start up - Significant hiatus between end of business of certified employer and creation of alleged successor – Board finds no successorship within the meaning of s. 37 of *The Trade Union Act*.

***The Trade Union Act*, s. 37**

REASONS FOR DECISION

Facts

[1] **Gwen Gray, Chairperson:** The United Brotherhood of Carpenters and Joiners of America, Local 1985, (the "Union") was certified for Hipperson Construction Company Limited (the "Employer") on December 4, 1946. This company carried on business in the construction industry since 1927. The original owners were the grandparents of Mr. Gordon Hipperson, the current owner of Hipperson Construction Company (1996) Limited ("Hipperson (1996)").

[2] In the 1950's and 1960's, the Employer was taken over by Donald and Nancy Hipperson, Gordon Hipperson's parents. They operated the construction business until 1984. After 1984, the Employer continued to be registered for tax purposes but it did not engage in construction work. Its only employee in the late 1980's and early 1990's was Bruno Bhenke who performed maintenance work on apartment and office buildings owned by Donald and Nancy Hipperson through their investment companies. In 1996, the Employer changed its name to 316310 Saskatchewan Ltd. The annual returns for the numbered company were discontinued and the company was struck from the Corporations Branch records in 1997. The last union dues paid by the Employer to the Union were in relation to Mr. Bhenke's employment in October, 1986.

[3] Gordon Hipperson started up Hipperson (1996) in October, 1996. The company engages in general contracting, project management and design building. When Hipperson (1996) was established, Gordon Hipperson caused an ad to be placed in the Leader-Post indicating that he was pleased to announce the "re-establishment" of Hipperson Construction Company Limited.

[4] The Union became aware of Hipperson (1996) and it eventually served the new company with a notice to implement union security provisions in accordance with s. 36 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "Act") on July 18, 2000. Hipperson (1996) did not comply with the notice and denied that it was a successor or related company to Hipperson Construction Company Limited.

[5] Gordon Hipperson was permitted to use the name Hipperson (1996) as a result of the change of name of Hipperson Construction Company Limited to a numbered company.

[6] The directors and shareholders of Hipperson (1996) are Gordon Hipperson and his mother, Nancy Hipperson. She was also a shareholder in Hipperson Construction Company Limited. Hipperson (1996) rents office space in an office building owned by corporate holdings of Donald and Nancy Hipperson. Hipperson (1996) does not own any construction equipment. It employs tradesmen on a project basis as needed.

[7] Gordon Hipperson testified that he received a loan of $75,000 from his father, Donald, which is secured through class "D" shares in Hipperson (1996). Other than the loan, Gordon Hipperson asserted that the business developed by him in Hipperson (1996) does not derive from the work performed by his father in Hipperson Construction Company Limited. Gordon Hipperson indicated that he is known in the construction industry, having worked for years with Graham Construction as a senior project manager. The reputation of Hipperson (1996) is not dependent upon Gordon Hipperson's work in the industry, and not on the work previously performed by his father's company. Mr. Hipperson testified that the only common element between the two companies was the family name "Hipperson" which he chose to resurrect as a business name.

Union's position

[8] The Union sought a successorship declaration pursuant to s. 37 of the *Act*. It argued that there was a transfer or disposition of the business of Hipperson Construction Company Limited to

Hipperson (1996). The indicia of the transfer included the corporate name, the shareholdings, the start up loan, the location of the business and the method of advertising the business as the "re-establishment" of Hipperson Construction Company Limited.

[9] The Union referred the Board to *I.B.E.W., Local 529 v. Mudjatik Thyssen Mining Joint Venture,* [2000] Sask. L.R.B.R. 332, LRB File No. 140-99; *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; *Stucor Construction Ltd. v. I.U.O.E., Local 793 et al.* (1988), 16 CLRBR (NS) 335 (Ont. LRB); *Sheet Metal Workers International Association Local Union No. 8 v. Drafab Metal Products Ltd. et al,* [1975] 2 Canadian LRBR 191 (Alta. I.R.B.); *C.U.P.E. v. Sollars et al.,* [1982] Dec. Sask. Labour Rep. 38, LRB File Nos. 128-82 to 163-82; *Accomodex Franchise Management Inc. v. H.E.R.E. Local 75,* [1993] OLRB Rep. April 281 (Ont. LRB) and *IWA Canada, Local 2693 v. Long Lake Forest Products Inc. et al.* (1995), 24 C.L.R.B.R. (2d) 255 (Ont. LRB).

Employer's Position

[10] The Employer argued that s. 37 does not apply to the facts of this case as there has been no transfer, sale or other disposition from Hipperson Construction Company Limited to Hipperson (1996). Counsel argued that the purpose of the successorship provisions contained in s. 37 is to preserve work for union members. Here, there was a hiatus of 12 years in the work and an insufficient nexus between the certified employer and the new company. Counsel argued that there was no "business" to transfer to Hipperson (1996) as the certified employer ceased to operate in the construction business in the mid-1980's. There was no transfer of key personnel, workmen, jobs, equipment, assets, management expertise or the like. The only possible transfer relates to the good will associated with the name "Hipperson" but the evidence indicated that most of the customers of Gordon Hipperson are unfamiliar with the certified employer and its former reputation in the construction industry.

Analysis

[11] In *Cana Construction Co. Ltd., supra,* the Board set out the factors that will be considered in determining if a construction company has been "sold, leased, transferred or otherwise disposed of" within the meaning of s. 37 of the *Act.* At 190, the Board observed:

In the construction industry, intangible assets like contracts, customers and goodwill can be impermanent. Construction companies are instead involved in a series of business relationships with customers, each of which exists for a relatively short time. Employees remain on a contractor's payroll only until a project is complete, whereupon they will look for work for another contractor on another project at another location. Working for the same contractor on more than one project may happen as much by accident as by design.

In the Board's opinion, the "economic life" of a construction company may therefore depend upon the availability of a combination of component parts at a cost

the market will bear and which include, among other things, the availability of skilled labour, managerial expertise, ownership of or access to the necessary equipment, and (especially in the commercial institutional and industrial sector) sufficient capital and financial stability.

Finally, a most important factor to be considered is whether in the Board's view the application of Section 37 to any particular situation will preserve the union's legitimately acquired bargaining rights, or whether it will serve instead to expand those rights or create new ones.

[12] In *Graham Construction Ltd., supra*, the Board looked to the acquisition of managerial expertise and experience of estimators, project managers, office and accounting staff by the successor employer from the certified employer; the acquisition of financial wherewithal from the parent holding company; common shareholdings and common control; similarity of work; and perception of continuity from certified employer to successor employer.

[13] In the present case, many of the factors referred to in *Cana Construction* and *Graham Construction Ltd.*, both *supra,* are not present. There is no acquisition in the present case of managerial expertise and experience. Gordon Hipperson developed his expertise while working for a different construction company. His father, Donald, is not a directing shareholder, employee or advisor in the new business. There is no evidence that other key personnel, such as estimators,

project managers, office and accounting staff were acquired by Hipperson (1996) from the certified employer.

[14] Similarly, while there is a continuation of the same or similar kind of work, that is, general construction contracting, the work does not flow from the assets owned by the certified employer, key personnel associated with the certified employer, or the reputation or good will of the certified employer. In our view, there is insufficient evidence of "sale, lease, transfer or other disposition" of a business to bring Hipperson (1996) within the successorship provisions in s. 37.

[15] The only real connections between the two employers are (1) the family name, and (2) the financial assistance from Donald Hipperson's corporation. In some circumstances, these factors may be sufficient to show a nexus between two corporations. However, in our view, it is not sufficient in this case. The family name is not significant factor in generating work for Hipperson (1996) as the work flows to Hipperson (1996) as a result of the reputation of Gordon Hipperson and his ability to develop competitive bids. The industry memory of his father's reputation is not meaningful to the success of his work today due to the great passage of time and change in the personnel in the construction industry. Second, the financial assistance provided by Donald Hipperson to Hipperson (1996), while it may have assisted Hipperson (1996) to get off the ground, is not sufficient in itself to establish successorship.

[16] We acknowledge that a hiatus in time between the end of the business of the certified employer to the creation of Hipperson (1996) may not defeat a successorship application. In some circumstances, such as *Accomodex Franchise Management Inc., supra,* referred to by the Union, the sale of fixed assets and the re-opening of the same or very similar business after the passage of some time, can be sufficient to establish a successorship. In construction, the transfer of management skills, bidding skills and the financial resources to engage in successful bidding and performance of construction work are more critical to a finding of successorship. In this case, there is insufficient evidence to find that Hipperson (1996) drew its life in any form from the certified employer.

[17] In our view, the Union has not established that Hipperson (1996) is a successor employer to Hipperson Construction Company Limited and the application is dismissed.

EDITH PINO, Applicant v. SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 299, Respondent

LRB File No. 244-00; May 1, 2001
Chairperson, Gwen Gray; Members: Gloria Cymbalisty and Marianne Hodgson

For the Applicant: George Mitten
For the Respondent: Greg Trew

Duty of fair representation – Scope of duty – Union representative gave sound advice relating to casual employee's situation on closure of workplace – Employee's command of English language limited - Employee did not request union to file grievance or ask union to explain situation further – Board would have preferred union or employer to give casual employees formal written notice of situation but concludes that union did not breach duty of fair representation.

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

REASONS FOR DECISION

Background

[1] Gwen Gray, Chairperson: Ms. Pino filed an application against the Service Employees International Union, Local 299 (the "Union") on September 18, 2000 alleging that the Union had failed to fairly represent her in relation to seniority and recall rights. The Union filed a reply indicating that, in its opinion, the application was flawed sufficiently to cause it to be dismissed.

[2] A pre-hearing was held between the parties on January 22, 2001 with no results.

[3] A hearing was held in Regina on April 18, 2001. Ms. Pino was represented by her friend, George Mitten, a resident of Redvers and a retired school teacher. The Union was represented by Greg Trew, International Representative.

Facts

[4] Ms. Pino was employed as a casual employee in the Redvers Hospital as an assistant cook, laundry aide and housekeeping aide. She started her employment in June 1997. As part of health care reform, the Redvers Hospital was closed. At the same time, Centennial Haven, a long term care

facility in Redvers, was renovated to add a health centre and the operations of the long term care centre and the health centre were merged into one facility.

[5] At the time of the merger in July, 1998, employees at the hospital were in a separate bargaining unit from employees at Centennial Haven. Each facility had its own seniority list and there was no district-wide seniority in place. As a result, when the hospital closed, its full-time and part-time employees received lay-off notices. The Union held meetings with its members at the hospital to explain the lay-off and bumping procedures. Notices of the meetings were posted in the hospital and the Union encouraged members to telephone the servicing representative if they had any questions about the impending closure. Several employees from the hospital were transferred to the new facility, including some casual employees in the nursing department.

[6] Ms. Pino is a recent immigrant to Canada from Chile and her command of the English language is limited. She was under the impression that employees of the hospital were entitled to use their seniority to obtain work at the new health care facility. She waited to be called to work at the new facility and eventually she attended at the facility to apply for work. Unfortunately, she has not been called to work.

[7] Ms. Pino's information regarding the use of seniority came from her former co-workers who are now working at the health care centre. They called Ms. Pino when work became available at the new health care facility and they encouraged Ms. Pino to apply for work. Ms. Pino is aware that one employee who had not worked at the hospital was hired by the health care centre. Ms. Pino could not understand why she was overlooked when she had seniority from the hospital.

[8] Ms. Pino contacted the Union after some delay through her friend, Mr. Mitten. Winston Lewis, the Union representative for acute care hospitals in the Redvers area, explained to Mr. Mitten the process used in the closure of the hospital. He provided Mr. Mitten with a copy of the Union's collective agreement at the hospital. Later, Mr. Lewis talked to Mr. Mitten's wife and provided her with a copy of the same collective agreement. At no point did Mr. Mitten ask Mr. Lewis to file a grievance on behalf of Ms. Pino. Mr. Lewis was courteous and helpful to Mr. Mitten.

[9] Ms. Pino then filed this application.

Ms. Pino's Position

[10] Mr. Mitten, on behalf of Ms. Pino, explained that his client merely wanted an apology from the Union for its role in not explaining to Ms. Pino that she would lose her casual work and would not be entitled to use her seniority to obtain casual work at the new facility. Mr. Mitten likened Ms. Pino's situation to the one considered by the Board in *K.H.* v. *CEP, Local 1-S and SaskTel*, [1997] Sask. L.R.B.R. 476, LRB File No. 015-97 where the Board found that the Union was required to accommodate a grievor who is disabled. According to Mr. Mitten, Ms. Pino had a limited ability to understand the process due to her limited command of English and the Union owed her a duty to make the process comprehensible to her. Mr. Mitten argued that Ms. Pino suffered a loss because she relied on her seniority to obtain work as opposed to understanding that she was required to apply to the health care facility to obtain work and to aggressively pursue such work options. Mr. Mitten suggested that Ms. Pino has suffered financially and emotionally from the Union's failure to accommodate her language needs.

The Union's Position

[11] Mr. Trew, for the Union, expressed his displeasure at having the issue before the Board framed in terms of a discrimination claim when the application before the Board had not raised discrimination as a basis for the application. He vehemently denied that the Union owed any duty to Ms. Pino to make her aware of the consequences of her job loss other than through the methods it had used which included the membership meetings and invitation by the Union staff representative to call with questions at any time. Mr. Trew argued that Ms. Pino had an obligation to make the Union aware that she did not understand the process and to ask for assistance directly. As there was no grievance requested, Mr. Trew asked the Board to dismiss the application.

Board Decision

[12] The duty of fair representation requires a union to fairly represent its members in grievance or rights arbitration proceedings that arise under a collective agreement reached between a union and an employer. The representation must take place in an atmosphere that is free of arbitrariness, discrimination and bad faith. In some cases, the Board will require a union to take extra-ordinary steps to accommodate the special needs of a member, where the member is incapacitated by some

disability in his or her ability to assess and understand the grievance and arbitration process. (see *K.H., supra.*)

[13] In this instance, we understand that casual employees at the hospital were not provided with any notice of their job loss or any individual notice of their entitlements or lack of entitlements with respect to the merger of the hospital with the new health facility. Apparently, part-time and full-time members of the hospital bargaining unit were each given a letter detailing their options for bumping, retirement, resignation, retraining, and the like. This lack of notice resulted in Ms. Pino's confusion about her seniority entitlements. If she had been provided with written notice, she would have been in possession of the information needed to help her understand why her seniority in the hospital bargaining unit did not apply to the new facility. Ms. Pino could have obtained assistance from her friends in understanding the written document.

[14] In fairness, the Union did conduct meetings with the membership of the hospital local and we are satisfied that Ms. Muriel Morhard, staff representative for the Union, made employees who attended the meetings aware of the process to be used to determine movement from the hospital to the new health care facility. She was not aware that Ms. Pino was confused about her entitlements or that she lacked the language ability in English to comprehend what Ms. Morhard was explaining to the staff.

[15] Ms. Pino did not attend all the Union meetings because she was led to believe that, in part, they did not pertain to her. In addition, she was required to keep working while other staff members attended at the meetings. When she did attend, the content of the meetings was incomprehensible to her in large part.

[16] We do not find, in these circumstances, that the Union has failed to fairly represent Ms. Pino in relation to a grievance or rights arbitration proceeding under the collective agreement. Mr. Lewis gave Mr. Mitten sound advice relating to Ms. Pino's situation. There were no provisions in the collective agreement that would allow Ms. Pino to use the seniority she accrued at the hospital to obtain work at the new facility. In addition, Ms. Pino did not request a grievance be filed and the Union was otherwise unaware of her need to have the process explained to her in more detail.

[17] In this case, Ms. Pino would have been satisfied with an apology from the Union for its failure to explain the process adequately to her. In our view, this was not an unreasonable request. The Union must bear some responsibility for not making individual casual employees aware of their impending job loss and lack of entitlements that flowed from the job loss. We are not at all critical of the manner in which the Union conducted its meetings or its other efforts to inform members of the merger issues. It seemed to the Board that Ms. Morhard dealt with the matters in a careful and competent manner. Our only criticism is with the lack of formal notice to casual employees, for which both the Union and the employer bear responsibility. A lot of time, effort, money and grief would have been spared Ms. Pino if she had been properly advised of the termination of her employment and its impending consequences in writing by the employer or the Union. Although her ability to understand English is limited, the written notice would have provided her with accurate information on which she could obtain advice from friends and co-workers.

[18] However, the Union's failure to ensure that casual employees were provided with individual notice of their lay-off and job loss does not constitute a violation of the provisions of *The Trade Union Act*, R.S.S. 1978, c. T-17 and this application is dismissed by the Board.

CANADIAN UNION OF PUBLIC EMPLOYEES LOCAL 4162, Applicant v. MAPLE CREEK SCHOOL DIVISION NO. 17, Respondent

LRB File Nos. 262-99, 132-00 to 136-00; May 1, 2001
Chairperson, Gwen Gray; Members: Mike Geravelis and Marianne Hodgson

For the Applicant: Don Moran
For the Respondent: Geraldine Knudsen

Unfair labour practice – Reasonable expectation of employees – Unilateral change – Evidence did not demonstrate that employer used seniority as basis for filling vacancies pre-certification – No basis upon which employees could reasonably expect that they would be awarded positions based on seniority – Employer's manner of filling vacancies post-certification conformed to pre-certification practice – Board dismisses application under s. 11(1)(m) of *The Trade Union Act*.

Unfair labour practice – Discrimination – Discrimination in hiring – In case of discriminatory activity except discharge or suspension, onus remains on union to establish connection between alleged discriminatory action and employer's motive – No evidence to link employer's failure to hire two individuals to an anti-union motive on employer's part – Board dismisses application under s. 11(1)(e) of *The Trade Union Act*.

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

REASONS FOR DECISION

Background

[1] **Gwen Gray, Chairperson:** The Canadian Union of Public Employees, Local 4162 (the "Union") was certified to represent employees of Maple Creek School Division No. 17 (the "Employer") on March 9, 1998. Negotiations for a first collective agreement commenced on December 3, 1998 and concluded on May 1, 2000 with the parties entering into a collective agreement.

[2] On October 27, 1999, the Union filed an unfair labour practice against the Employer alleging that the Employer did not offer a position to Marianne Wagner, a former Union member, who had previously been employed by the Employer. The Union claimed that the Employer had a pre-certification practice of offering positions to employees based on their seniority with the Employer. The Union also claimed that the Employer's refusal to hire Ms. Wagner had a chilling effect on support for the Union.

[3] The Employer asserted that it did not violate a known practice by not offering a position to Ms. Wagner.

[4] The parties agreed at the hearing that the Union could amend its application to allege violations of ss. 11(1)(c), 11(1)(e) and 11(1)(m) of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the "*Act*").

[5] On May 3, 2000, the Union filed an application seeking an order reinstating Marianne Wagner to a position of caretaker working 4 hours/day or 20 hours/week. The Union also sought an order for monetary loss relating to the refusal of the Employer to appoint Ms. Wagner to the position.

[6] On May 3, 2000, the Union also filed an unfair labour practice against the Employer in which it asserted that the Employer violated ss. 11(1)(a), (e) and (m) of the *Act* by not hiring Larry Kunz to a bus driving position contrary to the pre-certification practice of the Employer. The Union alleged that the Employer's conduct discouraged support for the Union. The Union also sought reinstatement and monetary loss for Mr. Kunz as remedies for the unfair labour practice.

[7] The Employer replied to the application by denying that it had violated a known pre-certification practice.

[8] At the hearing, the Union was allowed to amend its application by replacing the reference to s. 11(1)(a) to s. 11(1)(c).

[9] A hearing was scheduled for Regina on June 20, 2000 but needed to be adjourned at the request of the Employer. The Union sought costs from the Employer in relation to this adjournment. The application was heard by the Board on September 18, 2000.

Facts

[10] Marianne Wagner worked as a custodian at the Fox Valley Elementary School from October 1995 to December 1995 on a temporary part-time basis. She worked additional casual hours in 1996 and 1997. On November 1, 1997, she was hired as head custodian at the school on a temporary basis to fill in for the regular employee who was on long term disability. Ms. Wagner was told at the time

of her appointment that she was required to obtain the proper certificate to permit her to operate the boiler. She was advised that she would be given one year to obtain the certificate. Ms. Wagner made some attempt to obtain the necessary training in order to qualify for the certificate but she was unable to obtain the certificate as required. The Employer terminated Ms. Wagner's contract effective November 13, 1998.

[11] The full-time position of head custodian was advertised. Ms. Wagner applied for the position but she was not offered the job as a result of not possessing the boiler certificate. The full-time position was offered to Janet Koch on a temporary basis while the original employee was off on long term disability.

[12] An opening then came up for a part-time care taker at the school. The position had been filled on a temporary contract by Candice Koch from June 30, 1998. Ms. Wagner applied for this position when it came open on October 31, 1998. The Employer offered the position to Candice Koch effective November 23, 1998.

[13] On September 6, 1999, Candice Koch resigned from the part-time custodial position effective September 30, 1999. The position was posted for 8 hours per week. This position was filled by Linda Zeller effective October 25, 1999. Ms. Wagner applied for but was not accepted for the position.

[14] Ms. Wagner claims that she should be reinstated to the position of part-time custodian effective November 23, 1998.

[15] Larry Kunz was a substitute bus driver for approximately 15 years. He drove a permanent route for a brief period of time in 1995. He obtained a temporary contract to replace a permanent driver from April 1, 1999 to June 28, 1999. When the permanent driver resigned, the Employer advertised the position to begin effective September 1, 1999. Mr. Kunz applied for the position but he was not selected by the Employer. Brenda Kirk, a substitute driver for 2 years, was hired by the Employer. Mr. Kunz claims that he is entitled to be reinstated to this position effective September 1, 1999.

[16] In the hearing of this matter, the Union led evidence that a previous permanent employee in the bargaining unit was offered a bumping process when she was laid off from her teacher aide position at one school in the district. The Union relied on this evidence as evidence of the Employer's pre-certification practice of recognizing seniority in the filling of job vacancies.

[17] In addition, Mr. Kunz claimed that he was told by a school board member that hiring and filling of vacancies was done on the basis of seniority for school bus drivers. The President of the Union, Omar Murray, testified that the Union began its organizing drive in November and December, 1997. Mr. Murray indicated that seniority or years of service was used by the Employer to calculate annual increments and to bid on routes. He testified that, prior to the Union certification, the practice of assigning bus routes was different in the northern part of the district than in the southern part. In the northern part, employees for vacant routes were selected through a random draw. In the southern part of the district, vacant routes were bid on and awarded to the most senior applicant. Mr. Murray testified that, in the southern part of the district, the Employer left the selection of drivers to an employees' association who recommended employees based on seniority. He was not totally aware of the practice in the northern part of the district. Mr. Murray testified that Mr. Kunz was employed in the northern part of the district as was Ms. Wagner.

[18] Mr. Murray testified that the refusal of the Employer to hire Ms. Wagner and Mr. Kunz affected the perception of the Union. He testified that the perception of unfair treatment led people to question why they had joined the Union. Mr. Murray complained that the employees were forced to take a strike vote to obtain contract provisions that they already enjoyed and he blamed the Employer's negotiator for delaying contract talks until the Union threatened to strike.

[19] Beverly Bath, the secretary treasurer of the district, testified that Ms. Wagner's contract was terminated simply because she failed to become qualified to operate the boiler. The Employer was willing to extend the time during which Ms. Wagner could obtain the certificate and they endeavoured to help her find a suitable course. However, Ms. Wagner indicated to the Employer that she was not enrolled in a class and would not be obtaining the certificate. Ms. Wagner testified that the hiring of custodial staff is made on the recommendation of the local school board and the principal. In Ms. Wagner's case, the local school board and principal did not recommend her for appointment to the part-time position that was filled by Candace Koch.

[20] Ms. Bath testified that Mr. Kunz's application was rejected by the Board for the full-time route because he had trouble driving in the previous spring. Mr. Kunz testified that he had very difficult conditions to deal with in the spring because of the flooding conditions. As a result, the roads were muddy. The vehicle he drove was not large enough to deal with the conditions and, as a result, he blew two transmissions. Mr. Kunz felt that the reasons given for not hiring him for the vacant position were not fair.

[21] Ms. Bath also testified that the Employer did not have records of the hours of work performed by casual employees except for the past two years. There was no seniority list in effect in the district prior to the Union.

Relevant Statutory Provisions

[22] The Union alleges that the Employer violated ss. 11(1)(c), (e) and (m) of the *Act*, which 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:*
>
> > *(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;

Union's Position

[23] The Union argued that the Employer did not follow its pre-certification practice of filling vacancies in accordance with seniority. In the Union's view, both employees had a reasonable expectation that their seniority would be taken into account in appointing them to the vacant positions. The Union referred to *Canadian Union of Public Employees, Local 4152 v. Canadian Deafblind and Rubella Association,* [1999] Sask. L.R.B.R. 138, LRB File No. 095-98 and *Construction and General Workers' Union, Local 890 v. Brekmar Industries Ltd.,* [1993] 1st Quarter Sask. Labour Rep. 126, LRB File No. 113-92.

[24] The Union also argued that the Employer discriminated against the two employees in the method of selecting them for lay-off and retaining junior employees. If there is no good and sufficient reason given for the retention of junior employees, the Board may infer that the Employer discriminated against the employees in question because of their activity in support of the Union. The Union referred to *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Loraas Disposal Services Ltd.,* [1998] Sask. L.R.B.R. 1, LRB File Nos. 207-97 to 227-97 & 234-97 to 239-97 and *Saskatchewan Government and General Employees' Union v. Rural Municipality of Paddockwood No. 520,* [1999] Sask. L.R.B.R. 470, LRB File Nos. 059-99 & 087-99 to 093-99.

Employer's Position

[25] The Employer noted that the two positions in question were temporary employees on a limited contract. Their employment was not permanent in nature and the Employer's obligations to the employees terminated at the end of each term contract. Counsel for the Employer argued that there was no expectation of continuing employment for either employee given the nature of their term appointments.

[26] In addition, the Employer argued that the evidence of seniority based bumping related to permanent positions, not temporary positions. In relation to the selection of routes by means of seniority, counsel pointed out that this practice was not consistent throughout the district and it pertained to the selection of routes, not the filling of vacancies.

[27] Counsel noted that the two employees were complaining about the failure of the Employer to appoint them to positions, not their discharge or termination from positions. Counsel distinguished the *Paddockwood* case, *supra,* on the grounds that the employees in that instance had a reasonable expectation of recall, being seasonal employees.

[28] The Employer also disagreed that it acted in any manner that discriminated against the two employees based on union activity.

Analysis

[29] In the post-certification period, before a first collective agreement is reached between the Union and Employer, the Employer is required to maintain the "status quo" or pre-certification practices. The Board has set out the rationale for the rule expressed in s. 11(1)(m) in *Canadian Deafblind and Rubella Association, supra,* at 151 as follows:

> *The purpose of the statutory freeze provision is to maintain the prior pattern and structure of the employment relationship while collective bargaining takes place. It provides a solid foundation and point of departure from which to begin negotiations towards a first agreement, preventing unilateral changes to the status quo which might allow an unfair advantage to one party in the bargaining process.*

[30] In that case, the Board found that the employer had strayed from the pre-certification practice when it re-assigned employees to different homes, an action that it had not taken prior to the certification of the union. Section 11(1)(m) required the employer to bargain with the union prior to introducing the change.

[31] In the *Loraas Disposal Services Ltd.* case, *supra,* the Board found that a downsizing of the employer's business in the post-certification period was also subject to the requirement to bargain with the union. In that case, the employer did not have any established pattern of down-sizing in the pre-certification period. As a result, the failure of the employer to negotiate the matter with the union constituted a breach of s. 11(1)(m).

[32] In the *Paddockwood* case, *supra,* employees worked on a seasonal basis and had been called back to work over several seasons. The Board found that the employees had a reasonable expectation of recall and that the employer's failure to discuss a change of the recall pattern with the union constituted an unfair labour practice under s. 11(1)(m).

[33] In the present case, there is evidence that the Employer laid-off permanent staff through application of the seniority principle. The teacher aide who was subject to lay-off was offered the opportunity to bump a less senior teacher aide. The Employer explained that such rights were granted to permanent employees, but not to casual employees.

[34] In addition, there was some evidence that employees in the bus routes in the southern portion of the district were allowed to recommend the drivers who would be assigned to routes that came open. This was done through the use of seniority. The same was not the case, however, for drivers in the northern part of the school district.

[35] There was also evidence from Ms. Bath that the local school board and principal made recommendations to the district of persons they would like to hire when filling job vacancies. Ms. Bath indicated that this procedure was used for custodial staff and bus drivers. In this sense, the filling of temporary vacancies would not necessarily take place on the basis of seniority, but would be based on an assessment by the local school board and school principal of the work performed by the individuals in question.

[36] In addition, there were no accurate records kept except over the past two years of the time actually worked by casual employees. Any seniority assessment would be somewhat subjective or would be based simply on the date of hire as there would be no compilation of hours of work available to determine seniority on an hourly basis.

[37] In our view, the evidence does not demonstrate that the Employer used seniority as the basis for filling vacancies and there was no basis on which employees could reasonably expect that they would be awarded positions based on seniority. In this circumstance, we find that the Union has not established a breach of s. 11(1)(m) by not appointing Ms. Wagner and Mr. Kunz to the positions in question. There was evidence that persons laid off from permanent positions could use seniority to bump into another person's position, but there is not sufficiently convincing evidence that seniority was used to fill vacancies.

[38] Ms. Bath testified as to the manner of filling both vacancies and these practices did conform to the Employer's pre-certification procedures.

[39] In relation to the Union's claim that the Employer's failure to appoint Ms. Wagner and Mr. Kunz to the positions in question constituted discrimination within the meaning of s. 11(1)(e), the Board is not convinced that the evidence demonstrates any anti-union animus on the part of the Employer. We do not find that the failure to appoint Ms. Wagner or Mr. Kunz to the positions in question constituted a termination of employment. As indicated above, neither employee had a

reasonable expectation based on the Employer's pre-certification practices of being appointed to the positions based on their seniority. This is then a case of failure to hire, as opposed to a dismissal or termination of employment unlike the situation before the Board in the *Paddockwood* case, *supra.*

[40] Section 11(1)(e) places an onus on the employer in a case of discharge or suspension to establish that the discharge or suspension was for "good and sufficient reason." In the case of other discriminatory activity, the onus remains on the union to establish some connection between the alleged discriminatory action and the employer's motives. In this case, the only suggested connection between the two events is the fact that the Union organized the workplace in November and December, 1997 and had been bargaining with the Employer for some period of time. The non-selection of Ms. Wagner occurred in November, 1998 some 12 months after the commencement of the Union's organizing campaign. Mr. Kunz was not selected for the bus driving position in September, 1999, one and one-half years past the organizing campaign. There is no other evidence to link the failure of the Employer to appoint Ms. Wagner or Mr. Kunz to an anti-union motive on the Employer's part. In our view, the evidence is insufficient to establish discriminatory treatment of Ms. Wagner or Mr. Kunz contrary to s. 11(1)(e).

[41] As a result, we find that the Employer did not violate s. 11(1)(c), (m) or (e) of the *Act* and the Union's application must be dismissed. No order will be made with respect to the Union's claim for costs incurred due to the adjournment of the hearing.

SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant v. TEMPLE GARDENS MINERAL SPA INC., Respondent

LRB File No. 308-00; May 2, 2001
Vice-Chairperson, James Seibel; Members: Ken Hutchinson and Donna Ottensen

For the Applicant: Larry Kowalchuk
For the Respondent: Deb Thorn

Unfair labour practice – Anti-union animus – Employer appointed junior in-scope employee to temporarily perform out-of-scope duties – Union alleges that decision to not appoint senior in-scope employee constituted unfair labour practice – Board accepts reasons proffered by employer for appointing junior employee and finds no evidence of anti-union animus on part of employer – Board dismisses application.

***The Trade Union Act*, ss. 11(1)(a) and 11(1)(e).**

REASONS FOR DECISION

Background and Facts

[1] James Seibel, Vice-Chairperson: Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Union") is designated as the bargaining agent for a unit of employees of Temple Gardens Mineral Spa Inc. (the "Employer"), which operates a spa and hotel facility in Moose Jaw. The Union filed this application alleging that the Employer had committed unfair labour practices in violation of ss. 11(1)(a) and 11(1)(c) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the *"Act"*) by assigning a more junior bargaining unit employee, instead of a more senior employee, to temporarily act as an out-of-scope supervisor of bargaining unit employees for the reason that the assigned employee had not joined the Union. Sections 11(1)(a) and 11(1)(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;*

. . .

> *(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;*

[2] Jeanine Lavallee, who has been employed by the Employer as a housekeeper for approximately four years, testified on behalf of the Union. She is a shop steward and the second most senior employee in the department. Deb Thorn, the Employer's chief executive officer, testified on behalf of the Employer.

[3] There are two out-of-scope staff positions in the Employer's housekeeping department: executive housekeeper and assistant executive housekeeper. The assistant executive housekeeper, Michelle Paul, was to go on maternity leave on December 4, 2000; the Employer hired Serena Wilcox to temporarily fill her position. At this same time the executive housekeeper, Joan Wright,

took a sudden leave of absence from work for emergency surgery. The Employer's most senior in-scope employee, Diane Dolphe, who had had some managerial experience and familiarity with scheduling as the Employer's former laundry supervisor, was also off work due to a work-related injury. On occasion, Ms. Dolphe, who is also a shop steward, had previously filled in as assistant executive housekeeper. Ms. Thorn testified that she contacted Ms. Dolphe to see if she could obtain medical permission to return to work part-time. Ms Dolphe agreed to come in two days per week to assist Ms. Wilcox starting on December 9, 2000.

[4] On December 6, 2000 Ms. Wilcox, who wanted to take December 7, 2000 as an additional day off, appointed an in-scope employee, Kim Ayres, to fill in for her; Ms. Ayres has somewhat less seniority than Ms. Lavallee. Ms. Lavallee, who is the most senior employee in the department after Ms. Dolphe, testified that she questioned Ms. Wilcox about this decision, but admitted that she did not express any desire to do the job herself. She said that Ms. Wilcox told her that Ms. Thorn had approved the appointment of Ms. Ayres because Ms. Ayres had not joined the Union; she also said that a co-worker, Kim McConnell, was a witness to the conversation. Ms. Lavallee opined that Ms. Ayres was one of the lead organizers of a failed campaign to decertify the Union a short time before these events.

[5] However, in her testimony, Ms. Thorn vigorously denied that she had either had any such conversation with Ms. Wilcox or had made any such decision. She said that she was not aware of whether Ms. Ayres held membership in the Union or not. Indeed, she said that Ms. Wilcox had exceeded her authority in appointing Ms. Ayres to act in her stead without seeking Ms. Thorn's permission. Although Ms. Ayres had satisfactorily performed the duties required of her, once Ms. Thorn learned of the action on December 8, 2000, she reprimanded Ms. Wilcox.

[6] Ms. Thorn said that on December 9, 2000 Ms. Wilcox was absent again and Ms. Ayres volunteered to fill in for her. Ms. Thorn said that she agreed because Ms. Dolphe, who was starting back that day, required assistance, and the facility was nearly full and two other housekeepers were away – Ms. Thorn described it as a case of "crisis management."

[7] Ms. Thorn terminated Ms. Wilcox's employment on December 21, 2000 and appointed Ms. Ayres to act as assistant executive housekeeper until Ms. Paul returned from her leave. She said that, prior to filing the present application, neither Ms. Lavallee nor the Union had expressed the opinion

that Ms. Lavallee ought properly to have been offered the opportunity to do the job on any of the occasions described above.

Argument

[8] Mr. Kowalchuk, counsel for the Union, argued that the evidence established that the Employer, through Ms. Thorn, had approved the temporary appointment of Ms. Ayres to an out-of-scope position, and had failed to offer the work to the most senior employee, Ms. Lavallee, because it was believed that Ms. Ayres was not a Union member or supporter, whereas Ms. Lavallee was a shop steward and an outspoken promoter of seniority rights. Mr. Kowalchuk asserted that, prior to the present material events, the Employer had made such temporary assignments to the most senior employee, Ms. Dolphe. Mr. Kowalchuk argued that, in the circumstances, there was direct evidence of a violation of ss. 11(1)(a) and 11(1)(e) of the *Act* in that the Employer had discriminated against Ms. Lavallee with respect to a term or condition of employment with a view to discouraging membership in the Union. He asked that the Board issue a declaration that the Employer had committed unfair labour practices and remain seized of the matter to determine other remedies.

[9] In argument, Ms. Thorn summarized the substance of her testimony and asserted that there was no violation of the *Act*. She said that, while she had reprimanded Ms. Wilcox for initially appointing Ms. Ayres, the issue was not whether someone else ought to have been appointed but that Ms. Wilcox had exceeded her authority. As it turned out, she said, Ms. Ayres performed well the duties of assistant executive housekeeper.

Analysis and Decision

[10] We are of the opinion that the application should be dismissed. The Union bears the evidentiary onus in the present case. Regardless of what Ms. Lavallee says Ms. Wilcox told her about Ms. Thorn being involved in the decision to appoint Ms. Ayres to perform her duties on December 7, 2000, it is not evidence that Ms. Thorn was involved or made the comments attributed to her. We accept the evidence of Ms. Thorn that she was unaware of the decision which, she said, was made unilaterally and without authority by Ms. Wilcox, an infraction for which she was reprimanded and which was part of the basis for her termination a short while later.

[11] We also accept the *bona fides* of the reasons proffered by Ms. Thorn for appointing Ms. Ayres and not appointing Ms. Lavallee – the management of the department was in disarray owing to the foreseeable absence of Ms. Paul and the unforeseeable absence of Ms. Wright. There is no evidence that Ms. Thorn was motivated by an anti-union animus in making her decisions to appoint Ms. Ayres on December 9, 2000 and December 21, 2000. Indeed, she appointed Ms. Dolphe, a Union shop steward and a member of its bargaining committee, to act in the stead of Ms. Wright. In all of the circumstances, we do not find the alleged violations to be made out. The application is dismissed.

HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES UNION, LOCAL 206, Applicant v. EL RANCHO FOOD & HOSPITALITY PARTNERSHIP, Respondent

LRB File No. 089-00; May 2, 2001
Chairperson, Gwen Gray; Members: Gloria Cymbalisty and Leo Lancaster

For the Applicant: Garry Whalen
For the Respondent: Deron Kuski

Reconsideration – Criteria – Matters raised by employer in reconsideration application not unanticipated when original order issued – Original Board order did not alter previous approach or change policy on designing appropriate bargaining units – Board dismisses application for reconsideration.

***The Trade Union Act,* s. 5(i).**

REASONS FOR DECISION

Background and Facts

[1] Gwen Gray, Chairperson: Hotel Employees and Restaurant Employees Union, Local 206 (the "Union") applied to be certified for a bargaining unit composed of drivers employed by El Rancho Food & Hospitality Partnership (the "Employer") operating as KFC at 1631 Victoria Avenue, Regina. The Union was already certified to represent all other employees of the Employer at the Victoria Avenue location of KFC (see LRB File No. 303-99). The Employer opposed the issuing of a tag-end certification order for drivers on the grounds that the proposed unit was not appropriate for collective bargaining. A hearing was conducted by the Board on November 1, 2000 and Reasons for Decision issued on November 27, 2000. The Board found that the bargaining unit, while not an ideal unit, was appropriate in the circumstances for collective bargaining and it issued a certification Order for a drivers bargaining unit.

[2] The Employer applied for reconsideration on January 9, 2001, seeking an order rescinding the certification Order. The grounds for reconsideration included (1) the Order operates in an unanticipated manner by causing intermingling problems between employees in the two bargaining units; (2) the original decision misinterpreted board policy preferring large bargaining units; and (3) the decision is precedential and amounts to a significant policy adjudication that should be reconsidered.

[3] The Union did not oppose the Employer's application for reconsideration. There is no evidence before the Board relating to the support of employees for or against the Union.

[4] A hearing of the reconsideration application was held in Regina on May 1, 2001.

Analysis

[5] The Employer requests that the Board reconsider its Order and find that the proposed bargaining unit of drivers is not an appropriate bargaining unit. The unusual circumstance in this case is that the Union does not oppose the application for reconsideration and appears content to let its certification of drivers lapse. The Union and the Employer have negotiated a collective agreement covering all employees other than the drivers, but they have not entered into an addendum or a collective agreement for the drivers.

[6] On a reconsideration application, the criteria for deciding if the Board will reconsider a previous decision and order are set out in *Remai Investment Corporation, o/a Imperial 400 Motel v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union,* [1993] 3rd Quarter Sask. Labour Rep. 103, LRB File No. 132-93, at 107-108 as follows:

> *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.*

[7] In the present case, the Employer argued that the Board's decision worked in an unanticipated manner because it did not result in a merged bargaining unit and it caused intermingling problems because some drivers also worked in the main bargaining unit. In our view, this issue was addressed in the first application and the Board recognized that the unit of drivers was a tag-end group. The problems caused by the two certification Orders are easily overcome through collective bargaining and

present no real obstacle to industrial stability in the workplace. In our view, the matters raised under this heading were not unanticipated when the Order was issued.

[8] The second ground for seeking reconsideration relates to an alleged misinterpretation of Board policy relating to the appropriateness of small tag-end groups of employees. The Employer asserted that it was the Union's decision to leave the drivers out of the large "all employee" bargaining unit and its decision resulted in the costly and time consuming consequence of a second certification application.

[9] The Board has recognized that small, departmental bargaining units are not ideal. In some sectors, however, it has also recognized that it is difficult to organize employees on an "all employee" basis due usually to the transient nature of the workforce, the high use of casual or part-time employees, and other characteristics that render organizing difficult, if not impossible, on an "all employee" basis. In this instance, the Board referred in its Reasons for Decision to *Hotel Employees & Restaurant Employees Union, Local 767 v. Regina Exhibition Association Ltd.,* [1986] Oct. Sask. Labour Rep. 43, LRB File No. 015-86. In addition, unless the tag-end group of drivers was required to apply through an application to add-on and amend the certification Order issued for the main group of employees, they would not be entitled to representation. In these circumstances, the certification of the tag-end group as a separate order is the only method that will grant immediate access to collective bargaining to the employees in question. This piece meal approach to organizing a workplace may well give rise to intermingling and other similar issues but, because the main group of employees is already certified with the same trade union, these issues can easily be resolved through collective bargaining.

[10] We do not conclude that the Board has altered its approach to the certification of tag-end groups or changed its approach to organizing in this sector in any significant manner. In this sense, we do not accept the Employer's third argument that the decision is precedential in effect and significantly changes Board policy on designing appropriate bargaining units.

[11] For these reasons, the Employer's application for reconsideration is dismissed.

[12] The Union may choose to abandon or not abandon the bargaining unit in question. On an application of this nature, the Board is not entitled to go behind its finding of majority support unless there is evidence presented that the support was obtained improperly or some fraud was committed in

relation to the support evidence originally presented to the Board. There is no evidence on this application that would support a setting aside of the support evidence filed with the original application. The certification Order belongs to the employees. If they no longer wish to be represented by the Union, they may file for rescission in the open period.

UNIVERSITY OF SASKATCHEWAN, Applicant v. CANADIAN UNION OF PUBLIC EMPLOYEES LOCAL 1975 and ADMINISTRATIVE AND SUPERVISORY PERSONNEL ASSOCIATION, Respondents

LRB File No. 150-00; May 10, 2001
Chairperson, Gwen Gray; Members: Gerry Caudle and Brenda Cuthbert

For the Applicant: Neil Gabrielson, Q.C.
For the Respondent, CUPE: Jim Holmes
For the Respondent, ASPA: Gary Bainbridge

Bargaining unit - Appropriate bargaining unit – Multiple bargaining unit setting – Administrative and supervisory bargaining unit not middle management bargaining unit – Board relies upon history of duties of positions in dispute and whether duties can be traced back to either bargaining unit – Board assigns new positions to administrative and supervisory bargaining unit.

***The Trade Union Act,* s. 5(m).**

REASONS FOR DECISION

Background

[1] **Gwen Gray, Chairperson:** The University of Saskatchewan (the "University") applied for an order assigning the newly created positions of Risk and Insurance Analyst and Safety and Environment Coordinator to the appropriate bargaining unit. Canadian Union of Public Employees, Local 1975 ("CUPE") and the Administrative and Supervisory Personnel Association ("ASPA") both claimed that the positions properly belonged within the scope of their bargaining units. A hearing was held in Saskatoon on September 25, 2000.

Facts

Risk and Insurance Analyst

[2] This position is located in the Department of Insurance Services and the incumbent reports to the Manager, Insurance Services. The duties of the position include coordination and administration of insurance claims; developing and preparing underwriting and property appraisal information;

interpreting and analyzing coverage under insurance policies; identifying risk exposures and recommending, coordinating and implementing practical solutions; reviewing contract indemnity and insurance clauses; participating in the presentation and delivery of risk management and insurance presentations; administering motor vehicle registration and insurance; and other related duties. The person must possess post-secondary education in insurance and/or risk management with significant credits towards AIIC, CRM or CIP designation or an equivalent combination of education and related experience. The position is a two-year term position.

[3] Bruno Konecsni testified that he assessed the position based on its job duties, the past decisions of the Board and past practice and determined that the position should be assigned to the ASPA bargaining unit.

[4] Nowell Seaman, Manager, Insurance Services, testified that his workload has increased over time with increased emphasis on risk management, more construction and other contracts, more complex insurance issues and with the duties he is assigned as EMS coordinator. As a result, he recommended and obtained approval to create the new position of Risk and Insurance Analyst. The functions performed by this position devolved from the manager's general duties. The analyst is responsible for investigating claims, dealing with faculty and staff inquiries, dealing with medium sized property claims, assessing risk and undertaking risk management, and dealing with insurance brokers. Mr. Seaman will supervise the day-to-day work of the analyst but any disciplinary response would be imposed by the Director of Corporate Administration.

Safety and Environmental Co-ordinator

[5] This position reports to the Director of Operations and Maintenance in the Facilities Management Department. The duties include the development, implementation and evaluation of safety and environmental programs in the Facilities Management Department. The incumbent will ensure that the University and its contractors comply with health, safety and environmental regulations.

[6] The 1978 Certification Order lists the exclusion of a Safety Supervisor in the Building and Grounds Department (predecessor of Facilities Management). This position was transferred to a centralized Health, Safety and Environment Department. Later, due to budget restraints, it was

eliminated. With increased workload dealing with new construction, the Facilities Management Department felt it necessary to create a health, safety and environmental position in house to deal with regulatory concerns.

[7] Mr. Konecsni pointed out that the position is similar to those of the Radiation Safety Officer, Chemical Safety Officer, Biological Safety Officer and similar positions in the Health, Safety and Environment Department, all of which are placed currently in ASPA.

[8] Mr. Holmes for CUPE established that a position called Project Coordinator in the Health, Safety and Environment Department was assigned by Professor Quigley, in an arbitration of the matter, to CUPE. That position deals with the twelve (12) Occupational Health and Safety Committees located on campus and with health and safety programs.

Positions of the Parties

[9] The University argued that both positions were comparable to other positions within ASPA and both fell properly within the ASPA bargaining unit. The duties of the Risk and Insurance Analyst derived from the Manager, Insurance Services. The Safety and Environmental Coordinator is a recreation of the old Safety Supervisor position which was transferred out of the Division of Facilities Management. It is comparable to positions within the Health, Safety and Environment Department, the majority of which are assigned to ASPA.

[10] ASPA applied the three tests set by the Board in earlier cases, that is, the history of the duties, where they originated from and comparisons between those duties and similar positions within either ASPA or CUPE. Applying these tests, ASPA concluded that both positions fell within its bargaining units.

[11] CUPE argued that the title of the positions is meaningless in the overall context of the University. For instance, the term "analyst" refers to positions within ASPA, the Faculty Association and out-of-scope positions. There is nothing inherent in the title that would result in an assignment of the position to ASPA. In addition, CUPE argued that tracing the duties from one position to another is also a meaningless exercise. In this case, the duties have been simplified and delegated to more junior employees. The professional component of the positions is not significant. In this event, CUPE urged the Board to apply principles set out in *Kelowna Hospital Society,* [1977] 2 Canadian

LRBR 58. CUPE argued that there is no direct line between the old Safety Supervisor, who was excluded in the 1978 Certification Order, and the new Safety and Environmental Coordinator. It also disputed that there was any conflict of interest between the Safety and Environmental Coordinator and membership in CUPE. The conflict would be the same if the person were assigned to ASPA – that is, the job duties may give rise to a conflict between membership in ASPA or CUPE. CUPE argued that it is not different from security personnel who may be required to report on a member of their union. CUPE noted that there is no difference between the Project Coordinator position which was assigned to CUPE and the Safety and Environmental Coordinator.

Board Analysis and Decision

[12] The test applied by the Board to determine the assignment of positions between the CUPE and ASPA bargaining units is set out in *Canadian Union of Public Employees Local 1975 v. University of Saskatchewan et al.,* [1990] Summer Sask. Labour Rep. 97, LRB File No. 040-90 at 98:

> *Because of the overlapping and poorly defined boundary between these two bargaining units, the Board, in coming to its decision, was influenced by the history of the three new positions and particularly whether the duties and responsibilities of the new positions could be traced back to either of the bargaining units.*

[13] The Board has followed this test in its recent decisions in *Canadian Union of Public Employees, Local 1975 v. University of Saskatchewan et al,* [2000] Sask. L.R.B.R. 83, LRB File No. 218-98 and *University of Saskatchewan v. Canadian Union of Public Employees Local 1975 et al.,* [2000] Sask. L.R.B.R. 529, LRB File Nos. 083-00 & 108-00.

[14] The Board does not characterize the bargaining unit assigned to ASPA as a strict middle management bargaining unit. For historical reasons, it has evolved in a different manner than other middle management bargaining units. As a result, its membership is not restricted to positions which have a labour relations conflict as a result of the exercise of supervisory, but not managerial, functions over members of the larger bargaining unit. Some of the membership of ASPA do fall within a general "middle management" description but others are in the unit for historical reasons which relate primarily to the scope of CUPE's original Certification Orders. Those Orders are summarized in the Board's recent decision in *Saskatchewan Government and General Employees' Union v. Saskatchewan Liquor and Gaming Authority et al.,* [2001] Sask. L.R.B.R. 152, LRB File

No. 037-95. There were originally 7 different Certification Orders creating bargaining units on the basis of departments, such as the power house, or occupations, such as maintenance and servicing employees or "all painters." When the Orders were amalgamated into one "all employee" Order by the Board, the Supreme Court of Canada held that the amalgamated Order improperly swept unorganized employees into the bargaining unit without testing their support for CUPE. As a result, at the University, ASPA evolved as the bargaining unit for a variety of tag end groups that were not formerly organized by CUPE. Although it would be much simpler for all parties if the ASPA unit were a middle management unit, it has not evolved in this fashion and the Board is simply not entitled at this stage to redesign the bargaining unit into a middle management unit. The Board will continue to apply an historical approach to determine the assignment of positions to the appropriate bargaining unit.

[15] In this case, the duties of the Risk and Insurance Analyst devolved from the Manager, Insurance Services position. As a result, we find that the position properly belongs in ASPA and it will be assigned to ASPA for that reason.

[16] In relation to the Safety and Environmental Coordinator, we find that the position is comparable to the Safety Officer positions in the Health, Safety and Environment Department and is similar in nature to the former excluded position of Safety Supervisor. As a result, the position is assigned to ASPA.

[17] For these reasons, we find that the positions properly fall within ASPA and no demonstration of support is required. If the parties require an amended Order, the Board will issue one pursuant to s. 5(j)(ii).

CLR CONSTRUCTION LABOUR SASKATCHEWAN INC., Applicant

SECTION 10.2 OF *THE CONSTRUCTION L 1992*

LRB File No. 202-00, May 22, 2001
Chairperson, Gwen Gray; Members: Marianne Hodgson

For the Applicant: Alan McIntyre

Construction industry – Representati Approval/amendment of bylaws – Board r amendments to bylaws.

***The Construction Industry Labour Relations Act, 1992*, ss. 9.1, 10.1, 10.2 and 18.**

REASONS FOR DECISION

Background

[1] Gwen Gray, Chairperson: The Board issued Reasons for Decision on November 20, 2000 outlining amendments that are required to be made to the constitution and bylaws of CLR Construction Labour Relations Association of Saskatchewan Inc. ("CLR"), which is designated by s. 9.1 of *The Construction Industry Labour Relations Act, 1992,* S.S. 1992, c.C-29.11, as amended (the "*CILRA*") as the statutory representative employers' organization for several trade divisions.

[2] CLR made the necessary amendments to its bylaws and referred them back to the Board for approval. In a hearing on May 7, 2001, the Board approved the changes made to the bylaws dated March 21, 2001, and found them to conform with the Board's November 20, 2000 directions.

[3] In addition, CLR filed its application for membership and collective bargaining authorization, which the Board approved on May 7, 2001. The Board did not approve the wording of paragraphs 6, 7 and 8 in an attached statutory declaration which prospective members of CLR are intended to complete. These paragraphs require the applicant employer to acknowledge that related employers are "unionized employers" and to list the names of related employers. The form also requires the applicant employer to agree that it is willing to subject its relationship to other related

employers in the same trade division to the Board for a determination of whether the related employer is a "unionized employer" within the meaning of the *CILRA*.

[4] The Board does not agree with CLR that it can restrict its membership to those construction employers who voluntarily agree to subject related employers to the bargaining scheme set out in the *CILRA*. Section 10.1 of the *CILRA* permits each unionized employer in a trade division to join the representative employers' organization and participate in its activities. In relation to construction employers who operate through "spin off" corporations, the Board is granted the power under s. 18(1) of the *CILRA* to declare more than one corporation, partnership, individual or association to be one unionized employer for the purposes of the *CILRA* and *The Trade Union Act,* R.S.S. 1978, c. T-17. Until such an order is granted, related employers who operate on a non-union basis are not subject to the *CILRA*.

[5] It is somewhat of a chicken and egg argument – the new provisions allow the Board to declare corporations to be "related" and therefore to be one unionized employer for the purposes of the *CILRA*. Once they are determined by the Board to be related employers, they are subject to the terms of the *CILRA* and are required to conduct their labour relations in accordance with the terms of the *CILRA*. Until the declaration, however, the unionized portion of such group of related construction employers may apply for membership in CLR and may participate in its activities in accordance with s. 10.1 of the *CILRA*.

[6] Paragraphs 6, 7 and 8 of the statutory declaration attached to the membership application are not permissible in the context of s. 10.1 of the *CILRA* and CLR is directed to remove them from the statutory declaration and to not require construction employers who seek membership in CLR to complete such questions or give such undertakings as are contained in paragraphs 6, 7 and 8.

DON LIEN, Applicant v. CHAUFFEURS, TEAMSTERS AND HELPERS UNION, LOCAL 395, Respondent

LRB File No. 203-00; May 28, 2001
Chairperson, Gwen Gray; Members: Donna Ottenson and Leo Lancaster

For the Applicant: Ronalda Nordal
For the Respondent: Angela Zborosky

Duty of fair representation – Scope of duty – Duty of fair representation refers to representation of employees by unions with respect to disputes that arise under terms of collective agreement – Duty of fair representation does not cover matters arising under union's constitution and bylaws – Board dismisses application under s. 25.1 of *The Trade Union Act*.

Union – Membership – Board finds that s. 36.1(3) of *The Trade Union Act* applies to individuals permitted to work by construction unions through hiring hall systems – Board reviews union's normal practices in admitting new members and union's practice relating to applicant – Union followed normal procedures and took legitimate factors into account in not offering membership to applicant – Board dismisses application under s. 36.1 of *The Trade Union Act*.

***The Trade Union Act*, ss. 25.1 and 36.1.**

REASONS FOR DECISION

Background

[1] Gwen Gray, Chairperson: Don Lien filed an application against the Chauffeurs, Teamsters and Helpers Union, Local 395 (the "Union") in which he alleged that the Union unreasonably denied him membership in the Union and deprived him of natural justice in violation of ss. 25.1 and 36.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*").

[2] The Union filed a general denial of the alleged infractions.

[3] A hearing was held in Regina on December 14, 2000 and March 5, 2001.

Facts

[4] The Union represents teamsters in the pipeline sector of the construction industry and it dispatches Union members to pipeline work through its hiring hall. Under the Union's rules, members are assigned work according to their seniority in the Union.

[5] Don Lien was dispatched by the Union on a number of occasions from 1998 to February, 2000. He is not a member of the Union but was permitted to work on occasions when the Union had no unemployed members. The Union considered Mr. Lien to be a good, reliable, intermediate driver.

[6] Ray Gergely, business agent of the Union, testified that new members have been added to the Union on a number of occasions. In the 1980's, the membership of the Union was expanded to deal with the increased demand for teamsters arising out of the construction of two oil upgraders. On this occasion, Mr. Gergely assessed the qualifications of various individuals who had performed work under permit with the Union and offered membership to them. In some cases, individuals were added in order to meet local hiring quotas agreed to in the various project agreements.

[7] Currently, the Union maintains two separate hiring boards. The "A" board is composed of 52 members while the "B" board is composed of 12 members. The rights of "A" and "B" board members are the same, except that "B" board members are not entitled to vote on motions to change the dispatch rules relating to the dispatch of members by seniority. The "A" board members apparently fear that new members would seek to implement a rotational board, as opposed to the seniority board. As a result, only "A" board members are entitled to vote on this issue. "B" board members may move up to "A" board status as members on the "A" board retire from membership.

[8] The "B" board came about in 1998 when there was a large demand for teamsters in the pipeline industry. Mr. Gergely decided to take three First Nations persons into membership from the group of First Nations individuals the Union had recruited to meet First Nations hiring policies of the pipeline contractors.

[9] Members of the Union were upset with Mr. Gergely's unilateral actions in adding new members to the list. As a result, the Union decided to add a total of nine new members and to establish the "B" board. A committee was established to select the new members, in addition to the

three First Nations members who Mr. Gergely had already added to the membership. The Committee sent a letter to the membership outlining the process for selecting new members. Members were invited to sponsor individuals for membership and to send in resumes of such individuals. The letter made it clear that applicants would be considered in three categories – lowboys, intermediate positions and lower qualified positions. The letter was sent to members on February 8, 1999 with a March 15, 1999 deadline for receiving nominations.

[10] The Union received 70 to 80 applications for membership. Each application was reviewed by the membership committee. The committee selected a number of the applicants and included them on ballots according to their qualifications as lowboy, intermediate or lowend drivers. Mr. Lien's name was included on the middle end intermediate drivers list, along with 24 other names.

[11] The ballots were sent to members of the Union. Each member voted for two drivers in each category and the results were reviewed at the membership meeting on May 17, 1999. As a result of the vote, six new members were selected along with the three First Nations members. All nine members were placed on the "B" board. Mr. Lien was not selected for membership through this process.

[12] Mr. Gergely discovered that one individual who was selected in the intermediate category changed his mind about joining the Union and declined the membership offer. As a result, Mr. Gergely decided to replace him with another individual who had also applied for membership in the Union and who had received the next largest number of votes. As it turned out, the person chosen by Mr. Gergely had received the same number of ballots as Mr. Lien. According to Mr. Gergely, however, the new member had more driving experience than Mr. Lien and he held a certificate for driver training, which would be useful in the Union's training programs. This last factor was the chief reason Mr. Gergely selected the individual over Mr. Lien.

[13] In the spring of 2000, members suggested that more names be added to the "B" board. It was decided by the membership at the April 24, 2000 meeting to add three new names to the list. The selection of names was left up to Mr. Gergely and he selected names from the lists previously created for the ballots. He considered the qualifications of the individuals and the assistance they previously had given to the Union. Mr. Lien again was not selected for membership.

[14] At the May 15, 2000 meeting, members approved the addition of the three new persons selected by Mr. Gergely for membership.

[15] Mr. Gergely maintains that he is entitled to select new members when the membership delegates the task to him. He referred to Article 2 of the bylaws of the Union in support of his assertion. Mr. Gergely pointed out that in hiring hall unions, the membership of the union generally determines when new members are added to the list and how such members will be selected. Membership is not automatically granted to persons who apply. The Union maintains control over the number of individuals on the list and their qualifications. He did point out that some locals of the Union have different rules and he noted that Local 362 in Alberta used to grant membership to individuals after they had been permitted to work on two occasions. Mr. Gergely noted that now Local 362 is not taking any new members.

[16] In February, 2000, there was an incident involving Mr. Lien on a job site in Whitecourt, Alberta that rather soured Mr. Lien's relationship with the Union. Mr. Lien was working on a project at Whitecourt under a permit issued by the Union. After receiving a lay-off notice, Mr. Lien was asked by the foreman to stay and work on a different crew. Mr. Lien knew that he should receive permission from the Union so he checked with the Alberta shop steward on the site who told him it was all right to continue to work. The Saskatchewan steward on the site, however, took exception to Mr. Lien continuing to work when members of the Union were on lay-off and he sent Mr. Lien home.

[17] According to Mr. Gergely, Mr. Lien ought to have been dispatched to the job by the Union, not through the Employer, and he ought to have phoned the hall to get clearance to work when the Employer offered additional work. Mr. Gergely testified that had Mr. Lien been a Union member, he would have been sent home for working without a dispatch and he may have been penalized by being put to the bottom of the list for a considerable period of time. In the view of the Union, the offence was serious and it did influence the membership when new members were selected in May, 2000. Mr. Gergely commented that it was a serious error in judgment for Mr. Lien to accept the work without seeking approval of the Union.

[18] Mr. Lien has not been issued a permit to work in the Union since February, 2000. Mr. Gergely explained that pipeline work has dried up in Saskatchewan and there is hardly enough work

coming up to keep current members working. Mr. Lien is convinced that he has not received work from the Union because of the Whitecourt incident. Mr. Lien asked for an opportunity to speak to members of the Union to explain the incident but he was not permitted to attend the meeting as he is not a member of the Union.

[19] For the period of time that Mr. Lien was dispatched to jobs, he was allowed to participate in the health and welfare plans negotiated between pipeline contractors and the Union. He was also required to pay regular monthly union dues, but he was not required to pay the initiation fees.

[20] Bert Royer, president of the Saskatchewan Building Trades Council, testified that his union, the Ironworkers union, selects new members through its executive committee. Once selected, the names are submitted to the membership for approval at a general union meeting. Individuals who apply for membership generally have worked on permit with the union.

Relevant Statutory Provisions

[21] The provisions under review in this case include s. 25.1 and s. 36.1 of the *Act,* which read as follows:

> *25.1 Every employee has the right to be fairly represented in grievance or rights arbitration proceedings under a collective bargaining agreement by the trade union certified to represent his bargaining unit in a manner that is not arbitrary, discriminatory or in bad faith.*
>
> . . .
>
> *36.1(1) Every employee has a right to the application of the principles of natural justice in respect of all disputes between the employee and the trade union certified to represent his bargaining unit relating to matters in the constitution of the trade union and the employee's membership therein or discipline thereunder.*
>
> *(2) Every employee shall be given reasonable notice of union meetings at which he is entitled to attend.*
>
> *(3) No employee shall unreasonably be denied membership in a trade union.*

Applicant Argument

[22] Ms. Nordal, counsel for Mr. Lien, argued that Mr. Lien's membership application was not fairly considered by the membership of the Union. Counsel asserted that the Union was required to place the applicants for membership before the whole membership of the Union and to allow a vote on who would be admitted into membership. Counsel argued that Mr. Lien did not have his application fairly considered by Mr. Gergely.

[23] Counsel also argued that Mr. Lien was denied natural justice because he was not permitted to address the membership with respect to the Whitecourt incident. Ms. Nordal noted that it was admitted that the incident played a role in Mr. Gergely's decision not to offer membership to Mr. Lien. She argued that Mr. Lien ought to have been permitted to tell the membership his side of the story and clear up the misunderstanding that occurred.

[24] Counsel referred the Board to *Stewart v. Saskatchewan Brewers' Bottle and Keg Workers, Local Union No. 340,* [1995] 2nd Quarter Sask. Labour Rep. 204, LRB File No. 029-95; *McMillan v. Saskatchewan Union of Nurses*, [1999] Sask. L.R.B.R. 33, LRB File No. 377-97; *K.H. v. Communications, Energy and Paperworkers Union, Local 1-S et al.,* [1998] Sask. L.R.B.R. 76, LRB File No. 015-97; *Johnson v. Amalgamated Transit Union, Local 588 et al.,* [1998] Sask. L.R.B.R. 98, LRB File No. 091-96.

Union Argument

[25] Ms. Zborosky, counsel for the Union, argued that there is no breach of s. 25.1 on the facts of this case because s. 25.1 applies to "employees" and imposes the requirement that the Union fairly represent such persons in grievance or rights arbitration proceedings under a collective agreement. According to the Union, Mr. Lien's dispute with the Union does not fall within this duty.

[26] The Union referred the Board to cases before the Ontario, British Columbia and Canada Labour Relations Board which hold that the duty of fair representation rules do not apply to union members who are awaiting dispatch from a hiring hall union.

[27] With respect to s. 36.1(3), the Union argued that Mr. Lien was not an "employee" when his membership application was considered and he is therefore not entitled to make a claim under s. 36.1(3). It would appear that the *Act* did not contemplate that s. 36.1(3) would apply to construction or hiring hall unions where individuals are selected for work by the union, not the employer.

[28] In the alternative, the Union argued that s. 36.1(3) simply requires the Union to consider Mr. Lien's application for membership.

Analysis

[29] The Board agrees with the Union that the only issue arising on the facts of this case is whether Mr. Lien was denied membership in the Union contrary to s. 36.1(3) of the *Act.* The duty of fair representation, which is set out in s. 25.1 of the *Act,* refers to the representation of employees by unions with respect to disputes that arise under the terms of a collective agreement. It does not cover matters that arise under the constitution and bylaws of a union. This view is supported by the decisions referred to by Ms. Zborosky, namely *McNeilly v. International Association of Bridge, Structural and Ornamental Iron Workers, Local 97,* 82 CLLC 16, 195; *Roberts v. Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 48* (1974), 1 Canadian LRBR 201; and *Hynes v. International Longshoremen's Association, Local 269* (1988), 88 CLLC 16,056.

[30] With respect to s. 36.1(3), the wording of the provision indicates that it only applies to "employees." In most workplaces, the two terms – employees and members – are synonymous. Employees are hired by the employer and are required, on hiring, to join the union in accordance with the union security provision in the collective agreement. Once an employee is hired and has applied for membership in the union, the union must consider the request for membership: see *Stewart, supra.*

[31] In construction, however, employees are selected through the hiring hall rules of the union. Membership in the union is determined through the constitution and bylaws of the union and entitlement to work flows from such membership. Permit workers (non-members) are allowed in some circumstances.

[32] We do not think it is an undue stretch of the word "employee," as used in s. 36.1(3), to apply it to an individual who has been permitted to work by a construction union through its hiring hall system. Permit employees are not strangers to the union; they have established their basic qualifications to perform the work in question; and the union has some means of assessing whether the person would be a suitable member. It would seem to the Board that s. 36.1(3) should apply to construction unions to require them to fairly consider an application from an individual who has been permitted by the union to work on union jobs.

[33] In determining if the Union unreasonably denied Mr. Lien's membership application, we must take into account the normal practices of the Union in admitting new persons into membership and the manner in which the Union considered Mr. Lien's membership application.

[34] It would appear that, in most cases, Mr. Gergely, as business agent for the Union, was authorized to decide who should be accepted into membership in the Union. Once he assessed the various applicants for membership, he would put the names to a vote at a membership meeting. With the exception of one occasion, the membership of the Union accepted this practice.

[35] On the one occasion when this process was not followed, the views of the entire Union membership were sought through a secret ballot vote. Mr. Lien's membership application was first considered on this occasion. Initially, he was not chosen by the membership as one of two intermediate drivers to be added to the membership list.

[36] When one driver refused membership, Mr. Gergely decided to replace him with another driver who had a similar number of votes as Mr. Lien but who also possessed driver training certificates which could benefit the Union as a whole in terms of developing Union training programs. In our view, this is not an unreasonable factor to take into account. The Union has an on-going interest in ensuring that its members are properly trained to perform the work offered by the pipeline contractors.

[37] On the third go-round, Mr. Gergely chose drivers according to their qualifications and by reference to previous assistance they had provided to the Union. Again, the factors were not unreasonable. In each case, the membership of the Union voted on acceptance of the new members selected by Mr. Gergely.

[38] The Whitecourt incident was a factor in the Union's on-going view of Mr. Lien. As indicated in Mr. Gergely's testimony, however, a Union member who made the same mistake would be subject to severe repercussions and would likely be placed on the bottom of the board for a considerable period of time. The dispatch rules are strict for a reason. If members "jump the queue," the hiring hall system falls apart. It is in the interest of all members of the Union for the business agent to maintain tight control over the process of distributing work among the members to ensure fairness in accordance with the rules set by the membership. In our view, the Union is entitled to take into account such breaches of Union rules and procedures when considering applications for membership. The Board came to a similar conclusion in *Dombowsky v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local 318,* [1987] Feb. Sask. Labour Rep. 51, LRB File No. 149-86.

[39] In the Board's opinion, the Union did not fail to fairly consider Mr. Lien's application for membership. It followed the usual and normal procedures and it took into account legitimate factors in determining who would be selected for membership.

[40] Mr. Lien also complained that he was not permitted to speak to Union members at a membership meeting to explain his side of the Whitecourt incident. He suggested that the Union failed to ensure that the rules of natural justice were followed in relation to his request to be heard.

[41] In our view, s. 36.1(1) of the *Act* replaces the common law rules that require a union to apply the principles of natural justice when bringing internal discipline against a member of the union. Section 36.1(1) does not add new requirements for fair hearings in relation to applications for membership in a trade union. The question of denial of membership is specifically addressed in s. 36.1(3) and it sets out the test that a union must not unreasonably deny membership. No mention is made of the right to be heard in relation to the decision to grant or deny membership in the Union.

[42] In conclusion, the Board finds that the Union did not improperly deny Mr. Lien membership in the Union and the application is accordingly dismissed.

[43] The Board will not make any order for costs in relation to Mr. Lien's application as the circumstances do not justify the award of any costs to the applicant.

JANICE STANIEC, Applicant v. UNITED STEELWORKERS OF AMERICA, LOCAL 5917 and DOEPKER INDUSTRIES LTD., Respondents

LRB file No. 205-00; May 31, 2001
Vice-Chairperson, James Seibel; Members: Ron Asher and Donna Ottensen

For the Applicant: Janice Staniec, on her own behalf
For the Respondent: Neil McLeod, Q.C.

Duty of fair representation – Scope of duty – Applicant alleges breach of duty of fair representation where union members allegedly privy to more information about progress of bargaining than non-members – Board confirms that union owes duty of fair representation to all members of bargaining unit but adds that union has right to control flow and nature of details about negotiations – Board finds no violation of s. 25.1 of *The Trade Union Act*.

Unfair labour practice – Union – Interference – Applicant claims that union's refusal to permit non-members to participate in interim bargaining committee elections coercive and intimidating – Board concludes that union had right to decide to open meeting to members only – Fact that applicant had to choose whether to become member in order to participate in union decision making process is not coercion or intimidation within meaning of s. 11(2)(a) of *The Trade Union Act*.

Unfair labour practice – Union – Notice of union meeting – Length of notice set out in union bylaws is not measure of reasonable notice required by s. 36.1(2) of *The Trade Union Act*, although may be factor to take into account – Union's explanation for length and mode of notice sensible – Board concludes that notice reasonable under circumstances.

Union – Constitution – Union interprets constitutional documents as not requiring formal process to be followed for interim election – Application of requirements of natural justice and procedural fairness generally limited to matters of membership and internal discipline, not to every decision made by union pursuant to constitutional structure and procedures – Board dismisses application pursuant to s. 36.1 of *The Trade Union Act*.

***The Trade Union Act*, ss. 11(2)(a), 25.1 and 36.1.**

REASONS FOR DECISION

Background

[1] **James Seibel, Vice-Chairperson:** United Steelworkers of America, Local 5917 (the "Union") is designated as the bargaining agent for a unit of employees of Doepker Industries Ltd., at its manufacturing facility at Annaheim, Saskatchewan, by an Order of the Board dated April 11, 2000 (LRB File No. 016-00). Janice Staniec is an employee of Doepker Industries Ltd. and a member of the bargaining unit, and an erstwhile member of the Union. She applied to the Board for an order declaring that the Union has violated s. 36.1(2) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the *"Act"*), and its constitution and bylaws, in respect of a meeting of the Union membership held on January 22, 2000, approximately one week after the Union filed the application for certification, but before the application was heard by the Board.

[2] Ms. Staniec takes issue with the conduct of the meeting on two main grounds: the short advance notice of the meeting that was provided to Union members and the oral mode of notice, and the process of nomination and election of the local president and a bargaining committee at the meeting. With respect to the second ground, while the application alleges a violation by the Union of its bylaws, it is apparent Ms. Staniec also intended her application to encompass an allegation of violation of s. 36.1(1) of the *Act*. Section 36.1 provides as follows:

> *36.1(1) Every employee has a right to the application of the principles of natural justice in respect of all disputes between the employee and the trade union certified to represent his bargaining unit relating to matters in the constitution of the trade union and the employee's membership therein or discipline thereunder.*
>
> *(2) Every employee shall be given reasonable notice of union meetings at which he is entitled to attend.*
>
> *(3) No employee shall unreasonably be denied membership in a trade union.*

[3] In its reply to this portion of the application, the Union asserts that the meeting was required to comply with the reasonable notice requirement of s. 36.1(2) of the *Act*, but says that, in any event, it was in compliance with the provision. It also responds that the election conducted at the meeting was not for "president" but rather for an "interim unit chairperson" and that its bylaws as referred to by the Applicant do not apply to such election or to that of the bargaining committee. The Union further asserts that s. 36.1(1) of the *Act* has no application to those matters. Moreover, the Union disputed Ms. Staniec's standing to bring an application regarding the alleged violations of s. 36.1 regarding these matters as she requested to withdraw her membership in the Union the day following the meeting and prior to filing her application.

[4] The application by Ms. Staniec also alleges that the Union violated s. 11(2)(a) of the *Act* on two grounds: in allegedly using coercion at the January 22, 2000 meeting to increase membership in the Union, and in allegedly failing to provide the members of the bargaining unit with information to which she claims they are entitled in order to make a decision whether to join the Union. The first ground is in reference to the Union's restriction that only members were allowed to attend the meeting. Section 11(2)(a) 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;*

[5] In its reply to this portion of application, the Union agrees that only members of the Union were entitled to attend the January 22, 2000 meeting, but that anyone who wanted to attend that was not yet a member was allowed to take out membership at the door prior to the meeting. The Union's reply denies the allegation that anyone was coerced to become a member, and refers to the Board's decision on the certification application ([2000] Sask. L.R.B.R. 258, LRB File No. 016-00) where the Board found that allegations by Ms. Staniec, as an intervenor in that application, of coercion or intimidation by the Union in its organizing drive were without foundation. The Union further responds that it provided appropriate information to interested and sincere employees during the organizing drive.

[6] Ms. Staniec also alleges that the failure by the Union to provide the exact wording of contract language "signed off" during bargaining constitutes a violation of the duty of fair representation contained in s. 25.1 of the *Act*. The Union counters that Ms. Staniec did not make any request for such information. 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.*

Preliminary Issue

[7] At the commencement of the hearing before the Board, Ms. Staniec raised an issue that she had requested the production of certain documents and information from the Union prior to the hearing, but that not all of it was provided. The Board reviewed the list of requested items with the parties and then recessed while the Union obtained certain additional information and provided it to Ms. Staniec. Upon reconvening, Ms. Staniec confirmed that she was satisfied with the additional information that was disclosed to her by the Union during the recess.

Evidence

[8] Ms. Staniec is employed by Doepker Industries Ltd. (the "Employer") as a welder. She testified that she became a Union member prior to the January 22, 2000 meeting of the Union

membership – her card requesting membership is dated January 21, 2000 – but requested to withdraw from membership the day following the meeting; the Union acceded to her request on January 25, 2000. Although she attended the meeting, Ms. Staniec objected to the fact that she had received a verbal notice of the meeting only the afternoon before, and opined that this was not "reasonable notice" and constituted a violation of s. 36.1(2) of the *Act*. Ms. Staniec also took issue with the fact that business conducted at the meeting included the nomination and election of a local union president (as she thought it was) and members of the Union's bargaining committee. In cross-examination, Ms. Staniec admitted that when she was advised of the meeting she understood that the elections would take place and that the bargaining committee elected would bargain with the Employer in the event the Union was certified.

[9] As the basis for her objections, Ms. Staniec referred to a "bargaining survey" document distributed at the meeting and to the Union's bylaws. In particular, she pointed out that the bargaining survey, which asked members to prioritize issues for bargaining, made passing reference to the bargaining committee being elected after certification. Ms. Staniec said that at the meeting she asked why the election was being held before certification. She was told by the meeting chairperson to put her objection in the form of a motion, which she did, but it was not seconded. Ms. Staniec also referred to article 4 of the Union's bylaws and to the Union's "Local Union Elections Manual": both documents provide for the election of "local union officers" on certain notice to the members, and notice of a prior nomination meeting. Ms. Staniec asserted that the notice provisions of both documents were not complied with. Nonetheless, she took part in the election proceedings.

[10] Ms. Staniec also expressed her displeasure that the election ballot count was not disclosed to the members at the meeting, and that instead of the secret ballot specified in the bylaws it was a "write-in ballot" by which, she said, a voter might be identified by their handwriting. However, she acknowledged she had no reason to believe that anything wrong was done.

[11] In describing what she called "coercion" with respect to the January 22, 2000 meeting, Ms. Staniec referred to feeling personal pressure to attend the meeting because a large number of her co-workers were going to attend and she did not want decisions concerning her terms and conditions of work to be made in her absence. She called it "undue, unnecessary or excessive pressure to have the meeting held" to conduct the business described above on January 22, 2000 rather than after

certification. She said that in the circumstances she felt "forced" to apply for Union membership so that she could attend the meeting and vote. In cross-examination, Ms. Staniec admitted that she did not know of anyone else who took issue with the length of notice that had been provided.

[12] Ms. Staniec testified that in her opinion there was confusion about whether the Employer's workers were organized into a "local union" or an "amalgamated union," and that that status would affect the disposition of union dues once the employees began to pay them; Ms. Staniec expressed concern that if it is an amalgamated union the dues are not held locally, because there is no treasurer's office, and they would go to the Union in Regina.

[13] In her evidence, Ms. Staniec also took issue with two other points. Firstly, she said that, as a result of information provided at a Union organizational meeting held on January 11, 2000, she believed that all employees would have the right to participate in a ratification vote on a collective agreement; however, she later ascertained that only members of the Union would have the right to participate in the vote. Secondly, at a meeting of employees at the Annaheim community hall on January 14, 2000, she said that a Union representative admitted that Union organizers had deliberately avoided approaching certain employees.

[14] In cross-examination, Ms. Staniec admitted that she had voluntarily withdrawn her membership shortly after the January 22, 2000 meeting, but said she felt it was coercive that Union members might be privy to more information than non-members regarding the progress of bargaining, despite the fact that notices concerning same were issued jointly by the Employer and the Union, and she had never asked for additional information from the Union.

[15] Barry Herman is employed as a welder by the Employer and has been the Union's interim unit chairperson since he was elected to the position at the January 22, 2000 meeting. He testified under subpoena by Ms. Staniec. He explained that the Union is an amalgamated union comprising bargaining units at least at Doepker Industries, Brandt Industries and Degelman Industries. He identified the president of the Union as one Joe Nestor of Regina. He agreed with Ms. Staniec that union dues from the amalgamated units are administered by the local union. Mr. Herman said that in common usage by the Union the term "unit chairperson" is interchangeable with that of "unit president," being the senior official of a bargaining unit in an amalgamated local union. It was

pointed out that a footnote to article 1(b) of the Union's "Bylaws for Local Unions – Part II Supplementary Provisions Governing Amalgamated Local Unions" (the "Bylaws") provides that "Amalgamated Local Unions may choose to refer to the 'Unit Chair Person' as 'Unit President'". He said his position is interim until regular elections are held after the first collective agreement is achieved.

[16] On examination by Ms. Staniec, Mr. Herman acknowledged that the Bylaws and the Union's "Local Union Elections Manual" provide for nominations of officers a week before elections are held and for election by secret ballot; however, he said that the bylaw nomination and election procedure is not applicable to the election of interim officers prior to a first agreement, but to regular elections. Mr. Herman further acknowledged that while the joint notices regarding bargaining refer to the progress made or clauses "signed off" regarding certain issues the members of the bargaining unit were not generally privy to the specific text of the articles.

[17] In cross-examination by Mr. McLeod, Mr. Herman acknowledged that the joint notices referred to himself as either Local 5917 "Annaheim Plant" or "Annaheim Branch" *union* president rather than *unit* president, but asserted that it was the same thing, and intimated that it was really a minor error in nomenclature occasioned by the lack of experience of the bargaining committee members including himself.

[18] Florian Renneberg, is an employee of the Employer and a member of the bargaining unit. He was called to testify by Ms. Staniec. He said that he found out about the January 22, 2000 meeting by word of mouth and, although he wanted to attend, he did not apply for membership. He said he understood that if he joined the Union and attended membership meetings he would be privy to more information than if he did not.

[19] Jeff Kallichuk is a member and former president of the Union's Local 5890. Presently on leave from his regular job at IPSCO in Regina, he is a Union staff representative for southern Saskatchewan and the Northwest Territories; he was a Union organizer at Doepker Industries. He testified on behalf of the Union.

[20] Mr. Kallichuk explained that the Union held a number of informational meetings prior to applying for certification of the bargaining unit at Annaheim which were generally open for attendance by all employees, but that the organizers were initially guarded about who they talked to because of some employees' vocal opposition to unionization. Once the application for certification was filed on January 14, 2000, he said, attendance at Union meetings was generally restricted to members, but that membership was open to all employees without restriction, and in its discretion the Union could hold a general meeting of all employees.

[21] Mr. Kallichuk said the January 22, 2000 meeting, the purposes of which were to advise that the certification application had been filed and to elect interim officers and the bargaining committee, was restricted to Union members. He said that prior to the meeting Union members were verbally advised of the time and date of the meeting and the business that would be transacted. Non-members, including Ms. Staniec were allowed to apply for membership prior to the meeting – even at the door – if they wished to attend and participate. However, Mr. Kallichuk confirmed that the Union's general policy is that in order to attend a members-only meeting, membership must be obtained at least one day prior to the meeting.

[22] Mr. Kallichuk agreed that the notices of nomination and election did not conform with the specific procedure in the Bylaws. He said the organizers' interpretation of the Bylaws was that they allowed for variation from the prescribed procedure where, as in the present case, the unit had not yet been certified and had no existing structure; the prescribed procedure, he said, applied to regular elections in an established bargaining unit. He said the election of interim unit officials and a bargaining committee was conducted quickly to consolidate employee unity and to bolster morale among the membership as the Employer was taking a tough-minded stance against certification. He said the function of the interim unit chairperson was to head up the bargaining committee and liase with the members pending conclusion of a first collective agreement and regular elections. He said that it was not unusual for the bargaining committee to be formed prior to certification because the members of the committee have to prepare to carry out their responsibilities by attending Union bargaining education courses.

[23] Mr. Kallichuk described the unit chairperson nomination and election procedure at the meeting. The floor was opened for nominations; the persons nominated all stood for election; their

names were written on a board; two tellers and a returning officer were elected; there were voting tables separated by screens; voters wrote their selection on a slip and deposited it in a box; the tellers and returning officer all counted the ballots; the winner was declared but the specific count was not revealed. The procedure for the election of the members of the bargaining committee was the same except that the day shift and night shift employees voted discreetly for their respective nominees.

[24] In her cross-examination of Mr. Kallichuk, Ms. Staniec took issue with the composition of the bargaining committee, suggesting that it was over-represented by welding personnel versus production personnel. Mr. Kallichuk explained that the four-person bargaining committee originally comprised two welding and two production personnel, however, because of the withdrawal of two of the members from the committee, they were replaced by two more welding personnel.

[25] Mr. Kallichuk confirmed that the Employer's Annaheim bargaining unit was part of an amalgamated union – several units included under a single charter. He said that the bargaining unit at Annaheim was not large enough to be a stand-alone local, but did not rule out the possibility for the future. He said the dues structure for an amalgamated union was explained in the new members kit provided by the Union. He explained that an amalgamated union derives certain benefits and revenues from the international union such as education, meeting and delegate expenses. He said that no dues were yet being paid by the members at Annaheim; the costs for bargaining the first agreement with the Employer and the wages of the bargaining committee members were being covered by the international union, and certain other expenses were being paid by the Union.

[26] Under cross-examination by Ms. Staniec, Mr. Kallichuk confirmed that the organizational meetings held prior to filing the application for certification, and membership in the Union, were open to all employees, but that organizers were selective about who they directly invited to the meetings, deeming it prudent to be discreet in organizing until an application for certification could be filed. He said that notice of meetings prior to certification is commonly verbal because the Union does not have access to posting boards in the workplace.

Argument

[27] Ms. Staniec argued that because the Union's Bylaws specify at least seven days notice of meetings for the nomination and election of officers, anything less should not be considered as

reasonable notice within the meaning of s. 36.1(2) of the *Act*. She admitted that she had been unable to put forward any other employee to join with her in her complaint in this regard, but suggested they were reluctant because they feared reprisal by the Union – she did not articulate either why she had such a fear or what form a reprisal might take.

[28] Ms. Staniec allowed that to her knowledge no one had been denied membership in the Union, and did not take issue with the fact that certain Union meetings are restricted to members only; however, she asserted that the January 22, 2000 meeting ought to have been open to all employees in order that they could have input into the decision about who would represent them in negotiations with the Employer. Ms Staniec took issue with the election of the bargaining committee at that time because the bargaining survey document alluded to its election after certification. She opined that the election results at the meeting were manipulated, but was unable to say how or in what way. Ms Staniec asserted that the Union ought not to be allowed to deviate from the black letter prescriptions contained in its Bylaws and elections procedure manual, and that such deviation as occurred in the present case was a denial of natural justice in violation of s. 36.1(1) of the *Act*.

[29] In support of her argument, Ms. Staniec referred to *Andersen v. International Longshoremen's and Warehousemen's Union, Local 514* (1996), 96 CLLC 141,383, a case of expulsion from union membership for failure to pay dues and a refusal to reinstate upon payment of arrears, in which the British Columbia Supreme Court held that where a union's constitution does not specifically exclude the rules of natural justice on matters of fundamental significance to members, such as suspension or expulsion from membership, the rules will be implied into the constitution.

[30] Ms Staniec also referred to the Board's decision in *Stewart v. Saskatchewan Brewers' Bottle and Keg Workers, Local 340* (1995), 95 CLLC 143,621 in which the Board held that the Union had violated natural justice and the duty of fair representation when it denied membership to so-called "temporary" employees, some of whom had been employed continuously for years but whose hours of work fluctuated seasonally. In that case, the Board stated that it is sufficient to constitute an unfair labour practice if it can be shown that conduct of the union has the effect of restricting access by employees to the rights they are meant to enjoy under the *Act*. Ms. Staniec argued that while there was no evidence that any employee had been denied membership and the right to attend a members-

only meeting, she argued that the Union's policy, requiring membership at least one day prior to a meeting, even though it was not applied in this case, was unduly restrictive and violated the rules of natural justice as explained in *Stewart*, *supra,* and s. 36.1(1) of the *Act*.

[31] Ms. Staniec argued that the feeling of pressure to attend the January 22, 2000 meeting that was engendered in her and because it was required that she be a member before she could attend, was coercive conduct by the Union to increase its membership. Ms. Staniec also took issue with the fact that only Union members may be allowed to vote on ratification of a tentative collective agreement, maintaining that during the organizing campaign she was led to believe that all employees would have the right to vote. She described these actions as coercive and a violation of s. 11(2)(a) of the *Act*.

[32] Ms. Staniec also complained that non-members should be entitled to receive all of the same information as members, and that a failure to provide all employees with the exact wording of articles signed-off by the parties to collective bargaining was a violation of the duty of fair representation in s. 25.1 of the *Act*. In support of this portion of her argument, Ms. Staniec referred to the decision of the British Columbia Labour Relations Board in *Bigfoot Industries Inc. v. United Steelworkers of America, Local Union 8637*, [2000] BCLRB No. 279/2000, which describes many of the principles that also have been enunciated by this Board in relation to the notion of coercion as referred to in the *Act*, for example, that a complaining party does not have to show that anyone was actually intimidated and it is sufficient if the impugned conduct was reasonably likely to have that effect, and that the test is an objective one.

[33] Ms. Staniec also referred to the Board's decisions in *Saranchuk v. Capital Pontiac Buick Cadillac GMC Ltd. and United Steelworkers of America*, [1998] Sask. L.R.B.R. 286, LRB File No. 250-97; *Dreher v. Watergroup Canada Ltd. and Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, [1993] CLLC 16,021; *Banga v. Saskatchewan Government Employees Union*, [1993] 4th Quarter Sask. Labour Rep. 88, LRB File No. 173-93; and, *Radke v. Canadian Paperworkers Union, Local 1120*, [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92, which we have reviewed.

[34] Mr. McLeod, counsel for the Union, maintained that the notice of the January 22, 2000 meeting was reasonable, but that Ms. Staniec had no right to complain in any event. This view is based upon the fact that the meeting was legitimately for Union members only and Ms. Staniec did not apply for and acquire membership until the day before the meeting; in the circumstances, the argument goes, lack of seven days notice of the meeting was irrelevant to her. Mr. McLeod pointed out that there was no evidence that any other employee had a complaint in this regard.

[35] With respect to the elections held at the meeting, Mr. McLeod asserted that because the bargaining unit was not yet organized, there was no intention that the elections be carried out in strict compliance with the Bylaws or the Union's elections manual which apply to organized and certified bargaining units. While he admitted that the more common procedure is to conduct such elections after certification, it is not a legal requirement. He referred to the explanation given by Mr. Kallichuk that the Union was eager to consolidate employee support and get the bargaining committee members trained for anticipated collective bargaining. In any event, he said, citing the Board's decision in *McMillan v. Saskatchewan Union of Nurses*, [1999] Sask. L.R.B.R. 33, LRB File Nos. 377-98 & 378-98, in support, the Board should be reluctant to peer too closely into the Union's internal processes.

[36] With respect to Ms. Staniec's allegations of coercion and violation of s. 11(2)(a) and s. 25.1 of the *Act*, Mr. McLeod argued that while Ms. Staniec might have felt some compulsion to take out Union membership in order to attend a members-only meeting, such meetings are legitimate and there was no evidence of any conduct by the Union other than to call a meeting. He pointed out that there was no evidence of denial of membership to anyone who applied, and said that the cases cited by Ms. Staniec in support of her argument all deal with denial of, or expulsion from, membership or discipline by the Union. Counsel asserted that there is no legal requirement to keep non-members as informed as members about the details of negotiations, and that, in a any event, Ms. Staniec had not asked for any additional information beyond the joint notices issued by the Union and the Employer. Differential treatment regarding such matters, he argued, is not an unfair labour practice under the *Act* – the bargaining committee commonly reports to the members with such details as it considers appropriate.

[37] Mr. McLeod opined that Ms. Staniec's perception of differential treatment by the Union of members and non-members might be rooted in the difficult history of the certification of the workplace and subsequent problems in initiating negotiations, which involved heightened emotions and allegations of several unfair labour practices. He asserted that her complaint regarding who would participate in a ratification vote was premature.

[38] In support of his arguments, counsel referred to the following decisions which we have reviewed: *Beutel v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union,* [1987] Oct. Sask. Labour Rep. 42, LRB File No. 106-87; *Fisher v. Amalgamated Transit Union and City of Saskatoon*, [1999] Sask. L.R.B.R. 86, LRB File No. 203-98; *Popoff v. Esco Limited and Canadian Association of Industrial, Mechanical and Allied Workers, Local 1*, [1977] BCLRB No. 55/77.

Analysis and Decision

[39] The first issues raised by the application are those concerning alleged violations of s.36.1 of the *Act* in relation to the meeting of January 22, 2000: the notice of the meeting and the conduct of the elections.

[40] We must determine whether on the particular facts of this case the notice of the meeting was reasonable within the meaning of s. 36.1(2). While this is ostensibly an objective determination, it is highly fact sensitive: notice that is not reasonable is not necessarily synonymous with short notice. In the present case, the length of notice for a meeting at which a bargaining committee or unit chairperson will be elected as set out in the Union's Bylaws (if they apply) is not the measure of reasonable notice required by s. 36.1(2) of the *Act*, although it may be a factor to take into account. Ms. Staniec did not assert that any employee, including herself, who wished to attend the meeting was unable to do so because of the length of notice, or suffered some prejudice or undue hardship associated with attending on short notice. The explanation offered by the Union for the length of notice as well as its oral mode was sensible. The meeting was deemed to be important to quickly consolidate support for the Union among the membership. Only members were entitled to attend and only members were entitled to notice. This did not include all of the employees and it did not include Ms. Staniec until she acquired membership the day before the meeting. The Union did not

have access to post notices of the meeting at the workplace. Union representatives spent about a week individually advising employees of the meeting and promoting advertisement by word of mouth. In the circumstances, we conclude that notice to the membership in general was reasonable, and that notice to Ms. Staniec was not required until she acquired membership. In actual fact, she had notice of the meeting before she was entitled to attend; she had notice at the instant she was entitled to same.

[41] Ms. Staniec further alleges that the conduct of the elections at the January 22, 2000 meeting was a denial of natural justice within the meaning of s. 36.1(1) of the *Act*.

[42] In *McMillan, supra*, it was alleged that the union had violated s. 36.1(1) in entering into a letter of understanding with the employer, which effectively amended the collective agreement, without referring the matter to the membership for a vote, a procedure which, the applicant asserted, was required by the union's constitution and bylaws. Pointing out that *Act* does not require a union to seek membership ratification before entering into a collective agreement or letter of understanding, the Board concluded, at 40-41:

> *In the circumstances of the present case, the requirement to hold a ratification vote is founded entirely on an interpretation of the constitution and bylaws of SUN. Mr. McMillan concluded that the constitution and bylaws require SUN to conduct a ratification vote on the letter of understanding, while the elected officers of SUN disagree with this interpretation. In our view, the proper interpretation of the constitution and bylaws of a union rests with the union itself, and not with the Board under s. 36.1(1) of the Act.*
>
> *The Board's role under s. 36.1(1) of the Act is to ensure that employees are granted the right to participate in the union in a manner that accords with the principles of natural justice. Mr. McMillan has been permitted to raise the issue internally within his union; he has received information from staff representatives and elected officials outlining the reasons for their decision and their interpretation of the constitution and bylaws; there have been no efforts to prevent Mr. McMillan from participating in other democratic avenues that may be open to him to challenge the decision, such as*

> *attendance at local union meetings and annual union meetings. Under s. 36.1(1) of the Act, the Board will supervise the employee's rights to access such internal procedures, but, as outlined in the Alcorn and Detwiller case, supra, and the Stewart case, supra, we do not sit on appeal of every decision made by a trade union under its constitution. The extent of the Board's supervisory power is limited to matters of natural justice and do not extend to determining the actual interpretation to be placed on the constitution and bylaws of a union. Whether or not the Union was required by its constitution and bylaws to hold a ratification vote in these circumstances is a matter that is left entirely to the internal workings of the union.*

[43] In the present case, Ms. Staniec asserts that an array of internal union documents, including its Bylaws, elections procedure manual, a pre-bargaining survey document and other Union literature, demonstrate that the elections of the interim unit chairperson and bargaining committee at the meeting of January 22, 2000, were improperly conducted. The Union's interpretation of its Bylaws and elections procedure manual is that the rules mandated therein do not apply to interim elections conducted prior to certification of a bargaining unit and conclusion of a first collective agreement. Its position is that the Union may determine its own process for election of interim executives and other officials, a procedure that may be adapted to the local conditions that pertain during the period following organizing and application for certification, and when there may be residual turmoil in the workplace.

[44] In our opinion, the Union's right to interpret its constitutional documents with regard to the matters complained of by Ms. Staniec must prevail. Whether the requirements of natural justice apply, and the particular content of procedural fairness, is dependent upon the nature of the dispute and the rights alleged to have been violated. The case law concerning s. 36.1(1) of the *Act*, and analogous provisions in other jurisdictions, indicates that a union's duty to apply the principles of natural justice in respect of disputes between employees and the union has generally been restricted to matters of membership and internal discipline. The provision is not intended to constitute the Board as a body for the routine review of every decision no matter how picayune made by a union pursuant to its constitutional structure and procedures. The Board's policy in this regard was described in *Stewart, supra*, at 213 as follows:

> *Employees and trade union members have traditionally been able to pursue some of these questions in the common law courts, although this is not a feasible avenue for many individual employees. The significance of s. 36.1, in our view, is that it gives employees recourse to the Board to express concerns about their status or treatment within the trade union which represents them. As we have indicated in the decisions quoted earlier, the Board has no intention of becoming a body of appeal or of routine review of every decision made pursuant to a trade union constitution or internal procedural rules. Where an allegation is made, however, that a violation of The Trade Union Act has occurred, the Board must be prepared to scrutinize the internal workings of the trade union to the extent necessary to determine whether the Act has been breached.*

[45] In all the circumstances of this case, even if we were to conclude that the Union had breached its Bylaws and election procedures as alleged, in our opinion the violations would not constitute a denial of natural justice. Furthermore, Ms. Staniec apparently has not availed herself of other avenues to challenge the local Union's actions, such as an internal appeal procedure, perhaps because she elected to withdraw from membership and cease to participate in the activities of the Union. The application is dismissed with respect to the allegation of a breach of s. 36.1(1) of the *Act*.

[46] Ms. Staniec further alleges that the Union has violated s. 11(2)(a) of the *Act*. She says she felt coerced to join the Union in order to be able to attend a meeting open only to Union members at which the bargaining committee and interim executive would be elected, and because Union members may be privy to information regarding collective bargaining that is not published to non-members. The latter point dovetails with her allegation that the Union has violated its duty of fair representation under s. 25.1 of the *Act* with respect to a failure to provide employees with detailed contract language "signed off" by the Employer and the Union and because non-members may not be entitled to participate in a vote to ratify a collective agreement.

[47] Section 11(2)(a) of the *Act* is, in part, intended to prohibit and remedy the exercise by a trade union of intimidation or coercion with a view to encouraging membership in the union; it is not intended to prohibit activities to encourage membership that do not possess repugnant qualities described in the section. The *Act* does not require that union meetings in general be open to all

employees in a bargaining unit. The January 22, 2000 meeting was for the purposes of conducting internal union business including election of officers and a bargaining committee. The Union decided, not unreasonably, to open the meeting only to members of the Union: this it had a right to do. The Union may elect to restrict participation in the transaction of internal business to its members and supporters. The fact that one had to become a member in order to attend such a meeting does not violate s. 11(2)(a). That Ms. Staniec had to choose whether to become a member in order to participate in the Union's decision-making process is not "coercion" or "intimidation" within the meaning of the *Act*.

[48] The fact that Union members may receive information regarding the course of negotiations at members-only meetings, and to which non-members are not privy, likewise does not constitute coercion to join the Union nor is it a violation of the duty of fair representation. Ms. Staniec did not adduce any evidence that Union members were in receipt of further or better information regarding the course of negotiations than were non-members. She admitted that she had not requested any information beyond that contained in the joint releases issued by the Employer and the Union.

[49] In *Banga, supra*, at 98, the Board described its interpretation of the scope of the duty of fair representation as it relates to collective bargaining and collective agreement administration:

> *The concept of the duty of fair representation was originally formulated in the context of admission to union membership. In the jurisprudence of the courts and labour relations boards which have considered this issue, however, it has been applied as well to both the negotiation and the administration of collective agreements. Section 25.1 of The Trade Union Act, indeed, refers specifically to the context of arbitration proceedings. This board has not interpreted the section in a way which limits the duty to that instance, but has taken the view that the duty at "common law" was more extensive, and that Section 25.1 does not have the effect of eliminating the duty of fair representation in the context of union membership, collective bargaining, or the grievance procedure.*
>
> *It is clear from the jurisprudence which has accumulated concerning the duty of fair representation that it is not the task of a labour relations board to second guess a*

> *trade union in the performance of its responsibilities, or to view the dealing of that union with a single employee without considering a context in which numerous other employees and the union itself may have distinct or competing interests at stake.*

[50] There is no doubt that a bargaining agent owes the same duty of representation to all members of the bargaining unit whether or not they are members of the union. This duty extends to collective agreement negotiation and administration. For example, the bargaining agent cannot negotiate better terms and conditions of work for union members than for non-members.

[51] At the time of hearing this application, the Employer and the Union had not yet achieved a first collective agreement. Whether the Union will seek to have a tentative agreement ratified is not certain; and we are not about to speculate as to what the Union's constitution or internal procedures mandate with respect to the issue. In any event, Ms. Staniec's complaint in this regard, if not misguided, is certainly premature. We wish to point out, however, that there is no statutory requirement for ratification of a tentative collective agreement (other than a vote on an employer's final offer where a strike has continued for 30 days pursuant to s. 45 of the *Act*) and there is no statutory impediment that having determined to have the agreement ratified a union cannot restrict who may participate in the ratification vote. As the Board observed in *Beutel, supra*, at 45:

> *The Board therefore concludes that at common law the union's constitution determines whether ratification votes are necessary and, if they are, whether voter eligibility extends to all employees to be covered by the terms and conditions of the proposed collective bargaining agreement. The Trade Union Act does not alter the common law to the same extent as labour legislation in some other provinces; it mandates a ratification vote and authorizes employees who are not union members to vote only in the particular circumstances described in Section 45, which do not apply in this case.*

[52] With respect to information provided to employees during negotiations, we have observed that collective bargaining is not usually a smooth and easy process. It involves much planning and strategy. It is an intense exercise in compromise and concession: gains achieved in one area may involve losses in another. One party or the other may at one time or another possess economic power

which it may threaten to use or actually use. Particularly in the context of negotiations for a first collective agreement, the union is in a sensitive and oftentimes precarious position: it must convince the employer to reach an agreement on the best terms it can achieve for all of the employees, while at the same time maintaining the confidence and solidarity of its supporters, attempting to mollify or even marginalize its detractors, and trying to achieve a first agreement before the opportunity to attempt to decertify arises. The newly organized employer may be smarting from the success of the union's campaign; it may have lingering difficulty with recognition of the union; it may secretly (or not so secretly) hope for destabilizing forces to be exerted on the newly certified union. Both parties often engage in a certain amount of "spin-doctoring" with respect to the progress of negotiations. All this is to say that the union, as the employees' exclusive bargaining agent, has the right to control the flow and nature of the details of negotiations. It is, however, a privilege with no small measure of risk: if it fails to meet employees' demands for information, it may unwittingly contribute to employees' disappointment and frustration with the process; if it releases too many details regarding isolated provisions as they are negotiated and signed off, employees who are unable to see the negotiations as a whole may misinterpret what the union is doing. It is not unusual and indeed it is often prudent that the union may choose to share more sensitive details with the persons who provide it with continuing support, than those who do not; it may seek direction from its membership and decline to seek direction from those who do not actively support its objectives.

[53] In order to achieve the objectives of collective bargaining the union must have the ability to act and change direction quickly and skillfully and with the best interests in mind of the bargaining unit as a whole. The Ontario Board described the freedom that the bargaining agent must have at this stage in *Zorzi v. Diamond "Z" Association*, [1975] OLRB Rep. 791, at 795-96:

> *There is no dispute that the duty of fair representation owed to employees in a bargaining unit is just as relevant during the negotiation of a collective agreement as during its term of operation once concluded. It is also without dispute that the pivotal period anticipated in the collective bargaining process is the conclusion by the parties of a collective agreement. The supervisory jurisdiction of the Board as expressed in the Act in connection with the conduct of both union and employer during negotiations is restricted to the requirement that the parties "shall bargain in good faith and make every reasonable effort to make a collective agreement". Save*

for this mandatory requirement the Board in applying a standard owing employees in the bargaining unit during the negotiating process is conscious that it must not interfere with the wide discretion conferred the employees "exclusive bargaining agent" to reach a settlement. The Board is cognizant, especially during the negotiation of a first agreement, that the period preceding the making of a collective agreement is often when employees' hopes for improved terms and conditions of employment are at their height. Indeed the trade union may have induced these expectations by representations made during the course of an organizational campaign or at the twilight of an agreement about to expire. The realities of the negotiating process however may often result in some measure of employee disappointment with respect to the ultimate settlement. The synthesis contemplated in the bargaining process where the initial positions of the parties are subjected "to the give and take" of compromise and concession is bound to cause some measure of alteration in those positions. In this context the trade union representative must be at his most adroit. He must convince the rank and file that the sacrifice of long term benefits for immediate gains is desirable having regard to the particular circumstances. The employees must be convinced that the benefits not included in a settlement are merely deferred benefits until the onset of the next bargaining session. In the same context the employer's strategy of containing the more excessive demands of the trade union may have resulted in the avoidance of a work stoppage by virtue of acceding to the minimal requirements that constitute in the circumstances a fair settlement. Achieving this mutual accommodation requires the unfettered discretion of the representatives of the parties to explore all avenues of accommodation without the intervention of this Board in setting standards of conduct that may be characterized as an unwarranted intrusion in their private affairs. We are of the view that the representative trade union despite its obligation to employees in complying with the duty of fair representation must necessarily have a "free hand" in setting strategies that will best forward employees' interests irrespective of their expectations.

[54] It seems that Ms. Staniec seeks to influence the direction and activities of the Union without accepting the responsibilities that pertain to membership. If she is able to do this, there is nothing wrong with it; however, she cannot attempt to exert such influence under the guise that the Union is failing to fairly represent her, or the group of employees that are not members of the Union, in collective bargaining. None of the complaints advanced by Ms. Staniec constitute a violation of the Union's duty of fair representation pursuant to s. 25.1 of the *Act*.

[55] Having considered all of the evidence adduced, the arguments advanced and the authorities cited by each party, we have determined that the application must be dismissed.

SOUTH SASKATCHEWAN 911, Applicant v. INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 1318, Respondent

LRB File No. 249-00; May 31, 2001
Gwen Gray, Chairperson; Members: Ken Hutchinson and Patricia Gallagher

For the Applicant: Murray Walter, Q.C.
For the Respondent: Gerry Huget

Unfair labour practice – Union – Denial of union membership – Union advised employee that he would be denied membership and would therefore lose his employment – Latter assertion was made in error and error was acknowledged in subsequent written apology forwarded to employee and employer – Board concludes matter resolved by apology and declines to find violation of s. 11(2)(e) of *The Trade Union Act*.

***The Trade Union Act*, ss. 11(2)(e) and 36(3).**

REASONS FOR DECISION

Background

[1] **Gwen Gray, Chairperson:** South Saskatchewan 9-1-1 (the "Employer") filed an application in which it alleged that International Association of Fire Fighters, Local 1318 (the "Union") violated s. 36(3) of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the "*Act*") by taking steps to have an employee discharged for failure to acquire or maintain membership in the Union when the employee in question had complied with s. 36(3) of the *Act.* The Employer asserted that the Union's conduct also violated s. 11(2)(e) of the *Act.*

[2] In its reply, the Union acknowledged that it made a mistake when interpreting its bylaws and told the employee in question that he could lose his employment as a result of being a volunteer fire fighter. The Union asserted that it later apologized to the employee and the Employer for its mistake. The Union asked that the application be dismissed.

[3] A hearing was held in Regina, Saskatchewan on January 16, 2001.

Facts

[4] The Union is certified to represent employees of the Employer. On August 5, 2000, the Union wrote the manager of the Employer to inform him that the Union does not allow auxiliary fire fighters to hold membership in its organization. The Union advised the Employer that it would not grant membership to Jamie Affleck, who was employed as a communication technician with the Employer, so long as he also served as an auxiliary fire fighter with Swift Current Emergency Services. The last sentence of the letter stated:

> *As you know South Sask. 911 Comtechs are members of IAFF, so for as long as Mr. Affleck is an Auxiliary Fire Fighter with Swift Current Emergency Services he will be denied membership in Local 1318 and there by employment of an in-scope position with South Sask. 911.*

[5] On August 9, 2000, Allan Guest, Manager of the Employer, replied to the Union stating that, pursuant to s. 36(3) of the *Act,* Mr. Affleck is deemed to continue as a member of the Union so long as he tenders membership dues. The Employer indicated that it would continue to employ Mr. Affleck.

[6] On August 14, 2000, the Union wrote Mr. Affleck and advised him that "if you remain an auxiliary fire fighter while employed with South Sask. 911 you will be charged by the International Union and could face fines or have your union membership revoked resulting in a loss of employment with South Sask. 911."

[7] On October 18, 2000, the Union wrote the Employer and apologized for incorrectly interpreting the Union's constitution and bylaws in relation to requiring the Employer to terminate the employment of Mr. Affleck. The Union assured the Employer that it would not take any steps to cause the termination of Mr. Affleck's employment. A similar letter was also sent to Mr. Affleck. The letter clarified that the Union could not seek Mr. Affleck's termination as a result of his being an auxiliary fire fighter and clarified that Mr. Affleck could be charged under the Union's constitution and bylaws for this conduct, but that such charges and their outcome were not certain.

Relevant Statutory Provisions

[8] The relevant statutory provisions include s. 36(3) and s. 11(2)(e) of the *Act*:

> *36(3) Where membership in a trade union or labour organization is a condition of employment and:*
>
> > *(a) membership in the trade union is not available to an employee on the same terms and conditions generally applicable to other members; or*
> >
> > *(b) an employee is denied membership in the trade union or his membership is terminated for reasons other than the failure of the employee to tender the periodic dues, assessment and initiation fees uniformly required to be paid by all other members of the trade union as a condition of acquiring or maintaining membership;*
>
> *the employee, if he tenders payment of the periodic dues, assessments and initiation fees uniformly required as a condition of acquiring and maintaining membership:*
>
> > *(c) shall be deemed to maintain his membership in the trade union for purposes of this section; and*
> >
> > *(d) shall not lose his membership in the trade union for purposes of this section for failure to pay any dues, assessments and initiation fees that are not uniformly required of all members or that in their application discriminate against any member or members.*
> >
> > . . .

> *11(2) It shall be an unfair labour practice for any employee, trade union or any other person:*
>
> > *(e) to seek or take steps to have an employee discharged for failure to acquire or maintain membership in a trade union, where such membership is a condition of employment, if the employee complies with subsection 36(3);*

Analysis

[9] The facts of this application are not in dispute. We do not find that the Union violated s.11(2)(e) in its letter dated August 5, 2000 as it did not "seek or take steps to have an employee discharged for failure to acquire or maintain membership in the Union." The Union merely stated that if Mr. Affleck continued to be an auxiliary fire fighter he would be denied membership in the Union and consequently, his employment. This latter assertion was made by the President of the Union in error, as was acknowledged by the President in his later correspondence. No steps were taken by the Union to seek the termination of Mr. Affleck's employment.

[10] In our view, the matter was resolved by the Union's apology.

[11] For these reasons, the application is dismissed.

CANADIAN UNION OF PUBLIC EMPLOYEES, Applicant v. BOARD OF EDUCATION OF THE KAMSACK SCHOOL DIVISION NO. 35 OF SASKATCHEWAN, Respondent

LRB File Nos. 031-01, 032-01 & 033-01; June 1, 2001
Chairperson, Gwen Gray; Members: Mike Geravelis and Don Bell

For the Applicant: Aina Kagis
For the Respondent: LaVonne Black

Unfair labour practice – Burden of proof – Discharge – Union led sufficient evidence of union activity to shift onus of establishing good and sufficient reason for discharge to employer – Employer led evidence that it was not happy with employee's performance, it had taken steps to encourage better performance and it had ultimately decided to eliminate position and contract work out – Board finds no anti-union animus and no violation of s. 11(1)(e) of *The Trade Union Act*.

Certification – Amendment – Collective agreement – Application to amend filed before position eliminated – Positions added to bargaining unit through amendment application not automatically covered by terms of existing collective agreement – Board holds that employer required to bargain with union with respect to terms to be applied to newly included and subsequently eliminated position.

***The Trade Union Act*, ss. 11(1)(a) and 11(1)(e).**

REASONS FOR DECISION

Background

[1] **Gwen Gray, Chairperson:** The Canadian Union of Public Employees ("CUPE") applied to the Board in LRB File No. 298-00 for an order amalgamating its bargaining units with the Board of Education of the Kamsack School Division No. 35 (the "Employer") and to include the previously excluded position of maintenance worker/supervisor to the bargaining unit. Support evidence was filed with the application. The Board granted the Union's application for amendment on March 28, 2001.

[2] In the present application, the Union alleges that the Employer committed an unfair labour practice within the meaning of s. 11(1)(e) of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the "*Act*"),

by eliminating the position of maintenance worker/supervisor and terminating the employment of the incumbent, Mr. Mark Koeppe, effective February 28, 2001. The Union alleges that the position was eliminated in response to the Union's application to have Mr. Koeppe included in the bargaining unit. The Union sought reinstatement and monetary loss for Mr. Koeppe.

[3] The Employer denied that it terminated Mr. Koeppe's position for any reason other than budgetary reasons.

[4] A hearing was held in Regina on April 30, 2001.

Facts

[5] Mark Koeppe was employed as the maintenance supervisor/worker for four years prior to applying to the Union for membership and inclusion in the bargaining unit. The application to include Mr. Koeppe was filed with the Board on November 27, 2000. As Mr. Koeppe was the only employee affected by the application to add-on a new position to the bargaining unit, the Employer was aware that he had signed a card supporting the Union.

[6] On December 20, 2000, Mr. Koeppe was informally advised by Larry Wagner, Director of Education, that his position was up for review in the budgetary process and was being evaluated for its viability. Mr. Wagner told Mr. Koeppe that he was providing him with an early "heads up" because of the significant impact the decision could have on Mr. Koeppe. Mr. Wagner advised Mr. Koeppe that the decision would be finalized in March or April, 2001. Mr. Koeppe received a letter from the Chairman of the School Division on December 20, 2000 confirming Mr. Wagner's advice.

[7] Mr. Koeppe attended the Employer's board meeting on January 25, 2000 to attempt to convince the Employer that his position was essential to the smooth workings of the School Division. Mr. Koeppe explained that he was responsible for supervising the work of outside contractors. He gave examples of mistakes made by such contractors due to their lack of familiarity with the operation of the equipment in the school buildings. Mr. Koeppe also explained to the Employer that he performed preventative maintenance work in the school buildings which saved the Employer money by avoiding major mechanical problems.

[8] Unfortunately for Mr. Koeppe, the Employer passed a motion at its January 25, 2001 board meeting terminating the position of maintenance supervisor/worker effective February 28, 2001. Mr. Koeppe was notified of this decision by letter delivered to him on January 26, 2001.

[9] Mr. Koeppe was surprised by this turn of events. He noted that at the earlier Board hearing the Employer had argued that his position was integral to the management team and ought to be placed out of scope.

[10] Larry Wagner, Director of Education, testified on behalf of the Employer. Mr. Wagner was appointed to his position in January, 2000. Over the course of the year, Mr. Wagner received various complaints from the schools in the School Division related to Mr. Koeppe's work. The most common complaint was that the school principals could not contact Mr. Koeppe. Mr. Wagner met with Mr. Koeppe to discuss his job performance in April, 2000. Mr. Wagner also reviewed the job descriptions for caretakers and discovered that they were assigned many of the small repair tasks that Mr. Koeppe was actually performing. Mr. Wagner shared this information with the Employer in October, 2000.

[11] In June, 2000, Mr. Wagner met again with Mr. Koeppe to discuss and set out the summer maintenance schedule. At the end of the summer, Mr. Wagner was disappointed with the progress Mr. Koeppe had made with respect to completing the maintenance work agreed to in June. Subsequently, Mr. Wagner scheduled weekly meetings with Mr. Koeppe to attempt to keep him focused on the tasks assigned to him by the Employer and the school principals. Mr. Wagner noted that Mr. Koeppe seldom had a plan for the work he intended to accomplish over the course of a given week.

[12] Mr. Wagner reported on the matter to the Employer. The Employer was unhappy with the value it was receiving for the money paid to Mr. Koeppe and it set about to review his position in October, 2000. However, the Employer was aware that board elections were about to take place and it did not want to make a decision with respect to the position prior to the election of a new board. In the board meeting following the election, the item was raised again on the agenda.

[13] Around this time, CUPE applied to this Board for an amendment to its bargaining unit to consolidate its bargaining units and to include Mr. Koeppe in the consolidated bargaining unit. Mr.

Wagner received a copy of the application on December 5, 2000. Prior to this time, he was unaware that Mr. Koeppe had joined the Union.

[14] At the December 14, 2000 board meeting of the Employer, a motion was passed to investigate the viability of the position of maintenance supervisor as part of the 2001 budgetary process. Following this meeting, Mr. Wagner met with school principals and janitorial staff to discuss the issue and to determine if the schools could function without assistance from the maintenance supervisor/worker. According to Mr. Wagner, most caretakers agreed that they could perform the work in question with help from contractors, when needed. The caretakers were concerned in one school with the added time, the difficulty of obtaining materials and tools to perform the work. In one school, the caretaker did not feel competent to undertake some of the mechanical work. However, overall, Mr. Wagner concluded that the caretaking staff could perform most of the work with some additional outside help. He reported on his meetings to the Employer in January, 2001.

[15] Mr. Wagner testified that the Employer and schools are satisfied with the current arrangements. He confirmed that in his view, the Employer made the decision as a result of its conclusion that it was not receiving value for money spent in relation to Mr. Koeppe's position.

[16] Mr. Wagner acknowledged that if Mr. Koeppe had been laid off after his inclusion in the collective agreement, he would have been protected by the normal lay-off and recall provisions set out in the collective agreement, which would include the right to displace more junior employees. Mr. Wagner also acknowledged that he signed the Employer's reply to the application to amend on December 14, 2001 alleging that Mr. Koeppe's position was managerial in nature and ought not to be included in the bargaining unit. He denied, however, that the Employer's decision to investigate the viability of the position and the Union's application were related in any way.

[17] No discussions were held with the Union prior to Mr. Koeppe's lay-off.

[18] Vernon Seversen, chairperson of the Employer, testified as to the budgetary pressures on the Employer. School enrollments are declining in the School Division and costs need to be tightly controlled. Mr. Seversen indicated that he had received several complaints from his local school administration about Mr. Koeppe's work. He raised the complaints with Mr. Wagner and

encouraged Mr. Wagner to monitor the situation more closely. Mr. Seversen testified that the Employer did not feel it was getting value for the money paid to Mr. Koeppe and it concluded that his work could be better performed by the caretakers and outside contractors. Mr. Seversen denied that Mr. Koeppe's lay-off was motivated by his decision to join the Union.

Relevant Statutory Provisions

[19] The Union alleges that the Employer breached ss. 11(1)(a) and (e) which 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;*
> >
> > . . .
> >
> > *(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;*

Union Argument

[20] Ms. Kagis, for the Union, argued that the sequence of events in relation to the application to amend and the decision of the Employer to investigate the viability of Mr. Koeppe's position and its ultimate decision to lay off Mr. Koeppe, establishes sufficient Union activity to transfer the onus of establishing good and sufficient reason to the Employer. The Union asserted that the Employer accelerated the decision with respect to Mr. Koeppe's position to avoid having him included in the bargaining unit.

[21] The Union pointed out that the reasons relied on by the Employer for terminating the maintenance supervisor/worker position relate to Mr. Koeppe's performance, not to budgetary restraints. These reasons do not accord with the position taken by the Employer in the amendment application that the maintenance supervisor/worker position was managerial in nature and important in a management sense to the overall working of the School Division.

[22] The Union asked the Board to find that the Employer violated s. 11(1)(a) and (e) of the *Act* and sought an order reinstating Mr. Koeppe to his position.

Employer Argument

[23] Ms. Black, counsel for the Employer, pointed out that the Employer and Mr. Wagner had concerns with the manner in which Mr. Koeppe was performing his work prior to learning that Mr. Koeppe was seeking membership in the Union. Ms. Black suggested that the coincidence in timing had more to do with Mr. Koeppe feeling the heat than with any anti-union motivation of the Employer. The Employer was unhappy with the manner in which Mr. Koeppe performed his work

and took steps to evaluate the need for the position. The Employer had been certified for over 21 years and has a mature relationship with the Union. The dispute over the inclusion of Mr. Koeppe's position in the bargaining unit was not a motivating factor in the Employer's decision to eliminate the position.

Analysis

[24] The Board agrees with the Union that there is sufficient evidence of Union activity to shift the onus of establishing "good and sufficient reason" for Mr. Koeppe's termination to the Employer. In this instance, the Employer led evidence indicating that it was not happy with the performance of the employee in question and that it had taken steps prior to the lay-off to encourage better performance. In the end result, the Employer decided to eliminate the position and to have the work in question performed through the use of outside contractors and caretakers.

[25] In our view, the lay-off was motivated by the Employer's assessment of the quality of Mr. Koeppe's work and an assessment of whether the work in question could be performed more efficiently and effectively through other means. The discontinuance of the position was primarily a result of the Employer's dissatisfaction with the manner in which Mr. Koeppe was performing his work. This may not be a preferred method for dealing with performance issues, but it was the method adopted in this instance. We do not find that the Employer was motivated by anti-union animus and, in fact, we conclude on the facts that Mr. Koeppe's decision to join the Union was more likely motivated by the difficulties he was experiencing with the Employer and Mr. Wagner. In these circumstances, the Board does not find that the Employer violated s. 11(1)(a) or (e) of the *Act.*

[26] We would point out, however, that the Employer is under an obligation to bargain with the Union with respect to Mr. Koeppe's position including his status as a laid-off employee and his seniority entitlements. The application to amend was filed before Mr. Koeppe's position was made redundant and the Order adding the position to the bargaining unit has been issued. As determined by the courts 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, quashed at (1996) 151 Sask. R. 112 (Sask. Q.B.), aff'd (1998), 167 D.L.R. (4th) 410 (Sask. C.A.), leave to appeal denied, [1999] S.C.C.A. No. 18 (S.C.C.), positions which are added to a bargaining unit through an amendment application are not automatically covered by the terms of the

existing collective agreement and an employer is required to bargain with a union with respect to the terms that will be applied to the newly included positions. As a result of the amendment, the Employer is obligated to bargain collectively with the Union to determine the terms and conditions that will apply to the position of maintenance supervisor/worker and to determine their applicability to Mr. Koeppe in particular.

[27] The Board dismisses the Union's application for the reasons set out above.

BOB LAVALLEE, Applicant v. INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, LOCAL 555, Respondent

LRB File No. 001-01; June 4, 2001
Chairperson, Gwen Gray; Members: Pat Gallagher and Mike Carr

For the Applicant: Bob Lavallee
For the Respondent: Bob Pelton

Unfair labour practice – Union – Denial of union membership – In rejecting application for membership, union inappropriately took into account efforts by applicant to obtain assistance from Department of Labour representative in sorting out applicant's membership difficulties – Board concludes this approach to assessing membership qualifications unreasonable – Board orders union to reconsider application for membership without reference to inappropriate consideration.

***The Trade Union Act*, s. 36.1.**

REASONS FOR DECISION

Background

[1] **Gwen Gray, Chairperson:** Bob Lavallee brought an application against the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 555 (the "Union") alleging that the Union violated s. 36.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") by unreasonably denying him membership in the Union.

[2] The Union filed a detailed reply in response to the application acknowledging that Mr. Lavallee had been dispatched from the Union's hiring hall as a permit worker; that he had applied for membership; and that his membership applications had been rejected either because the applications were deficient or did not receive support from a majority of members of the Union. The Union claims that Mr. Lavallee is not entitled to rely on s. 36.1 of the *Act* because he was not an "employee" when he submitted his application form.

[3] A hearing was held in Regina on April 12, 2001.

Facts

[4] Mr. Lavallee worked on a permit basis with the Union in 1990-1991. He testified that he asked Dale Smith, Assistant Business Manager of the Union, how he could obtain membership in the Union. Mr. Smith advised Mr. Lavallee to obtain his journeyman ticket or his pressure welding ticket. He also explained that Mr. Lavallee would need to fill out an application form and submit it to the Union along with two evaluation forms from his foremen.

[5] Mr. Lavallee did obtain his journeyman ticket and he applied for membership late in 1998. He testified that he gave the material to a co-worker, Clarence Lipinski, a member of the Union, who took the material to a regular meeting of the Union membership in October, 1998. Mr. Lipinski gave the material to Mr. Smith who told Mr. Lipinski the matter could not be dealt with at that meeting because it was not submitted in time for the executive board to review the materials. Mr. Lipinski recalled that the application form was complete with two evaluations attached. He also recalled that the application was considered by the Union's membership meeting in December, 1998 and was defeated by a membership vote. He attributed the vote results to the membership objecting to Mr. Lavallee attempting to get the Department of Labour to assist him in having his membership application considered by the Union. Mr. Lipinski thought the information provided by Mr. Smith concerning Mr. Lavallee's contact with the Department of Labour "poisoned" the membership against Mr. Lavallee. Mr. Lipinski admitted that he was unclear on the timing of the meetings. He also acknowledged that some members questioned Mr. Lavallee's skill as a journeyman.

[6] According to Mr. Smith, the first application filed by Mr. Lavallee in October, 1998 had only one evaluation form attached, not two as required by the Union. As a result, the application was not considered by the Union. Mr. Smith recalled advising Mr. Lavallee that the application was sent in late and was defective.

[7] Mr. Smith testified that a second application was received from Mr. Lavallee in November, 1999. It was considered by the executive of the Union to ensure that the proper material was present and it was submitted by the executive to the Union membership at the next regular meeting. Mr. Smith has been unable to locate a copy of this application form. He recalled that there was

discussion at the Union meeting concerning Mr. Lavallee's skills. In the end result, the membership voted against offering membership to Mr. Lavallee.

[8] Mr. Smith testified that during 1999 Mr. Lavallee did not work on a permit with the Union. He started on permit in August, 1990 and worked a total of 6475.25 hours over the course of years from 1990 to June, 2000. Mr. Lavallee did not work any hours in 1994 or 1999.

[9] Mr. Smith did not harbour any hard feelings against Mr. Lavallee, as evidenced by his continued referral of Mr. Lavallee to pipeline work. He also acknowledged that the Union had been contacted by Terry Stevens, Executive Director of Labour Relations and Mediation Division, Saskatchewan Labour about Mr. Lavallee's application for membership, as had the international representative of the Union. Mr. Smith described the Union's membership procedures to Mr. Stevens. He also reported on the conversation to the membership at the meeting where Mr. Lavallee's application was considered. Mr. Smith, however, concluded that the membership rejected Mr. Lavallee's application based on their assessment of his skill, not on the basis that he contacted Mr. Stevens for assistance in obtaining his membership.

[10] The Union does not keep minutes of applications that are considered and rejected by the membership. The Union filed two completed evaluation forms that were date stamped "October 27, 1998 – 4:10 p.m." and "October 28, 1998 – noon." A pink sticky note attached to one document indicates that "Norm has application from meeting October 17, 1998 Regina." This reference indicates that the business manager of the Union had taken Mr. Lavallee's application to the Winnipeg office of the Union. It was unclear in the evidence if the evaluation forms were submitted along with the application form on October 17, 1998 or if they were submitted later.

[11] A third application form was submitted by Mr. Lavallee in June, 2000 but it was not accompanied by any evaluation forms and was not considered by the Union.

[12] Mr. Smith acknowledged that it is very unusual to have a membership application rejected by the membership of the Union.

Relevant Statutory Provision

[13] The application alleges a breach of s. 36.1 which provides as follows:

> *36.1(1) Every employee has a right to the application of the principles of natural justice in respect of all disputes between the employee and the trade union certified to represent his bargaining unit relating to matters in the constitution of the trade union and the employee's membership therein or discipline thereunder.*
>
> *(2) Every employee shall be given reasonable notice of union meetings at which he is entitled to attend.*
>
> *(3) No employee shall unreasonably be denied membership in a trade union.*

Applicant Argument

[14] Mr. Lavallee argued that he did comply with the requirements set by the Union when he first submitted his application in October, 1998 and he does not understand why the Union refused to deal with his application at that time. He testified that it is difficult to obtain evaluation forms in order to make new applications because he is seldom called to work and when he is called, not all foremen will fill out the evaluation form.

Union Argument

[15] Mr. Pelton, counsel for the Union, noted that only the 1999 application form was properly completed. At that time, Mr. Lavallee was not an employee. As such, the Union argued that s. 36.1(3) does not apply to Mr. Lavallee. In the alternative, the Union argued that the application was properly considered and rejected by the membership.

Analysis

[16] In *Lien v. International Brotherhood of Teamsters Local 395,* [2001] Sask. L.R.B.R. 395, LRB File No. 203-00, the Board held that s. 36.1(3) will apply to individuals who are dispatched from union hiring halls on a "permit" basis. Although Mr. Lavallee was not actually working on a construction project in 1999 when he applied for membership, he had worked as a permit worker on a consistent basis for many years, and he has continued to work on that basis.

[17] In our view, the definition of "employee" as it is used in s. 36.1(3) can be interpreted to include permit workers who are dispatched from hiring halls. As explained in *Lien, supra,* the Union has an opportunity to evaluate the work performed by permit workers and to assess their suitability for membership in the Union. The opportunity for permit workers to apply for and have their membership applications considered by the Union would otherwise be significantly limited. We do not think this was the intent or purpose of s. 36.1(3).

[18] The Union has established that it considered Mr. Lavallee's application for membership in 1999 in the same manner that it considers other applications for membership. That is, the application was first vetted by the executive of the Union to ensure that it was complete. It was then referred to the membership at a regular Union meeting. The membership voted on the application and rejected Mr. Lavallee as a member.

[19] In our view, there is nothing improper about the method used by the Union to determine Mr. Lavallee's application. The only question is whether Mr. Smith unduly influenced the membership against Mr. Lavallee by disclosing to them that Mr. Lavallee had sought assistance from Mr. Stevens in sorting out his membership application problems. Mr. Smith denied that this was a factor that worked against Mr. Lavallee while Mr. Lipinski thought otherwise.

[20] In our view, Mr. Lipinski, as a general member of the Union, was in a good position to judge whether or not Mr. Smith's comments had a bearing on how members voted in relation to Mr. Lavallee's application. Although Mr. Lipinski could not recall specific details of Mr. Lavallee's various applications, it seems to the Board that he would recall the reaction of the membership to the information provided by Mr. Smith.

[21] In the Board's opinion, it is inappropriate for the Union to take into account efforts by Mr. Lavallee to obtain outside assistance from the Department of Labour in sorting out his membership difficulties. The *Act* encourages the use of the Labour Relations and Mediation Division in resolving disputes that arise both in the workplace and in trade unions. Mr. Stevens' role is to provide such assistance when requested. Mr. Lavallee's application for membership in the Union should not be rejected because he sought such assistance. This is an unreasonable approach to assessing membership qualifications.

[22] At the same time, however, it was not inappropriate for the Union to take into account the quality of Mr. Lavallee's work. This is a legitimate concern for the Union as it has a direct interest in ensuring that the tradespeople it supplies to construction employers are qualified. The Board cannot substitute its judgment of Mr. Lavallee's qualifications for that of the Union.

[23] In these circumstances, the most effective remedy is to require the Union to reconsider Mr. Lavallee's application for membership without reference to his conduct in contacting the Department of Labour for assistance.

[24] As the Union has misplaced Mr. Lavallee's application and evaluations, it is directed to place Mr. Lavallee's application for membership dated June 23, 2000 along with the two evaluation forms date stamped October 27, 1998 and October 28, 1998 before its membership for consideration. If there are any other requirements for Mr. Lavallee to meet, he shall be informed in writing as to those requirements. The Union shall also notify Mr. Lavallee of the results of the membership meeting held to consider his application in writing within 10 days after the meeting.

[25] If Mr. Lavallee has more current evaluations to present to the membership, he shall be entitled to file them with the Union in advance of the executive and membership meetings at which the application will be considered. The Union shall be required to refer Mr. Lavallee's application to the executive and the membership meetings within 90 days of this Order and to advise Mr. Lavallee of the date of such meetings.

NADINE SCHREINER, Applicant v. CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 59 and RICHARD WOODVINE, Respondents

LRB File No. 015-01; June 4, 2001
Chairperson, Gwen Gray; Members: Bruce McDonald and Don Bell

For the Applicant: Dave Taylor
For the Respondent: Harold Johnson

Union – Constitution – In most cases Board will permit union to develop its own interpretation of constitution and will restrict Board intervention to assessment of reasonableness of union's interpretation in context of ensuring fair treatment of union members – Board finds nothing in process followed by union trial committee that denied applicant natural justice within meaning of s. 36.1 of *The Trade Union Act* – Board dismisses application.

***The Trade Union Act,* s. 36.1.**

REASONS FOR DECISION

Background

[1] **Gwen Gray, Chairperson:** Ms. Nadine Schreiner filed an unfair labour practice application with the Board in which she alleged that the Canadian Union of Public Employees, Local 59 (the "Union") and Richard Woodvine, chairperson of a trial committee constituted under the Union's constitution violated s. 36.1(1) of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the "*Act*"). Ms. Schreiner sought Board assistance in having charges she filed under the Union's constitution brought to a hearing.

[2] The Union filed a reply denying that it had violated s. 36.1(1). A hearing was held in Saskatoon on April 24 and 25, 2001.

Facts

[3] Ms. Schreiner is an employee at the City of Saskatoon and a member of the Union. The Union has gone through a turbulent period of change over the course of the past year. The former president, Dave Taylor, who had been president for 10 years, was defeated in his run for re-election in June, 2000 by Lois Lamon, formerly the vice-president of the Union. The presidential election necessitated an election for vice-president, which took place in August, 2000. Mr. Taylor ran for this position, but he was defeated by Ann St. Denis, who formerly had been the recording secretary. A subsequent election was held in October for the recording secretary position and Ms. Schreiner let her name stand in this election but she was defeated by another candidate. Unfortunately, the Union remains pretty well split between supporters of Mr. Taylor and supporters of Ms. Lamon.

[4] The fall-out from the elections held in the past year have been brutal. Ms. Lamon has received written threats and has been the subject of snide remarks and rumours about her dedication to the job. Ms. Lamon described the past year as the worst year of her life. The stress of the on-going dispute has caused her to become ill and she has taken extensive sick leave.

[5] In order to quell some of the early dissention in the membership, Ms. Lamon decided to send a personal letter to all Union members. Ms. Lamon wrote and paid for the letter that was circulated among members of the Union in its various workplaces. The letter was entitled "President's Special Appeal to CUPE Local 59 Members" and it outlined the difficulties Ms. Lamon was experiencing with members of the Union who opposed her election. The general tone of the letter can be gleaned from the following excerpt:

> *Whether our local is in negotiations, or not, it has always been important that elected officers, executive members and members at large work together for the betterment of all members.*
>
> *Unfortunately, that has not been happening lately. There have been a number of actions by some members which have been purposefully hostile and destructive towards other Local 59 members and peaceful relations in our Local. These actions have not been honest differences of opinion and fair debate between members. These have been in the form of letters, emails, motions and conversations. Many*

have come from the former President, Dave Taylor and his partner, Nadine Schreiner. Dave Taylor was President of CUPE Local 59 for ten years, up until this June. Following the election in June, instead of acknowledging the members choice and gracefully conceding the Presidency to myself, he proceeded to challenge the vote results with demands for recounts of the ballots and scrutinizing of other election materials that was truly bizarre. The first recount meeting held on July 5, 2000 disintegrated into a yelling match, with two people walking out, when Dave insisted on a recount of every one of the eight or so ballots in the hundreds of unused ballot books leftover from the election, instead of just recounting the ballots cast for President. After several letters to and from CUPE National and Staff, from Dave and after another recount on July 13, 2000 supervised by the Regional Director of CUPE, he finally accepted the results. There were no irregularities found and the final recount confirmed the election results.

[6] Ms. Lamon attached various documents to the letter, including an e-mail she had received from Ms. Schreiner in which Ms. Schreiner voiced her objections in rather hostile terms to any discussion about her personal life at Union executive meetings. Ms. Schreiner testified that, in June, 2000, she asked the executive to stop discussing her relationship with Mr. Taylor. Ms. Schreiner explained that she had met Mr. Taylor in the course of dealing with the City over a grievance related to her employment and a personal relationship ensued. Ms. Schreiner was very upset that their relationship became the topic of conversation at Union executive meetings. She tried to get the executive to stop discussing her personal life and was angry that the topic kept surfacing.

[7] Ms. Lamon indicated in her special appeal that the discussion of the personal relationship between Ms. Schreiner and Mr. Taylor arose in the context of assessing whether Mr. Taylor had a conflict of interest in representing Ms. Schreiner in her grievance matter when he was Ms. Schreiner's partner.

[8] Prior to the circulation of Ms. Lamon's special appeal, Ms. Schreiner had been away from work on a six month leave of absence due to illness. She returned to work in a different area of City Hall from her previous employment, approximately one and a half weeks before the circulation of the special appeal. As a result, many of her new co-workers were not aware of Ms. Schreiner's relationship with Mr. Taylor. Ms. Schreiner explained that no one had any business knowing about

her personal life and she was offended by Ms. Lamon's letter because it shared information about Ms. Schreiner and Mr. Taylor, in her words, "like the National Enquirer." Ms. Schreiner received a copy of Ms. Lamon's special appeal from a co-worker.

[9] Ms. Schreiner also complained that Ms. Lamon circulated the special appeal the day before the election for recording secretary and she blamed Ms. Lamon for causing her defeat in the election for recording secretary.

[10] As a result of these events, Ms. Schreiner filed charges against Ms. Lamon, Ms. St. Denis, Mr. Baraniecki and Mr. Boa under the constitution of the Union. The charges read as follows:

> *Be advised that I, Nadine Schreiner, do hereby allege that [Lois Lamon, Ann St. Denis, Jim Boa, Matt Baraniecki] CUPE 59 Member, is guilty of a breach of the CUPE Constitution, in that:*
>
> > *B. VI TRIALS*
> > *B.6.1 Every member of a Union is guilty of an offence against the Constitution who:*
> >
> > > *(e) Publishes or circulates, either verbally or otherwise, among the membership, false reports or misrepresentations concerning any member of the Canadian Union of Public Employees in respect to any matter connected with the affairs of the Canadian Union of Public Employees.*
> > >
> > > . . .
> > >
> > > *(n) Engages in behavior which constitutes sexual, racial or ethnic, or personal harassment, or harassment on the basis of sexual orientation.*
>
> *These actions took place on October 16, 2000, when materials were distributed by Brother Boa throughout the membership.*

[11] At the same time that Ms. Schreiner brought her charges against the three executive members and one other member, Mr. Taylor also brought charges against Ms. Lamon, Ms. St. Denis and Mr. Baraniecki in relation to Ms. Lamon's special appeal, and Mr. Boa for circulating the document and against Sharon Schaeffer, a member, for personal harassment.

[12] The national president of Canadian Union of Public Employees ("CUPE"), Judy Darcy, appointed Tom Graham, a member of CUPE, Local 859 and Regional Vice-President of CUPE, to chair the membership meeting where members would be nominated to the trial committee. Mr. Graham sent a notice to all members of the union advising them of his role as chair of that portion of the meeting relating to the selection of a trial committee; the date of the membership meeting at which time the trial committee was to be selected; the method set out in the constitution for selecting trial committee members; and the trial committee process, all of which information accorded with the provisions set out in the constitution above. The notice sent by Mr. Graham was dated November 11, 2000. Ms. Schreiner complained to Mr. Graham that the notice did not provide her with adequate time to find members willing to stand for nomination to the trial committee.

[13] Ms. Schreiner also raised questions concerning her right to legal counsel and the entitlement of the accused to receive pay during the trial process. She also requested details of the costs of preparing and circulating Ms. Lamon's special appeal and asked if the costs would be reimbursed to the union if Ms. Lamon was found guilty of the charges against her. In addition, Ms. Schreiner asked that members who attended a special meeting of the Union on November 14, 2000 be disqualified from sitting as trial committee members because of a comment made by Ms. St. Denis, a member of the Union. Ms. Schreiner asked Mr. Graham to respond to her list of issues and questions which he did on November 16, 2000.

[14] Ms. Schreiner testified that she contacted Mr. Graham before the meeting and asked if nominations for the trial committee could be made by providing a statement from Union members that they are willing to let their names stand for nomination to the trial committee without attending at the meeting. According to Ms. Schreiner, Mr. Graham indicated that nominations to the trial committee could be made in this fashion. As a result, she obtained five documents from members in which they indicated in writing that they would let their names stand for nomination to the trial committee. None of the nominations were co-signed by a member as witness. At the meeting on November 21, 2000, the issue of receiving nominations in the manner proposed by Ms. Schreiner

was put to the membership for a vote. The membership determined that only those members who were in attendance would be eligible for nomination to the trial committee. A trial committee was selected consisting of five members.

[15] Ms. Schreiner complained about the process of refusing to accept written nominations to Ms. Darcy following the November 21, 2000 meeting and she also complained that Mr. Graham had advised the trial committee that they could contact two members of the national staff for assistance. Ms. Schreiner disagreed with any advice coming from the national office as "there are personality conflicts in question and political games being played, within our local and within your national office."

[16] The trial committee met after the general membership meeting to elect a chairperson and to arrange for further meetings. Richard Woodvine was selected to be chairperson of the trial committee. He has been a member of the Union for over 23 years and he works as a Facility Attendant II. He holds a business administration certificate from the University of Saskatchewan and has been active in the Union for many years.

[17] Although the trial committee had been told by CUPE that they were entitled to consult with Randy Sikes, executive assistant to Ms. Darcy, or John Elder, legal director, the trial committee declined to do so because Ms. Schreiner had objected to such outside consultation. As a result, the trial committee determined the procedures that would be used in carrying out their tasks without benefit of legal or other assistance.

[18] The trial committee met and determined the procedure it would follow in hearing the complaints and set out the procedure in a letter dated November 28, 2000 to all parties. The letter required the accusers, Ms. Schreiner and Mr. Taylor, to submit all evidence regarding their allegations to the trial committee by December 14, 2000. The accused were given 14 days following receipt of the accusers' material to file notice of objection to proceeding to trial. The trial committee would then meet in private to consider the objections and evidence and to decide whether to dismiss the allegations or proceed with the trial. Evidence filed by the parties with the trial committee was to be shared with the other parties.

[19] Following the issuing of the November 28, 2000 letter, Ms. Schreiner complained in writing to the trial committee that she did not wish to share her evidence with the accused. In a letter to the trial committee, Ms. Schreiner wrote:

> *Due to the fact that harassment and the distribution of a 15 page character assassination on me are the very basis for my charges, I will not allow my personal statement to be submitted to anyone, other than the trial committee. I fear these statements and evidence will be "shared" with the corporation, should they find their way into the accused's hands. I have also had witnesses tell me that they are wanting to submit a statement to the committee, but will not do this, if it is going to be put into Ms. Lamon's hands. There is a trust issue here, that this committee is not aware of.*

[20] In addition, Ms. Schreiner commented that the accused were given 14 days to ponder their evidence, in Ms. Schreiner's words, to "create a defence or in order that they may find yet another hurdle for all of us to get through."

[21] The trial committee advised Ms. Schreiner that the procedure to be used was set out in the November 28, 2000 letter to her.

[22] Subsequently, Ms. Schreiner informed Mr. Woodvine, chairperson of the trial committee, that she did not want to receive any further correspondence from the trial committee unless it was a hearing date for the trial as the first letter was too upsetting to her. Mr. Woodvine asked Ms. Schreiner to provide the trial committee with the name of a person to represent her and who could receive material from the trial committee.

[23] On December 14, 2000, Ms. Schreiner provided the trial committee with her submissions, which consisted of Ms. Lamon's 15 page special appeal along with her submission. Ms. Schreiner reiterated her request that the materials provided by her to the trial committee be kept confidential and not be circulated to the accused.

[24] On December 22, 2000, the trial committee advised Ms. Schreiner that it was required to forward her submission to the accused in order to ensure that they were fully informed of the charges

against them. In order to overcome any confusion in the committee's procedure, the committee extended the deadline for Ms. Schreiner to January 2, 2001. It also revised its procedural letter and forwarded a copy of the new procedure to Ms. Schreiner. A hearing date was set for Wednesday, January 17, 2001 for the purpose of making decisions regarding the notices of objections filed (if any) and whether to dismiss the allegations or proceed to trial.

[25] On December 28, 2000, Ms. Schreiner advised the trial committee that she was giving her permission to the trial committee to distribute the materials submitted by her in support of her charges to the accused.

[26] Ms. Schreiner was provided with a copy of the materials filed by Ms. Lamon in the proceedings on January 15, 2001. At that time, the trial committee advised Ms. Schreiner that it had dismissed the complaints Ms. Schreiner had filed against Ms. St. Denis, Mr. Baraniecki and Mr. Boa. The trial committee stated in its reasons: "[I]t is therefore the decision of this committee to dismiss the allegations as provided for in Article B.VI – Trials, B.6.4 (b) which states in part: The trial committee may, as a preliminary matter, decide on any objection to proceeding with the trial, including dismissing the complaint."

[27] The trial committee reached its decision after reviewing the material filed by Ms. Schreiner, Ms. St. Denis, Mr. Baraniecki and Mr. Boa. It did not provide Ms. Schreiner with copies of the material filed by the accused on these charges.

[28] As a result, the only charge filed by Ms. Schreiner that was sent to a preliminary hearing was Ms. Schreiner's charge against Ms. Lamon. At the January 17, 2001 hearing, Ms. Schreiner complained about the dismissal of the three charges referred to above and made a submission on her charges against Ms. Lamon. Ms. Schreiner testified that she was dismayed when she discovered that Ms. Lamon was being represented by Ms. St. Denis at the hearing before the trial committee. Ms. Schreiner apparently thought that Ms. St. Denis, as an accused person, should not represent another accused person. Ms. Schreiner also raised a conflict of interest charge against Mr. Joe Willick, a member of the trial committee, based on his involvement in placing a restructuring motion before the general membership meeting in January 16, 2001 which was supported by Ms. Lamon and her supporters and opposed by Mr. Taylor and his supporters.

[29] The trial committee permitted both Ms. Schreiner and Ms. Lamon to speak for ten minutes and both were timed by the committee. Ms. Schreiner left the room after she had made her presentation to the committee.

[30] After considering the presentations made by Ms. Schreiner and Ms. Lamon, the trial committee voted to dismiss the charge against Ms. Lamon. The dismissal was made under Article B.VI – Trials, B.6.4 (b) of the constitution. The decision was communicated to the parties by notice dated January 22, 2001.

[31] As a result of its dismissal during the preliminary stages, the trial committee did not conduct a trial where witnesses were called to give evidence on behalf of Ms. Schreiner or Ms. Lamon, or the other accused members.

[32] The trial process did not meet with Ms. Schreiner's approval and she brought this application to the Board alleging that the Union had violated s. 36.1(1) of the *Act*.

Relevant Statutory Provision

[33] Section 36.1(1) of the *Act* provides as follows:

> *36.1(1) Every employee has a right to the application of the principles of natural justice in respect of all disputes between the employee and the trade union certified to represent his bargaining unit relating to matters in the constitution of the trade union and the employee's membership therein or discipline thereunder.*

Applicant Argument

[34] Ms. Schreiner argued that she was denied natural justice in her dispute with the Union contrary to s. 36.1(1). Ms. Schreiner pointed to a number of deficiencies in the Union's handling of her complaints against Ms. Lamon, Ms. St. Denis, Mr. Baraniecki and Mr. Boa, including:

> (1) the Union's refusal to allow nominations to the trial committee of members who were not present at the membership meeting;
>
> (2) the dismissal of the charges against Ms. St. Denis, Mr. Baraniecki and Mr. Boa without hearing and without providing Ms. Schreiner with a copy of the materials filed on behalf of Ms. St. Denis, Mr. Baraniecki or Mr. Boa;
>
> (3) the dismissal of the charges against Ms. Lamon without a hearing;
>
> (4) the failure to permit evidence to be called through witnesses and the failure to permit cross-examination of witnesses.

[35] Ms. Schreiner sought an order of the Board directing the Union to conduct a new trial under Board supervision.

Union Argument

[36] Mr. Johnson, counsel for the Union, argued that s. 36.1(1) of the *Act* applies the principles of natural justice to a person who is charged with an offence under the Union's constitution and not to the person who brings the charge. The principles require that a person who is charged with an offence be given reasonable notice of the charges and to have the matter decided without bias and in good faith. The Union also argued that s. 36.1(1) is limited in its scope and applies the principles of natural justice only to issues pertaining to the discipline of a member or the entitlement of a person to membership in the Union, not to matters that do not pertain to such discipline or membership entitlement. Counsel also argued that bias in the situation of a trial committee is restricted to matters of actual, as opposed to, apparent bias.

[37] The Union argued that Ms. Schreiner's complaints did not raise issues that fall under the scope of s. 36.1(1) because she was an "accuser" not an "accused," the matters raised did not involve any discipline of Ms. Schreiner under the Union's constitution or threaten her status as a member of the Union. As such, s. 36.1(1) was inapplicable to the facts of the case.

[38] In the alternative, the Union argued that there was no breach of the principles of natural justice in the manner that Ms. Schreiner's complaints were dealt with by the trial committee. Counsel noted that Ms. Schreiner requested that the trial committee not consult with the legal department of CUPE. As a result, it was left to its own devices to establish its hearing procedures. The trial committee did the best it could in the circumstances in developing its procedure; it was not motivated by bad faith; it did not demonstrate any real bias against Ms. Schreiner.

[39] Counsel referred the Board to *Ward v. Saskatchewan Government Employees' Union*, [1994] 4th Quarter Sask. Labour Rep. 94, LRB File No. 173-94; *Stewart v. Saskatchewan Brewers' Bottle & Keg Workers, Union No. 340*, [1995] 2nd Quarter Sask. Labour Rep. 204, LRB File No. 029-95; *McMillan v. Saskatchewan Union of Nurses*, [1999] Sask. L.R.B.R. 33, LRB File Nos. 377-97 & 378-97; *Coleman and Leaney v. Rentz and OPEIU, 378* (1995), B.C.L.R.B. No. B282/95.

Analysis

[40] Trade unions enjoy a unique status in Canadian society. Unlike other associations, such as non-profit or for profit corporations or co-operatives, the rules governing a trade union derive almost solely from the mechanisms established by the trade union as set out in the union's constitution and by-laws. Trade union rules are generally established through the democratic principle of majority rule and are subject to change in the annual or other meetings held by the membership of a union. Generally, trade unions develop their union structures and carry out their collective bargaining and dispute resolution mandates with little external supervision.

[41] There are occasions, however, when courts or labour relations boards are called upon to intervene in internal union affairs. The courts justify intervention on the basis that the constitution of a trade union is a contract between the members and among the members. The limits of this theory have recently been tested in *Berry et al. v. Pulley et al.* (1999), 45 O.R. (3d) 449 (Ont. Sup. Ct. Jus.); aff'd. (2000), 48 O.R. (3d) 169 (Ont. C.A.) where a group of union members brought action in contract and

tort against other members of the union and sought personal damages from the union members relating to the failure of the members collectively to abide by the rules of the trade union. The Ontario courts concluded that such an action in contract for personal damages against individual union members went beyond any reasonable expectation arising out of the relationship between union members. At paragraph 89, Winkler J. concluded:

> *[89] The contracts between union members are relational as opposed to transactional. The enforcement of commercial contracts, or other similar voluntary relationships, is predicated on a determination of the reasonable expectations of the parties. As Kerans J.A., writing for the Alberta Court of Appeal in Westfair Foods Ltd. v. Watt (1991), 79 D.L.R. (4th) 48, 79 Alta. L.R. (2d) 363 (C.A.), stated at p. 54:*
>
> > *The company and the shareholders entered voluntarily, not by duty or chance, into a relationship. Our guides are the rules in other contexts, such as contract law, equity, and partnership law, where the courts have also considered just rules to govern voluntary relationships. In very general terms, one clear principle emerges is that we regulate voluntary relationships by regard to the expectations raised in the mind of a party by the word or deed of the other. . . This is what we call reasonable expectations . . .*
>
> *[90] The plaintiffs seek to have the remedy of damages considered an incident of the contract in this case. I cannot accept, conceptually, that the remedy of damages has been "furnished by the parties", nor would I hold that this result was in the "reasonable expectations" of the parties when the agreement was made.*

[42] At paragraph 94 Winkler J. commented on the fictional nature of the contractual approach to understanding trade unions:

> *[94] As the commentators have stated, the notion of union membership as being contractually based is a "legal fiction". This theory was developed out of necessity because of the lack of legal personality of unions and the absence of adequate statutory protection for individual union members. Since the decision in [Orchard v. Tunney,*

> *[1957] S.C.R. 436], the concept of a duty of fair representation has become entrenched in both the common law and statutory matrix within Canada. An extension of the contract theory of union membership to provide a remedy in damages against union members in their personal capacity would be to take the legal fiction well beyond its original purpose and dramatically alter the landscape of labour relations. . .*

[43] As Winkler J. noted, the contract theory provided the courts with the means of addressing perceived injustices in the treatment of individual members by trade unions. Judicial intervention in internal union affairs primarily addresses issues of unduly oppressive action by the majority against the minority or individual. Overall, the courts attempt to insert a balance between group rights and individual rights.

[44] In M. Lynk, *Denning's Revenge: Judicial Formalism and the Application of Procedural Fairness to Internal Union Hearings* (1997) 23 Queen's L.J. 115, the author argues that the courts have gone too far in supervising the internal workings of trade unions and have failed to adequately take into account the need for collective action and discipline among the members of a trade union in order to accomplish collective bargaining goals. Lynk comments on the tension that exists in trade unions between the need for solidarity among members and the rights of individual members at paras. 28 and 29:

> *Unions have three particular characteristics that are critical to understanding their social and economic role but have only been faintly acknowledged in the judicial caselaw on internal union proceedings. First, unions are primarily economic associations designed to concentrate power in order to win better working conditions and living standards for employees – "fighting organizations" in Kahn-Freund's oft-cited description. As Melvyn Dubofsky has observed:*
>
> > *[U]nions have to be understood as peculiarly contradictory institutions. They are . . . simultaneously town meetings and military formations. In one guise, unions are marked by rank and file participation where policy decisions are reached only after open democratic debate. In the other guise, they are fighting machines struggling for survival or victory through discipline, absolute loyalty*

> *to command and unbroken solidarity. To stress workers' individual rights and to romanticize the heroic rank and file compared to autocratic union leaders is to threaten the survival of trade unionism.*

The employers that unions face across the bargaining table make no pretence of being democratic; they wield as much and usually more economic might, and they have the institutional capacity for efficient and strategic decision-making. Accordingly, unions must weld their members into viable common fronts during negotiations. Once negotiations have been concluded, the union has the legal and economic duty to carry out the terms of the collective agreement. A union which cannot live up to its bargained commitments because of internal conflict and factionalism is unable to ensure industrial peace and is unlikely to obtain future bargaining concessions from employers. Consequently, procedural protection for union members, in itself a worthy aim, must be balanced against the fundamental activities of the union. Philip Taft, a supporter of legal protection for membership rights, has argued:

> *[A] union must regard the conduct of its members from the point of view of the union's survival. The judicial procedure of the union is not an instrument for dispensing abstract justice; but is a means of keeping the union intact and effective. We are therefore not dealing with a problem of absolute justice, but with the possibility of an individual securing a maximum degree of justice under a given institutional arrangement. Unless we are willing to concede the union's right to exercise control over its membership within an allotted sphere, any penalty the union inflicts would be a negation of justice . . . Anyone who recognizes the necessity, desirability or inevitability of labour unions must also recognize their right to impose sanctions upon those members who violate their rules or impede their efforts.*
>
> *[footnotes omitted]*

[45] In approaching the supervision of internal union matters, the Board should be mindful of the overall purpose of the *Act* which is to foster and encourage effective collective bargaining. This requires an appreciation of the need for trade unions to develop solidarity among their members to ensure effective collective bargaining and effective collective agreement administration. The discipline provisions contained in a union constitution are primarily aimed at maintaining and reinforcing the need for such solidarity. The provisions are not a substitute for civil action, nor are they intended as a means for addressing all wrongs or for solving all political debates among union members.

[46] As noted by Winkler J. in *Berry v. Pulley, supra*, a large part of the role of supervising trade unions has been transferred from the common law courts to labour relations boards under various changes to trade union legislation. The *Act* makes various provisions for Board supervision of internal union affairs. For instance, s. 25.1 of the *Act* requires trade unions to fairly represent their members in grievances or rights arbitration proceedings under a collective agreement. Section 36(3) of the *Act* limits the ability of a trade union to require an employer to terminate the employment of a union member who is expelled from membership. Sections 36(4) and (5) limit the ability of unions to discipline members who cross picketlines and work for struck employers. Section 36.1(1), which is under review in this case, provides that an employee has the right to the application of the principles of natural justice in respect of all disputes between the union and the employee. Section 36.1(2) requires a trade union to provide reasonable notice of union meetings. Section 36.1(3) requires a union not to unreasonably deny a person membership. Other interventions in the internal workings of a union and its constitution are set out in the unfair labour practice provisions contained in s. 11(2) of the *Act*, including the method of conducting a strike vote (s. 11(2)(d)); the timing of a strike (s. 11(2)(b)); attempting to have an employee discharged for failure to obtain or maintain membership in the union where s. 36(3) applies (s. 11(2)(e)); and the supervision of strike and ratification votes (s. 11(8)).

[47] This Board has considered its approach to the supervision of internal union matters in a number of cases. In *Ward, supra*, a union member was issued a reprimand by his union as a result of his conduct during a strike. The union failed to provide the member with notice that a complaint had been received against him and that disciplinary action was being contemplated. In these circumstances, the Board found that s. 36.1(1) required the union to provide the employee with timely notice that charges had been brought against him and that disciplinary measures might result. The Board recognized that the requirements of natural justice can vary depending on the nature of the organization and the rights

involved. However, in disciplinary matters, s. 36.1(1) would require, at a minimum, notice to the employee.

[48] In the *Stewart* case, *supra*, the Board reviewed its previous decisions concerning the supervision of internal union matters and concluded at 213 as follows:

> *Employees and trade union members have traditionally been able to pursue some of these questions in the common law courts, although this is not a feasible avenue for many individual employees. The significance of s. 36.1, in our view, is that it gives employees recourse to the Board to express concerns about their status or treatment within the trade union which represents them. As we have indicated in the decisions quoted earlier, the Board has no intention of becoming a body of appeal or of routine review of every decision made pursuant to a trade union constitution or internal procedural rules. Where an allegation is made, however, that a violation of The Trade Union Act has occurred, the Board must be prepared to scrutinize the internal workings of the trade union to the extent necessary to determine whether the Act has been breached.*

[49] In that instance, the Board found that the union had failed to fairly consider Mr. Stewart's application for membership in the union, pursuant to s. 36.1(1) of the *Act*.

[50] In *Alcorn and Detwiller v. Grain Services Union*, [1995] 2nd Quarter Sask. Labour Rep. 141, LRB File No. 247-94, the union fined employees for working during a strike. The Board held that the union's constitution did not provide for an assessment or fine prior to the commencement of the strike as required by s. 36(5). The Board was prepared to scrutinize the union's constitution in locating the source of the union's disciplinary authority as indicated in the following passage at 155:

> *In this instance, a review of the constitution discloses that there is no mention whatsoever of the source or division of disciplinary authority with respect to union members, although a recent constitutional amendment has been adopted which deals with union officers. Even assuming, for the sake of argument, that the strike solidarity policy could be seen as setting out an acceptable code of offences and procedure for addressing infractions, we think that the authority of the local to put such a policy into*

> *effect was without foundation in the provisions of the constitution, and that the fines imposed by this means were not based on sound constitutional grounds. In our view, the disciplinary proceedings which led to the imposition of the fines were void and without effect with respect to members of the Union as well as non-members.*

[51] At least with respect to the requirements set out in s. 36(5), the Board has taken a strict approach to the interpretation of a union's constitution requiring the governing document to spell out clearly the union's ability to fine employees who cross a picketline and work for a struck employer. This approach may be justified by the wording of ss. 36(4) and (5) which places clear statutory limits on the union's ability to discipline employees who work during a strike.

[52] In general, however, there is no requirement that the Board approach the interpretation of a union's constitution from a strict point of view. It would seem appropriate, in most cases, to permit the union to develop its own interpretations and to restrict the Board's intervention to assessing the reasonableness of the interpretation in the context of ensuring fair treatment of union members. In *McMillan, supra*, a union member complained that the union improperly interpreted the ratification provisions of the collective agreement and argued that he was improperly denied a chance to vote on an amendment to the collective agreement. At 40, the Board concluded:

> *In the circumstances of the present case, the requirement to hold a ratification vote is founded entirely on an interpretation of the constitution and bylaws of SUN. Mr. McMillan concluded that the constitution and bylaws require SUN to conduct a ratification vote on the letter of understanding, while the elected officers of SUN disagree with this interpretation. In our view, the proper interpretation of the constitution and bylaws of a union rest with the union itself, and not with the Board under s. 36.1(1) of the Act.*

[53] In the present case, Ms. Schreiner argues that the Union failed to properly assign a trial committee. She does not assert that the rules of natural justice were breached in relation to the manner of selecting trial committee members; her only assertion is that the procedure did not accord with the Union's past practice. The chairperson's ruling with respect to the manner of nominating trial committee members is not a matter that the Board will review under s. 36.1(1). This is simply a

procedural matter and it does not give rise to any issues of natural justice in relation to Ms. Schreiner's dispute with the Union.

[54] Ms. Schreiner also complained about the procedures adopted and implemented by the trial committee. In our view, the Union should be allowed a great deal of flexibility in deciding if it should process charges filed against a member to trial. As indicated above, the purpose of the disciplinary provisions in a union constitution is to foster and enforce union solidarity; not to make amends for every hurt or upset that arises in the rough and tumble of running the affairs of a union.

[55] In accordance with the Union's constitution, Ms. Schreiner could expect to have her charges against other members considered by a trial committee. The committee was assigned the task of determining whether the charges should proceed to trial. In undertaking this task, we are of the view that the trial committee can take into account many factors, including the importance of the charges to the health and functioning of the Union as a whole given the overall purpose of the disciplinary proceedings.

[56] We do not view the purported procedural deficiencies relied on by Ms. Schreiner as giving rise to any claim under the general rubric of a denial of natural justice. Ms. Schreiner was accusing other members of the Union with misconduct, and her complaints were considered by the trial committee in a manner that it considered appropriate, given the limitations Ms. Schreiner placed on the committee's access to outside advice. The Board is also reluctant to insert any requirement in the internal operation of a trade union that persons who bring charges against fellow members of a union are entitled to have their complaints dealt through the trial process established in the union's constitution. The decision to bring charges against a member to trial is a serious matter for the members affected and ought to be left in the hands of those assigned to make the decision under the Union's constitution. It would be unusual, to say the least, if the Board were to direct a trade union to refer charges against a member to trial. The trial committee had the authority to determine if the charges should proceed to trial and we see no reason for interfering with its decision.

[57] Ms. Schreiner approached the disciplinary provisions under the constitution as though they provided a private remedy for her upset. In our view, this is not the purpose or function of a union's internal disciplinary procedures. Other avenues are available to Ms. Schreiner, including the obvious avenue of campaigning against the current leadership at the next Union elections.

[58] There was nothing in the processes adopted by the trial committee that would cause the Board to conclude that Ms. Schreiner was denied natural justice in relation to a dispute between her and the Union with respect to the constitution and her membership therein. The charges brought by Ms. Schreiner were considered by the trial committee and rejected as unsuitable to take to trial against the members named. The nature of this decision by the trial committee does not invite a high level of scrutiny by the Board under the general rubric of natural justice as there is no penalty that will be visited on Ms Schreiner as a result of the trial committee's decision and no threat to her on-going membership in the Union. The Union's internal processes on an issue of this nature should not be interfered with unless there are very unusual circumstances, none of which exist in this case.

[59] For these reasons, the Board dismisses the application.

NADINE SCHREINER, Applicant v. CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 59, Respondent

LRB File No. 023-01; June 4, 2001
Chairperson, Gwen Gray; Members: Bruce McDonald and Don Bell

For the Applicant: Dave Taylor
For the Respondent: Harold Johnson

Union – Constitution – Applicant alleged that union breached s. 36.1 of *The Trade Union Act* by passing restructuring motion at union meeting without conducting roll call vote and thereby changing applicant's union representative for grievance proceedings – Even if Board accepts facts alleged by applicant, would not amount to breach of *The Trade Union Act* – No right exists in individual union member to choose person who will represent member in grievance proceedings - Board dismisses application.

***The Trade Union Act,* ss. 25.1 and 36.1.**

REASONS FOR DECISION

Background

[1] Gwen Gray, Chairperson: Nadine Schreiner filed an unfair labour practice application against the Canadian Union of Public Employees, Local 59 (the "Union") alleging that the Union breached s. 36.1(1) of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the "*Act*"), by passing a motion at a Union meeting to restructure the executive of the Union without conducting a roll call vote, as requested by members in attendance at the meeting. Ms. Schreiner complained that, as a result of the restructuring motion, her choice of representatives in the handling of a grievance she has against the City has been taken away from her.

[2] The Union replied by acknowledging that the Union's bylaws were changed and by denying that Ms. Schreiner's right to fair representation had been denied.

[3] A hearing of this matter was held in Saskatoon on April 26, 2001.

[4] At the hearing the Union raised a preliminary objection to the application based on the assertion that the materials filed in the application did not disclose any cause of action under the *Act*. The Board heard argument on this objection from the Union and Ms. Schreiner and ruled in favour of the Union at the conclusion of the argument. These Reasons for Decision set out the Board's reasons for dismissing the application.

Relevant Statutory Provisions

[5] Section 36.1(1) of the *Act* reads:

> *36.1(1) Every employee has a right to the application of the principles of natural justice in respect of all disputes between the employee and the trade union certified to represent his bargaining unit relating to matters in the constitution of the trade union and the employee's membership therein or discipline thereunder.*

[6] Section 25.1 reads:

> *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 and Decision

[7] In accompanying Reasons for Decision relating to LRB File No. 015-01 between these parties, the Board set out its understanding of s. 36.1(1) and the role the Board plays in supervising the internal operation of a trade union. In this case, the applicant complains that the Union did not follow its bylaws or meeting rules with respect to the conduct of a vote at a Union meeting. As a result, the Union officers who were assisting the applicant in her grievance with the City were changed. Ms. Schreiner complains that her right to a choice of Union representatives was removed.

[8] The Board dismissed the application without a hearing. There are two reasons for the dismissal. First, the facts alleged by the applicant, if they were established in evidence, are incapable of constituting a violation of s. 36.1(1). There is no dispute between the Union and Ms. Schreiner relating to matters of the Union's "constitution and the employees' membership therein or discipline thereunder." The failure to call for a roll call vote is a matter of procedure only and does not affect any personal right of Ms. Schreiner related to her membership in the Union.

[9] Ms. Schreiner also claims that the result of the vote, which led to the re-structuring of the Union executive and the personnel who were assigned to represent Ms. Schreiner in her grievance, affected Ms. Schreiner's right to freely choose her Union representation. This claim is made on a false premise. There is no right in the individual union member to choose the person who will represent him or her in their grievance handling. The Board has often stated that a grievance belongs to the union. The union decides who will be assigned to work with members in negotiating and settling grievances. As a result, Ms. Schreiner's claim has no basis in law under s. 36.1(1) or s. 25.1.

[10] In summary, the facts alleged, even if they are accepted as established, cannot lead to a conclusion that the Union committed a breach of s. 36.1(1) or s. 25.1. For these reasons, the Board dismissed the application.

REGINA DISTRICT HEALTH BOARD, Applicant v. CANADIAN UNION OF PUBLIC EMPLOYEES, Respondent

LRB File No. 054-00; June 5, 2001
Vice-Chairperson, James Seibel; Members: Donna Ottenson and Judy Bell

For the Applicant: Deron Kuski
For the Respondent: John Welden

Employee – Confidential personnel – Volume of clerical duties associated with performance of occupational health and safety director's job reasonably requires clerk typist support position to regularly act in confidential capacity with respect to employer's industrial relations – Board excludes clerk typist support position.

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

REASONS FOR DECISION

Background

[1] James Seibel, Vice-Chairperson: Canadian Union of Public Employees (the "Union") is designated by an Order of the Board as the bargaining agent for a unit of employees of Regina District Health Board (the "Employer") composed of all health services providers with certain exceptions. The Employer has applied to amend the certification Order to add the position of Confidential Secretary, Occupational Health and Safety department, to the list of exclusions from the bargaining unit on the grounds that the person occupying the position is not an "employee" within the meaning of s. 2(f)(i)(B) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), which provides 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.

Evidence

[2] Debbie Beaton, a labour relations consultant with the Employer since 1995, testified on behalf of the Employer. She described the Employer's organizational structure. Six vice-presidents report to the President and Chief Executive Officer and manage over 30 departments. The Employer's Occupational Health and Safety ("OH&S") department, which is headed by a director, is one of seven departments under the management of the Vice-President of Resource and Developmental Services (the "Vice-President"); the other six departments include Education and Development, Library, Human Resources; Public Affairs, Spiritual Care and Volunteer Services, and System Effectiveness.

[3] The OH&S department has approximately 16 full-time equivalent positions including Occupational Health Nurses, Safety Consultants, Healthy Workplace Coordinator and five or six clerical positions in the scope of the bargaining unit. The position that the Employer seeks to have excluded as Confidential Secretary on this application is the Office Assistant to the Department Director presently staffed by an in-scope Clerk Steno II, Donna Sliva. Ms. Beaton testified that the Human Resources department, which also reports to the Vice-President, has seven out-of-scope clerical staff. Prior to 1992, she said, other departments, including the OH&S department, would "borrow" an out-of-scope clerical person from Human Resources as their needs for confidential clerical services required. However, after 1992, because of changes to the department's physical space, this arrangement became impractical, and the OH&S department director began doing her own confidential typing and clerical work.

[4] Ms. Beaton described the nature of the responsibilities of the OH&S director that she said required a confidential clerical capacity: the director oversees the Employee and Family Assistance Program ("EFAP"), involving personal information about employees and their family members that is often related to disciplinary and work performance issues; the director is privy to all manner of employee information related to employees' sick time usage, workers' compensation claims, rehabilitation programs, and workplace harassment claims; this includes information gathered or received by the occupational health nurses and safety consultants in the OH&S department; the director communicates relevant information to the Workers' Compensation Board and with all kinds of outside agencies in relation to employee assistance; the director deals with situations where employees refuse to perform allegedly unsafe work; the director performs analyses for use in collective bargaining by the Employer, and its bargaining agent, the Saskatchewan Association of Health Organizations ("SAHO"), including employee sick time usage and return to work programs, and workplace safety issues, and has input into bargaining proposals impacting the area under the department's aegis. Also, Ms. Beaton said, the departmental directors take turns keeping the minutes of the Vice-President's meetings with the directors, which have included such matters as budget reviews, cutbacks impacting on staffing levels and specific collective bargaining proposals; the minutes of these meetings are transcribed in the office of the director performing the recording secretary's role for that meeting for distribution to the meeting attendees. Ms. Beaton estimated that perhaps 80 per cent of the work of the OH&S director was related to labour relations matters.

[5] According to Ms. Beaton, the director felt that she could no longer handle such duties as part of her workload and in August, 1998 the Employer formally requested of the Union that the existing in-scope Office Assistant to the Director position be changed to a Confidential Secretary position that would be out-of-scope of the bargaining unit. Since that time, although her position is presently in-scope, Ms. Sliva has been charged with performing the clerical duties for the director that are deemed by the Employer to be confidential and requiring an excluded status.

[6] In cross-examination of Ms. Beaton, Mr. Welden elicited that under the collective agreement between the parties they recognized that occupational health and safety and the health of employees and their families are concerns shared by the Employer and the Union, and that the parties had established a joint committee to deal with occupational health and EFAP issues and development. Ms. Beaton also confirmed that individual employee injury reports would be reviewed by the committee, but added that the director's separate report containing interpretation of and

recommendations regarding the situation are prepared by the person in the disputed position; that is, the position has access to the confidential specific claims management by the director.

[7] Ms. Beaton also testified that the person in the disputed position prepared the director's materials related to individual employee discipline in the department.

[8] Irene Borgstrom has been the acting director of the Employer's OH&S department since April, 2000. She has been employed by the Employer since 1975 in various capacities and has been in the OH&S department since 1993.

[9] Ms. Borgstrom testified that the position in dispute, presently occupied by Ms. Sliva, primarily acts as confidential clerical support to the acting director and to the nurses and safety consultants in the department as necessary. She said that since 1992 she has had the opportunity to observe the expansion in programs managed by the OH&S department under the former director, Ms. Pitfield. Her assessment was that there had been a large increase in the director's workload during this time and she observed Ms. Pitfield to do all of the clerical work associated with confidential matters. In 1998, she said, Ms. Sliva was hired as a casual employee to provide administrative support to the director and has been treated as having a confidential capacity since that time.

[10] As the acting director, Ms. Borgstrom estimated that up to 80 percent of her time was spent on confidential work in relation to the Employer's industrial relations including the following: the budget review and 3-year plan which impacts staffing and service levels; with respect to collective bargaining, she is consulted by labour relations as to interpretation of occupational health and safety legislation and proposals for bargaining; she performs and completes performance appraisals of the employees in the department; she has reporting responsibilities (to which the Union is not privy) to the Employer, the President and Vice-Presidents and the Chief Executive Officer, regarding health and safety issues, processes, trends, illness and injury rates, and analysis of workers' compensation costs, and provides recommendations regarding same; she periodically takes the minutes of the monthly directors' meeting with the Vice-Presidents and Chief Executive Officer which includes collective bargaining updates. Also, according to Ms. Borgstrom, as concerns employee family assistance matters, the Union, as a part of the joint committee, will only have access to that information if the employee consents. Ms. Borgstrom stated that Ms. Sliva performs the clerical duties associated with these responsibilities and has access to her e-mail and correspondence.

[11] Ms. Borgstrom provided an example of a labour relations conflict in which the disputed position might be involved: in the process of managing an injury claim, if the director receives information that the claimant employee is working at outside employment, the director advises the Workers' Compensation Board; if Ms. Sliva is not in a confidential position, the director must prepare and handle all correspondence and communication herself.

[12] Ms. Sliva, the incumbent in the disputed position, has worked for the department director since October, 1998. She was called to testify on behalf of the Employer. It was her opinion that she has had access to confidential information in relation to the Employer's industrial relations, at least as concerns the following: employee harassment claims; a threatened walk-out by out-of-scope staff; employee discipline; collective bargaining issues; employee performance appraisal; directors' meeting minutes; and, budget information, including impact on staffing. She added that, during a strike in 1998, she was privy to the Employer's contingency plans for staffing. She confirmed that she has access to the director's mail and e-mail, and that there is nothing in the position description that she does not do. She indicated that she felt that the position had a high risk of potential conflict with other members of the bargaining unit, although she felt that she had managed to avoid same.

[13] Deborah Blenkinsop has worked for the Employer as a Clerk Typist II at Alcohol and Drug Services since 1995, and for two years prior to that before devolution from the Province. She testified that her immediate supervisor is in scope of the Union and the manager of the service is out of scope. She said that she is privy to very confidential client information and to budget information. She is a chief shop steward for the Union and was on its last bargaining committee. She said that she has found no labour relations conflict of interest in her job. She opined that there was no need for out-of-scope clerical services in any department.

Argument

[14] Mr. Kuski, counsel for the Employer, argued that the clerical support position to the OH&S director should be out-of-scope, because it involves a considerable amount of time spent on matters in relation to the Employer's industrial relations. In support of his argument he cited the following decisions of the Board: *Canadian Union of Public Employees v. City of Prince Albert*, [1996] Sask. L.R.B.R. 680, LRB File No. 095-96; *Hillcrest Farms Ltd. v. Grain Services Union (ILWU - Canadian Area)*, [1997] Sask. L.R.B.R. 591, LRB File No. 145-97; *Communications, Energy and*

Paperworkers Union of Canada v. E.C.C. International Inc. [1998] Sask. L.R.B.R. 268, LRB File No. 362-97.

[15] Mr. Welden, on behalf of the Union, argued that there is very little information to which Ms. Sliva is privy that the Union would not eventually obtain, because the framework of the collective agreement between the Union and the Employer discloses a very open relationship. He described the department's involvement in the Employer's collective bargaining as very limited, because it is handled by SAHO. In support of the Union's position, Mr. Welden also cited *E.C.C. International, supra*, and *Prince Albert Council on Alcohol and Drug Abuse v. Saskatchewan Government and General Employees' Union*, [1999] Sask. L.R.B.R. 356, LRB File Nos. 049-99 & 050-99.

Analysis & Decision

[16] In order to justify an exclusion from the bargaining unit under s. 2(f)(i)(B) of the *Act* the Board must be satisfied that the person regularly acts in a confidential capacity with respect to the industrial relations of the Employer. The Board's jurisprudence makes it clear that it is irrelevant whether the person acts in a confidential capacity with respect to other kinds of information unless it creates the real potential for a conflict of interest in a labour relations sense with other members of the bargaining unit.

[17] The policy basis for the exclusion was stated by the Board in the *City of Prince Albert, supra*, 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.*

[18] In *Hillcrest Farms Ltd., supra*, the Board added, 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.

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.

[19] The Board takes a cautious approach to this type of exclusion from the unit because the employee involved is not necessarily a member of management but is prevented from enjoying the benefits of collective bargaining and union representation. In *E.C.C. International, supra*, the Board stated, at 276:

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.*

[20] While it is not a requirement of the *Act* that the duties and responsibilities of the position in question be primarily focused upon or be exercised in relation to the Employer's industrial relations, nor that even a substantial portion of the person's work time be spent on such confidential matters, the person must "regularly" (rather than incidentally) act in a confidential capacity with respect to such matters. As stated by the Board in *E.C.C. International, supra*, at 268, "...such duties will be regularly performed, genuine and significant, though not necessarily greatly time-consuming."

[21] In the present case, the Union argues that the Employer's collective bargaining is handled by SAHO and that the Employer has no need for a confidential exclusion of any kind. In *United Food and Commercial Workers, Local 1400 v. Household Trust Company*, [1987] Mar. Sask. Labour Rep. 29, LRB File No. 087-86, the Board declined to allow an exclusion of any clerical position from a bargaining unit composed of the employees of a branch of a trust company on the grounds that the employer's industrial relations were primarily conducted at higher levels of the company than the branch level; the Board determined, at 30-31, that the access of the persons in the positions in dispute to confidential information regarding the employer's industrial relations was merely "incidental and without purpose" and that the positions were not involved "to any significant degree in collective bargaining, the administration of the collective agreement or labour relations in general."

[22] In the present case, however, while SAHO does represent the province's health districts, including the Employer, at the bargaining table with the health sector unions, it is merely the bargaining agent and relies upon the advice and direction of the health districts. The health districts are integrally charged with the day-to-day administration of the collective agreement with the Union and the minor

labour relations problems that arise on a constant basis. Accordingly, the Employer in the present case is not the counterpart to SAHO that the branch was to head office in *Household Trust, supra.* The evidence adduced discloses that, at a local level, the OH&S department is regularly involved in the collection of information and reporting about individual employees in the bargaining unit that will potentially affect their employment and access to programs such as Workers' Compensation benefits, and at a broader level, it is regularly involved in the analysis and reporting of information, and consultation with respect to matters that impact the formulation of policy and strategy for collective bargaining by SAHO on the Employer's behalf.

[23] We are satisfied that the job duties of the director of the OH&S department to a significant degree are regularly related to the industrial relations of the Employer in regard to both collective agreement administration and the Employer's role in collective bargaining with the Union by SAHO. We have had the benefit of the evidence of the incumbent, Ms. Sliva, who has been working in the disputed position providing clerical support to the director for some time. We are satisfied that the volume of clerical duties associated with the performance of the director's job reasonably requires the professional clerical and administrative support presently rendered by Ms. Sliva, and requires that Ms. Sliva regularly act in a confidential capacity with respect to the industrial relations of the Employer. The evidence shows that a large portion of Ms. Sliva's duties regularly require her to access information and correspondence, and prepare documents and correspondence, directly related to the administration of the collective agreement that may affect the terms and conditions of employment of individual employees in the bargaining unit, and with respect to matters directly related to collective bargaining on behalf of the Employer.

[24] For the reasons set out above, it is determined that the position of Confidential Secretary, Occupational Health and Safety department, is excluded from the bargaining unit. If the parties require an amended order, they should advise the Board accordingly.

CANADIAN UNION OF PUBLIC EMPLOYEES, Applicant v. UNIVERSITY OF SASKATCHEWAN and ADMINISTRATIVE AND SUPERVISORY PERSONNEL ASSOCIATION, Respondents

LRB File No. 154-00; June 5, 2001
Chairperson, Gwen Gray; Members: Judy Bell and Duane Siemens

For the Applicant: Harold Johnson
For the Respondent Employer: Neil Gabrielson, Q.C.
For the Respondent Union: Gary Bainbridge

Union – Company dominated – At time of certification significant public interest grounds exist for permitting another trade union or labour organization to intervene to assert that applicant organization is company dominated – As time passes after certification, it is members of certified trade union who hold real and direct interest in trade union's status – Board concludes that, under circumstances of case, second union lacks necessary interest to bring application alleging company domination of certified trade union.

***The Trade Union Act,* ss. 2(e), 2(h), 5(h), 11(1)(b) and 11(1)(k).**

REASONS FOR DECISION

Background

[1] Gwen Gray, Chairperson: Canadian Union of Public Employees ("CUPE") is certified to represent employees in various bargaining units at the University of Saskatchewan (the "Employer"). It brought an application against the Employer alleging that the Employer is bargaining with a company dominated union contrary to ss. 11(1)(b) and (k) of *The Trade Union Act,* R.S.S. 1978, c.T-17 (the *"Act").* The alleged company dominated union is the Administrative and Supervisory Personnel Association ("ASPA"), which is also certified to represent employees in a bargaining unit with the Employer.

[2] The Employer replied to the application by asserting (1) the issue of company domination of ASPA is *res judicata*; (2) CUPE is estopped from raising the issue at this time by virtue of the principles of *laches* and/or acquiescence; (3) the Employer contributions to ASPA are similar to the

contributions the Employer makes to CUPE; (4) all collective agreements between ASPA and the Employer have resulted from arms-length negotiations.

[3] ASPA also filed a reply to the application in which it denied the involvement of the Employer in its formation or administration; denied the Employer's involvement in ASPA's certification; asserted that CUPE's allegations are *res judicata* having been made and determined in LRB File No. 602-77; asserted that the doctrine of issue estoppel arises because the issues raised by CUPE could have been raised in LRB File No. 602-77. ASPA also replied in detail to the particulars relied on by CUPE in bringing its application.

[4] ASPA served notice that it intended to object to CUPE's status to bring the application in question.

[5] A hearing was held in Saskatoon on January 9, 2001.

[6] At the hearing, the Board heard arguments from the parties on the preliminary issue of standing and adjourned the hearing to determine the preliminary issue. These Reasons address the question of CUPE's standing to bring the application.

Relevant Statutory Provisions

[7] Sections 11(1)(b) and (k) 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:*
>
> > *(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;*
>
> . . .
>
> *(k) to bargain collectively with a company dominated organization;*

Argument

[8] Mr. Bainbridge, counsel for ASPA, argued that CUPE has no direct or indirect interest in the subject matter of this application. He noted that CUPE has not filed support evidence claiming to represent any employees who fall within ASPA's bargaining unit. CUPE stands to the Employer and ASPA as would any other trade union. It has no special status and no interest that would give it a right to bring the application in question.

[9] Counsel for ASPA referred the Board to *Merit Contractors Association Inc. v. Saskatchewan Provincial Building and Construction Trades Council et al.,* [1996] Sask. L.R.B.R. 119, LRB File No. 098-95 and *Saskatchewan Government and General Employees Union and Government of Saskatchewan,* [1999] Sask. L.R.B.R. 404, LRB File No. 114-99.

[10] Mr. Gabrielson, Q.C., counsel for the Employer, encouraged the Board to consider Mr. Bainbridge's arguments.

[11] Mr. Johnson, counsel for CUPE, argued that there is no other body to bring the application but CUPE. Counsel noted that members of ASPA have a direct supervisory role over CUPE members at the University and in some situations, are responsible for creating positions which are then placed in the ASPA bargaining unit. CUPE is of the view that ASPA is taking jobs away from CUPE members and is able to do so because of its relationship with the Employer.

Analysis

[12] The issue of standing is determined in part by reference to s. 6(1) of the Regulations to the *Act,* Sask. Reg. 165/72 which provides:

> *6(1) Any trade union or any person directly affected may apply to the board for an order or orders determining whether or not any person has engaged in or is engaging in any unfair labour practice or any violation of the Act, and requiring such person to refrain from engaging in any such unfair labour practice or any violation of the Act.*
>
> *(emphasis added)*

[13] The Board considered the standing issue in *Merit Contractors Association Inc., supra.* In that case, Merit Contractors Association Inc. brought an application against various respondents who were parties to the Crown Construction Tendering Agreement alleging that the Agreement violated various provisions of the *Act.* The standing of Merit Contractors Association Inc. to bring the application was challenged and the Board held that it lacked standing to bring the unfair labour practice application. At 125, the Board referred to *Construction Association Management Labour Bureau v. International Union of Heat & Frost Insulators & Asbestos Workers,* [1978] 2 Canadian LRBR 150, where the Nova Scotia Labour Relations Board stated the test as follows:

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

[14] The Board found that the interests of non-union contractors in the Crown Construction Tendering Agreement were not sufficient to give them standing to challenge the terms of the Agreement under the *Act*.

[15] In the present case, we must assess the standing of CUPE *vis à vis* the relationship between the Employer and ASPA. CUPE asserts that the Employer has committed an unfair labour practice by bargaining with a company dominated organization contrary to s. 11(1)(k). "Company dominated organization" is defined in s. 2(e) as:

> *. . . a labour organization, the formation or administration of which an employer or employer's agent has dominated or interfered with or to which an employer or employer's agent has contributed financial or other support, except as permitted by this Act;*

[16] An "employer's agent" is defined in s. 2(h) as:

> *(i) a person or association acting on behalf of an employer;*
>
> *(ii) any officer, official, foreman or other representative or employee of an employer acting in any way on behalf of an employer with respect to the hiring or discharging or any of the terms or conditions of employment of the employees of the employer;*

[17] The purpose of the provision is to prevent employers from improperly influencing employees with respect to their choice of trade unions. In *Canadian Union of Public Employees v. Bo-Peep Co-operative Day Care Centre,* [1979] Feb. Sask. Labour Rep. 44, LRB File No. 189-78, the Board considered whether a trade union was company dominated as the result of the participation of a managerial person in the union's organizing campaign. The issue was raised by the employer who had been unaware of the role of its director in the organizing of the union. The Board found that the director of the daycare was an employer's agent as defined above. There was no evidence, however, that the director was involved in the formation of the local union, which was a composite local of CUPE involving more than one employer. Similarly, there was no evidence that the director had anything to do with the administration of the local. As a result, the Board found that the local of

CUPE was not "company dominated." It did caution, however, that organizations that permit persons who perform managerial functions to participate in their affairs leave themselves open to the accusation that they are company dominated organizations.

[18] In *Kinetic Construction Ltd. v. Local #1 Canadian Iron, Steel and Industrial Workers Union ("CISIWU") and Victoria Labour Council,* [1992] B.C.L.R.B. No. C45/92, the British Columbia Industrial Relations Council considered an application brought by the Victoria Labour Council against Kinetic Construction Ltd. and CISIWU alleging that the latter was a company dominated organization. An issue arose with respect to the standing of the Victoria Labour Council to bring the application in question as it was not a trade union and could not assert any direct interest under the British Columbia Labour Code. In that instance, the Council held as follows at 10 and 11 (QL):

> *We begin by addressing the issue of standing. In International Paper Industries Ltd., IRC No. C145/89, the IRC followed the test set by Madam Justice Rowles of the Supreme Court of British Columbia in Sandy Nelles and the Parents' Association of Marian Regional High School, Vancouver Registry A881729 (June 15, 1988) as one in which the party applying for interested party status must "demonstrate that its interest would be affected in a direct, legal and material way by the outcome of the proceedings or that its application raised an issue or issues of significant importance within the labour relations community."*
>
> *The panel went on to say that "to simply state the test for granting interested party status is of little assistance. It is necessary to consider the relevant jurisprudence and infer from it the kinds of facts necessary to support a finding of direct legally material interest." What followed in that case was a review of a number of significant Labour Relations Board and IRC cases in which interested party status was granted on certification applications. Without repeating that review, several common features become apparent. In cases where a union is competing in an organization drive with the applicant union, where a union already has a relationship with the employer for some or all of its employees, where a union's organizing efforts are defeated by an employer's build-up of bargaining units members or in cases of alleged unfair labour practices, unions were found to have direct and legally material interests. In the case before us, the party which would*

have come within those parameters was the Carpenters. They chose not to file an application or participate in the hearing as a party.

We note that the Labour Council said at the hearing that it represents the interests of certain employees who complained to it regarding the certification of CISIWU. A review of the Labour Council's December 12, 1990 letter to the IRC discloses that at the time the letter was sent, the only employee who complained did not have, at that time, and, at the present time, does not have an employment relationship with Kinetic. A review of further correspondence reveals that other employees upon whose evidence the Labour Council relies were similarly situated. There was no allegation that these employees were dismissed or in any way discriminated against for their support of the Carpenters or opposition to CISIWU. Had the Labour Council been representing current employees of Kinetic, i.e. persons who were employees at the time of the application, or former employees who claimed an improper termination of the employment relationship, then the case would had been styled as an application by "certain employees" represented by the Labour Council. On that basis we might have been disposed to an argument that the Labour Council is representing employees with a direct and legally material interest. However, given that the employees whom the Labour Council did purport to represent at this hearing did not have an employment relationship with Kinetic at all relevant times, it cannot qualify under this branch of the Marian Regional High School test, supra. As a result, the only branch of the test under which the Labour Council can obtain interested party status is the second. It must raise an issue or issues of significant importance to the labour relations community. We conclude that such an issue has been raised.

The certification process under the Act is an expedited process designed to facilitate employees' ability to choose a bargaining representative. It supplants the recognition strike. The IRC hears many certification applications, the majority of which are granted without objections from employers. While the IRC must be satisfied that the trade union applying for certification is a trade union within the meaning of the Act, that it has the requisite support amongst employees on the date of application, and that the bargaining unit for which it applies is appropriate for

collective bargaining, the IRC cannot nor does it have the resources to conduct a full evidentiary hearing or full evidentiary inquiry into each case, particularly where there are no objections to the certification application from any interested parties. In many cases the employer does not even appear. It has long been recognized, although not regularly articulated, that such uncontested applications are granted almost pro forma as long as the matters upon which the IRC must be satisfied have been prima facie met. In doing so, the IRC relies on an investigation conducted by the Industrial Relations Officer in the field, and it relies on the integrity of the parties concerned. Where either the trade union or an employer try to tamper with the process, the other party usually brings that to the IRC's attention through an objection to the application or through a concurrent unfair labour practice complaint. But on occasion, a rare case may arise where an employer's tampering favours or assists a trade union. The trade union which may be the beneficiary of such gratuitous interference is unlikely to come before the IRC to impeach its own application. Employees, on the other hand, who would in law be in the position to raise an objection may not necessarily be aware of the facts or of their rights or the channels through which to pursue them. A labour board may determine an uncontested certification application unaware that certain events have taken place which, if known, could place that application in jeopardy. In such cases, the IRC should be prepared to accept evidence put before it by any person with a general but legitimate labour relations community interest which would assist in maintaining the integrity of the process.

[19] After cautioning that care should be taken in such instances, the Council concluded at 12 (QL):

. . . there is significant merit to the Labour Council's concern viz-a-viz Kinetic. The revelation of significant facts, where these facts affect a process in which decisions are made on an expedited basis and in which the Council depends on the integrity of the parties by and large, is a matter of significant importance to the labour relations community which must be addressed. On that basis we have concluded that the Labour Council has standing under the second branch of the test set down by the courts to

present the evidence in support of its allegations that the certification process was significantly flawed in this case.

[20] In the present case, CUPE offers the following grounds for its application:

(1) The Employer was involved in the formation and certification of the organization.

(2) The Employer has contributed substantial funds to the operation of the organization.

(3) The collective agreement between the parties is unilaterally imposed by the Employer.

(4) ASPA included and includes in its membership substantial numbers of Employer's agents, some of who are or have been officers of the organization.

[21] With respect to the first issue, we note that in the certification application relating to ASPA [LRB File No. 602-77], the Board made a finding that ASPA is a "trade union" as that term is defined in s. 2(l) of the *Act*. ASPA would have been required to establish its status as a trade union in LRB File No. 602-77 as this was the first time the Board had dealt with a certification application from ASPA. It would seem to the Board that CUPE, as the then certified bargaining agent for "all employees" of the Employer, had a legitimate interest in raising the issue of ASPA's trade union status at the time of the certification application. CUPE participated in the hearing although we are unable to ascertain from the records whether the issue of company domination was raised.

[22] At the time of certification, there are significant public interest grounds for permitting another trade union or labour body to intervene and assert that the applying organization is company dominated. As indicated by the British Columbia Industrial Relations Council, without the intervention of "friends of the Board," so to speak, employer domination may not come to the attention of the Board panel hearing a case.

[23] However, as time passes, the membership of the labour organization are surely the real judge of the *bona fides* of a trade union. ASPA has many members who are well educated and quite capable of organizing a campaign to decertify ASPA or to replace it with a different trade union.

They are the ones who now hold a real and direct interest in the status of ASPA as a trade union. In our view, CUPE's entitlement to claim a public interest ground for its application has elapsed since the issuing of ASPA's Certification Order.

[24] Does CUPE have any direct or material interest in the issue at this stage? CUPE argues that its membership is unduly affected by the fact that ASPA is company dominated. CUPE asserts that ASPA has an advantage because its members can create new positions and design them to fit the criteria of belonging to ASPA. In essence, CUPE complains that ASPA members are provided too many managerial or supervisory responsibilities and they use them for the benefit of ASPA and to the detriment of CUPE.

[25] In our view, this issue is insufficient to give CUPE a real or direct interest in attacking the status of ASPA. In previous cases before the Board, CUPE has raised many questions regarding the appropriateness of the ASPA bargaining unit and its relationship to the CUPE bargaining unit. The Board has noted that the line drawn between the two units is somewhat haphazard and difficult to administer. Nevertheless, a test has evolved for determining placement of new positions in one or the other bargaining unit and CUPE has access to the Board for assistance in relation to the assignment of new positions. The power to create new positions almost always rests with the Employer who can design new positions to fall in either bargaining unit, or out-of-scope and structure its workforce in the manner it thinks most suitable. The fact that CUPE views the Employer as favouring ASPA in the creation of new positions is not one that gives rise to a real or direct interest on the part of CUPE in challenging the status of ASPA as a trade union. It would seem to the Board that CUPE's real interest, in this case, is limited to the assignment of positions between bargaining units.

[26] For these reasons, the Board finds that CUPE lacks the necessary interest to bring the application in question and its application is dismissed.

DARREN MAYER, Applicant v. L. L. LAWSON ENTERPRISES LTD., WHITE SAND ENTERPRISES LTD. P. & M. HOTELS LTD. and CHAINLINK ENTERPRISES LTD. o/a SEVEN OAKS INN, REGINA and UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Respondents

LRB File No. 013-01; June 5, 2001
Vice-Chairperson, James Seibel; Members: Mike Geravelis and Mike Carr

For the Applicant: Susan Barber
For the Respondent Union: Drew Plaxton
For the Respondent Employer: Larry LeBlanc, Q.C.

Decertification – Interference – Applicant solicited fellow employees individually without advice, encouragement, support or assistance from employer – Applicant's views about trade unions extreme and uninformed but not implausible as forming basis for motivation to bring application – Board declines to find employer interference or influence pursuant to s. 9 of *The Trade Union Act*.

Decertification – Practice and procedure – Where rescission and first collective agreement application concurrently pending, in certain circumstances, Board may exercise discretion to dismiss rescission application - Board must examine whether employees fundamentally unhappy with union because of its own actions or neglect or because of employer's conduct or default – Board declines to dismiss present application under circumstances.

***The Trade Union Act*, ss. 5(k), 9 and 26.5.**

REASONS FOR DECISION

Background

[1] James Seibel, Vice-Chairperson: By an Order of the Board dated February 21, 2000 (LRB File No. 327-99) United Food and Commercial Workers, Local 1400 (the "Union") was designated as the bargaining agent for a unit of employees employed by L.L. Lawson Enterprises Ltd., Whitesand Enterprises Ltd., P. & M. Hotels Ltd. and Chainlink Enterprises Ltd., operating as Seven Oaks Inn, Regina (the "Employer"). Darren Mayer, an employee and member of the bargaining unit, filed an application for an order pursuant to s. 5(k) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") rescinding the Certification Order on January 17, 2001. In its reply to the application, the Union

asserts that the application ought to be dismissed pursuant to s. 9 of the *Act*, alleging that it is made in whole or in part on the advice of, or as a result of influence of or interference by the Employer. The Board heard the application on April 26, 2001.

[2] Following certification, the parties commenced bargaining for a first collective agreement. However, on November 23, 2000, the Union filed an unfair labour practice application (LRB File No. 293-00) alleging the Employer had engaged in bad faith bargaining in violation of s. 11(1)(c) of the *Act* and a further application (LRB File No. 294-00) seeking assistance in achieving a first collective agreement pursuant to s. 26.5. The Board heard the applications in March, 2001; the applications were subsequently withdrawn.

[3] At the commencement of the hearing of the present application, the Union and the Employer informed the Board that they had reached a tentative first collective agreement, subject to ratification by the Union, which included withdrawal of the unfair labour practice and first contract assistance applications. Mr. Mayer and his counsel, Ms. Barber, first learned of these developments at the hearing. There was a short adjournment so they could consider the tentative agreement and Mr. Mayer's position with respect to his application for rescission. Mr. Mayer determined to proceed with the application.

[4] The statement of employment was not in issue. On the date the application was filed, there were 88 employees in the bargaining unit. Evidence purporting to demonstrate that a majority of the employees support the application was filed with the Board.

[5] Mr. Mayer testified on his own behalf. He has been employed full-time as a painter at the Seven Oaks Inn for eight years. Mr. Mayer testified that he consistently has been averse to the presence of the Union in the workplace since he first learned of its organizing efforts, and since the Certification Order was issued has been systematically canvassing his fellow employees with respect to whether they would support an application to rescind the Order. He said he had not been involved in the Union's organizing campaign and has only attended one meeting of the employees since certification when an officer of the Department of Labour attended an information session to explain the situation to the employees and answer their questions. Indeed, he said that at that meeting he inquired as to how long the employees would have to wait to decertify the Union.

[6] Mr. Mayer testified that he has never had any interest in the progress of collective bargaining between the Union and the Employer, has no interest in knowing, and has never inquired, about what the Union might be able to achieve for the employees in bargaining, and is not now interested in the substance of the tentative agreement that has been reached. Mr. Mayer described himself as capable of handling his own employment relationship with the Employer and expressed absolute confidence that he could negotiate and obtain better terms and conditions of work for himself than could the Union. He expressed an aversion to paying union dues (although to date none have been collected) and to the idea that he might be required by the Union to participate in a strike. He opined that the presence of the Union had split the employees in the workplace and created tension between them.

[7] Mr. Mayer testified that he met with the majority of approximately 80 of the employees alone and face-to-face at the workplace, planning his visits with them by consulting the departmental schedules posted in the workplace indicating when they would be working and a telephone list of restaurant and lounge employees kept at the restaurant hostess station. He was adamant that he did so without the knowledge, assistance, encouragement or approval, express or tacit, of any person in management. He said that any employee who advised him that they were not interested in supporting an application for rescission, he did not approach again; on the other hand, if they advised him that they would support such an application or were non-committal, he added their name to a list he kept so he could approach them to sign a document indicating their support for an application at a later date. Mr. Mayer testified that he neither sought nor received any information or assistance from the Employer to facilitate his contacting the employees. He spoke to a handful of the employees on the telephone or at their homes. He indicated that his personal meetings with employees were characteristically brief and casual and were held anywhere at the hotel that was convenient and relatively private but without much regard as to whether he or the employee was then on or off shift or a break.

[8] Mr. Mayer testified that in working to garner the support of employees he told some of them that he thought they could better improve their terms and conditions of work without the Union, but that most typically they asked no questions and he offered no opinions.

[9] In cross-examination, Mr. Mayer admitted that he sometimes met with Glen Weir, the food and beverage manager, in Mr. Weir's office behind the hotel front desk to discuss details of the painting of banquet facilities at the hotel or to determine the work shifts of managers and employees for whom he was rendering painting services outside of work. Although he could not remember any specific time when it had happened, he agreed that it was possible that he and Mr. Weir might have been observed looking at one department schedule or another together in his office during the period of time when he was garnering support for his application.

[10] When asked how he came to consult his solicitor, Ms. Barber, for the purposes of making the present application, Mr. Mayer said that he was introduced to her in December, 2000 by a fellow employee, Deborah Dahl, who he said had expressed an interest early on in obtaining rescission of the Union's bargaining rights; he admitted that he did not ask for Ms. Dahl's assistance in finding a lawyer, and to that point had made no efforts to consult one himself. Mr. Mayer said that he did not know how Ms. Dahl knew Ms. Barber. He admitted that he believed that Ms. Dahl was friendly with managers, Crystal Lawson and Candace Lawson. He said that he alone undertook to perform all the work necessary to prepare the application and obtain evidence of support, and he did not ask Ms. Dahl for her assistance. Mr. Mayer testified that he understood that the services of his counsel might run into the thousands of dollars and that he was prepared to bear the cost alone if he could not obtain contribution from his fellow employees; he indicated that to date he had received contributions of a few hundred dollars from employees.

[11] In cross-examination, Mr. Mayer denied the assertion that he had mentioned to at least one employee, Nick Dalrymple, when soliciting his support for the application, that "it would look better to management if you signed," testifying instead that what he said was, "it would look better for us if you signed."

[12] Glenn Stewart has been a representative of the Union since 1993. He is on the Union's bargaining committee with the Employer. He testified with respect to the history of the relationship between the Union and the Employer since certification. He said that he had once been upbraided by manager, Len Lawson, for meeting with an employee in the workplace in a location other than the employees' lunch room.

[13] Margaret Dunkeld has worked for the Employer on the front desk for twelve years. She is on the Union's bargaining committee. She said Mr. Mayer approached her with respect to supporting an application for rescission while she was in the hotel kitchen on a break. She said that no other employees were around at the time and she did not know whether Mr. Mayer was on shift. She said that it would not be unusual for Mr. Mayer to be seen in a manager's office on some occasion or another.

[14] Joe Gustafson has worked in housekeeping for the Employer for the past year and a half. He is on its bargaining committee. He said that Mr. Mayer approached him in mid-November, 2000 while he was working alone in a hotel hallway and asked him whether he would support an application to decertify the Union. It did not appear to him that Mr. Mayer was being secretive about their meeting. Mr. Gustafson also testified that while recently involved in negotiations on behalf of the Union, during a break he had served a fellow employee, Dawn Millar, while she was on shift, with a subpoena to attend the present proceedings. He said that shortly afterwards Len Lawson reprimanded him and threatened to fire him for doing so.

[15] Dawn Millar has worked for the Employer in housekeeping for two years. She testified that in January, 2001 Mr. Mayer approached her while she was working alone in a hotel hallway and asked whether she would sign a document in support of an application for rescission. After she advised him that she was not sure about what to do, he left, but she estimated that he subsequently approached her on perhaps five occasions with respect to the issue. She indicated that she felt pressured by him to provide her support for the application.

[16] Desiree Rose has been employed in the Seven Oaks Inn lounge for three years. She testified that in mid-January, 2001, while delivering a business document to Mr. Weir in his office, she observed he and Mr. Mayer looking together at what she believed to be the restaurant/lounge employee work schedule. She indicated that the schedule is also posted in the lounge, the kitchen and at the hostess station. However, she did not indicate that Mr. Mayer's presence in Mr. Weir's office was particularly odd.

[17] Nick Dalrymple has been employed at the Seven Oaks Inn as a part-time porter and pool attendant for two and a half years. He testified that Mr. Mayer approached him in January, 2001 while he was working alone in the pool area and asked whether he would sign a document in support of a rescission application. Mr. Dalrymple was adamant that Mr. Mayer advised him that "it would look good in the eyes of management" if he supported the application and he would probably get a better raise.

[18] Counsel for the employer, Mr. LeBlanc, offered to allow counsel for the Union, Mr. Plaxton, to cross-examine Mr. Weir. Mr. Weir stated that he first heard rumours about decertification probably sometime in January, 2001, but was unable to say whether it was before or after the present application was filed. He was adamant that he had never discussed the issue with Mr. Mayer, Ms. Dahl or any other employee. He said that he mentioned the rumour to Len Lawson but that that was the extent of their discussion. He indicated that both he and Mr. Lawson had prior experience in managing unionized properties and they both "understood they should do nothing" with respect to efforts to rescind the Certification Order. Mr. Weir testified that it was not unusual for Mr. Mayer or other employees to come and see him in his office.

Statutory Provisions

[19] Relevant statutory provisions include the following sections 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:*
>
> *(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.

. . .

26.5(1) Either party may apply to the board for assistance in the conclusion of a first collective bargaining agreement, and the board may provide assistance pursuant to subsection (6), if:

(a) the board has made an order pursuant to clause 5(a), (b) or (c);

(b) the trade union and an employer have bargained collectively and have failed to conclude a first collective bargaining agreement; and

(c) any of the following circumstances exist:

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

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

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

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

Argument

[20] Ms. Barber, counsel for Mr. Mayer, argued that there was no evidence of influence or interference by the Employer in the making of the application for rescission. She asserted that the evidence demonstrated that Mr. Mayer consistently has been against Union representation since he first learned it was organizing at the workplace and did not obtain advice or receive suggestions or encouragement from anyone in management with respect to the application. Citing the Board's decision in *Chrunik, et al. v. International Brotherhood of Electrical Workers, Local 2038 and National Electric Ltd.*, [1996] Sask. L.R.B.R. 568, LRB File No. 060-96, counsel argued that it is not enough for the Union to simply say that the Employer must have known that Mr. Mayer was garnering support for the application at the workplace and that by not taking active steps to prevent his activity it influenced the making of the application. She pointed out that all of the Union's witnesses, with the exception of Ms. Millar regarding one instance, testified that when Mr. Mayer approached them they were working alone or on a break and their meeting with him was private. With respect to the one exception cited by Ms. Millar, she indicated that one or two other employees were in the vicinity. Counsel relied upon the Board's decisions in *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, and *Smith v. Remai Investment Corporation o/a Imperial 400 Motel and United Food and Commercial Workers*, Local 1400, [1997] Sask. L.R.B.R. 1, LRB File No. 342-96, to support her argument that, in any event, the evidence did not disclose that the ability of the employees to make a decision about union representation had been compromised.

[21] Citing *Chrunik, supra*, and *Wells v. Remai Investment Corporation o/a Imperial 400 Motel and United Food and Commercial Workers, Local 1400*, [1996] Sask. Labour Rep. 194, LRB File No. 305-95, Ms. Barber further argued that the evidence disclosed that Mr. Mayer had given serious thought to his decision to make the application but that he was not required to demonstrate that his views were either accurate or fair.

[22] Counsel for the Employer, Mr. LeBlanc, addressed the issue of alleged Employer influence or interference and asserted that there was no evidence of same.

[23] Counsel for the Union, Mr. Plaxton, made two main arguments. First he asserted that there was sufficient evidence of Employer influence to fatally taint the application, and, secondly, he argued that, because of the pending application for first contract assistance pursuant to s. 26.5 of the *Act*, the Board should dismiss the application in any event.

[24] With respect to the first issue, Mr. Plaxton argued two points: first, he asserted that while the evidence of Employer influence in making the application in the present case might be subtle, it was ample and sufficient to improperly affect Mr. Mayer and other employees who have ostensibly expressed support for the application in arriving at their decision; and, second, that Mr. Mayer's professed reasons for making the application are irrational and implausible and we ought therefore to draw the conclusion that he was improperly influenced to make the application. In support of these propositions, counsel cited the decisions of the Board in *Cook v. Shelter Industries Inc. and International Woodworkers of America*, Local 1-184, [1981] Mar. Sask. Labour Rep. 34, LRB File No. 368-80; *Poberznek v. United Masonry Construction Ltd. and International Union of Bricklayers and Allied Craftsmen*, Local No. 3, [1984] Oct. Sask. Labour Rep. 35, LRB File No. 245-84; *Wells v. Remai Investment Corporation o/a Imperial 400 Motel and United Food and Commercial Workers, Local 1400,* [1996] Sask. L.R.B.R. 194, LRB File No. 305-95; and, *Schaeffer, et al., v. Loraas Disposal Ltd. and Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, [1998] Sask. L.R.B.R. 573, LRB File No. 019-98.

[25] Mr. Plaxton specifically referred to the apparent conflict in the testimonies of Mr. Mayer and Mr. Dalrymple regarding their meeting and suggested that if Mr. Dalrymple's version of their meeting is accepted, it is cogent evidence from which to draw the inference that the Employer improperly influenced Mr. Mayer. Counsel also argued that an important factor to consider in the present case was the weakness of Mr. Mayer's explanation as to how he was going to pay the legal fees to make the application, referring to the Board's decision in *Leavitt v. Confederation Flag Inn (1989) Ltd. and United Food and Commercial Workers, Local 1400*, [1990] Summer Sask. Labour Rep. 61, LRB File No. 225-89.

[26] With respect to the second issue, Mr. Plaxton argued that the Board ought not to consider an application for rescission of a Certification Order while an application for assistance to conclude a first collective agreement is pending before the Board pursuant to s. 26.5 of the *Act*. In advancing his argument counsel referred to the decision of the Board in *Dyck v. Bridge City Electric (1981) Ltd. and International Brotherhood of Electrical Workers*, [1983] Feb. Sask. Labour Rep. 46, LRB File No. 370-82. In that case, an application for rescission was filed during the course of a lengthy strike by the union against all unionized employers in the electrical trade division of the construction industry including the respondent. After referring to the Canadian jurisdictions which at that time by statute restricted decertification proceedings during a strike or lockout, the Board expressed concern about the situation, as follows, at 47:

> *Although it does not have a similar legislative time restriction, the British Columbia Labour Board has expressed a similar reluctance to decertify during a strike or lockout. The approach of that Board is based on one of the fundamental principles of the British Columbia Labour Code which, indeed, is a fundamental principle of the Saskatchewan Trade Union Act. That principle is that a collective bargaining impasse should be settled by a strike or lockout process. To decertify during such an impasse could, in some cases, involve the Board to an unacceptable extent in the collective bargaining process and could terminate a collective bargaining dispute in a manner not contemplated by the code.*

Another basis for the reluctance of the British Columbia Labour Board is expressed in Adams Laboratories Limited, (1980) 2 Can. LRBR 101, where decertification is seen as a clash between two competing groups of employees, each of which is seeking to exercise a legal right. One group continues to strike and picket as they have a legal right to do. Another group have decided not to strike but to cross the picket line and to continue to work as they have a legal right to do. To grant decertification in these circumstances would effectively extinguish one of those competing legal rights, while withholding decertification would not extinguish the rights of anyone.

We agree with the thinking of the British Columbia Labour Relations Board on these matters.

We have considered all the facts and circumstances surrounding the application and we have not been persuaded to grant the decertification requested. This Board has held on many occasions that it will avoid becoming involved in the collective bargaining process. It will be especially careful to avoid interfering with that process by granting a decertification order during a strike or lockout.

[27] Counsel argued that, by analogy, because s. 26.5(2) of the *Act* prohibits the commencement or continuation of a strike or lockout where an application has been made for the assistance of the Board in the conclusion of a first collective agreement – that is, it prevents or suspends the exercise of the rights of the employees and the employer, as the case may be, to use their respective economic power when collective bargaining has broken down – to consider an application for decertification filed after the application for first contract assistance but before it is determined, would grant an unfair advantage to one of the competing groups referred to in *Dyck*, *supra*, and in such circumstances the decertification application should be dismissed. Counsel argued that consideration of a decertification application while first contract assistance is pending runs counter to the spirit and intent of the concept of assisting the parties to resolve their collective bargaining differences without resort to strike or lockout, while exposing the Union to the risk of obliteration.

[28] Mr. Plaxton further argued that the procedure adopted by the Board in *Choponis v. Madison Development Group Inc. o/a Madison Inn, and United Food and Commercial Workers, Local 1400*, [1996] Sask. L.R.B.R. 511, LRB File No. 226-95, where it suspended the vote on the rescission application until after the disposition of the first contract application would be an imperfect resolution in the present situation in that it would create a conflict between employees who would be asked, in short succession, to vote on ratification of the recent tentative collective agreement and then on whether they supported the Union.

[29] In reply to this issue, Ms. Barber argued that it would be unfair to dismiss the application by which Mr. Mayer and the other employees that supported it were attempting to exercise rights protected by the *Act* given that the time when a rescission application may be made is mandated by statute and its contemporaneity with the first contract assistance application was merely coincidental. Counsel also asserted that to accede to the Union's argument would allow unions, in other circumstances, to use applications under s. 26.5 for a purpose other than legitimately seeking first contract assistance, viz., to preemptively defeat a feared application for decertification.

[30] As an experienced practitioner before the Board, Mr. LeBlanc was invited to comment upon the proposition made by Mr. Plaxton. He pointed out that the Board's delay of the representation vote on the rescission application until after the first contract assistance application was disposed of in *Choponis v. Madison Development Group, supra,* was as far as the Board had ventured in this area, and he opined that the situation in *Dyck v. Bridge City Electric, supra*, was distinguishable in that in that case there was an active strike in progress, whereas in the present case the Union does not possess even a strike mandate from the employees. Mr. LeBlanc suggested that, in the event the Board allowed the present application, it might consider delaying the representation vote for a period of time – perhaps a few months – after the tentative collective agreement is signed.

[31] However, Mr. Plaxton expressed concern with the suggestion to delay a representation vote for several months, citing fears of a deterioration of the constituency of voters that might result because of employee turnover.

Analysis and Decision

[32] There is no issue that the application was filed on behalf of Mr. Mayer during the "open period" mandated by the *Act* for an application to rescind a Certification Order where no collective bargaining agreement exists. And, ostensible evidence that a majority of employees support the application was filed with the Board.

[33] On carefully considering the whole of the evidence, we are not satisfied that the application is made in whole or in part on the advice of, or as a result of influence or intimidation by the Employer or Employer's agent.

[34] Mr. Mayer's evidence that he did not solicit or receive advice, encouragement, support or assistance of any kind from the Employer in assembling, or garnering support for, the application was delivered forthrightly and with a conviction that impressed us as coherent and honest. All of the witnesses called to testify by the Union, with the exception of Ms. Millar as to one of her several meetings with Mr. Mayer, corroborated his assertion that he approached the employees individually, in the absence of other persons, and was respectful of any indication that they declined to provide evidence of support for the application. While the circumstances of the direction by Ms. Dahl of Mr. Mayer to a particular lawyer was unexplained – that is, how she herself came to first consult the lawyer – there was evidence that she shared Mr. Mayer's views about Union representation from a date shortly after certification. There was no evidence to tie her to any assistance or encouragement by the Employer to seek legal advice herself or to procure or suggest same to Mr. Mayer.

[35] Mr. Weir, the food and beverage manager, who was voluntarily produced for cross-examination by counsel for the Employer, also struck us as forthright and believable in his assertion that he had no involvement, active or tacit, in procuring or assisting in the application. He appears to have been genuinely unaware of Mr. Mayer's activities until at least a late date prior to filing, which is not incredible given the corroborated evidence of Mr. Mayer's discretion and planning in approaching employees to sound their views of support for his application.

[36] In *Poberznek, supra*, the Board dismissed an application for rescission in part because it considered that the applicant failed to provide a plausible explanation for his desire to decertify the union. In brief reasons for its decision, the Board reported as follows, at 36:

> *[The Applicant] testified that he was applying [for rescission of the Certification Order] 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 of 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 slowdown 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 the Saskatchewan. Although he had no reason to believe that he would be laid off, he expressed concern that there would be a shortage of work because existing wage rates were too high.*
>
> *According to the applicant, it was simply coincidence and good luck that he first consulted a lawyer during the 30 - 60 "open period" for applying for rescission. . . .*
>
> *Any one of the above circumstances would not necessarily cause the Board to conclude that this application was made as a result of influence, interference or intimidation by the employer. However, when taken together and viewed along with the evidence on LRB File No. 115 - 84, the Board is drawn to that conclusion. It cannot accept the proposition that the applicant acting spontaneously, alone, and at his own expense, with no knowledge of industrial relations between the employer and the union and no idea how the application might affect him personally, took it upon himself to retain a lawyer to apply for rescission at a time that happened to coincide with the available open period.*

[37] The Board dismissed the application upon drawing the inference that it was made as a result of influence by the employer.

[38] While Mr. Mayer's views regarding trade unions in general are extreme and, apparently, entirely uninformed, they are not implausible as forming the basis for his motivation for applying for rescission, given his admitted profound ignorance of industrial relations and his intentional attempts to remain so in that he declined at any time to obtain any advice or information regarding the nature, activities and performance of trade unions; and, although he actively and consistently avoided soliciting or receiving any such advice or information from anyone, it cannot be said that he had not adverted his mind to considering the potential effectiveness of the Union to better his personal pre-certification circumstances as the highest paid employee in the bargaining unit. The conclusion he arrived at was that without the assistance of a union he personally had done very well in comparison to his fellow employees, and believed that he would be in a better position to continue to do so in the absence of the Union. It does not appear that he either shared with his fellow employees the fact of his position as the highest paid employee in the existing wage structure and his apprehension that his ability to better his own situation might be adversely affected by the presence of the Union, or that he may not have had any altruistic motivation to improve their lot when soliciting their support for the application to decertify. One may not necessarily agree with his views, but we are satisfied that they are honestly held if based in abject ignorance.

[39] While Mr. Mayer's evidence conflicted on one point with that of Mr. Dalrymple – whether Mr. Mayer said that Mr. Dalrymple's signing in support of the application would look better "for the employer" or "for us" (meaning Mr. Mayer and his supporters) – regardless of which version is accepted, on the whole of the evidence we are not satisfied that it should lead us to draw the inference that Mr. Mayer was acting on the influence of the Employer. At worst, we find that he was simply articulating his belief, however cynical one might consider such a view, that supporters of a successful decertification might "look good" to the Employer, but in the absence of anything further, in all the circumstances, we are not led to draw an inference that the Employer is linked to Mr. Mayer's application.

[40] The Board outlined the purpose of s. 9 of the *Act* in *Schan v. Little Borland Ltd. and United Brotherhood of Carpenters and Joiners of America*, [1986] Feb. Sask. Labour Rep. 55, LRB File Nos. 221-85 & 227-85, at 58, as follows:

> *The purpose and intent of Section 9 is to ensure that applications made by employees do not succeed if they are made in whole or in part as a result of employer influence – not any influence, but influence that so compromises the employees' ability to make an informed, reasoned decision that their basic right to decide should be removed by the Board.*

[41] Citing this passage with approval in *Scheidt v. Pineland Co-operative Association Limited and Saskatchewan Joint Board, Retail Wholesale and Department Store Union*, [1995] 1st Quarter Sask. Labour Rep. 256, LRB File No. 239-94, at 259, the Board added:

> *What is generally required for the Board to decide that an application should be dismissed pursuant to Section 9 is a demonstration that an employer was linked to a rescission application in a way that casts doubt upon the ability of employees to make a decision independently. The evidence in this case disclosed no such link between the Employer and the group of employees who organized and supported the rescission application.*

[42] We find that influence of the kind described in these cases did not exist in the present case.

[43] However, even where the Board is satisfied of the bona fides of an application for rescission and of the surrounding circumstances, there is an over-riding discretion to dismiss the application, at least in certain circumstances, as demonstrated by the Board in *Dyck v. Bridge City Electric, supra.* As explained in the summary of arguments set out above, the Board in that case articulated a general policy, adopted from the experience of the British Columbia Labour Relations Board, to avoid interfering with the collective bargaining process by granting a decertification Order during a strike or lockout. However, the Board also expressed caution in its approach by adding the following caveat, at 47:

> *In dismissing this application the Board wishes to make it clear that it is in no way limiting its discretion to consider each application on the particular merits of the case.*

[44] The B.C. Board has quite recently confirmed its policy with respect to its discretion to disallow decertification during a strike as described in *Adams Laboratories, supra*, in *British Columbia Automobile Association v. Office & Professional Employees' International Union, Local 378*, [1999] BCLRB No. B282/99 (reconsideration dismissed [1999] BCLRB No. 515/99). At paras. 27 and 32, the B.C. Board expressed caution in stating that the exercise of its discretion must recognize and be consistent with "the balance of the [Labour Relations] Code," and that the board should be "most careful" in exercising its discretion if it would interfere with an on-going collective bargaining struggle, that is, if granting decertification would extinguish one of two competing rights.

[45] One of the purposes of the *Act* is to promote conditions favourable to the orderly, constructive and expeditious settlement of disputes between employers and unions and to promote collective bargaining. The ultimate sanction of strike or lockout is part of that process. To dismiss an application for rescission that is contemporaneous with a strike will not affect the right of any employee to continue working (should they decide to) but to allow such application would remove the right of employees who wish to be represented by the union to continue with job action or to engage the first contract assistance process and, if unsuccessful, to engage in strike and picketing activity.

[46] However, it appears that the scope of this Board's discretion to dismiss an application for rescission of a Certification Order where there is no evidence of employer influence has not been specifically argued or considered by the Board since *Bridge City Electric* and certainly not in relation to first contract assistance; of course, s. 26.5 was only enacted with the 1994 amendments to the *Act*.

[47] In 1995, in *Choponis v. Madison Development Group, supra*, the Board considered an application for rescission while an application for first contract assistance was pending before the Board. In determining to suspend the conduct of a vote until after the first contract application was disposed of, the Board commented, at 517 and 518:

The interrelated nature of all of these proceedings creates something of a dilemma for the Board in determining what is the best way of ensuring that the improper conduct of the Employer is not a factor which affects the outcome of any expression of employee wishes with respect to continued representation by the Union.

On the one hand, we are satisfied that the application for rescission as such was not encouraged or influenced by the Employer. On the other, to the extent that the Employer has had a hand in frustrating the process for reaching a collective agreement, and to the extent that this has added to the discontent of the employees, we are of the view that the absence of a collective agreement should not be a factor in an expression of employee opinion.

In order to counteract the possibility that the absence of a collective agreement might be a factor in the outcome of a vote, we have decided to suspend the holding of a vote until such time as the application for first contract arbitration has been disposed of, and until the Union has had a reasonable opportunity to present the resulting agreement to the employees in the bargaining unit.

[48] It does not appear in *Choponis v. Madison Development Group* that the Board was asked to consider dismissing the rescission application because of the concurrently pending first contract assistance application. However, it is clear that the Board recognized the conflict between the two processes. It should be noted that in that case, unlike the present case, the application for rescission was filed several months before the application for first contract assistance, but was not heard until after the Board, in its initial consideration of the first contract application, had appointed an agent to facilitate negotiations and report to the Board on recommended terms of a collective agreement.

[49] The British Columbia Labour Relations Board has had experience with a first collective agreement assistance process in the B.C. *Labour Relations Code* since 1973. While there are differences between the procedure mandated by the B.C. *Code* and the analogous procedure in the *Act*, the B.C. process is similar in many ways: to access the process, the union must have a strike mandate; commencement or continuance of a strike or lockout are prohibited when an application is made; the

parties first attend mediation; an agreement may be imposed by the board, the parties may be directed to continue in mediation, the agreement may settled by binding arbitration by the board or a third party, or the parties may be freed to exercise the right to strike or lockout. However, despite its long experience, the jurisprudence of the B.C. Board does not reveal that it has decided the specific issue raised in the present case, although it has been put forward in argument in several cases.

[50] In *Simplex International Time Equipment Co. Ltd. v. International Brotherhood of Electrical Workers, Local 213*, [1994] BCLRB No. B355/94, an application for decertification was filed after an application for first contract assistance and while the parties were in the mediation process prescribed by the legislation. The union alleged that the employer had engaged in "surface bargaining" and had committed unfair labour practices that induced the employees to apply to decertify. The union argued that to allow decertification at that time would make a mockery of the Board-assisted mediation process and allow unscrupulous employers to use the mediation process to gain time for dissident employees to mount a decertification campaign. The union opined that unions would quickly lose their appetite for a patient, consensual approach to securing a first contract through the legislation. The employer argued that in the absence of an unfair labour practice by the employer, the board must accede to the wishes of the majority of employees to decertify. The B.C. Board did not rule on the argument, rejecting the application for decertification on the basis of employer influence.

[51] However, in *B.C. Automobile Association, supra*, at para. 36, the B.C. Board recognized the potential for conflict present in concurrent decertification and first contract assistance proceedings:

> *While the point was not mentioned in Adams Laboratories, we attach some significance to the fact that the [decertification] application has been brought during negotiations for a first collective agreement. It is often a difficult exercise for trade unions to meet the overall expectations of employees in newly certified bargaining units.*

[52] At para. 37, the B.C. Board goes on to observe that the prospect of decertification during negotiations for a first collective agreement "could distract the parties' attention from the collective bargaining process." In the end, however, the B.C. Board exercised its discretion to dismiss the decertification application because of an ongoing strike.

[53] Most recently, in *White Spot Limited v. National Automobile, Aerospace Transportation and General Workers Union of Canada (CAW-Canada), Local 3000*, [2001] BCLRB No. B16/2001, in considering an application for "partial decertification"[1] the B.C. Board expressly acknowledged that the "timing and context" of the application were important considerations in determining whether to allow the application.

[54] The Canada Industrial Relations Board (and its predecessor, the Canadian Labour Relations Board) has also had a lengthy experience with a statutory first agreement settlement process, which first appeared in the *Canada Labour Code* in 1978. However, unlike the *Act*, the *Code* also contains a provision that expressly allows the Canada Board to exercise a discretion to dismiss an application for "revocation of certification" where no collective bargaining agreement is in force unless the union has failed to make a reasonable effort to achieve a collective agreement.

[55] As early as 1979, in *Martin v. CSP Foods Ltd. and Grain Services Union (C.L.C.)*, [1979] 3 Can LRBR 184, the Canada Board recognized the dynamic between the first agreement settlement process and revocation of certification, commenting as follows at 193:

> *In Arleen Allen, [1979] 2 Can LRBR 72, we sought to explain the existence of the [no rescission without an agreement] provision in the Code and indicated we think it distorts the Code's balance between employee freedom and industrial stability. We think a discretionary authority to deny revocation would permit administration of the Code directed to its objectives, as the discretionary nature of the first collective agreement provisions in section 171.1 can be administered. . . . The discretion in both cases can be an important deterrent to employer delay.*

[56] Ontario labour relations legislation provides for settlement of a first collective agreement by arbitration where it appears to the Ontario Labour Relations Board that the process of collective bargaining has been unsuccessful because of the refusal of the employer to recognize the bargaining authority of the union, the uncompromising nature of any bargaining position adopted by a respondent

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[1] An application for amendment of the Certification Order by a minority group of employees to exclude them from the scope bargaining unit.

without reasonable justification, the failure of a respondent to make reasonable or expeditious efforts to conclude a collective agreement, or for any other reason the Board considers relevant[2]. In *Triac Industries Inc.*, [2000] OLRB Rep. July/August 735, a case decided a few months before the changes effected to the Ontario *Labour Relations Act, 1995*, in late 2000[3], the Ontario Board also identified the dynamic between first contract settlement and decertification proceedings, stating, at para. 29:

> *The Act properly identifies a potential rivalry between first contract applications and termination applications. The Act recognizes that they are likely to occur in similar circumstances: when a certified union and an employer have been unable to conclude an agreement as a consequence of their own fault or default and some level of frustration among the employees in the bargaining unit has resulted. The Act contemplates that a union and an employer will have a fair opportunity to conclude a first collective agreement through arbitration without the threat of an impending termination application if the circumstances described in subsection 43(2) pertain. If they do not, and the first contract application fails, then the Act expressly provides at subsection 43(23) that the termination application will proceed.*

[57] In our opinion, it is obvious that the timing and context of the rescission application in *Choponis v. Madison Development Group, supra*, was an important element in this Board's decision to suspend the vote on the application until after disposition of the application for first contract assistance. Any discretion to allow an application for rescission in such circumstances cannot be based solely on ostensible "employee wishes," but must consider whether the timing and context of the application make it inappropriate for it to proceed. The timing and context of an application for rescission in relation to applications for the exercise of other rights protected by the *Act*, including access to strike and first contract assistance, are elements that allow the Board to exercise a discretion to choose from among a range of responses in order to ensure that the true wishes of the employees are respected.

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[2] See, *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A, s. 43(2).

[3] At the time the *Triac* case was decided, s. 43(23) of the *Labour Relations Act, 1995*, provided that competing applications for first contract arbitration and decertification should be considered by the Ontario Board "in the order it considers appropriate", and in the event that it granted one of the applications, it was bound to dismiss the other.

[58] If there is a pending strike or lockout, or the union has a strike mandate, or the employer is guilty of a failure to bargain when the application for first contract assistance is made, the timing and context of a concurrent rescission application must be carefully examined. This list is by no means exhaustive: evidence of actions by an employer, particularly related to the process of collective bargaining, that tend to indicate that it has improperly and negatively influenced the perception of employees as to the effectiveness of their bargaining agent, even if they do not constitute influence within the meaning of s. 9 of the *Act*, may prompt a similar review by the Board and could result in the dismissal of the application for rescission. The reasons for this are clear. Section 9 is not exhaustive of the grounds upon which the Board may dismiss an application. The *Act* must be interpreted and applied with regard to the *Act* as a whole and the fundamental purposes and objects of the *Act* and the rights of employees as enunciated in s. 3 in particular. The first agreement assistance process set out in s. 26.5 of the *Act* is an integral part of the protection of the s. 3 rights of employees; it is designed to promote a successful conclusion to the certification process. The Canada Board succinctly described this relationship in *Union of Bank Employees (Ontario), Local 2104 v. Canadian Imperial Bank of Commerce* (1986), 86 CLLC 16,023, at 14,196-97:

> *It was not merely coincidence that Parliament took steps to bring in first contract settlement provisions in 1978 while it was shoring up the certification process. The two are intrinsically linked. It can be seen from the foregoing review that section 171.1 has more to do with the reinforcement of the certification process than it has to do with the settlement of provisions in a compulsory arbitration sense. The settlement of first collective agreements by the Board was primarily intended to give support and some meaning to the exercise of the fundamental freedom of association rights of employees. It was not just some aimless governmental intrusion into the free collective bargaining system, nor was it simply a prop for weak unions as some commentators have described the concept of first contract settlements. Parliament had no interest in balancing bargaining powers vis-a-vis the ability of newly organized employees to wrest substantial gains in benefits from their employer. Section 171.1 was aimed at bringing into line those employers who, having been finessed of the opportunity to influence the certification process, decide to turn first contract negotiations into a*

recognition struggle for the bargaining agent by refusing to participate in any meaningful collective bargaining. That notion is further supported by Parliament's adoption of the British Columbia approach which provides for selective intervention by the Board where the collective bargaining regime is challenged ...

[59] Once certified, the trade union selected by the majority of employees is the exclusive representative of all employees in the bargaining unit. Only the employer and the bargaining agent are given the right to collectively bargain or apply for first contract assistance under s. 26.5; by necessary implication these rights are denied to everyone else including the employees. This is consistent with the statutory status of the union as the exclusive bargaining agent after certification – employees in the bargaining unit are no longer able to bargain individually with the employer. Concluding a collective agreement is the responsibility of the employer and the bargaining agent. The only avenue for employee input is through the certified union. There is not even a statutory requirement for ratification of a collective agreement by the employees; employees in the unit are bound by the collective agreement, but do not negotiate it. To determine that the Board has no discretion in any circumstances to disallow an application for rescission when an application for first contract assistance is concurrently pending, particularly where the bargaining agent has a strike mandate or the employer has failed to bargain collectively, would, notionally, allow dissident employees to affect or render null the method of concluding a collective agreement chosen by their exclusive bargaining agent.

[60] The initial ten-month statutory bar to an application for rescission is justified on a policy basis to allow the newly certified union to consolidate its support among the employees in the bargaining unit and seek to obtain a first collective agreement. Whether or not an application for rescission brought during the first open period is properly founded, while it is pending the attention and focus of the union cannot help but to be diverted from its primary statutory duty to represent and bargain on behalf of the employees. Assuming it has diligently attempted to do so, in the presence of a pending application for rescission, employees seeking to conclude a first collective agreement may be reluctant to act upon a legitimate strike mandate for fear of losing their jobs if they engage in strike activity. In certain cases the evidence may show that disappointment with the course of negotiations that has been the fault of the employer is at the root of the momentum to decertify. The Board must examine whether the employees are fundamentally unhappy with the union because of its own actions or neglect, or because of the employer's conduct or default.

[61] In certain circumstances, the Board may exercise a discretion to dismiss the rescission application. The absence of such a discretion in the Board would render the first contract assistance process hostage to improper manipulation by employers and bargaining agents: if there is no discretion to dismiss a rescission application in such circumstances, there is a significant incentive for unscrupulous employers to strategize in their bargaining to effect delay and foster employee discontent with their new bargaining agent, or to make an application for first contract assistance itself in order to buy time for dissident employees to apply for rescission during the first open period by delaying the conclusion of a first agreement until after the period has closed. On the other hand, if there were to be no discretion but to dismiss the application for rescission, it is open for an unscrupulous union to make a first contract assistance application without regard to the real intention of the provision solely to defeat a rescission application that may in fact reflect the true wishes of the employees uninfluenced by the employer. A party that has bargained in a manner that belies its assertions of bona fides to reveal an improper ulterior motive ought not to profit from its actions. Accordingly, the most prudent course consistent with the objects of the *Act* as a whole and s. 26.5 in particular is for the Board to exercise a discretion to allow or dismiss an application for rescission that is concurrent with an application for first contract assistance having regard to the timing of the rescission application and the context of the entire situation.

[62] In the present case, however, we have determined that there is an insufficient basis for us to exercise our discretion to dismiss the rescission application. The Union does not have a strike mandate; it has withdrawn the application for first contract assistance and, consequently, the allegation that the Employer has committed the unfair labour practice of failure to bargain collectively. In these circumstances, the concurrency of the two applications lacks the significance that might attract a close examination of the timing and context of the rescission application: the fact that it was filed after the application for first contract assistance without more is not enough to warrant its dismissal. As described earlier in these Reasons, there is no evidence that would lead us to draw the inference that the making of the application for rescission is linked to any conduct or omission by the Employer.

[63] An Order will issue that a vote on the application will be conducted in the usual manner. The vote shall be conducted within 30 days of the date of the Order. As there was no issue raised with respect to the statement of employment filed on the application, it shall constitute the list of voters; only those employees on the list who are employed on the date of the vote shall be eligible to vote.

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 4449, Applicant v. GLENCAIRN CHILD CARE CO-OPERATIVE, Respondent

LRB File No. 092-01; June 5, 2001
Vice-Chairperson, James Seibel; Members: Hugh Wagner and Leo Lancaster

For the Applicant: Aina Kagis
For the Respondent: Dorothy Payne

Certification – Appropriate bargaining unit – General policy of Board to prefer larger more inclusive units to smaller less inclusive units, providing employees wide access to benefits of collective bargaining – Employer raises administrative concerns about including casual employees in bargaining unit – Board concludes that unit including casual employees appropriate and that employer's concerns are matters for collective bargaining.

Employee – Managerial exclusion – Employer seeks to exclude daycare Floor Supervisor from bargaining unit – Floor Supervisor has no authority to impose formal discipline and participation in hiring process consultative only – Board concludes that Floor Supervisor does not have primary responsibility to exercise managerial authority within the meaning of *The Trade Union Act* and duties of position do not conflict with inclusion in bargaining unit.

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

REASONS FOR DECISION

Background and Facts

[1] **James Seibel, Vice-Chairperson:** Canadian Union of Public Employees, Local 4449 (the "Union") filed an application for certification as the bargaining agent for all employees of Glencairn Child Care Co-operative (the "Employer") except the director and the accountant. The Employer, a parent-run child care co-operative, takes the position that the scope of the bargaining unit should not include casual substitute employees called in to work on short notice or a new position created over a year ago – Floor Supervisor – which has never been filled. The Board heard the application on May 24, 2001.

[2] The Union rested on its application as filed and the purported evidence of support for the application by the employees in the proposed bargaining unit.

[3] Dorothy Payne, the Employer's director for the past six years, testified on behalf of the Employer. Ms. Payne explained that provincial regulations require that the Employer maintain a particular ratio of child care workers to children, and workers that do not have the prescribed minimum educational qualifications may not work more than 60 hours per month. On any given day, depending on the number of children received into care, and the number of regular employees scheduled to work who are absent due to illness or other reason, the Employer must call in casual substitute workers to maintain the prescribed ratio. Ms. Payne said that most of the substitutes lack the minimum qualifications and the number of hours they can work is restricted.

[4] Ms. Payne explained that the Employer has great difficulty finding sufficient substitute workers. She opined that if they were included in the proposed bargaining unit it would be even more difficult because they would be required to pay union dues. She also stated that if the Employer were required to call in substitutes on the basis of seniority, it would make what is already a busy process more hectic and difficult.

[5] With respect to the Floor Supervisor position, Ms. Payne testified that the creation of the new position was approved over one year ago at a meeting of the Employer's board of directors in March, 2000. The position was advertised in March and April, 2000, but remains vacant because of a dearth of qualified applicants. Ms. Payne testified that the intended duties of the position are set forth in a position description prepared at the time it was advertised. She asserted that the position ought to be excluded from the bargaining unit because it has a degree of managerial responsibility. The position description provides as follows:

> *Supervisor Job Description:*
>
> *-all duties as outlined for child care workers*
>
> *Programming:*
>
> *-monitor and work with staff on all aspects of programming for the center*
> *-do bulletin boards regularly according to the themes and programming*
> *-pick up programming materials, books, tapes and whatever else is needed from the library, SECA or wherever else*
> *-check staff programming every month and help staff incorporate all activities needed to cover all areas required*

-help organize the Christmas concert

-organize the summer program along with the staff

-order, pick up and return the block of books each month

-organize special events that happen

Staff:

-monitor staff progress

-assist in the preparation and presentation of all staff evaluations

-assist with the interviewing and hiring staff along with the director and the board of directors

-assist with the discipline and firing of staff along with the director and board of directors

-call in subs as needed

-arrange staff schedules and duties when director is absent and as necessary

-make sure all child care regulations and staff policies are being followed by the staff

-report all areas of concern to the director immediately

-initiate new staff, subs and students to the day care

-evaluate students along with the staff involved

General:

-work the early shift so that the day care is supervised by the same person every morning and a person that has the authority to make decisions in the center

-be in charge on the floor throughout the day

-parent communication - deal with all parent concerns when the director is away or unavailable

-initiate parents to the day care in absence of the director or when director is unavailable

-do child care attendance - mark in hours every day and add hours at the end of each month

-help with and supervise parent breakfast

-work with special needs children and attend meetings as necessary
-help staff who have special needs children in their groups
-be in charge of the day care when the director is away
-learn duties of the director so that you can take over director duties when director is away
-any other duties as required by the director and the board of directors

[6] Ms. Payne emphasized that the main responsibilities of the position are to act in her stead when she is not available, to consistently work the first shift of the day and to supervise the floor during her shift. With respect to the anticipated responsibility of the position regarding hiring, she said that the Floor Supervisor would assist herself (or a board member in her absence) with the task of interviewing and adding input to recommendations. She said the Floor Supervisor would also be involved in employee performance evaluation. With respect to firing, she confirmed that the Floor Supervisor would have the independent authority only to verbally reprimand care staff, except when acting in the stead of the director, in which case the Floor Supervisor could suspend an employee pending review of the decision. Ms. Payne confirmed that she herself has no independent authority to terminate staff without board approval.

Statutory Provisions

[7] Relevant provisions of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") include the following:

> *2 In this Act:*
>
> *(a) "appropriate unit" means a unit of employees appropriate for the purpose of bargaining collectively;*
>
> . . .
>
> *(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.

. . .

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;*

Argument

[8] Ms. Kagis, on behalf of the Union, argued the proposed bargaining unit is an appropriate unit and, while the Employer has expressed concerns about the inclusion of the casual substitute employees in the unit, such concerns are really matters for collective bargaining. With respect to the Floor Supervisor position, Ms. Kagis asserted that the position has no real independent decision-making authority that affects the terms and conditions of employment of other employees. In support of her argument against the exclusion of the position from the bargaining unit, she referred to the decision of the Board in *Canadian Union of Public Employees, Local 1902-10 v. Regina's Market Square Early Learning Child Care Centre Inc.*, [1996] Sask. L.R.B.R. 744, LRB File No. 152-96.

[9] Ms. Payne, on behalf of the Employer, reiterated the difficulties the Employer has in securing sufficient substitute help, and argued that the casual substitute employees should not be included in the bargaining unit. With respect to the Floor Supervisor position, she maintained that the position exercises real managerial authority for at least a portion of every work day when the director is unavailable, and has access to confidential information.

Analysis and Decision

[10] Pursuant to the *Act* the Board has the jurisdiction to determine whether a proposed bargaining unit is a unit appropriate for the purposes of collective bargaining. In keeping with the purpose of the *Act*, as expressed in s. 3 to protect the rights of employees to organize and bargain through the representative of their choice, the general policy of the Board is to prefer larger more inclusive units to smaller less inclusive units, providing to the employees in an organized workplace as wide an access as possible to the benefits of collective bargaining.

[11] It is our opinion that the proposed bargaining unit including the casual substitute employees is appropriate for the purposes of collective bargaining. While the Employer may have legitimate concerns about the possible administrative effects of including the substitute employees in the bargaining unit, we are in agreement with the representative of the Union that such concerns are matters for collective bargaining between the Employer and the Union.

[12] With respect to the Floor Supervisor position, we are not persuaded to exclude the position from the scope of the bargaining unit. Section 2(f)(i)(A) of the *Act* provides that, to meet the threshold for exclusion, the person who occupies the position must have as their *primary* responsibility the actual exercise of authority and performance of functions that are of a managerial character. In this regard the decision of the Board in *Regina's Market Square, supra*, is apposite. In that case, at issue was the exclusion from the bargaining unit of a Floor Supervisor in a children's daycare. As in the present case, the Floor Supervisor had no authority to impose formal discipline and required the approval of the employer's board of directors; similarly the participation of the Floor Supervisor in the hiring process was consultative and with a capacity to recommend; the Floor Supervisor was also expected to be "in charge" in the absence of the director. In concluding that the Floor Supervisor position should be included in the bargaining unit, the Board stated, at 748:

> *It is our view that the position of Floor Supervisor in this case is closer in its essential features to the latter of the situations described in the John M. Cuelenaere Library case. Though the Floor Supervisor clearly has a considerable amount of responsibility in terms of directing the daily work of staff, monitoring equipment and supplies, providing input for budget proposals and implementing programming decisions, none of these aspects of her job could be expected to have any significant impact on the*

terms and conditions of employment of her fellow employees. In the Metis Addictions Council decision, supra, the Board made an observation which seems to have some application to these circumstances, at 60:

> *The test of the degree of their authority is not whether Mr. Laliberte respects their opinions and often relies on their recommendations in making decisions, but whether it lies within their power to actually make decisions which have more than a provisional effect on those with whom they work. Though Mr. Laliberte may genuinely see the decisions which are reached in consultation with Ms. McLean and Ms. Dagenais as joint decisions, we have concluded that the actual decision-making authority lies with him, and not with them. We, therefore, find that the Senior Counsellors should not be excluded from the bargaining unit.*

[13] We find no evidence in the present case that leads us to conclude that the position in question has a primary responsibility to exercise managerial authority within the meaning of the *Act* such that it should be excluded from the bargaining unit. Neither are we persuaded, to use the language used by the Board in *City of Regina v. Canadian Union of Public Employee, Local 21 and Regina Civic Middle Management Association*, [1995] 3rd Quarter Sask. Labour Rep. 153, LRB File No. 268-94, at 158, that the duties which are attached to the Floor Supervisor position are of a kind and extent which would create an "insoluble conflict" in a labour relations sense between the position and other employees in the bargaining unit.

[14] For the reasons given, we have concluded that the casual substitute employees and the Floor Supervisor should be included in the bargaining unit. As the Union has filed evidence of support from a majority of employees in the bargaining unit, a certification Order in the form requested in the application shall be issued.

TRINA HILDERMAN, Applicant v. TWENTY FOUR HOUR CHILDCARE CO-OPERATIVE and SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, Respondents

LRB File No. 097-01; June 12, 2001

Chairperson, Gwen Gray; Members: Gloria Cymbalisty and Leo Lancaster

For the Applicant: Trina Hilderman
For the Respondent Employer: Donna Kilbach
For the Respondent Union: Susan Jeannotte-Webb

Decertification – Practice and procedure – Rescission application filed within appropriate time period with sufficient support to give rise to vote – Outstanding dismissal grievance about to proceed to arbitration – Board directs vote with results to be sealed pending conclusion of arbitration proceedings.

***The Trade Union Act*, s. 5(k).**

REASONS FOR DECISION

Background

[1] Gwen Gray, Chairperson: Trina Hilderman (the "Applicant") brought an application on May 14, 2001 to rescind the Certification Order issued to the Saskatchewan Government and General Employees' Union (the "Union"). The application was filed within the 30 – 60 day period prior to the anniversary of the effective date of the last collective agreement. The Union did not oppose the application but asked for a vote and asked that a decision on the application be postponed to permit the completion of an unjust dismissal arbitration on behalf of one of the members of the Union.

Relevant Facts

[2] The Union was certified to represent all employees of the Twenty Four Hour Childcare Co-operative (the "Employer") on March 12, 1985. The Employer has entered into various collective agreements with the Union, the last of which was entered into on October 23, 2000 for the period running from July 1, 2000.

[3] A member of the Union was fired by the Employer and a grievance was filed with the Employer on October 11, 2000, prior to the signing of the new collective agreement. The grievance has progressed through the grievance process to the stage of selecting an arbitration board. The Employer informed the Union of the name of its nominee to the arbitration board on November 9, 2000 and it is prepared to proceed to have the matter determined in arbitration. Ms. Jeannotte Webb, Union representative, indicated at the hearing that the Union would be proposing two names for arbitrators within the next week.

[4] The employees present at the hearing indicated that they are dissatisfied with the services provided by the Union. The Board asked the employees if they were aware that the effect of a rescission application is to remove the collective agreement. The two employees indicated that they were aware of that fact. They also indicated that the employee who was terminated and who is the subject of the grievance has attempted to have her matter dealt with in a more timely fashion. She apparently reported to the two employees who attended the hearing that she has a difficult time reaching Ms. Jeannotte Webb and has not had her calls returned. She is unable to receive employment insurance until the matter is resolved.

Board Decision

[5] The rescission application is properly before the Board. It was filed in the open period and is filed with sufficient support to give rise to a vote among the employees in the bargaining unit. The Union did not object to the names listed on the statement of employment. As a result, the Board will order that a vote be conducted among the employees listed on the statement of employment who remain employed on the date of the vote. The vote will be conducted as soon as possible.

[6] In order to preserve the entitlements of the employee who is subject to the grievance and arbitration procedure, the Board will direct the Board agent to seal the ballot box after the vote and to delay the counting of the vote until September 1, 2001 or the first business day following that date. The vote will be counted in the normal manner in the presence of representatives of the parties.

[7] During the time from the issuing of this Order to September 1, 2001, we would expect that the Union and the Employer will arrange for the arbitration of the outstanding dismissal grievance. Although the time frame is short, it nevertheless provides a reasonable amount of time to hear the matter and obtain a decision from the arbitration panel.

[8] The unfortunate part of this application is the underlying complaint of lack of fair representation by the Union of its members. Our main goal in delaying the counting of the vote is to ensure that the rights of the terminated employee are not extinguished before the arbitration can be heard and determined.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1985, CONSTRUCTION & GENERAL WORKERS, LOCAL 890, CONSTRUCTION & GENERAL WORKERS, LOCAL 180, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 771, INTERNATIONAL UNION OF OPERATING ENGINEERS, HOISTING, PORTABLE AND STATIONARY, LOCAL 870 and OPERATIVE PLASTERERS & CEMENT MASONS INTERNATIONAL ASSOCIATION, LOCAL 222, Applicants v. 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 Nos. 014-98 & 227-00; June 13, 2001
Chairperson, Gwen Gray; Members: Tom Davies and Duane Siemens

For the Applicants:	Drew Plaxton
For Graham Construction and Engineering Ltd., Graham Construction and Engineering (1985) Ltd. and BFI Constructors Ltd.:	Larry Seiferling, Q.C.
For Banff Labour Services Ltd., Jasper Labour Services Ltd. and Banff Financial Co. Inc.:	Larry LeBlanc, Q.C.
For Points North Construction Ltd.:	Jay Watson

Practice and procedure – Natural justice – Reasonable apprehension of bias – Sixteen years earlier Board chairperson acted as advocate for one applicant against certain of respondents in application argued before and decided by Board – Board concludes that present day applications not the same case as case in which chairperson was advocate – Board finds no reasonable apprehension of bias on part of Board chairperson.

Practice and procedure – Natural justice – Necessity – Board chairperson and both vice-chairpersons previously acted as counsel for one or more party to applications before Board – Board finds no reasonable apprehension of bias on part of Board chairperson but notes that, alternatively, question of necessity arises.

REASONS FOR DECISION

Background

[1] **Gwen Gray, Chairperson:** In LRB File No. 014-98, the United Brotherhood of Carpenters and Joiners of America, Local 1985 (the "Carpenters' Union") filed an application on February 2, 1998 against Graham Construction and Engineering Ltd., Graham Construction and Engineering (1985) Ltd., BFI Constructors Ltd., Banff Labour Services Ltd., Jasper Labour Services Ltd., Banff Financial Services Co. Inc., Peter Ballantyne Construction Ltd. and Points North Construction Ltd.

[2] The main thrust of the Carpenters' Union's application in LRB File No. 014-98 is an allegation that the companies named as respondents are "related employers" within the meaning of s. 37.3 of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the "*TUA*") and/or s. 18 of *The Construction Industry Labour Relations Act, 1992,* S.S. 1992, c. C-29.11 (prior to the amendments made in July, 2000) (the "*CILRA*").

[3] In addition, the Carpenters' Union alleges in LRB File No. 014-98 that Graham Construction and Engineering Ltd. transferred its business to Graham Construction and Engineering (1985) Ltd., and that the latter corporation is a successor employer within the meaning of s. 37 of the *TUA*. The Union alleges that this transfer of business occurred in 1985, after the Board heard an earlier case (LRB File No. 330-84) involving the Carpenters' Union, P.W. Graham and Sons Ltd., Graham Construction and Engineering Ltd. and Banff Labour Services Ltd. The Board heard LRB File No. 330-84 on March 6, 7 and April 26, 1985 and issued Reasons for Decision on April 9, 1986.

[4] In LRB File No. 014-98, Graham Construction and Engineering (1985) Ltd. and Graham Construction and Engineering Ltd. raised the preliminary issue of conflict of interest on the part of Chairperson Gray and Vice-Chairperson Seibel. To avoid greater delays in this matter, the Board appointed a panel consisting of two employer representative members of the Board and one organized employee representative member of the Board. In *Graham Construction and Engineering Ltd. et al v. United Brotherhood of Carpenters and Joiners of America, Local 1985 and the Saskatchewan Labour Relations Board* (1999), 178 Sask. R. 264 (Sask. Q.B.), Hrabinsky J. found

that this panel was not properly constituted because it did not include the Chairperson or Vice-Chairperson as required by ss. 4(1) and 4(2) of the *TUA*. Hrabinsky J. went on to hold that the Board must act with either the Chairperson or Vice-Chairperson in LRB File No. 014-98 as a matter of necessity.

[5] Various procedural rulings[1] have since been issued in LRB File No. 014-98 by a panel of the Board composed of Vice-Chairperson Seibel (who was consented to by the parties as chair of the panel) and members McDonald and Lancaster. No hearing has been conducted on the merits of the application in LRB File No. 014-98.

[6] In LRB File No. 227-00, the Carpenters' Union and five other trade unions[2] (the "Applicants") filed an application on August 21, 2000 against the same eight respondents as named in LRB File No. 014-98. The Applicants have also sought to add two additional respondents – Graham Industrial Contractors Ltd. and Graham Industrial Services Ltd.

[7] The main assertion of the action in LRB File No. 227-00 is that the respondent corporations named in the application are related companies within the meaning of the *CILRA,* as amended by S.S. 2000, c. 69 and/or s. 37.3 of the *TUA*. In addition, the Applicants allege that Graham Construction and Engineering Ltd. transferred its business to Graham Construction and Engineering (1985) Ltd. in or about 1986.

[8] The 2000 amendments to the *CILRA,* included an amendment to the related employer provisions contained in s. 18 of the *CILRA*.

[9] The Board held a pre-hearing meeting with the parties conducted by Vice-Chairperson Matkowski. At the pre-hearing meeting the parties agreed to provide the Board with the list of procedural matters that they thought ought to be addressed before the hearing of this matter which is

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[1] [1999] Sask. L.R.B.R. 446; [1999] Sask. L.R.B.R. 220; [1999] Sask. L.R.B.R. 446; and [1999] Sask. L.R.B.R. 620.

[2] Construction and General Workers, Local 890, Construction and General Workers, Local 180, International Association of Bridge, Structural Ornamental and Reinforcing Iron Workers Local 771, International Union of Operating Engineers, Local 870, Operative Plasterers and Cement Masons International Association, Local 222.

scheduled to take place on June 25 through June 29, 2001 in Saskatoon. A number of the respondents asserted that the panel of the Board to hear this case must be set before the hearing dates and ought to be chaired by Vice-Chairperson Matkowski.

[10] After receiving the lists of procedural matters, the Board convened a panel composed of Chairperson Gwen Gray and members Tom Davies and Duane Siemens to provide procedural direction to the parties in order that the hearing involving both LRB File Nos. 014-98 and 227-00 might proceed during the dates selected. In Board Directives dated May 29, 2001, the Board informed the parties that the panel for hearing would be composed of Chairperson Gray and members Davies and Siemens and asked the parties to set out any objections they might have to the panel within 7 days of receipt of the Board Directives. The Board set out the involvement of the Chairperson and Vice-Chairpersons in matters related to the parties before the Board as follows:

- *Chairperson Gray was counsel for United Brotherhood of Carpenters and Joiners of America, Local 1867 in an action brought before the Labour Relations Board in LRB File No. 330-84 on August 24, 1984 against Graham Construction Ltd., Graham Construction and Engineering Ltd., and Banff Labour Services Ltd. The application was heard by the Board on March 6 and 7, 1985 with arguments submitted in final on April 26, 1985. Reasons for Decision were issued by the Board on April 9, 1986.*

- *Prior to his appointment to the Labour Relations Board in November, 1997, Vice-Chairperson Seibel was a partner in Gauley & Company and acted as counsel on behalf of the respondents, Graham Construction and Engineering Ltd., Graham Construction and Engineering (1985) Ltd., BFI Constructors Ltd. and Points North Construction Ltd., in relation to various matters.*

- *Vice-Chairperson Matkowski, in his former employment at MacPherson, Leslie & Tyerman [1986 to 1989] acted as junior counsel in matters relating to a joint venture between Graham Construction and Engineering (1985) Ltd. and Combustion Engineering Canada Inc. and as junior counsel on behalf of Combustion Engineering Canada Inc. in an action against Graham Construction and Engineering (1985) Ltd. ([1988] S.J. No. 231).*

[11] Counsel for Banff Labour Services Ltd., Jasper Labour Services Ltd. and Banff Financial Co. Inc. argues that the present application is an attempt to re-litigate questions which were determined in LRB File No. 330-84 and that the Chairperson's involvement in that case precludes her from sitting as Chairperson on the present application. Counsel argues that the Chairperson's advocacy in 1986 related to the very matters that are before the Board in the present application. On this basis, counsel distinguishes the Supreme Court of Canada's decision in *Arsenault-Cameron v. Prince Edward Island*, [1999] 3 S.C.R. 851. Counsel sought the appointment of Mr. Matkowski to the panel notwithstanding the information set out by the Board in its Board Directives relating to Mr. Matkowski's advocacy role both for and against Graham Construction and Engineering (1985) Ltd. while with the firm now representing Banff Labour Services Ltd., Jasper Labour Services Ltd. and Banff Financial Co. Inc.

[12] Counsel for Graham Construction and Engineering Ltd., Graham Construction and Engineering (1985) Ltd., and BFI Constructors Ltd., argues that the Chairperson should not sit on the panel hearing the applications by reason of her former advocacy on behalf of the Carpenters' Union in LRB File No. 330-84. Counsel cited the Supreme Court of Canada's decisions in *Szilard v. Szasz,* [1955] S.C.R. 3 (S.C.C.) and *Committee for Justice and Liberty v. Canada (National Energy Board),* [1978] 1 S.C.R. 369 (S.C.C.). Counsel sought the appointment of Mr. Matkowski to the panel.

[13] Counsel for the Carpenters' Union and the Applicants argues that it is up to the Board to choose the hearing officer for each case, and notes that the only issue is whether the Chairperson must excuse him or herself. Counsel noted that it is unrealistic to believe that all members of any particular panel of the Board would be totally isolated from all and each of the parties in their past dealings and notes that each of the Board officers has had dealings with one or more of the parties in the past. Counsel argued that the preference of the parties for one or another panel member does not create a reasonable apprehension of bias. Counsel argued that there is no reasonable apprehension of bias with the Chairperson sitting on the panel.

[14] Counsel for Points North Construction Ltd. also objected to the appointment of the Chairperson to the Board panel based on her advocacy for the Carpenters' Union in LRB File No. 330-84. Counsel sought the appointment of Mr. Matkowski to the panel.

Analysis

[15] The test to be applied by the Board in deciding if the Chairperson should remove herself from the hearing on the grounds of perception of bias is set out in *Committee for Justice and Liberty v. Canada (National Energy Board),* [1978] 1 S.C.R. 369 (S.C.C.) by de Grandpré J. (in dissent) at 394 :

> *The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would a informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly."*

[16] In *R. v. R.D.S.*, [1997] 3 S.C.R. 484 (S.C.C.), Cory J. elaborated on the test as follows at paragraph 111:

> *The manner in which the test for bias should be applied was set out with great clarity by de Grandpré J. in his dissenting reasons in Committee for Justice and Liberty v. National Energy Board, [1978] 1 S.C.R. 369, at p. 394:*
>
> > *[T]he apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. . . [The] test is "what would a informed person, viewing the matter realistically and practically – and having thought the matter through – conclude" .*
> >
> > . .
>
> *This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. . .*

> *Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold" . . .*

[17] In relation to the question of the role of the decision-maker as a former advocate, Justice Bastarache summarized the law as follows in *Arsenault-Cameron v. Prince Edward Island,* [1999] 3 S.C.R. 851 at paragraph 4:

> *The same reasoning was adopted by the Constitutional Court of South Africa in a decision delivered on June 4, 1999, South Africa (President) v. South African Rugby Football Union, [1999] S.A.J. No. 22 (QL). That court noted in particular that no recusal application could be founded on a relationship of advocate unless the advocacy was regarding the case to be heard (see para. 79).*

[18] In applying these tests, the Board must decide if the present applications are the "same" applications that were before Board in LRB File No. 330-84 in which the Chairperson acted as advocate for the Carpenters' Union in an application brought against Graham Construction Ltd., Graham Construction and Engineering Ltd. and Banff Labour Services Ltd. The substance of the allegations in that case were set out by the Board in its decision ([1986] June Sask. Labour Rep. 35, LRB File No. 330-84) as follows at 39:

> *1. Was there a sale, lease, transfer or other disposition of a business or part thereof from G.C.L. [Graham Construction Ltd.] to G.C.E.L. [Graham Construction and Engineering Limited] within the meaning of Section 37 of The Trade Union Act? If so, is there any proper basis for the Board to order that the certification order and/or the collective bargaining agreement affecting employees of G.C.L. should not apply to G.C.E.L.?*
>
> *2. Was there a sale, lease, transfer or other disposition of a business or part thereof from G.C.L. to Banff within the meaning of Section 37 of The Trade Union Act?*

If so, is there any proper basis for the Board to order that the certification order and/or the collective bargaining agreement affecting employees of G.C.L. should not apply to Banff?

3. Did G.C.L. and/or G.C.E.L. and/or Banff fail or refuse to comply with an obligation to bargain collectively with the union in violation of Section 11(1)(c) of The Trade Union Act? Have they violated Section 11(1)(a) of The Trade Union Act by interfering with any employee in the exercise of a right conferred by the Act?

4. Whether or not there was a transfer of a business or part thereof from G.C.L. to Banff, should the Board designate employees of Banff as employees of G.C.L. for the purposes of The Trade Union Act?

[19] It must be kept in mind that the Board in LRB File No. 330-84 was asked to determine the issues set out above in the context of the *TUA*, as it existed at that time, which did not include a related employer provision such as is now contained in s. 37.3 of the *TUA* or s. 18 of the *CILRA*.

[20] In our view, the present applications before the Board raise different issues than the ones raised in LRB File No. 330-84 and those issues are raised in the context of events occurring (with one key exception) in the years 1999 and 2000.

[21] When the chaff is separated from the wheat in the current applications before the Board, the primary issues raised by the Applicants are as follows:

(1) Whether the respondent companies are "related employers" within the meaning of the related employer provisions that were added to the CILRA in 1992, or as amended, in July, 2000, or, alternatively, as set out in s. 37.3 of the TUA, as it was amended in 1994. The time frame for considering the "relatedness" of the corporations is the time frame immediately preceding the filing of the applications – that is, in the case of LRB File No. 014-98, February 28, 1998 and, in the case of LRB File No. 227-00, August 21, 2000;

(2) Whether the respondent, Graham Construction and Engineering (1985) Ltd. (now called Graham Construction and Engineering Ltd.) is a successor employer within the meaning of s. 37 of the TUA to the former Graham Construction and Engineering Ltd. We note that Graham Construction and Engineering (1985) Ltd. was not a party in LRB File No. 330-84 and, on its face, appears not to have been incorporated as a corporation at the time the application was filed.

[22] There are secondary issues raised by the Applicants in their materials (notably the particulars filed by the Carpenters' Union on July 2, 1999) that may appear to touch on matters that were dealt with in the earlier proceedings. The Applicants allege a transfer of business within the meaning of s. 37 of the *TUA* between the parent corporation and Banff Labour Services Ltd., Jasper Labour Services Ltd., Banff Financial Co. Inc. and BFI Constructors Ltd. The Board understands the pleadings as raising a secondary issue of successorship flowing from Graham Construction and Engineering (1985) Ltd. to the above-named corporations. This issue was not before the Board in LRB File No. 330-84 as Graham Construction and Engineering (1985) Ltd. was not a party to the application and no finding of successorship flowing from Graham Construction and Engineering Ltd. has been made by this Board in relation to the issue.

[23] In essence, then, as the Board understands the pleadings, the Applicants allege that there has been a successorship from the former Graham Construction and Engineering Ltd. to Graham Construction and Engineering (1985) Ltd., occurring after the date of the filing of LRB File No. 330-84 and that the alleged successor companies and other respondents are "related employers" as of the date of the filing of LRB File Nos. 014-98 and 227-00.

[24] In our view, these matters were not dealt with in LRB File No. 330-84 and are not matters upon which the Board Chairperson has advocated on behalf of the Carpenter's Union.

[25] As indicated earlier, counsel for Banff Labour Services Ltd., a party to the proceedings in LRB File No. 330-84, argues that the Applicants are attempting to re-litigate the issues in LRB File No. 330-84 and that the defenses of *res judicata* and issue estoppel arising from the Board's decision in LRB File No. 330-84 are essential to his client's case.

[26] We agree that it would be improper to re-litigate matters that were heard and determined by the Board in LRB File No. 330-84. However, we do not understand the Carpenters' Union's or Applicants' pleadings as requesting a re-litigation of the issues heard and determined in LRB File No. 330-84. The pleadings raise issues between Banff Labour Services Ltd. and Graham Construction and Engineering (1985) Ltd., a company that did not exist at the time LRB File No. 330-84 was filed and heard by the Board.

[27] The Board finds that the present Chairperson did not advocate on behalf of the Carpenters' Union in relation to the cases currently before the Board.

[28] For the information of the parties, the Board Chairperson advises that she has no information relating to LRB File No. 330-84 other than is contained in the Board file and the Board Reasons for Decision as published. The Board Chairperson has no memory of the details of the evidence led in the proceeding. In addition, the client file in relation to the application was destroyed in the ordinary course of file management some years past. The Chairperson's actual knowledge of the factual issues is, at this point in time, confined to the information contained in the Board's Reasons for Decision. The case was filed some 17 years ago and the hearing was held 16 years ago.

[29] In applying the test for apprehension of bias, the Board notes the acceptance by the Supreme Court of Canada that the role of advocate does not, in itself, lead to the conclusion of reasonable apprehension of bias. In our view, the applications before the Board are not the same as the application heard and determined by the Board in LRB File No. 330-94. In addition, the Board Chairperson did not provide advice to the Carpenters' Union nor did she obtain personal knowledge from that relationship, relevant to the case before the Board. On this test, then, the Board finds that the Chairperson is not disqualified to sit on the panel hearing the present applications.

[30] In the alternative, the Board is faced with a question of necessity, as discussed by Hrabinsky J. in *Graham Construction and Engineering Ltd. et al, supra.* Both Vice-Chairpersons have acted as counsel for and/or opposed to various of the respondents in their past law careers. Their contact with the individual respondents is more recent and more intimate, in the sense of obtaining actual knowledge of the workings of the respondent corporations, than the knowledge obtained by the Chairperson in her role as advocate for the Carpenters' Union in LRB File No. 330-84 some 16 years ago.

[31] In this situation, the Board has determined that it is appropriate for the Chairperson to be assigned to hear the applications.

[32] The Board also views that a ruling from the Courts would be useful prior to a hearing of this matter should the objecting parties not accept the Board's ruling. Parties who intend to seek judicial review of this decision of the Board on the bias issue are asked to do so before the commencement of the hearing set for June 25, 2001. If the Board is not served with such an application prior to June 22, 2001, the hearing will commence on June 25, 2001 on the understanding that the objection is waived. If such an application is received, the Board Registrar will reschedule the hearing of these matters for September, 2001.

Board Directives

[33] Two of the respondents complained that the Board inappropriately issued Board Directives on May 29, 2001 relating to procedural issues outlined in brief by the various parties to the application as a result of the pre-hearing meeting held by Vice-Chairperson Matkowski without providing the parties with a full opportunity to argue each issue. We would point out that the Board's Directives deal solely with procedural issues and do not make or purport to make any substantive rulings. The order of proceeding is a matter for the Board to determine and many of the issues raised have already been the subject of rulings in LRB File No. 014-98 as noted above. Further hearings on preliminary matters would cause an unnecessary delay in the hearing of the applications. The parties are asked to comply with the Board Directives to ensure the applications can be heard by the Board in an expeditious manner.

UNITED STEELWORKERS OF AMERICA, Applicant v. KELLY TUCKER and AARON DEJONG, Respondents

LRB File Nos. 024-01 & 025-01; June 19, 2001
Vice-Chairperson, Walter Matkowski; Members: Bruce McDonald and Tom Davies

For the Applicant: Neil McLeod, Q.C.
For the Respondents: Rob Garden, Q.C.

Unfair labour practice – Union – Interference – Two individuals who initially were union supporters changed their minds about union representation and threatened bodily harm to union supporters at union meetings – Test for interference pursuant to s. 11(2)(a) of *The Trade Union Act* objective one – Board finds individuals guilty of unfair labour practices pursuant to s. 11(2)(a) of *The Trade Union Act*.

***The Trade Union Act*, s. 11(2)(a).**

REASONS FOR DECISION

Background

[1] Walter Matkowski, Vice-Chairperson: The United Steelworkers of America (the "Union") applied to the Board alleging an unfair labour practice pursuant to s. 11(2)(a) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") against two individuals who had signed membership cards in support of the Union. Kelly Tucker ("Tucker") (LRB File No. 024-01) and Aaron DeJong ("DeJong") (LRB File No. 025-01), the two individuals accused of the unfair labour practices, acknowledged making threatening comments against members of the Union. Counsel for the parties agreed that exhibits filed would be applicable for both cases, where relevant.

Relevant Facts

[2] Klinger Oilfield Services Ltd. (the "Employer"), operates a business servicing oil wells in and around the Lloydminster area. The Employer also has an office in Lashburn, Saskatchewan and both the respondents reside in Lashburn, Saskatchewan. The evidence provided that the Union obtained signed membership cards within a five to six day period immediately prior to the membership cards being filed with the Board on December 18, 2000.

[3] Tucker signed a membership card on the morning of December 16, 2000. Tucker testified that "he didn't understand the membership card" and that he "didn't read the card fully."

[4] The Employer called a meeting for all employees on the morning of December 18, 2000 in Lashburn. David Leriche ("Leriche"), a key Union organizer, called Tucker on the evening of December 17, 2000 to warn Tucker that the meeting would be a fear tactic meeting. Tucker apparently already had a change of heart about signing a membership card and asked Leriche for his membership card back. Leriche recalled that he told Tucker he would see what he could do. Tucker testified that Leriche told him that he would get rid of Tucker's membership card.

[5] Tucker attended the December 18, 2000 morning meeting called by the Employer, which reinforced what he had thought in regard to no longer supporting the Union. Tucker concluded from the meeting that the Employer didn't want a Union. Tucker testified that he didn't ask Leriche at the December 18, 2000 morning meeting for his membership card back.

[6] A second meeting was organized by Frank Butt, an employee of the Employer, for the evening of December 18, 2000. The purpose of the meeting was to discuss whether the employees really needed a union. Tucker attended this meeting. A committee was formed among the employees present at the meeting to organize opposition against the Union with Tucker testifying that he voted for a motion that there would be no need for the Union.

[7] Under cross-examination, Tucker acknowledged that, at the December 18, 2000 morning meeting, the Employer explained to employees how to get their membership cards back from the Labour Relations Board. Tucker also acknowledged that he knew the Union had already filed its certification application. Tucker testified that on the evening of December 18, 2000, he contacted Leriche about his membership card and Leriche said "no problem." Leriche didn't recall the December 18, 2000 telephone conversation with Tucker and he didn't recall advising Tucker his card had been destroyed or torn up.

[8] The Union called a meeting on January 11, 2001 in Lashburn at the Legion Hall. Union officials decided to open the meeting to both supporters and non-supporters of the Union, with there being between 40 and 50 people present. The meeting turned out to be a difficult one, with a lot of screaming going on. Ultimately, the non-supporters left the meeting.

[9] Leriche testified that, after the non-supporters left the Legion Hall, Tucker asked him to leave the meeting area and come outside to the vestibule area, which he did. In the vestibule area, Tucker asked him why he (Leriche) hadn't gotten rid of Tucker's membership card. Tucker then said, in a hostile manner, that "he should take Leriche outside the door and kick the shit out of him." Leriche testified that Tucker's voice was raised when he threatened him and there was at least one individual by the door who heard the threat. Tucker did not carry out on his threat and left the Legion Hall, only to return shortly thereafter. Upon his return, Tucker yelled at Leriche and said words to the effect that "I treated you with respect, why didn't you treat me with respect." Tucker then said to Leriche "I should rip your fucking head off." An individual from inside the meeting area then asked Leriche to come inside the meeting room and Tucker challenged this individual to "come outside." Leriche confirmed that he was extremely scared when Tucker threatened him.

[10] Tucker testified that, on the evening of January 11, 2001, he went to the bar and consumed 4-6 drinks. He then attended the meeting at the Legion Hall and was agitated that they were not getting anywhere. He then asked Leriche outside to the vestibule area where they talked about his membership card. Leriche apologized to Tucker for not obtaining Tucker's membership card back. Tucker provided that he didn't threaten Leriche but that he may have raised his voice. Tucker testified that he went back to the bar and had a couple more drinks. Tucker then returned to the Legion Hall to see Leriche and threatened Leriche that he should "rip his fucking head off" because Leriche had lied to him. Tucker then heard an individual say that this was not a place to argue and he challenged this individual to "step outside and tell him (Tucker) what he could or could not do."

[11] Tucker testified during cross examination that, when he went to the January 11, 2001 Legion Hall meeting, he didn't want the Union, that he was interested in getting rid of the Union and that he was part of a group of people who had, as a goal, a desire to get rid of the Union. Tucker conceded that it was not just his membership card he wanted to get rid of, but the Union.

[12] Tucker testified that he is 6' 3", 280 pounds. From the Board's observations of Leriche, he is significantly smaller than Tucker.

[13] Tucker said that he attended an anti-Union meeting on January 30, 2001. At this meeting, Tucker was chosen to go on the Union's bargaining committee, subject to a vote at an actual meeting of the Union. Tucker confirmed that this committee did not support the Union.

[14] Tucker conceded there was a lot of speculation that, with the Union, jobs would be lost and workplace rumors that the Employer would lose contracts as a result of the Union.

[15] Leriche testified that he had never been involved in a union drive before. Leriche further testified that he and his girlfriend had received threats over the telephone as a result of his activity for the Union. Unfortunately, on February 3, 2001, Leriche was jumped by three cowardly hooded men and beaten up. For whatever reason, according to the testimony before the Board, the RCMP refused to look into the matter. Counsel for the Union advised the Board that he would take steps to ensure this matter was looked into by the RCMP.

[16] Leriche testified that meetings called by the Union following the January 11, 2001 Legion Hall meeting drew fewer supporters, with the meeting called by the Union on February 8, 2001 drawing three supporters of the Union.

[17] Leriche testified that he attempted to contact a staff representative from the Union, John Stevens in regard to Tucker's membership card but that Stevens had gone to Regina already, and the cards were filed with the Board on December 18, 2000.

[18] In regard to the unfair labour practice application filed against DeJong, DeJong signed his membership card on approximately December 11, 2000. DeJong changed his mind about supporting the Union following the Employer's December 18, 2000 morning meeting. DeJong expressed concerns about whether "they'd still be employed," and that "you hear horror stories about unions," and that "they have a contract alliance with Husky Oil and he wasn't sure if Husky would appreciate the Union."

[19] DeJong testified that on January 25, 2001 he attended a meeting of the Union where there were approximately 12 - 15 people present, including John Stevens, and another official of the Union, Keith Turcotte ("Turcotte"). At this meeting Turcotte opened the floor in an attempt to obtain a bargaining committee. Ryan Topley ("Topley") was initially nominated. DeJong provided that he was furious Topley had been nominated because "they were nominating pro-Union people" to the bargaining committee. DeJong then asked Topley "can you honestly tell me you can look after my

family," with Topley replying "no." DeJong then threatened Topley by saying "if anything happened to my family, I would fucking kill you." DeJong confirmed that he apologized to Topley and that he made a motion to adjourn the meeting, "so he could get the proper people in place on the Union bargaining committee," that being, non-supporters of the Union. After the meeting, DeJong again apologized to Topley. DeJong confirmed that he attended a January 30, 2001 meeting where people opposed to the Union agreed that at the next Union meeting they would nominate people opposed to the Union and get rid of the Union and not bargain a collective agreement with the Employer.

[20] DeJong asked for and obtained a letter from Topley which provided that Topley accepted his apology. DeJong did not advise Topley that he intended to submit the letter as an exhibit at this hearing.

[21] Under cross examination, DeJong provided that this was the only time he had ever threatened to kill someone and that, after the December 18, 2000 Employer meeting, there were rumors of contracts being terminated, cut-backs in hours, and that in effect, he "threatened to kill someone based on a rumor." DeJong reiterated that at the January 25, 2001 meeting he was furious, he didn't want the Union and he didn't want the nominations to go ahead at all. DeJong provided that he didn't want a bargaining committee appointed and he didn't want Topley to accept the nomination. DeJong confirmed that he received the unfair labour practice application (LRB File No. 025-01) on approximately February 2, 2001.

[22] Fred Boone ("Boone"), an employee of the Employer, also signed a membership card and was present at the January 25, 2001 meeting. Boone testified on behalf of the Union and confirmed DeJong's threat to kill Topley. Boone testified that DeJong was red in the face and looking straight at Topley. Boone also testified that "it was a shocker to everyone, no one expected it."

[23] Boone confirmed that DeJong put forward a motion to end the January 25, 2001 meeting and that DeJong apologized to Topley after the meeting. Boone confirmed that supporters of the Union were intimidated and did not show up at future Union meetings.

Relevant Statutory Provisions

> *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;*

Analysis

[24] There were countless incidents described during this hearing which were extremely troubling for the Board. While it is recognized that the individual parties in this case have very little experience dealing with unions and that this is a learning process for the individual parties involved, threats to "kill people" or to "kick the shit" out of people should not be accepted in any setting in our society. This is not usual behaviour during organizing campaigns either among employees who support unions or those who oppose unions. The Board is disturbed by the evidence relating to the physical attack on Leriche and even more so by the evidence that the RCMP refused to investigate the assault on Leriche. The cowardly assault on Leriche occurred almost immediately after the unfair labour practice applications were filed against Tucker and DeJong.

[25] Counsel for the Union argued that both Tucker and DeJong were guilty of unfair labour practices pursuant to s. 11(2)(a) of the *Act*. Both Respondents made threats of bodily harm against

members of the Union at meetings. These threats influenced other members of the Union and were made with the intent of interfering with the Union in its attempt to bargain collectively with the Employer.

[26] Counsel for the respondents portrayed his clients' actions as vigorous opposition to the Union. Counsel argued that DeJong was scared for his family and argued further that Tucker believed he had been lied to by Leriche about his membership card. Counsel also suggested that the test to be utilized as to whether or not Tucker and DeJong committed an unfair labour practice pursuant to s. 11(2)(a) of the *Act* must be a subjective one.

[27] The purpose of s. 11(2)(a) of the *Act* is to prevent the development of an atmosphere that renders it impossible for employees to express their true wishes on joining or not joining a trade union. The Board in its decision in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Western Automotive Rebuilders Ltd.* [1993] 1st Quarter Sask. Labour Rep. 156, LRB File Nos. 239-92 & 263-02, provided at 160 and 161:

> *Counsel representing Mr. Dudra argued that the concept of "interference" should be interpreted to include any misrepresentation which impaired the ability of an employee to make a truly free choice concerning union representation. In his view, the evidence demonstrated that Mr. Kildaw had wilfully misled his client on a particular which was crucial to the obtaining of his support; even if the misrepresentation was innocent, the Union should be held accountable for it.*
>
> *Counsel for the Union argued that an unfair labour practice must involve some impropriety, and that this could not be established unless the party making the allegation could show culpable conduct on the part of the Union. The appropriate standard, in his view, is not that set by the subjective conviction of Mr. Dudra that he had been misled, but an objective standard according to which union conduct is scrutinized to determine whether any improper steps were followed in obtaining evidence of support.*

> *It is our conclusion that the concept of "interference" in Section 11(2)(a) must be broad enough to include conduct on the part of a trade union which, while not coercive or intimidating, is improper in some other way. Wilful misrepresentation which is not coercive would, in our view, constitute an illustration of this. On the other hand, insofar as the argument on behalf of Mr. Dudra relies on a standard of relatively strict liability with respect to union conduct, we are unable to accept the argument. The next phrase in Section 11(2)(a) – "with a view to encouraging or discouraging membership" – indicates that the intention of the section is to prohibit conduct which is undertaken with a conscious purpose, and does not catch conduct which is innocent of such calculation.*

[28] The conduct of both Tucker and DeJong was most certainly taken with a conscious purpose. On the whole of the evidence, there can be no other logical conclusion. Both individuals expressed a desire to not have a union. Both individuals acknowledged being part of a group of employees who belonged to an anti-union group whose goal was to nominate anti-union people to the Union's bargaining committee, not bargain a collective agreement with the Employer, and ultimately get rid of the Union. Their threats of physical violence on supporters of the Union can only be seen as part and parcel of their plan to get rid of the Union.

[29] While the right to free speech must be protected, it does not include speech that is threatening or intimidating to others. Given the events which were happening at the workplace from and after December 18, 2000, it is difficult for anyone to argue that supporters of the Union were not intimidated by the actions of Tucker and DeJong. DeJong offered no real rationale for his actions but, at least, he had the decency to offer an apology for his actions on January 25, 2001. Tucker, on the other hand, did not apologize for his actions and attempted to justify his actions based on the fact that Leriche was unable to retrieve Tucker's membership card following their alleged December 17, 2000 telephone conversation. In our view, Tucker's feeble justification, which is not accepted, does not excuse his violent threats and behaviour at the January 11, 2001 meeting.

[30] In *Western Automotive Rebuilders Ltd., supra*, the union attempted to obtain a certification order. In a separate application, a number of applicants accused the union of obtaining their signatures on union membership cards through misrepresentation. According to the Board's

decision, one of the applicants even provided that "he felt he had been lied to." However, rather than threatening people or using "bullying tactics," the applicant was able to control his emotions and find a socially acceptable method to bring forward his concerns. It is hoped that Tucker and DeJong can likewise find a more socially accepted method of voicing their concerns when disagreements arise.

[31] In regard to the allegations made against Tucker, where there is conflict between the evidence of Tucker and Leriche, the Board accepts the evidence of Leriche. Leriche's testimony was more believable and plausible than Tucker's. Tucker presented himself as an individual who did not possess the ability to control his emotions. Tucker had been drinking on the evening in question. He admits that he attended the January 11, 2001 meeting and threatened Leriche. He wanted to get rid of the Union in the workplace. In our view, his conduct constitutes an unfair labour practice pursuant to s. 11(2)(a) of the *Act* in that he threatened an employee with a view to discouraging membership in or activity in or for the Union.

[32] Similarly, we find the actions of DeJong amount to an unfair labour practice pursuant to s. 11(2)(a) of the *Act*. His actions were meant to and did threaten an employee with a view to discouraging membership in or activity in or for the Union.

[33] Counsel for the Union provided that the test as to whether or not Tucker and DeJong committed an unfair labour practice pursuant to s. 11(2)(a) of the *Act* must be an objective one. The Board agrees. In its decision in *United Food and Commercial Workers, Local 1400 v. Saskatoon Co-operative Association Limited*, [1985] Apr. Sask. Labour Report 29, LRB File Nos. 255-83 & 256-83, the Board noted at 37:

> *The Board's approach is designed to ascertain the likely effect on an employee of average intelligence and fortitude. That kind of objective approach by its very nature eliminates insignificant conduct, since trivialities will not likely influence an average employee's ability to freely express his wishes. It also necessitates an inquiry into the particular circumstances of each case, because it recognizes that the effect of an employer's words and conduct may vary depending upon the situation.*

[34] The Board in the decision *Service Employees' International Union, Local 299 v. Canadian Linen Supply Co. Ltd.,* [1990] Spring Sask. Labour Rep. 63, LRB File No. 176-89, likewise adopted the objective test at 65 as follows:

> *The Board went on to state that the test for interference is objective, that is an employee of average intelligence and fortitude, and that the Board must consider not only the comments themselves, but the attendant circumstances, in order to determine the probable effect upon the employees.*

[35] There are objective indicators in this case that the behaviour of Tucker and DeJong did have a coercive and intimidating effect on members of the Union for the purpose of discouraging their participation in the Union. Employees would not let their names stand for election to the bargaining committee after DeJong threatened to kill Topley. As a result, DeJong was able to make a motion to end the meeting. Following the threats of Tucker and DeJong, the number of supporters of the Union at meetings of the Union diminished substantially. This evidence leads this Board to the inescapable conclusion that the actions of Tucker and DeJong discouraged membership or activity in or for the Union.

[36] In regard to a remedy, counsel for both parties provided to the Board that they would consider a rectification plan, submitted by the respondents pursuant to s. 5.1 of the *Act*. Counsel for the respondents suggested that his client, DeJong, had apologized already for his actions and that his other client, Tucker, may also be interested in apologizing for his actions. Counsel for the Union requested that the Union be given the opportunity to respond to the rectification plan submitted to the Board prior to the Board's final Order.

[37] The Board orders that the respondents be given fifteen (15) days from the date of these Reasons for Decision to submit a written rectification plan to the Board and to counsel for the Union, together with their rationale for same. The Union shall have a further fifteen (15) days to respond to the respondents' rectification plan. The Board will issue its usual order under s. 5(d) and (e)(i) of the *Act* and will reserve its jurisdiction to make further orders under s. 5(e)(ii) upon receipt of the rectification plan and the Union's comments thereon.

PATRICK JAMIE McCOY, Applicant v. INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 870, Respondent

LRB File No. 178-00; June 19, 2001
Vice-Chairperson, James Seibel; Members: Bruce McDonald and Marianne Hodgson

For the Applicant: Leslie Belloc-Pinder
For the Respondent: Neil McLeod, Q.C.

Union – Membership – Union offered permit employee opportunity to become union member and provided necessary forms and instructions – Union never received completed application for membership or initiation fee – Not clear whether union's non-receipt due to employee's failure to pay initiation fee or to employer's failure to forward same to union - Board concludes that union's subsequent failure to pursue employee about membership does not constitute violation of s. 36.1(3) of *The Trade Union Act*.

***The Trade Union Act*, ss. 25.1 and 36.1.**

REASONS FOR DECISION

Background

[1] James Seibel, Vice-Chairperson: Patrick Jamie McCoy ("McCoy") filed an application alleging that the International Union of Operating Engineers, Local 870 (the "Union"), committed an unfair labour practice in violation of s. 36.1(3) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") by unreasonably denying him membership in the Union. He asserts that one effect of the alleged violation is that he has been precluded from access to the Union's health and welfare benefits plan. The Union denies the charge and replies that McCoy was allowed to work by the Union for a unionized employer, Lloydminster Maintenance Ltd. ("LM Ltd."), as a permit employee, but failed or neglected to perfect membership in the Union. The Union says further that eligibility to access the benefit plan is not contingent upon membership in the Union, but that McCoy did not perfect his eligibility.

Evidence

[2] McCoy testified that he commenced employment with LM Ltd. at the heavy oil upgrader in Lloydminster on April 27, 1998. He said he believed that after 400 hours of work he would be eligible to complete an application for membership in the Union and that he would be covered by the

benefits afforded by membership after 500 or 600 hours of work. McCoy said he received a blank application while at work at the upgrader from one Ernie Nolter, then a shop steward for the Union. Mr. Nolter, he said, told himself and a fellow employee, Terry Keller ("Keller"), who was also present at the time, to complete the forms and deliver them with the appropriate initiation fee to the offices of LM Ltd. in Lloydminster. McCoy maintained that he completed the application and the oath of obligation contained on the same document on August 24, 1998 and delivered it to the LM Ltd. office in Lloydminster the following day. He said that Keller, who was delivering his own application, was with him at the time. McCoy said he left the document with a person whom he did not know, but who appeared to be a secretary, and also paid her the initiation fee in cash, which he believed to be the sum of $136.50. McCoy said he did not obtain a receipt for the payment as this person advised him he would be sent one at the end of the year. Indeed, McCoy referred to a copy of his original application, which he confirmed was completed in his handwriting and which is purportedly dated August 24, 1998. In cross-examination, however, he was unable to explain why he had not completed the blank spaces referring to the initiation fee and form of payment thereof.

[3] McCoy said that about one month later Mr. Nolter told him to contact the LM Ltd. office with respect to deduction of union dues. He said that he attended at the LM Ltd. office in person. He said he was asked by the person in attendance whether he had paid the initiation fee. McCoy indicated that he had, to which the person replied that it did not appear that payment had been received but that if there was a problem she would contact him.

[4] McCoy referred to his paycheque statement dated July 9, 1998 that indicates that monthly union dues had been deducted from his pay for the corresponding period, but noted that the box for union dues deductions on the 1998 Revenue Canada T4 slip he received from LM Ltd. is blank.

[5] On October 4, 1998, McCoy suffered a serious injury on the job. He has been receiving workers' compensation benefits since the accident. He said he first became aware that the Union did not consider him to be a member some eighteen months after the accident when he tried to access benefit coverage for some dental work. The Union's office advised him it had no record of his membership.

[6] McCoy spoke to Ed Cowley, the Union's chief executive officer and business manager who wrote him a letter dated May 1, 2000. The letter reads in part as follows:

> *Please be advised that upon checking our records we have determined that Jamie McCoy is not presently a member of I.U.O.E. Local 870 nor has he ever been a member of this local union. McCoy worked for Lloydminster Maintenance between the months of May, 1998 and November, 1998. During the period of employment McCoy failed to pay required initiation fees as required by the constitution and bylaws of our local union, he was treated as a permit employee during the period that he was employed by Lloydminster Maintenance.*

[7] McCoy then filed this application with the Board.

[8] In his evidence, McCoy was referred to five letters addressed to him in 1999 from the Operating Engineers Trust Funds, which is administered by a board of trustees composed of Union and employer appointees, dated January 14, March 29, April 30, May 13 and June 15, 1999. Each of the letters is similar: the January and April letters refer to the Health and Welfare Plan and the March, May and June letters refer to the group insurance plan. For example, the January 14 letter reads as follows:

> *RE: I.U.O.E. 870 HEALTH AND WELFARE PLAN*
> *--Eligibility for Enrolment*
>
> *According to our records, you are **eligible** (as a "permit" of Local 870) for enrolment effective January 1, 1999 under our Health & Welfare Plan, **if we receive your completed Enrolment Card (enclosed) by the deadline of January 27, 1999.***
>
> *If we receive your Enrolment Card **after January 27, 1999, you may no longer be eligible for enrolment** or your enrolment date may be **later than January 1, 1999.***

> *At enrolment, we will deduct hours (currently 135/month) from your "reserve account". If the balance in your reserve account falls below 135 hours, you will be sent a notice by mail stating that your coverage will be terminated if you do not choose to make self-payment at that time.*
>
> *Complete both sides of the enclosed Enrolment Card, sign it, and ensure that it is* ***received in our office by January 27, 1999.***
>
> *A summary of benefits available under each of the Health & Welfare Plan and the Pension Plan is included in the enclosed Trust Funds Member Handbook.* ***Please note, however, that the information regarding the Pension Plan does not necessarily apply to you at this time, since only Members of Local 870 (in good standing) are eligible for enrolment in the Pension Plan.***
>
> (Emphasis in original)

[9] McCoy testified that, while he might have received the January 14, 1999 letter, he did not recall receiving the others. He said he was aware that he had to complete some document to enroll in the Union's Health and Welfare Plan, and that he did so in August or September, 1998. He said that he recalled completing another document related to the plan near the end of 1998. McCoy admitted that he has some memory problems related to his injuries.

[10] McCoy's spouse, Sonja McCoy, testified on his behalf. She said she recalled giving her husband the cash for the Union initiation fee around the end of August, 1998. She said she recalled her husband receiving a form from the Union related to health and welfare benefits at around the same time. She said her husband completed and signed the form and she mailed it. She said she recalled that he received a similar form sometime after his accident but before the end of the year. Ms. McCoy said that she did not contact LM Ltd. at any time to find out whether anyone there had a recollection that her husband paid the initiation fee. She did not recall that her husband received any of the five letters from the Union trust funds in 1999.

[11] Ed Cowley testified on behalf of the Union. He has been the Union's business manager since 1974 and sits as the chairperson of the Union's health and welfare, pension and training trust funds. He explained that the Union has two collective agreements with LM Ltd., one for the employees working in maintenance and one for those working in the coking operation at the upgrader. The Union holds a Certification Order for the maintenance employees but is voluntarily recognized by LM Ltd. with respect to the coking employees. McCoy was employed under the coking contract. Mr. Cowley said that no employee is forced to join the Union when they are hired in the coking operation, but that all employees covered by the collective agreement are required to pay union dues. Persons who do not join are "permitted" by the Union to work. Non-members are allowed to attend Union meetings, but do not have a "voice or vote" at general membership meetings of employees of multiple employers.

[12] Mr. Cowley explained that, pursuant to the health and welfare trust agreement, members of the Union are eligible to enroll in the Health and Welfare Plan after 400 hours of work, and permit employees may do so after 800 hours. A permit employee is not entitled to put his or her name on the Union's "out-of-work board" if laid off. Mr. Cowley noted that an employee who is not a Union member is nonetheless eligible to enroll in the benefit plans, subject to certain conditions. He advised that the Union's constitution allows anyone to obtain membership if they submit an application, pay the initiation fee and the Union's executive board accepts them for membership. To remain a member in good standing one must keep one's monthly dues current.

[13] Mr. Cowley testified that the Union had not received McCoy's application for membership or the requisite initiation fee. He referred to a memorandum that the Union received from one Murray Peterson of LM Ltd., dated July 10, 2000 which indicated to the Union that LM Ltd. had no record that McCoy had paid the initiation fee. The memorandum reads, in part, as follows:

> *LML have no record of collecting or remitting any union initiation fee for Jamie – perhaps it was overlooked because he was a temporary employee. We did withhold and remit working dues and monthly dues, as our union agreement requires.*

[14] Mr. Cowley referred to the copy of McCoy's application for membership which was adduced in evidence through McCoy and said that he received it by facsimile from Mr. Peterson on March 13, 2001 after Mr. Cowley made an inquiry in preparation for the hearing of this application. The accompanying memorandum from LM Ltd. reads as follows:

> *A copy of Jamie McCoy's application form is attached. We still have the original in our file. The girls assume we were holding it until we received his cheque.*

[15] Mr. Cowley also said that, although McCoy maintained that he both completed the membership form and delivered it with the initiation fee to LM Ltd. at the same time as did his co-worker, Keller, Keller's application for membership is dated a week prior to McCoy's – on August 17, 1998 – and the blanks regarding payment of the initiation fee are completed. Furthermore, the Union's records indicate that it received the initiation fee on behalf of Keller on October 8, 1998.

[16] Ron Williams is a chartered accountant and has been the administrator of the Union's trust funds since November, 1997. He testified on behalf of the Union. He explained the Health and Welfare Trust Fund enrollment process for Union members and permit employees. Eligibility for enrollment is based upon accumulated hours of work credit. Employees may move in and out of eligibility according to ongoing depletion of or addition to their individual "reserve account" of hours of work credit. He said the Health and Welfare Trust Fund tracks each employee's hours and when they are eligible to enroll the trust fund contacts them by mail and provides enrollment materials. He confirmed that according to the records of the trust fund, as a permit employee, McCoy was eligible to enroll as of November 25, 1998, but coverage could not have commenced until at least January 1, 1999, the month following the remittance by the employer of its contribution to the fund on his behalf.

[17] The Health and Welfare Trust Fund information booklet for employees explains the necessity for enrollment, at 7, as follows:

> *<u>It should be noted that:</u>*
>
> *You and/or your dependants will not be covered for benefits until your completed "Enrollment Card for Group Insurance" is received by the Trust Funds office.*

Claims can only be processed after the completed Enrolment Card is received in the Trust Funds office.

Claims can only be made for losses and/or services provided after the effective date of your coverage.

[18] The booklet explains the continuation of eligibility, and the termination and reinstatement of benefits based on the status of an employee's reserve account of accumulated hours. Briefly, each month 135 hours of work credit are deducted for each month of eligibility. An employee remains eligible so long as his or her reserve account contains at least 135 hours of work credit. Benefits under the plan terminate at the end of the month in which the work credits in the employee's reserve account fall below 135 hours. If coverage is terminated, an employee again becomes eligible for enrolment when his or her reserve account totals at least 270 hours within the six-month period subsequent to termination of coverage. The employee must submit a new enrolment card to be reinstated to coverage. If benefits coverage terminates, an employee has the option to extend coverage by self-payment for up to 12 months. Certain benefits continue if the employee is in receipt of long term disability or workers' compensation benefits.

[19] Mr. Williams confirmed that the records of the trust fund indicated that McCoy was sent the five letters in 1999 as referred to above, and that, after the last in June 1999, his reserve account had depleted to the level where he was no longer eligible to enroll. He also indicated that the records of the trust fund did not indicate that a completed enrollment form was ever received from McCoy.

[20] Murray Peterson is the vice-president of operations for LM Ltd. He was called to testify by the Union. He said that, because of the voluntary recognition agreement on the coking side of the Employer's operations, LM Ltd. facilitates the acceptance and remittance of applications for Union membership and initiation fees. He recalled one occasion when one employee (other than McCoy) paid the initiation fee in cash to LM Ltd.: he said the employee was provided with a receipt on the spot. LM Ltd. deposited the money and then remitted the fee to the Union with its regular monthly remittance of dues and fees by a company cheque.

[21] Mr. Peterson confirmed that when he received an inquiry about McCoy from Mr. Cowley in July, 2000 he checked LM Ltd.'s records including the receipt book, petty cash account and bank deposit records for a three month period and could not find anything pertaining to McCoy . He confirmed that LM Ltd. would not have sent cash to the Union. Furthermore, he testified that he checked with everyone in the LM Ltd. office, including a former clerk who no longer worked for the company, and no one had any recollection of receiving money from McCoy. He said that he found McCoy's original application for Union membership in his personnel file. He opined that LM Ltd. did not forward the application to the Union because McCoy had not paid the initiation fee.

Relevant Statutory Provisions

[22] McCoy alleges that the Union breached s. 25.1 and s. 36.1 of the *Act* which provide as follows:

> *25.1 Every employee has the right to be fairly represented in grievance or rights arbitration proceedings under a collective bargaining agreement by the trade union certified to represent his bargaining unit in a manner that is not arbitrary, discriminatory or in bad faith.*
>
> . . .
>
> *36.1(1) Every employee has a right to the application of the principles of natural justice in respect of all disputes between the employee and the trade union certified to represent his bargaining unit relating to matters in the constitution of the trade union and the employee's membership therein or discipline thereunder.*
>
> *(2) Every employee shall be given reasonable notice of union meetings at which he is entitled to attend.*
>
> *(3) No employee shall unreasonably be denied membership in a trade union.*

Argument

[23] Ms. Belloc-Pinder, counsel for McCoy, argued that there was negligence and carelessness on the part of the Union in this matter, and that it was not necessary that McCoy prove that there was any motive of bad faith on the part of the Union. She argued that credibility was a key element in the case, stating that McCoy's evidence was corroborated by his wife, and it was improbable that McCoy would be so negligent as to have delivered the application for membership to LM Ltd. but not paid the initiation fee. She said that the failure to perfect his Union membership and enroll in the benefit plan was not the fault of McCoy, but that something went wrong between LM Ltd. and the Union. She said further that, while the letters from the Health and Welfare Trust Fund are damaging to McCoy's position on their face, that would only be the case if they were in fact received by him, and both he and his wife said that they were not. She asserted that McCoy was entitled to the benefit of the doubt. Ms. Belloc-Pinder concluded her argument by saying that the Union had failed to fulfill its fiduciary duty to keep McCoy informed as to whether he was a member of the Union or only a permit member.

[24] Mr. McLeod, counsel for the Union, asserted that counsel for McCoy did not take the position that the Union had received McCoy's initiation fee and had refused to grant him membership, but rather that it ought to have pursued him with respect to the issue of membership. He argued that there was no evidence that the Union had unreasonably denied McCoy membership within the meaning of s. 36.1(3) of the *Act*. Under the circumstances, Mr. McLeod argued, there was no prejudice to McCoy from the lack of membership as he could have enrolled in the Health and Welfare Plan in any event; that is, benefits under the plan were not contingent on Union membership. Mr. McLeod suggested that McCoy and his wife were mistaken in their belief that enrollment documents were completed and submitted. Counsel stated that it was simply an unfortunate circumstance for McCoy, but that the Union had no liability under the circumstances. He said that neither was there any violation of the duty of fair representation as the Union had not acted in bad faith or arbitrarily and had not discriminated against McCoy.

[25] In reply, Ms. Belloc-Pinder asserted that the Union had failed to act at the standard to be expected in its representation of McCoy as a permit member of the Union.

Analysis and Decision

[26] Having reviewed the evidence in detail, we are inclined to agree with counsel for the Union that the situation is indeed unfortunate for McCoy. However, we do not find that the Union either unreasonably denied him membership or failed to fairly represent him as a permit employee.

[27] We accept the evidence of Mr. Cowley, that with respect to the employees in the bargaining unit for which LM Ltd. has voluntarily recognized the Union as the bargaining agent, the Union does not force employees or new employees to become members of the Union. The evidence discloses that through the shop steward, Ernie Nolter, McCoy was offered the opportunity to apply for membership and McCoy understood that it required the completion and delivery of an application for membership and the payment of an initiation fee. It is beyond question that he completed the application and delivered it to LM Ltd.; it is not beyond question that he paid the initiation fee. It is not known what happened to the application form after it was delivered to LM Ltd.; that LM Ltd. misplaced it is entirely possible given that it only managed to locate same some months after Mr. Cowley's initial inquiry. But this does not explain the lack of any record of payment of the initiation fee. While LM Ltd. may have misplaced that too and/or failed to make a record of receipt therefore, McCoy's evidence surrounding payment was uncertain: he was obviously mistaken in his recollection of attending with and paying at the same time as Keller on or about August 25, 1998, and he at least failed to secure a receipt for payment that could have corroborated his evidence. Unfortunately the evidence of Sonja McCoy that she gave him cash for the purpose is not helpful in resolving the issue.

[28] We accept the evidence of the Union that it did not receive either the application for membership or the initiation fee – whether that was as a result of the failure of McCoy to pay the fee or the failure of LM Ltd. to forward same to the Union is not relevant to the issue we must decide, namely, whether the Union unreasonably denied McCoy membership. Without enunciating what a bargaining agent in general must do with respect to the consideration of an application for membership by a permit member of a voluntarily recognized bargaining unit, we find that in the circumstances, after offering McCoy the opportunity to join and apprising him of the necessary conditions therefor, the Union did not unreasonably deny McCoy membership by failing to proactively pursue him further with respect to the issue and did not violate s. 36.1(3) of the *Act*. Whether McCoy has any recourse against LM Ltd. in the circumstances is not a matter on which we offer any opinion.

[29] We also find that the Union did not breach its duty of fair representation pursuant to s. 25.1 of the *Act*. With respect to the matter of enrollment in the Health and Welfare Trust Fund plan, we accept that the trust fund repeatedly advised McCoy of his eligibility to enroll in the plan and clearly stated the requirements for enrolment, the conditions for maintaining enrolment and the consequences if he failed to return the necessary documents to the trust fund; it also advised him that he was considered to be a permit worker of the Union rather than a member. While it cannot be said with certainty that the letters from the trust fund were in fact sent and delivered to McCoy , it is more probable than not that they were; they were addressed to McCoy's proper address. Short of ascribing some nefarious motive to the Union or the trust fund, which Ms. Belloc-Pinder clearly stated her client was not doing, the trust fund had no reason to generate the letters but not send them. There was no evidence that it did not follow its usual and ordinary office practice in handling the correspondence in this case. In any event, McCoy believed that he probably did receive at least the January 14, 1999 letter.

[30] Therefore, on the whole of the evidence, for the reasons stated above, the application is dismissed.

RICHARD BEAUPRE, Applicant v. COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA and MAXIM TRANSPORTATION SERVICES INC., Respondents

LRB File No. 094-01; June 19, 2001
Vice-Chairperson, Walter Matkowski; Members: Bruce McDonald and Don Bell

For the Applicant: Richard Beaupre
For the Respondent Maxim: Kevin Wilson

Decertification – Practice and procedure – Timeliness – Where two separate Certification Orders merged into one larger unit and no collective agreement in place, Board concludes that anniversary date of order creating merged unit is date to use to calculate open period pursuant to s. 5(k)(ii) of *The Trade Union Act*.

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

REASONS FOR DECISION

Background and Facts

[1] **Walter Matkowski, Vice-Chairperson:** Richard Beaupre, ("Beaupre") an employee with Maxim Transportation Services Inc. ("Maxim"), the successor employer to Northland Trucks (1978) Ltd. (the "Employer"), applied to the Board pursuant to s. 5(k) of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the *"Act"*) seeking an order rescinding the Order of the Board dated May 5, 1999 whereby all employees in the service and maintenance areas of the Employer, with some exceptions, were deemed an appropriate unit of employees for the purpose of bargaining collectively and certifying the Communications, Energy and Paperworkers Union of Canada (the "Union") as representing a majority of the employees of the Employer.

[2] Subsequent to the May 5, 1999 Order of the Board, by Order dated November 16, 1999, the Board certified the Union as the bargaining agent for a number of employees in the parts department of the Employer.

[3] By Order dated November 24, 2000, the Board rescinded both the May 5, 1999 Order and the November 16, 1999 Order.

[4] By Order dated November 24, 2000, the Board merged the two units of the Employer into one bargaining unit, being the service, maintenance and parts areas of the Employer, with some exceptions.

[5] By letter, provided to all parties, dated May 11, 2001, the Board Registrar advised Beaupre:

> *I have reviewed your application and have concluded that it has not been filed within the open period described in s. 5(k) of The Trade Union Act for any of the Board's Orders relating to this workplace.*
>
> *All parties should be prepared to address the Board at the hearing scheduled for May 25, 2001 on the issue of when the appropriate open period falls given the circumstances of this bargaining unit (ie. two original Certification Orders and one Amendment Order with no collective agreement in place).*

[6] By letter to the Board dated May 7, 2001, Beaupre sought the help of the Board in having the decertification application proceed. Beaupre advised in the May 7, 2001 correspondence that, in effect, he was provided two dates from which to calculate the open period by the Board, being May 5, 2001, and November 24, 2001.

[7] Beaupre verbally advised the Board at the hearing that he did not recall who advised him from the Board that the appropriate date for calculating the open period was May 5, 2001.

[8] Counsel for Maxim acknowledged that his client was the successor to Northland Trucks (1978) Ltd. and that his client had advised the Union it was the successor employer.

[9] The parties agreed that no collective agreement had ever been reached between the Union and the Employer.

Relevant Statutory Provisions

[10] Sections 5(j) and 5(k) of the *Act* read as follows:

> *5 The board may make orders:*
>
> *(j) amending an order of the board if:*
>
> *(i) the employer and the trade union agree to the amendment; or*
>
> *(ii) in the opinion of the board, the amendment is necessary;*
>
> *(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 that a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;*

Analysis

[11] Even if this Board accepted that Beaupre was advised by someone from the Board that the appropriate date to calculate the open period in the case at hand was May 5, 2001, Beaupre did not file his material with the Board until May 9, 2001, thus missing the open period pursuant to clause 5(k) of the *Act*, assuming for the moment that this was the correct date from which to calculate the open period.

[12] In attempting to calculate the open period, the Board considered the decision *Monahan v. Capital Pontiac Buick Cadillac GMC Ltd. and United Steelworkers of America*, [1993] 3rd Quarter Sask. Labour Rep. 121, LRB File No. 169-93, wherein the Board commented at 122 as follows:

> *The applicant in accordance with the Board's interpretation of s. 5(k)(ii), used the date of the original Certification Order to determine the open period. In Canada Safeway Ltd., [1986] May Sask. Labour Report 61, the Board considered precisely the same issue and concluded that the "order" referred to in s.5(k)(ii) is the original Certification Order. It rejected the argument that the open period should be calculated from the date of a subsequent amendment to that order. The Board stated that its reason for choosing the date of the original Certification Order over the date of the amended order as:*
>
> *... to use anything but the date of the original Order would greatly increase the difficulty and complexity of determining the proper open period.*

[13] Under normal circumstances, the open period will be calculated from the date of the original Certification Order as set out in *Monahan, supra*. However, in this case, two separate Certification Orders were rescinded and the two separate units were merged into one unit. In essence, a new bargaining unit was created through the merger process. Under this view, the proper date for calculating the next open period is November 24, 2001, the anniversary date of the Order which merged the two separate units into one bargaining unit.

[14] Counsel for the Employer urged the Board to utilize s. 5(j) of the *Act* to rescind the November 24, 2000 Order of the Board. Counsel relied on the Board's decision in *Canadian Union of Public*

Employees, Local 1788 v. John M. Cuelenaere Library Board, [1996] Sask. L.R.B.R. 732, LRB file No. 052-96. In that decision, the Board found at 742:

> *Section 5(j) places in the hands of the Board a discretion to amend or rescind an Order in other circumstances than those where it is considered necessary to clarity or correct the Order. It permits the Board to contemplate such amendment or rescission for a range of reasons which could include substantive considerations of policy, as well as the technical issues which were the basis of such amendment or rescission before the amendment to s. 5(j). In our view, one of the implications of this is that the restrictions on considering applications which are filed outside the open period in s. 5(k) are no longer of a jurisdictional nature; the restrictions which remain are those imposed by the Board in the light of whatever factors we think relevant.*
>
> *As we indicated in the University of Saskatchewan decision, supra, we do not think the amendment of s. 5(j) constituted a signal for the wholesale abandonment of the open periods set out in s. 5(k). As a general rule, the requirement that parties who wish to apply for amendment or rescission of Board Orders concerning the scope of bargaining units and the representation of employees by trade unions serves a useful purpose in terms of ensuring orderliness and predictability. The temporal benchmarks provided by the open periods should continue to guide the parties in the vast majority of cases. It is only where the application of the ordinary requirements creates a significant difficulty for the parties or an obstacle to sound collective bargaining that the Board should consider exercising our discretion under s. 5(j).*

[15] In *Cuelenaere, supra*, the situation was factually different than the case at hand, in that the Board was dealing with a situation where an employer was seeking a determination pursuant to s. 5(m) of the *Act* on the status of two positions. In *Cuelenaere, supra*, the Board exercised its discretion under s. 5(j) of the *Act* because the parties had been attempting to resolve the issue of the two positions for more than a year, the two positions were key positions in the employer's administrative structure and because the two positions held important industrial relations duties. None of the factors considered by the Board in exercising its discretion in *Cuelenaere, supra* to utilize s. 5(j) of the *Act* are present in the case at hand.

[16] In the present case, there was no demonstrated significant difficulty for the parties which would justify the Board utilizing it discretion under s. 5(j). The fact that the applicant must wait approximately six months to proceed with a decertification application does not amount to significant difficulty.

[17] To be clear, in the case at hand, the Board is dealing with a unique situation and will continue to calculate the applicable open period from the anniversary date of the original Certification Order in the vast majority of cases for the reasons set out in *Monahan, supra.*

[18] The Board therefore directs that the proper date from which the applicant should calculate the open period, pursuant to s. 5(k) of the *Act*, is November 24, 2001, the anniversary of the date of the Order which rescinded the two separate Certification Orders and the date of the Order which merged the two separate units into one. This application is therefore dismissed. The applicant or any other employee of the Employer is free to file another application in the appropriate open period, if they so desire.

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 4438, Applicant v. TOWN OF CANORA, Respondent

LRB File No. 070-01; June 22, 2001
Chairperson, Gwen Gray; Members: Don Bell and Mike Geravelis

For the Applicant: Malcolm Matheson
For the Respondent: Randy Kachur

Bargaining unit – Appropriate bargaining unit – Board policy – Majority of employees included in proposed bargaining unit and no evidence that those employees intermingle with group not included in proposed bargaining unit – Proposed bargaining unit does not lack bargaining strength – Board concludes that proposed bargaining unit appropriate.

Certification – Statement of Employment – Pool guards not employed on date application filed – No evidence that pool guards similar to employees laid off with reasonable possibility of recall – Board concludes that pool guards lacked sufficient tangible relationship to employer at time application filed – Board removes pool guards from Statement of Employment.

Bargaining unit – Appropriate bargaining unit – Confidential personnel – Because of deprivation of union representation for employee involved, confidential exclusions only allowed for good and compelling reason – Accounting Clerk does not perform duties of confidential nature in relation to employer's industrial relations – Board includes Accounting Clerk in bargaining unit.

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

REASONS FOR DECISION

Background

[1] Gwen Gray, Chairperson: Canadian Union of Public Employees, Local 4438 (the "Union") applied to be certified for a bargaining unit composed of all employees of the Town of Canora with certain managerial exceptions. The application was filed with the Board on March 23, 2001.

[2] The Town of Canora (the "Employer") filed its Statement of Employment on April 20, 2001 indicating that there were 39 employees in the unit proposed by the Union. The Employer sought the exclusion of the Accounting Clerk, Fire Chief and Swimming Pool Manager, in addition to those managerial exclusions sought by the Union. The Union did not oppose the exclusion of the Fire Chief or the Swimming Pool Manager.

[3] The Union filed an amendment to its application for certification on May 25, 2001 by seeking a bargaining unit comprising all employees of the Employer except the employees of the fire department. The Union opposed the exclusion of the Accounting Clerk.

Facts

[4] The Employer employs approximately 40 employees in four general areas: General Office, Public Works, Leisure Services and Protective Services. The Employer contracts its policing services to the RCMP and pays them one-half of the salary of a clerk-steno. The clerk-steno reports to and is directed in her work by the RCMP members stationed in Canora.

[5] The Employer operates an outdoor pool in the summer months. The pool is staffed by a Pool Manager, Assistant Pool Manager and eight pool guards. The pool guards were offered employment by the Employer prior to the date of the Union's application, but they do not commence work until July. The pool guards are high school students who are not available for work until the end of school.

[6] The fire department is part of the protective services department. The fire hall is run by a Fire Chief, Deputy Fire Chief and 1st Vice Chief, all of whom are paid a monthly salary by the Employer. The remaining fire fighters work on an "as needed" basis and are paid an hourly rate for all hours of fire fighting, training and other related fire fighting duties. Fire fighters also have a separate benefits package. They are issued T-4's at the end of each calendar year and are considered "employees" by the Employer. Most fire fighters are engaged in other employment in the town of Canora. Persons who wish to become fire fighters are interviewed by the chief who will make hiring recommendations to the town council. The Fire Chief is also responsible for budget preparation and control in his department.

[7] Mr. Glenn Dutchak, alderman, testified that the fire fighters have comparable employment to casual workers in the leisure services department of the Employer.

[8] The main affairs of the Employer are managed by the Town Administrator. The position is currently vacant.

[9] In addition to the Town Administrator, there is an Accounting Clerk and an Office Clerk. The Accounting Clerk, Ms. Val Antoniuk, is responsible for the accounts of the Employer, including the assessment rolls, pay roll, general ledger, budget updates and similar duties. Ms. Antoniuk does not perform clerical duties and, according to her, most of the clerical work falls to the Office Clerk. In addition, the past administrator prepared the agenda, reports and minutes of council meetings on his own computer. Although the Accounting Clerk is assigned the task of preparing the minute minder for town council, this task was actually assigned to the Office Clerk and then transferred to the Town Administrator once he obtained his own computer.

[10] Ms. Antoniuk testified that she is also responsible for replacing the Town Administrator when he is absent. This entailed her occasional attendance at town council meetings and the preparation of council minutes and resolutions. Ms. Antoniuk testified, however, that the Town Administrator generally had the council package ready for her and often typed the minutes of the council meeting on his return from Ms. Antoniuk's notes.

[11] The Accounting Clerk has responsibility for maintaining time sheets and pay packages for employees. For that purpose, she has access to personnel files that are kept in the town office. She testified that other staff also had access to personnel files, including the Office Clerk.

[12] The Accounting Clerk does not have managerial authority over any other employee. She was also not involved in the recommendation of wage increases or other employment related matters with the town council or Town Administrator. She did not have access to confidential matters related to the employment of other employees, aside from her access to the payroll records.

[13] Ms. Antoniuk volunteered that she was the key organizer for the Union. She has also been subject to some disciplinary steps taken against her by the Employer. On May 11, 2001 she was issued a written warning regarding her conduct. The written warning was given to Ms. Antoniuk by the Mayor and Alderman Dutchak. In the written notice, the Employer referred to an incident between Ms. Antoniuk and Alderman Rakochy. Ms. Rakochy complained that Ms. Antoniuk had spoken to her in an abrupt fashion in relation to council's decision to end the employment of the former Town Administrator and in relation to the unionization efforts. This conversation occurred on April 12, 2001, a few days after the removal of the former Town Administrator. Ms. Antoniuk acknowledged that she had been spoken to by the Town Administrator on one former occasion regarding her absences from work.

[14] Sometime prior to the Union's application for certification, the Employer sought advice from the Labour Standards Branch, Saskatchewan Labour, regarding the managerial status of the Accounting Clerk position. The Labour Standards Branch apparently advised the Employer that the position was not a managerial position within the meaning of *The Labour Standards Act*, R.S.S. 1978 c. L-1. After this determination, town council altered some of the benefits previously provided to Ms. Antoniuk, including the loss of earned days off. In addition, overtime was not paid after 7.5 hours of work but only after 8 hours of work.

Relevant Statutory Provisions

[15] The Board must decide if the Accounting Clerk is an employee within the meaning of s. 2(f)(i)(B) of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the "*Act*") which provides 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;

Union Argument

[16] Mr. Matheson, for the Union, argued that the bargaining unit described in the Union's amended application is appropriate for collective bargaining. The Union pointed out that Board policy does not require the Union to apply for the "most" appropriate bargaining unit. Mr. Matheson noted that the terms and conditions of employment of the fire fighters was different from the remaining employees. In this regard, the Union relied on *United Steelworkers of America v. Wheat City Steel, A Division of Sametco Auto Inc.,* [1996] Sask. L.R.B.R. 532, LRB File No. 102-96 and *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. 332-95.

[17] The Union also argued that the swimming pool guards were improperly included on the Statement of Employment because they were not employees on the day the application for certification was filed. Mr. Matheson referred the Board to *Canadian Union of Public Employees, Local 3737 v. Town of Moosomin,* [1994] 2nd Quarter, Sask. Labour Rep. 92, LRB File No. 038-94.

[18] The Union also opposed the exclusion of Ms. Antoniuk, the Accounting Clerk and argued that the Board must be satisfied that the position requires the clerk to be acting on a confidential basis in a regular fashion, not merely an incidental fashion. The Union cautioned the Board against removing Ms. Antoniuk's position from the bargaining unit when she is relatively vulnerable to being terminated for her union activity. The Union referred the Board to *Communications, Energy and*

Paperworkers Union of Canada v. E.C.C. International Inc., [1998] Sask. L.R.B.R. 268, LRB File No. 362-97.

Employer Argument

[19] Mr. Kachur, counsel for the Employer, argued that the appropriate bargaining unit is the unit that includes all employees of the Employer and does not exclude a group of casual or part-time employees, such as the fire department employees. Counsel referred the Board to the Board's long-standing preference for all-inclusive bargaining units as outlined in *Communication, Energy and Paperworkers Union of Canada v. Arch Transco Ltd.,* [2000] Sask. L.R.B.R. 633, LRB File No. 060-00; *Canadian Union of Public Employees, Local 3077 v. Lakeland Regional Library Board,* [1987] Oct. Sask. Labour Rep. 74, LRB File No. 116-86; *Service Employees International Union, Local 299 v. Cadillac Fairview Corporation Ltd.,* [1986] Apr. Sask. Labour Rep. 32, LRB File No. 308-85. Counsel compared the fire fighters to casual employees at the swimming pool. Counsel also noted that the constitution of the International Association of Fire Fighters, a trade union representing professional fire fighters, does not grant membership to part-time, casual or volunteer fire fighters. The Employer argued that the rights of fire fighters to become unionized would be negatively affected if the Board adopted the Union's amended bargaining unit description. Counsel also noted that an all employee bargaining unit was not beyond the organizational reach of the Union.

[20] In relation to the issue of the swimming pool guards, counsel for the Employer noted that the pool guards were offered employment prior to the date the application for certification was filed with the Board. The pool guards, in his opinion, are similar to laid off employees who have a reasonable possibility of recall. On this basis, counsel for the Employer argued that they should be included on the Statement of Employment.

[21] Counsel for the Employer argued for the exclusion of the Accounting Clerk on the grounds of her confidential capacity in relation to the employer's industrial relations. Specifically, counsel noted that the Accounting Clerk is second in command in the town office. She prepares payroll documents and has access to the personnel files of town employees. In addition, she replaces the Town Administrator when he or she is absent and has responsibilities on those occasions to attend council meetings. The job description of the Accounting Clerk assigns the keeping of council minutes to the Accounting Clerk, even though she did not perform this function. Counsel also

pointed out that there will be additional industrial relations issues that arise when and if the Union is certified. Counsel noted that it was not unrealistic to provide for one confidential position in the town administration, aside from the exclusion of the Town Administrator.

[22] The Employer referred the Board to *Community Health Services (Saskatoon) Association Ltd. v. Canadian Union of Public Employees, Local 974,* [2000] Sask. L.R.B.R. 326, LRB File No. 246-98; *E.C.C. International Inc., supra; University of Regina (McKenzie Art Gallery) v. Canadian Union of Public Employees, Local 1975,* [1995] 1st Quarter Sask. Labour Rep. 213, LRB File No. 266-94; *Town of Moosomin, supra.*

Analysis

Appropriate Bargaining Unit

[23] The test for determining if an under-inclusive bargaining unit is an "appropriate bargaining unit" was set out in *Graphic Communication International Union, Local 75M v. Sterling Newspapers Group, A Division of Hollinger Inc.,* [1998] Sask. L.R.B.R. 770, LRB File No. 174-98 at 780 as follows:

> *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.*

[24] In the present case, the majority of employees are included within the scope of the Union's proposed bargaining unit. There is no evidence that these employees intermingle or overlap in skill or work areas with fire fighters. Fire fighters do have a discrete skill set and are frequently certified as a separate bargaining unit.

[25] The proposed bargaining unit does not lack bargaining strength as a result of the exclusion of the fire fighting staff. In reality, the opposite may be true as the majority of the fire fighting staff are not dependent on the Employer for their full-time incomes and lack a community of interest in wages and benefits with the full-time, regular employees.

[26] Although the Union could have organized the fire fighting employees as part of its overall organizing drive, we do not consider it fatal to the application that fire fighters are not included in the bargaining unit.

[27] We do not agree with the Employer that fire fighters are comparable to other casual employees and ought to be included. We would agree with the Employer that it would be inappropriate in most situations to exclude part-time or casual employees who work in the same job categories as full-time and included employees, such as was considered in *Lakeland Regional Library Board, supra,* in relation to substitute branch librarians. In the present case, the Union seeks the exclusion of a group of employees who possess a discrete skill set; whose terms of employment are different from all other employees of the Employer; and whose work does not frequently overlap or intermingle with employees who are included in the bargaining unit.

[28] For these reasons, we find that the bargaining unit applied for is appropriate for the purposes of collective bargaining.

Inclusion of Pool Guards on the Statement of Employment

[29] In *Lakeland Regional Library Board, supra,* the Board noted that although it is the policy of the Board to include casual, temporary and part-time employees, such persons must have a "reasonably tangible employment relationship with the employer" before they are considered to be "employees." In *United Food and Commercial Workers, Local 1400 v. The Tropical Inn,* [1998] Sask. L.R.B.R. 87, LRB File No. 305-97, the Board considered whether persons who were offered

employment prior to the filing of a certification application, but who did not commence employment until after the application was filed, were "employees" within the meaning of the *Act*. At 89, the Board held:

> *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 rationale 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.

[30] The same reasoning was followed in *Service Employees' International Union, Local 299 v. Vision Security and Investigation Inc.,* [2000] Sask. L.R.B.R. 121, LRB File No. 228-99.

[31] The Employer in this instance, argued that the pool guard employees were similar to employees who are laid off and have a reasonable possibility of being recalled to work. This may be the case, but there was no evidence before the Board indicating which, if any, of the pool guards fell in this category.

[32] The Board finds that the pool guards lacked a sufficient tangible relationship to the Employer at the time the application for certification was filed to be included on the Statement of Employment and their names will be removed from the statement.

Status of the Accounting Clerk

[33] A useful summary of the Board's case law on confidential exclusions was set out by Vice-Chairperson Seibel in *Communication, Energy and Paperworkers Union of Canada v. E.C.C. International Inc.,* [1998] Sask. L.R.B.R. 268, LRB File No. 362-97 at 275:

> *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.*

[34] 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.*

[35] 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.*

[36] 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.*

[37] 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.*

[38] In the present case, we think it is realistic to expect that the Town Administrator will require clerical assistance to carry out the labour relations functions arising from the certification of the Union. The main issue on this application is whether that assistance comes from the Accounting Clerk. In our view, the Accounting Clerk's duties primarily revolve around the accounting functions. Her access to personnel files and confidential material is minimal and not a significant part of her duties. She has not been privy to confidential discussions related to personnel issues with the Town Administrator or with the town council. In our view, the Accounting Clerk does not regularly act in a confidential capacity with respect to her employer's labour relations.

[39] The question is whether or not the Accounting Clerk will assume such duties if the Union is certified. The present assignment of duties among the office staff is currently in a state of flux. The past Town Administrator performed many of his own clerical duties, and sought help from the Office Clerk when extra clerical help was needed. Ms. Antoniuk would assist the Office Clerk with minor clerical duties when time permitted. A new administrator may decide to perform the work in a different manner. In this situation, it is unclear as to the actual assignment of confidential duties related to labour relations.

[40] In our view, given the state of flux that the Employer is in with the change in Town Administrators and the possible introduction of the Union, the Employer should be provided an opportunity to determine the assignment of confidential duties and, once assigned, to have an opportunity to negotiate the scope of the position in question with the Union. If no resolution of the matter can be reached by agreement between the parties, the Employer may refer the matter back to the Board for a determination.

[41] In the meantime, the Accounting Clerk will be included in the bargaining unit as she does not perform duties of a confidential nature in relation to the Employer's industrial relations.

Conclusion

[42] In summary, the Board finds that a bargaining unit composed of all employees of the Employer, except employees of the fire department, is an appropriate bargaining unit. The bargaining unit shall be described as follows:

> *All employees of the Town of Canora, except the Town Administrator, Town Superintendent, Director of Leisure Services, Economic Development Officer, Swimming Pool Manager, Fire Chief, and all employees employed in the fire department of the Town of Canora.*

[43] The names of the RCMP steno (1), pool guards (8), and all fire department employees (17) are removed from the Statement of Employment and the name of the Accounting Clerk is retained on the Statement of Employment. The RCMP steno is removed as the Employer has no effective control over her employment and she cannot be said to be an "employee" of the Employer.

[44] As the Union filed evidence of majority support among the employees in the appropriate bargaining unit, the Board will issue a Certification Order.

UNIVERSITY OF SASKATCHEWAN FACULTY ASSOCIATION, Applicant v. UNIVERSITY OF SASKATCHEWAN, Respondent and CANADIAN UNION OF PUBLIC EMPLOYEES, Intervenor

LRB File No. 127-99; July 11, 2001
Vice-Chairperson, James Seibel; Members: Ron Asher and Gerry Caudle

For the Applicant: Neil McLeod, Q.C.
For the Respondent: John Beckman, Q.C. and Catherine Sloan
For the Intervenor: Jim Holmes and Heather Wagg

Certification – Amendment – Add-on to existing unit – Union seeks to add clinicians from medical college to academic bargaining unit which already includes tenure track faculty in medical college – Board notes strong community of interest between two groups – Employer argues that source of funding for positions mandates against inclusion – Board finds that problems which might arise as a result of different sources of funding are matters that can be solved by collective bargaining – Board orders amendment.

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

REASONS FOR DECISION

Background and Issues

[1] **James Seibel, Vice-Chairperson:** The University of Saskatchewan Faculty Association (the "Faculty Association") is certified as the designated bargaining agent for a unit of employees of the University of Saskatchewan (the "University") by an Order of the Board dated January 26, 1995 (the "Certification Order"). The Faculty Association has filed an application for an order, pursuant to s. 5(i) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") for certain amendments to the existing language of the Certification Order to better reflect the present classification of certain employees in the bargaining unit and to add two groups of employees to the bargaining unit. Canadian Union of Public Employees ("CUPE") represents another bargaining unit of employees of the University; CUPE sought and was granted intervenor status.

[2] The bargaining unit description in paragraph (a)(i) of the Certification Order presently reads as follows:

> *... all full time academic employees of the University of Saskatchewan, in the Province of Saskatchewan, appointed by and receiving salaries as such full time academic employees from funds disbursed by the Board of Governors from money originating in the University Operating Budget, with respect only to the academic component of the income of such employees as is derived from the operating budget of the University and such other terms and conditions of employment as are common to all such employees, including: all instructors and lecturers, all special lecturers, all Assistant Professors, Associate Professors, all Professors; all Librarians; Assistant Extension Specialists and Senior Extension Specialists; Members of the Department of Cancer Research holding academic appointments; and, with respect to full time academic employees of the clinical departments of the College of Medicine holding academic appointments as set out above, subject to the rules and regulations, and medical staff bylaws of the University Hospital and the Plains Health Centre, but excluding the President; Vice-Presidents; Assistants to the President; Deans; Associate Deans; the University Librarian; Associate Librarian; Director, Extension Division; all employees represented for the purpose of bargaining collectively by the Canadian Union of Public Employees Local 1975 and Local 3287, and all employees represented by the Administrative and Supervisory Personnel Association;*

[3] The groups that the Faculty Association seeks to add on to the bargaining unit include: (1) all less-than-full-time academic employees of the University; and, (2) the full-time academic employees of the College of Medicine holding academic appointments as instructors and lecturers, special lecturers, assistant professors, associate professors and professors. The Faculty Association membership comprises approximately 850 persons. According to the Faculty Association, the less-than-full-time faculty proposed add-on group comprised nine persons at the date of application, and the College of Medicine proposed add-on group, 80 persons. The Faculty Association has filed ostensible evidence of majority support for the application by the members of the latter group, but did not file any evidence of support from among the members of the former group.

[4] The amended Certification Order proposed by the Faculty Association reflecting the add-ons to the bargaining unit and the other amendments reads as follows (the proposed changes are denoted by the deletions as struck through and the additions in bold script):

all ~~full time~~ academic employees of the University of Saskatchewan, in the Province of Saskatchewan, appointed by and receiving salaries as such ~~full time~~ academic employees from funds disbursed by the Board of Governors from money originating in the University Operating Budget, with respect only to the academic component of the income of such employees as is derived from the operating budget of the University and such other terms and conditions of employment as are common to all such employees, ~~including: all~~ ***employed as*** *instructors and lecturers, ~~all~~ special lecturers, ~~all~~ Assistant Professors, Associate Professors, ~~all~~ Professors; ~~all~~ Librarians; ~~Assistant~~ Extension Specialists ~~and Senior Extension Specialists~~; Members of the Department of Cancer Research holding academic appointments; ~~and, with respect to full time academic employees of the clinical departments of the College of Medicine holding academic appointments as set out above, subject to the rules and regulations, and medical staff bylaws of the University Hospital and the Plains Health Centre~~,* ***and the full time academic employees of the College of Medicine holding academic appointments as instructors and lecturers, special lecturers, Assistant Professors, Associate Professors, and Professors,*** *but excluding the President; Vice-Presidents; Assistants to the President; Deans; Associate Deans; the University Librarian; Associate Librarian; Director, Extension Division; all employees represented for the purpose of bargaining collectively by the Canadian Union of Public Employees Local 1975 and Local 3287, and all employees represented by the Administrative and Supervisory Personnel Association;*

[5] In its application, the Faculty Association submitted that its reasons for the changes were as follows:

(a) with respect to the deletion of the descriptive phrase "full time," which would have the effect of including less-than-full-time faculty within the scope of the Certification Order, the Faculty Association says that it already represents part-time employees who, by voluntary recognition by the University in certain provisions of the collective agreement between the parties, already enjoy certain rights under the collective agreement; the Faculty Association says that under these circumstances it is not necessary to adduce evidence of support from among the employees in the group, who at the date of the application were nine in number;

(b) with respect to the deletion of "including," the several uses of "all," and the addition of the phrase "employed as," the Faculty Association says that it is a more accurate description and more clearly restricts the intended scope of the Certification Order to persons functioning as academics, thus excluding, for example, persons in administration who retain an academic rank;

(c) the Faculty Association says the proposed wording more clearly identifies those academic employees who are, or are not, subject to the "operating budget" proviso of the Certification Order;

(d) the Faculty Association says the use of the term "Extension Specialist" reflects the current classification in the collective agreement between the parties; the classifications of "Assistant Extension Specialist" and "Senior Extension Specialist" no longer exist;

(e) the Faculty Association seeks the change to the description regarding the College of Medicine to bring within the scope of the Certification Order, and to provide access to collective bargaining to, a number of full-time academic faculty members who work within the College who have been appointed without term or for a limited term (i.e., non-tenure track academic employees); these persons, called "clinicians," it says, carry out teaching, research, administrative and clinical duties within the College, but their remuneration is paid from funds received from sources other than the University's operating budget, viz., "the clinical earnings plan," which comprises funds generated by entrepreneurial medical practice by faculty members, and/or "the clinical services fund," which is part of the provincial government's grant to the Royal University Hospital, the teaching hospital adjacent to the University, and from some other third party sources.

[6] In its reply to the application, the University does not oppose the proposed amendments relating to the use of the word "all," the addition of "employed as" or the clarification of the extension specialist classification, but it oppose the balance of the proposed amendments to change the scope of the Certification Order on several grounds, including:

(a) with respect to the proposed inclusion of less-than-full-time faculty within the scope of the Certification Order, the University says that the present scope of the Certification Order is based upon the academic component of earnings of only full-time faculty from the University's operating budget; it says that the definition of the term "faculty member" in *The University of Saskatchewan Act, 1995*, S.S. 1995, c. U-6.1, is limited to full-time academics who are appointed by the University's

board of governors[1]; it says that it is not appropriate to include less-than-full-time faculty even if they are paid from the University's operating budget;

(b) with respect to the proposed add-on group in the College of Medicine, the University says that the members of the group do not come within the University's "operating budget" proviso of the present Certification Order; it is concerned that while it "administers" the two funds that are the main sources of the remuneration for the group, it does not "control" them, or other funds, including research grants, from which remuneration may also be drawn;

(c) in any event, with respect to the proposed add-on group of less-than-full-time faculty, the University says that the Faculty Association must adduce evidence that a majority of the employees in the group support the application, and that because it has failed or neglected to file any evidence of support, that portion of the application must fail;

(d) with respect to the evidence of support filed from among the members of the proposed add-on group of employees in the College of Medicine, the University says that the statement of employment it filed dated May 13, 1999, which was properly filed pursuant to the regulations under the *Act* given the date of the filing of the application, but after the end of the winter academic term, does not reflect the true number of persons (73) in the group, which, it says, is more accurately reflected by the statement of employment it filed dated October 4, 1999, after the start of the fall academic term (87);[2] in the case of the part-time add-on group, the difference in numbers between the two dates is nine versus thirteen.

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[1] Section 2(h) of *The University of Saskatchewan Act, 1995*, defines "faculty member" as "a person who is employed on a full-time basis by the university or an affiliated or federated college and who serves as a professor, associate professor, assistant professor, lecturer, full-time special lecturer, full-time instructor, librarian or extension specialist." It should be noted that pursuant to s. 49(1)(j) of that *Act* the powers of the University Board of Governors include the power to "appoint...the faculty members and any other ... employees that it considers necessary for the purposes of the university, fix their salaries or remuneration and define their duties and terms of ... employment."

[2] The "academic year" runs from July 1 until June 30 of the succeeding year. There are two "academic terms" in each academic year, the first (fall) term and the second (winter) term.

[7] In its reply to the application, CUPE expressed the concern that the proposed amendment to the scope of the Certification Order with respect to less-than-full-time faculty might include the sessional lecturers who are part of its bargaining unit.

[8] Pursuant to the collective bargaining agreement between the Faculty Association and the University, certain issues specified in the agreement are determined and resolved by a joint committee composed of an equal number of representatives of each party referred to as the "Joint Committee for the Management of the Agreement" ("JCMA"). At the hearing before the Board, some witnesses, in providing their evidence, and counsel for the parties in making their arguments, referred to certain provisions of the agreement. The text of these provisions is set out in Appendix 1 to these Reasons for Decision.

Evidence

Peter Dooley

[9] Professor Peter Dooley was called to testify on behalf of the Faculty Association. He has been a faculty member in the Department of Economics for some 34 years. He has held a variety of offices in the Faculty Association since it was first certified in 1977. He was the chair of the Faculty Association's executive committee at certification and when the first collective agreement was negotiated with the University, was the co-chair of the Faculty Association's negotiating committee for the present collective agreement, and presently is again the chair of the executive committee.

[10] Professor Dooley opined that the reference to "full-time academic employees" in the extant Certification Order has been there since it was first granted and reflects the Faculty Association's original constitution when virtually everyone of academic rank was full-time, although there were references to part-time faculty even in the first collective agreement between the parties of 1977-79[3]. He said that changes introduced in the next collective agreement, 1979-80, included the provisions for transfer from full-time to part-time status or vice-versa (see Article 13.2.3 of the present collective agreement, *supra*).

[3] Art. 13.2 of the 1977-79 collective agreement referred to the designation of academic ranks as including, *inter alia*, part-time appointments.

[11] Professor Dooley said the "reduced appointment plan" referred to in Article 13.2.3.3 of the present agreement was first introduced in the 1991-92 collective agreement to accommodate academic staff members who were eligible for pension but who did not want to retire. He said that Article 25.4.1 reflects the fact that an increasing number of academic staff were retiring before the usual age of 67 but wished to continue working; he said that it was configured so as not to conflict with CUPE's representation of sessional lecturers who are hired and paid on a per course basis under the collective agreement between CUPE and the University. He explained that special lecturers are paid on a salaried basis and have departmental duties in addition to their teaching responsibilities (see Article 13.1.4 and Article 13.2.1 of the collective agreement, *supra*). By definition, special lecturers are appointed only for a limited term (see Article 13.1.4, *supra*). Professor Dooley said that the part-time faculty members are not necessarily special lecturers – the latter is an academic rank while the former merely denotes a less-than-full-time status regardless of rank.

[12] Professor Dooley said that as the Certification Order presently reads, in theory, the University could appoint all academic staff to less than full-time employment, say 99 per cent, and they would all be out-of-scope of the bargaining unit defined by the Certification Order. For example, he referred to one Professor Rozwadowski who, appointed at 80 per cent of full-time, is out-of-scope of the present bargaining unit description. According to Professor Dooley, when a full-time faculty member moves to part-time status their reduced duties, remuneration and other terms and conditions of employment are individually negotiated in the JCMA – routinely, this includes their retention of status as a member of the bargaining unit covered by the collective agreement. He opined that, logically, there is no reason why part-time academic employees paid out of the University's operating budget are not part of the bargaining unit that the Faculty Association is certified to represent.

[13] With respect to the full-time non-tenure track academic employees in the proposed College of Medicine add-on group ("the clinicians"), Professor Dooley admitted that under the present wording of the Certification Order most were excluded from the bargaining unit by the operating budget proviso because of the sources of their remuneration outside the operating budget.

[14] However, Professor Dooley said that the Faculty Association represents and negotiates on behalf of all full-time academic tenure track employees in the College of Medicine with respect to the academic component of their earnings (i.e., paid from the University's operating budget) and with respect to benefits such as long-term disability, vacations, etc., but not with respect to their earnings from clinical activities. However, although the majority of some 80 or 90 non-tenure track clinicians appointed "without term" or for a "limited term" are full-time employees with academic teaching and other faculty responsibilities, they are not in the bargaining unit and have no union representation because of the sources of their remuneration outside of the University's operating budget.

[15] Professor Dooley explained that although the qualifications required for "without term" and "limited term" appointments are the same as for appointment to full-time tenurable positions, such appointments are not tenurable (see Articles 13.3.2.1 and 13.3.3 of the collective agreement, *supra*): appointments "without term" require JCMA approval (if made within the bargaining unit), continue only from year to year and persons holding such appointments may be dismissed without cause on 3 months' notice (see Article 13.3.3); initial appointment to a "limited term" position is restricted to a maximum term of two years unless otherwise approved by the JCMA (see Article 13.3.2) and to a maximum accumulated period (which varies depending upon the academic rank), again unless otherwise approved by the JCMA (see Article 13.3.2.2). The reason for these approval requirements, according to Professor Dooley, was to abrogate the ability of the University to appoint unlimited numbers of academic employees "without term," as opposed to making probationary tenure-track appointments, or to endlessly extend "limited term" appointments. The problem, as he described it, is that the approvals only apply to appointments made within the bargaining unit (i.e., to full-time academic employees paid out of the University's operating budget), but the number of persons appointed "without term" or for a "limited term" who are paid partly or wholly from sources other than the University's operating budget has steadily increased since the Faculty Association was originally certified.

[16] Professor Dooley also asserted that what is included in the "operating budget" is fluid and has changed over time; he intimated that nothing prevents its being drastically altered, for example, if a separate "research chair" line were created to take that source of funding out of the operating budget.

[17] Professor Dooley testified that, while the clinicians originally opposed inclusion in the bargaining unit, over the last five years they have organized themselves and it was they who approached the Faculty Association about representation. Professor Dooley made it clear that the Faculty Association did not seek to represent medical doctors who are truly part-time within the College of Medicine, as, for example, those who have a private medical practice and may teach a class: he admitted that such persons have no community of interest with the without term and limited term clinicians who are part of the academic community of the University and have faculty duties.

[18] In cross-examination by Mr. Beckman, Professor Dooley acknowledged that the collective agreement specifically provides that when a member of the bargaining unit goes from full-time to part-time status, the terms and conditions of their employment continue to be bargained by the Faculty Association (Article 13.2.3.1(v)), and that those who participate in the reduced appointment plan specifically continue as members of the bargaining unit (Article 13.2.3.3(ii)), but there is no similar reference with respect to those who move from part-time to full-time because it is assumed that they then will become members of the bargaining unit (Article 13.2.3.2). However, Professor Dooley maintained that the University voluntarily recognized part-time employees as part of the bargaining unit because of the many rights and privileges accorded them in the collective agreement and for that reason the Faculty Association had not filed evidence of support for the application from amongst the members of the group.

[19] Professor Dooley stated that since certification the Faculty Association has, at the JCMA, consistently expressed its disapproval of without term and limited term appointments, which it views as tending to erode tenure, and preferring that appointments be made probationary to tenure track.

Andrew Lyon

[20] Andrew Lyon is an associate professor in the Department of Pathology in the College of Medicine. He was called to testify by the Faculty Association. He was first appointed without term as an assistant professor in 1993, and, although he is a full-time faculty member of the College he is still without term. As such, his employment is of indefinite duration and he may be dismissed on 90 days notice.

[21] Professor Lyon testified that his duties which are assigned to him by the department head, include teaching, research and scholarly activity, and clinical services. The last item, which consumes approximately one-half of his time, involves his providing services to the Saskatoon District Health Board ("SDHB") as supervisor of its laboratory technologists at the three hospitals in Saskatoon.

[22] His salary is composed of two components: an "academic component" and a "service component" both paid from the Clinical Services Fund (the "CSF"). The CSF is funded by a grant from Saskatchewan Health to pay for the clinical services provided by faculty of the College of Medicine. The service component is approximately one-fifth of his total salary and is identified separately on his pay stub.

[23] Professor Lyon described the several methods by which, and the funds from which, College faculty are remunerated. Briefly, all full-time faculty who receive the academic component of their salary from the University operating budget (i.e., tenured and tenure track positions) are in-scope of the Faculty Association, while without term and limited term appointees (i.e., non-tenure track clinicians) like himself are not because their academic salary component is paid from other sources.

[24] His position is not in-scope of the Faculty Association because the academic component of his salary is not paid from the University operating budget. Other full-time faculty whose academic salary component is paid from that budget are in-scope although they receive a service component from the CSF that may exceed the academic component by several times. For example, Professor Lyon said, in order to attract "high priced talent" the University may provide a "clinical service market supplement" from the CSF or a "prepaid clinical billing supplement" (from the Clinical Earnings Plan described, *infra*) over and above such persons' academic salary. Their academic salary component may only be one-quarter of their total annual remuneration, which can exceed $250,000 or more, but the fact that it is paid wholly from the University operating budget means that they are in-scope. The non-tenure track without term or limited term clinicians such as Professor Lyon, although full-time faculty members whose duties may be identical to such persons, are not in-scope because the academic component of their salaries is paid from sources other than the University operating budget.

[25] Professor Lyon referred to the standard College of Medicine Clinicians' Agreement, which he was required to execute. It provides in part as follows:

> *1.01 The Clinician has been appointed by the University as a full-time faculty member of the College of Medicine in the Department of _____. The duties of such member include patient services and/or clinical instruction, as well as teaching, research and scholarly work. The University and the Clinician recognize patient services and or clinical instruction as integral and fundamental components of a medical teaching institution and that they are necessary to further the academic mission of the College of Medicine and the Department; to maintain the Clinician's professional skills; and to advance medical science.*
>
> *1.02 Any professional fees generated by clinical members of the College are the property of the University.*
>
> *2.01 Professional Fees are all funds generated by the Clinician in the performance of any professional service or related activity.*
>
> *2.02 It is acknowledged by the Clinician that all professional fees are the property of the University.*
>
> *3.01 The Clinician agrees to keep good records and accounts of all billings of professional fees which are billed directly to the Clinician, ...and pay such fees over to the University . . .*
>
> *4.01 The University administers and allocates the funds collected from the professional fees in accordance with its policies, procedures and rules and regulations which may be in force from time to time.*
>
> *6.02 If the Clinician is a member of the bargaining unit of the University of Saskatchewan Faculty Association, where the terms of this Agreement conflict with the provisions of the Collective Agreement, the terms of the Collective Agreement shall govern.*

[26] Professor Lyon said that the Clinicians' Agreement is used for all clinical staff in the College of Medicine and encompasses all professional fees that a clinician may generate. He himself does not generate any professional fees from patient services and his time spent working for SDHB is not billed for, but other College clinicians bill the provincial Medical Care Insurance Branch ("MCIB") for services to patients (e.g., for operations or diagnostic services); the funds generated are turned over to the University in accordance with the Clinicians' Agreement. These funds are deposited into a "Clinical Earnings Plan" ("CEP") maintained by each department in the College that generates fees from billing for clinical services. The funds retained by each departmental CEP are paid to

departmental members in accordance with rules and policies developed by the department's members through a departmental finance committee.

[27] Professor Lyon said the reference in Article 6.02 of the Clinicians' Agreement to the superseding nature of the collective agreement allows in-scope College faculty to, for example, take on work not assigned by the University or the College and retain the funds generated therefrom.

[28] Professor Lyon said that not all departments in the College of Medicine generate clinical earnings, for example, anatomy and biochemistry, because their members perform research and do not see patients or provide clinical services. There are apparently no without term faculty in departments that do not provide clinical services.

[29] Professor Lyon said that the Faculty Association is only seeking to represent clinicians who hold an academic rank as opposed to physicians who provide a small amount of time training or teaching in the College for an hourly rate but whose careers are outside the College. He stated that all full-time faculty in the College, whether in-scope or not, have the same general duties: teaching, scholarly work and research, training, community service and departmental administrative and committee duties as assigned by the respective department head. The main difference, he said, is that in-scope faculty can participate in recommending the department head, tenure track appointments and promotions as provided for in the collective agreement. Both in-scope and out-of-scope faculty receive an identical office expense allowance, but for in-scope faculty it is provided for by the collective agreement; the collective agreement provides for a hiring and review process for in-scope faculty, but the College has a parallel process for the full-time out-of-scope clinicians. That is, according to Professor Lyon, the University applies most of the provisions of the collective agreement to the out-of-scope clinicians, but they have no ability to provide input with respect to negotiation of same.

[30] Professor Lyon said that most members of the College are expected to provide a certain amount of time for services to SDHB, and their participation is directed by the department heads who assign their academic and clinical duties. For example a without term physician clinician in the Family Medicine Department might provide clinical services to SDHB through Royal University Hospital by seeing patients and training residents. Similarly, the Department of Surgery includes

non-tenure track faculty involved in teaching, training residents, performing research and also doing operations.

[31] Fees generated by billing for professional services (including billings to MCIB for patient services) are placed into the CEP maintained by each department whose members generate such funds. Payments from the CEPs are one of the service components of the salary for clinicians who provide billable services, while the CSF is used to compensate those who cannot bill for their clinical work, such as Professor Lyon.

[32] Professor Lyon explained that the interest of the clinician add-on group is not financial gain, but to be able to participate fully in the academic community and departmental activities such as choosing or serving as a department head. He said that while they are faculty in every other sense of the word and have processes applied to them that are identical to those in the collective agreement for in-scope faculty, they have no right to participate in negotiation of those terms.

Syl White

[33] Syl White has been the Director of Administration and Finance for the College of Medicine since 1978. He testified for the University. Mr. White said that the academic component of the salary for all in-scope faculty of the College is negotiated between the University and the Faculty Association. Faculty providing clinical services may have one or more additional service components to their total salary. The service components are exempt from the terms of the collective agreement.

[34] Mr. White explained that the CSF was set up in 1978 with funding from the then University Hospital and the provincial health department to provide clinical and patient services such as diagnostic work and medical imaging. The sources of funding have evolved and are now widely varied, but a large component is a grant from Saskatchewan Health. In the last fiscal year, the CSF totaled more than $21 million.

[35] Mr. White described the workings of the CEPs maintained by the College departments that have members who bill for services. Each departmental finance committee is comprised of members of that department and determines how that department's CEP will be divided. The applicable rules apply to non-tenured and out-of-scope faculty in the department as well as to tenured in-scope

faculty. The combined amount of the CEPs exceeds $15 million. Mr. White referred to standard agreement between the University and members of the College faculty with respect to the CEPs; the funds in the CEPs belong to and are administered by the University. Mr. White said that the agreement applies to faculty who generate fees from billing for clinical services or from private practice whether or not they are in-scope. The academic salary component for such persons is paid on the grid in the collective agreement with the Faculty Association regardless of whether the faculty member is in- or out-of-scope.

[36] Mr. White stated that the payment of salary and benefits for College faculty by source breaks down as follows:

- University operating budget – 31.3%
- CEPs – 30.1%
- CSF – 38.6 %

He stated that the salaries of without term appointees are wholly funded from sources outside the University operating budget such as the CSF, the CEPs or some third party grant or research funds. Mr. White said that the funding for the CSF is not secure from year to year and other fund sources can be withdrawn by the source organizations with little notice. As an example, Mr. White referred to a situation where a significant sum for medical imaging which formerly went into the CSF for services provided through the Nuclear Medicine Department was suddenly paid instead to SDHB; as a consequence, the without term clinicians that formerly provided the services had to leave the University and take employment with SDHB.

[37] Mr. White testified that the CSF has been in a deficit position in some years but has been "absorbed" by revenue from other accounts or additional funds from Saskatchewan Health.

[38] Mr. White went through several names on the statement of employment for the clinician's group to illustrate the many permutations and combinations of their salary components and sources. He said that some faculty earn nearly $500,000 a year mostly paid from the CSF and CEP; if, however, they are tenure track and receive an academic salary component from the University operating budget they are in-scope of the Faculty Association. Mr. White was unable to explain the University's interest or the operational or administrative reasons in the without term and limited term appointments remaining out-of-scope.

[39] In cross-examination, Mr. White agreed that some College clerical staff represented by CUPE are paid by the University out of the CEPs and some administrative and finance staff represented by the Administrative and Supervisory Personnel Association are paid out of the CSF; he also agreed that some employees represented by Saskatchewan Government Employees Union or the Health Sciences Association of Saskatchewan at the Family Medicine Clinic operated by the College in Regina are paid from the CSF as are at least five employees of SDHB in the Pediatrics, Medicine and Rehab Medicine Departments. Likewise, the clerical staff member in the office of the Dean of Medicine, represented by CUPE, is paid from the CSF.

[40] Mr. White pointed out that the names of Anil Patel and Lou Horlick were included on the statement of employment in error: the former being a tenure track employee and the latter having retired.

Colleen Fulgerud

[41] Colleen Fulgerud is employed by the University as a Human Resources Manager. Her duties include salary and contract administration for the bargaining unit represented by the Faculty Association. She was called to testify by the University.

[42] Ms. Fulgerud testified as to the employment status of the employees in the part-time faculty add-on group. She said that the application of the collective agreement to part-time faculty members is limited to those who were once full-time and is not the same as being in-scope. Only those who were full-time tenure track faculty and became part-time under the reduced appointment plan remain in-scope. She explained that those persons originally hired as part-time are all out-of-scope.

Melana Soroka

[43] Melana Soroka is employed by the University as an Administrative Officer. She is primarily involved in labour relations matters regarding the Faculty Association. She has been serving on the JCMA since 1987. She was called to testify by the University.

[44] Ms. Soroka testified that she assembled the statements of employment filed by the University. She confirmed the employment status of several persons on the statements of May and October. She confirmed that Anil Patel was a part-time limited term appointee as of May 13, 1999 at the time the application was filed. She also said that if the October list is applicable the name of Lou

Horlick should be removed as he was retired, as should the name of Karen Laframboise as she was paid out of the operating budget on a retroactive appointment.

[45] Ms. Soroka opined that the October statement is more representative of the clinician's group because although the academic year runs to June 30, most of the students are gone by April 30.

Heather Wagg

[46] Dr. Wagg is employed as a sessional lecturer in the Languages Department. She has held office in CUPE, Local 3287, which represents sessional lecturers at the University since certification in 1989 and has been involved in collective bargaining. Her evidence was directed to describing the status and function of sessional lecturers. In brief, they are part-time teachers remunerated on a per class basis; sessional music instructors are paid by the hour. She expressed concern that there might be out-of-scope part-time faculty appointed without term or to a limited term that should be sessional lecturers, but was unable to provide details for a lack of information.

Argument

The Faculty Association

[47] Mr. McLeod, counsel for the Faculty Association, argued that the onus had been met with respect to the inclusion of both the part-time faculty and clinicians add-on groups within the scope of the Faculty Association's Certification Order.

[48] With respect to the former group, counsel characterized the limitation of the Certification Order to full-time faculty as an illogical anachronism. He summarized the references to part-time faculty in the successive collective agreements since certification. He asserted that the amendment was justified because there is no substantive reason to make a distinction between part-time faculty who are initially appointed part-time (and therefore out-of-scope of the bargaining unit) and those who were full-time but have since become part-time and continue to be treated as in-scope. He argued that the part-time faculty have an undeniable community of interest with the full-time faculty.

[49] Mr. McLeod said that no evidence of support from the part-time group was filed because the Faculty Association takes the position that they have been included in the unit by voluntary recognition under the collective agreement. He referred to the decisions of the Board in

Saskatchewan Government Employees Union v. Saskatchewan Liquor Board, [1981] May Sask. Labour Rep. 37, LRB File No. 256-80, and *Canadian Union of Public Employees, Local No. 88 v. St. Elizabeth's Hospital*, [1995] 4th Quarter Sask. Labour Rep. 85, LRB File Nos. 260-94 & 032-95, where the Board considered the impact of modifications to the scope of the bargaining unit which are agreed to by the parties after a Certification Order has been issued. Mr. McLeod referred to the Board's decision in *The Canadian Association of Fire Bomber Pilots v. Government of Saskatchewan and Saskatchewan Government Employees Union*, [1993] 1st Quarter Sask. Labour Rep. 202, LRB File No. 164-92, in support of his contention that it was not necessary to show evidence of majority support among then members of the part-time add-on group.

[50] With respect to the clinicians' group, Mr. McLeod argued that this group also has an undeniable community of interest with their in-scope colleagues and that a distinction based upon the source of their academic salary component is artificial; he asserted that the University had offered no compelling reason for their exclusion from the bargaining unit. The group shares the same duties, responsibilities, benefits and salary levels and is subject to the same review process as their in-scope colleagues; they are supervised and directed by their department head, but unlike their in-scope counterparts, have no input into the selection of the department head.

[51] Mr. McLeod asserted that as a general concept the Board had determined in the existing Certification Order that the full-time College of Medicine faculty members are appropriately included in the bargaining unit and that a distinction based on the source of its members' individual remuneration is irrelevant to the issue of the definition of which of its members should be specifically in-scope. In support of this position, counsel 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 (the "*Crop Scientists*" case). In that case, the Faculty Association had applied to amend its Certification Order to add six research scientists in the University Crop Development Centre of the College of Agriculture ("crop scientists"). The crop scientists did not hold academic appointments, but the terms and conditions of their employment, including salary and benefits, had always, by design, paralleled as closely as possible those of their corresponding professorial academic rank in the College of Agriculture with whom they shared physical premises and support staff and served with on College committees.

[52] At 206 of the *Crop Scientists* case, the Board observed that,

> *On a day-to-day basis, except for budget purposes, it is difficult to see where the University makes any distinction between the scientists and the academic faculty of the College of Agriculture. For budgetary purposes, a distinction is necessary because the Centre and the University are funded out of different pockets of the Government of Saskatchewan.*

[53] The College of Agriculture full-time academic faculty was paid from the University's operating budget composed of the grant from the provincial Department of Post-secondary Education, while the crop scientists were paid from the College of Agriculture Agriculture Development Fund funded by the provincial Department of Agriculture. The Board granted the application.

[54] Mr. McLeod further stated that the May statement of employment was the appropriate statement to consider on the application.

The University

[55] Mr. Beckman filed a written brief to supplement his oral argument that we have reviewed. He asserted that there were three issues on the application: (1) whether evidence of support for the application among the part-time add-on group was necessary; (2) the appropriateness of including either of the groups in the bargaining unit; and, (3) the effect of the source of remuneration as it pertains to issue (2) in regards to the clinicians' group.

[56] With respect to the first issue, Mr. Beckman maintained that the decision in *University of Saskatchewan v. Canadian Union of Public Employees*, [1978] 2 S.C.R. 834 (S.C.C.) requires that evidence of support be demonstrated when a distinct group of employees is sought to be swept into a bargaining unit. He also cited the *Fire Bomber* case, *supra*, in support of this position. He rejected the notion that the University had voluntarily recognized the part-time faculty as in-scope.

[57] With respect to the clinicians, Mr. Beckman asserted that it was not appropriate to include the group in the bargaining unit, intimating that the nature of their appointments (i.e., without term or limited term) was necessitated by the exigencies of health care delivery. He argued that the source of funding for their remuneration was an exceedingly important consideration: that is, given that the academic component of their salaries was paid from sources other than the University operating

budget, there was "nothing to bargain about." And, the University did not control the funds available in the CSF or CEPs or from other third party sources.

[58] Mr. Beckman argued that the *Crop Scientists* case, *supra*, is distinguishable in that the principles enunciated by the Board in that case are not appropriate to health care.

[59] Mr. Beckman argued that the October statement of employment was the appropriate statement to consider on the application.

CUPE

[60] Mr. Holmes, on behalf of CUPE, reiterated his concerns that inclusion of the part-time faculty in the Faculty Association's bargaining unit may result in a bargaining unit description that is not consonant with the sessional lecturers' bargaining unit description.

Analysis and Decision

The Part-time Faculty

[61] Because we are of the view that it is necessary to prove majority support for the application from among the members of the groups sought to be included in then bargaining unit, it is not necessary for us to determine whether it is appropriate to include the part-time faculty in the bargaining unit. In our opinion, the decision of the Supreme Court of Canada in *University of Saskatchewan*, *supra*, requires such evidence in this case for the application to succeed. The part-time faculty are in our view a distinct group albeit with a strong community of interest with the full-time faculty. Such evidence not having been adduced, this part of the application is dismissed.

The Clinicians' Group

[62] The determination of the appropriateness of a proposed bargaining unit is an important one. A range of factors must be considered in determining whether a bargaining unit is appropriate for the purposes of collective bargaining and the relative weight of individual criteria vary from case to case based more on pragmatic considerations as to whether the purposes and objects of the *Act* in the promotion of access to collective bargaining will be well-served.

[63] In many prior decisions regarding this issue, the Board quoted with approval the following statement by the Ontario Labour Relations Board in *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, as to the task involved:

> *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?*

[64] One of the important factors in the present case is the consideration as to the degree to which the clinicians' group shares a community of interest with their in-scope faculty colleagues. This entails an examination of, *inter alia*, their skills, duties, working conditions and interests. In the *Crop Scientists* case, *supra*, the Board examined this factor in detail as concerned the research scientists in relation to their academic colleagues in the College of Agriculture. The Board observed, at 208, as follows:

> *The Employer disputed whether the scientists shared a sufficient community of interest with the members of the Faculty Association, but it is very clear from the evidence that there is a strong community of interest between these two groups of employees. The working conditions, terms and conditions of employment and collective bargaining aspirations of the two groups of employees are not only the same, but directly linked, in almost every important way. In fact, the differences that there are, such as pension arrangements, are mostly attributable to the fact that the scientists are not in the Faculty Association bargaining unit. We cannot see any basis for finding that there is any conflict between the scientists and the members of the Faculty Association which would render their inclusion in the same bargaining unit inappropriate.*

[65] Considering all of the evidence adduced on the point, leads to the ineluctable conclusion that the clinicians' group shares a similar strong community of interest with their tenure track faculty colleagues in the College of Medicine. They perform identical work for identical salaries under identical working conditions. They share most of the same employment benefits and are subject to the same duties, responsibilities and performance review. Both groups teach, train, perform research, engage in scholarly activity, provide clinical services, and shoulder departmental administrative tasks in broadly equal measure. This factor, therefore, strongly suggests that their inclusion in the same bargaining unit is appropriate.

[66] However, in the argument on behalf of the University it was strongly asserted that differences in the sources of the respective remuneration of the two groups is a paramount consideration that should lead us to dismiss the application. The reasons included, *inter alia*, that the outside funding used as sources of remuneration was variable, uncertain and beyond the control of the University. The University made a similar argument in the *Crop Scientists* case, *supra*. The Board observed, at 210, of the decision:

> *The Employer submitted that the fact that the Crop Development Centre was funded by an outside third party made the inclusion of the scientists in the University bargaining unit inappropriate. The University submits that it cannot control this funding and if it were withdrawn or significantly reduced, this would lead to difficulties if the scientists were included in the Faculty Association bargaining unit. These difficulties were never explained.*

[67] However, the Board rejected the argument in the following terms, also at 210:

> *The fact that the Crop Development Centre and the University are funded out of different pockets of government is a factor to look at, but it does not automatically lead to the conclusion that the bargaining unit is inappropriate or unworkable. If the Agriculture Development Fund reduces or eliminates its funding for the Crop Development Centre, the University will have some decisions to make concerning the Centre's future, but certification of the scientists does not cause this problem and is neutral in its resolution. If the staff of the Crop Development Centre remain unorganized, their rights will be determined by the common law and their contracts of employment. If they are members of the Faculty Association, those same rights will be determined by the collective bargaining process or collective bargaining agreement if one has been negotiated. If this application is granted and such a dispute subsequently arises, we cannot see how the Union, the Employer or any of the employees will be in a situation that the Board should protect them from by dismissing this application.*

[68] We agree with the Board's reasoning in the *Crop Scientists* case; the problems which the University says would be effected by the inclusion of the clinicians in the bargaining unit are almost entirely matters that can be solved by collective bargaining. The dire description of those problems appears to us to have been overstated: the University already negotiates with other bargaining agents representing certain employees in the College of Medicine whose remuneration is wholly paid from the CSF, the CEPs or some other third party source.

[69] We are of the opinion that the appropriate statement of employment upon which to arrive at a determination of the level of support for the application regarding the clinicians is that as of May 13, 1999. The Faculty Association has filed evidence of majority support from among the members of that group.

[70] The application as concerns the clinicians in the College of Medicine is granted.

Other Amendments

[71] The parties are agreed that the Certification Order should be amended to reflect certain housekeeping matters as described earlier in these Reasons for Decision. The application for these amendments is also granted.

APPENDIX 1

Excerpts from the Collective Agreement

DEFINITIONS

Faculty Member means a person appointed by the Board [of Governors] to the rank of Professor, Associate Professor, Assistant Professor, Lecturer, Special Lecturer or Instructor.

Employee means any faculty member, professional librarian or extension specialist included within the scope of the Certification Order of the Saskatchewan Labour Relations Board.

13. APPOINTMENTS

13.1 Appointments to Faculty. All appointments to the faculty, except Sessional Lecturers, are made by the Board [of Governors] in accordance with the procedures specified in this Agreement.

13.1.1 Academic Ranks[4]. The following are the ranks of academic faculty appointments:

(i) Professor
(ii) Associate Professor

---

[4] The sessional lecturers represented by CUPE are not part of the academic ranks covered by the collective bargaining agreement between the Faculty Association and the University. They are not appointed by the University's Board of Governors: See, fn. 1, *supra.*

(iii) Assistant Professor
(iv) Lecturer
(v) Instructor
(vi) Special Lecturer

These ranks may be designated part-time, visiting, adjunct, or clinical.

13.1.4 Special Lecturers. The special lecturer rank is used for appointments made to accommodate the special requirements of the employee, the Employer, or both and for which the specific salary and other terms and conditions of employment have been approved by the Joint Committee for the Management of the Agreement. An appointment to the rank of Special Lecturer is a limited term appointment. ...

13.2 Full-Time and Part-Time Appointments.

13.2.1 Part-Time Appointments. A part-time appointment is one in which the faculty member's assigned duties require less than full-time employment and in which the faculty member is required to work on the basis of less than full days, less than full weeks or less than an academic term, or a combination of these. A sessional lecturer is a part-time teacher remunerated on a per class basis. The term "clinical" is applied to certain part-time faculty members of the Health Science colleges.

13.2.2 Full-Time Appointments. A full-time appointment is one in which the faculty member's assigned duties require full-time employment on a 12-month basis, except that a faculty member appointed for less than a full year shall be designated full-time if the faculty member's period of employment is coincident with an academic term and the assigned duties require full-time employment.

Appointments of full-time faculty members for less than twelve months shall extend from the date of appointment to the end of the academic year, unless otherwise approved by the Joint Committee for the Management of the Agreement.

13.2.3 Change in Status.

13.2.3.1 Full-Time to Part-Time Status. By mutual agreement between the Employer and the employee, the conditions of employment of a probationary, tenured or permanent employee may be changed from a full-time to a part-time basis with a corresponding change in salary, provided the following conditions are met:

(i) The employee's assigned duties, while requiring less than full-time employment according to Article 13.2.1, do require the employee to work on a basis of 50% or more of full-time.

. . .

(vii) The change is for a defined period of time except for employees on the Reduced Appointment Plan.

(v) The change is approved by the Joint Committee for the Management of the Agreement.

(vi) The Association will continue to negotiate terms and conditions of employment for those who have become part-time employees according to the provisions of this article.

13.2.3.2 Part-Time to Full-Time Status. By mutual agreement between the Employer and the employee, the conditions of employment of a part-time probationary, tenured or permanent employee, except for employees on the Reduced Appointment Plan, may be changed from a part-time to a full-time basis with a corresponding change in salary, provided the following conditions are met:

. . .

(iv) The change is approved by the Joint Committee for the Management of the Agreement.

13.2.3.3 Reduced Appointment Plan. The following terms shall apply to employees who are 55 years of age or older and have a minimum of 10 years of service, in addition to the terms of Article 13.2.3.1:

. . .

(ii) Employees on reduced appointment will continue as members of the Faculty Association Bargaining Unit.

(iii) Except in unusual circumstances, reduced appointments will be limited to 4/5, 3/4, 2/3 or 1/2 of full-time duties.

. . .

13.2.3.4 Types of Appointment. All full-time faculty appointments at the University shall be made under one of the following conditions:

(i) for a limited term
(ii) without term
(iii) on probation
(iv) with tenure

. . .

13.3.2 Limited Term Appointments. Appointments to the rank of Instructor, Extension Specialist 1 and to all professorial ranks designated "with term" or "visiting" shall be for a limited term not exceeding two years unless otherwise approved by the Joint Committee for the Management of the Agreement. Limited term appointments are not tenurable. . . .

13.3.2.1 Purpose of Limited Term Appointments. Limited term appointments are not a substitute for probationary appointments. They are made in the professorial, lecturer and instructor ranks only where a position is not tenurable because:

(i) it is a replacement for a faculty member on leave; or

(ii) it is a replacement for an employee who is appointed to another position within the University but who retains a tenurable academic rank; or

(iii) the appointment is funded from research grants, contract, or similar sources; or

(iv) a position is tenurable but there has been inadequate opportunity to conduct a satisfactory search for an appointee; or

(v) a search has failed to produce a candidate considered suitable for a probationary appointment; or

(vi) funds, budgeted for part-time appointments (13.2.1), are combined.

13.3.2.2 Length of Limited Term Appointments. The length of the employment period will be clearly stated in the letter of appointment from the President. . . . The maximum accumulated period for limited term appointments is four years for Instructors, three years for Lecturers, Assistant Professors and Associate Professors, and two years for Professors, unless otherwise approved by the Joint Committee for the Management of the Agreement.

13.3.2.3 Reappointment for a Limited Term. The reappointment of a faculty member holding a limited term appointment for a subsequent term beyond the initial period of employment requires the approval of the Joint Committee for the Management of the Agreement and no offer of reappointment shall be made until such approval has been obtained. All reappointments of full-time limited term employees will be for a twelve month period or more unless a shorter term is approved by the Joint Committee for the Management of the Agreement.

13.3.2.4 Termination of Limited Term Appointments. Because a limited term appointment automatically terminates on the last day of the stated term with no right of renewal, no reasons need be given for the decision not to reappoint and there shall be no right of grievance or appeal against a decision not to reappoint.

13.3.3 Appointments Without Term. These are academic appointments made when faculty status is deemed appropriate although the terms of the appointment and the duties are such as to make the granting of tenure, permanent status, or continuing status (in the CDC) inappropriate. Appointments without term are not tenurable and are continued from year to year unless the appointee is given, or gives, three months notice of termination. No without term appointments shall be made within the bargaining unit without prior approval of the Faculty Association through the Joint Committee for the Management of the Agreement.

13.3.3.1 Purpose of Appointments Without Term. Appointments without term are not a substitute for probationary appointments. They are made only in cases where there is a significant reason which makes the granting of tenure, permanent status, or continuing status (in the CDC) inappropriate. The reasons are:

(i) salary paid from a research grant or similar source of funds;

(ii) part-time employment with duties beyond those expected of a sessional lecturer;

(iii) significant non-academic duties;

(iv) concurrent self-employment or employment by another institution.

. . .

13.3.3.2 Continuing Part-time. A person appointed continuing part-time, without term, shall be a member of the bargaining unit provided the following conditions are met:

(a) the appointment is made in accordance with Article 13.5 and is designated "continuing part-time";

(b) the person's assigned duties, while requiring less than full-time employment according to Article 13.2.1, do require the person to work on a basis of 50% or more of full-time;

(c) the person's salary is funded from the University's operating budget;

(d) the appointment is approved by the Joint Committee for the Management of the Agreement.

. . .

25.4.1 The Employer agrees that any employee who has retired according to this article and who is hired following retirement on a full-time or part-time basis shall be appointed as a Special Lecturer, provided that the individual performs more than teaching duties. ...

DOUGLAS WOODSIDE, Applicant v. REGINA POLICE ASSOCIATION INC. and REGINA BOARD OF POLICE COMMISSIONERS, Respondents

LRB File Nos. 167-99, 168-99 & 169-99; July 11, 2001
Chairperson, Gwen Gray; Members: Mike Carr and Bob Todd

For the Applicant: Don Findlay
For the Regina Police Association: Garrett Wilson, Q.C.
For the Regina Board of Police Commissioners: James McLellan

Remedy – Monetary loss – Calculation – Board ordered union to pay member's legal fees incurred in bringing duty of fair representation application before Board – Union argues that number of hours spent by member's counsel not reasonable – Board sets test as time spent in preparation and hearing by reasonably experienced labour lawyer – Board applies test and calculates amount owing from union to member.

***The Trade Union Act*, ss. 5(g) and 25.1.**

REASONS FOR DECISION

[1] Gwen Gray, Chairperson: The Board is asked in this decision to set the legal fees that are required to be paid by the Regina Police Association Inc. (the "Association") to the applicant, Douglas Woodside. In an earlier Order issued by the Board on August 16, 2000, the Association was required to pay two sets of legal costs to Mr. Woodside. The first set pertained to the legal costs incurred by Mr. Woodside in his appeal to the Regina Police Commission to the extent that such costs were not already ordered to be paid by the Regina Board of Police Commissioners by Arbitrator Pelton. The second set of legal costs related to the legal costs incurred by Mr. Woodside in his applications before this Board.

[2] The issue before this Board relates to the legal fees incurred by Mr. Woodside in relation to his applications before this Board. Counsel for the Association indicated that the hourly rate of $140.00 and the disbursements incurred by counsel for Mr. Woodside were not in dispute. The only issue in dispute related to the number of billable hours incurred by counsel for Mr. Woodside. The account rendered claimed for approximately 124 hours of time. Counsel for the Association did not

dispute that counsel for Mr. Woodside actually spent this amount of time preparing for and conducting the hearing in question. Rather, the Association questioned whether this was a reasonable amount of time to spend on the application, taking into account the skill, ability, experience of counsel and the overall value of the work performed. Counsel for the Association advised the Board that the Association was billed a total of 62 hours in relation to the Board application and suggested that an appropriate fee would be $9,800.00.

[3] Counsel for Mr. Woodside reminded the Board of the complexity of the evidentiary issues arising in the application and the need to properly assess the factual underpinnings of the evidence in order to properly advise his client relating to the Board's remedial authority in cases of this nature.

[4] The arguments on both sides of this issue have considerable merit. On the one hand, the Board does not want to encourage the view that duty of fair representation cases are a growth industry for lawyers by awarding costs in circumstances that are routine or in amounts that do not reasonably bear a relationship to the amount that would be charged by reasonably experienced labour counsel. On the other hand, in cases where legal fees are awarded, the amount ordered should take into account the complexity of the case and the need to provide accurate legal advice to the client before proceeding to hearing.

[5] In our view, counsel for Mr. Woodside was required to spend time over and above the ordinary in reviewing the documentation on this file and in piecing together a very confusing and lengthy factual picture. The amount of time spent preparing for hearing would not follow the normal rule of two or three days of preparation time for one day of hearing.

[6] However, in the area of legal research, we do not expect counsel to re-invent the wheel. Counsel who do not regularly practice before the Board are at a disadvantage in terms of knowing the Board's case law and recent developments therein. However, this can be remedied by seeking a consultation with experienced labour relations counsel. In this area, we are of the view that the time spent was somewhat excessive. This is not a criticism of the quality of research or preparation undertaken by Mr. Findlay, which in all respects, was of the highest quality.

[7] We would set the test as the time spent in preparation and hearing by a reasonably experienced labour lawyer. Although there is no great science in our estimation of the hours that would be required, we would estimate from our common experience that 100 hours of preparation and hearing time would be sufficient for the average reasonably experienced labour lawyer. We would reduce the fees to $14,000.00 and require the Association to pay legal fees in the amount of $14,000.00 in addition to the disbursements incurred as set out in the statement of account.

[8] An Order will issue in the terms set out.

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 4279 Applicant v. AFS ABORIGINAL FAMILY SERVICE CENTRE INC. and ABORIGINAL HEADSTART PROGRAM, LITTLE EAGLES LANGUAGE AND CULTURE NEST – REGINA FRIENDSHIP CENTRE, Respondents

LRB File No. 226-99; July 11, 2001
Vice-Chairperson, James Seibel; Members: Mike Carr and Mike Geravelis

For the Applicant: Harold Johnson
For AFS Aboriginal Family Service Centre Inc.: W. Robert Waller
No one appearing for Regina Friendship Centre

Successorship – Transfer of business – Section 37 of *The Trade Union Act* – Government funded social program changed program providers from one non-profit corporation to another – Change in program provider does not constitute transfer of a business within meaning of s. 37 of *The Trade Union Act* – Board dismisses application.

***The Trade Union Act*, s. 37.**

REASONS FOR DECISION

Background

[1] James Seibel, Vice-Chairperson: By a Certification Order of the Board dated April 20, 1999 (LRB File No. 081-99) Canadian Union of Public Employees, Local 4279 (the "Union") is designated as the bargaining agent for the following bargaining unit:

> *all employees of the Aboriginal Headstart Program, Little Eagles Language and Culture Nest – Regina Friendship Centre at Kitchener School in Regina, Saskatchewan, except the Executive Director, Program Co-ordinator and Financial Co-ordinator.*

[2] In the present application, the Union has applied pursuant to s. 37 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), for an order of the Board determining that AFS Aboriginal Family Service Centre Inc. ("AFS") is the successor to the employer designated in the Certification Order, namely, Aboriginal Headstart Program, Little Eagles Language and Culture Nest – Regina Friendship Centre ("RFC").

[3] The reply to the application filed on behalf of AFS alleges that the Aboriginal Head Start Little Eagle Program (the "Program") was not sold, leased, transferred or otherwise disposed of to AFS within the meaning of s. 37 of the *Act*. AFS alleges that: the Program was operated by RFC pursuant to an agreement with Health Canada (the "Contribution Agreement") whereby Health Canada provided funding for the Program for a term from July 5, 1996 to March 30, 1999; Health Canada determined not to renew the Contribution Agreement; RFC effectively terminated the employment of the Program staff by laying them off on April 9, 1999; following a tender process Health Canada awarded the sponsorship of the Program to AFS effective September 1, 1999. Pursuant to the Contribution Agreement, the funds were disbursed monthly upon receipt of a quarterly financial claim in accordance with an approved budget; any surplus was to be returned to Health Canada.

Evidence

[4] Angela Noname was called to testify by the Union. Ms. Noname worked for the Program from March, 1998 until she was laid off on April 9, 1999, first as a child care worker until May 31, 1998, then as the Program's executive director from June 1, 1998 until January 5, 1999, and then once again as a child care worker from Jan 6, 1999 until her layoff on April 9, 1999.

[5] Ms. Noname said that RFC delivered and administered several programs funded by various levels and agencies of government, of which the Program was one. She described the Program as being designed to provide aboriginal pre-school age children a "head start" to commencing their formal education through the use of aboriginal cultural resources. She said that Health Canada provided the Program funding; RFC administered the funding and did the books; Health Canada and RFC together hired and fired Program staff; a volunteer parent advisory committee provided advice on the Program content and objectives. Program staff included six persons: the executive director, a childcare worker, a nutrition worker, two teachers and a bus driver. She said that the Program's budget also included funds for training parents of the children enrolled in the Program. In addition to their child care and instructional activities, she said the Program staff cooked daily snacks and cleaned the premises which were located in a portion of Kitchener School. There were also parent social activities each week and designated "cultural days," all part of an integrated community approach to the Program.

[6] According to Ms. Noname, Health Canada funds such Head Start Programs in some other provincial centres; the program sponsor (such as RFC) has flexibility to design the program subject to certain guidelines set by Health Canada. Delivery of the program by the sponsor is reviewed and overseen by a consultant from Health Canada – in the case of RFC, the consultant was Lynne Robertson – who has a say in the hiring and firing of the program's staff and acts as a liaison with the parent advisory committee. A second Head Start Program was operated in Regina by the Aboriginal Human Services Co-operative operating out of Scott Collegiate; its sponsorship also terminated on March 31, 1999.

[7] Ms. Noname testified that the Program staff first discussed unionization after the RFC annual general meeting on October 20, 1998. She said that she told Lynne Robertson of their desire to unionize sometime in November, 1998. Ms. Noname testified that RFC was aware of the Union's organizing effort at least by April 1, 1999 when the application for certification was filed with the Board, on which date Ms. Noname said RFC executive director, Reina Sinclair, advised her of the fact.

[8] She said that on December 14, 1998, at a meeting called by Lynne Robertson, with the co-ordinator of the Program, Albert Robillard, Ms. Noname herself, and three members of the parent committee, regarding renewal of funding for the Program, Ms. Robertson explained how to complete the renewal application package, advised that the Program was "not in danger" and described the renewal process as "routine."

[9] However, Ms. Noname said she learned in March, 1999 that the Contribution Agreement would not be renewed and the Program would end March 31, 1999. She said that the employees met with Lynne Robertson who assured them that only the Program sponsor would change and that they would not lose their jobs; she said the Program sponsored by RFC was extended to June 30, 1999. In fact, Ms. Noname said, the Program sponsored by RFC ended with the expiry of the Contribution Agreement on March 31, 1999 and on April 9, 1999 RFC laid off all the Program employees including herself.[1] Ms. Noname said the notice of layoff provided no reason.

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[1] In *Canadian Union of Public Employees, Local 4279 v. Aboriginal Headstart Program, Little Eagles Language and Culture Nest – Regina Friendship Centre and Canadian Union of Public Employees, Local 4285 v. Regina Friendship Centre*, [2000] Sask. L.R.B.R. 481, LRB File Nos. 112-99, 113-99, 117-99, 119-99, 120-99, 123-99, 144-99 to 161-99, 166-99, 182-99, 241-99 and 242-99, the Board found RFC guilty of several unfair labour practices in suspending or terminating the employment of several employees of the Aboriginal

[10] Ms. Noname said a meeting was held by Health Canada on June 17, 1999 at Scott Collegiate to discuss and circulate applications for sponsorship of the Little Eagle Program. Eventually, Health Canada entered into a contribution agreement with AFS to sponsor the Little Eagle Program. Ms. Noname said she was not contacted by AFS or Health Canada with respect to an opportunity for employment.

[11] Don Moran is a staff representative of the Union assigned to service the bargaining units at RFC and the Program. He testified that he was given a copy of a letter dated April 9, 1999 from Sophie Staley, Provincial Manager, Health Canada Health Promotion and Programs Branch to then RFC executive director, Reina Sinclair by the executive director who succeeded Ms. Sinclair, Pam Lavallee, which cited the reasons for non-renewal of RFC's sponsorship of the Program as:

> *1. Poor financial accountability;*
>
> *2. Poor staff management demonstrated high turnover; and,*
>
> *3. Lack of support to the Parent Advisory Committee to obtain a substantive role in the management and delivery of the program.*

The letter states, in part, as follows:

> *[The Health Canada Renewal Committee] determined that the Regina Friendship Centre had not demonstrated the abilities to effectively and efficiently manage and deliver an Aboriginal Head Start Program.*

It continues, as follows, with an explanation as to why the Contribution Agreement with a nominal expiry date of March 31, 1999 was not being extended to June 30, 1999 as the parties had apparently earlier discussed:

> *The contribution agreement Health Canada entered into with the Regina Friendship Centre expired March 31, 1999. Although the Renewal committee recommended non-renewal, we were hoping to extend this agreement until June 30, 1999 which would allow for the completion of the school term, allow for appropriate notice to staff and allow time for Health Canada to solicit new sponsorship of the program. We offered to meet with you to discuss the possibilities of such an arrangement on March 30. Unfortunately, you declined and requested that we submit to you in writing the reasons*

Headstart Program for union activity related to the organization drive, and ordered reinstatement and payment for monetary loss.

> *for non-renewal and furthermore urged that we reconsider the decision. Please note that the decision remains as stated and no further review will be conducted.*
>
> *Furthermore, after giving consideration of recent events, we no longer have confidence that this program can operate appropriately within the guidelines of Aboriginal Head Start, even in the short term. As the contribution agreement expired March 31, 1999, there will not be an extension until June 30, 1999.*

[12] Mr. Moran speculated that the "recent events" referred to in the last paragraph quoted above was the application for certification by the employees.

[13] Delores Parisien has been the executive director of AFS since 1997. Ms. Parisien described AFS as a non-profit corporation established in 1996 operated by a board of directors composed of members of the community it serves offering programs and services to disadvantaged aboriginal people at risk. She said that AFS originally started out by operating, and continues to operate, a support program for families in crisis funded under a contract with the Department of Social Services. It now also delivers various other programs as well as the Aboriginal Head Start Program it acquired in 1999.

[14] With respect to the latter program, Ms. Parisien said that by a notice dated January 13, 1999 AFS was invited by Health Canada to an informational meeting to be held on January 21, 1999 regarding solicitation for sponsorship of "the Regina Aboriginal Head Start Program" previously sponsored by the Aboriginal Human Services Co-operative upon termination of its sponsorship on March 31, 1999. She believed that perhaps five other organizations were sent similar notices. AFS submitted a letter of intent and a proposal to sponsor the program on January 27, 1999. Ms. Parisien said AFS was notified by letter from Health Canada dated February 12, 1999 that it was awarded sponsorship of the program effective April 1, 1999; the draft contribution agreement was sent to AFS for signature on March 26, 1999, the same day that Health Canada gave RFC written notice that its sponsorship would end as per the terms of its Contribution Agreement, subject to an overture by Health Canada to meet and discuss an extension to June 30, 1999.

[15] Ms. Parisien said that AFS advertised for applicants for seven staff in the Leader Post newspaper. She confirmed that AFS operated the program out of the Scott Collegiate premises formerly used by the Aboriginal Human Services Co-operative for the same purposes; AFS

negotiated a lease for the space with the Regina Public School Board. It called the program "Come and Learn."

[16] Ms. Parisien testified that AFS and six other aboriginal community groups received a notice from Health Canada dated June 2, 1999 of an informational meeting to be held on June 17, 1999 at the Albert Scott Community Centre regarding "new sponsorship" of an Aboriginal Head Start Program to be located in Regina. Operation of the program was to commence on August 15, 1999. Unlike the similar notice of January, 1999 this notice did not identify the former sponsor of the program, but the application form was entitled "Application for Sponsorship of Little Eagle Language and Cultural Nest AHS Project." AFS submitted a letter of intent and program proposal to Health Canada on June 27, 1999 describing how it intended to incorporate this second Head Start Program into its first. Health Canada awarded the program to AFS on August 5, 1999 and, rather than execute a separate contribution agreement, merely amended the existing agreement with AFS by simply doubling the amount of the funding.

[17] Ms. Parisien testified that AFS set out to hire four additional staff and to increase the hours of an existing part-time clerical person. It again advertised in the Leader-Post in early August. She said AFS received at least one application for a teacher associate position from a former employee of the RFC Program. She said that because enrollment in the program was to double from 40 to 80 children, AFS required larger premises, however, because of the short notice it had received from Health Canada it negotiated with the Public School Board to use the premises at Kitchener School previously used by RFC. AFS reorganized physical delivery of the program by maintaining its administrative offices, a kitchen and parent training facilities at its space in Scott Collegiate and delivering all child programming at the Kitchener School premises. It now has approximately 20 staff members.

[18] Ms. Parisien described the differences between the program delivered by AFC from that delivered by RFC as she understood it: she said that the RFC Program had a strong language and spiritual component, whereas the AFS program emphasizes culture and training. She said that AFS has not had any communication whatsoever with RFC about the Program. At the time of the Board hearing, AFS had provided its Head Start Program employees with lay-off notices pending a decision as to whether its sponsorship would be renewed by Health Canada.

[19] Sophie Staley has been the Health Canada provincial manager for health programs since 1997. She said that the Aboriginal Head Start Program is a national program; there are sixteen such programs sponsored in Saskatchewan and each may vary as to its emphasis. They are federally funded and locally delivered by aboriginal non-governmental organizations. RFC had been selected as one of the original sponsors when the program was originated in 1995.

[20] She said that RFC Program staff were invited by Health Canada to a meeting to discuss the renewal process in December, 1998. She said that RFC submitted a renewal proposal. She said that Health Canada has a renewal review committee including program consultants and experts in early childhood learning. The committee determined not to renew RFC as a program sponsor. She said that, because the federal government fiscal year end of March 31 did not coincide with the school year end of June 30, Health Canada was prepared to discuss an extension of the RFC sponsorship to minimize disruption to the students. However, she said that RFC opted not to meet to discuss such an extension.

[21] Ms. Staley described the concerns that Health Canada had with delivery of the Program by RFC as outlined in her letter of April 9, 1999 to RFC; she was adamant that Health Canada had no knowledge of a union organizing effort when it was considering renewal of RFC's sponsorship and did not learn about it until sometime between March 26 and April 9, 1999. She testified that her reference to "recent events" in the said letter was to what she called "disturbing recriminations" leveled against each other by RFC management, parents and staff during the previous two weeks, including allegations of intimidation, stalking and tire slashing; she said that consultant Lynne Robertson had to take time off because of stress and Ms. Staley assumed management of the situation personally.

[22] She said that then RFC director, Albert Robillard, terminated the lease of the premises at Kitchener School and transferred control of all program assets to Health Canada in accordance with the Contribution Agreement.

[23] Under cross-examination by Mr. Johnson, counsel for the Union, Ms. Staley agreed that the Head Start Program sponsored by Aboriginal Human Services Co-operative had been sub-contracted by that organization to another organization, Youth Unlimited. Mr. Johnson suggested that the reason the sponsorship was not renewed was because Youth Unlimited was organized by the

Saskatchewan Government Employees Union, a proposition that Ms. Staley denied. Mr. Johnson also suggested that sponsorship of the Head Start Program in North Battleford was not renewed because there was an organizing drive with respect to that sponsor's employees; Ms. Staley denied any knowledge of the situation.

Statutory Provisions

[24] Section 37 of the *Act* provides as follows:

> *37(1) Where a business or part thereof is sold, leased, transferred or otherwise disposed of, the person acquiring the business or part thereof shall be bound by all orders of the board and all proceedings had and taken before the board before the acquisition, and the orders and proceedings shall continue as if the business or part thereof had not been disposed of, and, without limiting the generality of the foregoing, if before the disposal a trade union was determined by an order of the board as representing, for the purpose of bargaining collectively, any of the employees affected by the disposal or any collective bargaining agreement affecting any of such employees was in force the terms of that order or agreement, as the case may be, shall, unless the board otherwise orders, be deemed to apply to the person acquiring the business or part thereof to the same extent as if the order had originally applied to him or the agreement had been signed by him.*
>
> *37(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 or 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*
> > > *(v) 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).

Argument

[25] Counsel for the Union, Mr. Johnson, argued that AFS is the successor to RFC and the Certification Order ought to apply to the AFS employees involved in delivering the Little Eagle Head Start Program. Counsel asserted that the RFC Program assets transferred to AFS included the equipment at the Kitchener School premises and the Program components. He said that the fact that the application for sponsorship completed by the potential sponsors, including AFS, referred to Little Eagle Language and Culture Nest is evidence that the program was transferred to AFS. He pointed out that AFS is delivering the program from the same premises used by RFC.

[26] Counsel claimed that the evidence demonstrated that every time an attempt at unionizing was made with respect to the employees of a Head Start Program sponsor, Health Canada failed to renew the sponsor's funding; the fact that the employees had been assured in December, 1998 that renewal was virtually a formality casts suspicion on Health Canada's motives.

[27] Counsel for AFS, Mr. Waller, filed a written argument that we have reviewed. He argued that there is no evidence of a sale, transfer or other disposition of a business in whole or in part from one employer to another within the meaning of s. 37 of the *Act*. He pointed out that there were no dealings between AFS and RFC. He said that the program components – that is, the six project areas required by Health Canada to be addressed in the delivery of the program – is not a business within the meaning of the section. Counsel argued that RFC was bound to deliver the Program pursuant to a contract (i.e., the "Contribution Agreement") for a limited period of time and once the contract expired any right it had to deliver or control the content of the Program also expired: it had no

authority to assign, and in fact did not assign, the Program or delivery of the Program to any other entity. AFS, he said, did not deliver the RFC Program but its own program under a name assigned by Health Canada; it did not obtain any ownership rights to equipment or assets formerly used by RFC to deliver the RFC Program but merely a right to use the equipment from Health Canada.

[28] Mr. Waller asserted that the physical assets used in the Program did not belong to RFC. He pointed out that RFC terminated its lease of the Kitchener School premises and AFS negotiated its own lease. Counsel further pointed out that certain aspects of the Little Eagle program – the parental and nutrition components and administration – are operated by AFS from the Scott Collegiate premises with which RFC had no connection whatsoever. No one connected with the RFC Program is employed by AFS, and there was a hiatus of some months between the end of the RFC Program and the commencement of the AFS program.

[29] Counsel argued that the situation is merely one of a change in contractors and s. 37 of the *Act* does not apply to such situations.

[30] In reply, Mr. Johnson stated that if the Board fails to find a successorship in this case, unions will be unable to assist employees of non-governmental organizations delivering programs funded by outside agencies.

Analysis and Decision

[31] The issue in the present case is whether AFS is the successor to RFC with respect to the Little Eagle Head Start Program such that it ought to be bound by the RFC Certification Order. The present case involves the delivery of a social program by a non-governmental organization under guidelines and restrictions for the structure and delivery of the program and funding for the program received from an outside agency pursuant to a time-limited contract in circumstances where the funding agency fails to renew its contract with the program provider and enters into a contract to provide the service with another provider.

[32] The essential purpose of s. 37 of the *Act* is to ensure that the employees' rights obtained and exercised under s. 3 to be represented by a bargaining agent, are not defeated by an employer alienating its business. To this end the broad wording of s. 37 is intended to ensure that the form of

the alienation does not triumph over its substance to defeat the employees' rights. Given that the legislation is remedial in nature, it is necessary to ascribe it a liberal interpretation as opposed to too narrow a construction.

[33] However, the Board has often referred to the fact that the determination as to whether there has been a successorship is not easy. 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, at 179-80, the Board commented on the situation where an entity currently contracting out certain functions changes contractors:

> *A related scenario is the situation where a contract of this kind moves from one contractor to another. In a number of such cases, a union has argued that there is a transfer of obligations under Section 37. The Board has found in these cases that the mere replacement of one contractor with another does not provide the necessary nexus between the two to constitute the transfer of a "business" within the meaning of Section 37. In one such case, Saskatchewan Joint Board Retail, Wholesale and Department Store Union v. Diogenes Investments Ltd., LRB File No. 072-83, the Board said that in order for a successorship to be found, "there must be more than a performance of a like function by another business entity." There must be something disposed of which is a "going concern" of the kind described in Metropolitan Parking; see also Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Marriott Canadian Management Ltd., LRB File No. 029-88; Hotel Employees and Restaurant Employees Union v. Beaver Foods Ltd., LRB File No. 002-89; Hotel Employees and Restaurant Employees v. JKT Holdings Ltd., LRB File No. 149-89.*
>
> *. . . to establish that an employer is a successor in the sense envisaged by Section 37, it must be established that something of a coherent and dynamic nature, something which may enjoy a separate existence as a "business," was passed on from the original employer to the successor. To quote the Board in the Headway Ski case, we must look to whether there is "a discernible continuity in the business or part of the business formerly carried on by the predecessor and now being carried on by the successor."*

[34] The present case bears some resemblance to another case recently decided by the Board: *Amalgamated Transit Union, Local 615 v. Saskatchewan Abilities Council, Transportation Division, Wayne Bus Ltd. and Base Communications Ltd. o/a Tel-J Communications*, [2001] Sask. L.R.B.R. 180, LRB File No. 057-99 (the "*SAC* case"). It is instructive to briefly review the facts of that decision. The Saskatchewan Abilities Council ("SAC") operated a special needs transportation service in Saskatoon from the early 1950's until the end of 1998. It operated the service privately until 1975 when the City of Saskatoon and the Province assumed funding responsibility for the service on a cost-shared basis. SAC continued to operate the entire service, including dispatch,

scheduling and driving services, using its own equipment and employees, under contract to the City. In 1989, SAC's employees were certified and represented by Amalgamated Transit Union, Local 615. In the fall of 1998 SAC provided notice to the City that effective the end of the year, when its contract with the City expired, it would no longer provide the service. The City solicited tenders for two contracts, one to provide dispatch and scheduling services and one to provide driving services. Wayne Bus was awarded the driving contract and Tel-J Communications was awarded the dispatch contract. Each contractor was non-union and used its own employees and equipment to provide the service from their own premises; neither acquired any equipment from SAC or the City and neither employed any former employees of SAC. There was no hiatus in service. ATU applied to the Board for an order that each of Wayne Bus and Tel-J were successors to SAC and were bound by its Certification Order.

[35] In determining that Wayne Bus and Tel-J were not successors to SAC, the Board noted that there was no evidence of a sale, lease or other disposition of anything by SAC to either of the new contractors and the case was merely one of the substitution of one contractor for another.

[36] In the present case, the only nexus between RFC and AFS with respect to the Little Eagle program is the use by AFS of the Kitchener School premises and equipment formerly used by RFC. But RFC had terminated its lease of the premises, and there was a hiatus of several months until AFC negotiated its own lease of the premises. There was no communication or correspondence between RFC and AFS at any time. The Head Start Program, like the special needs transportation work in the *SAC* case, *supra*, did not belong to RFC and was not its to alienate; rather, like the City in the *SAC* case, which itself had never performed any part of the work, Health Canada changed contractors. Pursuant to the Contribution Agreement, upon termination of the program RFC was bound to transfer title to the minister of any project assets specifically acquired for the purposes of the program. The assets and equipment acquired by RFC for the purpose of delivering the Program did not really belong to it but were held in a form of trust. In any event, they were not RFC's to transfer to AFS, and no such transfer took place.

[37] Despite the fact that Health Canada ascribed the same Little Eagle name to the second Head Start Program awarded to AFS, the program itself is not the same program. The respective contribution agreements entered in to by RFC and AFS with Health Canada describe "the project" as being that set out in each party's respective proposal submitted to Health Canada when applying to

sponsor a Head Start Program; those proposals are not the same, nor substantially the same, and, therefore, the program actually delivered by AFS is not the same as that delivered by RFC. There was no discernible continuity in the delivery of a program by RFC and then AFS. It is a fact of life that social programs funded by government or outside agencies and delivered by non-profit organizations come and go depending on funding, and program providers often change based on their ability to deliver the program. In the present case, the change in program provider did not constitute the transfer of a business within the meaning of s. 37 of the *Act*.

[38] Counsel for the Union adduced evidence related to, and placed much of the emphasis in his argument on, an attempt to demonstrate an anti-union animus on the part of Health Canada and RFC in the failure to renew the RFC sponsorship of the Little Eagle program. But there is no unfair labour practice application before us in this matter. The motives of Health Canada and RFC in the matter of non-renewal are largely irrelevant to the issue at hand.

[39] In all the circumstances of the case we do not find that there was a sale, lease or other disposition of a business or part thereof by RFC to AFS or that AFS is a successor to the employer named in the subject Certification Order, namely, Aboriginal Headstart Program, Little Eagles Language and Culture Nest – Regina Friendship Centre, within the meaning of s. 37 of the *Act*.

[40] The application is dismissed.

SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant v. REGINA EXHIBITION ASSOCIATION LIMITED, Respondent

LRB File No. 179-00; July 11, 2001
Chairperson, Gwen Gray; Members: Ken Hutchinson and Donna Ottenson

For the Applicant: Larry Kowalchuk
For the Respondent: Larry Seiferling, Q.C.

Duty to bargain in good faith – Unilateral change – Board discusses purpose of statutory freeze. – Unfair labour practice – Unilateral change – Employer unilaterally implemented part of negotiated agreement on wages prior to execution of collective bargaining agreement – Board concludes employer's action was destructive of collective bargaining process and role of union as exclusive representative of employees – Board finds violation of s. 11(1)(m) of The Trade Union Act. – Arbitration – Deferral to – Board defers issuing remedial order until issue of retroactivity of gratuity provision determined through grievance and arbitration provisions.

The Trade Union Act, s. 11(1)(m).

REASONS FOR DECISION

Background and Facts

[1] Gwen Gray, Chairperson: Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Union"), applied to the Board for an unfair labour practice under s. 11(1)(m) of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the "*Act*") alleging that the Regina Exhibition Association Limited (the "Employer"), had unilaterally altered terms or conditions of employment without negotiating the same with the Union.

[2] The factual background is quite simple. The Union was certified to represent employees in the Food Services Department of the Employer on April 24, 1997. This is one of four bargaining units represented by the Union at the workplace of the Employer. The main bargaining unit is the Operations Department and its collective agreement came open in the spring of 1999. At that time, the Union and the Employer agreed to bargain with respect to most items affecting all four bargaining units at one common table.

[3] One area of discussion in the negotiation of the Food Services Department agreement was the payment of gratuities to employees. The Union had previously entered into a collective agreement with a competitor of the Employer in which the Union agreed to forego the gratuity payment built into the customers' account by the Employer in exchange for higher wage rates. The Employer wanted a similar provision in its collective agreement and the Union agreed to it. Negotiations surrounding the Food Services Department agreement were primarily concluded in September, 1999. Both parties ratified the proposed collective agreement and the bargaining officials set to work to finalize the written text of the agreement. The final agreement was signed on February 3, 2000.

[4] The wage schedule set out in the agreement was set to come into effect on September 1, 1999 and payment was made to employees on a retroactive basis once the agreement was signed in February, 2000. However, effective September 1, 1999, the Employer stopped paying employees any share of the gratuities charged or collected from its customer invoices. The Union wrote to the Employer in January, 2000 to complain about its unilateral implementation of the gratuities article.

[5] In February, 2000, the Employer tabled an implementation Letter of Understanding with the Union which read as follows:

> *LETTER OF UNDERSTANDING*
>
> *BETWEEN:* *Regina Exhibition Association Limited, Regina, Saskatchewan, hereinafter referred to as the Employer*
>
> *AND:* *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, hereinafter referred to as the Union*
>
> *RE:* *Terms and Conditions*
>
> *All parties agree that the terms and conditions of the collective agreement negotiated will become effective on the first day of signing the new agreements.*
>
> *The parties further agree that the wage proposal will have an effective date of September 1, 1999 and that the payment of gratuities to employees will cease effective September 1, 1999.*

Signed this "3rd" day of February, 2000.

SIGNED ON BEHALF OF THE UNION:

_____

SIGNED ON BEHALF OF REGINA EXHIBITION ASSOCIATION LIMITED:

_____

[6] The Union refused to sign the Letter of Understanding with the final paragraph in it. In the end result, the Letter of Understanding was signed with the final paragraph stroked out and initialed by the parties.

[7] The Union alleges that this change constitutes a violation of s. 11(1)(m) of the *Act* as effective September 1, 1999 no collective agreement had been reached between the parties.

[8] The Employer argues that a collective agreement was in force for the period in question as its effective dates run from April 1, 1999 to March 31, 2002 even though it was not signed until February 3, 2000. As such, it argues that there can be no violation of s. 11(1)(m). The Employer argued as well that the complaint raised by the Union should be resolved through the grievance and arbitration procedures set out in the collective agreement.

The Statutory Framework

[9] The *Act* sets up a statutory framework for collective bargaining that commences with the certification of a trade union for an appropriate unit of employees. On the issuing of the Certification Order, the Employer is obligated to bargain with the trade union as the exclusive representative of employees. The parties are required to bargain collectively with the view to concluding a collective agreement which will replace the common law conditions of employment by setting out rates of pay, hours of work and other working conditions of employees that have been arrived at through the negotiation process.

[10] Once a Certification Order is issued by the Board, s. 11(1)(m) provides for a "freeze" of the rates of pay, hours of work or other conditions of employment until a first collective agreement is achieved. Section 11(1)(m) provides as follows:

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

[11] The purpose of the statutory freeze provision is to permit the parties to commence collective bargaining with a fixed set of working conditions in place from which to commence collective bargaining. It stabilizes the working conditions and prevents the employer from altering conditions as a method of interfering with the employees' choice to join a union. The statutory freeze is intended to bolster the relationship between the employer and the union by facilitating the collective bargaining process and by reinforcing the statutory role of the union as the exclusive representative of the employees. The matters that are subject to the statutory freeze are the same matters that are the subject of collective bargaining. In conjunction with the requirement to bargain in good faith, which includes obligations to disclose information to the union, the statutory freeze is essential to the establishment of successful collective bargaining.

[12] Although the statutory freeze contained in s. 11(1)(m) operates to prevent employers from altering the terms and conditions of employment to discourage trade union activity, the provision itself does not require proof of improper motive before a violation will be found. Changes that are made for reasons that demonstrate anti-union animus are already violations of the *Act* under ss. 11(1)(a), (e) and (g) of the *Act*: see *Irwin Toy Ltd. v. U.S.W.A., Local 1357* (1983), 4 CLRBR (NS) 23 and other cases referred to in *The Newspaper Guild Canada/Communications Workers of America v. Sterling Newspapers Group, a Division of Hollinger Inc., o/a The Leader-Post Leader Star News Services,* [2000] Sask. L.R.B.R. 558, LRB File Nos. 272-98 & 003-00. As expressed by the Ontario Labour Relations Board in *Ontario Public Service Employees Union v. Royal Ottawa Health Care Group,* [1999] OLRB Rep. July/August 711, at para. 68, "the freeze provisions, . . . lacking a requirement for "anti-union motivation," are more accurately viewed as a form of economic regulation, rather than a fault-based prohibition.

[13] The freeze provision contained in s. 11(1)(m) is a simple and straightforward directive to employers to retain the working conditions as they existed at the time of certification unless the union consents to the change. In this sense, the freeze provision facilitates the development of the bargaining relationship by requiring the employer to negotiate all changes to rates of pay, hours of work and other conditions of employment with the union and to cease any direct dealings with individual employees over the terms and conditions of their individual employment.

[14] The freeze concept is relatively easy to grasp but is more difficult to apply. The process of determining what constituted the pre-certification rates of pay, hours of work or other conditions of employment of employees is not entirely an easy matter and it has been the subject of various Board decisions. Generally, the Board determines what constitute pre-certification terms and conditions by applying the interpretative tool of asking how the employer operated the business before certification – the "business as before" test. 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, at 115, the Board explained the test as follows:

> *Using the standard of "business as before" establishes a fairly clear baseline for measuring employer conduct during the negotiation of a first collective agreement. It means that the employer is entitled to continue to make business decisions, but must not change terms and conditions of employment which were in existence at the time of the certification. The employer cannot alter terms and conditions in a way which may be seen as punishing employees for choosing to support the certification of a trade union; equally, this standard prevents an employer from selecting the post-certification period to demonstrate that employees may enjoy positive changes without having to obtain them through collective bargaining. Though this way of looking at the post-certification period should indicate to the prudent employer that it is necessary to be cautious about making changes which may be characterized as undermining collective bargaining, it does not hamstring the employer completely.*

[15] Recently, the Board has also adopted an interpretative tool based on the "reasonable expectation of employees": see *Canadian Union of Public Employees, Local 2152 v. Canadian Deafblind and Rubella Association,* [1999] Sask. L.R.B.R. 138, LRB File No. 095-98 at 159-160 where the Board set out the test as follows:

> *The cases demonstrate that, in the past, this Board has given a broad, flexible and purposive interpretation to s. 11(1)(m) of the Act; what in Ontario might be considered to be "privileges" rather than "terms and conditions" of employment, in Saskatchewan appear to have been interpreted to be included within "other conditions of employment." Such items would be within what the Board in the Brekmar decision,*

> *supra, described as "a real, well-known and well-defined part of the labour relations fabric before certification." This "labour relations fabric" includes practices and policies that existed prior to certification as well as the terms, conditions and benefits of the relationship of the employees, and of each employee, with the employer. If the employees have come to expect these things it can only be because the employer has made them part of its "business as usual." It seems to us that the reasonable - and we emphasize the word "reasonable" - expectations of employees arise out of the employer's usual and customary way of conducting its operations and dealing with its employees. Strictly speaking, many of these items could not be legally enforced as being a term of an individual employment contract, (for example, the wage increases at issue in the Brekmar decision, supra), but there is no doubt that they are part of the "labour relations fabric" that existed prior to certification such that the employees have a reasonable expectation that they would continue until a collective agreement is reached.*
>
> *The "reasonable expectations" test does not expand the scope of the result of the application of the "business as before" test. However, it can be a useful tool to better clarify and more accurately identify what is encompassed within the pre-freeze pattern of business, and to assist in making a reasoned determination in instances of first time events. What is the reasonable expectation of employees, or an employee, is an objective standard, that can help to achieve the most accurate balancing of employers' and employees' rights prior to reaching a collective agreement; employees can place reliance in the fact that the pre-certification pattern of business is preserved, while an employer's ability to respond to changing conditions and new events is not abrogated.*

[16] In *Royal Ottawa Health Care Group, supra,* Chairperson MacDowell engaged in a critical discussion of the various interpretative approaches to the freeze provisions set out in the Ontario Labour Relations Act and suggested an alternate approach to the question at paras. 88 to 93 as follows:

> *¶ 88 In my view, and in light of experience, these traditional views have to be augmented by another perspective that is more in tune with the precise role that section 86(1) is to play in the regulatory framework, once bargaining has begun. The language of section 86 has to be read as the Board did in Ottawa Public Library, supra with these statutory purposes clearly in mind: bolstering the bargaining process; reinforcing the status of the union as the employees' bargaining agent (hence the distinction between the section 86(1) and 86(2) freezes); and providing a firm (if temporary) starting point from which bargaining will take off.*
>
> *¶ 89 From that perspective it is necessary to pay particular attention to how the proposed change in employment conditions relates to BARGAINING. Is it the kind of thing that would typically be the subject of collective bargaining? And would changes of this kind, if implemented unilaterally in these circumstances, unduly disrupt, vitiate, or distort that bargaining process (what the freeze is designed to avoid whether or not the changes would ALSO be a BREACH of section 17)? Is it the kind of thing about which the employer would normally be required to bargain*

by virtue of section 17? Because if the answer to these questions is "yes", it is the kind of thing that probably falls within the ambit of section 86(1) and "should" be frozen (at least for a time) while that bargaining process proceeds ("should" because while the words themselves are open to alternative interpretations, policy and purpose point in favour of that one).

¶ 90 It is also useful to consider whether the employer action is broadly based and treats employees AS A COLLECTIVITY (as a "collective" agreement does); or, alternatively, whether it is something intrinsic to an individual employee's situation (reclassifying an individual as opposed to introducing a new classification system; granting a promotion as opposed to creating a new process for promotions; disciplining an employee for misconduct as opposed to publishing a new scheme of workplace rules enforceable by discipline, etc.). For even in a collective bargaining regime, there is considerable scope for unilateral action impacting on employees and unaccompanied by any individual interaction that could be construed as "bargaining" with the employee(s).

¶ 91 If the change in question is the kind of thing that affects employees AS A COLLECTIVITY, and it is the kind of thing that the employer would be obliged to bargain about (per section 17), and it is the kind of thing that, as a matter of labour relations practice, employers typically do bargain about, then it is likely to be the kind of thing that the employer cannot implement unilaterally during the currency of the statutory freeze. In other words, it is the kind of change to employee "terms and conditions of employment rights, privileges or duties" that requires the consent of the bargaining agent.

¶ 92 Conversely, (and subject to section 73) there is nothing inimical to collective bargaining if an employer carries on business as before in respect of individual hiring, firing, promotions, demotions, work assignment and so on - the daily stuff of individual employer-employee interactions, that in large measure, are unrelated to the collective bargaining process, and are typically presented to employees as a FAIT ACCOMPLI.

¶ 93 It seems to me that the answer to questions such as these, may provide a better guideline to the Board's actual interpretation of section 86(1), than asking whether the employer is carrying on "business as usual", or whether the changes are ones that employees might reasonably expect to be implemented unilaterally; because, unlike these other formulations, these questions require the Board to consider how the words of section 86(1) apply or relate to the BARGAINING PROCESS - the actual subject of regulation. At the very least, the answer to these questions helps to illuminate the purposive approach which the Board applies in respect of section 86(1), and thus fills out the picture painted by the "reasonable expectations" considerations in Simpsons, and the "business as usual" analysis in Spar.

[17] Without engaging in a lengthy discussion of the various interpretative lenses that can be applied to the freeze provision contained in s. 11(1)(m), it is important from the perspective of this case to keep in mind that the freeze provision is intended to nurture collective bargaining, to set a solid basis for negotiations, to support the union's role as the exclusive bargaining agent and to prevent unilateral changes of the sort that are destructive of collective bargaining.

Analysis

[18] How do we apply the statutory framework to this case? It would seem to the Board that the Employer has taken two approaches to the implementation date of the provisions of the collective agreement. By ceasing the payment of gratuities to employees on September 1, 1999, the Employer's conduct suggests that the collective agreement was intended to be implemented prior to the formal signing of the collective agreement. On the other hand, by delaying the payment of retroactive wage increases to the formal date of signing the collective agreement on February 3, 2000, the Employer's conduct suggests that the collective agreement was not intended to be implemented until it was formally signed by the parties.

[19] These two opposite conclusions are untenable in labour relations terms. Either the parties agreed to implement the agreement prior to formal signing or they agreed to implement it after formal signing. The exhibits filed by the parties, particularly the Letter of Understanding referred to above, indicate clearly that the explicit agreement was to implement the terms of the agreement after it was formally signed.

[20] This conclusion of fact does not mean that certain provisions contained in the collective agreement are not intended to be retroactive to an earlier date. Retroactivity is clearly spelled out in the agreement for wage rates and the effective date of the agreement. These two matters, however, are different from the implementation date, which, for the vast majority of provisions contained in the agreement, would be the date of actual signing. For instance, changes in the number of statutory holidays, hours of work, vacation entitlements and the like are difficult to make on a retroactive basis and are generally assumed to be implemented on the date the formal agreement is signed. Whether or not a provision has retroactive effect is a complicated question that has generated much arbitral jurisprudence: see, for example, the decision of Robert Pelton, arbitrator, in *Regina Police Association Inc. and Douglas Woodside v. The Regina Board of Police Commissioners,* Feb. 7, 2000.

[21] In our view, the Union is entitled to complain that the Employer cherry-picked the implementation dates of the contractual provisions. From the Union's perspective, either the provisions were effective on the conclusion of collective bargaining and ought to have been implemented in total on September 1, 1999 or the agreement came into being on February 3, 2000, with retroactivity of certain provisions as provided for in the collective agreement.

[22] The Employer argues that it is a question of contract interpretation as to whether or not the changes agreed to in the payment of gratuities were intended to be retroactive to September 1, 1999. We agree that the interpretation of the retroactivity of certain contractual provisions is a task that properly belongs with an arbitration board. If the provision is retroactive to September 1, 1999, then the Employer may have been justified in off-setting the gratuities paid to employees during the period from September 1, 1999 to February 3, 2000 against the monies owing to them for retroactive wage increases for the same period. If the Union disagreed with the Employer's interpretation of the retroactivity of the gratuity provision, then the matter may have to be resolved through the grievance and arbitration route.

[23] However, there is no suggestion in the evidence that the Employer and the Union agreed to implement the gratuity provision prior to the formal signing of the collective agreement. Retroactive or not, it is difficult to rationalize the Employer's decision to implement the change in gratuity payment on September 1, 1999 without such an agreement from the Union. The decision to unilaterally implement part of the bargain prior to the formal signing, but not the whole bargain, was destructive of the collective bargaining process and of the role of the Union as the exclusive representative of employees. The Employer placed the Union in an untenable position with its members who would see their wage packages reduced below their pre-certification rates for a six month period prior to receiving any increase in pay. If discussions had occurred between the Union and the Employer with respect to an early implementation of the gratuity provision, it is predictable that the Union would have insisted on the implementation of the new wage grid at the same time. The Union, no doubt, would want to avoid leaving its members with the perception, albeit a temporary one, that they were worse off as a result of the negotiations between the Employer and the Union.

[24] In our view, the Employer unilaterally implemented a change in the wages of the employees in the bargaining unit without properly negotiating the matter with the Union. Although the provision had been agreed to and may, in fact, be found by an arbitrator to be retroactive to September 1, 1999 in the same manner that the wages were made retroactive to September 1, 1999, there was no agreement reached between the Union and the Employer to implement the provision prior to the signing of the formal agreement.

[25] As explained above, the purpose of the freeze provision is to channel such decisions into the collective bargaining arena and to require the Employer to discuss and obtain the agreement of the Union with respect to such issues. In the present case, the Employer had the option of returning to the bargaining table to obtain the Union's agreement with respect to the implementation date of the gratuity provision. Alternatively, the Employer could continue to pay the gratuities and raise the issue when the formal agreement was signed and retroactive pay became payable. At that point, if the parties disagreed on the retroactive effect of the gratuity provision, they could resolve the matter through the grievance and arbitration provisions contained in their agreement. This is the collective bargaining framework in which the parties are expected to conduct their affairs once a Certification Order is issued.

[26] In conclusion, we find that the Employer violated s. 11(1)(m) by unilaterally implementing the gratuity provision on September 1, 1999 without negotiating this matter with the Union. The Employer argued that the collective agreement was in force effective April 1, 1999 and that s. 11(1)(m) cannot apply to the change which was implemented on September 1, 1999. In our view, however, the collective agreement did not come into force until it was signed on February 3, 2000. There are provisions contained in the agreement that have retroactive effect, such as the wage scale and the effective date provision. These do not alter the fact, however, that on September 1, 2000 until February 3, 2000, no collective agreement was in force.

[27] The issue of remedies is complicated by the continuing dispute between the parties over the retroactivity of the gratuity payment. It may well be the case that an arbitrator agrees with the Employer that the provision was intended to be retroactive, along with the wage scale, to September 1, 1999. In this case, no gratuity payment would now be owing to the employees. On the other hand, an arbitrator may side with the Union's interpretation and find that the gratuity payment provision

was not intended to be retroactive and is owed to the employees for the period from September 1, 1999 to February 3, 2000.

[28] Rather than complicate the situation by ordering payment of the gratuities and sending the parties off to arbitration to have the retroactivity issue resolved, we will suspend any remedial order that the Board could make under s. 5 of the *Act,* except for the general s. 5(d) and (e)(i) order, until a resolution of the retroactivity issue is obtained through the grievance and arbitration route. At that time, either party may apply to the Board for a determination of any additional remedies under s. 5(e)(ii) of the *Act* on providing the Board and the party opposite with notice of its intent to seek further remedies.

UNIVERSITY OF SASKATCHEWAN, Applicant v. CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1975 and ADMINISTRATIVE AND SUPERVISORY PERSONNEL ASSOCIATION, Respondents

LRB File No. 233-00; July 11, 2001
Vice-Chairperson, James Seibel; Members: Gerry Caudle and Ron Asher

For the Applicant:	Neil Gabrielson, Q.C.
For Canadian Union of Public Employees, Local 1975:	Jim Holmes
For Administrative and Supervisory Personnel Association:	Gary Bainbridge

Bargaining unit – Appropriate bargaining unit – Multiple bargaining unit setting – Board provisionally assigns two new positions to proper bargaining unit using Board's historical approach to this multiple bargaining unit setting.

***The Trade Union Act*, ss. 5(m) and 5.2.**

REASONS FOR DECISION

Background and Evidence

[1] **James Seibel, Vice-Chairperson:** Each of Canadian Union of Public Employees, Local 1975 ("CUPE") and Administrative and Supervisory Personnel Association ("ASPA") are designated in Certification Orders of the Board as the bargaining agent for a group of employees of the University of Saskatchewan (the "University"). The University applied for a determination pursuant to s. 5(m) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") respecting the assignment of four new positions that it intended to create to the appropriate bargaining unit. The positions are: (a) Marketing Co-ordinator, College of Kinesiology; (b) Manager, Minor Projects, Division of Facilities Management; (c) Executive Director, Women's Studies Research Unit; and, (d) Grants Administrator, Office of Research Services.

[2] The University attempted to bargain with CUPE with respect to the placement of the positions, but those two parties were unable to reach an agreement. The positions of the University and ASPA were that each of the new positions ought properly to be assigned to the bargaining unit represented by ASPA (the "ASPA unit"). CUPE, however, took the stance that the positions ought properly to be assigned to the bargaining unit it represents (the "CUPE unit").

[3] At the commencement of the hearing by the Board the parties advised that they agreed that the position of Manager, Minor Projects, Division of Facilities Management, ought properly to be assigned to the ASPA unit. And, after evidence was adduced at the hearing but before arguments were presented by the parties, the parties advised the Board that they agreed that the position of Grants Administrator, Office of Research Services, ought properly to be assigned to the ASPA unit as well. Accordingly, the summary of the evidence adduced and our Reasons for Decision on the application are restricted to the issues regarding the positions of Marketing Co-ordinator, College of Kinesiology and Executive Director, Women's Studies Research Unit.

A. Executive Director, Women's Studies Research Unit

[4] Mr. Bruno Konecsni, the University's Director of Employee Relations and Dr. Louise Forsyth, Co-chair of the Women's Studies Research Unit (the "WSR Unit") and formerly the Dean of Graduate Studies, testified on behalf of the University.

[5] Dr. Forsyth testified that the WSR Unit has campus-wide responsibility for the research conducted respecting all women's issues. While the Faculty of Arts & Sciences has a separate Women's and Gender Studies department, there is no administrative connection between that department and the WSR Unit. Dr. Forsyth explained that the WSR Unit is not located in an academic college but is an administrative unit located in the University's Research Studies Unit: its purpose is to serve as an interdisciplinary hub for all research related to women's studies. Mr. Konecsni and Dr. Forsyth testified that the University has several other "research units" such as toxicology research, agricultural medicine and neuropsychiatry, to name but a few.

[6] The WSR Unit, created in 1986, was originally funded by what Mr. Konecsni termed "soft money" provided by various sources such as contractors and donors or through bequests, as opposed to funds from the University's operating grant from the provincial government. He said that the staff positions remunerated from such sources are typically designated as term positions because there is a limited amount of funding for a limited time: such is the case with the Executive Director of the WSR Unit. The incumbent, Marie Green, a full-time term employee who is not in scope of any bargaining unit, reports to a volunteer executive committee composed of some members of faculty and representatives of interested agencies and groups outside of the University. Mr. Konecsni stated that the outside sources of funding for the WSR Unit have essentially "evaporated" and the University has decided to fund the WSR Unit out of its operating budget. One consequence of this

change in funding, he said, will be that the position of Executive Director will be made permanent. As described by Dr. Forsyth, while Ms. Green has been the Executive Director for some seven years, the conversion to operating budget funding designates it as a "new" position.

[7] Mr. Konecsni stated that the duties of the Executive Director are assigned by the executive committee. The executive committee has developed a vision, mission and strategic plan: it is the job of the Executive Director to implement the plan. He described the position as a senior administrative position with responsibility for projecting and managing the budget, planning, preparation of grant applications, implementing decisions made by the executive committee, the administration and supervision of all research within the purview of the WSR Unit, hiring and supervising and evaluating clerical support staff, preparation of the WSR Unit's annual report, public relations and reporting to the committee. The Executive Director is a full member of the executive committee.

[8] The WSR Unit offers a seminar program, a speakers series, has organized two international conferences and collaborates with graduate students to make conference presentations.

[9] Mr. Konecsni testified that the position is similar to that of the Director of the Native Access Program to Nursing in the College of Nursing and the Business Manager of Business Advisory Services in the College of Commerce, both of which have been assigned to the ASPA unit. With respect to the comparison with the former position, which recruits and provides support for aboriginal nursing students, Mr. Konecsni said the Executive Director of the WSR Unit provides services and research supervision to faculty and researchers: both positions report to a board of directors and are directly charged with the implementation of the plan made by their respective boards.

[10] In cross-examination by Mr. Holmes, Dr. Forsyth admitted that at some time in the past, a casual clerical staff person had been terminated by the Executive Director of the WSR Unit; however, she said that the decision was made by the WSR Unit co-chairs after consulting with the faculty members whose research the employee was engaged in supporting.

B. Marketing Co-ordinator, College of Kinesiology

[11] Mr. Konecsni testified that the Marketing Co-ordinator is responsible for all marketing activities related to the Huskies athletics program (comprising the University's representative sports teams) under the direction of the Athletics Director, Ross Wilson. He said that the Marketing Co-ordinator's duties were formerly performed by the team coaches and Mr. Wilson as an adjunct to their other duties. According to Mr. Konecsni, the revenue required to financially support the teams and remain competitive has increased greatly in recent years and it is deemed vital that the marketing function be handled by a full-time person dedicated to the task: this includes a mandate to form, foster and service relationships with new and existing sponsors and donors, work with the alumni association to generate support for programs, organize and run special events and supervise assistant and support staff.

[12] According to Mr. Konecsni, comparable positions include the Business Manager, Business Advisory Services in the College of Commerce, and the Administrative Assistant and Director of Major Giving in the Alumni and Development Office. The latter two positions, both in the ASPA unit, he said, like the position presently under review, include the development of relationships with sponsors and donors in the community. He pointed out that CUPE had agreed to the inclusion of the position in the ASPA unit on an interim basis.

[13] Ross Wilson has been the University's Athletics Director since 1991 (prior to 1999 the position was called the Athletic Program Co-ordinator). Mr. Wilson testified that he was the University's first non-faculty Athletics Director and the first without academic teaching responsibilities. He described the scope of his responsibilities as extremely broad: overseeing the Huskies athletics program; representing Huskies athletics as liaison with all persons and groups nationally, provincially and within the University; representing the University and Huskies athletics on all national bodies (such as the CIAU), at conferences and at meetings; budget responsibility; supervision of all head coaches and staff of all Huskies programs. He himself reports to the Dean of the College of Kinesiology.

[14] Mr. Wilson gave a brief history of the funding for Huskies athletics programs in the modern era. Until the mid-1980's the programs were funded from the University's operating budget; in 1991, monies from the University operating budget and student athletics fees comprised about 90 per cent

of revenue. Gradually, funding has been shifted in the direction of other resources such that now, only approximately 15 per cent of funding is from the operating budget; and 45 per cent from student athletics fees; 40 per cent is department-generated from sources such as sponsorship agreements, the sale of logo merchandise, special events (such as the hosting of a national hockey championship), gate receipts, concession sales and fundraising. While the budget in 1991 was approximately $750,000, it is now about $1.5 million. Therefore, Mr. Wilson said, the requirement to raise external funding has become ever more critical.

[15] Mr. Wilson stated that his ability to manage the demands of a marketing program has decreased with an increasing workload. Recent staff additions, which are within his supervisory responsibility, include an Athletics Services Officer, a Sports Information Officer (both of which are within scope of ASPA) and, now, a Marketing Co-ordinator; all perform some duties previously performed by himself, an ASPA member.

[16] He described the anticipated duties of the Marketing Co-ordinator to obtain, foster and service sponsorships and donations; obtain and co-ordinate advertising; the development and co-ordination of promotions both within the University and in the community and at off-site events. These duties, he feels, require someone with experience and ability in marketing and knowledge of sports programs. The person who has been selected for the position has some nine years of marketing experience with a national sports organization.

[17] Mr. Wilson stated that all other full-time positions in the Huskies athletics program are in the ASPA unit, including the athletics director, a physiotherapist, six coaches, the sports information officer and the athletics services officer.

Argument

[18] Mr. Gabrielson, Q.C., counsel for the University, argued that the evidence adduced satisfied the test enunciated by the Board in a recent prior decision involving the same parties (LRB File No. 218-98, *infra*) and that, based upon the source of each position's duties, the nature of the duties, and a comparison with the comparable positions cited, the two positions in issue ought properly to be assigned to the ASPA unit. Counsel asserted that neither of the positions was comparable to any

existing CUPE position. Counsel requested that the Board assign the positions to the ASPA unit on the usual provisional basis pursuant to s. 5.2 of the *Act*.

[19] Mr. Bainbridge, counsel for ASPA, asserted that the positions in issue are practically identical to other positions assigned to ASPA and argued that there was no evidence that either position had, as its source of work, duties performed by members of the CUPE unit: the duties of the Marketing Co-ordinator, he said, were formerly performed by the athletics director and faculty team coaches; the other nine people in the department of a comparable level are in scope of the ASPA unit. Counsel filed a written brief that we have reviewed.

[20] Mr. Holmes, on behalf of CUPE, argued, with respect to the Executive Director of the WSR Unit, that the position was not comparable to the Director of the Native Access to Nursing Program and that it was not demonstrated that the incumbent "supervises" any staff or research to any significant degree. He pointed out that the source of the position's duties is not from an ASPA position but from outside of any bargaining unit.

[21] With respect to the Marketing Co-ordinator position, Mr. Holmes admitted that the source of the position's duties was from positions presently in the ASPA unit, but that the fact that the position does not supervise staff or administer a budget should tend to warrant its assignment to the CUPE unit. Mr. Holmes filed a book of authorities that we have reviewed.

Analysis and Decision

[22] The assignment of new positions as between the ASPA and CUPE bargaining units at the University is somewhat of an anomaly with historical roots stretching back to the certification of the ASPA unit nearly 25 years ago. In a recent previous decision between the same parties regarding an identical type of application, reported at [2000] Sask. L.R.B.R. 83, LRB File No. 218-98, at 100-101, the Board enunciated the status and nature of the ASPA Certification Order and the approach by the Board to applications of this kind involving the parties:

> *We would comment briefly at this point on CUPE's interpretation of the ASPA Certification Order. As we understand, CUPE is asking the Board to confine the ASPA Order to those positions that involve teaching or are managerial or confidential in nature. As we have indicated above, however, the Certification Order issued to ASPA on its face is broader than the bargaining scope that CUPE urges upon the Board. When ASPA applied to be certified as a bargaining agent, the Board described its bargaining unit in a generic fashion by using the terms*

> *"administrative and professional persons and all technical officers". We agree that it is not easy to discern the boundaries between CUPE and ASPA; nevertheless, some effort must be made to give meaning to the original Order, which stands as a valid Order unless it is subject to an application to amend or vary in accordance with the provisions contained in s. 5 of the Act.*
>
> *In these circumstances, the Board reverts to its previous decisions involving the same parties and applies principles that have been developed in those cases. In the case cited above, Vice-Chairperson Hobbs referred to the history of the positions and particularly whether the duties and responsibilities of the new positions could be traced back to either of the bargaining units. The Board also considers the similarities between the new positions and ones currently assigned to each bargaining unit.*

[23] In the present case, we have carefully considered the evidence particularly as concerns the source of the duties and responsibilities of the two positions in question, the nature of the duties and responsibilities that each position entails and the similarities to positions currently assigned to either unit.

A. Executive Officer, Womens' Studies Research Unit

[24] The functions of this position have not been performed by any bargaining unit member at any time. The position has been externally funded for over fifteen years and has been outside the University's bargaining structures. The position will now be funded from the University's operating budget and assigned permanent, rather than term, status. While the evidence was somewhat vague as to its comparability to the Director of the Native Access to Nursing Program position and the Business Director, Business Advisory Program of the College of Commerce, in our opinion it has senior administrative functions sufficient to justify its inclusion within the scope of the ASPA bargaining unit. We note that the position, in addition to all of the day-to-day administrative duties of the WSR Unit, is also a full member of the WSR Unit's executive committee.

[25] While Mr. Holmes attempted to elicit that the position included responsibility for terminating the employment of a part-time clerical staff member, it was clear that the incumbent merely communicated to the employee what was a decision by the executive committee co-chairs after consultation with the faculty member whose research the employee was assisting.

B. Marketing Co-ordinator, College of Kinesiology

[26] The bulk of the functions of this position were previously performed by the athletics director and the coaches of Huskies teams, all of whom are within scope of ASPA – none of the duties were previously performed by any position within scope of CUPE. We accept the evidence that the marketing functions related to University athletics programs have become much more complex, sophisticated and important to the financial health of those programs over the last ten or fifteen years.

[27] The evidence disclosed that, in addition to the performance of the marketing duties previously performed by ASPA members as described above, the duties of the position also include the supervision of casual staff required from time to time depending upon the workload created by such things as the hosting of special events. The functions of the position coupled with a community of interest much more closely related to the other ASPA positions in the department than to any CUPE positions lead us to conclude that it ought properly to be within the scope of the ASPA unit.

Conclusion

[28] Pursuant to ss. 5(m) and 5.2 of the *Act*, the Board assigns the following positions to the ASPA unit:

- Executive Director, Women's Studies Research Unit
- Marketing Co-ordinator, College of Kinesiology

[29] This determination is provisional and shall become final after the expiry of one year from the date hereof unless, before that period expires, one of the parties applies to the Board for a variation of the determination.

SASKATCHEWAN INDIAN FEDERATED COLLEGE INC., Applicant v. UNIVERSITY OF REGINA FACULTY ASSOCIATION, Respondent

LRB File No. 046-01; July 11, 2001
Vice-Chairperson, James Seibel; Members: Mike Geravelis and Judy Bell

For the Applicant: Greg Curtis
For the Respondent: Tom Waller, Q.C.

Employee – Managerial exclusion – Position description contains vague reference to disciplinary authority – Board must determine whether functions of position lead to real potential for conflict of interest in labour relations sense with members of bargaining unit – Board provisionally determines that position is properly in-scope of bargaining unit.

***The Trade Union Act*, ss. 2(f), 5(m) and 5.2.**

REASONS FOR DECISION

Background

[1] **James Seibel, Vice-Chairperson:** The University of Regina Faculty Association ("URFA") is designated by Certification Orders dated December 18, 1990 (LRB File No. 146-90) and July 2, 1991 (LRB File No. 123-91) as the bargaining agent for two groups of employees of the Saskatchewan Indian Federated College ("SIFC" or the "Employer"). The bargaining unit in the former Order (the "academic unit"), which includes staff with core responsibilities for teaching and/or research, is described as follows:

> *all members of the academic staff employed . . . on a full-time basis . . . including Department Heads, Director, Centre of International Indigenous Studies and Development, and term appointments but excluding: the President, Vice-Presidents, Deans, sessional lecturers and administrative, clerical and library personnel . . .*

[2] The bargaining unit in the latter Order (the "APT unit"), which primarily includes staff charged with the administration of SIFC programs, is described as follows:

> *all members of the administrative, professional and technical employees' group employed . . . on a full-time basis . . . except:*
>
> > *1. The President, Vice-President, Deans, Registrar, Director of Accounting, Director of Personnel, Director of Plant, Property and Maintenance, the Accounting Officer, Payroll, and Personnel Officer;*

> *2. all those employees described in an Order of the Labour Relations Board dated December 18, 1990 (LRB File No. 146-90);*
>
> *3. sessional lecturers;*
>
> *4. clerical personnel; and,*
>
> *5. library personnel.*

[3] The Employer applied to the Board pursuant to ss. 5(i), (j) and (m) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") for an order amending the description of each of the Orders to exclude a position from the scope of either bargaining unit. Briefly, the Employer takes the stance that it has created a new position – Director, International and Special Projects ("ISP Director") – from the merger of two positions, namely:

> *(a) Program Manager Aboriginal Youth Leadership Program ("AYLP Manager"), which was newly created itself in January, 1999 the placement of which was never resolved; and,*
>
> *(b) The position of Director, Centre of International Indigenous Studies and Development ("IISD Centre Director"), which is specifically included in-scope of the academic bargaining unit described in the first Certification Order, above;*

to which, the Employer says, has been added such duties and responsibilities of a managerial nature that the person filling the position will not be an "employee" within the meaning of s. 2(f)(i)(A) of the *Act*. URFA disputes that the new position should be excluded from the administrative unit.

[4] SIFC, Luther College and Campion College are all federated with the University of Regina (the "University"). The academic staff appointments at the Colleges are approved by the University. URFA represents separate academic bargaining units at Luther and Campion Colleges and the University and a separate APT unit at the University ("the University APT unit"). Canadian Union of Public Employees ("CUPE") represents clerical, administrative support and cleaning staff at the Colleges, including SIFC, and the University.

[5] SIFC has approximately 168 staff of which approximately 37 are not within the scope of any bargaining unit. The APT unit at SIFC has approximately 24 members.

Evidence

[6] Robin McKenzie has been the Employer's Human Resources Director since 1997. She testified that the AYLP Manager position was conceived in January, 1999. She said that the job description for the position was sent to the Union at that time seeking its agreement to place the position out-of-scope. The position description for AYLP Manager is reproduced in Appendix 1 to these Reasons for Decision. Leonzo Barreno was appointed AYLP Manager effective April 1, 1999 on a term basis by SIFC President, Dr. Eber Hampton, and treated by the Employer as in-scope of the APT bargaining unit pending negotiation of the position's placement. The organizational chart for the AYLP Program is reproduced at Appendix 2 to these Reasons for Decision.

[7] While discussions between the parties regarding the AYLP Manager position were still taking place, the Employer developed another new position that made the AYLP Manager position redundant. Ms. McKenzie called this further new position - Director, Indigenous Centre for International Development ("ICID Director") - an "evolution" of the AYLP Manager position and described it as an amalgamation of that position and an existing IISD Centre Director which was in-scope of the academic bargaining unit (see, Certification Order, *supra*). The position description for the ICID Director is reproduced in Appendix 3 to these Reasons for Decision. Mr. Barreno was appointed as acting ICID Director effective June 15, 2000 by President Hampton.

[8] The Employer has since made some limited changes to the ICID Director position description and re-titled it Director, International and Special Projects ("ISP Director"). The ISP Director position description is reproduced at Appendix 4 to these Reasons for Decision. Ms. McKenzie stated that the position descriptions for ICID Director and ISP Director are identical except that the latter adds responsibility for the administration of collective agreements as they apply to employees reporting to the position.[1] The Employer has treated the ICID/ISP Director positions as in-scope of the APT unit.

[9] Ms. McKenzie testified that the ISP Director reports to the SIFC President as indicated on the organizational chart that is reproduced at Appendix 5 to these Reasons for Decision. Three positions report to the ISP Director as indicated on the departmental organizational chart reproduced at Appendix 6 to these Reasons for Decision; these include an administrative assistant in-scope of the

[1] Compare Item 1, "Human Resources Management" in each position description.

bargaining unit represented by CUPE, and two vacant project co-ordinator term positions in-scope of the APT unit represented by URFA that are currently being recruited.

[10] Ms. McKenzie referred to the definition of "dean, director or equivalent" in the current collective agreement between the parties for the APT unit and opined that the ISP Director came within the definition, which reads as follows:

> *a) the out-of-scope head of a functional unit to which the employee belongs; or*
>
> *b) such out-of-scope person within the unit to whom the head may delegate this responsibility.*

[11] According to the provisions of the collective agreement, the dean, director or equivalent may discipline APT members by written warning or reprimand; the vice-president of administration may suspend for up to 30 days; the president may dismiss for cause. The dean, director or equivalent may only recommend suspension or discharge.

[12] In cross-examination by Mr. Waller, counsel for URFA, Ms. McKenzie disputed the assertion that the president was the "functional head" of the Department of International and Special Projects. She admitted that there had been no formal discipline of any employee in either the AYLP or ICID/ISP departments while Mr. Barreno was either manager or director thereof, as the case may be. She also agreed that as AYLP manager, Mr. Barreno supervised seven persons as opposed to three (two vacant) as ISP Director.

[13] Under cross-examination by Mr. Waller, Ms. McKenzie admitted that the incumbent, Mr. Barreno, had no involvement in the collective bargaining process in his position as AYLP Manager or ISP Director.

[14] Wes Stevenson has been the SIFC vice-president of administration since 1993. He testified that he was responsible for the creation of the AYLP Program which he developed with Mr. Barreno. He further testified that the ISP Director position was developed jointly by himself, President Hampton and Mr. Barreno. He finally approved the position descriptions in consultation with President Hampton.

[15] Mr. Stevenson agreed that, while the former position of IISD Centre Director (the amalgamation of which with AYLP Manager resulted in the creation of the ICID Director position) was in-scope of the academic bargaining unit, the Employer had unsuccessfully attempted to bargain the position out-of-scope.

[16] Mr. Stevenson opined that the ISP Director was a "dean, director or equivalent" as defined in the collective agreement with the authority to issue a formal written warning. He said that his expectations of the position included a role in hiring the project co-ordinators and evaluating their performance.

[17] Mr. Stevenson described the primary responsibilities of the ISP Director as the international promotion of SIFC and the securing of funding for projects. In cross-examination, Mr. Stevenson added that other responsibilities included departmental staffing, budget administration and overall responsibility for the execution of programs.

[18] Leonzo Barreno is the incumbent ISP Director, and prior to that the AYLP Manager. Although he did not have occasion to impose any formal discipline – the only disciplinary problem was resolved by a verbal warning and simply waiting until the employee's contract expired – he felt he had the authority to do so. While he stated that were he to remain within the APT unit he would feel "uncomfortable" disciplining employees within the scope of the APT unit in positions that report to him, he admitted that with respect to this disciplinary situation, "the fact I was in-scope caused no problems" and did not cause him to feel uncomfortable; he did not raise it as an issue with anyone. He said he may have felt differently if it had been an instance requiring formal written discipline. He agreed that such situations were rare and admitted that he would not make a disciplinary decision unilaterally without consulting the human resources department.

[19] Debbie Sagel is employed by URFA as a Professional Officer with responsibility to administer the collective agreement with the University regarding APT employees. She said that the University APT unit comprises some 138 members, approximately 20 of whom supervised other APT members and numerous members of the bargaining unit represented by CUPE.

[20] In her evidence in chief, Ms Sagel testified that URFA did not receive a copy of the position description for the ISP Director (see Appendix 4) or the letter of appointment of Mr. Barreno to the

position until the day of the hearing of this application by the Board. She said that to her knowledge there had only been one instance of formal discipline of a SIFC-APT unit member that was resolved by negotiation with the Vice-President of Administration. She referred to three positions in the University APT bargaining unit – University Bookstore Manager, Co-operative Education Manager and Manager of Alumni Affairs and Services – all of which, she said, supervise several staff (the Bookstore Manager supervises fifteen to twenty staff) including other University APT members.

[21] Ms. Sagel stated that the academic unit Certification Order clearly included within its scope the department heads and the Director, Centre of International Indigenous Studies and Development from which the ISP Director position was developed.

Statutory Provisions

[22] Relevant provisions of the *Act* include the following:

> *2* *In this Act:*
>
> . . .
>
> *(f)* *"employee" means:*
>
> *(i)* *a person in the employ of an employer except:*
>
> *(A)* *a person whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character, . . .*
>
> . . .
>
> *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.*

Argument

[23] Mr. Curtis, counsel for SIFC, argued that the ISP Director has significant managerial authority, including disciplinary authority which, particularly because there is a potential conflict of interest if the ISP Director must discipline a fellow APT unit member, justifies the position being placed out-of-scope of any bargaining unit.

[24] In support of his argument, Mr. Curtis referred to the following decisions of the Board, which we have reviewed: *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, L.R.B File Nos. 037-95 & 349-95; *Sheet Metal Workers' International Association, Local 296 v. Daycon Mechanical Systems Ltd.*, [2000] Sask. L.B.R.B. 377, LRB File No. 227-99; *Swift Current District Health Board v. Service Employees' International Union, Local 336*, [2000] Sask. L.R.B.R. 356, LRB File No. 001-99; *Canadian Union of Public Employees, Local 882 v. City of Prince Albert*, [1996] Sask. L.R.B.R. 680, LRB File No. 095-96.

[25] Mr. Curtis argued in the alternative, that in the event that the Board determines to place the position in the APT unit, it should make the determination provisional pursuant to s. 5.2 of the *Act*.

[26] Mr. Waller, counsel for URFA, argued strenuously that the continuous "evolution" of the position in question, the recent changes to the position description and the failure by the Employer to provide URFA with the position description until the hearing before the Board disclose a desperate attempt by the Employer to buttress its case for exclusion. But, he said, examination of the actual duties that have been and are being performed by Mr. Barreno demonstrate that the core job functions of the ISP Director have not really changed from those performed previously by the AYLP Director, placement of which was unresolved, and the IISD Centre Director which was in-scope of the academic unit.

[27] Mr. Waller emphasized that even if it was accepted that the ISP Director was a "dean, director or equivalent" within the meaning of the collective agreement (which counsel did not, however, concede) and might be in a position of potentially giving a formal written warning to an APT member, only the Vice-President of Administration and the President could, respectively, impose a suspension or dismiss an employee: the authority of the ISP Director in that regard would

be restricted by the collective agreement to recommendation only. Referring to the *Saskatchewan Liquor and Gaming Authority, supra*, counsel asserted that the ISP director has no "effective power" to impose significant discipline. Mr. Waller filed a written brief which we have reviewed.

Analysis and Decision

[28] The Employer has applied for the exclusion of the ISP Director from any bargaining unit. In the event that we should determine that the position is in-scope, the parties are agreed that the appropriate bargaining unit would be the APT unit.

[29] Upon considering all of the evidence and the arguments of counsel and the authorities referred to in their arguments, we are of the opinion that the position is properly in-scope of the administrative, professional and technical employees unit represented by URFA. The position is derived to a significant degree from the position of IISD Director, which for years was in-scope of the academic bargaining unit and with respect to which the Employer had been unsuccessful in negotiating its exclusion.

[30] Section 2(f)(i)(A) excludes from the definition of "employee" only those persons whose primary responsibility is to actually exercise authority and perform functions that are of a managerial character. While there is no exhaustive list of what that authority and those functions include that will lead the Board to determine that one is not an employee, the Board's jurisprudence clearly indicates that it is that authority and those functions that lead to a real potential for a conflict of interest in a labour relations sense between the position in question and members of the bargaining unit. Typically, the authority to affect the terms and conditions of employment of employees – their "economic lives" so to speak – has wielded greater weight than other factors. And, under the rubric of authority to influence terms and conditions of employment, the power to impose discipline beyond a minor admonitory power is of significant import.

[31] In the present case, the ISP Director position description (and we note that a position description is not necessarily persuasive evidence of actual job functions) contains a vague reference to disciplinary authority: under the collective agreement between the parties even a "dean, director or equivalent" may only impose discipline constituting a warning. Arguably, this is no different than the kind of admonitory authority had by a supervisor in an industrial or office setting.

[32] We note that while the APT Certification Order specifically excludes "deans" from the bargaining unit, it contains no such blanket exclusion of departmental "directors" and only excludes named director positions. For this reason, the definition of "dean, director or equivalent" in the collective agreement begs the question we are charged with determining on this application, for it refers to the "out-of-scope head of the functional unit." In the sense used in the collective agreement, it must mean out-of-scope according to the Certification Order or as negotiated by the parties. If the International and Special Projects department is a functional unit (a matter we need not determine), the out-of-scope head on the basis of the organizational chart is the president.

[33] We understand the suspicion that URFA has of the Employer's motive caused by its recent change the position description to include "administration of collective agreements" and its failure to provide the latest description to URFA prior to the hearing, and while we do not ascribe any bad faith to these maneuvers, we are not entirely convinced that URFA's suspicions are misplaced.

[34] Counsel for SIFC did not specifically argue that the position ought to be excluded pursuant to s. 2(f)(i)(B) of the *Act* on the grounds that it regularly acts in a confidential capacity with respect to the Employer's industrial relations, but, in any event, the evidence does not support such a contention.

[35] In all of the circumstances, we have determined that the Director, International and Special Projects is in-scope of the administrative, professional and technical employees unit represented by URFA. Pursuant to s. 5.2 of the *Act* this determination is provisional and shall become final after the expiry of one year from the date the Order issues unless, before that period expires, either party applies to the Board for a variation of the determination.

EDITIORIAL NOTATION: *Appendices 1 – 6 were filed as Exhibits and form part of the original case file. Photocopies of the said Appendices are available from the Saskatchewan Labour Relations Board upon request.*

SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant v. REGINA EXHIBITION ASSOCIATION LIMITED, Respondent

LRB File No. 302-00; July 13, 2001
Vice-Chairperson, Walter Matkowski; Members: Gloria Cymbalisty and Marianne Hodgson

For the Applicant: Larry Kowalchuk
For the Respondent: Larry Seiferling, Q.C.

Unfair labour practice – Duty to bargain in good faith – Disclosure – Employer implemented mandatory retirement policy after failing to obtain mandatory retirement language in collective agreement – Board finds that employer disclosed intention to implement policy to union at bargaining table – Board dismisses union's application under s. 11(1)(c) of *The Trade Union Act*.

***The Trade Union Act*, s. 11(1)(c).**

REASONS FOR DECISION

Background

[1] Walter Matkowski, Vice-Chairperson: The Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Union") applied to the Board alleging an unfair labour practice pursuant to s. 11(1)(c) of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the "*Act*") against Regina Exhibition Association Limited (the "Employer").

[2] In its application, the Union alleges that the Employer proposed mandatory retirement language during the last round of bargaining, which was rejected by the Union's membership. The Union alleges that the Employer withdrew its proposal of mandatory retirement language leading to the ratification of the parties' collective agreement. The Union alleges that, subsequent to the parties signing the collective agreement, the Employer unilaterally implemented a policy requiring employees to retire at age 65, with the policy being effective January 1, 2001.

[3] The Employer opposed the Union's application on its merits and, in addition, raised the preliminary objection that the Board should defer its jurisdiction to an arbitration board. The Employer's position is best set out in the Employer's reply to the application, which provides in part:

The Union and the Employer have a Collective Bargaining Agreement which includes management rights. While the issue of retirement was discussed at the table, it was made clear that if the Union would not agree, the Company was going to rely on their management rights of the Agreement. The question of the rights will have to be determined by arbitration based upon the cases relating to unilateral implementation of mandatory retirement.

Relevant Facts

[4] The Union represents employees in four bargaining units at the Employer's workplace, including the operations/administration division ("operations division"). At the latest round of collective bargaining, the parties negotiated all four contracts at a common bargaining table. Bargaining occurred throughout 1999 and 2000.

[5] The evidence of both Mark Hollyoak ("Hollyoak"), a union representative and chief negotiator for the Union at the joint table, and Edward Helm ("Helm"), a representative of the Employer at the joint table, was that the Employer raised the mandatory retirement issue with the Union and made a proposal on the mandatory retirement issue to the Union at the joint table.

[6] Hollyoak's recollection was that the Employer wanted a consistent mandatory retirement clause in all of its collective agreements. According to Hollyoak, the Employer raised concerns over the "competency" of some staff who were older than 65 years. Hollyoak also recalled the Employer stating at the table that a policy on mandatory retirement was grievable. Hollyoak acknowledged being aware of the "pension issue" during bargaining, at least in the context of changing the existing plan to a Registered Retirement Savings Plan. Hollyoak was of the belief that the Employer did not want a mandatory retirement policy outside of the collective agreement. Hollyoak conceded that he didn't ask the Employer whether or not they would implement a mandatory retirement policy outside the collective agreement and it was Hollyoak's testimony that the Employer didn't say whether they would or wouldn't implement a mandatory retirement policy.

[7] In the end result, the Union agreed to include a mandatory retirement clause in the proposed collective agreement for each division. In regard to the operations division collective agreement, the Union made no recommendation as to acceptance. Three of the four divisions of the Employer ratified the collective agreement, (which contained mandatory retirement language) during the spring and summer of 2000.

[8] The operations division, which has approximately 35 employees over 65 years of age, rejected the proposed collective agreement. Hollyoak was able to ascertain through a non-binding vote of the operations division, that the collective agreement would be ratified if the mandatory retirement clause was removed from the collective agreement.

[9] Hollyoak informed the Employer that the operations division had rejected the contract and that the stumbling block was the mandatory retirement clause.

[10] The Employer withdrew the mandatory retirement clause from the operations division contract. Subsequently, the operations division ratified the collective agreement in approximately April, 2000. As a result, three bargaining units entered into collective agreements with mandatory retirement clauses, while the operations division collective agreement did not have a mandatory retirement clause.

[11] By a Memorandum to Employees dated June 30, 2000, Douglas Cressman, the Employer's general manager, advised employees that the Employer would be implementing a retirement policy. The Memorandum to Employees provided as follows:

> *The Association commenced a review in 1998 of the REAL Pension Plan. Several issues were identified that have been resolved as a result of the conversion of the Pension Plan to a Group RRSP. The review also raised concern regarding the inconsistent application of mandatory retirement and the Association's policy on the issue. The inconsistency occurred when a full-time employee was required to retire while a regular, part-time or casual employee could continue to work indefinitely.*
>
> *The old REAL Policy #2015 identified that full-time employees would normally retire from active service upon reaching the age of 65. While the old REAL policy, Pension Benefits Act and Collective Agreements did not define full-time, the Association had adopted a practice of defining full-time as those employees working 37.5 hours or more per week. None of the current employees who are 65 years or older are considered full-time. Therefore, in their case, the old policy did not apply.*
>
> *This issue was raised during the collective bargaining process for Food Services, Aramark, Racing and Operations/Administration. While it was recognized by the Bargaining Committee Members that inconsistencies existed, the Committee Members were divided on the issue of mandatory retirement. When collective bargaining concluded, the membership of each bargaining unit voted as follows:*
>
> - *REAL Food Services ratified their collective agreement which included mandatory retirement at age 65, effective August 31, 2000.*

- *Aramark Food Services ratified their collective agreement which included mandatory retirement at age 65, effective August 31, 2000.*

- *Operations/Administration rejected their collective agreement on the issue of mandatory retirement. The Association removed the mandatory retirement clause from this agreement and the membership ratified a new agreement on April 17, 2000.*

- *The Race Department employees have not voted on the proposed agreement.*

As a result, new inconsistencies have been created namely:

- *Some employees must retire while other employees could remain working.*

- *Two collective agreements have language that supports mandatory retirement while one collective agreement is silent on the issue.*

To eliminate these inconsistencies, the Association's Board of Directors, on Management's recommendation, made a decision to introduce a policy making retirement mandatory at age 65. The policy, a copy of which is attached, will be effective June 30th, 2000. In addition to specifying how mandatory retirement will be addressed, it also provided for some ongoing benefits which recognize the contribution retirees have made over the years.

[12] The policy attached to the Employer's June 30, 2000 memorandum provides as follows:

POLICY TITLE: RETIREMENT

Intent: To recognize the contribution made by long-term employees, to assist in their transition from employment to retirement and to ensure that all employees are treated fairly and consistently.

Policy: Retirement age for all employees shall be sixty-five (65) years of age.

In accordance with our recently negotiated Collective Agreement, all in-scope employees in the Food Services bargaining unit who are of retirement age as of August 31, 2000 shall retire on or before August 31, 2000. All other employees who are of retirement age shall retire on or before December 31, 2000.

As a gesture of good faith to employees who are affected by this new Policy, all employees retiring on or before December 31, 2000, will receive a one (1) time lump sum payment in the amount of $25.00 for each completed year of service. However, employees retiring subsequent to this date will not receive a lump sum payment.

After December 31, 2000, all employees shall retire from employment with the employer on the first day of the month immediately following their 65th birthday.

All retiring employees who have a minimum of five (5) years of employment with the Regina Exhibition Association will be eligible for the following:

- *A life-time picture pass that allows access to Regina Exhibition Association produced events for the pass holder and one (1) guest. The General Manager can revoke the right to picture passes if circumstances warrant.*
- *Retirees will be entitled to enjoy the preferential pricing of food and beverage items offered to REAL employees.*
- *Retirees will be invited to join a volunteer committee set up specifically for retired employees. This exclusive committee would be invited to be ambassadors for various REAL events.*
- *Retirees will be invited to attend all monthly staff meetings.*

BACKGROUND:

A review of the Association's Pension Plan raised concern regarding the issue of mandatory retirement. The old policy identified that full-time employees would normally retire from active service upon reaching the age of 65. While the old REAL Policy, Pension Benefits Act and Collective Agreements did not define full-time, the Association had adopted a practice of defining full-time as those employees working 37.5 hours or more per week.

The inconsistency occurred when full-time employees were required to retire while regular, part-time and casual employees could continue to work indefinitely. REAL decided it was only fair to other employees and their Association to have a retirement policy that is consistently applied to all employees.

[13] By letter dated July 4, 2000, Hollyoak to Jenny Wakelam ("Wakelam") Manager, Human Resources, the Union responded as follows:

Please be advised that we are opposed to the implementation of a mandatory retirement rule as it applies to the Operations/Administration Collective Agreement. The Employer's rule is in conflict with the express terms of our Collective Agreement. The Employer proposed mandatory retirement in the last round of bargaining and withdrew same with prejudice. As soon as your rule impacts negatively on a member of the bargaining unit we will be forwarding a grievance to deal with this matter.

You may want to review 4:1500 in Brown and Beatty. Also, I found a case in point from the mandatory retirement section of Brown and Beatty 7:7200 (enclosed).

[14] Helm testified that the Employer did not respond to the Union's July 4, 2000 letter for a number of reasons. Firstly, the Employer's secretary was on holidays until July 20, 2000 then resigned. Secondly, Wakelam resigned on July 30, 2000. Helm testified that the Employer didn't even find the July 4, 2000 letter from Hollyoak to Wakelam in its file.

[15] The Union did not raise the mandatory retirement issue again with the Employer until December 7, 2000, when, by letter dated December 7, 2000, Hollyoak filed a grievance challenging the implementation of the Employer's mandatory retirement policy. The parties agreed to an arbitrator, with the arbitration being scheduled on June 15, 2001.

[16] The Union and the Employer hold monthly union/management meetings where issues are discussed. The Union did not raise the mandatory retirement issue at any of the said meetings following the Employer's unilateral implementation of the mandatory retirement policy as set out in the June 30, 2000 Cressman memorandum.

[17] The Union then filed an unfair labour practice application with the Board on December 11, 2000.

[18] Helm testified that the Employer did let the Union know that it would implement a mandatory retirement policy in the event the mandatory retirement clause in the collective agreement was not accepted.

[19] The Employer subpoenaed Cory Marchand ("Marchand"), a member of the Union's bargaining committee to testify. Marchand could not remember the exact dates, but testified that the Employer did advise the Union's bargaining committee, at the bargaining table, on a number of occasions, that it would be implementing a mandatory retirement policy. Marchand indicated during cross-examination that "it was a given fact at the table it (the mandatory retirement policy) would be done" outside the collective agreement by way of a policy.

[20] A representative of the Employer kept minutes of various Employer/Union meetings which occurred during bargaining. No reference is made in any of the minutes to the Employer telling the Union at the bargaining table that the Employer would implement a mandatory retirement policy if it was unable to obtain a mandatory retirement clause in the collective agreement. The evidence was

that the minutes don't mention everything dealt with by the parties at the table. Marchand testified that he thought the minutes were approved by both sides.

[21] Helm testified that the Employer raised the mandatory retirement issue with the Union for a number of reasons. Helm testified that the Employer knew that it needed a consistent mandatory retirement policy or the policy would be unenforceable. Helm testified that the "pension" issue and the "mandatory retirement" issue were linked in that the pension plan provided that full time employees had to retire at age 65. Prior to the present collective agreement, Helm testified that non-full time employees did not have to retire at age 65. Helm also testified that he informed Hollyoak at a bargaining meeting with the Union on May 6, 1999 that the Employer had the right to bring in the mandatory retirement policy and that Hollyoak agreed with him on that point.

[22] Helm testified that the mandatory retirement issue was his issue and that he also advised the Union during bargaining meetings on June 22 and 23, 1999 that the Employer wanted mandatory retirement language in the collective agreements and if not, the Employer would implement a mandatory retirement policy. Helm testified that he specifically recalled that one of the Union bargaining committee members, Jim Unique, wanted it recorded in the June 23, 1999 meeting minutes that he objected to mandatory retirement.

Relevant Statutory Provisions

[23] Sections 2(b) and 11(1)(c) of the *Act* provide 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 . . .*
>
> . . .
>
> *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;*

Preliminary Objection:

[24] The Employer argued that this matter should be dealt with by an arbitration board, not the Labour Relations Board. In this case, as the Union puts it, the issue is whether or not the Employer signed the operations division collective agreement in bad faith. Using Hollyoak's words, the Union's complaint is that the Employer did not tell the Union that it would be implementing a mandatory retirement policy in the event the Employer was not able to secure mandatory retirement language in the collective agreement. Counsel for the Union argued that the Union is not asking the Board to interpret any clause in the collective agreement. For that matter, the Union is not asking the Board to review whether or not the Employer's mandatory retirement policy is valid on its wording alone. Rather, the Union is questioning whether or not the Employer acted in bad faith or more properly bargained in bad faith in obtaining the collective agreement with the operations division.

[25] This issue falls squarely within the Board's jurisdiction under s. 11(1)(c) and is not a matter that can be remedied in arbitration. In these circumstances, the Board has indicated in earlier decisions such as *Canadian Union of Public Employees, Local 3736 v. North Saskatchewan Laundry and Support Services Ltd.*, [1996] Sask. L.R.B.R. 54, LRB File Nos. 389-95 & 290-95, that it will not defer its jurisdiction to that of an arbitrator in circumstances where there is no suitable arbitable remedy for the matter in dispute.

Concession Argument Raised by the Union:

[26] The Union, in its brief of law filed before the Board, argued that the Employer had sought a concession from the Union as a condition of withdrawing its mandatory retirement proposal from the operations division collective agreement. The Union argued that "the employer must respect the collective bargaining process by being honest at the table and to honour the bargain made – a deal is a deal." In support of its position, the Union relied on two cases, *Construction and General Workers, Local 890 v. Interprovincial Concrete Ltd.*, [1991] 1st Quarter Sask. Labour Rep. 85; LRB File No. 077-89 and *Prince Albert Police Association v. Prince Albert Board of Police Commissioners*, [1998] Sask. L.R.B.R. 296, LRB File No. 005-97.

[27] The Employer, in its brief of law, did not even respond to the Union's "concession" argument.

[28] The majority of the Board was surprised by the Union's concession argument and rejects it for the following reasons.

[29] The Union, in its application before the Board, makes no reference to a deal whereby a concession was gained by the Employer from the Union as a condition of the Employer withdrawing its mandatory retirement proposal from the operations division collective agreement.

[30] Likewise, neither Hollyoak, the key Union representative at the bargaining table, nor Helm, arguably the key Employer representative at the bargaining table, testified that there was any kind of deal revolving around the Employer withdrawing its mandatory retirement proposal from the operations division collective agreement.

[31] In support of its concession argument, the Union relied solely on the minutes of the March 24, 2000 bargaining meeting, which were entered as an exhibit by the Union and provide:

> *Negotiations – March 24, 2000*
>
> *Present: Jeanne Anderson, Dorothy Zablotney, Mark Hollyoak, Gord Clark, Darwin Godlien, Cory Marchand, Bob Osadchy, Ed Helm, Bill Stoner, Sheldon Fritz, Jim Unique, Gary Soucy, Kathie Rotariu.*
>
> *Management*
> - *resume OPS/ADMIN negotiations*
> - *understand that the contract was turned down due to mandatory retirement clause*
>
> ***Union***
> - *proposes to take out all mandatory retirement clauses and then are confident that it will pass*
> - *it was pre-ratified, but will have to be ratified again*
>
> *Management*
> - *may accommodate*
> - *would like the contracting out of Racetrack Maintenance to be included in appendix B*
> - *then will drop all clauses which refer to mandatory retirement*
>
> *Caucus*
>
> *Union*
> - *there is no agreement on mandatory retirement, therefore, there is nothing to trade*

- *It is not in existence, there never was an agreement to recommend to the membership*

Management

- *the fact that the union offered a proposal indicated to them that the union was receptive to the idea*
- *objection to include racetrack maintenance?*

Union

- *Yes, as this issue is ongoing at Union/Management meetings*
- *Right down to the issue of the legitimate contractor*
- *There is a problem and will continue to discuss at Union/Management*
- *To raise it here is a new issue*

Management

- *Was an issue in race negotiations and should have been in OPS/ADMIN agreement*
- *Did not get raised when all agreements were negotiated*

Caucus

Management

- *Willing to sign removing mandatory retirement*
- *Want a letter of memorandum stating the contracting out is still outstanding and will be resolved at Union/Management*
- *We want it recognized until we can find a way of resolving*
- *Concerned that if the agreement is signed that does not include racetrack maintenance, that it will be interpreted as resolved.*

Union

- *Agree its an issue*
- *Don't understand what will be achieved by a letter*
- *Has a cost analysis been done lately*
- *It was operations work for 40 years*

Discussion took place on racetrack maintenance

Management

- *Suggest that the letter contain a resolve date and then go to arbitration*

Caucus

Union

- *Agree to a letter of Understanding which includes:*
  - ◊ *60 days to resolve at Union/Management*
  - ◊ *30 days to mediation, Dept of Labour*
  - ◊ *30 days to Arbitration*
  - ◊ *these are calendar days.*

Management
- *Deal*
- *Will get amendments done regarding mandatory retirement*
- *Put in agreement, the Union/Management decision regarding stat holidays*

Union
- *No problem with that*

Management will do up the wording
Courier to Mark on Monday

[32] The minutes of the March 24, 2000 bargaining meeting are extremely sketchy and vague, and cannot be used by the Union to override the testimony presented before the Board, which would include the evidence of the Union's primary witness, Hollyoak.

[33] The minutes from the March 24, 2000 bargaining session were used by counsel for the Union during the cross-examination of Helm to demonstrate that nowhere in the March 24, 2000 minutes does it show that Helm advised the Union that the Employer would unilaterally implement a mandatory retirement policy once the mandatory retirement language was removed from the operations division collective agreement. The March 24, 2000 minutes were not used by counsel for the Union during the cross-examination of Helm, to suggest that some type of concession had been gained from the Union as a condition of the employer withdrawing its mandatory retirement clause.

[34] Finally, when counsel for the Union asked to enter the March 24, 2000 minutes as an exhibit, counsel for the Employer asked for what purpose. Counsel for the Union did not respond that the Union's purpose was to later argue that a "concession deal" had been made between the Union and the Employer.

Argument

[35] Hollyoak's testimony was that the Employer had committed an unfair labour practice pursuant to s. 11(1)(c) of the *Act* in that the Employer signed a collective agreement in bad faith, and that the Employer should have told the Union it would implement the mandatory retirement policy anyway.

[36] The Union relied extensively on the Board decision in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Regina Exhibition Association Ltd.*, [1997] Sask. L.R.B.R.

749, LRB File No. 266-97, (quashed on grounds not related to the point at issue before the Board at (1998) 162 Sask. R. 218 (Sask Q.B.)). In *Regina Exhibition, supra*, the Board confirmed at 16:

> *The duty to disclose pertinent information during the course of collective bargaining is part of the overall duty to bargain in good faith.*

[37] The Board also found in *Regina Exhibition, supra,* at page 17:

> *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.*

[38] Counsel for the Employer argued that it had bargained in good faith because the Employer had advised the Union that it would implement the mandatory retirement policy if the Employer was unable to obtain mandatory retirement language in the four Collective agreements.

Analysis:

[39] The onus of proof is on the Union to prove that the Employer bargained in bad faith and thus committed the unfair labour practice. The Union has failed to meet its burden in the case at hand. As such, the unfair labour practice charge against the Employer is dismissed for the following reasons.

[40] The key factual issue for the Board to determine was whether or not the Employer advised the Union at the bargaining table that it would implement a mandatory retirement policy if it was unable to obtain mandatory retirement language in the collective agreement. If the Board finds as a fact that the Employer did disclose its position to the Union, the Employer has met its obligation to disclose pertinent information to the Union and thus has bargained in good faith. The evidence before the Board revealed that the Union was aware at the bargaining table of the Employer's desire to have a consistent mandatory retirement policy throughout all of its divisions. Likewise, it was known by the Union that the Employer had a competency issue with respect to some of the older staff. This evidence demonstrates that the Employer did raise the mandatory retirement issue with the Union and wanted to deal with this issue.

[41] The evidence of Marchand confirmed Helm's evidence that the Employer did advise the Union it would implement a mandatory retirement policy in the event it could not obtain mandatory retirement language in the collective agreements. While it is possible the Employer may have spoken softly in this regard, or that Hollyoak did not hear the Employer's assertions, nonetheless Marchand confirmed that the Union was advised by the Employer of this possible outcome. There was no plausible argument advanced by the Union as to why Marchand's testimony should be ignored or disbelieved. Marchand, as a member of the Union's bargaining committee, was in a position to observe what the Employer did or did not say to the Union at the bargaining table. Marchand, as a member of the Union's bargaining committee was placed in the unenviable position of having to testify as to facts which did not help the Union's case. He is to be commended for his honesty and integrity.

[42] Marchand's testimony is also consistent with the Employer's overall theme, which Hollyoak concedes he was aware of, that the Employer have a consistent mandatory retirement policy. If the Employer enforced mandatory retirement at age 65 in all of its workplace divisions other than the operations division, how could this goal have been achieved? It makes no sense to believe, without some type of evidence, that the Employer had abandoned this goal.

[43] Counsel for the Union objected to the evidence of Marchand and asked that it be struck as the Union was unfairly surprised by his testimony. This Board declines to do so. Counsel for the Employer questioned Hollyoak as to whether or not the Employer advised the Union at the bargaining table that it would implement a mandatory retirement policy in the event the Employer could not get mandatory retirement language in the collective agreement. Counsel for the Employer is entitled to call evidence supporting its version of what transpired at the bargaining table in order to demonstrate that it did disclose pertinent information during the course of collective bargaining to the Union.

[44] For these reasons, the unfair labour practice charge against the Employer is dismissed.

[45] Board member Cymbalisty dissents and would have granted the unfair labour practice application based on the March 24, 2000 minutes which, in Board member Cymbalisty's opinion, shows a deal.

[46] Board member Cymbalisty would also have found that the Employer could not have made full disclosure to the Union at the bargaining table based on the June 30, 2000 Memorandum from Douglas Cressman, General Manager, in that in Board member Cymbalisty's view, the Employer did not even have authority to implement the mandatory retirement policy until board approval was received.

[47] In addition, Board member Cymbalisty asserts that the Union, in its unfair labour practice application, did not charge the Employer with failure to disclose and believes that the majority erred in finding that disclosure is a defence to the commission of an unfair labour practice based on different grounds.

SASKATCHEWAN INDIAN FEDERATED COLLEGE INC., Applicant v. UNIVERSITY OF REGINA FACULTY ASSOCIATION, Respondent

LRB File No. 049-01; August 9, 2001
Chairperson, Gwen Gray; Members: Tom Davies and Pat Gallagher

For the Applicant: Greg Curtis
For the Respondent: Tom Waller, Q.C.

Employee – Status – New position – Development Consultant position has supervisory authority over Administrative Assistant but does not have any significant ability to affect economic lives of other employees of employer – Position will not play central role in collective bargaining or formulation of collective bargaining strategies – Board provisionally includes Development Consultant position in bargaining unit.

***The Trade Union Act*, ss. 2(f), 5(m) and 5.2.**

REASONS FOR DECISION

Background and Facts

[1] Gwen Gray, Chairperson: Saskatchewan Indian Federated College Inc. ("SIFC") is a First Nations' College that is affiliated with the University of Regina. It offers degree programs in various disciplines and is renowned for its academic focus on First Nations' studies. SIFC operates campuses in Regina, Saskatoon and Prince Albert. It employs approximately 160 persons who are assigned to three different bargaining units. The University of Regina Faculty Association ("URFA") has been certified to represent academic and library staff and administrative, professional and technical staff in two separate Certification Orders. The Canadian Union of Public Employees ("CUPE") represents clerical staff at SIFC.

[2] In this application, SIFC seeks an amendment to the administrative, professional and technical bargaining unit by excluding the position of Development Consultant. URFA opposes the exclusion.

[3] There was a certain amount of confusion at the hearing of this matter over the specific nature of the position of Development Consultant. Dr. Eber Hampton, President of SIFC, testified that he was unaware until the morning of the first day of hearings that the job description did not place the Development Consultant on the senior management team of SIFC. Dr. Hampton envisaged the position as a key player on the senior management team providing the executive of SIFC with detailed financial information relating to its fundraising efforts, program development, strategic planning, collective bargaining, and overall budgeting.

[4] The main duties of the Development Consultant relate to fundraising through contacts with alumni, business, government and community. Prior to the creation of the position, fundraising work was undertaken through an agency that was contracted by SIFC. The agency was responsible for fundraising sufficient capital to allow for the construction of a new college building on the campus of the University of Regina. Dr. Hampton saw the need to continue with fundraising efforts to supply SIFC with sufficient funds to carry on and develop its programming work. The position would be attached to the President's office and would report directly to the President.

[5] Dr. Hampton expressed his views in an email sent to Robin McKenzie, Director of Human Resources, in preparation for this application to the Board. Dr. Hampton indicated in his email that "This position is an update of our previous (out of scope) Executive Director of Planning and Development position. That position was held in abeyance while Ketchum provided a Campaign Director under the terms of their contract. The position reports directly to the President (not to the President/Board as an earlier draft said). As Development Consultant the new person will have direct supervisory responsibilities and will also deal with more general labour relations issues as they affect the development of SIFC internally and externally."

[6] In the course of preparing materials for this application, Ms. McKenzie emailed Wes Stevenson, Vice-President of Administration, to clarify if the Development Consultant position would be a full member of the senior management team. He replied that he did not believe that the position would be part of the senior management team.

[7] The job description that was presented to URFA did not reflect the President's vision of the position. It read as follows:

Position Description:	*Development Consultant*
Department:	*Executive Office*
Location:	*Regina Campus*
Reports to:	*The President*
Position Status:	*Permanent Full-time*
Scope:	*APT Bargaining Unit (pending a managerial exclusion submission to the Labour Relations Board)*
Pay Range:	*$34,168 to $47,324 (Pay Grade 5) (pending review)*
Direct Reports:	*Administrative Assistant (CUPE pay grade 4)*

Mission

The Development Officer's mission is to plan, develop, implement, and evaluate all SIFC initiatives and functions in relation to fundraising, corporate partnerships and sponsorships, alumni relations and special events.

Primary Responsibilities & Accountabilities

- *Performance management of the in-scope Administrative Assistant including Performance Review and the determination and implementation of disciplinary action if necessary;*
- *Budget management, including budget development and monitoring and controlling actual expenditures;*
- *Development of policies, strategies and initiatives for the Development Office;*
- *Volunteer management including establishing and maintaining a close working relationship with key volunteers and by providing support to volunteers who assist SIFC in fundraising initiatives;*
- *Development of annual fundraising initiatives;*
- *Coordinate prospect identification, prospect research, and prospect review and evaluation;*
- *Implementation of all strategic fundraising initiatives and plans;*
- *Management and implementation of all fundraising communications in cooperation with SIFC's Communications Officer;*
- *Working cooperatively with SIFC faculty and staff;*
- *Securing and tracking donor pledge payments in a confidential manner;*
- *Development and implementation of a donor stewardship plan;*
- *Perform other related duties as assigned.*

Minimum Qualifications

- *Bachelor of Arts, Bachelor of Business Administration/Commerce, or equivalent*
- *Experience in a fundraising or public relations*
- *Supervisory experience is an asset*

- *Excellent oral and written communication and presentation skills*
- *Demonstrated interpersonal skills*
- *Ability to work independently*
- *Demonstrated ability to organize and prioritize competing demands and meet deadlines*
- *Ability to work collegially in a team setting*
- *An energetic self-starter*
- *Computer Skill:*
  - *experience with the Windows environment*
  - *working knowledge of MS Word*
  - *ability to design and create simple spreadsheets in Excel*
  - *experience with Power Point, Access and e-mail is an asset*

[8] Ms. McKenzie stressed the supervisory role of the Development Consultant in relation to the Administrative Assistant position that is attached to the development office. The Administrative Assistant is a member of CUPE and has been in place in the position for some time. The role of the Development Consultant with respect to this position involves performance management. Ms. McKenzie understood that this would include the authority to discipline and possibly dismiss the Administrative Assistant. Typically, such decisions are made by the President in consultation with the Department Director, Dean or Vice-President.

[9] The incumbent in the position, Mr. Barry Crowe, doubted that he would exercise such serious disciplinary functions in relation to the Administrative Assistant. He viewed his role in relation to the Administrative Assistant as more of a supervisory role, managing the assignment of daily work and ensuring the quality of work in the office. In relation to collective bargaining, Mr. Crowe did not envisage that he would be essential to the process although he would be willing to attend such meetings if called upon to do so.

[10] URFA compared the Development Consultant position to other similar positions at the University of Regina, all of which are in-scope of URFA's administrative, professional and technical unit at the University. URFA also compared the Development Consultant position to the position of Communications Officer at SIFC which reports to the Vice-President of Administration and works closely with the President's office and department heads in the academic bargaining unit, and which also supervises Administrative Assistants in the CUPE bargaining unit.

Relevant Statutory Provisions

[11] The term "employee" is defined in *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") as follows:

> *2 In this Act:*
>
> *(f) "employee" means:*
>
> *(i) a person in the employ of an employer except:*
>
> *(A) a person whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character, or*
>
> *(B) a person who is regularly acting in a confidential capacity with respect to the industrial relations of his or her employer.*

[12] The Board is given the responsibility for determining if newly created positions fall within the definition of "employee" under s. 5(m) and ss. 5.2(1) and (2) of the *Act.* These provisions allow parties to bring applications to the Board for provisional rulings.

Analysis

[13] In the present case, the incumbent, Mr. Crowe, has not occupied the position in question for a sufficiently lengthy period of time to permit an accurate assessment of his actual duties. He has not, for instance, been involved in the hiring of an Administrative Assistant and has not had an opportunity to deal with performance management issues. In such a case, the Board must assess the position by reference to the formal job duties that are contained in the relevant job description as expanded upon in evidence before the Board.

[14] In the present case, there is not a clear picture that emerges from the evidence given by SIFC's witnesses. Clearly, the human resources department did not capture all of the features of the position that were sought by the President. In addition, these features have not been communicated in a coherent fashion to the incumbent, Mr. Crowe. This makes an assessment of the position somewhat premature as there is a lack of consensus among the management team as to the role and function of the Development Consultant.

[15] We are required, however, to assess the evidence as presented and after considering the job description, the evidence of all witnesses, and the cases referred to by counsel, the Board concludes that the position falls within the scope of the administrative, professional and technical bargaining unit assigned to URFA. The role of the Development Consultant is essentially a fund-raising and alumni relations position. The Development Consultant has supervisory authority over the Administrative Assistant but this role, in itself, does not remove the position from the administrative, professional and technical bargaining unit.

[16] In *Saskatchewan Government Employees' Union v. Saskatchewan Liquor and Gaming Authority,* [1997] Sask. L.R.B.R. 836, LRB File Nos. 037-95 & 349-96, the Board adopted the following criteria for assessing the managerial nature of a position:

> *The job functions which the Board considers central to the finding of managerial status includes the power to discipline and discharge, the ability to influence labour relations, and to a lesser extent, the power to hire, promote and demote. Other job functions, such as directing the workforce, training staff, assigning work, approving leaves, scheduling of work and the like are more indicative of supervisory functions which do not, in themselves, give rise to conflicts that would undermine the relationship between management and union by placing a person too closely identified with management in a bargaining unit.*
>
> *In assessing managerial authority, the Board considers the actual authority assigned to a position and the use of that authority in the workplace. Section 2(f)(i) of the Act excludes only persons "whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character" from the right to be represented by a trade union. As noted in past Board decisions, managerial functions that are claimed to justify exclusion from a bargaining unit must be genuine, not merely paper, powers. In this sense, the Board looks to the actual performance of work by the person whose status is in question to determine what managerial functions are actually performed. In Service Employees International Union, Local 333 v. North Central District Health Board and Nirvana Pioneer Villa, [1995] 4th Quarter Sask. Labour Rep. 124, LRB File No. 224-95, the Board indicated its preference to hearing direct evidence from an incumbent as to the actual performance of managerial duties,*

as opposed to documentary evidence of a job description. In this instance, the Board had the benefit of hearing from managers at all levels of the system.

The authority bestowed on a managerial employee must also be an effective authority; it is not sufficient if the person can make recommendations, but has no further input into the decision-making process. In this regard, the Board recognizes that in most modern corporations managerial powers are no longer centralized in the executive suite. Generally, such powers are spread over several layers of management. Decisions related to labour relations are often made by a manager after consultation with her superiors, human resources personnel and on some occasions, legal counsel. Despite the trend to disperse managerial functions among different levels of management, it is not uncommon for an employer to require that certain decisions, such as the termination of an employee, be approved by senior management before being implemented by the person whose status is in question. However, this multi-layered approach to decision-making does not detract from the managerial status of the person in question if it can be demonstrated that the individual has an ability to make an effective determination. In the Cowichan Home decision, supra, the British Columbia Board explained the term "effective determination" as follows, at 149:

> *In our view, effective determination in the context of discipline means that at least in the majority of cases the sanction imposed by the person whose status is in question must be substantially the ultimate discipline imposed. We recognize that the grievance procedure itself inevitably leads to changes in the actual amount of discipline imposed - typically from negotiation and compromise which are essential elements of the grievance process. That is different from changes made by more senior persons, or where the person whose status is in issue merely has input into the decision-making process. In such circumstances, it cannot be said discipline was "effectively determined" by the original author of the sanction.*

The primary purpose of excluding persons who exercise the degree of managerial authority set forth above is to ensure that persons who can affect the economic lives of other employees are not placed in a conflict of interest by including them in a bargaining unit.

[17] In our view, in its present form, the Development Consultant does not possess any significant ability to affect the economic lives of employees of SIFC. His role in relation to the Administrative Assistant with whom he works is primarily a supervisory role, similar to the role played by his counterparts at the University of Regina and the Communications Officer at SIFC. In addition, his overall position has not evolved into one that will play a central role in collective bargaining or in the formation of SIFC's collective bargaining strategies. This role was not articulated in the written job description or in the materials provided to the incumbent. There is no current conflict of interest that

would arise for the Development Consultant by placing the position in the administrative, professional and technical bargaining unit.

[18] For these reasons, we conclude that the position falls within the administrative, professional and technical bargaining unit assigned to URFA. This Order will be made on a provisional basis and may be reviewed by the Board on application by either party prior to one year from the date of this Order.

HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES UNION, LOCAL 206, Applicant v. 7-ELEVEN CANADA, INC., Respondent

LRB File No. 224-00; August 13, 2001
Chairperson, Gwen Gray; Members: Tom Davies and Hugh Wagner

For the Applicant: Garry Whalen
For the Respondent: Jeff Grubb and Karen Demay

Unfair labour practice – Anti-union animus – Employer demonstrated coherent and credible explanation for termination of union organizer – No evidence that decision to terminate employment of union organizer tainted by anti-union animus – Board dismisses unfair labour practice application.

***The Trade Union Act*, s. 11(1)(e).**

REASONS FOR DECISION

Background

[1] Gwen Gray, Chairperson: Hotel Employees and Restaurant Employees Union, Local 206 (the "Union") applied to the Board for an unfair labour practice under ss. 11(1)(a), (b) and (e) of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the "*Act*") and an order for reinstatement and monetary loss for Lori Decker, an employee of 7-Eleven Canada, Inc. (the "Employer") and a rank and file organizer

[2] The Employer denied that it committed unfair labour practices by terminating the employment of Ms. Decker and asserted that Ms. Decker had been fired for just cause.

Facts

[3] The Union applied to the Board to be certified for employees at the 938 Victoria Avenue Store of the Employer on May 4, 2000. Lori Decker, a store employee, was a key union organizer at the store and she appeared with the Union at the Board hearing on June 29, 2000.

[4] At the hearing, a number of employees of the store appeared to oppose the application. They were represented by a lawyer who apparently was hired by one of the employees in question, although other members of the group of employees did not know or have any contact with the lawyer

either before, during or after the hearing at which he represented them as a group. The employees who testified at this hearing and who participated in the group opposing the Union at the certification hearing were unaware of how the lawyer's account was dealt with by the employee who engaged him.

[5] The Board issued a Certification Order for the bargaining unit on July 10, 2000. Since that date the Union and Employer have engaged in collective bargaining which has not yet resulted in the conclusion of a first collective agreement.

[6] Ms. Decker was suspended from work with pay on August 1, 2000 and was terminated from her employment on August 11, 2000. The Union alleges that she was terminated because of her role in forming the Union.

[7] The Employer asserts that she was terminated from her employment because of two incidents, both of which occurred on July 28, 2000. Ms. Decker was charged with a criminal offence related to the incidents in question. Ms. Decker was acquitted of the criminal charges after a trial of the matter in February, 2001.

[8] The allegations leveled against Ms. Decker by the Employer relate to the theft of store property. In the first instance, Ms. Decker was accused of giving a store customer a package of cigarettes without charging him for the package. The second incident relates to Ms. Decker providing her husband with a carton of cigarettes without recording the purchase on her staff purchase sheet. The two incidents were brought to the attention of the assistant store manager by two of Ms. Decker's co-workers, Carol Hack and Tracy Richards.

[9] Ms. Hack testified that she was working with Ms. Decker on Friday, July 28, 2000, around 6:30 p.m., when she observed Ms. Decker ask a customer "What kind?" then reach up and remove a package of cigarettes. Ms. Decker then gave the cigarettes to the customer and did not ring the purchase through the till. The customer had purchased two drinks from Ms. Decker which were rung in the till. Ms. Hack recognized the customer as a regular customer and she assumed from the conversations that he had with Ms. Decker that they were friends outside of the workplace.

[10] After observing the situation, Ms. Hack removed the till tape recording the purchase of the two drinks and the absence of any charge for the package of cigarettes. Ms. Hack reported the matter to her co-workers, Tracy Richards and Tanya Gelowitz. Ms. Gelowitz suggested to Ms. Hack that they report the matter to Richard Reid, the store manager. Ms. Gelowitz called Mr. Reid and reported the matter. He advised the employees to secure the till tape and the journal tape from the till in question and secure them in the post office section of the store until he could attend the store to review the in-store video cameras.

[11] The store camera videotape which was placed in evidence before the Board confirms Ms. Hack's observations. Ms. Decker and the Union did not dispute that Ms. Decker had given the customer a package of cigarettes without ringing them in through the till, as Ms. Hack observed.

[12] The second incident occurred later on Friday, July 28, 2000 and was reported to management by Tracy Richards. Mr. Richards observed Ms. Decker take a carton of cigarettes in a small 7-11 bag and place the bag behind a cigar display case around 6:45 p.m. Then he observed that Ms. Decker gave the package of cigarettes to a friend who accompanied her husband into the store some time later in the evening. Mr. Richards did not see Ms. Decker pay for or accept money for the cigarettes.

[13] The videotape evidence showed that Ms. Decker's husband and friend entered the store during the evening in question empty handed and left carrying bags. No till entries were made by Ms. Decker in this exchange.

[14] Mr. Reid, the store manager, attended the store on Saturday, July 29, 2000 and observed the videotapes with Ms. Wanita Keil, the assistant store manager. At that time, Ms. Keil reported to Mr. Reid that Tracy Richards had observed Ms. Decker handing off a carton of cigarettes apparently without receiving any payment for the same. Mr. Reid and Ms. Keil reviewed the in-store video camera to determine if the two incidents were recorded on the video camera. They also asked the staff members involved in reporting the incidents to record their observations in writing.

[15] Mr. Reid reported the matter to his superior, Ms. Cheryl Stephan, acting field consultant. Ms. Stephan, Mr. Reid and Ms. Keil met with Ms. Decker on Tuesday, August 1, 2000. At that time, the tapes of the two incidents were replayed for Ms. Decker and an explanation of the incidents was sought. In relation to the package of cigarettes handed to the customer, Ms. Decker explained that

she must have rung them in. The tape was replayed at that point and it was pointed out to Ms. Decker that she had not rung in the cigarettes. She then stated that she must have forgotten because she was too busy. She denied that she had deliberately given the cigarettes to the customer with the intent of stealing them from the Employer.

[16] In relation to the carton of cigarettes which Mr. Richards observed Ms. Decker take and put aside for her husband, Ms. Decker explained in the August 1, 2000 meeting that she had asked Ms. Hack to put the carton of cigarettes on her staff charge sheet. Ms. Decker asked that Ms. Hack be called into the meeting to confirm that she had asked her to put the charge on her charge sheet. Ms. Stephen advised Ms. Decker that she was suspended with pay.

[17] The Employer then reported the incident to the police and later on August 1, 2000, Ms. Decker was charged with theft.

[18] A few days later, Ms. Decker called Ms. Keil to explain that she now recalled that the customer to whom she gave the package of cigarettes had been in the store earlier on July 28, 2000. According to Ms. Decker, he had purchased cigarettes at that time and paid for them but she had forgotten to give him a package. He returned later to purchase the two drinks and reminded her that she had not given him the cigarettes earlier. Ms. Decker asked Ms. Keil to check the videotape to confirm her story.

[19] Management personnel did review the videotape but could not find another occasion where the customer in question appeared to be purchasing goods in the store from Ms. Decker.

[20] Ms. Decker was asked to provide a written statement to the Employer after the meeting with management personnel on August 1, 2001. Apparently, Ms. Decker contacted her Union representative who provided the Employer with unsigned copies of affidavits purporting to be the statements of Ms. Decker. The Employer did not accept the unsigned affidavits as a sufficient explanation of the events. As a result, on August 11, 2001, Ms. Decker was called to a meeting with Cheryl Stephan and her assistant and was informed by Ms. Stephan that her employment was terminated for "violation of company policy." Mr. Christoph, Ms. Decker's Union representative, also attended the meeting and asked what policy the Employer was relying on to dismiss Ms. Decker.

Ms. Stephan indicated that the Employer was relying on the policy that required staff to properly complete staff charge sheets.

[21] At the criminal trial of this matter, Ms. Decker explained the carton of cigarettes by suggesting that the carton had been written on her charge sheet and paid for by her husband on July 29, 2000.

[22] During the present hearing, Mr. Reid testified that Ms. Decker's husband paid Ms. Decker's staff charge sheet the morning of July 28, 2000 and the till record did not record a carton of cigarettes. Ms. Decker then explained that she was mistaken about when her husband paid the staff charge. She assumed that he had paid for the staff charge on Saturday, July 29, 2000.

[23] The policy of the Employer with respect to staff charge sheets requires an employee to record any unpaid purchases on the sheet and have a co-worker sign the sheet. Co-workers are not permitted to complete staff charge sheets for each other. At the hearing, however, the Employer's witnesses acknowledged that the rule was not always followed as employees would frequently ask co-workers and managers to write down their staff charges on their charge sheets.

[24] The policy of the Employer with respect to theft by employees is strict and is well known to the employees who testified before the Board. If an employee is caught stealing, they are dismissed and the Employer reports the matter to the police. The Employer does not tolerate employee theft.

[25] The Union's evidence followed two themes: first, evidence of anti-union conduct on the part of store managers in the time frame before the dismissal of Ms. Decker; and second, the inconsistent approach by management to the rules relating to staff charges and other store policies.

[26] In relation to the anti-union conduct, the Union led evidence relating to the certification application, the identification of Ms. Decker as a union organizer during the Board hearing, the presence of a lawyer who appeared for a number of employees who apparently opposed the Union's application, and the lack of knowledge by those employees of who paid for the lawyer in question. Ms. Hack, on cross-examination, indicated that the managers had discussed the question of the Union with her and had told her to make up her own mind on the question. She was told that the managers could not discuss the issue with her.

[27] Tracy Richards acknowledged on cross-examination that he had a conversation with Ms. Hack where Ms. Hack told him that there was a reward offered, presumably by the Employer, if an employee could secure the dismissal of those employees who were sympathetic to the Union. This rumour circulated throughout the workplace and was denied by the managerial witnesses at the hearing. Ms. Hack was not asked directly if she had been offered a reward for reporting on Ms. Decker.

[28] Shelly Winkler testified for the Union that there had been discussions in the back room of the store regarding the Union's organizing efforts. Ms. Winkler identified that Ms. Keil was participating in these discussions and was advising staff not to join the Union. However, on cross-examination, Ms. Winkler agreed that she did not hear what had been said by Ms. Keil as Ms. Winkler had left the area when the discussion turned to the Union issue. Ms. Winkler testified that Ms. Hack told her that she was paid a reward by the Employer for reporting Ms. Decker to management. Ms. Winkler speculated that Ms. Hack trusted her because Ms. Winkler had originally not supported the Union's organizing campaign and Ms. Hack was unaware that, after the Certification Order was granted, Ms. Winkler changed her mind. Ms. Winkler testified in chief that her hours of work were reduced and she attributed this to her support for the Union; however, on cross-examination, she agreed with counsel that her hours of work had not been reduced and in fact had increased. Ms. Winkler did not impress the Board as a reliable witness as she seemed prepared to agree with any suggestion put to her by counsel.

[29] With respect to the theme of discriminatory treatment, Ms. Gelowitz testified that she has violated the charge sheet policy and was not disciplined for her violation. In addition, Karen Scherle testified that she committed the same mistake as Ms. Decker and was not terminated by the Employer. Ms. Scherle apparently asked a fellow employee to write a charge on her charge sheet, which the employee failed to do. Ms. Scherle caught the error and did pay for the carton of cigarettes. Ms. Scherle testified that she reported a theft of produce to management and the employee in question was allowed to quit and was not fired or criminally charged with theft. In addition, she noted that several other employees had violated store policy on taking stale dated food and they had not been disciplined or fired by the Employer. Ms. Scherle complained that as a Union supporter she had been discriminated against in the workplace on several occasions mainly by Wanita Keil, the assistant store manager. Ms. Scherle complained that her hours of work were altered and she is not accommodated in the same manner that other employees are accommodated.

Relevant Statutory Provisions

[30] Section 11(1)(e) 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:*
>
> > *(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;*

Analysis

[31] Section 11(1)(e) of the *Act* is designed to prevent employers from discriminating against employees, or using coercion or intimidation to discourage employees from joining or organizing a trade union. In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Courtyard Inns Ltd. (c.o.b. Regina Inn)*, [1996] Sask. L.R.B.R. 719, LRB File Nos. 154-96, 155-96 & 156-96, the Board discussed the role of s. 11(1)(e) as follows at 725-726:

> *The Board has often alluded to the critical role of s. 11(1)(e) of The Trade Union Act in providing protection to employees when they or others are exercising the rights conferred upon them under the statutory scheme laid out in the Act. In Saskatchewan Government Employees' Union v. Regina Native Youth and Community Services Inc., [1995] 1st Quarter Sask. Labour Rep. 118, LRB File Nos. 144-94, 159-94 and 160-94, the Board made the following comment, at 123:*

> *It is clear from the terms of s. 11(1)(e) of The Trade Union Act that any decision to dismiss or suspend an employee which is influenced by the presence of trade union activity must be regarded as a very serious matter. If an employer is inclined to discourage activity in support of a trade union, there are few signals which can be sent to employees more powerful than those which suggest that their employment 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.*

[32] In the present case, the Union is newly certified and the Employer and the Union have not settled the terms of the first collective agreement. The relationship between the Union and Employer is at a critical stage of its development. Ms. Decker played an important role in organizing the Union and her role was known to the Employer as a result of her participation in the hearing of the certification application before this Board. The Union has clearly established a *prima facie* case as required under s. 11(1)(e) that (a) employees were exercising their rights under the *Act* to join the Union, and (b) Ms. Decker was terminated from her employment. As a result, the onus of proof shifts to the Employer to establish that Ms. Decker was terminated for "good and sufficient reason."

[33] The Board focuses on the Employer's reasons for the dismissal in order to determine if the reasons provide a coherent and credible explanation for the Employer's decision to dismiss the employee in question. This assessment is made for the purpose of uncovering the Employer's motivation for the dismissal to determine if anti-union animus played any role in the Employer's decision to dismiss the employee. The Board assesses the reasons and the evidence supporting the reasons in the context of the Employer's usual work rules and the Employer's past practice in relation to the dismissal of other employees who engaged in similar conduct.

[34] However, unlike arbitrators acting under just cause for dismissal clauses found in most collective agreements, the Board is not required to determine if the reasons for termination constitute just cause for dismissal. In the circumstances of Ms. Decker's case, the issue of "just cause for dismissal" may be the subject of arbitration under s. 26.2 of the *Act*.

[35] In the present case, the Employer provided the Board with extensive evidence supporting its decision to terminate the employment of Ms. Decker. Two of Ms. Decker's co-workers reported Ms. Decker's conduct to the Employer. The videotape evidence confirmed their observations. Ms.

Decker did not have a ready explanation for the incident involving the package of cigarettes at the time she reviewed the tapes on August 1, 2000. This is not too surprising as Ms. Decker was in a stressful situation and the videotape evidence was confusing because it indicated that it was recording events that occurred on Saturday, July 29, 2000 when, in fact, it had recorded events on Friday, July 28, 2000. The videotape date indicator was out by one day. Ms. Decker provided an explanation for this transaction a few days later when she informed Ms. Keil that the customer in question had come in earlier, asked and paid for cigarettes, but had not been provided with the cigarettes. This explanation, on its face, is logical. However, it is not supported by the evidence of any of her co-workers, nor is it supported in evidence by the videotape. We conclude that from the circumstances of this incident, the Employer had ample reasons for concluding that Ms. Decker had passed off merchandise to the customer in question without receiving payment for the merchandise.

[36] In coming to this conclusion, we are relying on the civil standard of proof, the preponderance of evidence, not the criminal standard of proof.

[37] The second incident involved the alleged theft of a carton of cigarettes by Ms. Decker. Again, the matter was reported to the Employer by Ms. Decker's co-workers. The videotape evidence confirms their observations. Ms. Decker explained that she asked Ms. Hack to record the carton on her staff charge sheet. Ms. Hack denies that Ms. Decker made such a request. Ms. Decker testified at her criminal trial that her husband paid her staff charge on Saturday, July 29, 2000 after the carton of cigarettes should have been added to her charge sheet and she assumed that the carton had been paid for by him at that time. At the hearing of this matter, the evidence was clear that the staff charge sheet was paid on the morning of July 28, 2000 and did not include a charge for a carton of cigarettes. The videotape evidence indicates that Ms. Decker's husband and his friend entered the store with no shopping bags and left carrying more than one shopping bag without making any visible signs of payment.

[38] We conclude from the evidence that the Employer had sufficient reason to believe that Ms. Decker took merchandise without paying for it. The explanation provided to the Employer by Ms. Decker was contradicted by Ms. Hack who denied that Ms. Decker asked her to put the carton of cigarettes on Ms. Decker's staff charge. There is no other evidence supporting Ms. Decker's assertion that she intended to pay for the cigarettes by putting them on her staff charge sheet.

[39] Was Ms. Decker treated in a similar manner to other employees? The Employer provided the Board with two recent, post-certification examples of dismissals of other employees at the store for similar reasons. Employees are aware that the Employer does not tolerate employee theft. Employees were also aware that they were responsible for ensuring that their staff charge sheets were accurate and that merchandise taken by employees must be recorded on the sheet and paid for at the end of each two week pay period. There is no evidence in Ms. Decker's case that she intended to pay for the carton of cigarettes.

[40] On the face of the matter, we conclude that the Employer has demonstrated to the Board that it had a coherent and credible explanation for terminating the employment of Ms. Decker.

[41] Was the decision to dismiss Ms. Decker tainted in any manner by anti-union animus? The Union's evidence suggested that Ms. Keil, the assistant manager, engaged in anti-union discussion with employees in the workplace. This evidence was given by Ms. Winkler, who, in the Board's view, was not a reliable witness. This is not to suggest that Ms. Winkler was being untruthful, only that she seemed to be willing to agree with any suggestion put to her by legal counsel thus making it difficult for the Board to determine which version of events recollected by her was true.

[42] The Union also pointed to the suspicious circumstances surrounding the hiring of a lawyer to represent employees at the certification hearing. The Union implied that the Employer was involved in hiring the lawyer in question. However, the employee who hired the lawyer was not called to testify with respect to the matter and there was no direct evidence linking the decision to hire a lawyer for a group of dissenting employees to the Employer. The Employer denied that it played any role in hiring the lawyer in question.

[43] The "reward" issue also suggested that there may have been an attempt on the part of the Employer to encourage other employees to take steps against Ms. Decker as a method of punishing her for organizing the Union. Again, its chief source was from Ms. Winkler, whom the Board found to be an unreliable witness. The employee who was alleged to have received a reward for her role in obtaining the dismissal of Ms. Decker was not questioned about the matter. The remaining evidence appears to consist of rumours.

[44] In total, we do not find that there is evidence that the decision to terminate Ms. Decker's employment was tainted in any manner by anti-union animus.

[45] For these reasons, the Board dismisses the unfair labour practice application.

SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant v. YOUNG CO-OPERATIVE ASSOCIATION LIMITED AND FEDERATED CO-OPERATIVES LTD., Respondents and UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 649, Interested Party

LRB File No. 060-98; September 4, 2001
Chairperson, Gwen Gray; Members: Don Bell and Bob Todd

For the Applicant:	Larry Kowalchuk
For the Respondent, Young Co-operative Association Limited:	Rob Garden,Q.C.
For the Respondent, Federated Co-operatives Ltd.:	Larry Seiferling, Q.C.
For the Interested Party:	Drew Plaxton

Employer – Status – Board reviews factors relevant to determining which of two corporate entities is employer for purposes of s. 2(g) of *The Trade Union Act* – While industrial relations specialists from one corporate entity clearly play influential role in labour relations affecting other corporate entity and employees, latter corporate entity retains primary and fundamental control and is employer.

***The Trade Union Act*, ss. 2(g), 2(h), 5(j), 11(1)(c) and 37.3.**

REASONS FOR DECISION

Background

[1] **Gwen Gray, Chairperson:** Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Union") applied to the Board to have Federated Co-operatives Ltd. ("FCL") named as the employer of the employees of Young Co-operative Association Limited ("Young Co-op") and to amalgamate various retail co-operative bargaining units into one large bargaining unit. The Board issued two previous Reasons for Decision on various aspects of this case, which are reported at [1999] Sask. L.R.B.R. 521 and [2000] Sask. L.R.B.R. 382.

[2] These Reasons for Decision deal with the issue of whether or not FCL is the employer of the employees at Young Co-op.

Facts

[3] Young Co-op is a membership co-operative located in the town of Young, Saskatchewan. It consists of a grocery store and service centre for hardware, agricultural products and fuel. It employs 8 employees, four of whom are part-time employees. The general manager manages the day-to-day operations and he reports to an elected board of directors. Young Co-op purchases its merchandise and fuel primarily from FCL and receives various services from FCL including retail advice, payroll, accounting and industrial relations.

[4] The Union was certified to represent the employees of Young Co-op on March 19, 1991. The Union represents employees at 17 retail co-operatives in Saskatchewan, as well as the employees of FCL in Regina and in the Melfort Feed Mill. The Union has bargained three collective agreements with Young Co-op and has similar collective agreements with the other remaining retail co-operatives and with FCL.

[5] FCL is a co-operative whose members consist of retail co-operatives in Western Canada. The directors of FCL are elected from 19 geographical districts across the provinces. Each retail co-operative that is a member of FCL sends a representative to the district meetings. FCL primarily acts as a wholesale buyer and distributor for the co-operative retailing system. It also provides a variety of other services including accounting, payroll, recruiting, human relations and industrial relations, and retail advisory services. Each service is provided to the retail co-operatives on a fee for service basis.

[6] In relation to its labour relations, Young Co-op relies on FCL to provide payroll and industrial relations services. FCL prepares direct deposit payroll cheques for Young Co-op and forwards union dues deducted from the pay cheques to the Union using cheques drawn on FCL bank accounts.

[7] FCL has provided Young Co-op with industrial relations services in relation to the certification application, all collective bargaining sessions and all grievances that have arisen at Young Co-op. The services are provided through the industrial relations directors located in the human resources department of FCL. Gordon Hamilton, former industrial relations director of FCL, testified that he provided assistance to Young Co-op in relation to the handling of the certification

application, the negotiation of two collective agreements and the resolution of two grievances. Mr. Hamilton was the chief spokesperson for Young Co-op in its dealings with the Union.

[8] Paul Guillet, representative of the Union, was the Union's representative at the bargaining table at Young Co-op.

[9] Mr. Guillet testified that there were three areas of concern for the Union in dealing with FCL at the Young Co-op bargaining table. First, FCL was unwilling to address Union proposals on most available hours. Mr. Guillet understood Mr. Hamilton to be indicating that they – meaning FCL – were not prepared to agree to such provisions anywhere in the retail co-operative system. Second, according to Mr. Guillet, Mr. Hamilton was unwilling to agree to the Union's normal definition of "grievance" as a result of Mr. Hamilton's experience elsewhere in the retail co-operative system. Third, the Union was unable to bargain different benefit plans for members as a result of Mr. Hamilton's insistence on benefit plans negotiated by FCL for retail co-operatives. The impression left from Mr. Guillet's evidence was that FCL had a master plan for its approach to bargaining collective agreements in the retail sector and actually controlled bargaining through the provision of industrial relations directors to the retail co-operatives.

[10] Mr. Guillet acknowledged that the board of directors of Young Co-op ratified and signed each collective agreement. He also acknowledged that the general manager of Young Co-op hired most employees and directed their daily work.

[11] Mr. Hamilton explained his role as industrial relations director in somewhat different terms. He suggested that his role was more akin to a private lawyer providing industrial relations advice to a client. He acknowledged that he brought his experience in other sets of negotiations and other grievances to the attention of the board of Young Co-op in order to provide them with useful advice. However, he denied that FCL controlled bargaining at Young Co-op and indicated that the board of directors of Young Co-op had the final say over the terms of the collective agreement.

[12] Mr. Hamilton did acknowledge that FCL prepared briefs to government on issues related to labour law reform, including the hours of work issue and changes to *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") on behalf of its membership. He also acknowledged that FCL entered into an agreement with the Government of Saskatchewan to encourage the hiring of aboriginal employees

in FCL and its affiliated retail co-operatives. A provision in the agreement indicates that the parties will undertake "to assist FCL, its manufacturing enterprises and retail co-operatives in negotiating modifications to collective agreements, to remove provisions which may create barriers to the appointment, retention and promotion of Aboriginal workers with co-operatives."

Relevant Statutory Provisions

[13] The term "employer" is defined in s. 2(g) of the *Act* as follows:

> *2 In this Act:*
>
> *(g) "employer" means:*
>
> *(i) an employer who employs three or more employees;*
>
> *(ii) an employer who employs less than three employees if at least one of the employees is 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;*

[14] The Board has power to amend a Certification Order pursuant to s. 5(j) of the *Act* which provides as follows:

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

(ii) in the opinion of the board, the amendment is necessary;

[15] This application is not brought under the related employer provisions now contained in s. 37.3 of the *Act*, but it will be useful to set out the terms of this provision for the discussion of the legal issues involved in this case. Section 37.3 provides 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.

[16] In addition, we may refer to the definition of "employer's agent" and the requirement set forth in s. 11(1)(c) to bargain in good faith. These provisions are as follows:

2 In this Act:

(h) "employer's agent" means:

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

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

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;

Analysis

Questions which this application does not address

[17] The responding parties to this application applied to have the application dismissed on several grounds that are set out in the Board's Reasons for Decision at [1999] Sask. L.R.B.R. 521. In part, the respondents sought to have the application dismissed on the ground that the application was akin to a "related employer" application as provided for in s. 37.3 of the *Act*. The respondents argued that an application of this nature could not be brought under s. 2(g)(iii) since it has been subsumed in part by s. 37.3. In addition, they asserted that the respondents, if they were "related employers" became related prior to the coming into force of s. 37.3 and hence, were "grandfathered" under the terms of that provision. In the alternative, the respondents argued that the application must be founded under s. 37 of the *Act* and, if not so founded under either provision, could not be sustained by the Board.

[18] The Board ruled that the application could be made under s. 2(g) of the *Act* and did not require a case to be made out under the related employer provisions contained in s. 37.3 or under the successorship provisions contained in s. 37. In addition, the Union did not claim that its application fell within the provisions contained in s. 2(g)(iii) of the *Act* – that is, it did not allege that the relationship between FCL and Young Co-op was that of a contractor who supplies the services of employees for or on behalf of a principal pursuant to the terms of a contract.

[19] As a result, it is important to keep in mind on this application that the Union is not seeking a declaration that FCL and Young Co-op are "related employers"; nor is the Union seeking a declaration that FCL is a successor employer to Young Co-op; nor is it seeking to have the Board find a contractor-principal relationship with FCL designated as the "employer." This application simply raises the pure question of who is the employer of the employees in this bargaining unit. We raise this point because counsel for the Union based his arguments on factors which assist the Board in identifying if two employers are related employers within the meaning of provisions like s. 37.3 or s. 2(g)(iii). These factors, in our view, are not in issue in this case as the focus is on which entity is the "employer," not whether Young Co-op and FCL are "related employers."

Does the Board have jurisdiction to amend a Certification Order which has already found Young Co-op to be the "employer" of the employees in the appropriate bargaining unit?

[20] This issue was addressed to some extent in the Reasons for Decision cited above. The Board has broad authority under s. 5(j) of the *Act* to "amend an order of the Board if in the opinion of the Board, the amendment is necessary." In *United Steelworkers of America v. Impact Products, A Division of General Scrap and Car Shredder Ltd.*,[1996] Sask. L.R.B.R. 766, LRB File No. 180-96, the Board relied on s. 5(j) to clarify the geographic scope of a Certification Order and in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Raider Industries Inc.*, [1996] Sask. L.R.B.R. 27, LRB File Nos. 274-95 & 275-95, the Board relied on s. 5(j) to reconsider and alter the geographic scope of the bargaining unit. In *Canadian Union of Public Employees, Local 1788 v. John M. Cuelenaere Library Board,* [1996] Sask. L.R.B.R. 732, LRB File No. 052-96, at 742, the Board interpreted the amended power contained in s. 5(j) as:

> *permit[ting] the Board to contemplate such amendments or rescission for a range of reasons which could include substantive considerations of policy, as well as the technical issues which were the basis of such amendment or rescission before the amendment to s. 5(j). In our view, one of the implications of this is that the restrictions on considering applications which are filed outside the open period in s. 5(k) are no longer of a jurisdictional nature; the restrictions which remain are those imposed by the Board in light of whatever factors we think relevant.*

Clearly, the Board's finding that Young Co-op was the employer of the employees in the bargaining unit under consideration in this application is one of the findings made by the Board that may be the subject of a s. 5(j) application to amend.

How does the Board determine which corporate entity is the "true" employer?

[21] There are a variety of factors that have been considered by the Board in past decisions in order to determine which corporate entity is the "employer" for the purposes of s. 2(g) of the *Act.*

[22] In *International Brotherhood of Electrical Workers, Local 2038 v. Flint Electrical Management Ltd.,* [1989] Fall Sask. Labour Rep. 49, LRB File No. 040-89, the Board summarized the tests to be applied in determining which entity is the employer as follows at 50:

> *The Board has recently set out the principles and factors it takes into account when called upon to identify the employer of an employee. In Lakeland Regional Library Board, [1987] April Sask. Labour Rep. 59, it decided that the employer is the entity*

with fundamental control over industrial relations matters affecting the employees or with effective control over the essential aspects of the employment relationship. To aid in determining who had that control, the Board identified the person who exercised the authority to hire, supervise, evaluate, approve leave and holidays, and who bore the responsibility for remuneration.

In University of Regina, [1987] May Sask. Labour Rep. 43, the Board identified the responsibility for payment of wages, the power to determine other terms and conditions of employment, the responsibility for day to day direction, and the responsibility for deducting Income Tax, Canada Pension Plan and UIC contributions, as the hallmarks of an employer. It identified who the employee would look to for payment if wages or benefits were withheld and from whom the employee would seek redress if he was wrongfully dismissed.

In University Hospital, [1988] Mar. Sask. Labour Rep. 41, the Board identified an employer as the one with the power to hire, fire, discipline, evaluate and supervise and the one with the obligation to pay wages.

The Ontario Labour Relations Board adopted similar criteria in York Condominium Corporation No. 46 and/or Medhurst Hogg and Associates Limited (1977), OLRB Rep. Oct. 645 at p 648 namely:

> *1. The party exercising direction and control over the employees performing the work;*
> *2. The party bearing the burden of remuneration;*
> *3. The party imposing the discipline;*
> *4. The party hiring the employees;*
> *5. The party with the authority to dismiss the employees;*
> *6. The party who is perceived to be the employer by the employees;*
> *7. The existence of an intention to create the relationship of employer and employees.*

Obviously, no single criterion is determinative, and all factors do not have equal or constant weight. When different factors point in different directions, as they often do, the Board must determine the issue by balancing them. In Sutton Place Hotel, [1980] OLRB Rep. Oct. 1538, the Ontario Labour Relations Board summarized the situation as follows:

> *A particularly important question answerable through an evaluation of all of the factors set out in York Condominium, is who exercises fundamental control over the employees. In some cases, control over hiring may reflect fundamental control. In other situations, reminiscent of a hiring hall, it may not. In some cases, day to day supervision may suggest fundamental control, in others it may not. Similarly, with the payment of wages: in the factual mix of some cases the payment of wages may, along with other factors, suggest who holds the fundamental control while in other cases it may be of minor significance. No single factor in York Condominium*

> *inevitably points to the possession of fundamental control. The Board's ultimate evaluation of who holds fundamental control in any particular fact situation, however, is generally the single most determinative question in identifying the employer. In a word, to find the seat of fundamental control is generally to find the employer for the purposes of The Labour Relations Act.*

[23] The fundamental control test was applied by the Board in *Professional Association of Interns and Residents of Saskatchewan v. University of Saskatchewan,* [1996] Sask. L.R.B.R. 209, LRB File No. 278-95, at 233:

> *We have concluded that the University of Saskatchewan is the employer of the residents on whose behalf this application has been made. All of the clinical activities of the residents are supervised by faculty members from the College of Medicine. The Saskatchewan Postgraduate Medical Committee is merely the vehicle for conducting a certain aspect of the relationship between the residents and the College of Medicine. It is the College of Medicine, and thus the University, which substantially directs and controls the activities which have been the subject of collective bargaining between the parties.*

[24] The Board applied similar control tests in *The Newspaper Guild of Canada/Communication Workers of America v. Sterling Newspapers Group,* [1999] Sask. L.R.B.R. 5, LRB File No. 187-98 at 19:

> *In each certification application, the Board must identify a corporate entity or other concern as the "employer" of the employees in the proposed bargaining unit. The Board has developed various tests to determine which of two or more entities is the "employer" in the labour relations sense. These tests assess the relative control that different corporate or other entities exercise over the employment relation in question.*

Who is the "true" employer in the present case?

[25] The Board concludes from the evidence that Young Co-op remains the "true" employer of the employees in the bargaining unit assigned to the Union. The Board reaches this conclusion by assessing the traditional factors set forth above to assess which of the two corporate entities exercises fundamental control over the labour relations of employees in this bargaining unit. These factors can be summarized as follows:

(1) Direction and control over the performance of work – the evidence indicated that Young Co-op through its general manager exercises day-to-day control over the

work performed by employees of Young Co-op and provides daily direction to those employees. FCL may have some peripheral involvement through its retail advisory services which sets out a plan for displaying store merchandise, recommends retail prices, and the like. This service, however, does not direct employees in the actual day to day performance of their work. The General Manager remains responsible for the assignment of work, work schedules, vacation schedules, leaves of absences and the like.

(2) The party bearing the burden of remuneration – the evidence indicated that, although FCL provides a payroll system to Young Co-op, it is Young Co-op that is responsible for the actual payment of wages to employees.

(3) The party imposing the discipline – Young Co-op is responsible for disciplining the employees. In the course of resolving a grievance, there was some evidence that FCL, through its employee, Mr. Hamilton, had the ability to settle the grievance on behalf of Young Co-op. The role of the Industrial Relations Department of FCL will be examined in more detail below. However, in relation to disciplinary grievances, we accept Mr. Hamilton's explanation that the industrial relations personnel take instruction from Young Co-op with respect to the settlement of grievances.

(4) The party hiring the employees – there is evidence that FCL provides a recruitment service to the various retail co-operatives. Mr. Hamilton explained that FCL would provide Young Co-op with a list composed of several applicants from which Young Co-op would chose the successful candidate. In relation to most positions, Young Co-op conducted the hiring on a local basis.

(5) The party with the authority to dismiss employees – Young Co-op is responsible for dismissing employees. FCL may have a role through its Industrial Relations Department in dealing with the grievance and any arbitration that may take place in relation to such dismissal. However, the primary responsibility remains with Young Co-op.

(6) The party who is perceived to be the employer by the employees – It is fair to conclude that employees view their employer as a melded entity – Young Co-op and FCL. This view emerges from the role FCL plays in negotiating collective agreements, grievance and arbitration meetings, and its overall role in providing human resources and other services to Young Co-op.

(7) The existence of an intention to create the relationship of employer and employee – the parties have been negotiating collective agreements for some ten years on the basis that Young Co-op is the "employer."

[26] In addition to the traditional factors set forth above, we must also consider the role that the Industrial Relations Department of FCL plays in managing labour relations at Young Co-op.

[27] The Union's case, to a large extent, rests on the degree of influence that FCL's Industrial Relations Department exerts over labour relations in retail co-ops. The evidence indicates that FCL's industrial relations personnel are involved in the certification process, collective bargaining, grievance meetings, arbitration and in the provision of day-to-day advice to the general manager and board of directors of Young Co-op. In the course of providing such services, the industrial relations personnel of FCL take a particular approach to the resolution of issues that reflects a common strategy or plan of action among the different retail co-ops. For instance, Mr. Hamilton explained that he had experience in another arbitration setting involving a different employer that led him to take a particular position with respect to the Union's bargaining proposal on the definition of grievance in bargaining for Young Co-op. Mr. Guillet provided other examples where he perceived that patterned bargaining was taking place during collective bargaining with Young Co-op. We accept that Mr. Guillet's perception on this point is accurate and that FCL industrial relations personnel do approach collective bargaining on behalf of Young Co-op from a perspective that considers the entire retail co-operative system, not merely Young Co-op. The agreement entered into between FCL and the Government of Saskatchewan in relation to aboriginal hiring indicates, as well, that FCL has significant influence over the industrial relations of retail co-operatives.

[28] However, we do not view the tendency toward patterned bargaining on the employer's side as a sign that FCL has fundamental control over labour relations at Young Co-op. In effect, Young Co-op, through its association with FCL, has evolved a method of engaging in collective bargaining

that is not dissimilar to the method adopted by the Union, that is, through the provision of centralized labour relations specialists. The Union has a similar structure where its representatives plan a co-ordinated strategy for collective bargaining in the retail co-op sector. Mr. Guillet indicated that the two Union representatives responsible for co-op bargaining had developed a model collective agreement proposal that forms the foundation of all collective bargaining in this sector on behalf of the Union. Young Co-op has adopted a similar model through its association with FCL's Industrial Relations Department by bringing in specialists who are aware of bargaining patterns and trends.

[29] FCL industrial relations specialists clearly play an influential role in collective bargaining at Young Co-op. However, they do not have the final say over the settlement of grievances or collective bargaining disputes. These matters remain in the hands of the local board of directors of the co-op and the general manager. If Young Co-op does not agree with the advice given by the FCL specialist, it can reject the advice and settle the matter in accordance with its own wishes. Young Co-op has ultimate authority and responsibility for its labour relations.

[30] There is one aspect of the relationship between Young Co-op and FCL that would tend to suggest that FCL plays a larger role in setting the terms and conditions of employment for employees in the retail co-operative system than that of a mere spokesperson for Young Co-op. This aspect relates to the provision of various benefit plans including group life insurance, superannuation, income guarantee insurance, sick leave and dental benefits. FCL negotiates the terms of the plans with insurance providers and offers group plan membership to its own employees and to employees of the retail co-operative system. It is not clear from the evidence if such plans are the same for all employees, or if each retail co-operative can choose plans from a menu of group plans.

[31] Mr. Guillet indicated in his evidence that the plans are offered at the bargaining table on a "take it or leave it" basis – that is, either the employees belong to the FCL plan or no plan. The Union is unable to bargain with respect to the details of the FCL plan with Young Co-op as Young Co-op does not have the ability acting on its own to change the terms of the FCL plan.

[32] The respondents suggested that FCL's role in the provision of benefit plans to retail co-ops was similar to that of an employer who purchases benefit plans directly from an insurance provider. In our view, however, in the latter situation, the Union has more flexibility in being able to bargain the terms of the plans with such an employer as the employer has the ability to alter the terms of the plans with the insurance provider.

[33] In this situation, FCL acts as an intermediary between the insurance provider and retail co-operatives. Young Co-op only has an indirect role in determining the terms of the various plans through its membership in FCL. FCL has assumed responsibility for defining a significant part of the wage package for employees of retail co-ops and its role in determining the benefit plans is a factor to be balanced in assessing the fundamental control issue.

[34] In our view, FCL's role in relation to the provision of employment benefit plans is akin to that of an employer's agent as that term is defined in s. 2(h) of the *Act*. FCL does not exercise total control over the decision to provide benefits, as ultimately Young Co-op must decide if a benefit package will form part of its collective agreement. Once, however, that decision has been made, FCL acts as an employer's agent in determining the type and kind of benefits. This aspect of the relationship between Young Co-op and FCL tips the scales to some degree in determining whether FCL or Young Co-op exercise fundamental control over the labour relations of employees in the bargaining unit. Overall, however, it is not a sufficiently weighty factor to overcome the opposing factors that place primary and fundamental control over labour relations with Young Co-op.

[35] For these reasons, the Board finds that the employer of employees at Young Co-op is Young Co-op. Accordingly, the application to amend the Certification Order is dismissed.

COMMUNICATIONS, ENERGY AND PAPERWORKERS' UNION OF CANADA, Applicant v. HOLLINGER CANADIAN NEWSPAPERS, LP, carrying on business as the SASKATOON STAR PHOENIX, Respondent

LRB File No. 331-99; September 11, 2001
Vice-Chairperson, James Seibel; Members: Leo Lancaster and Bruce McDonald

For the Applicant: Neil McLeod, Q.C.
For the Respondent: Larry Seiferling, Q.C. and Clint Weiland

Unfair labour practice – Intimidation – Employer paid bonus to all employees except those in department for which certification application pending – Employer's policy on bonuses tailored and applied to punish and discourage employees who supported union – Employer's conduct designed to interfere with, intimidate and coerce employees – Board finds violations of ss. 11(1)(a) and 11(1)(e) of *The Trade Union Act*.

Unfair labour practice – Remedy – Monetary loss – Award – Board orders employer to pay employees bonus that would have been paid but for employer's unfair labour practices.

Unfair labour practice – Remedy – Monetary loss – Interest – Board awards interest on amounts owing to employees pursuant to *The Pre-Judgment Interest Act* from the date upon which the amounts became due to the date payment tendered.

***The Trade Union Act*, ss. 11(1)(a) and 11(1)(e).**

REASONS FOR DECISION

Background

[1] James Seibel, Vice-Chairperson: Communications, Energy and Paperworkers' Union of Canada (the "Union") was designated by the Board as the certified bargaining agent in December, 2000, for a unit of employees of Hollinger Canadian Newspapers, LP, carrying on business as the Saskatoon Star Phoenix (the "Employer") composed of employees in the Inserting/Distribution Department (see, [2000] Sask. L.R.B.R. 760, LRB File No. 276-99). The Inserting/Distribution Department includes approximately 77 employees out of the Employer's total staff complement of approximately 334 employees in eleven departments. In the present application, the Union alleges that the Employer has committed unfair labour practices in violation of ss. 11(1)(a) and (e) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") when, after the Union filed the application for certification, the Employer paid all its employees except those in the then proposed bargaining unit a

productivity bonus. The Union alleges that the failure to pay bonuses to the employees in the Inserting/Distribution Department constituted improper interference by the Employer with the exercise by these employees of rights under the *Act*. In its reply to the application, the Employer alleges that the money that would otherwise have been paid as bonuses to the employees in the Inserting/Distribution Department was not improperly applied by the Employer to legal and other expenses related to the attempt to certify a bargaining agent for the employees in that department and asserts that there was no obligation to provide the bonus in any event.

Evidence

[2] Gord Hunter is a national representative of the Union. Mr. Hunter testified that he coordinated the Union's organizing drive of the employees in the Inserting/Distribution Department at the Star Phoenix newspaper culminating in the filing of the application for certification with the Board on November 14, 1999. Within a few weeks of the filing of the application Mr. Hunter said that he heard from some employees in the department that they had been told by supervisors that they would not be receiving a Christmas bonus because of the pending application for certification. He said he telephoned the Employer's Human Resources Manager, Gail Kukurudza, sometime in the first part of December, 1999 to ask whether the rumor was true and gained the impression from her response that the bonuses would be paid as they had been in the past. Mr. Hunter said that, however, he learned on December 15 or 16, 1999 that many of the employees in the department were upset that they would be paid no bonus and some questioned the wisdom of having attempted to organize. Mr. Hunter said that bonuses equivalent to two weeks' pay were paid to all employees except those in the Inserting/Distribution Department on or about December 17, 1999. It resulted in criticism of the Union by some employees.

[3] Anthony Swann was employed in the Inserting/Distribution Department from 1997 to 2000. He was called to testify by the Union. Mr. Swann said that he received a bonus with his pay cheque shortly before Christmas in both 1997 and 1998. He said there was no explanation as to how the amount of either bonus was determined. He testified that before the end of November, 1999 he heard of no concerns about additional costs or economic troubles in the department. He did mention that there was a certain amount of overtime associated with the installation and commissioning of a new press in the adjoining press department and renovations to the Distribution Department. Mr. Swann said that he first learned there would be no bonuses for the Distribution Department employees from a fellow worker, Dawn Stevens, on December 17, 1999. Mr. Swann said that he found a

memorandum to all employees from the newspaper's publisher, Lyle Sinkewicz, posted the same day on the department bulletin board thanking the employees for a successful year including record advertising volumes and the installation of a new press and advising that a party to celebrate the event would be held in the new year. Mr. Swann said he did not receive a copy of the memorandum although he believed that the employees in other departments received a copy with the pay cheque containing their bonuses. Mr. Swann stated that he was surprised that he did not get a bonus and that he was very upset because he felt that the Distribution Department had contributed significantly to the Employer's success in 1999. He said that some fellow employees in the department blamed those thought to be Union supporters for the fact that none of them received a bonus.

[4] Gail Kukurudza has been employed with the Star Phoenix for some 20 years, the last 12 as Human Resources Manager. She was called to testify by the Employer. She testified that, while she is responsible for the overall administration of the Employer's personnel policies, she has no involvement in the allocation of bonuses. Ms. Kukurudza confirmed that she received a telephone call from Mr. Hunter inquiring about bonuses for the Inserting/Distribution Department employees and said she advised him to the effect that they would be dealt with in the same way as in the past.

[5] Ms. Kukurudza confirmed that bonuses had been paid to employees in 1996, 1997 and 1998, and to all but Inserting/Distribution Department employees in 1999. She said however that bonuses are not "automatic." She testified that at the time of her conversation with Mr. Hunter she did not know that the employees in Inserting/Distribution would not be given a bonus. She confirmed that the adulatory memorandum from Mr. Sinkewicz of December 17, 1999 was included with all employees pay cheques except those in the Distribution Department.

[6] Ms. Kukurudza testified that she was not aware of any productivity problems in the Inserting/Distribution Department that were the fault of the employees. She said that it was her understanding that there were special costs associated with the department related to the certification application and legal fees.

[7] Lyle Sinkewicz has been the publisher of the Star Phoenix for some six years and is the newspaper's chief operating officer responsible for day-to-day operations and financial reporting to the newspaper's proprietors; he is also a regional manager for Hollinger, LP. Hollinger acquired the Star Phoenix in 1996. The Employer has paid bonuses to employees each year since. The

Employer's fiscal year end is December 31st. Mr. Sinkewicz said that about mid-December each year he, as publisher, is authorized to determine bonuses based upon the newspaper's financial performance. He said he considers the revenues generated and any special expenses incurred by departments. Bonuses paid each year were as follows:

- 1996 – one-half weeks' pay
- 1997 – one weeks' pay
- 1998 – two weeks' pay
- 1999 – two weeks' pay

[8] Mr. Sinkewicz said he received a memorandum dated December 3, 1999 from his superior, Robert Calvert, Hollinger executive vice-president, advising him that payment of a Christmas bonus was in his discretion and outlining certain considerations. The memorandum provided as follows:

> *We have now decided to provide you with the option to have a Christmas Bonus instituted at your newspaper.*
>
> *The bonus is at your absolute discretion and is not automatically renewed from year to year.*
>
> *You should note that of you decide that some or all of the money will not be awarded as bonuses because of the entire newspaper's performance, departments or individual's performance, the money provided is money directed to your newspaper to be applied to your profits and losses.*
>
> *We would expect in the allocation of bonuses to any department or individual within a department, the following factors should be considered:*
>
> > *a) The productivity of that department or individual in that department in relation to the entire newspaper.*
> >
> > *b) The cost associated with that department or individual that may be extraordinary or unusual in the year. You may also consider anticipated costs from events which began in the year but have not yet been concluded. These events could include such things as labour standards claims to higher wages, applications under which you have to hire lawyers, or any other similar situation where the employees in the department have created the need for you to hire outside experts, including lawyers, or creating costs for that department over other departments within the operation.*

> *c) Any time or effort that has been taken in the year by management to deal with individuals or the entire department on issues that were not issues in other departments.*
>
> *d) As a global combination of the above, all costs direct or indirect, external or internal that have been or you anticipate will be in one department or on behalf of one individual which creates dissimilarity to other groups*
>
> *It is apparent that we are providing the newspaper with a global sum of money for you to allocate or not allocate based upon the criteria. This is merely to clarify the position that has always been the position of Hollinger that the allocation of the bonus is totally discretionary to you.*

[9] Mr. Sinkewicz testified that although he had not received such a memorandum in prior years the criteria for payment of bonuses had been the same.

[10] Mr. Sinkewicz confirmed that all employees at the Star Phoenix except those in the Inserting/Distribution Department were paid a bonus in December 1999. He said the latter employees were excluded "because it was the entire department that incurred the extra expenses because of their [certification] application." He said he anticipated there would be expenses for legal counsel, labour relations consultants, contract negotiations, travel and other expenses and the amount that would otherwise have been paid to the employees of the department as bonuses would not cover such expenses. He confirmed that 1999 was the first time that the employees of a department at the Star Phoenix had been excluded from the payment of bonuses and that neither had any individual employees ever been excluded. In cross-examination, Mr. Sinkewicz admitted that unbudgeted costs incurred in other years, such as the defence of defamation claims or losses incurred by employees such as vehicle accidents had not affected payment of bonuses. He also said that the costs associated with a wrongful dismissal action would probably just be charged to general expenses rather than to a department. However, he did say that unbudgeted costs incurred as a result of an unsuccessful certification application to the Board in 1996 with respect to employees other than those in the Inserting/Distribution Department affected the bonus paid that year.

[11] In cross-examination, Mr. Sinkewicz admitted that the bonus was intended to be part of the reward for the success experienced by the newspaper in 1999 as a result of the contributions of all employees including those in the Inserting/Distribution Department. He candidly admitted that he knew that the failure to pay a bonus to those employees would doubtless cause some reaction against

the Union. When asked in cross-examination whether it was a way to elicit criticism of the Union, Mr. Sinkewicz replied that as the manager of the Star Phoenix he had to respond to the situation. He denied that it was his intention to penalize the distribution employees, but said rather that it was a reaction to "the economic circumstances arising out of the application for certification." He admitted, however, that some employees might feel they were being penalized.

[12] Mr. Sinkewicz confirmed that his memorandum of congratulations was not given to the employees of the Distribution Department explaining that "it was not appropriate because they were not getting a bonus." Mr. Sinkewicz testified that the total cost of the bonuses for 1999 was approximately $500,000 and the saving from not paying same to the distribution employees was approximately $38,000. While he admitted that he did not know on December 17, 1999 what the legal and other costs would be that might be associated with the application for certification, he said that based on his experience one "could go through a hundred thousand dollars in a hurry." While the Employer's budget included an item for legal expenses, Mr. Sinkewicz could not say whether at that time it had been spent for the year. He also admitted that certain costs would likely be charged against the 2000 budget rather than the 1999 budget. Mr. Sinkewicz admitted that the employer costs associated with the certified bargaining unit at Hollinger's Prince Albert paper are treated as operating expenses for the paper generally rather than charged to the department.

[13] In re-examination, Mr. Sinkewicz stated that an expense incurred as a result of the actions of a single employee, such as in the case of an action for wrongful dismissal, would not be charged against a department, as opposed to a group action such as an application for certification.

Statutory Provisions

[14] Relevant sections 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.*
>
> ...

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;*

Argument

[15] Counsel on behalf of the Union, Mr. McLeod, suggested that the evidence was beyond doubt that the Employer did not pay the bonus to the Inserting/Distribution employees because of the application for certification made on their behalf and argued that the Employer's motivation and purpose was to penalize the employees in that department and discourage support for the Union; he said that in the guise of "cost accounting" the employer discriminated against the employees because they chose to exercise statutory rights granted by s. 3 of the *Act*. Counsel asserted that the Employer did not make a benign financial decision but acted in the interests of eroding support for the Union with the intention of intimidating and coercing employees in the exercise of their rights; counsel further asserted that the Employer's action was not the result of a *bona fide* business decision based on an established policy. Mr. McLeod stated that the Employer's action was analogous to charging

the costs of non-culpable absenteeism against the employees of a department: the costs anticipated in the present situation would be incurred as a result of the exercise of legally protected rights. Counsel pointed out that Mr. Sinkewicz did not describe any other situation where legal expenses might be charged against a whole department except with respect to union labour relations. However, citing as support the decisions of the Ontario Labour Relations Board in *The Globe and Mail Division of Canadian Newspapers Company Limited*, et al., [1982] 2 Can LRBR 73, and of the Canada Labour Relations Board in *Doyle v. Yellowknife District Hospital Society* (1977), 77 CLLC 16,083, counsel also argued that even if an employer acts pursuant to a legitimate policy, if its actions are nonetheless motivated in part by an anti-union animus it constitutes an unfair labour practice and the timing of its actions may lead to the inference that such motivation exists. Counsel pointed out that the Board approved of this reasoning in *Saskatchewan Union of Nurses v. Jubilee Lodge Inc.*, [1990] Summer Sask. Labour Rep. 70, LRB File Nos. 021-90, 022-90 & 023-90. Counsel noted that with respect to alleged violation of s. 11(1)(a) of the *Act* the Board has held that even if an employer does not intend to interfere with the exercise by employees of rights under the *Act*, if the employer's actions have that effect, they may constitute an unfair labour practice: see, *Saskatchewan Government and General Employees Union v. R.M. of Paddockwood, No. 520*, [1999] Sask. L.R.B.R. 470, LRB File Nos. 059-99 & 087-99 to 093-99, upheld on judicial review at [2000] Sask. L.R.B.R. c-30 (Sask. Q.B.).

[16] In his argument, Mr. McLeod referred to the decision of the Canada Labour Relations Board in *Union of Bank Employees, Locals 2104 and 2100 v. Canadian Imperial Bank of Commerce* (1980), 80 CLLC 16,002, where the Canada Board, after finding that annual general salary increases were an integral part of the employer's compensation for its employees, held that the employer's action to extend such increases to all employees except those in branches where union certification was pending or had been granted was an unlawful interference with the rights of the employees to seek collective bargaining. Counsel also referred to the decision of the Board in *Communications Workers of Canada v. Saskatchewan Telecommunications*, [1987] May Sask. Labour Rep. 67, LRB File No. 013-87, in which the employer by its offer to provide legal assistance to members of the bargaining unit if they decided to work during a strike was determined to have committed an unfair labour practice by discriminating in favour of employees that engaged in anti-union activity; the Board held, at 70, that the employer's offer was "an inducement intended to discourage activity in and for the union."

[17] Mr. Seiferling, counsel for the Employer, argued that the Employer's only consideration in determining whether to pay the bonus was costs incurred as a result of the certification application. He said that the fact that the employees in the Inserting/Distribution Department had decided to apply for union representation itself was not a factor. Counsel asserted that the fact that there had been no application made to the Board alleging that the Employer had committed any unfair labour practice during the organizing campaign itself ought to counter any allegation that there was anti-union animus in the present case. Counsel argued that the *CIBC*, *Canadian Newspapers* and *Yellowknife Hospital* cases, cited by the Union, *supra*, ought to be distinguished because they all dealt with allegations of interference in the context of an organizing campaign rather than afterwards as in the present case. Counsel also asserted that the Employer's action in the present case was a legitimate business decision untainted by any anti-union motive. Counsel argued that the *Sask Tel* case, *supra*, ought to be distinguished as a case of improper communication with employees, and the *Jubilee Lodge* case, (*supra*), as one involving improper termination in which the employer faced a reverse onus under s. 11(1)(e) of the *Act*.

[18] With respect to the exercise of rights under s. 3 of the Act, Mr. Seiferling argued that the statute does not provide that there will be no adverse economic consequences as the result of the exercise of those rights; he said the Employer did not know whether or not its action would cause any erosion of support for the Union. Counsel further argued that payment of the bonus was discretionary in any event and not a term or condition of employment and, therefore the Employer's action was not within the purview of s. 11(1)(e) of the *Act*. In support of this argument, counsel referred to the decision of the Alberta Labour Relations Board in *Communications, Energy and Paperworkers Union of Canada, Local 1118 and Graphic Communications International Union, Local 34M v. Southam Inc. (Calgary Herald),* [1999] Alta. LRBR 566, where the employer had declined to pay a bonus to its unionized employees. Counsel also referred to the decision of the Board in *Retail, Wholesale and Department Store Union, Local 635 v. Weyburn Co-Operative Association Ltd.,* [1989] Fall Sask. Labour Rep. 43, LRB File No. 232-88, where the Board held that the employer's selective lockout of employees who engaged in strike action did not violate either of ss. 11(1)(a) or (e) of the *Act*.

[19] Mr. Seiferling referred to the Board's decision in *International Association of Bridge, Structural and Ornamental Iron Workers Union, Local 838 v. Metal Fabricating Services Ltd.*, [1990] Spring Sask. Labour Rep. 70, LRB File Nos. 166-89, 193-89 to 195-89 & 214-89 to 216-89,

in support of his argument that even if there is evidence of anti-union animus, that in itself does not mean that an employer is thereafter unable to make decisions in the normal course of its business for economic reasons.

[20] Mr. Seiferling also argued that even if the Board should find that there was an unfair labour practice the remedy ought not necessarily to be payment of the bonus if there was a legitimate business reason for not doing so in the first place.

Analysis and Decision

[21] We are asked to determine whether the Employer's conduct in paying a year end bonus to all of its employees except those in a then proposed bargaining unit that was the subject of an application for certification pending before the Board violated ss. 11(1)(a) and (e) of the *Act*. More specifically, the issue is whether the conduct was interfering, restraining, intimidating, threatening or coercive of employees in the exercise of rights conferred by the *Act* (s. 11(1)(a)) and/or discriminated with respect to a term or condition of employment or was intimidating or coercive with a view to discouraging membership or activity in or for the Union.

[22] The Board recently considered a situation very similar to the instant case in *The Newspaper Guild Canada/Communication Workers of America v. Sterling Newspapers Group, A Division of Hollinger Inc., operating as The Leader-Post and Leader-Star News Services*, [2000] Sask. L.R.B.R. 558, LRB File Nos. 272-98 & 003-00, upheld on judicial review at [2001] Sask. L.R.B.R. c-1 (Sask. Q.B.). In that case the employer had paid Christmas bonuses and wage increases to all employees at the Leader-Post except, in 1998, to the employees in the editorial department which was the subject of a pending application for certification, and, in 1999, to the same group of employees who were now in a bargaining unit designated by the Board in a Certification Order. As in the present case, the employer's position was that the bonuses were discretionary and determined in a manner consistent with the employer's pre-certification practices; similarly, the employer said it considered a number of factors in making its determination, including any extra costs, expenses or disruptions associated with a particular department in the course of the year. A memorandum with respect to the payment of bonuses had been provided to the publisher of the Leader-Post by Robert Calvert that was identical to that provided by him to Mr. Sinkewicz in the present case.

[23] In the *Leader-Post* case, *supra*, at 581, the Board held that the employer's conduct violated, *inter alia*, ss. 11(1)(a) and (e) of the *Act*, stating as follows:

> *In the present case, the evidence clearly established that the Employer treated employees in the editorial department differently from the non-union employees of the Leader-Post with respect to the bonuses and wage increases for reasons related to their decision to join a trade union. The first bonus that was denied to the editorial staff was the bonus paid to other Leader Post employees in December, 1998, after the Union applied to be certified to represent the editorial employees, but before the Certification Order was determined. During this period, there was no obligation on the part of the Employer to bargain collectively with the Union. The Employer justified its refusal to pay this bonus to the editorial staff based on the unknown costs of unionization and its policy on granting bonuses. For the reasons stated in the earlier portion of these Reasons we do not find the explanation to be credible. In our view, the policy was applied solely to exclude unionized employees from the bonus provisions. Aside from this explanation and the general explanation that the Employer wished to resolve all monetary issues at the bargaining table, the Employer did not present a business justification for treating the unionized (or about to become unionized) employees different from other Leader Post employees in terms of both of the payment of bonuses and wage increases.*
>
> *In addition, Mr. McLean admitted to an anti-union motive. He told Ms. Kyle that he would do anything to be rid of the Union. In this context, we conclude that the decision not to pay Christmas bonuses to the editorial employees in 1998 and 1999 and the wage increase of 1999 were an attempt on the part of the Employer to punish the editorial staff for their decision to join the Union. This conduct interfered with the employees in the exercise of their right to join the Union and discriminated against them for joining or attempting to join the Union in contravention of ss. 11(1)(a), (g) and (e).*

[24] In arriving at its decision, the Board referred to another fairly recent decision of the Board – *Retail, Wholesale and Department Store Union v. BASF Canada Inc.*, [2000] Sask. L.R.B.R. 200, LRB File No. 259-98 – where the Board considered circumstances where the employer established a valid business explanation for the difference in the benefits for hourly paid union members and those for the salaried out-of-scope employees based on the structure of collective bargaining in the corporation in its various workplaces across Canada. The Board commented, at 204-206, as follows:

> *The Board is asked in this instance to conclude that a difference in the benefits package offered to out-of-scope employees by the Employer is automatically a violation of s. 11(1)(e) when the same package is not extended to the Union. The theory of the Union's case is that any unjustified difference in pay or benefits or work conditions between union and non-union employees must constitute discriminatory treatment because it leads employees to the conclusion that they*

would be "better off" without the Union. The Employer, on this theory, is assumed to have intended the natural consequences of his action.

Cases which have discussed such a theory include Irwin Toy Ltd. and U.S.W.A., Local 1357 (1983), 4 CLRBR (NS) 23 where the Ontario Labour Relations Board concluded at 28-29:

> *8. It is obviously not axiomatic that the unionized employees in one plant of an employer must necessarily receive the same treatment in respect of wages and benefits as comparable employees in another plant. Economic considerations may justify different wages and benefits in different work places. By the same token, it is plainly unlawful for an employer to punish a group of employees because they have chosen union representation or to reward another group because they have not. If it is unlawful for an employer to make such distinctions, it is equally in violation of the Act for it to bring them forcibly to the attention of employees as a means of discouraging union support in the course of bargaining or in a representation vote.*

In Irwin Toy Ltd., the employer granted higher wages and benefits to non-union employees than it provided to recently certified employees. The employees performed similar work in different locations and there was no obvious reason for a salary or pay difference.

In Iberia Airlines of Spain and C.U.P.E. (Airline Division), Local 4027 (1990), 13 CLRBR (2d) 224, the Canada Labour Relations Board summarized the relevant case law as follows at 253:

> *These decisions illustrate cases in which the desire of an employer to establish conditions of employment through collective bargaining that are inferior to those that existed prior to unionization, or are unfavorable when compare with those for other groups of non-unionized employees whose duties and qualifications are comparable, has been found to be contrary to the duty to bargain in good faith and, in all cases, unlawful. These conclusions are based on the general context of negotiations, the specific situation of the parties and the reasons and justifications put forward in support of such proposals.*

The mere fact of offering different conditions of employment to different categories of employees is not in itself a violation of the duty to bargain in good faith. However, the manner in which the negotiations unfolded may, in some circumstances, lead to a finding that the conduct of an employer who has made offers of this nature or taken such positions at the bargaining table is contrary to the Code.

The Canada Labour Relations Board went on in the Iberia Airlines case to find the Employer in violation of the duty to bargain in good faith as a result of its

preferential treatment of comparable non-union employees during the bargaining period with the Union.

A similar approach was taken by the New Brunswick Labour and Employment Board in Atlantic Wholesalers Ltd. and United Food and Commercial Workers Union, Local 1288P (1999), 51 C.L.R.B.R.(2d) 161.

In this case, the evidence indicates that the Employer bargains, as it is required to do, on a plant-by-plant basis with its unionized employees. In each plant, the benefits plans form part of the collective agreement between the local Union and the Employer. There appears to be no uniformity in the terms negotiated between plants. Employees who are covered by the terms of the various collective agreements perform work that is comparable to the work performed by members of the Union. There does not appear to be a significant group of non-union employees who perform comparable work to the members of the Union.

In our view, the difference between the benefits plans for Union members and out-of-scope members in the Regina plant does not automatically demonstrate anti-union animus on the part of the Employer. Such differences are not unusual between members of management and other salaried employees and hourly employees. The two groups of employees are not directly comparable, either in the work they perform or the conditions of their work. We would not conclude from the fact of this difference alone that the Employer was attempting to discriminate against Union members or influence their decision to remain or leave the Union.

[25] The present case is very similar to the *Leader Post* case, *supra*. The whole of the evidence in the present case leads us to conclude that the Employer's policy on bonuses was tailored and applied for the primary reasons of punishing and discouraging the employees that supported the Union at the Star-Phoenix. The memorandum from Mr. Calvert to Mr. Sinkewicz outlining the policy that the Employer relies upon to attempt to establish a *bona fide* business rationale for its actions, in our opinion, is a self-serving attempt to justify how it planned to handle the bonuses. The timing of the memorandum is suspect: although Mr. Sinkewicz testified that bonuses at the Star-Phoenix in previous years were determined using the same criteria, no plausible explanation was given as to why it was deemed necessary to reduce it to writing in December 1999. While the majority of the memorandum speaks in general terms about productivity and singular costs, it specifically targets costs related to legal expenses and legal expenses related to labour issues in particular. The author of the memorandum, Robert Calvert, was not called to testify to clarify the timing and contents of the memorandum.

[26] According to his testimony, the only anticipated extraordinary costs that Mr. Sinkewicz considered were those associated with the Union's application for certification. His description of

why and how he considered anticipated extraordinary costs was specious and demonstrated an entirely arbitrary approach. Although Mr. Calvert's memorandum appears to direct Mr. Sinkewicz to consider claims by any department or individual that could result in legal expenses for the Employer, Mr. Sinkewicz could think of no instances that might lead him to deny or reduce the bonus paid to the employees in a department or to any individual other than those related to the certification application which he considered an ostensible justification of his decision. Mr. Sinkewicz did not credibly explain why expenses that might be incurred to defend defamation or wrongful dismissal claims, for example, would not be considered under the guidelines expressed in Mr. Calvert's memorandum. Despite the fact that at the time when the bonuses were paid to other employees the Employer had no idea what legal costs it was likely to incur in connection with the certification application Mr. Sinkewicz denied the bonus to the Distribution/Inserting employees. Although the Employer had an annual budgeted amount for legal expenses, Mr. Sinkewicz did not explain how it was disbursed or why it did not apply to the certification proceedings. Mr. Sinkewicz admitted that he presumed that his action with respect to the denial of the bonus would provoke an adverse reaction against the Union. The mean-spiritedness of the action is demonstrated by his not extending the congratulations to the Distribution/Inserting employees that were provided to the other employees advising of the plan to hold a celebration for the commissioning of the new press despite the fact that he admitted that they contributed as well to the success of the paper in 1998.

[27] While the Employer may have planned to use the money saved from the non-payment of bonuses to fund its defence of the application, the evidence leads us to conclude that a major motive for denying the bonus to the Distribution/Inserting employees was to promote ill feelings against the Union and attempt to influence employees to reconsider their course of action in applying for certification. Although the application had already been filed, a union is vulnerable during the period before a Certification Order is made and before a first collective agreement is reached to the creation and fostering by an employer of a perception among employees that it is ineffective as a bargaining agent and detrimental to the position of the employees in the employer's organization. It is obvious to us that Mr. Sinkewicz foresaw that his action would almost certainly result in adverse fallout for the Union and he sought to take advantage of that. The Employer's conduct in denying the bonus was designed to interfere with and intimidate and coerce the employees with respect to their activity in support of the Union and as such was in violation of ss. 11(1)(a) and 11(1)(e) of the *Act*.

[28] In our opinion it is appropriate to order a remedy similar to that made in the *Leader-Post* case, *supra*. The Board orders the Employer to pay to Distribution/Inserting Department employees on the payroll during the month of December, 1999, or their estates, an amount equivalent to two weeks' pay plus interest calculated according *to The Pre-Judgment Interest Act*, S.S. 1984-85-86, c. P-22.2 from December 17, 1999 to the date payment is tendered. The Board reserves jurisdiction to determine any dispute between the parties relating to the payees or the amount payable should the parties be unable to agree.

[29] The Employer is further ordered to post a copy of these Reasons for Decision and the Order issued therewith for a period of ten (10) days from the receipt of the Order on a bulletin board where it is likely to be seen by a majority of the employees in the Distribution/Inserting Department.

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS' UNION OF CANADA (CAW-CANADA), Applicant v. SASKATCHEWAN INDIAN GAMING AUTHORITY INC., O/A NORTHERN LIGHTS CASINO, Respondent

LRB File No. 092-00; September 18, 2001
Chairperson, Gwen Gray; Members: Brenda Cuthbert and Bob Todd

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

Collective agreement – First collective agreement – Where one party agrees with Board agent's recommendations and other party does not, Board sets out process to be followed in subsequent hearing before Board – Board declines to permit either party to call Board agent as witness in subsequent hearing.

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

REASONS FOR DECISION

Background

[1] **Gwen Gray, Chairperson:** The National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada), (the "Union") filed an application seeking Board assistance in the conclusion of its first collective agreement with Saskatchewan Indian Gaming Authority Inc., (the "Employer") on March 30, 2000. The Board issued an Order appointing a Board agent on January 25, 2001 and the Board agent filed his report with the Board on June 5, 2001. The Union notified the Board that it agreed with the Board agent's report. The Employer notified the Board that it did not accept the Board agent's report and it took the position that the Board should not intervene in this collective bargaining dispute.

[2] A hearing was convened on August 20, 2001, at which time the Employer raised three preliminary issues. First, the Employer sought a direction from the Board concerning the burden of proof with respect to the application. The Employer argued that the Union has the onus of establishing that the terms recommended by the Board agent satisfy the criteria set by the Board for an imposed first collective agreement. In relation to this issue, the Employer argued that the Board agent's report has no evidentiary status before the Board without *viva voce* evidence called in support

of it. Second, the Employer sought to cross-examine the Board agent with respect to the process used by the Board agent in preparing his report and the recommendations made by the Board agent. Third, the Employer sought the Board's direction with respect to the matter of determining whether or not the Board should intervene to impose a first collective agreement.

[3] After hearing arguments from the Employer and the Union on these issues, the Board reserved its decision and adjourned the hearing to September 24, 25 and 26, 2001. These Reasons for Decision will address the preliminary procedural and evidentiary matters.

Relevant Statutory Provisions

[4] Section 26.5 of *The Trade Union Act*, R.S.S. 1978, c, T-17 (the "*Act*") provides as follows:

> *26.5(1) Either party may apply to the board for assistance in the conclusion of a first collective bargaining agreement, and the board may provide assistance pursuant to subsection (6), if:*
>
> > *(a) the board has made an order pursuant to clause 5(a), (b) or (c);*
> >
> > *(b) the trade union and an employer have bargained collectively and have failed to conclude a first collective bargaining agreement; and*
> >
> > *(c) any of the following circumstances exist:*
> >
> > > *(i) the trade union has taken a strike vote and the majority of those employees who voted have voted for a strike;*
> > >
> > > *(ii) the employer has commenced a lock-out; or*
> > >
> > > *(iii) the board has made a determination pursuant to clause 11(1)(c) or 11(2)(c) and, in the opinion of the board, it is appropriate to assist the parties in the conclusion of a first collective bargaining agreement pursuant to subsection (6).*
>
> *(2) If an application is made pursuant to subsection (1), an employee shall not strike or continue to strike, and the employer shall not lock out or continue to lock out the employees.*

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

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

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

> *(a) file with the board a list of the issues in dispute and a statement of the position of that party on those issues, including that party's last offer on those issues; and*
>
> *(b) serve on the applicant a copy of the list and statement.*

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

> *(a) the board may require the parties to submit the matter to conciliation if they have not already done so; and*
>
> *(b) if the parties have submitted the matter to conciliation or 120 days have elapsed since the appointment of a conciliator, the board may do any of the following:*
>
> > *(i) conclude, within 45 days after undertaking to do so, any term of terms of a first collective bargaining agreement between the parties;*
> >
> > *(ii) order arbitration by a single arbitrator to conclude, within 45 days after the date of the order, any term or terms of the first collective bargaining agreement.*

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

> *(a) evidence adduced relating to the parties' positions on disputed issues; and*
>
> *(b) argument by the parties or their counsel.*

(8) Notwithstanding section 33 but subject to subsections (9) and (10), the expiry date of a collective bargaining agreement concluded pursuant to this section is deemed to be two years from its effective date or any other date that the parties agree on.

(9) Notwithstanding section 33 not less than 30 days or more than 60 days before the expiry date of a collective bargaining agreement concluded pursuant to this section, either party may give notice in writing to terminate the agreement or to negotiate a revision of the agreement.

(10) Where a notice is given pursuant to subsection (9), the parties shall immediately bargain collectively with a view to the renewal or revision of the agreement or the conclusion of a new agreement.

[5] Section 18 of the *Act* provides as follows:

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.

Procedure Used by Board to assist parties to conclude a first collective agreement:

[6] The Board set out its approach to the first collective agreement provisions contained in s. 26.5 of the *Act* in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Prairie Micro-Tech Inc.*, [1996] Sask. L.R.B.R. 36, LRB File No. 201-95. In that case, the Board concluded that s. 26.5 of the *Act* adopts a "mediation/breakdown" model of intervention in first collective agreement negotiations, as opposed to a "bad faith/extraordinary" remedy model. The Board commented at 49 that "the overall purpose of the provision is to intervene, where the situation warrants it, in an attempt to preserve the collective bargaining relationship, and the ability of the trade union to continue to represent employees." The Board stressed the need to reinforce the collective bargaining system through its interventions under s. 26.5, rather than replace that system.

[7] Over the course of hearing first collective agreement applications, the Board has instituted a practice of appointing Board agents, who generally are senior labour relations officers from the Labour Relations, Mediation and Conciliation Branch, Saskatchewan Labour, to carry out two main tasks: (1) to assist the parties to conclude a first collective agreement; and (2) after a certain number of days, to report to the Board on (a) whether or not the Board should intervene in the collective agreement dispute; and (b) if so, what collective agreement terms should be imposed by the Board. If the Board agent is successful in assisting the parties to conclude a first collective agreement, the Board is informed by the parties that settlement has been reached and the application before the Board for first collective agreement assistance is withdrawn by the party who filed the application. Where the Board agent is not able to assist the parties to resolve all of the outstanding issues, the

Board agent will file his or her report with the Board indicating, first of all, his or her opinion on whether the Board should intervene in the dispute, and if so, on what terms. The parties are provided a copy of the Board agent's report by the Board and are asked to advise the Board if they agree or disagree with the Board agent's recommendations, and if so, which recommendations. A hearing is then held by the Board to determine (1) should the Board intervene in the dispute (if this remains an issue between the parties); and (2) if so, what collective agreement terms should the Board impose. In relation to the second issue, the Board directs the parties to focus on the question of why the Board agent's recommendations should not be imposed.

[8] As a result of the practice of appointing Board agents, the Board is provided with recommended terms of settlement from a neutral third party who has been in discussion with the parties and who has a good ability to judge (a) where the parties would settle, if settlement could be achieved; and (b) what is fair and reasonable in the circumstances.

[9] The appointment of Board agents to assist parties to a first collective agreement application has proven to be successful. In the 26[1] applications that have been filed with the Board since the enactment of s. 26.5, six[2] were settled by the intervention of the Board agent. In six cases[3], the Board resolved the collective agreement application by imposing various terms. In three of these six cases, the Board's intervention was related to very few terms as the parties had resolved most of the outstanding matters with the Board agent.[4] In three cases, the Board refused to intervene in the

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[1] There have been 32 applications for first collective agreement assistance filed in the period from the enactment of s. 26.5 to the date of these Reasons. Six of these applications are currently pending before the Board.

[2] *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Prairie Micro-Tech Inc.*, LRB File No. 201-95, *United Food and Commercial Workers Union, Local 1400 v. Remai Investment Corporation (Corona Regency Inn)*, LRB File No. 004-96, *Saskatchewan Science Centre Inc. v. IATSE, Local 295*, LRB File No. 096-96, *Canadian Union of Public Employees, Local 3777 v. Town of Cudworth*, LRB File No. 158-96, *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Raider Industries Inc.*, LRB File No. 170-96, *International Union of Operating Engineers, Local 870 v. Rural Municipality of Lipton No. 217*, LRB File No. 181-96.

[3] *Saskatchewan Government and General Employees' Union v. Namerind Housing Corporation Inc.*, LRB File No. 189-97; *International Union of Operating Engineers, Local 870 v. Rural Municipality of Coalfields No. 4*, LRB File No. 326-97; *Off the Wall Productions v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, LRB File No. 209-98; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Loraas Disposal Services Ltd.*, LRB File No. 037-99, *The Newspaper Guild Canada/ Communication Workers of America v. Sterling Newspapers Group, A Division of Hollinger Inc.*, LRB File No. 274-99; *Grain Services Union Local 1450 v. Bear Hills Pork Producers Limited Partnership*, LRB File No. 146-00.

[4] *International Union of Operating Engineers, Local 870 v. Rural Municipality of Coalfields No. 4*, LRB File No. 326-97; *The Newspaper Guild Canada/ Communication Workers of America v. Sterling Newspapers*

dispute.[5] Four cases were adjourned *sine die* by the parties for a variety of reasons, including settlement by the parties without assistance from the Board. Six cases have been withdrawn, again for a variety of reasons, including settlement by the parties on their own accord.

[10] The Board examined its authority to appoint Board agents in *Madison Inn,* [1996] Sask. L.R.B.R. 777, LRB File No. 053-96, at 781-2 as follows:

> *The first issue raised by counsel for the Employer is whether the appointment of a Board agent for this purpose is consistent with s. 26.5. Counsel argued that, while s. 26.5 (6) allows the Board to direct the parties to conciliation if they have not already availed themselves of that process, the only options open to the Board following any conciliation process are either to conclude a term or terms of a collective agreement, or to appoint an arbitrator to conclude an agreement. The terms of the legislation do not allow any role for a Board agent to carry out the kind of tasks contemplated in the terms of reference set out for Mr. Cuddington.*
>
> *In our view, this argument is based on a rather narrow understanding of the authority of the Board to manage our own procedure in the most effective way, and in a way which makes most effective use of resources. The statute specifies several ways in which the Board may approach an application for first contract arbitration. We may direct the parties to avail themselves of the conciliation process, which we understand to mean the making of a request to the Department of Labour for the appointment of a conciliator employed by that Department. Once this process has continued for a specified period without resulting in a concluded first agreement, the Board may either undertake to "conclude ... any term or terms of a first collective bargaining agreement," or may appoint an interest arbitrator to perform this task.*
>
> *We do not read these provisions as precluding the steps which the Board has taken here. For one thing, a provision which envisions that the Board may "conclude" a term or terms of a collective agreement does not seem on its face to restrict us to conducting an adjudicative or quasi-judicial proceeding - though, as we have indicated all along, we do contemplate holding a hearing or more than one hearing at which the parties may make representations concerning the appropriateness of imposing certain terms of a collective agreement.*
>
> *In any case, it would, in our opinion, place unreasonable limitations on the effectiveness of the Board as an administrative tribunal charged with advancing the legislative objectives contained in The Trade Union Act to interpret the statute as restricting the Board to employing adjudicative hearings as the exclusive means of*

Group, A Division of Hollinger Inc., LRB File No. 274-99; *Grain Services Union Local 1450 v. Bear Hills Pork Producers Limited Partnership*, LRB File No. 146-00.

[5] *Board of Education of the Tisdale School Division No. 53 v. Canadian Union of Public Employees, Local 3759*, LRB File No. 078-96; *United Brotherhood of Carpenters and Joiners of America, Local 1985 v. Construction Labour Relations Association of Saskatchewan Inc.*, LRB File No. 328-96; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Temple Gardens Mineral Spa Inc.*, LRB File No. 193-00.

obtaining information, exploring possibilities for settlement, or determining subsidiary or policy issues. In connection with some applications, we have made use of the offices of the vice-chairperson and certain members of the Board, as well as other agents, to carry out these important roles.

It is true that The Trade Union Act, unlike legislation in some other jurisdictions, does not specify all of the circumstances under which the Board may delegate these tasks. It must be remembered that the Act is an open-textured and flexible instrument, which creates considerable latitude for the Board to determine the most effective way of conducting our affairs. Within the statute itself, however, there are at least some clues that the legislature contemplated that the Board would develop a range of procedures and mechanisms to support our work. Section 18 of the Act, for example, confers upon "duly appointed agents" powers under The Public Inquiries Act which are the equivalent of those conferred upon the Board and its members:

> *18 The board and each member thereof and its duly appointed agents have the power of a commissioner under The Public Inquiries Act and may receive and accept such evidence and information on oath, affidavit or otherwise as in its discretion it may deem fit and proper whether admissible as evidence in a court of law or not.*

As we suggested to the parties in an exchange which took place at the hearing of these objections, the Board has found the appointment of a Board agent a useful mechanism in connection with applications under s. 26.5. In some cases, such an agent may be successful in assisting the parties to reach an agreement by acting as a mediator or conciliator. In other cases, the agent may at least help the parties to refine the issues, or to reduce the number of issues which will be submitted to the Board for consideration at a hearing.

When the Board finally comes to hear an application under s. 26.5, we are departing somewhat from our usual role as a guarantor of vigorous collective bargaining. It represents an interference in the bargaining process, premised on the existence of one of the preconditions set out in s. 26.5(1)(c). On the basis of a review of the jurisprudence and literature concerning first contract arbitration in other jurisdictions, the Board, in a decision in Prairie Micro-Tech, supra, set out some guidelines to indicate an overall approach to this remedy. In these guidelines, we indicated our intention to intervene only in a restrained and selective way, and not to utilize this remedy in a way which would make it a substitute for bargaining between the parties.

[11] There are two stages to the process of hearing an application for first collective agreement assistance under s. 26.5 of the *Act*. In the first stage, the Board must determine if it will provide assistance to the parties. In order to determine this question, the Board must initially determine that the factors listed in subparagraphs (a), (b), and (c), are present before proceeding further with the application. In the present case, that determination was made by the Board in its earlier Reasons for Decision (see [2001] Sask. L.R.B.R. 42).

[12] In addition to the statutory requirements set out in s. 26.5(1)(a) to (c), the Board must also decide the broader question, that is, whether or not there are sound labour relations reasons that would justify Board intervention in the collective bargaining process. In the *Prairie Micro-Tech Inc.* case, *supra,* the Board indicated that intervention is not automatic upon finding that the initial requirements set out in s. 26.5(1)(a) to (c) are met. Although the Board could intervene in any situation where the strict requirements of s. 26.5(1) are present, in keeping with the policy of facilitating, and not replacing, collective bargaining, the Board will scrutinize each case to determine if there are sound labour relations reasons for Board intervention. Some of these factors were set out in *Prairie Micro-Tech Inc.* at 49 quoted above.

[13] The Board agent's report assists the Board in making the determination that there are sound labour relations issues justifying intervention. These reasons may be stated in a detailed fashion in the report itself or may be inferred from the information provided in the report, such as the type and number of issues remaining in dispute, the number of meetings held between the parties, the length of the bargaining process, the complexity of the outstanding issues, and the like. The Board agent's report will provide one source of information on which the Board will rely to make the determination as to whether or not it ought to intervene in the bargaining process.

[14] Once a determination has been made to intervene in the bargaining process, the Board will turn again to the Board agent and will consider the recommendations made by the Board agent for settling the terms of the collective agreement.

[15] As noted in *Madison Inn* case, *supra,* s. 26.5 directs the Board to "conclude . . . any term or terms of a first collective bargaining agreement" and that, in the course of so doing, the Board "may hear evidence adduced relating to the parties' positions on disputed issues; and argument by the parties or their counsel" (s. 26.5(7)).

[16] In our view, these provisions recognize that the process of assisting parties to conclude a first collective agreement involves different processes and considerations than a determination of other applications that may be brought under the *Act,* which are more focused on "rights" adjudication, as opposed to the settlement of interest disputes. In our view, the nature of the task assigned to the Board necessitates a different approach than would be conducted in a "rights" type application. The

overall goal of s. 26.5 is to assist the parties to conclude a first agreement and the process of assigning a Board agent to act in a mediation capacity and a reporting capacity on the two issues described above greatly enhances the Board's role in carrying out the legislative intent of s. 26.5.

[17] In the present case, the Employer urged the Board to approach its task under s. 26.5 as a "rights" type of dispute by requiring the Union to adduce evidence supporting the recommendations of the Board agent and by permitting the Employer to cross-examine the Union's witnesses and the Board agent on the recommended provisions. The Employer urged the Board to adopt the procedures used in rights applications before the Board that would place the onus of proof on the applicant. The Employer also put forth the position that the Board agent's report has no status before the Board and may not be considered by the Board unless it is adduced into evidence by a witness.

[18] In our view, the hearing process contemplated under s. 26.5(7) is designed to elicit each party's position on the disputed matters, including the issue of whether or not the Board ought to intervene to determine the terms of their collective agreement. On the threshold question of whether or not the Board should intervene in the collective bargaining process, the Board needs to know how each party views the state of their collective bargaining; what their estimate is of the likelihood of success if left to their own devices; what efforts they have made on their own to conclude an agreement; what the main stumbling blocks are; and how they would propose to resolve them without Board assistance. This information can be given to the Board through a witness called by each side or through representations made by their counsel. There need not be any great degree of formality to explaining either party's position on this threshold question. In addition, the Board will refer to the Board agent's report for an understanding of the efforts made to date by the parties, the items left outstanding, the complexity of the problem and the like. The Board may also refer to the proceedings that have occurred between the parties as part of its assessment of the threshold question.

[19] If the Board decides to intervene in the matter, the manner in which the Board asks the parties to address the outstanding issues is by indicating to the Board why the party does not accept the Board agent's recommendations. For instance, on the question of wages, a party may argue that the wages proposed by the Board agent exceed the wage package that is provided for similar employees under different collective agreements. The Board needs to be persuaded that the Board agent's report does not succeed in:

(1) replicating what the parties may have achieved in collective bargaining had they been successful; or

(2) presenting a fair and reasonable settlement in the context of the parties, the industry, the fact that the agreement is a first collective agreement and other similar considerations.

[20] Again, the manner of presenting such information to the Board generally would occur through the presentation of witnesses who can explain the parties' positions on the matters in dispute, and through arguments. We do not require formal proof of reference materials, for instance, other collective agreements, annual reports or the like. We would encourage the parties to deal with each item in dispute separately so that we may hear each party's position for instance on the first issue identified by the Board agent as remaining outstanding, then move to the second issue, until all issues are covered.

[21] In relation to the terms that may be imposed by the Board, the Board agent's report, while it is not binding on the Board, provides a neutral third party assessment of the two key themes of (1) what the parties would have arrived at in collective bargaining had they been successful (the "replication theory"); and (2) what is fair and reasonable in all the circumstances. On some occasions, the Board has been persuaded by parties to s. 26.5 applications that the Board agent has missed the mark and gone astray in their assessment of the particular situation. In those situations, the Board will impose different terms than those proposed by the Board agent.

[22] Where one party has agreed with the Board agent's recommendations, the Board will consider this factor as an indication that the Board agent has achieved a fair degree of success in replicating what the parties would have agreed to if they had been successful in collective bargaining. As a result, it is not necessary for the party who agrees with the Board agent's recommendations to explain why they do agree with the recommendation, although they may do so if they choose.

[23] We will also address the question of whether the Board agent may be called as a witness in the proceedings. This question was addressed in the *Madison Inn* case, *supra* where the Board noted that Board agents are not fulfilling an adjudicative function in performing the tasks assigned to them by the Board. In the course of providing assistance to the parties, Board agents perform a role that is

akin to conciliation. It is generally accepted and recognized by labour relations boards and legislatures that in order for conciliation to be successful, the parties must be assured that their communications with the conciliation officer will not be the subject of evidence in other proceedings. Board agents must attempt to find areas of compromise and to try various methods of moving the parties closer to an agreement. Their ability to perform this useful and important function would be impaired if they were required to give evidence relating to those efforts. For these reasons, the Board agent will not be required to testify in these proceedings.

[24] In summary, for the guidance of the parties, the Board will proceed to hear the matter as follows:

> (1) both parties will present evidence and/or argument on whether the Board ought to impose a first collective agreement. For convenience, we will direct the Union to proceed first with its position on this matter, followed by the Employer.
>
> (2) the Board will reserve its decision on point (1) above and will proceed to hear each party's evidence and/or arguments on the Board agent's recommendations and any other matter that they have raised in their responses to the Board agent's report. We will commence by hearing both parties' evidence and/or arguments on the first recommendation made by the Board agent. We will then proceed to the next recommendation until all Board agent recommendations are covered. Any additional matters may then be addressed by the parties. In this case, the Union has accepted the Board agent's recommendations. As a practical matter, then, the Employer will be asked to proceed first with its evidence and/or arguments as to why the Board agent's recommendations should not be accepted by the Board and the Union will be permitted to respond to the Employer's position.
>
> (3) the Board agent will not be called by either party as a witness in the proceedings.

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1975, Applicant v. TREATS AT THE UNIVERSITY OF SASKATCHEWAN, Respondent

LRB File No. 220-98; September 18, 2001
Vice-Chairperson, James Seibel; Members: Brenda Cuthbert and Gerry Caudle

For the Applicant: Jim Holmes
For the Respondent: Larry Seiferling, Q.C.

Collective agreement – First collective agreement – Parties unable to agree on monetary issues – After reviewing positions of parties, including employer's financial position, Board imposes terms of collective agreement with respect to issues upon which parties could not come to agreement.

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

REASONS FOR DECISION

Background

[1] James Seibel, Vice-Chairperson: Canadian Union of Public Employees, Local 1975 (the "Union") applied pursuant to s. 26.5 *of The Trade Union Act*, R.S.S., 1978, c. T-17 (the "*Act*") for assistance in achieving a first collective agreement with Treats at the University of Saskatchewan (the "Employer"). While the parties had made considerable progress towards an agreement, certain issues appeared intractable. For reasons reported at [2000] Sask. L.R.B.R. 301, the Board determined to intervene and impose terms of a collective agreement with respect to the matters concerning which the parties had been unable to agree. The Board noted in its decision that the Employer had failed to file a list of issues in dispute and its position concerning same as required by s. 26.5(5) of the *Act* and that its only response to the Union's wage proposal had been to say that there should be no change to the status quo. The Employer was ordered to file a list of issues in dispute and a statement of its position on those issues; the Union was directed to file an updated list of issues in dispute. The bulk of the issues in dispute are monetary and include: (1) wages, including increments, overtime, and unsocial hours of work; (2) holidays and compensation for working on a holiday; (3) vacations; (4) sick leave; (5) employee benefits; (6) rest breaks; (7) compassionate leave; and (8) duration of agreement.

[2] The Board heard the representations of the parties and received the evidence of the Employer's principal, Ron Cummings, and the written submissions of the parties. At the hearing of the matter, the Employer maintained its position that it was not prepared to increase any wages or benefits to employees, declaiming an inability to pay. This general position has been considered with respect to each of the items discussed below.

1. Wages, Increments, Premium for Unsocial Hours of Work, Signing Bonus and Term and Duration of Agreement

[3] Ron Cummings and his spouse operate a coffee, light snack and beverage business called Treats. It has two locations: one at the University, comprising a smaller coffee emporium on the upper level of Place Riel and the main University outlet and bakery on the lower level and a second outlet is located in a mall on 8th Street in Saskatoon. Only the University outlet is unionized. The 8th Street location provides a significant amount of product to the University location because of the latter's space limitations. The majority of the Employer's workforce at the University comprises students and part-time employees; employee turnover is relatively high; most employees are short-term – only two have been employed for more than three years. During the University academic year the Employer has five full-time employees and approximately thirteen part-time employees at the University locations, mostly students. While the operation is open approximately 90 to 100 hours a week during the academic term, all but approximately four employees are laid off for four months over the summer.

[4] At the time of hearing all the employees were paid the minimum wage of $6.00 per hour, except for the two longer-term employees who were paid $6.20 and $6.30 respectively.

Union's Position

[5] The Union proposed a retroactive wage increase to $12.00 per hour from January 1, 2000 and $12.24 from January 1, 2001. It stated that the rates were equivalent to a cafeteria worker working in Food Services at the University of Saskatchewan at the top of the range after two years; those workers are also entitled to fringe benefits.

[6] The Union filed evidence of wage rates, increments and other benefits in various food services operations at the University of Saskatchewan and the University of Regina. The wages ranged from the high for the cafeteria worker referred to above down to the $6.37 to $8.00 range for student waitpersons and servers at the University of Saskatchewan Students Union and Faculty Club. Its position on increments was that they could probably be left for later bargaining if the employees received a substantial wage increase, otherwise there should be an hours-of-service type of increment structure; no specific proposal was made in this regard.

[7] The Union proposes a two-year agreement from January 1, 2000 to December 31, 2001.

[8] The Union also proposed a signing bonus for each employee equivalent to the difference between the present wage and the wage determined by the Board in these proceedings times the hours worked by the employee between January 1 and June 30, 2000 times two.

[9] The Union originally proposed an "unsocial hours" shift premium of sixty cents an hour, but subsequently advised that the matter should be left to future bargaining.

[10] Mr. Holmes, the Union's representative, argued that the comparative information in other university food services operations demonstrates a higher overall level of wages than at Treats as the norm. He said that the 8th Street location financial information presented by Mr. Cummings in his evidence (summarized below) should be broken out of the University location information in determining the issues at hand. He said that the evidence of Mr. Cummings discloses that the Employer is a viable and profitable operation.

Employer's Position

[11] The Employer proposed that there be no wage increase or shift premium. Mr. Cummings testified at length regarding the Employer's financial position, some of which we decline to detail here in the interests of brevity and privacy for Mr. Cummings.

[12] Mr. Cummings testified that he acquired the Treats franchise and inventory in 1991 for a stated sum and remits a stated percentage of the gross to the franchisor for royalties and promotion. He has managed the business himself since 1995; his daughter runs the 8th Street store and her

partner runs the University location. He said he has not drawn a salary since he purchased the operation and has received no return on his investment; he and his spouse both work in the business. He said the business was profitable in its first year because it was the only food outlet in Place Riel and he was able to pay off some of the shareholders' loans. However, starting in 1992, competitive establishments arrived on the scene. In cross-examination Mr. Cummings agreed that the Employer had product exclusivity at Place Riel for cookies and muffins.

[13] Mr. Cummings produced combined unaudited earnings statements for both locations for the fiscal years 1996-97, 1997-98 and 1998-99. He testified that the business experienced a loss in 1996-97, a loss about half that much in 1997-98 and showed a small profit in 1998-99. He said he has had the business (not including the coffee emporium) for sale for some time hoping to recoup only his original investment. Mr. Cummings outlined the strategies, such as diversification of product, that he has used in order to strive to compete, but said that product price increases would not be possible.

[14] In cross-examination, Mr. Cummings described the rent structure at the University location: a fixed cost based on square footage plus a stated percentage of gross sales. The fixed cost was approximately 14 percent of the total rent for 1998-99. He described the operation's weekly wage costs during the academic year and over the summer slowdown. In cross-examination, Mr. Cummings agreed that as the operation's loss decreased and then turned to a profit over 1996 to 1999, the wage costs had been dropping. Also, the coffee emporium at the University was built and the 8th Street location renovated in 1996. He said the ratio of his wage costs to expenses was presently within what is considered normal in the industry. He agreed sales at the University location represented nearly three-quarters of total sales for both locations and that labour costs as a percentage of sales were one-third lower at the University than at 8th Street. The 1997-98 expenses include a bonus to Mrs. Cummings.

[15] Mr. Seiferling, Q.C., counsel for the Employer decried the Union's reliance on the university food services comparisons, maintaining that proper comparisons would be fast food operations in the private sector. He said that a primary factor to be considered was the Employer's ability to pay (looking at the Employer as a whole and not just at the University location) and any decision should be fair and reasonable and replicate what could be obtained in collective bargaining. Counsel maintained the Union had no economic leverage in the present situation and the Employer was

prepared to take a strike. The Employer made no proposal regarding the term or duration of an agreement.

Board Ruling

[16] As stated by the Board in *Saskatchewan Government Employees Union v. Namerind Housing Corporation Inc.* [1998] Sask. L.R.B.R. 606, LRB File No. 189-97, where the Board imposed a more complicated wage structure including benefits than pertains to the instant case, in determining an appropriate wage adjustment, the objective is to attempt to replicate the results that would be achieved through collective bargaining. Of course it is often difficult to attain this objective. While we agree that the Union has limited economic power in the present situation mostly because of the relatively short-term non-career nature of the employee workforce, we do not accept that the Employer is as willing or able to sustain a strike as it vociferously claimed. The effects and result of a strike of a business on a university campus would be highly unpredictable for both parties. In all of the circumstances we find that the replication of what would be achieved through collective bargaining in the matter of wages is something and not nothing as the Employer suggests. On the evidence presented, while we do not believe that the Union could obtain a wage increase of the magnitude it has requested, we do not accept either that the Employer cannot afford any increase in labour costs whatsoever or that a replication of what could be obtained in collective bargaining as concerns monetary issues would be nothing. However, we are convinced that such replication reasonably must reflect a quite modest increase. In making our decision we have considered the proposals and arguments of the parties and all of the evidence presented, including the Employer's fiscal condition and history, and the time that elapsed between certification and the first agreement assistance process.

[17] With respect to wages, we have determined to set only a dollar amount. Any increments system and the issue of shift differential can be the subject of future bargaining should the parties choose. The Union's proposal for a two year agreement with an effective date of January 1, 2000 seems reasonable – it has been prepared to forego a significant period of retroactivity despite the time that has elapsed since certification. The Board orders that there shall be a wage increase of $0.75 per hour in the first year and $0.50 per hour in the second year. The hourly rates to be paid retroactively shall be as follows:

- January 1, 2000 – $6.75 per hour
- January 2, 2001 – $7.25 per hour

2. Compassionate Leave

Union's Position

[18] The Union proposes paid leave for up to three regularly scheduled work days for bereavement or serious illness of persons of a certain degree of kinship, suggesting the following language:

> *15.5 – Compassionate Leave*
>
> *If required by the circumstances, up to three (3) regularly scheduled work days leave without loss of pay or benefits shall be granted by the Employer for bereavement or serious illness of a spouse, parent, child, brother, sister, mother-in-law, father-in-law, grandparent, grandchild, or other person who would ordinarily be considered a member of the employee's immediate family. When circumstances indicate that additional or other time is required for bereavement, compassionate, or for personal reasons, permission may be granted. Application will be made as soon as possible and confirmed in writing.*

[19] In its written submission, the Union suggested making compassionate leave deductible from sick leave.

Employer's Position

[20] The Employer's position is that compassionate leave should be as in *The Labour Standards Act*, R.S.S. 1978, c. L-1. Section 29.3 of that *Act* provides for up to five (5) days of unpaid leave for bereavement only for defined members of the group including spouse or immediate family.

Board Ruling

[21] We are mindful of the Employer's financial position. In the Board's opinion a replication of what could be achieved in collective bargaining on this issue is some small enhancement beyond the provisions of labour standards legislation. It is our opinion that a bereavement provision that

enhances the dignity of the employees at little or no cost to the Employer is beneficial to a healthy employment relationship

[22] The text of the Compassionate Leave provision shall be as follows:

> *15.5 – Compassionate Leave*
>
> *An employee shall be granted leave of up to five (5) working days without pay for bereavement or serious illness of a spouse, parent, grandparent, child, grandchild, brother or sister of an employee or an employee's spouse. A request by an employee for additional leave shall not be unreasonably denied by the Employer.*

3. Holidays

Union's Position

[23] The Union proposes that there be eleven (11) paid designated holidays per year. In addition to the nine (9) "public holidays" provided for by *The Labour Standards Act,* the Union proposes the addition of Boxing Day and one additional day each year to be designated by the Employer after consultation with the employees.

Employer's Position

[24] The Employer proposes that there be no paid holidays beyond that provided by *The Labour Standards Act.*

Board Ruling

[25] In our opinion, at least the addition of Boxing Day as a designated paid holiday is a replication of what could be achieved in collective bargaining. Any additional days may be left to future bargaining.

[26] The text of the Named Holidays provision shall be as follows:

> *16.1 – Named Holidays*
>
> *Designated holidays with pay shall be New Year's Day, Good Friday, Victoria Day, Canada Day, Saskatchewan Day, Labour Day, Thanksgiving Day, Remembrance Day, Christmas Day and Boxing Day.*

4. Working on a Named Holiday

Union's Position

[27] The Union had proposed payment of double time for any time that an employee works on a named holiday. In its written submission, however, the Union stated that as the business is closed on all public holidays, it would agree to payment at one and one-half times the employee's regular rate.

Employer's Position

[28] The Employer proposed that payment be as per *The Labour Standards Act* being essentially one and one-half times regular rate.

Board Ruling

[29] We agree that the provisions of *The Labour Standards Act* should govern the matter.

5. Vacations

Union's Position

[30] The Union originally proposed that vacation accumulate at one and one-quarter days for each month of service. It also proposed that where compassionate leave, sick leave and other leave of absence is granted during an employee's vacation, the vacation days "displaced" by the leave should be added to the vacation period or reinstated for later use. However, in its written submission, the Union advised that given the relatively short service of most employees, assuming a "reasonable" wage increase, it would leave improvements to vacation entitlements for future bargaining, and proposed that compassionate leave be deductible from sick leave.

Employer's Position

[31] The Employer proposed that vacations be as provided for by *The Labour Standards Act*.

Board Ruling

[32] We find that accumulation of annual vacation shall be as provided for by *The Labour Standards Act*.

6. Sick Leave

Union's Position

[33] The Union's original sick leave proposal provided for earning sick leave credits at one and one-quarter days for each month of service (15 days per year) with no cap on accumulation and payout of unused sick credits upon termination.

[34] In its written submission, the Union suggested that sick leave be earned and expressed in hours at a ratio of one hour of sick leave for each 17 hours worked. On a 2080-hour work year, this represents approximately 122 hours or 15.3 days.

[35] The Union's proposal also contained provisions for notification of illness to the Employer, proof of illness in excess of five working days, use of sick leave to care for an ill family member, and some other minor matters.

Employer's Proposal

[36] The Employer proposed that there be no sick leave benefits for employees.

Board Ruling

[37] The majority of the Employer's workforce comprises students and part-time employees; employee turnover is relatively high and most employees are short-term. Their only entitlement at present is probably to statutory employment insurance illness benefits. While the parties will probably want to revisit the issue of the development of this and other benefit plans in future

bargaining, it is our view that the Employer's employees should be entitled to accumulate one (1) sick leave credit for each month of service to a maximum of thirty-six (36) days. Because of the often less than full time nature of employment with the Employer, the accumulation of sick leave credits shall be at a rate of one hour for every 21.6 hours of work.

[38] There shall be provisions for notice of illness and proof of illness as provided for in articles 18.8 and 18.6 of the Union's proposal and for maintenance of sick leave credits during leave of absence and layoff. All deductions from sick leave credits shall be for actual time used. There shall be no provision for the use of sick leave to attend to illness in the family nor for payment for unused credits upon termination of employment.

7. Employee Benefits

[39] Although the Union had originally proposed that the Employer buy into the group insurance, pension and long-term disability plans presently maintained by the University of Saskatchewan and enroll its eligible employees in the plans, in its written submission it agreed that the issue of benefit plans (other than sick leave) be left to future bargaining.

[40] In light of the Union's position we decline to impose any provisions with respect to these other benefit plans.

8. Rest Breaks

Union's Position

[41] The Union proposes two fifteen-minute rest breaks or one half-hour break for employees working full days, and one fifteen-minute break for employees working half days.

Employer's Position

[42] The Employer provided no position on the issue.

Board Ruling

[43] We find that the rest breaks shall be as provided for in Article 24.3 of the Union's proposal.

9. Overtime

[44] The Union had originally made a proposal for overtime to be paid at double an employee's regular rate. The Employer proposed that it be paid as per labour standards legislation. However, in its written submission, the Union suggested that the matter of enhancements to overtime compensation could be left to future bargaining. Accordingly, we make no ruling with respect to the matter.

[45] The Union will prepare a final draft of the terms of the collective agreement that incorporates the terms already agreed to by the parties and attaching a wage schedule. 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.

[46] Ms. Cuthbert dissents from this decision and may issue written reasons in due course.

SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant v. LAFLECHE CO-OPERATIVE ASSOCIATION LIMITED, Respondent

LRB File No. 147-01; October 2, 2001
Vice-Chairperson, James Seibel; Members: Judy Bell and Gloria Cymbalisty

For the Applicant: Paul Guillet
For the Respondent: Tom Fortosky

Certification – Raid – Timeliness – Applicant union filed application for certification of bargaining unit for which a local of applicant union held existing Certification Order – Application not filed within open period – Union had not acted on existing Certification Order for many years – Time limits in s. 5(k) of *The Trade Union Act* are strictly applied – Board dismisses application for certification.

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

REASONS FOR DECISION

Background, Agreed Facts & Preliminary Objection

[1] James Seibel, Vice-Chairperson: Saskatchewan Joint Board, Retail Wholesale and Department Store Union ("SJBRWDSU") applied to be certified as the bargaining agent for an all-employee unit at Lafleche Co-operative Association Limited ("Lafleche Co-op") pursuant to ss. 5(a), (b) and (c) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*").

[2] By a Certification Order dated July 5, 1972 (see, LRB File No. 026-72) Retail, Wholesale and Department Store Union, Local No. 455 ("RWDSU Local 455") was designated as the bargaining agent for an all-employee unit at Lafleche Co-op. Sometime after 1979 SJBRWDSU took over responsibility for collective bargaining on behalf of the employees in the bargaining unit from RWDSU Local 455. No evidence was adduced, however, that RWDSU Local 455 had assigned its bargaining rights to SJBRWDSU pursuant to s. 39 of the *Act*.

[3] By a letter dated December 21, 1992, Mr. Guillet, a representative of SJBRWDSU, advised Lafleche Co-op that SJBRWDSU intended to cease to represent the employees in the bargaining unit at the end of the year. The letter reads in part as follows:

> *Please be advised that effective December 31, 1992 we will no longer be collecting Union dues, assessments, initiation fees, etc. from current or future employees of the Lafleche Co-operative Association Limited. The Certification Order will go dormant and the current Collective Bargaining Agreement as of January 31, 1993 will be null and void.*

The letter continued on to make it clear that the action was being taken at the behest of a majority of employees rather than unilaterally by the bargaining agent. The collective agreement referred to in the letter was for a term from February 1, 1992 to January 31, 1993. Neither SJBRWDSU nor RWDSU Local 455 represented or bargained on behalf of the employees in the bargaining unit after 1992. No application was made to rescind the Certification Order.

[4] Although RWDSU Local 455 still exists, Mr. Guillet, on behalf of SJBRWDSU requested that the application be dealt with as a new certification under ss. 5(a), (b) and (c) of the *Act* rather than as an amendment of the existing Certification Order to substitute SJBRWDSU as the bargaining agent or as a "revival" of the representation rights of RWDSU Local 455. Mr. Guillet explained that since 1979, for its own administrative reasons, SJBRWDSU, rather than individual local unions, has made all applications for certification, although the conduct of bargaining and day-to-day representation might be assigned to the appropriate local union; but he did not aver that RWDSU Local 455 had assigned its rights to SJBRWDSU pursuant to s. 39 of the *Act*. The application also proposes a different bargaining unit description than the existing Certification Order or the last collective agreement.

[5] Mr. Fortosky, representing Lafleche Co-op, did not object to the request that the application be treated as an application for a new certification, but raised an objection that the application, which, if allowed, in essence, would result in the rescission or amendment of the existing Certification Order, is out of time as it was not made during the "open period" specified in s. 5(k)(ii) of the *Act*.

[6] Section 5(k) of the *Act* provides as follows:

> *5 The board may make orders:*
>
> *(k) rescinding or amending an order or decision of the board made under clause (a), (b) or (c) where:*
>
> *(i) there is a collective bargaining agreement in existence and an application is made to the board to rescind or amend the order or decision during a period of not less than 30 days or more than 60 days before the anniversary of the effective date of the agreement; or*
>
> *(ii) there is no agreement and an application is made to the board to rescind or amend the order or decision during a period of not less than 30 days or more than 60 days before the anniversary date of the order to be rescinded or amended;*
>
> *notwithstanding a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;*

The next open period in this case would be not less than 30 days or more than 60 days before July 5, 2002.

The applicant has filed evidence of support for the application of a majority of the employees in the proposed bargaining unit.

Arguments on Preliminary Objection

[7] Mr. Fortosky, on behalf of Lafleche Co-op argued that, notwithstanding that RWDSU Local 455 had "abandoned" its representation of the employees at Lafleche Co-op, there is an existing Certification Order and the present application for a new Certification Order by SJBRWDSU is, in essence, a "raid" application which must be made during the open period specified in s. 5(k) of the *Act*. Mr. Fortosky asserted that the open period is mandatory and because the present application was not made during the open period it should be dismissed.

[8] In support of his argument, Mr. Fortosky relied upon the recent decision of the Board in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. CAA Saskatchewan Emergency Road Service*, [2000] Sask. L.R.B.R. 476, LRB File No. 153-00.

[9] Mr. Guillet, on behalf of SJBRWDSU, said that the application was made in the form of a new application for certification because SJBRWDSU rather than its locals has administered the locals' bargaining rights and applied for all new certifications for more than the past 20 years. He pointed out that if the present application must be brought only during the open period established with reference to the anniversary of the Certification Order, the employees will have to wait some 9 months to apply for an order to replace RWDSU Local 455 and continue representation. Mr. Guillet did not directly address the issues raised in *CAA Saskatchewan, supra*, in the context of the present application.

Analysis and Decision

[10] In *CAA Saskatchewan, supra*, a Certification Order had been issued to one union in 1978, but a collective agreement was never reached. Following a strike in 1979, the certified union never exercised its bargaining rights further. In 2000, a second union applied to be certified for a group of employees that was part of the bargaining unit named in the Certification Order granted to the first union. The certified union did not object to the application, but the employer raised an objection that the application by the second union was out of time as it was not made during the open period specified in s. 5(k)(ii) of the *Act*. The Board agreed and dismissed the application, stating at 478-79 as follows:

> *[8] The Board finds that the application for certification was filed outside the time limits set in s. 5(k)(ii) of the Act and must be dismissed. There may be good grounds for arguing in this case that the Teamsters' Union abandoned its Certification Order. In our view, however, the doctrine of abandonment, if it were found, does not relieve the Union from the mandatory provisions contained in s. 5(k)(ii). The doctrine of abandonment simply prevents one party from relying on its strict legal rights in situations where it is clear to the Board that the party in question abandoned its legal rights. It does not, in our view, operate to rescind a Certification Order viz-a-viz third parties. It must be remembered that the principle of "abandonment" is not set out in any statutory provisions contained in the Act and it cannot be extended through creative interpretations to overcome mandatory statutory provisions, such as are contained in s. 5(k)(ii).*
>
> *[9] Although in the present case, it may seem extreme to require employees to apply in the open period of a Certification Order that has not been acted on for some 22 years, those employees had an opportunity each year since 1978 to apply to the Board to rescind the Certification Order issued to the Teamsters' Union, or to file within the open period set out in s. 5(k) of the Act to join a new trade union. These options remain open to the employees.*

[11] In that case, the Board also rejected the argument that it could rely upon ss. 5(j) and 42 of the *Act* to use its discretion to amend the Certification Order to substitute the second union for the first. Sections 5(j) and 42 provide as follows:

> *5 The Board may make orders:*
>
> *(j) amending an order of the board if:*
>
> *(i) the employer and the trade union agree to the amendment; or*
>
> *(ii) in the opinion of the board, the amendment is necessary;*
>
> *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 regulations made under this Act or with any decision in respect of any matter before the board.*

[12] The Board stated as follows, at 479:

> *[10] The Board also considered whether it could or should rely on ss. 5(j) and s. 42 of the Act to use its discretion to amend the Teamsters' Union Order by substituting the Union. In 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, the Board explained the rationale for strict adherence to the time limits set out in s. 5(k) as follows at 138 and 139:*
>
> > *The rationale for open periods is, in our view, to provide some predictability and order in the context of the changes, which are signalled by the events to which they apply. The open period established under Section 33(4), for example, permits trade unions and employers to prepare for the stage of bargaining which will occur following the expiry date of a collective agreement. Trade unions, employers and individual employees are made aware, by the choice of other open periods, of their opportunities to seek changes in the Certification Order or other orders issued by the Board. The Board has expressed the view in the past that it is not only beyond its jurisdiction to consider applications which are not filed during the relevant open period, but that it would produce confusion and inequity to do so.*

[13] The *Remai Investment* decision referred to in the quote above concerned an application to rescind certain existing Certification Orders held by the union for two bargaining units and replace them with an order which would amalgamate them as a single bargaining unit; the application had been made in the open period for one of the existing orders but not the other. Although the Board dismissed the application as untimely, the Board intimated, at 139 of that decision, that its insistence upon adherence to the requirement to file the application during the open period was predicated upon the fact that "the question of merger of bargaining units has been viewed by the Board . . . as a significant and substantive question, not as a mere administrative or procedural matter."

[14] Without commenting as to whether such an application would be allowed in the present circumstances, no request was made to amend the application to pray, in the alternative, that we consider amending the existing Certification Order pursuant to s. 5(j) of the *Act* to substitute SJBRWDSU for RWSDSU Local 455 as the bargaining agent. We note that there is some authority for the Board to consider an application made under s. 5(j). In *Canadian Union of Public Employees, Local 1788 v. John M. Cuelenaere Library Board*, [1996] Sask. L.R.B.R. 732, LRB File No. 052-96, after referring to the legislative amendment made to the section in 1994 and to the fact that the *Remai Investments* case, *supra*, was decided before the amendment was made, the Board stated as follows, at 741-42:

> *In a decision in Canadian Union of Public Employees, Local 3287 v. University of Saskatchewan, [1995] 3rd Quarter Sask. Labour Rep. 195, LRB File No. 139-95, the Board resisted the argument that the amendment of s. 5(j) had the effect of eliminating completely the strait-jacket imposed by the open periods in s. 5(k). The Board observed, at 199:*
>
> > *We have concluded that the amendment to s. 5(j) does not have the overall effect of nullifying the requirements set out in s. 5(k). In our view, the purpose of the amendment is to expand the opportunities for the Board, on our own initiative, to determine that a situation is so anomalous or constitutes such a threat to viable collective bargaining that it requires some amplification or alteration in an earlier Order. It does not have the effect of relieving the parties to an application of the obligation to adhere to the requirements respecting open periods. The Union in this case proceeded correctly by filing the application during the relevant open period, and the effect of s. 5(j) in these circumstances is to allow the Board more flexibility in considering options where there is something anomalous about the consequences of the application of s. 5(k).*

> *Section 5(j) places in the hands of the Board a discretion to amend or rescind an Order in other circumstances than those where it is considered necessary to clarify or correct the Order. It permits the Board to contemplate such amendment or rescission for a range of reasons which could include substantive considerations of policy, as well as the technical issues which were the basis of such amendment or rescission before the amendment to s. 5(j). In our view, one of the implications of this is that the restrictions on considering applications which are filed outside the open period in s. 5(k) are no longer of a jurisdictional nature; the restrictions which remain are those imposed by the Board in the light of whatever factors we think relevant.*
>
> *As we indicated in the University of Saskatchewan decision, supra, we do not think the amendment of s. 5(j) constituted a signal for the wholesale abandonment of the open periods set out in s. 5(k). As a general rule, the requirement that parties who wish to apply for amendment or rescission of Board Orders concerning the scope of bargaining units and the representation of employees by trade unions serves a useful purpose in terms of ensuring orderliness and predictability. The temporal benchmarks provided by the open periods should continue to guide the parties in the vast majority of cases. It is only where the application of the ordinary requirements creates a significant difficulty for the parties or an obstacle to sound collective bargaining that the Board should consider exercising our discretion under s. 5(j).*
>
> (Emphasis added.)

[15] However, in the present case, no evidence was adduced to support an exercise of discretion pursuant to s. 5(j) of the *Act* on the grounds described in *John M. Cuelenaere, supra*, or any other basis, except to say that the employees would otherwise have to wait some 9 months to apply to rescind or amend the existing Order. The Board has often commented that the predictability of the open periods regarding rescission of Certification Orders and the replacement of bargaining agents adds to the stability of the labour relations between certified unions and employers and the Board has tended to strictly adhere to and apply the provisions of the *Act* that provide for the time limits.

[16] In the present case, the application was not made during the open period whether it be treated as a new certification (i.e., as in *CAA Saskatchewan, supra*, to replace one independent bargaining agent with another) or as an amendment to the existing Order. While it might be arguable that SJBRWDSU is either one and the same as RWDSU Local 455, or, if bargaining rights have been assigned under s. 39 of the *Act* by RWDSU Local 455 to SJBRWDSU (indeed, the former was recognized by Lafleche Co-op as the bargaining agent when last they communicated in 1992), neither was evidence adduced nor argument advanced that such is the case. In any event, it is not clear why RWDSU Local 455 (or SJBRWDSU) did not simply serve Lafleche Co-op with a notice to bargain, and, if Lafleche Co-op refused to bargain, file an unfair labour practice application. There are no

provisions in the *Act* dealing with either of the concepts of "abandonment" or "revival" of bargaining rights, but, as a practical fact, if majority support were demonstrated, it is not unlikely that the Board would recognize the representation rights of the bargaining agent as continuing. Pursuant to s. 39 of the *Act,* if bargaining rights have been assigned, no order of the Board is necessary to substitute SJBRWDSU in the Order for the purposes of collective bargaining. An application to amend the Certification Order to formally substitute SJBRWDSU as the bargaining agent and to amend the bargaining unit description could be made during the subsequent open period, or sooner by agreement of the parties or with appropriate evidence in support pursuant to s. 5(j).

[17] The applicant did not ask that the application be treated as an application for amendment pursuant to s. 5(j) of the *Act* and no evidence was adduced to support such an application in any event. In the circumstances, the policy of the Board to strictly apply the time limits in s. 5(k) of the *Act* to applications to replace a trade union should apply. The application is dismissed.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 2034, Applicant v. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 2067, Respondent

LRB File No. 080-01; October 3, 2001
Vice-Chairperson, Walter Matkowski; Members: Gloria Cymbalisty and Leo Lancaster

For the Applicant: Angela Zborosky
For the Respondent: Ted Koskie

Certification – Local union files application for certification relating to employees of another local of same union – Both local unions subject to structural domination by international union – Relationship between two local unions as union and employer unsound from labour relations point of view – Board dismisses application for certification.

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

REASONS FOR DECISION

Background

[1] Walter Matkowski, Vice-Chairperson: International Brotherhood of Electrical Workers, Local 2034 (the "Union") applied to the Board for certification of all clerical and administrative staff employed by International Brotherhood of Electrical Workers, Local 2067 (the "Employer").

[2] The Employer did not oppose the application of the Union.

[3] The Board determined that a hearing was necessary on the issue of whether or not the Union is a "company dominated organization" within the meaning of s. 2(e) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*").

Relevant Facts

[4] Both the Union and the Employer are governed by the same International Brotherhood of Electrical Workers Constitution (the "Constitution"), a copy which was filed as an exhibit. The portions of the Constitution which are relevant to this case are as follows:

> *Art. 15*
>
> *Sec. 6. Local Union's are empowered to make their own bylaws and rules, but these shall in no way conflict with this Constitution. Where any doubt appears, this Constitution shall be supreme. All bylaws, amendments and rules, all agreements, jurisdiction, etc., of any kind or nature, shall be submitted in duplicate form to the International President for approval. In the case of agreements, however, additional copies are required by the International Office. Therefore, six (6) signed copies of construction trades agreements or amendments and five (5) signed copies of all other agreements or amendments shall be submitted to the International President. No Local Union shall put into effect any bylaw, amendment, rule or agreement of any kind without first securing such approval. All these shall be null and void without International President approval. The International President has the right to correct any bylaws, amendments, rules or agreements to conform to this Constitution and the policies of the I.B.E.W.*
>
> *Approval of Local Union collective bargaining agreements by the International President does not make the International a party to such agreements unless the International President specifically states in writing that the International is a party to any such agreement.*
>
> *Sec. 7. This Constitution and the rules herein shall be considered a part of all Local Union bylaws and shall be absolutely binding on each and every Local Union member.*
>
> *Sec. 8. All Local Union bylaws or rules in conflict with this Constitution and the rules herein are null and void.*
>
> *Sec. 9. Except when decided otherwise by the International President, agreements between the Local Union's and employers must contain a condition that the Local Union is part of the I.B.E.W. and that a violation or annulment of agreement with any Local Union annuls all agreements entered into with the same employer, corporation or firm and any other Local Union of the I.B.E.W.*
>
> . . .
>
> *Sec. 12. No Local Union shall cause or allow a stoppage of work in any controversy of a general nature before obtaining consent of the International President. The International President, or his representative, has the power at any time to enter any situation or controversy involving a Local Union or any of its members, and the decision of the International President, direct or through his representative, shall be accepted by the Local Union and is officers, subject to appeal to the International Executive Council and International Convention.*

> . . .
> *Sec. 18. No Local Union shall send out, or approve the sending out of, financial appeals of any kind without first having consent of the International President. No Local Union shall recognize or pass upon any financial appeals, etc., it may receive without such appeals having received approval of the International President.*

[5] Ron McLean ("McLean"), the business manager of the Union testified before the Board. McLean testified that the Union and the Employer have had a voluntary recognition arrangement from approximately 1992 to the present. McLean confirmed that the Union and the Employer have entered into three different contracts with the last contract set to expire on July 31, 2001. McLean testified that the relationship between the Union and the Employer is a normal one, with grievances filed to demonstrate this fact.

[6] McLean indicated that the last contract between the Union and the Employer was obtained through normal negotiations. McLean provided that the Union must notify the International Union President of any contracts entered into and that theoretically, the International Union President could say no to a proposed contract, even after it has been executed.

[7] McLean also testified that the Union would need the International Union's sanction in order to implement strike action. McLean indicated that he had contacted the International Union to advise it of the possible situation where the Union, being governed by the International Union, could seek the International Union's sanction for a strike against the Employer, also a member of the International Union. McLean provided that he had received some level of assurance that the International Union would authorize a strike. However, the International Union suggested that McLean look at another way to resolve the dispute, such as mediation, conciliation or any other form of alternate dispute resolution. McLean also provided that he could seek the assistance of an International Union representative if negotiations became difficult with the Employer.

[8] McLean testified that the Union gets no financial support from the International Union. The International Union does however, through an International Union representative, provide educational services and serves in an advisory, leadership type of role. The International Union does not deal with grievances of a local Union.

[9] McLean testified that the International Union President must approve all bylaws and amendments of the Union and confirmed that nothing must be in conflict with the Constitution.

[10] McLean provided that each local Union is autonomous. McLean confirmed that no money flows between the Union and the Employer. McLean did testify that the Union and the Employer have a fraternal relationship as both have a large membership in the power utility area and therefore they discuss issues which are relevant to both locals.

[11] Gord Gunoff ("Gunoff"), the business manager of the Employer was examined on the reply which he filed on behalf of the Employer. Gunoff testified that the International Union is not involved in contract negotiations between the Employer and the Union, even though the negotiated contract must be sent to the International Union for its approval. Gunoff indicated that the International Union doesn't hire or fire the employees of the Employer.

[12] Gunoff provided that the clerical staff need a union and that he didn't care which union it was.

[13] The evidence of Gunoff and McLean confirmed that one of the candidates running for the business manager position at the last elections of the Employer wanted to fire the support staff of the Employer. As such, Gunoff testified that the support staff of the Employer needed some protection. It is for this reason that Gunoff indicated that he was concerned that the Union was not certified.

Relevant Statutory Provisions

[14] Section 2(e) of the *Act* provides as follows:

> *2* *In this Act:*
>
> ***(e) "company dominated organization" means a labour organization, the formation or administration of which an employer or employer's agent has dominated or interfered with or to which an employer or employer's agent has contributed financial or other support, except as permitted by this Act;***

Analysis

[15] In the decision *Nipawin District Staff Nurses' Association v. Nipawin Union Hospital and Service Employees' Local Union No. 333* (1973), 3 Dec. Sask. L.R.B. 274, the Board dealt with the issue of company dominated organization at 283 to 284:

The Board is of the view that organization of professional persons, including nurses, in order that they might be in a position to bargain collectively is desirable. Under The Trade Union Act, R.S.S. 1965, Chapter 287 and amendments thereto many professional persons could be excluded from the benefits of The Trade Union Act. This, however, is no longer the case as all exclusions in this respect were removed by the new Trade Union Act, S.S. 1972, Chapter 137, which came into force on August 1, 1972.

It has been held, however, that it is not enough to deck an organization with the outward trappings of unionism for it to meet the requirements of The Trade Union Act. The organization applying to the Labour Relations Board must be a genuinely independent body in all respects which serve the purpose of employees who have had conferred upon them the right and the freedom to organize. The very core of unionism is its capacity to act for workers without interference of any kind from employers or their agents. Freedom of workers' organization, and its functions, are integral parts of democracy.

It is with extreme regret that the Board feels that it cannot on the facts in evidence in this application certify the applicant.

The Board concurs with the view expressed in a decision of this Board on October 2, 1953 (United Packinghouse Workers of America Local 518 and C.T. Gooding) wherein it was held that:

> *"it is the duty of this Board to prevent organizations dominated by employers... playing the role of representatives of the employees concerned for the purpose of bargaining collectively with their employers."*

APPLICANT UNDER THE DOMINATION OF THE SRNA COUNCIL

The applicant is clearly, at this time, under the domination of the SRNA Council. In the April 1971 issue of the New Bulletin published by the SRNA, Miss Ann Sutherland, then SRNA Employment Relations Officer stated:

> *"the SRNA council is almost always made up of management nurses so that approval by the council would in effect be control of the bargaining process by management. However, a more formal relationship of the staff nurses' association within SRNA will need to be established."*

The Board concurs, on the evidence presented to it in this application, with the view expressed by Miss Sutherland in the indicated article and feels that an organization under the domination, or control, of the SRNA Council would, or could, in effect be control of the bargaining process by management or management personnel.

Under these circumstances the fitness of the applicant to represent employees for the purpose of collective bargaining is impaired. It has been stated:

> *"Statutory policy is clear that unions should be free of employer influence or domination. The lines separating the policies can present neat cases."*
>
> *(see Carrothers "Collective Bargaining Law in Canada" 1965, page 207)*
>
> *APPLICANT IS A COMPANY DOMINATED ORGANIZATION*
>
> *The present application may well be a "neat" case, but nevertheless on a full consideration of all the evidence presented, the Board feels it has no alternative but to hold that the applicant is a company dominated organization and is accordingly not a trade union within the meaning of the Act.*
>
> *APPLICANT DISMISSED*
>
> *The Board accordingly feels obliged to dismiss the application herein.*
>
> *The Board feels, however, that it should indicate that the dismissal of the present application is made without prejudice to the right of the employees to bring a further application for certification but points out that the applicant should first ensure that it is an organization which is not under the domination or control of the SRNA Council in any manner.*

[16] In the *Nipawin Union Hospital* case, *supra*, the fact that the applicant trade union was "under the domination of the SRNA council," which was composed of managerial nurses, was sufficient to have the applicant declared to be a "company dominated organization."

[17] While this case does not fit squarely into the fact patterns as set in previously reported Board decisions dealing with "company-dominated organization" (see for example: *RWDSU and Canadian Pioneer Management and Canadian Pioneer Employees' Union*, [1978] May Sask. Labour Rep. 37, LRB File No. 661-77), the extent of the interrelationship between the International Union and Locals 2034 and 2067 (in theory, the Union and the Employer) is troubling to the Board. When the structural control over the Union and the Employer by the International Union is considered, this Board has no hesitation in exercising its discretion, pursuant to s. 5 of the *Act*, to not certify the Union as the bargaining agent for the clerical employees of the Employer.

[18] To be clear, in this case the connection between the Union and the Employer arises given that they are members of the same International Union. The Constitution requires the International President to approve collective agreements entered into by both locals, acting as representative of the

employees and acting as employer of the employees. This relationship between the Union and the Employer is fundamentally and structurally unsound from a labour relations point of view.

[19] As stated, in these unique circumstances, pursuant to s. 5 of the *Act*, the Board will not certify the Union as the bargaining agent for clerical employees of the Employer as the structural domination by the International over both the Employer and the Union is overwhelming.

[20] For these reasons, the application is dismissed.

CANADIAN UNION OF PUBLIC EMPLOYEES, Applicant v. SASKATCHEWAN ASSOCIATION OF HEALTH ORGANIZATIONS and SOUTH EAST HEALTH DISTRICT, Respondents

LRB File No. 281-00; October 11, 2001
Vice-Chairperson, Walter Matkowski; Members: Bob Todd and Judy Bell

For the Applicant:	Harold Johnson
For the Respondent, Saskatchewan Association of Health Organizations:	No one appearing
For the Respondent, South East Health District:	Larry LeBlanc, Q.C. and Jodi McNaughton

Employer – Representative employers' organization – Union brings unfair labour practice application against representative employers' organization but does not lead evidence establishing that representative employers' organization has power to interpret and administer collective agreement, to settle disputes arising thereunder or to bind actual employer to one interpretation of collective agreement – Board dismisses application.

***The Trade Union Act*, ss. 11(1)(b), 11(1)(c) and 11(1)(f).**
***The Health Labour Relations Reorganization Act*, s. 6.**
***The Health Labour Relations Reorganization (Commissioner) Regulations*, s. 12.**

REASONS FOR DECISION

Background

[1] Walter Matkowski, Vice-Chairperson: The Canadian Union of Public Employees (the "Union") applied to the Board alleging an unfair labour practice against Saskatchewan Association of Health Organizations ("SAHO") and South East Health District (the "Employer") pursuant to ss. 11(1)(b), (c) and (f) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*").

[2] The Union alleges that SAHO and the Employer have refused to recognize ambulance workers in the communities of Lampman and Stoughton as employees of the Employer and that SAHO and the Employer "have refused to implement an agreement on behalf of ambulance workers reached by SAHO and the Union dated October 10, 2000."

[3] No one appeared on behalf of SAHO. To ensure no error was made by representatives of SAHO as to the date of this hearing, the Board asked counsel to contact representatives of SAHO during an adjournment. Following a telephone conversation with a representative of SAHO, counsel for

the Employer advised the Board that this representative informed him that SAHO was aware of the hearing and chose not to attend or respond.

[4] Counsel for the Union, following the evidence in chief by the Union's only witness, withdrew the unfair labour practice charge against the Employer, maintaining the Union's right to re-file the charge against the Employer or to bring an application before the Board pursuant to s. 5 of the *Act*.

Relevant Facts

[5] The Union confirms that SAHO is the bargaining agent of the Employer and is not the Employer for the purposes of this application. The Certification Order of the Board dated March 14, 1997 lists the South East Health District as the Employer.

[6] In the applicable collective agreement (the "collective agreement") filed before the Board by the Union, Article 2 recognizes SAHO "as the representative Employer's Organization and sole bargaining agent." *The Health Labour Relations Reorganization (Commissioner) Regulations*, R.R.S., c. H-0.03, Reg. 1. (the "Dorsey Regulations"), s. 12, provides:

> *Representative employers' organization*
>
> *12(1) The Saskatchewan Health Care Association, commonly known as the Saskatchewan Association of Health Organizations, is designated as the representative employers' organization for all district health boards, all health sector employers listed in Table A or Table B and all other employers whose employees are added to a multi-employer appropriate unit.*
>
> *(2) Every employer mentioned in sub section (1) is to be a member of the representative employers' organization for the purposes of bargaining collectively.*

[7] Section 6(1)(b) of *The Health Relations Reorganization Act*, S.S. 1996, c. H-0.03 (the "*Health Act*") provides:

> *6(1) In this section:*
>
> > *(b) "representative employers' organization" means an employers' organization that is the exclusive agent authorized to bargain collectively on behalf of all or a group of health sector employers.*

[8] The collective agreement also includes a letter of understanding between SAHO and the Union in regard to ambulance employees dated May 6, 1999 which provides:

> *LETTER OF UNDERSTANDING*
> *BETWEEN*
> *SASKATCHEWAN ASSOCIATION OF HEALTH ORGANIZATIONS*
> *AND*
> *THE CANADIAN UNION OF PUBLIC EMPLOYEES*
>
> *Re: Ambulance Employees*
>
> *SAHO/CUPE will undertake a comprehensive study of all existing conditions within the ambulance industry in the SAHO/CUPE jurisdiction with the intent of identifying any outstanding issues and rolling them into the collective agreement.*
>
> *The parties hereto have affixed their signature this 6th day of May, A.D. 1999.*
>
> *"SIGNED ON BEHALF OF SASKATCHEWAN HEALTH ORGANIZATIONS"*
>
> *"SIGNED ON BEHALF OF CANADIAN UNION OF PUBLIC EMPLOYEES"*

[9] An additional letter of understanding dated October 10, 2000 (the disputed letter of understanding) was arrived at between SAHO and the Union in regard to ambulance employees. The disputed letter of understanding provides that the terms of the CUPE/SAHO collective agreement covering the term April 1, 1998 – March 31, 2001 shall apply to ambulance employees, subject to certain exceptions. There is no reference to "volunteers" in the disputed letter of understanding.

[10] Stephen Foley ("Foley"), a Union representative, testified on behalf of the Union. Foley testified that the Employer's position in regard to the ambulance personnel at Lampman and Stoughton was that these people were volunteers.

[11] The Employer's reply filed before the Board confirms that one of the Employer's legal positions was that "the volunteers who provide ambulance – related services in the communities of Stoughton and Lampman are not employees within the meaning of the *Act*."

[12] In its unfair labour practice application to the Board, the Union included a letter from Glenn Hilton ("Hilton"), Director, Human Resource Services, SAHO, to Mr. Gerry Hildebrand, Chief Executive Officer of the Employer, which provided:

> *Dear Gerry:*
>
> *Re: CUPE Letter of Understanding – Ambulance Employees*
>
> *In response to your October 18, 2000 email, SAHO is aware of the concerns raised by the South East Health District regarding the CUPE/SAHO Letter of Understanding regarding ambulance employees. The provincial collective agreement commits the parties to undertaking a comprehensive study and rolling employees into the collective agreement. Due to that commitment, we could not wait for the outcome of the provincial study you refer to in your email.*
>
> *Prior to negotiating the letter of understanding, the SAHO committee, through Reg Padbury, did conduct a comprehensive study of existing conditions for CUPE ambulance employees in the province. Knowing that extra mandate dollars were not available, SAHO obtained an "Employer mandate" to negotiate the terms that were ultimately agreed to. South East Health District participated in those discussions.*
>
> *SAHO is aware that the South East Health District and CUPE are not in agreement as to whether ambulance workers in Stoughton and Lampman are CUPE employees or volunteers. Until the employer agrees, or the Labour Relations Board directs, the letter of understanding does not apply to those workers because they are not employees.*
>
> *I trust this responds to your concerns.*
>
> (emphasis added)

[13] Foley testified that, at some unknown date, Union officials including himself met with SAHO representatives and Hilton. At this meeting, the unfair labour practice application dated November 7, 2000 was discussed. Foley provided that, at this meeting, Hilton informed the Union that SAHO was not supporting the Employer in its assertion that the ambulance workers at Lampman and Stoughton were volunteers and that SAHO would "tell the Employer this."

Statutory Provisions:

[14] The relevant provisions of the *Act* are as follows:

> *11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:*

> *(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;*
>
> . . .
>
> *(f) to require as a condition of employment that any person shall abstain from joining or assisting or being active in any trade union or from exercising any right provided by this Act, except as permitted by this Act;*

Analysis

[15] During argument, counsel for the Union expressed the Union's frustration at arriving at an understanding or agreement with SAHO, the bargaining agent for the Employer, and having the Employer not abide by this understanding or agreement. The Union referred to the Employer in this case during argument as a "maverick employer."

[16] Counsel for the Union also argued that "the Union wants SAHO to enforce the terms of the collective agreement and/or any letters of understanding."

[17] The critical issue for the Board to consider is SAHO's role in negotiating and enforcing the terms of the collective agreement reached between SAHO and the Union in regard to the Lampman and Stoughton ambulance workers. If SAHO is empowered to enforce the terms of the collective agreement, the Union's case, on the face of it, appears to have some merit.

[18] SAHO's role in regard to negotiating the terms of the disputed letter of understanding with respect to ambulance workers is clear. The *Health Act,* the Dorsey Regulations and the terms of the collective agreement recognize SAHO as the representative employers' organization and sole

bargaining agent. As such, SAHO was empowered to enter into the disputed letter of understanding *vis a vis* ambulance workers with the Union.

[19] What is not clear from the evidence is SAHO's role in enforcing and administering the collective agreement. In order to make a finding that SAHO is responsible for the interpretation and administration of the collective agreement, we would need evidence similar to that presented to the British Columbia Labour Relations Board in two decisions dealing with the Health Employers Association of British Columbia ("HEABC"), the British Columbia equivalent of SAHO.

[20] In *Health Employers Association of British Columbia Central Vancouver Island Health Region (West Coast General Hospital) and British Columbia Nurses' Union*, [2001] B.C.L.R.B.D. No. 188, the British Columbia Board concluded at 3:

> *II. THE ROLE OF THE HEABC*
>
> *4 The HEABC was created pursuant to the Public Sector Employers Act, S.B.C. 1993, c. 65 ("PSEA") (now R.S.B.C. 1996, c. 384) to be the voice of employer members in matters relating to labour relations. It is their accredited bargaining agent and, as such, has exclusive power to bargain on their behalf and to bind them by a collective agreement. It is responsible for coordinating human resource and labour relations policies and practices amongst its members. Under its by-laws, it is sole and exclusive agent of its members in matters relating to the interpretation and administration of collective agreements entered into on their behalf and is authorized to negotiate, conclude and settle any dispute arising out of such a grievance: see Rose Manor, BCLRB No. B21/96, and majority Award, at p. 25. It was responsible for the negotiation of a collective agreement which covers the single province-wide unit of nurses; see Grouseview Care Home Inc., BCLRB No. B403/97.*

[21] In *Rose Manor and Canadian Red Cross Society and Health Employers Association of British Columbia v. Hospital Employees' Union and British Columbia Nurses' Union and Health Sciences Association*, [1996] B.C.L.R.B.D. No. 21, the British Columbia Labour Relations Board reviewed the statutory provisions relating to HEABC at 5 and 6:

> *D. Purposes of HEABC*
>
> *19 The general purposes of employer associations under the PSEA, including HEABC, are enumerated in Section 6 as follows:*
>
> > *6.(2) The purposes of an employers' association are to coordinate the following with respect to a sector:*

> *(a) compensation for employees who are not subject to collective agreements;*
> *(b) benefit administration;*
> *(c) human resource practices;*
> *(d) collective bargaining objectives.*
>
> *(3) In addition, it is a purpose of an employers' association*
>
> *(a) to foster consultation between the association and representatives of employees in that sector, and*
> *(b) to assist the council in carrying out any objectives and strategic directions established by the council for the employers' association.*

20 Also, in the broader context of the purposes of the PSEA as set out in Section 2, HEABC is generally obligated to coordinate human resource and labour relations policies and practices amongst its members. These general purposes are reflected Section 2 of the HEABC Constitution.

21 With respect to collective bargaining, HEABC's role is, at a minimum, to coordinate collective bargaining objectives, human resource practices and benefit administration amongst its members. These objectives are also reflected in the HEABC Constitution, Section 2. However, pursuant to Section 7(3) and Section 10 of the PSEA, the role of an employers' association in the collective bargaining sphere may be significantly expanded. These sections provide:

> *7.(3) An employers' association may bargain collectively on behalf of its members if authorized to do so under section 43 of the Labour Relations Code, section 11 of this Act or any other enactment.*
>
> *10.(2) In addition to its other purposes under this Act, an employers' association that is accredited under the Code has the purpose of acting as bargaining agent for the members of the employers' association that are named in the accreditation.*

22 This too, is reflected in the HEABC Constitution, Section 2(f), (h) and (j). The Bylaws of HEABC make it clear, in Part 15, that each Member Organization, whether Deemed or Applicant, appoints HEABC as its sole and exclusive bargaining agent. The Bylaws state:

> *15.1 Each Member Organization hereby appoints the Society as its sole and exclusive agent:*
>
> *(a) to negotiate and, if ratified by the Society pursuant to bylaw 15.9, to conclude and execute all collective agreements involving any union which is*

> *the certified bargaining agent for any employee of the Member Organization;*
> *(b) to interpret and administer all such collective agreements; and*
> *(c) to negotiate, conclude and execute the settlement of any dispute arising out of any such collective agreement or the negotiation, interpretation, administration or any alleged violation thereof.*

[22] In British Columbia, as a result of the statutory and bylaw provisions, HEABC has power to act as the bargaining agent for each member organization, negotiate and ratify collective agreements, interpret and administer all such collective agreements and to negotiate and settle any disputes arising out of any such collective agreements.

[23] In *Rose Manor, supra,* the British Columbia Labour Relations Board noted at 2 that:

> *7 The PSEA requires HEABC to have a constitution and by-laws approved by the Minister:*
>
> > *7. (1) Every employers' association must*
> > ...
> > *(c) have a properly constituted board of directors and bylaws or rules considered necessary by the minister for the administration and management of the employers' association, and ...*

[24] In the present case, the Union did not file any bylaws of SAHO or a SAHO constitution which indicated that SAHO had any power to interpret and administer the applicable collective agreement or to settle any dispute arising out of the collective agreement. Accepting the evidence as presented by the Union, the Hilton letter makes no claim that SAHO is able to step in and interpret the disputed letter of understanding so that its interpretation is binding on the Employer. Furthermore, SAHO makes no representation that it can "negotiate, conclude and execute the settlement of any disputes arising out of any such collective agreement." Looking at the Hilton letter objectively, Hilton indicates that it is not SAHO's role to interpret the provisions of the collective agreement and to settle any disputes arising from the interpretation of the disputed letter of understanding when he provides in his letter:

> *Until the Employer agrees, or the Labour Relations Board directs, the letter of understanding does not apply to those workers because they are not employees.*

[25] Foley's testimony in regard to his discussion with Hilton that "Hilton was not supporting the Employer in its assertion that the ambulance workers at Lampman and Stoughton were volunteers and that SAHO would tell the Employer this" appears to confirm SAHO's lack of power. For example, SAHO did not provide in its letter or in its discussions with the Union that it would ensure that the Employer complied with SAHO's interpretation of the disputed letter of understanding.

[26] While SAHO has the ability to bargain on behalf of employers and bind them to the terms of a collective agreement, we were not presented with evidence in the form of bylaws or constitutions, nor referred to any statutory provisions, that establish SAHO as the representative employers' organization for the purpose of the interpretation and administration of the collective agreement.

[27] In a comparable statute, *The Construction Industry Labour Relations Act, 1992*, S.S. 1992, c. C-29.11 (the "CILRA") the Legislature saw fit to explicitly place responsibility for contract interpretation and administration in the hands of the individual employers. Section 31 of the CILRA provides as follows:

> *31(1) In this section, "appropriate unit" means appropriate unit as defined in The Trade Union Act.*
> *(2) Notwithstanding section 14, the responsibility for negotiating the settlement of grievances of employees covered by a collective bargaining agreement or represented by a trade union representing the majority of employees in an appropriate unit is that of the unionized employer.*
> *(3) Notwithstanding section 20, the responsibility for negotiating the settlement of grievances of employees covered by a collective bargaining agreement or represented by a trade union representing the majority of employees in an appropriate unit is that of the local of the trade union.*

[28] In other jurisdictions, the representative employers' organization's authority to act in relation to the interpretation and administration of a collective agreement is generally explicitly stated in the statute. For example, in *West Coast General Hospital, supra*, the British Columbia Labour Relations Board referred to the provisions contained in the *Public Sector Employers Act*. Additionally, s. 34 of the *Canada Labour Code* (the "*Code*") provides the authority for an employer representative to in effect discharge all the duties and responsibilities of an employer in regard to the employees. Section 34(5) of the *Code* provides:

> *An employer representative shall be deemed to be an employer for the purposes of this Part and, by virtue of having been appointed under this section, has the power to, and shall, discharge all the duties and responsibilities of an employer under this Part on behalf of all the employers of the employees in the bargaining unit, including the power to enter into a collective agreement on behalf of those employers.*

[29] Two recent decisions of the Canada Labour Relations Board, *Maritime Employers' Association et al v. Quebec Ports Terminals Inc. et al* (1994), 94 di 191, and *Maritime Employers' Association v. Quebec Ports Terminals Inc.*, [1998] 40 C.L.R.B.R. (2d) 10, review s. 34 of the *Code* and confirm the employer representative's powers over individual employers.

[30] No similar provisions exist in the *Health Act* or Dorsey Regulations. Both are silent on the topic of the role of SAHO in the day to day administration of the collective agreements. We are unaware if any authority relating to the administration of collective agreements is included in the constitution and bylaws of SAHO as the same were not presented to the Board in evidence. For these reasons, we dismiss the Union's application. However, the Union shall be entitled to re-file its application if it can submit more evidence in regard to SAHO's authority to interpret and administer the terms of the CUPE/SAHO collective agreement. Likewise, if the Union has a dispute as to how the Employer is interpreting a provision of the collective agreement or a letter of understanding, the Union can proceed to arbitration to have that matter dealt with. If the Union wishes to bring an application before the Board to deal with the "volunteer" versus "employee" issue, the Board discusses the distinction between a "volunteer" and an "employee" in its decision in *S.E.I.U. v. South West Crisis Services Inc.*, [1997] Sask. LRBR 63, LRB File No. 196-96.

SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant v. SASKATCHEWAN GAMING CORPORATION and MOOSE JAW EXHIBITION ASSOCIATION COMPANY LTD., Respondents

SASKATCHEWAN GAMING CORPORATION, Applicant v. SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, PUBLIC SERVICE ALLIANCE OF CANADA, Respondents, and MOOSE JAW EXHIBITION ASSOCIATION COMPANY LTD., Interested Party

LRB File Nos. 163-01 and 164-01; October 23, 2001
Chairperson, Gwen Gray; Members: Patricia Gallagher and Leo Lancaster

For the Applicant: Larry Kowalchuk
For the Respondent: Larry LeBlanc, Q.C.
For the Union: Rick Engel

Successorship – Practice and procedure – Advance rulings – Section 37(2) of *The Trade Union Act* permits Board to make advance rulings on successorship applications – Board may exercise discretion to do so where certain factors present - Proposed transaction must be crystallized - Agreements must be finalized or close to finalization and impact or effects of disposition must be known with some certainty – Applicant must advance independent labour relations purpose for declaratory ruling.

***The Trade Union Act*, s. 37.**

REASONS FOR DECISION

Background

[1] Gwen Gray, Chairperson: Saskatchewan Joint Board, Retail, Wholesale and Department Store Union ("RWDSU") is certified to represent employees who work at the Golden Nugget Casino in Moose Jaw. The Golden Nugget Casino is owned by the Moose Jaw Exhibition Association Company Ltd. ("MJEX").

[2] Saskatchewan Gaming Corporation ("SGC") owns and operates Casino Regina. The employees at Casino Regina are represented by the Public Service Alliance of Canada ("PSAC") and RWDSU (food and/or beverage services). SGC has proposed to establish a casino in Moose Jaw to be known as "Casino Moose Jaw." To this end, SGC entered into an agreement with MJEX to compensate it for the loss of revenues resulting from the establishment of a new casino.

[3] Construction of the new casino is to commence in the fall of 2001 and it is anticipated that Casino Moose Jaw will open in the fall of 2002.

[4] RWDSU brought an unfair labour practice application against SGC complaining about SGC's role in the proposed closure of the Golden Nugget Casino and MJEX's lack of control over the bargaining issues that face the parties in attempting to negotiate the issues surrounding the closure of the Golden Nugget Casino. RWDSU alleges that SGC has structured its negotiations with MJEX and the City of Moose Jaw for the purpose of avoiding the ability of RWDSU to represent employees at Casino Moose Jaw. RWDSU alleges that SGC has violated ss. 3, 11(1)(a), (c), (e), 12 and 37 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the *"Act")* and seeks a variety of orders from the Board, including an order requiring SGC to bargain collectively with RWDSU with respect to the closure of the Golden Nugget Casino.

[5] Around the same time, SGC applied to the Board for an advance ruling on whether its proposed development of Casino Moose Jaw gives rise to successorship rights on the part of PSAC or RWDSU.

[6] The Board initially refused to accept the filing of SGC's application because it requested a ruling from the Board on a state of facts that has not yet come into existence. Counsel for SGC resubmitted the application with a request that the Board consider whether or not s. 37 of the *Act,* in particular, s. 37(2)(a), allows the Board to issue advance rulings.

[7] The Board notified the parties on both applications that it would hear arguments on the preliminary issue of whether the Board has jurisdiction pursuant to s. 37 of the *Act* to hear and determine the applications.

Relevant Statutory Provisions

[8] Section 37 of the *Act* provides as follows:

> *37(1) Where a business or part thereof is sold, leased, transferred or otherwise disposed of, the person acquiring the business or part thereof shall be bound by all orders of the board and all proceedings had and taken before the board before the acquisition, and the orders and proceedings shall continue as if the business or part thereof had not been disposed of, and, without limiting the generality of the foregoing,*

if before the disposal a trade union was determined by an order of the board as representing, for the purpose of bargaining collectively, any of the employees affected by the disposal or any collective bargaining agreement affecting any of such employees was in force the terms of that order or agreement, as the case may be, shall, unless the board otherwise orders, be deemed to apply to the person acquiring the business or part thereof to the same extent as if the order had originally applied to him or the agreement had been signed by him.

(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 or 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*
> > *(v) 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).*

Argument

[9] Mr. LeBlanc, counsel for SGC, argued that s. 37(2)(a), when it refers to a "proposed disposition," makes it clear that the Board has statutory authority to issue an advance ruling on a successorship application. SGC takes the position that the business transaction is well-defined and that both RWDSU and PSAC have credible claims for either successorship rights or direct bargaining rights through their existing Certification Orders. SGC urged the Board to deal with the application in advance of the actual establishment of Casino Moose Jaw.

[10] Mr. Engel, counsel for PSAC, argued that, in his client's view, the matter does not raise an issue of successorship, but does raise an issue relating to the breadth of his client's current Certification Order at Casino Regina. PSAC agrees that the matter should be resolved prior to the opening of Casino Moose Jaw.

[11] Mr. Kowalchuk, counsel for RWDSU, agreed with counsel for SGC that the matter can be determined by the Board in advance of the actual transaction. He noted that s. 24 of the *Act* allows parties to agree to refer disputes to the Board and that all parties to this application were in agreement that the Board should hear and determine the applications prior to the actual transaction. RWDSU noted that there were real issues in dispute between it and SGC that required early resolution, notably, the effect of the closure of Golden Nugget Casino and the transfer of employees from the Golden Nugget Casino to Casino Moose Jaw.

[12] Ms. Bell, representative for MJEX also asked the Board to hear the applications to ensure a smooth transition and harmonious labour relations upon the establishment of the new casino.

Analysis

[13] Two issues arise on these facts under s. 37. First, does the Board have statutory authority to issue an advance ruling on a proposed sale, lease, transfer or other disposition under s. 37? Second, if the Board does have such authority, when should its authority be exercised? We will address both questions in this ruling. It should be noted that the parties were not asked to present any evidence to the Board on this occasion and any facts recited by the Board are simply assumed for the purpose of the legal argument. No findings of fact are made in these Reasons for Decision.

1. Does the Board have statutory authority to issue an advance ruling on a s. 37 application?

[14] Section 37 of the *Act* is somewhat unique in that it effects an automatic amendment of a certification order and a collective bargaining agreement on the occurrence of a sale, lease, transfer or other disposition of a business or part thereof. The new employer stands in the shoes of the original employer and the terms of the certification order and collective agreement are deemed to apply to the new employer "to the same extent as if the order had originally applied to him or the agreement had been signed by him" (s. 37(1)). No order of the Board is required to effect this change in either the certification order or the collective agreement.

[15] It is not uncommon, however, for unions and prospective employers to disagree as to whether a disposition constitutes a sale, lease, transfer or other disposition of a "business." It is only such a disposition that triggers the transfer of obligations under the terms of s. 37 and the Board is often asked to determine this threshold issue. Normally, this determination takes place after the transaction has been concluded as evidence of the continuity of the "business" from the predecessor employer to the successor employer is an important element in determining if a transfer of obligation has occurred: see *Cana Construction Ltd.,* [1985] Feb. Sask. Labour Rep. 29, LRB File Nos. 199-84, 201-84, 202-84 & 204-84.

[16] In 1994, the *Act* was amended to add subsection 37(2) which sets out specific orders the Board may issue on a successorship application. These provisions clarify the powers that the Board may exercise in relation to the automatic transfer of obligations that occurs under s. 37. Two of these subsections contain a temporal element. Subsection 37(2)(a) provides that the Board may make an order "determining whether the disposition or **proposed** disposition relates to a business or part thereof." In subsection 37(2)(b) the Board may make orders "determining whether, on the **completion** of the disposition of a business or part thereof, the employees constitute one or more units appropriate for collective bargaining." In the present case, we are concerned with whether the proper interpretation of subsection 37(2)(a) allows the Board to issue advance rulings on the transfer of obligations on a future disposition.

[17] 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 described its approach to the interpretation of the *Act* as follows:

> *The Board is of the view that the contextual approach is the most appropriate methodology to apply in interpreting the provisions of the Act. In doing so we will start by identifying the purpose of the Act and any interpretative guidance that flows from that purpose. We will then address the plausibility of the competing interpretations to determine which is more consistent with the legislative text contained in the Act. The Board will also consider the efficacy of the interpretations proposed in terms of their ability to promote the objectives of the Act and the acceptability of both interpretations.*

[18] In the present case, the underlying purpose of s. 37 is to ensure the continuation of the rights of employees to be represented by a trade union when and if their employer's business is sold or otherwise disposed of to another employer. If s. 37(2)(a) is interpreted as permitting the Board to issue advance rulings on a proposed disposition, employees' rights to continue to bargain through the trade union may be enhanced by avoiding a hiatus in union representation while the disposition is being litigated before the Board. Advance rulings may provide greater labour relations stability.

[19] On the other hand, advance rulings may also encourage more litigation. Employers may seek advance rulings as a way of determining if they have structured a sale, lease, transfer or disposition so as to avoid a transfer of obligations. When the sale is finalized, the actual details of the disposition may be different from the proposed disposition thereby causing the union to seek a new determination from the Board based on the actual form of the transfer.

[20] Overall, the purpose of s. 37 provides some interpretative assistance by demonstrating that an advance ruling could enhance labour relations stability on the sale, lease, transfer or disposition of a business and tips the scales slightly in terms of an interpretative approach that permits the Board to make advance rulings.

[21] The plausibility of an interpretation that permits the Board to issue advance rulings on successorship applications is strong. The statutory language brings into play the distinction between finalized transactions and proposed transactions when it uses the words "dispositions or **proposed** dispositions." In light of this language it is difficult to argue that an advance ruling would be inconsistent with the wording of s. 37(2)(a) or that it is not a plausible interpretation.

[22] Finally, an interpretation that allows the Board to make advance rulings can be more efficient in carrying out the labour relations purpose of s. 37 than an interpretation that resists such rulings.

This is tempered, however, by the realization that advance rulings may not be a total panacea and may result in more litigation.

[23] Overall, after considering the factors listed above, we find that s. 37(2)(a) permits the Board to issue advance rulings on successorship applications.

2. When should the power to issue an advance ruling be exercised by the Board? Should the Board provide advance rulings whenever either or both parties seek such rulings?

[24] The British Columbia Labour Relations Board has considered the same issue in *First Commercial Management Inc. and United Food and Commercial Workers' International Union, Local 1518,* BCLRB No. 213/93. Section 143 of the British Columbia *Labour Relations Code* allows the British Columbia Board to issue advance rulings "if [the Board] considers it necessary and proper to do so." Nevertheless, the British Columbia Labour Relations Board has adopted a policy restricting access to advance rulings on successorship applications to those cases where the facts are sufficiently "crystallized" and there exist valid labour relations reasons for issuing an advance ruling (at 6). The British Columbia Labour Relations Board explained its policy as follows at 6 and 7:

> *The notion of a declaratory opinion (or an "advance ruling" as it has been characterized here) is inherently problematic in the context of a potential successorship. The difficulties relate to "crystallization", as highlighted in Futura Forest Products and in the earlier authorities reviewed by the panel. A determination under what is now Section 35 of the Code typically depends upon an amalgam of various facts -- some pointing towards successorship, others suggesting the contrary conclusion. Where a declaratory opinion is provided, the relevant facts may well be subject to change. This might occur either deliberately (in an attempt to bring about a different result) or through unanticipated developments. In either situation, there will be the temptation to initiate further litigation before the Board, and the declaration will not have served its purpose.*
>
> *We do not believe that a valid labour relations purpose exists where the only concern is whether a proposed transaction will result in unionization. The question of whether an employer will be bound by a certification and collective agreement is not a sufficient test; rather, there must be some further or other basis for finding a valid labour relations purpose (e.g., concerns over what rights and obligations will be acquired). First Commercial's argument that labour relations consequences may have an important impact on business decisions is acknowledged. Generally, however, we are not prepared to depart from the policy that the Board should decline to express what effectively amounts to a legal opinion solely for the purpose of allowing parties to assess the commercial viability of a proposed transaction.*

> *Some examples of circumstances where it will continue to be appropriate to issue a declaratory opinion under Sections 143 and 35 of the Code are where there is a serious prospect of labour relations conflict (Johnson Terminals Limited et al, BCLRB No. L92/81); where a declaration will serve to protect an innocent third party from the effects of a labour dispute (238556 B.C. Ltd., BCLRB No. L157/81); where a successorship is either agreed to or not opposed, and the real issues in dispute concern the resulting consequences (Mainline Magazine Services, IRC No. C72/88; Palm Dairies Limited, IRC No. C132/89); or where the transaction involves substantial economic ramifications and other "compelling" reasons (Prince George Wood Preserving Ltd., supra). The foregoing situations are not intended to be exhaustive. Consistent with the legislative amendment in Section 143 of the Code, there will no doubt be new and additional cases where the facts have sufficiently crystallized and a valid labour relations purpose exists for a declaration. However, it is unnecessary in this case to provide more definitive examples.*

[25] The Alberta Labour Relations Board adopted a similar approach to its declaratory powers in *Revelstoke Companies Ltd. and United Food and Commercial Workers Local 401 v. Edmonton Co-operative Association Ltd.*, [1986] Alta. L.R.B.R. 96, where the Board concluded:

> *We agree with the B.C. Board that such advance rulings should only be given in special circumstances where some independent labour relations purpose would be served by making the advanced ruling. We agree with the suggestion from Whistler Village Inn [BCLRB No. 44/80] that ordinarily parties:*
>
> > *" . . .Have to protect themselves with whatever contractual or financial arrangements they have at their disposal . . . we are reluctant to be drawn into situations where we are essentially acting as legal advisors to guide someone . . . in making labour relations decisions."*
>
> *In the case at hand we see nothing in the nature of a special circumstance before us. The Union in question does not concede that facts may not be in dispute, either now or later. We are essentially being asked to certify the validity of legal advice, which in the absence of some further compelling reason we decline to do.*

[26] We see merit in adopting the cautious approach of the British Columbia and Alberta Labour Relations Boards. The proposed transaction must be "crystallized" in the sense that the agreements in question are finalized or close to finalization and the impact or effects of the disposition are known with some certainty. In addition, we will require the applicant to advance an independent labour relations purpose for the declaratory ruling. The list contained in *First Commercial Management Inc., supra,* provides a useful example of the types of issues that may compel the Board to issue an advance ruling. There may be other similar reasons as well. In the absence of such issues, however, the Board will decline to exercise its authority to issue advance rulings.

Conclusion

[27] In the present case, the parties were asked to present arguments only on the ability of the Board to issue advance rulings. We have answered that question in the affirmative, although with qualifications. We will proceed to hear and determine the two applications filed with the Board relating to the opening of Casino Moose Jaw. In the course of these hearings, the parties are requested to address in evidence and argument whether the business transaction is sufficiently crystallized and whether there are compelling labour relations purposes for issuing an advance ruling.

LARRY ROWE and ANTHONY KOWALSKI, Applicants v. CANADIAN LINEN AND UNIFORM SERVICE CO. and SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Respondents

LRB File No. 104-01; October 26, 2001
Vice-Chairperson, Walter Matkowski; Board Members: Don Bell and Pat Gallagher

For the Applicants:	Kenneth Love, Q.C. and Lynn Schuba
For Canadian Linen and Uniform Service Co.:	Larry LeBlanc, Q.C.
For Saskatchewan Joint Board, Retail, Wholesale and Department Store Union:	Larry Kowalchuk

Decertification – Interference – Evidence of applicants as to reasons for bringing application for rescission remarkably inadequate – Applicants showing lack of knowledge relating to rescission application itself – Board draws inference of employer influence and dismisses application for rescission.

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

REASONS FOR DECISION

Background

[1] Walter Matkowski, Vice-Chairperson: Larry Rowe ("Rowe") and Anthony Kowalski ("Kowalski") (collectively the "Applicants") applied during the open period to rescind the Certification Order issued by the Board to Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Union"). The Union was certified by the Board on May 7, 1999.

[2] This is the second application made by employees of Canadian Linen and Uniform Service Co. (the "Employer") since the Union was certified. The first application was dismissed by the Board in Reasons for Decision reported at [2000] Sask. L.R.B.R. 745, LRB File No. 073-00 on the basis of employer influence.

Facts

[3] Rowe testified in support of his application for rescission. His evidence was that he did not obtain any support cards for the application or talk to any employees about the application. Rowe testified that he had never distributed a leaflet (the "anti-union leaflet") which both criticized the

Union and asked for support for the application. Rowe testified that he had never read the anti-union leaflet and even though it bore his signature, he couldn't remember ever having seen it before.

[4] Rowe testified that either Kowalski or another employee, Tammi Smith ("Smith"), "got the signatures" in support of the application and one of those individuals told him to go to the lawyer's office to sign the application. Rowe also testified that the cost of the lawyer was being shared by himself, Kowalski and Smith.

[5] Kowalski testified that he, Smith and another employee, other than Rowe, paid for the legal costs of the application. Kowalski testified that Smith initiated the application. Initially Kowalski testified that he didn't ask anyone to sign a card to get rid of the Union. He then indicated that when people came to Smith's house he was "part of a group" and signed up either one or two people.

[6] Kowalski didn't write or hand out the anti-union leaflet. Kowalski testified that Smith showed him the anti-union leaflet with his and Rowe's names on it. Kowalski explained that Smith handed out the anti-union leaflets and "was doing the leg work" on the application. Smith did not testify before the Board.

Relevant Statutory Provisions

[7] *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.*

Argument

[8] Mr. Kowalchuk, counsel for the Union, argued both that there was employer influence and insufficient evidence advanced on behalf of the Applicants to support their application.

[9] Counsel for the Applicants asked the Board to order a vote pursuant to s. 6(1) of the *Act.*

[10] Counsel for the Employer argued that there was no employer influence.

Analysis

[11] Counsel for the Employer was correct when he argued that there was no direct evidence of employer influence. However, the question before the Board is whether or not there is any evidence which would cause the Board to draw an inference of employer influence.

[12] The Board in the decision *Saranchuk v. United Steelworkers of America and Capital Pontiac Buick Cadillac GMC Ltd.*, [1998] Sask. L.R.B.R. 756, LRB File No. 152-98 reviewed numerous other Board decisions which analyzed whether or not the Board would draw an inference of employer interference. In *Saranchuk, supra,* the Board found no employer influence after reviewing factors such as the applicant's explanation for wishing to have the Certification Order rescinded.

[13] In the present case, the evidence of Rowe was remarkably inadequate in regard to why he wanted to have the Certification Order rescinded while the evidence of Kowalski was only marginally better. Based on the testimony of Rowe and Kowalski, this Board has no hesitation in inferring that the application was made in whole or in part on the advice or as a result of influence by the Employer.

[14] Rowe was unable to identify the anti-union leaflet which he acknowledged as bearing his signature and in reality, Rowe appeared to be acting as nothing more than a front for the decertification application which more properly should have been brought by Smith. Kowalski also acknowledged that Smith was doing the leg work for the application. Presumably Smith prepared the anti-union leaflet though, amazingly enough, neither Rowe or Kowalski knew who prepared the anti-union leaflet.

[15] In any event, given the lack of any credible reasons from the Applicants as to why they wanted the Certification Order rescinded, together with the Applicants' lack of knowledge of their own application, the Board infers employer influence pursuant to s.9 of the *Act* and dismisses the Applicants' application.

GARY DOUGLAS BRESCH, Applicant v. SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION and 617400 SASKATCHEWAN LTD., carrying on business as ALBERT STREET GARDEN MARKET IGA, Respondents

LRB File No. 162-01; October 29, 2001
Chairperson, Gwen Gray; Members: Leo Lancaster and Maurice Werezak

For the Applicant:	Noel Sandomirsky, Q.C.
For the Employer:	Brian Kenny
For the Certified Union:	Larry Kowalchuk

Evidence – Admissibility – Hearsay – Union seeks to call witness to testify to evidence given by employer representatives as part of previous Board proceedings – Union argues evidence relevant to issue of employer interference pursuant to s. 9 of *The Trade Union Act* – Board finds proposed evidence falls under admission exception to rule against hearsay evidence.

***The Trade Union Act*, s. 9.**

PRELIMINARY EVIDENTIARY RULING

Background

[1] Gwen Gray, Chairperson: In the course of hearing evidence in this proceeding, Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Union") called Randy Hoffman to give evidence concerning testimony given by one of the owners of 617400 Saskatchewan Ltd., carrying on business as Albert Street Garden Market IGA (the "Employer"), Joan Zook, and the Employer's counsel and chief negotiator, Mr. Kenny, in another proceeding before this Board.

[2] The earlier proceeding was recorded by the Board but the quality of the tape recording was insufficient to permit a transcript to be produced, although one was requested by the Union. In addition, the proceedings were withdrawn from the Board before a decision was rendered and the Board did not issue Reasons for Decision in relation to the application.

[3] Gary Bresch (the "Applicant") objected to the evidence based on its relevance to the issues in dispute on the rescission application. The Union explained that one indicia of s. 9 interference in

an application for rescission is evidence of Employer intransigence at the bargaining table and, for this reason, among others, the application for rescission ought to be dismissed. The Union referred the Board to *Schaeffer and Lang v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Loraas Disposal Services Ltd.,* [1998] Sask. L.R.B.R. 573, LRB File No. 019-98.

[4] The Board agreed that the evidence of bargaining was relevant and permitted the Union to call evidence in this vein.

[5] The Employer objected to the hearsay nature of the evidence and argued that it was highly improper to call evidence through Mr. Hoffman of evidence given by Ms. Zook and Mr. Kenny in the prior proceeding.

[6] The Union argued that the testimony of Ms. Zook and Mr. Kenny in the previous proceedings amounted to an admission. When transcripts are not available, the Union argued that the evidence could be given through a witness who was present and heard the evidence in question.

[7] The Board indicated that it would issue a ruling with respect to the issue of whether the Union is entitled to call evidence through Mr. Hoffman of testimony given by others at a hearing before this Board.

[8] None of the parties to this application referred the Board to any case law on the subject.

[9] In the Board's view, the evidence sought to be called through Mr. Hoffman falls into the category of evidence known as "admissions" that are an exception to the hearsay rules. In S.A. Schiff, *Evidence in the Litigation Process*, Vol. 1 (Toronto: Carswell, 1993) the authors set out the rule as follows at 445:

> *The legal doctrine governing a party's admissions applies in both civil and criminal trials. It applies whether the admission is proved through the testimony of other witnesses . . . or out of the party's own mouth during his cross-examination as a witness . . ., or by his opponent reading into the record at a civil trial questions and answers at the party's pre-trial examination for discovery in that action. Indeed, an important purpose of examination for discovery is to obtain admissions for later use at the trial. And the doctrine applies whether the admission was made by voice or writing, and whether the party uttered the words in circumstances unconnected with*

> *any litigation or under oath in the course of some legal proceeding, for example, as a witness in another trial or, as just mentioned, in his examination for discovery.*
>
> (footnotes omitted)

[10] In the context of a rescission application, it is not unusual for the union to call witnesses who testify as to the conduct of the employer or its agents, and their communication with employees or the witness. Such evidence is relied on by unions to demonstrate employer interference that may cause the Board to dismiss the rescission application under s. 9 of *The Trade Union Act*, R.S.S. 1978, c. T-17. The "he said-she said" nature of such evidence is accepted as an exception to the hearsay rule as constituting an admission of a party to the proceedings.

[11] The unusual aspect of Mr. Hoffman's testimony is that it relates to evidence given by Ms. Zook and Mr. Kenny under oath in an earlier proceeding before this Board. In our view, this fact alone is insufficient to remove the evidence from the category of admission. We find that the evidence may be entered into evidence through Mr. Hoffman. The Employer, of course, will have the opportunity to cross-examine Mr. Hoffman in relation to the evidence and to call evidence to rebut the assertions made by Mr. Hoffman in his evidence.

CYNTHIA LaROSE, Applicant v. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL 395, Respondent

LRB File No. 194-00; October 30, 2001
Vice-Chairperson, James Seibel; Members: Tom Davies and Duane Siemens

The Applicant: Cynthia LaRose
For the Respondent: Vic Klassen

Duty of fair representation – Scope of duty – Union representative fairly investigated termination of applicant and, in consultation with senior officer of union, fairly arrived at decision not to file grievance – Board finds no violation of s. 25.1 of *The Trade Union Act*.

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

REASONS FOR DECISION

Background and Facts

[1] **James Seibel, Vice-Chairperson:** The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 395 (the "Union") is designated as the bargaining agent for a unit of all employees of the Prince Albert Society for the Prevention of Cruelty to Animals (the "Employer"). The Applicant, Cynthia LaRose, was employed there as a shelter attendant from April, 1999, until she was terminated in February, 2000. The Employer maintained that she was two days short of completing her probation period of ninety (90) working days. The Union declined to file a grievance of her termination. Ms. LaRose filed an application alleging that the Union violated its duty to fairly represent her contrary to s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*").

[2] At the hearing of the application, the Board heard evidence from Ms. LaRose, Cindy Zolinski, Bev McNab and Pat Slater.

[3] Ms. LaRose received a written reprimand in December, 1999, approximately two months prior to her termination, in which the Employer described several perceived deficiencies in her work, attendance and attitude. Following the termination of Ms. LaRose by the Employer for alleged

disappointment with her performance, the Union's business agent, Vic Klassen, investigated the circumstances. The Employer maintained that Ms. LaRose had only worked eighty-eight (88) days and did not complete her probationary period. Mr. Klassen was of the opinion that the collective agreement between the Union and the Employer precluded grievance and arbitration on behalf of a probationary employee. However, Ms. LaRose maintained that she had, in fact, worked the requisite ninety (90) days to complete her probationary period. She showed Mr. Klassen copies of work records that she said corroborated her contention that she did work the two additional days required – June 21 and July 28, 1999.

[4] Mr. Klassen provided the information to the Employer. He received a reply from the Employer's solicitor in March, 2000. The position of the Employer was that there were irregularities in the records relied upon by Ms. LaRose that, in its opinion, tended to indicate that they had been altered in an attempt to corroborate her assertion that she was present at work on the additional dates. The Employer's solicitor intimated that Ms. LaRose was being untruthful and raised the spectre of expert document analysis if it became necessary.

[5] Moreover, in Mr. Klassen's opinion, the records relied upon by Ms. LaRose were not consistent with the work schedule records, payroll records and other documents relating to the dates in question that he reviewed. Much of the evidence adduced at the Board hearing by the various witnesses concerned explanations and speculation about the nature and import of the information in these records. Faced with the prospect of what he viewed as a complex and expensive case, and after reviewing the matter with his superior, Mr. Klassen advised Ms. LaRose that the Union would not proceed with a grievance of her termination.

Statutory Provisions

[6] 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.*

Argument

[7] Ms. LaRose disputed the Employer's characterization of the records she relied upon to assert that she had completed her probation. She argued that in all the circumstances, the Union had a duty to represent her by filing a grievance of her termination and proceeding to arbitration if necessary.

[8] Mr. Klassen, on behalf of the Union, argued that he had adequately investigated the matter and consulted with his superior before advising Ms. LaRose that the Union would not proceed. He said he was of the opinion that a grievance of the termination would not be successful. He said that Ms. LaRose could have appealed the decision under the Union's constitution and bylaws, but admitted that he did not so advise her. Mr. Klassen asserted that the Union had not violated the *Act*.

Analysis and Decision

[9] The Board's general approach to applications alleging a violation of s. 25.1 of the *Act* was summarized as follows in *Lawrence 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 favoritism. 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 favoritism. 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.*

[10] On the facts of the present case, viewed in the light of the principles set out above, we are of the opinion that the Union did not act in a manner that was arbitrary, discriminatory or in bad faith in determining not to grieve the termination of Ms. LaRose by the Employer. It is not for us to determine whether the Union was correct in deciding that a grievance would not be successful, but rather to determine whether the Union took a reasonable view of the problem and made a thoughtful decision about what to do. Mr. Klassen fairly investigated the matter and, in consultation with the senior officer of the Union, fairly arrived at the decision not to file a grievance. The Union did not violate s. 25.1 of the *Act*.

[11] For the reasons set forth above, the application is dismissed.

594431 SASKATCHEWAN LTD. o/a CLARK'S CROSSING PUB AND BREWERY, Applicant v. SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Respondent

LRB File No. 081-01; October 30, 2001
Vice-Chairperson, Walter Matkowski; Members: Gloria Cymbalisty and Brenda Cuthbert

For the Applicant: Brian Kenny
For the Respondent: Larry Kowalchuk

Unfair labour practice – Union – Duty to bargain in good faith – Parties ask Board to rule on whether employer entitled to know accurate information about gratuities received by employees – Board confirms obligation to disclose which arises in collective bargaining and instructs union to disclose to employer any information which union possesses relating to cash gratuities received by employees.

***The Trade Union Act,* s. 11(2)(c).**

REASONS FOR DECISION

Background

[1] Walter Matkowski, Vice-Chairperson: 594431 Saskatchewan Ltd. o/a Clark's Crossing Pub and Brewery (the "Employer") brought an application alleging that Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Union") had committed an unfair labour practice arising from the fact that the Union would not disclose to the Employer the quantum of tips and gratuities earned by employees in the bargaining unit during their employment with the Employer.

[2] The Union argued that the Employer was not entitled to know the amount of money earned by bargaining unit employees by way of tips and gratuities. The Union also argued that this was a "privacy" issue, and that its members were not obliged to disclose these monies.

[3] The Employer and Union agreed to jointly submit the following question for determination by the Board:

> *Is the Employer entitled to know accurate information concerning gratuities received by employees in order that it can bargain a wage rate from an informed position?*

[4] No oral evidence was presented to the Board.

Analysis

[5] The answer to the question put before the Board is a qualified yes. The Employer is entitled to know the information which the Union possesses concerning cash gratuities received by employees, from and after January 1, 2001, in order that it can bargain a wage rate from an informed position.

[6] The Board has consistently held that there exists an obligation to disclose information during collective bargaining.

[7] In the decision of *Saskatchewan Government Employees' Union v. Government of Saskatchewan,* [1989] Winter Sask. Labour Rep. 52, LRB File Nos. 245-87 & 246-87, the Board described the obligation to disclose information during collective bargaining 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.*

[8] The Board in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Acme Video Inc.*, [1998] Sask. L.R.B.R. 126, LRB File Nos. 148-97 & 170-97, stated at 146:

> *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 over burdensome 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.*

[9] The Canada Industrial Relations Board in *Atomic Energy of Canada Ltd. (Re)* [2001], C.I.R.B.D. No. 7 confirmed an obligation to disclose relevant information. Chairperson Lordon concluded at 7 and 8:

> *¶22 It is important therefore to consider the merits of the complaint and the employer's response. It is useful as well to consider what the objectives of section 50 are. These were recently considered by the Board in its decision in Nav Canada, [1999] CIRB no. 13; 53 CLRBR (2d) 1; and 99 CLLC 220-047. A citation of two paragraphs will highlight certain relevant considerations respecting bad faith bargaining.*
>
> > *[146] The observations of the previous Board respecting bad faith bargaining are therefore most relevant. The observations of particular relevance include the positions of the predecessor Board's decisions highlighted by the underlining added above. The Board is concerned to emphasize the obligation of the parties to avoid acting in a manner that prevents full, informed and rational discussion of the issues. The requirement of rational discussion and its corollary, that parties effectively communicate with each other recognizing that proper collective bargaining depends upon effective communication, are of fundamental importance. The requirement that each party approach collective bargaining with the objective of entering into a collective agreement is also of concern.*
> >
> > *[147] One further comment needs to be made about the above quoted passage. In one respect, the passage has been superseded by subsequent developments, and it is important that note of that be made here. In the quoted passage, the CLRB stated that the two ingredients of the duty to bargain in good faith might be so blended as to loose their separate identities. In the view of the present Board, this interpretation of the meaning and intent of section 50(a)*

> *of the Code must be tempered by a consideration of the words of Mr. Justice Cory. In the passage quoted above, Mr. Justice Cory observed that 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 each 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 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. It is this latter part of the duty that prevents a party from hiding behind an assertion that it is sincerely trying to reach an agreement when, viewed objectively, it can be seen that its proposals are so far from the accepted norms of the industry that they must be unreasonable.*
> *(pages 46-47; and 143, 383)*
>
> *¶23 The essential point that must be considered here is that in collective bargaining, the parties are under the obligation to effectively communicate with each other to an extent that informed and rational discussion of the issues may occur, in order to meet their obligations under section 50 of the Code. Collective bargaining requires discussion and discussion requires complete and correct information. Where the relevant information is in the control of one party, it should be forthrightly provided to the other.*

[10] In this case, the Employer argues that the information requested has a reasonable bearing on its ability to bargain intelligently with the Union. The Board agrees with this assertion.

[11] The Employer is entitled to disclosure of information which the Union possesses concerning gratuities received by the Employer's employees from and after January 1, 2001. The information which the Union must supply to the Employer is limited to cash gratuities given that the Employer acknowledged in its Brief of Law that it knows credit card gratuity levels.

[12] The privacy issue raised by the Union on behalf of its members is a non-issue given that the Union is only obligated to disclose actual information which it possesses.

NADINE SCHREINER, Applicant v. CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 59, Respondent

LRB File No. 105-01; October 30, 2001
Chairperson, Walter Matkowski; Members: Bruce McDonald and Joan White

For the Applicant: Dave Taylor
For the Respondent: Harold Johnson

Duty of fair representation – Contract administration – Employer refused to pay applicant for time spent at earlier Board proceedings - Union investigated issue, determining that, in accordance with wording of collective agreement, payment only tendered in past for time spent under subpoena in court proceedings – Union declined to file grievance - Board finds no evidence that union's decision arbitrary, discriminatory or showed bad faith – Board dismisses application.

***The Trade Union Act*, ss. 25.1 and 36.1**

REASONS FOR DECISION

Background

[1] Walter Matkowski, Vice-Chairperson: Ms. Nadine Schreiner filed an unfair labour practice application against the Canadian Union of Public Employees, Local 59 (the "Union") alleging that the Union breached s. 36.1(1) and s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") by failing to file a grievance on Ms. Schreiner's behalf as a result of her not being paid by her employer, the City of Saskatoon (the "Employer"), following Ms. Schreiner missing work on April 24 and 25 and the morning of April 26, 2001.

[2] Ms. Schreiner did not work on the days in question because she was the applicant in two applications brought by her against the Union. (LRB File Nos. 015-01 and 023-01), both of which dealt with either s. 36.1(1) or s. 25.1 of the *Act*.

[3] A hearing of this matter was held in Saskatoon on October 9, 2001.

[4] At the hearing, Ms. Schreiner was not present. The Union graciously agreed to both Ms. Schreiner amending her application to include s. 25.1 of the *Act* and to the basic facts of Ms. Schreiner's case.

[5] The Board dismissed the application following the hearing and advised the parties that written reasons would follow.

Facts

[6] By letter dated February 13, 2001, the Board Registrar notified Ms. Schreiner of the following with respect to LRB File Nos. 015-01 and 023-01:

> *This is to advise that the above captioned application is scheduled for pre-hearing on Monday, March 19, 2001 at 10:00 a.m., and scheduled for hearing on Tuesday, April 24th, Wednesday, April 25th and Thursday, April 26, 2001 at 9:30 a.m., at the Labour Relations Board Hearing Room, 10th Floor, Sturdy Stone Building, 122 3rd Avenue North, Saskatoon, Saskatchewan.*
>
> *If there is any change to the status of the application, please contact me as soon as possible.*

[7] Ms. Schreiner attended before the Board on April 24, 25 and 26, 2001, for the hearing in question. Ms. Schreiner was not under subpoena when she attended the hearing.

[8] Ms. Schreiner completed a leave report with the Employer utilizing the union leave/union pay section. The Union refused to pay Ms. Schreiner for the days in question and the Employer likewise refused to reimburse Ms. Schreiner pursuant to her leave request.

[9] Ms. Schreiner's position is best set out in her May 8, 2001 fax to Sharon Lockwood, CUPE National Representative which provides in part:

> *Further to Article 36 – Jury and Witness Duty (Collective Agreement), please accept this letter as a formal request to CUPE Local 59 to pursue a grievance against the City of Saskatoon.*
>
> *The particulars are that I was in attendance at a Labour Relations Hearing. I was in attendance, as a witness, for the entire days of April 24 & 25, 2001 and the morning of April 26, 2001.*
>
> *The contract wording is such that:*

> *"An employee, other than a part-time employee who is on an availability list or a call-in list, who is required to serve as a juror, or is subpoenaed to appear in court as a witness, except for appearances arising as a result of personal misdemeanor(s) shall be paid any difference between payment receivable as a jury or witness fees and that normally receivable as wages – including overtime if acceptable".*
>
> *The City of Saskatoon has confirmed that they will not be paying my wage for those days. Therefore, it is my belief that a breach in the contract between the City of Saskatoon and The Canadian Union of Public Employees, Local 59 has occurred.*
>
> *I request that, within twenty-one (21) days, CUPE Local 59 move to Step Two of the grievance procedure, as outlined in the Collective Agreement. All correspondence regarding this grievance is to be between my representative, Sharon Lockwood, and myself only.*

[10] Ms. Lockwood, and Lois Lamon, president of the Union at the time of the incident, testified on behalf of the Union.

[11] Ms. Lamon's testimony was that the Union looked at the situation of filing a grievance on behalf of three members subpoenaed by Ms. Schreiner for the previous hearing. Initially, Ms. Lamon contacted the Employer seeking reimbursement for the three members. The Employer's response was a firm "no" based on its assertion that the Employer had never applied article 36 of the collective agreement to subpoenas for either arbitrations or Board hearings.

[12] Ms. Lamon testified that she verified the correctness of the Employer's representations to her and thereafter contacted Ms. Lockwood and Union counsel to obtain their opinions on the matter. Ms. Lamon was able to confirm a past practice where Union witnesses were not paid pursuant to article 36 of the collective agreement if these witnesses were called by the Union at arbitrations or Board hearings. The Union did not file a grievance for either Ms. Schreiner or the three witnesses subpoenaed by Ms. Schreiner for the April, 2001 Board hearing.

Relevant Statutory Provisions

[13] Section 36.1(1) of the *Act* reads:

> *36.1(1) Every employee has a right to the application of the principles of natural justice in respect of all disputes between the employee and the trade union certified to represent his bargaining unit relating to matters in the constitution of the trade union and the employee's membership therein or discipline thereunder.*

[14] Section 25.1 reads:

> *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 and Decision

[15] In *Schreiner v. Canadian Union of Public Employees, Local 59*, [2001] Sask. L.R.B.R. 444, LRB File No. 015-01, the Board set out its understanding of s. 36.1(1) and the role the Board plays in supervising the internal operation of a trade union. In this case, the applicant, through her representative, did not argue s. 36.1(1) of the *Act*, but rather only argued pursuant to s. 25.1 of the *Act*.

[16] The Board's general approach to applications alleging a violation of s. 25.1 of the *Act* was summarized as follows 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 favoritism. 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 favoritism. 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.*

[17] As indicated, the Board dismissed the application following the hearing. The primary reason for the dismissal was that the applicant pointed to no facts which would indicate that the Union acted in an arbitrary or discriminatory manner or that the Union acted in bad faith in regard to Ms. Schreiner's case. The applicant did not challenge the Union's procedural actions but rather argued

that the Board Registrar's letter of February 13, 2001 amounted to "a subpoena or a summons" and that, therefore, Ms. Schreiner was covered by the language of the collective agreement and that a grievance should have been filed. In addition, the applicant argued that the provisions of *The Public Inquiries Act*, R.S.S. 1978, c. P-38 somehow applied to the Board Registrar's letter thus, in effect, making the letter a "summons." Both of these arguments are in the Board's view extremely far fetched and were not considered by the Union when it made its decision not to file a grievance on behalf of Ms. Schreiner.

[18] Just because the Union did not take into account two far fetched arguments in arriving at its decision does not mean that the Union violated s. 25.1 of the *Act*. So long as the Union arrived at its decision not to file a grievance after taking a reasonable view of the problem and making a thoughtful decision about it, there is no violation of s. 25.1.

[19] In summary, there existed no evidence whatsoever to indicate that the Union committed a breach of s. 36.1(1) or s. 25.1 of the *Act*. For these reasons, the Board dismissed the application.

SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, Applicant v. RURAL MUNICIPALITY OF MEADOW LAKE, No. 588, Respondent

LRB File No. 140-01; October 30, 2001
Vice-Chairperson, James Seibel; Members: Tom Davies and Bruce McDonald

For the Applicant: Tom McKnight
For the Respondent: Robson Garden, Q.C.

Bargaining unit – Appropriate bargaining unit – Managerial exclusion – Administrator of rural municipality acts as employer's eyes and ears in workplace and has significant statutory duties, authorities and entitlements – Administrator would assist council members in bargaining and be day to day administrator of employer's obligations and interests under collective agreement – Board excludes administrator from bargaining unit.

Bargaining unit – Appropriate bargaining unit – Confidential personnel – Certification brings new set of duties and responsibilities for management related to bargaining and increase in ongoing administration of confidential personnel matters - Assistant administrator to act as clerical resource to administrator in labour relations matters – Board provisionally excludes assistant administrator.

Bargaining unit – Appropriate bargaining unit – Managerial exclusion – Superintendent/foreman exercises supervisory function but does not possess authority to hire, fire or suspend other employees – Board declines to exclude superintendent/foreman.

Bargaining unit – Appropriate bargaining unit – Independent contractor – Landfill custodians have unrestricted freedom to hire replacement help, have hours of work not regulated by contract and motivation and efficiency may significantly affect amount of remuneration – Board concludes that landfill custodians are not employees within the meaning of *The Trade Union Act*.

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

REASONS FOR DECISION

Background

[1] James Seibel, Vice-Chairperson: Saskatchewan Government and General Employees' Union (the "Union") applied to be designated as the certified bargaining agent for a unit comprising all employees of the Rural Municipality of Meadow Lake, No. 588 (the "Employer") pursuant to ss. 5(a), (b) and (c) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"). The application was filed on July 16, 2001. While the Employer did not dispute that a bargaining unit comprising all

employees was an appropriate unit, it took the position that, in the event the Union demonstrated that there was majority support for the application, four positions – the administrator, assistant administrator, superintendent and landfill custodian (the "disputed positions") – should be excluded from the scope of the proposed bargaining unit on the grounds that the persons occupying the first three positions are not employees within the meaning of s. 2(f)(i) of the *Act*; and, that the landfill custodian is not an employee but an independent contractor.

[2] The case was heard over two days on August 2 and August 20, 2001. As the Union had filed evidence that a majority of the employees in the proposed bargaining unit supported the application, notwithstanding whether the names of any or all of the persons occupying the disputed positions were included on the statement of employment for the purposes of determining the level of support, following the first day of hearing the Board issued a Certification Order designating the Union as the bargaining agent for an unit comprising all employees pending the determination of the status of the disputed positions.

[3] The administrator, assistant administrator and a part-time secretary work out of the Employer's administrative office in the town of Meadow Lake. The Employer's maintenance shop, including the superintendent's office, the tools, equipment and facilities for the employees engaged in maintenance and construction, is located in another part of the town. The landfill is located in the rural municipality itself. The rural municipality comprises an area of approximately 2500 square miles with some 515 miles of roads.

Evidence

[4] Lenn Lennea has been employed by the Employer since 1976. Originally hired as a grader operator, Mr. Lennea has been the superintendent of the Employer's maintenance and construction operations since the early 1980's. He has been on an indefinite leave due to illness since May 25, 2001.

[5] The major part of Mr. Lennea's job is the supervision of employees engaged in the Employer's maintenance and construction activities. The staff complement increases from approximately four employees in winter to approximately 16 employees during the construction season from spring thaw through to fall freeze-up. Employees are engaged in road maintenance,

rebuilding and new construction, snow-plowing, grading, culvert installation, gravel hauling and mowing, involving the operation of tractors, large trucks and heavy equipment.

[6] With respect to road grading, Mr. Lennea said that he and the former administrator divided the road system among four grader operators some years ago; the operators require little supervision and essentially maintain their areas as they deem in their experience to be required. Mr. Lennea sometimes directed the operators to service specific areas based on unforeseen special circumstances or requests from residents received by either himself or the Employer's administrative office. With respect to road construction, with the benefit of advice from Mr. Lennea and the administrator, council determined where roads would be built or rebuilt each season. Mr. Lennea determined the priority of the work and scheduled it accordingly, unless council specifically directed him otherwise, and supervised the work performed by the seven-person construction crew. Mr. Lennea also assessed the quality of the work performed. He also directed the maintenance or construction personnel as and when small emergencies (e.g., a road washout) arose. Infrequently, and generally only in an emergency, Mr. Lennea himself operated equipment and performed certain work; he said he had the authority to call in help after hours and on weekends as he deemed necessary, but most often consulted with the reeve before doing so.

[7] Mr. Lennea said that while some employees started their workday from the maintenance shop, others – the grader and mower operators in particular – routinely went straight to their current worksites. He said that he had little contact at all with the mower operator.

[8] While Mr. Lennea was paid a salary, all other maintenance and construction employees are paid an hourly wage. They submitted their timesheets to him for review and approval; he forwarded the sheets to the administrator for preparation of the payroll.

[9] Near the end of October each year, Mr. Lennea was responsible for laying off all but four persons. He testified that he had the discretion to determine who would be laid off, although usually the same four persons are retained, and his decision was subject to approval by council. In the spring he had the discretion to hire more staff for the construction season, subject to approval by council, and to determine when each person would start work. He testified that council never refused to grant approval. He described the process as being "pretty much routine." The administrator actually provided employees with written notices of lay off and hiring. Mr. Lennea said he had the same

authority to hire a replacement for any permanent year-round employee who retired. He said that when he hired someone to fill an existing position, he provisionally determined the rate of pay based on the applicant's experience and within the wage bracket that was usual for that kind of work. The administrator presented the wage rate to council for approval. Mr. Lennea did not hire for new positions nor did he set wage increases.

[10] Mr. Lennea alluded to a resolution of council passed on April 9, 1990 that provided him with the authority to hire and suspend employees. The resolution reads as follows:

> *That the superintendent, Lenn Lennea, be authorized to hire and position and where necessary suspend maintenance and construction employees.*

[11] Mr. Lennea said that council rescinded the resolution on July 10, 2001 upon hiring his replacement, John Cooney, as foreman.

[12] With respect to employee discipline, Mr. Lennea said that for several years there had not really been any discipline administered to any employee under his supervision beyond verbal admonishment. He said that several years ago he suspended an employee who was later terminated by council; his own involvement in the situation was to advise council with respect to the employee's performance and to provide his recommendation that he be terminated.

[13] Mr. Lennea testified that he exercised the authority to approve sick leave, vacation leave and casual leave. Because some of the employees also farm, requests for casual leave or flexible work hours are commonplace and routinely granted.

[14] Mr. Lennea is one of two employer representatives on its occupational health and safety committee. Mr. Lennea testified that he sometimes attended the meetings of council so he was available to answer questions relating to proposed construction projects. He said he did not have much contact with the administrator on a day-to-day basis – they each have their spheres of supervision – but the administrator relayed relevant information to him from council meetings that he did not attend.

[15] Mr. Lennea stated that while he did not authorize major equipment purchases, a function that was performed by council, he ordered parts for equipment repairs that sometimes totaled several thousands of dollars.

[16] During the course of cross-examination of Mr. Lennea by Mr. McKnight, Mr. Garden, counsel for the Employer, stated that the Employer was not seeking to exclude Mr. Lennea from the bargaining unit on the basis that he acted in a confidential capacity with respect to the employer's industrial relations pursuant to s. 2(f)(i)(B) of the *Act* (see, *infra*), but rather on the basis of a management exclusion pursuant to s. 2(f)(i)(A).

[17] Darryl Wilkinson was the Employer's administrator from 1984 until his retirement shortly after the present application was filed. During that period, his spouse, Marianne Wilkinson, served as the assistant administrator; she also recently retired from her position. They have since been replaced by Gina Bernier and Barbara Gallagher as administrator and assistant administrator, respectively. In his testimony Mr. Wilkinson described the administrator as the chief administrative officer of a rural municipality charged with carrying out certain duties pursuant to *The Rural Municipality Act, 1989*, S.S. 1989-90, c. R-26.1. He said that in his opinion the Employer could not function with the administrator in the proposed bargaining unit, because the administrator would almost certainly be on the Employer's bargaining team, and would be responsible on an ongoing basis for the receipt and handling of grievances and the administration of any collective agreement.

[18] Mr. Wilkinson said that he and Mr. Lennea co-operated as a "management team," each reporting to council rather than one to the other. He said that he himself had had little to do with the day-to-day operations of construction and maintenance. However, he admitted that in one "unusual instance" he hired the mower operator at the direction of council.

[19] Mr. Wilkinson explained that the Employer operated two geographically separate landfill sites with its employees until approximately 1997. At that time, the Employer contracted out operation of both landfills to a custodian. The change was prompted by the implementation of certain environmental regulations requiring that landfill sites be manned when open to the public. The contract was put out to tender. The present custodians are a husband and wife team, Murray and Leona Nixon. According to the contract with the Nixons, dated October 10, 2000, their custodial duties are required for the period between April 1 and October 31 in each of 2001, 2002 and 2003, on

specified days and between specified hours at each site. They are paid a flat monthly amount plus certain salvage rights that, according to Mr. Wilkinson, can be a significant additional amount. The custodians use their own vehicle for shelter when at the sites and do not receive any reimbursement therefor. Mr. Wilkinson said that the Nixons are responsible to find a replacement if they wish to take time off.

[20] With respect to the powers of an administrator to discipline employees, Mr. Wilkinson was of the opinion that pursuant to *The Rural Municipality Act, 1989, supra*, only the reeve of the rural municipality may suspend an employee and only council may dismiss an employee. As administrator, he did not have occasion to do so himself.[1]

[21] Gina Bernier has been the Employer's administrator since June 1, 2001. She testified that as the administrator she is directly responsible to council, attends all meetings of council and prepares all minutes of the meetings. In the performance of such duties she is privy to the deliberations of council and its decisions before they are made public pursuant to *The Rural Municipality Act, 1989, supra*. On a day-to-day basis she has a working relationship and communication with the reeve. She testified that she was authorized by council to instruct legal counsel with respect to the present application and other proceedings at the Board.

[22] Ms. Bernier supervises the work of the assistant administrator and a casual secretary. She has no role in the day-to-day operation of the construction and maintenance department, leaving that function to the foreman, Mr. Cooney, whom is temporarily replacing Mr. Lennea while he is on sick leave. In her opinion, the new title of "foreman" (as opposed to "superintendent"), and council's rescission of the resolution authorizing Mr. Lennea to hire and suspend maintenance and construction employees, is related to Mr. Cooney's comparative inexperience.

---

[1] *The Rural Municipality Act, 1989*, ss. 52(1) and(2) provides as follows:

> *52(1) The reeve may suspend any municipal employee and he or she, on the suspension , shall report:*
>
> *(a) the suspension; and*
>
> *(b) the reasons for the suspension;*
>
> *to the council.*
>
> *(2) When a municipal employee is suspended pursuant to subsection (1), the council may dismiss or reinstate the municipal employee.*

[23] Ms. Bernier said that the assistant administrator, Barbara Gallagher, who also commenced employment on June 1, 2001, was hired by resolution of council. Ms. Bernier assigns her her work. The assistant administrator's duties include most of the typing and clerical duties in the office, the updating of personal information on employee files, the administration of health and dental benefit claims and superannuation applications, and once she is trained, she will handle the payroll for all employees. Ms. Bernier said that the assistant administrator prepares the minutes of council when she is unable to do so herself. She testified that both she and the assistant administrator have bank signing authority with the reeve and deputy reeve.

[24] Ms. Bernier said that if the Union is certified, she foresees that she herself and the foreman will be on the Employer's bargaining committee, and the assistant administrator will record the negotiations for the Employer's side and perform the clerical preparation of offers to the Union. Once a collective agreement is in place, Ms. Bernier said she anticipated the assistant administrator would type correspondence with the Union and grievance replies, record the proceedings of union-management meetings and type reports to council regarding same.

Statutory Provisions:

[25] Relevant provisions of the *Act* include the following:

> *2 In this Act:*
>
> *(f) "employee" means:*
>
> *(i) a person in the employ of an employer except:*
>
> *(A) a person whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character, or*
>
> *(B) a person who is regularly acting in a confidential capacity with respect to the industrial relations of his or her employer.*
>
> *(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.*

Argument

[26] Mr. Garden, counsel for the Employer, argued that the administrator ought to be excluded under both ss. 2(f)(i)(A) and (B) of the *Act,* the assistant administrator under s.2(f)(i)(B) only, and the superintendent under s.2(f)(i) (A) only. He further argued that the landfill custodian ought to be excluded as an independent contractor rather than an employee. Mr. Garden filed a written brief that we have reviewed.

[27] With respect to the administrator, citing the Board's decision in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Remai Investment Co. Ltd.*, [1991] 4th Quarter Sask. Labour Rep. 56, LRB File No. 143-91, Mr. Garden said that, notwithstanding that Ms. Bernier supervised few employees, she exercised decidedly managerial functions. He said further that, in the event the Union is certified, she would play a key role for the Employer both in bargaining and with respect to its ongoing relationship with the Union.

[28] With respect to the assistant administrator, Mr. Garden argued that while the position does not exercise managerial authority, it is anticipated that the incumbent will have a role requiring her to act in a confidential capacity with respect to the Employer's industrial relations, and that it is not necessary that such duties constitute a majority of the duties, nor that they be the primary focus, of the position, so long as they are performed regularly. In support of his oral argument, counsel referred to the following decisions of the Board: *Royal Canadian Legion Regina (Sask.) No. 1 Branch v. Retail, Wholesale and Department Store Union, Local 454*, [1989] Spring Sask. Labour Rep. 56, 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; *Communications, Energy and Paperworkers' Union of Canada v. E.E.C. International Inc.*, [1998] Sask. L.R.B.R. 268, LRB File No. 362-97.

[29] With respect to the superintendent, Mr. Garden argued that the position exercises disciplinary authority as concerns the construction and maintenance employees. He asserted that

while s. 52 of *The Rural Municipality Act, 1989, supra*, provides that the reeve and council have the authority to suspend and dismiss, respectively that does not necessarily mean that all others are precluded from exercising such authority; he argued that pursuant to its general bylaw- and resolution-making powers under ss. 168 and 168.1 of *The Rural Municipality Act, 1989, supra*, council may delegate its authority and that of the reeve. Counsel further argued that the superintendent's supervisory duties as concerns the assignment and performance of the work and the administration of employee concerns such as leave are indicative of the position's status as a "first-line manager."

[30] With respect to the landfill custodian, counsel argued that the relevant indicia of the position lead to the conclusion that it is more in the nature of an independent contractor than of an employee.

[31] Mr. McKnight, representing the Union, argued that there was no evidence that the administrator exercised managerial authority as its primary responsibility and that it ought not to be excluded from the bargaining unit. He argued further that the administrator is not presently involved in a confidential capacity in the Employer's industrial relations and there is no compelling reason why the position should be excluded on that ground even if the Union is certified, intimating that council can handle such matters.

[32] Mr. McKnight argued that there is no evidence to support the exclusion of the assistant administrator: while there is the possibility that the position might be assigned to take notes at bargaining and perform clerical work, it will not be involved in actual bargaining or subsequent collective agreement administration.

[33] With respect to the landfill custodian, Mr. McKnight argued that the relationship with the Employer does not possess the hallmarks of an independent contractor: the hours of work are set by the contract and there is no ability to increase profit by changing the way in which the work is performed.

Analysis and Decision

[34] In deciding whether an individual is an "employee" for the purposes of the *Act* or, pursuant to s. 2(f)(i)(A) of the *Act*, ought to be removed from a statement of employment and his or her position

excluded from a proposed bargaining unit on the basis that he or she primarily exercises managerial authority, we must assess the evidence to determine whether it tends to indicate that the individual has, or would be likely to have, a conflict of interest, in a labour relations sense, with the other members of the proposed bargaining unit. In *Canadian Union of Public Employees v. Duck Mountain Ambulance Care Ltd.*, [1999] Sask. L.R.B.R. 697, LRB File No. 096-99, at 708-711, the Board reviewed the applicable criteria and underlying rationale in making this determination:

> *[36] The following statement by the Board in City of Regina v. Canadian Union of Public Employees and Regina Civic Middle Management Association, [1995] 3rd Quarter Sask. Labour Rep. 153, LRB File No. 268-94, at 158, and approved of in Remai Investments, supra, summarizes the issue and the overarching general consideration in determining the issue:*
>
> > *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.*
>
> *[37] While no exhaustive list can be made of factors which may be relevant to the determination, the question is essentially a factual one: the Board examines the existence of managerial functions, and assesses the degree of independent decision making authority, the nature of the decisions made, and the extent to which the individual formulates and implements employer policy, administers the business and directs the workforce. See, 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, at 47.*
>
> *[38] In Westfair Foods Ltd., supra, at 71, the Board enumerated several of the more important functions which consistently have been considered in making this determination. Reference should be made to the full case report for the complete discussion, but they are summarized as follows:*
>
> > *The extent of the power to hire new employees;*
> >
> > *The extent of the power to discipline;*
> >
> > *The extent of the power to promote and demote;*
> >
> > *The extent of the authority to administer personnel policies (and the collective agreement and grievances, if applicable);*

> *The extent of the authority to evaluate employee performance;*
>
> *The extent of the power to direct the workforce, including such tasks as scheduling, authorization of overtime, approval of vacation and leaves of absence, etc.*
>
> *The nature and extent of the discretion to affect, and responsibility for, the overall performance of the work area or department.*

[39] Of course, these are only some of the factors that may pertain to a given situation and the list is not meant to be exhaustive; depending upon the circumstances of the individual case, certain functions may be more clearly defined and have more prominence than others. The tendency towards dogmatism must be resisted; each situation must be assessed according to its own facts.

. . .

[41] However, the Board has accepted that certain of these functions, generally, are more accurate and important indicia of managerial authority and status than are others. In a series of recent decisions delineating the boundary between so-called "middle management bargaining units" and the larger general bargaining unit, the Board has described the core criteria as being the extent to which a supervisory position is in "conflict in a labour relations sense" with members of the bargaining unit, and whether the extent of any such conflict is sufficient to render the supervisor's position incompatible with membership in the unit. 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 Board described a more focussed approach to the issue than it had used in the past:

> *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.*

[35] In considering whether to found an exclusion under s. 2(f)(i)(B) of the *Act*, the Board must be satisfied that that the person regularly acts 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 marketplace.

[36] The Board explained the policy underlying such exclusions in the *Canadian Union of Public Employees, Local 882 v. City of Prince Albert,* [1996] Sask. L.R.B.R. 680, LRB File No. 266-94, at 683, as follows:

> *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.*

[37] However, because of the deprivation of union representation for the employee involved, the Board has consistently held that it is only for good and compelling reasons that exclusions on this basis should be allowed. The importance of this concern was described by the Board in *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, at 217,as follows:

> *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.*

[38] The Board has recognized that an employer requires a modicum of administrative resources and clerical support during the bargaining process and in carrying out its responsibilities under a collective agreement. In *Hillcrest Farms Ltd., supra,* the Board stated, 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 candor and confidence.*

[39] However, exclusions on this basis are not considered lightly. As the Board stated in *E.E.C. International, supra,* at 277:

> *. . . 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.*

The Administrator

[40] The position of administrator of a rural municipality is one that does not fit neatly into the standard model of the employer-employee relationship. The administrator is the chief administrative officer of a rural municipality, in contrast to the reeve who is the chief executive officer; the former is appointed by the council of the rural municipality (as are all municipal employees), while the latter is an elected position. The administrator position is recognized by *The Rural Municipality Act, 1989, supra.* In addition to those functions and duties of which Mr. Wilkinson and Ms. Bernier testified, the statutory duties and authorities of the administrator are many and diverse. A review of the statute paints a picture of the position that is not unlike the corporate offices of secretary and treasurer in a commercial enterprise. The position's statutory duties, authority and special entitlements include, *inter alia*: the duty to retain custody of the seal of the municipality and to affix same as required by law or by order of council (s. 7); co-obligated with the reeve, the duty and authority to sign every order, agreement or document made or executed on behalf of the municipality (s. 7.1); the duty to act as recipient of the declarations of office of the members of council (s. 21); the designated recipient of a notice of resignation by a member of council (s.23); in the absence of the reeve, deputy reeve or acting deputy reeve from a meeting of council, the duty to request that council appoint a chairperson (s. 41); the special status to be dismissed only by resolution of council (s. 56), and to continue to receive a salary upon suspension (s. 52); the duty to attend all meetings of council, to record the minutes thereof, to receive and keep safely all moneys belonging to the municipality, bank signing authority, the duty to keep the books and prepare the financial statements of the municipality, and to prepare and transmit to the minister such reports as the minister may require (s. 63); if authorized by council, to establish bank accounts, and joint authority to pay wages and accounts (s. 64); the duty to prepare the list of voters (s. 76); the duty to receive from the returning officer, and to keep safely, the sealed ballot boxes (s. 139); the duty to destroy the ballot box contents and retain the affidavits of the witnesses thereto (s. 140); the duty to receive an application for election recount and to attend the recount with the sealed ballot boxes (s. 143); the responsibility to hold the statutory office of assessor where no assessor has been appointed (s. 2(1)(b)); preparation of the tax roll (s. 339); authority to seize and sell goods for payment of outstanding taxes (s. 375); in the event that execution is levied against the rural municipality, the

entitlement to receive a percentage of the amount collected for his or her services in assisting the sheriff (s. 411).

[41] While the reeve is charged by statute with the responsibility to oversee the conduct of all municipal employees (s. 28), given that the reeve receives a daily honorarium not exceeding 15 days per year for supervising the work of the rural municipality (s. 29), in practical fact, the administrator is the eyes and ears of the reeve and council in the workplace. It is difficult to understand how council could function if such was not the case. And further, in practical fact, the administrator would be remiss in not keeping the reeve and council fully informed of all information relevant to their stewardship of the municipality, including the dereliction of duty of any employee.

[42] Therefore, regardless of whether or not only the reeve has the power to suspend employees, and council the power to hire and dismiss employees (assertions of interpretation of the statute with respect to which we make no finding), the function of the administrator as the Employer's eyes and ears, coupled with the significant and important statutory duties, authority and entitlements described above, lead us to conclude that the administrator should be excluded from the proposed bargaining unit as a member of management.

[43] In any event we have little difficulty in concluding that the administrator ought to be excluded on the basis of acting in a confidential capacity with respect to the Employer's industrial relations. The members of council are part-time and would not necessarily possess knowledge of the administration of the rural municipality nor the corporate memory to conduct collective bargaining without the close assistance of the administrator. Also, following the conclusion of a collective agreement, the administrator will be the day-to-day administrator of the Employer's obligations and interests in the workplace under the agreement.

The Assistant Administrator

[44] The exclusion of the assistant administrator from the proposed bargaining unit is sought on the basis of the assertions, briefly, that the incumbent will attend bargaining with the administrator for the purposes of taking notes, will be required to type proposals and correspondence relating to bargaining, and, subsequent to a collective agreement being achieved, will be required to perform typing and

clerical duties associated with grievances and administration of the agreement. The incumbent also has access to employee files.

[45] The last item is not particularly important. In most enterprises of any size with a unionized clerical staff, persons in the bargaining unit have access to employee files and personal employee information, including absenteeism, payroll and disciplinary records. The duty to keep such information confidential is simply part of certain employees' jobs, the breach of which duty may attract disciplinary sanction. The crux of the exclusion under s. 2(f)(i)(B) of the *Act* is that the position in question regularly acts in a confidential capacity with respect to the Employer's industrial relations. While on a broad interpretation, the clerical administration of employee personal information and records is part of the wider ambit of "industrial relations" to the extent that the concept includes human resources, it is not on the simple access to such records as part of one's job that the exclusion rests. Rather, it is the reasonably necessary involvement in, or access to, confidential information or discussions relating to negotiations, bargaining strategy, the internal consideration and adjustment of grievances, internal discussion regarding collective agreement interpretation, and the strategic administration of the collective agreement, on which the exclusion is most often based. We use the phrase "reasonably necessary" because it is the policy of the Board in keeping with the object and purpose of the *Act* to ensure that access to collective bargaining is open to as many employees in a proposed bargaining unit as is possible. That is, an employer cannot obtain an exclusion on this ground by arbitrarily adding such duties and authority to a position when it is not reasonably necessary to the prudent management of the workplace.

[46] The situation in the present case is somewhat different from that which the Board considered in *E.E.C. International, supra*, and the rationale in that case is not squarely applicable to the present situation. In that case the employer's sole manager, who was responsible for collective agreement negotiation and subsequent administration, was located several thousand miles from the head office, was unable to type and relied upon the clerical assistant for all such skills, and the clerical assistant had access to all of the manager's communications and e-mail with his superiors. In those circumstances, the clerical assistant was provisionally excluded from the bargaining unit.

[47] It is a trite observation that following certification there is a new set of duties and responsibilities levied upon management related to bargaining and that there also tends to be an increase in the ongoing administration of confidential personnel matters. In *Canadian Union of Public*

Employees, Local 3737 v. Town of Moosomin, [1994] 2nd Quarter Sask. Labour Rep. 92, LRB File No. 038-94, the Board excluded the new position of acting administrator/confidential secretary from the bargaining unit. The duties of the position were envisioned to include relieving the administrator during his or her absence, the preparation and processing of documentation related to collective bargaining and the discipline of employees, attendance at negotiating meetings and maintaining records of bargaining sessions. The Board stated as follows, 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.*

[48] In the present case, the Employer has planned that the assistant administrator will be present during negotiations as a clerical resource for the administrator who will have a leading role in the negotiations on behalf of the Employer. With respect to involvement in confidential industrial relations matters after a collective agreement is reached, the evidence was that the assistant administrator will be required to assist the administrator with the administration of grievances, correspondence with the Union relating to the grievance process and reports to council regarding personnel matters, and will be responsible for the maintenance of employee files with respect to these matters in addition to those already performed, such as the administration of benefit plans.

[49] The administrator in the present case appears to have varied and significant responsibilities and a heavy workload. There is a real concern that the administrator on her own will have significant difficulty handling an increased workload as a result of certification and operation under a collective bargaining regime. While the reeve and councillors, or some of them, will no doubt be involved in bargaining, they are elected officials not paid managers. If the assistant administrator is included in the bargaining unit, there will be no one to relieve the administrator for holidays or during other absences for the purposes of administering the collective agreement on a day-to-day basis.

[50] However, we recognize that the duties that it is envisioned will be performed by the assistant administrator are not yet being performed. Therefore, the assistant administrator will be provisionally excluded from the bargaining unit, which exclusion will become final after the expiry of one year from

the date of the Order to issue with these Reasons unless, before the period expires, the Employer or the Union applies to the Board for a variation of the determination.

Superintendent/Foreman

[51] Mr. Lennea occupied the position of "superintendent" until May 25, 2001 when he went on an indefinite leave of absence. Mr. Cooney was hired as his temporary replacement with the title of "foreman" and with a certain reduction in the authority that had been delegated by council to Mr. Lennea in 1990. It is not known when or if Mr. Lennea will return to work.

[52] The evidence discloses that both Mr. Lennea himself and the then administrator, Mr. Wilkinson, considered Mr. Lennea to be the direct line supervisor of the construction and maintenance department and employees with the historical responsibility to report to and advise council with respect to the operation of the department and the activities of its personnel. The evidence is that the former administrator had little to do with any of these matters when Mr. Lennea was superintendent. There is no evidence that the present administrator, Ms. Bernier, has any greater involvement in those matters. However, ostensibly, the Employer's council has seen fit to remove some of the autonomy formerly delegated to Mr. Lennea, and, presumably exercise that authority itself.

[53] We offer no opinion as to whether the delegation of certain authority to Mr. Lennea in 1990 by the resolution of council was or was not valid, but it is clear that it was unequivocally revoked shortly before the present application was filed. Given that the original resolution was personal to Mr. Lennea, the explanation that it was rescinded because of the inexperience of his replacement, Mr. Cooney, does not really make sense: the 1990 resolution purported to grant certain authority to Mr. Lennea to hire and suspend employees, not to the position of superintendent generally. With the rescission of the resolution, such authority was removed from Mr. Lennea and the head position of the construction and maintenance department whether it be called superintendent or foreman.

[54] Whether we consider the position as that of superintendent as occupied by Mr. Lennea (on leave) or of foreman as temporarily occupied by Mr. Cooney, as of July 10, 2001, the head of the department does not have the authority to hire or suspend employees. All other duties, responsibilities and authority remaining equal (after the rescission of the authority that had been delegated to Mr. Lennea), the position may, briefly: prioritize the work of the department (subject to the specific

direction of council); generally supervise the workers in the department; in conjunction with council, determine when the construction season will begin and end; provide advice to council with respect to hiring, discipline and discharge of department employees; authorize leaves of absence and vacation; authorize flexible working hours; determine when and how to undertake emergency work, usually in consultation with the reeve; approve timesheets for submission to payroll; authorize equipment repairs; infrequently perform hands-on construction or maintenance work.

[55] In *Rural Municipality of Lajord, supra*, the Board did not exclude the public works foreman from the bargaining unit. The Board observed, at 185:

> *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 determine 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.*

[56] The reasoning in *Rural Municipality of Lajord* is consistent with Board policy and precedent and is persuasive in the present case. The authority of the foreman (or superintendent) in the present case is similar to that of the public works foreman in that case. The duties of the position are primarily supervisory rather than managerial. The position ought to be included in the bargaining unit. Should the duties of the position change, it is open to the Employer to apply for exclusion during the open period.

Landfill Custodian

[57] In *Saskatchewan Government and General Employees' Union v. Saskatoon Open Door Society*, [2001] Sask. L.R.B.R. 210, LRB File No. 177-99, the Board recently reviewed the development of the consideration of the issue of employee-contractor status by labour relations tribunals. The Board stated, at 213-216, as follows:

> *[10] In several cases in the past few years, the Board has had occasion to track the evolution of the approach by labour relations tribunals to the employee-contractor dichotomy from the seminal decision by the Privy Council in Montreal v. The Montreal Locomotive Works Ltd., et al., [1947] 1 D.L.R. 161 (P.C.), which enunciated the well-*

known four-fold test, viz., (1) the degree of control over the method of providing goods and services; (2) ownership of the tools; (3) chance of profit; and, (4) risk of loss; through the "integration test" proposed by Lord Denning in Stevenson Jordan & Harrison Ltd. v. MacDonald & Evans, [1952] 1 TLR 101 (C.A.), which asks the question whether the work in issue is being done as an integral part of the employer's business and, therefore, whether the putative contractor is employed as part of the employer's business like other employees; to the addition of two tests to the Montreal Locomotive criteria by the Ontario Labour Relations Board in International Woodworkers of America v. Livingston Transportation Ltd., [1972] OLRB Rep. 488, namely, (1) whether a party is carrying on business on his own behalf or for a superior; and, (2) the statutory purpose test. In International Brotherhood of Electrical Workers, Local 2038 v. Tesco Electric Ltd., [1990] Summer Sask. Labour Rep. 57, LRB File No. 267-89, the Board described the statutory purpose test in the following terms:

> *. . . the statutory purpose of The Trade Union Act is to protect the rights of employees to organize in trade unions of their own choosing for the purpose of bargaining collectively with their employers. Accordingly, individuals should not be excluded from collective bargaining because the form of their relationship does not coincide with what is generally regarded as "employer-employee", when in substance, they might be just as controlled and dependent on the party using their services as an employee is in relation to his employer. If the substance of the relationship between the individual and the company is essentially similar to that occupied by an employee in relation to his employer, then the individual is in fact an "employee" within the meaning of Section 2(f) of the Act and will be so designated by the Board, notwithstanding the form or nomenclature attached to that relationship.*

[11] In an article entitled "Enterprise Control: The Servant Independent Contractor Distinction" (1987) 37 U.T.L.J. 25, Prof. Robert Flannigan formulated the enterprise control test which emphasized the risk-taking element of entrepreneurial activity as an essential characteristic of control over the enterprise.

[12] This latter test was referred to as the economic control test by the Canada Labour Relations Board in Canada Post Corporation v. Canadian Postmasters and Assistants Association, et al. (1989), 5 CLRBR (2d) 79, which assessed its function as being,

> *. . . to update the concepts of the "fourfold test" and the "integration test" and reconstruct them to suit the modern business milieu. It focuses on the contractor's activities rather than on the employer's business. This is important for the Board as it administers the Code in today's ever-changing business world where corporate takeovers, mergers and practices such as "contracting out" and "privatization" are becoming commonplace.*

[13] The Board has subsequently approved of an economic control analysis as a

fundamental part of the determination of employee-contractor status. In Retail, Wholesale and Department Store Union, Locals 539 & 540 v. Federated Co-operatives Limited, [1989] Fall Sask. Labour Rep. 60, LRB File No. 256-88, the Board stated:

> *. . . although it is not the only consideration, entrepreneurial independence or control, in the sense of the latitude to make decisions which determine the financial success or failure of the business, is the most important feature that distinguishes independent contractors from employees.*
>
> *This Board agrees with that analysis. An independent contractor is essentially a business person, an entrepreneur, a risk-taker, who takes chances in the marketplace with a view to making a profit. Success or failure of his enterprise depends upon how well he utilizes the capital and labour that he controls and how well he assesses the marketplace. Regardless of how inferior a businessman's bargaining power may be or how poor his bargain, he is not an employee within the meaning of the Act.*

[14] This approach has been adopted by the Board in several subsequent decisions including, McGavin Foods, supra; United Food and Commercial Workers, Local 241-2 v. Beatrice Foods Ltd., [1994] 3rd Quarter Sask. Labour Rep. 302, LRB File No. 264-93; Retail, Wholesale Canada, A Division of the United Steelworkers of America v. United Cabs Ltd., [1996] Sask. L.R.B.R. 337, LRB File No.115-95; Grain Services Union v. AgPro Grain Inc., [1996] Sask. L.R.B.R. 639, LRB File No. 111-96; Regina Musicians Association, Local 446 v. Saskatchewan Gaming Corporation, [1997] Sask. L.R.B.R. 273, LRB File No. 012-97. In the last decision, the Board looked to the following criteria previously identified by the Ontario Board in Algonquin Tavern v. Canada Labour Congress, [1981] 3 Can. LRBR 337, at 360 ff.:

> *1. The use of, or right to use substitutes. ...*
>
> *2. Ownership of instruments, tools, equipment, appliances, or the supply of materials. ...*
>
> *3. Evidence of entrepreneurial activity. ...*
>
> *4. The selling of one's services to the market generally. ...*
>
> *5. Economic mobility or independence, including the freedom to reject job opportunities, or work when and where one wishes. ...*
>
> *6. Evidence of some variation in the fees charged for the services rendered. ...*
>
> *7. Whether the individual can be said to be carrying on an "independent business" on his own behalf rather than on behalf of an employer or, to put it another way, whether the individual has become*

> *an essential element which has been integrated into the operating organization of the employing unit. ...*
>
> *8. The degree of specialization, skill, expertise or creativity involved. ...*
>
> *9. Control of the manner and means of performing the work - especially if there is active interference with the activity. ...*
>
> *10. The magnitude of the contract amount, terms, and manner of payment. ...*
>
> *11. Whether the individual renders services or works under conditions which are similar to persons who are clearly employees.*

[15] Despite the fact that both the Algonquin Tavern and Saskatchewan Gaming cases defined and considered these criteria in the context of entertainers engaged to perform for the public ancillary to the respective principal's main business, the list, which is not exhaustive, is informative for other situations and industries involving the determination of employee-contractor status.

[16] While the particular facts of McGavin Foods, supra, are not particularly instructive in the present situation in that that case involved a plan by McGavin to franchise or contract out its distribution routes formerly serviced by bargaining unit employees using company-owned trucks to owner-operators, the Board's description of the operation of s. 2(f) of the Act, at 210, is beneficial:

> *Section 2(f)(i.1) of the Act sets out a purposive test for determining if the relationship between contractors, in the opinion of the Board, could be the subject of collective bargaining. Section 2(f)(iii) of the Act prevents the common law test of "vicarious liability" that was developed to determine the legal liability of a master for the acts of a servant from being determinative of employment status. In Retail Wholesale Canada, A Division of the United Steelworkers of America v. United Cabs Ltd., Johnson et al., [1996] Sask. L.R.B.R. 337, LRB File No. 115-95, the Board, at 345, held that the focus of the assessment under s. 2(f)(i.1) and (iii) of the Act is an attempt to "distinguish between persons who are genuinely operating in an entrepreneurial fashion independent of an "employer," and those who, whatever the form their relationship with that putative employer takes, are really employees whose access to the option of bargaining collectively should be protected."*

[58] In the present case, the landfill custodians, the Nixons, are remunerated by a combination of a flat monthly amount and salvage rights. They are not entitled to receipt of the other employment benefits provided to the Employer's employees. With the exception of the maintenance and

construction foreman who is paid a monthly salary, all of the Employer's employees are remunerated on an hourly wage basis. The evidence indicates that at time periods the value of salvage rights may amount to as much as some hundreds of dollars a day. The Nixons' hours of work, and methods used, in relation to such rights are not regulated by their contract with the Employer; their freedom to hire replacement help for the custodial work or in relation to the salvage rights is unrestricted. Depending on their motivation and efficiency with respect to salvage rights, the custodians may significantly affect the total amount of their remuneration. They have no contact with the Employer's other employees, except perhaps infrequently with the foreman, and there is no lateral movement between the landfill custodian and other positions. They have no sufficient community of interest with the Employer's other employees. In all of the circumstances, we are of the opinion that the landfill custodians are independent contractors rather than employees within the meaning of the *Act* and should not be included in the bargaining unit.

[59] An Order will issue in a form reflecting the determinations made herein.

DISSENT

[60] **Tom Davies, Board Member:** I concur with this decision, which excludes from the bargaining unit, the positions of administrator, assistant administrator and landfill custodian.

[61] I do not concur with the majority decision that the position of superintendent/foreman should be included in the bargaining unit. My reasons follow.

[62] The superintendent reports directly to the reeve and not to the administrator. The reeve has two direct reports; the administrator and the superintendent. Both positions are senior management positions responsible for the management of the Employer. Therefore, because the superintendent satisfies the criteria for exclusion found under ss. 2(f)(i)(A) and (2)(f)(i)(B), that position should be excluded from the bargaining unit.

[63] The superintendent is responsible for the day-to-day operations of the Employer's maintenance and construction activities. He supervises a crew of about four employees during the winter months and

about sixteen employees from spring to fall. He is also responsible for the labour relations functions of his department with the ability to impose discipline and to recommend suspension and dismissal.

[64] While s. 52 of *The Rural Municipality Act, 1989,* provides that only the reeve or council have the ultimate authority to impose suspension or dismissal, the practical fact is that the superintendent is the one who does the actual supervision of employees and deals with all labour relations matters including recommending discipline up to suspension and dismissal. The reeve and council do not involve themselves in day-to-day labour relations matters nor do they involve themselves in the day-to-day management of the maintenance and construction activities of the Employer and rightly so.

[65] All employees receive their instructions from the superintendent. The superintendent is responsible for planning and organizing the work and for deciding what work gets done and when. The superintendent's primary role is to actually exercise authority and actually perform functions that are of a managerial nature. Further, the superintendent is a person who is regularly acting in a confidential capacity with respect to the industrial relations of the Employer.

[66] Therefore, my decision would be to exclude the position of superintendent/foreman from the bargaining unit.

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant v. VISION SECURITY AND INVESTIGATIONS INC., Respondent

LRB File No. 165-01; October 30, 2001
Vice-Chairperson, Walter Matkowski; Members: Bruce McDonald and Clare Gitzel

For the Applicant: Drew Plaxton
For the Respondent: Douglas Emsley

Certification – Bar – Earlier application for certification relating to same bargaining unit withdrawn by union – Employer argues that subsequent application barred pursuant to s. 5(b) of *The Trade Union Act* – Board confirms that six month bar applies to earlier application dismissed by Board not earlier application withdrawn by applicant.

Successorship - Certification – Employer argues that, due to successorship, union cannot obtain new Certification Order – Board concludes that successorship does not prevent union from seeking new Certification Order.

***The Trade Union Act,* ss. 5(a), 5(b), 5(c) and 37.**

REASONS FOR DECISION

Background

[1] Walter Matkowski, Vice-Chairperson: United Food and Commercial Workers, Local 1400 (the "Union") applied to the Board for certification of "all employees of Vision Security and Investigations Inc. (formerly known as Western Pacific Security Group Inc.) in the Province of Saskatchewan, north of the 51st parallel, except: Managers, Assistant Managers, Site Supervisors, Office Staff, Loss Prevention Personnel, and all those holding positions of equal or higher rank than Manager."

[2] Vision Security and Investigations Inc. (the "Employer") opposed the application on a number of grounds. The parties did not call any evidence and were able to agree on the relevant facts to be considered by the Board.

Relevant Facts

[3] Service Employees' International Union, Local 299 holds a Certification Order for the Employer (LRB File No. 228-99) covering employees employed by the Employer located in or around Regina.

[4] The Union holds separate Certification Orders for two predecessor employers (Inner-Tec Security Consultants Limited, LRB File No. 231-90 and Argus Guard and Patrol Ltd., LRB File No. 116-98.)

[5] The Employer recognizes the Union's successor rights in regard to the two predecessor employers (relating to employees who work at the St. Paul's Hospital site and the City Hospital site.) The employees who work at the St. Paul's Hospital site are covered by a collective bargaining agreement while the employees who work at the City Hospital site are covered by a letter of understanding.

[6] The Employer is in the security and investigation business with most if not all employees of the Employer being designated as security guards.

[7] The employees who work at St. Paul's Hospital are covered by a collective agreement entered into between the Union and Western Pacific Security ("Western"). Western and the Employer amalgamated on or about August 1, 2000. The Employer acknowledged the migratory nature of its workforce when the Employer provided that it had concerns about losing contracts and/or maintaining contracts.

[8] The Union initially brought an application for certification against the Employer on July 18, 2001. Prior to the commencement of the hearing the Union withdrew that application.

Relevant Statutory Provisions

[9] Section 5 (b) of *The Trade Union Act* R.S.S. 1978, c.T.17 (the "*Act*") reads:

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

[10] Section 37(1) of the *Act* reads:

> *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.*

Analysis

[11] The Employer opposed the Union's application for certification on a number of grounds. First, the Employer argued that because the Union had withdrawn its earlier application in July, 2001, s. 5(b) of the *Act* prevented the Union's application herein. In other words, the Employer argued that the Board should interpret the term "dismissal" in s. 5(b) of the *Act* to include the withdrawal of an application. The Board in *United Steelworkers of America v. VicWest Steel Inc.*, [1989] Summer Sask. Labour Report 77, LRB File No. 270-88 rejected this argument and this Board rejects the argument as well.

[12] The Employer more forcefully argued that because the Union has a deemed successorship to the two sites in question, it cannot obtain a Certification Order.

[13] The Union countered that argument by arguing that it did not bring a s. 37 application but rather seeks a Certification Order. Counsel for the Union argued that a s. 37 application would have given the Union the two working sites in question. However, counsel argued that there is nothing in the *Act* which prevents the Union from obtaining a Certification Order. Counsel for the Union argued that a geographical area, which they hoped to obtain with the Certification Order, would protect the Union given the movement common in the security business. In other words, if the Employer lost its contracts at St. Paul's Hospital and City Hospital but was able to obtain other contracts in Saskatoon, the Union would still be there for its members.

[14] The Union is correct in its argument that there is nothing in the *Act* which prevents it from obtaining a Certification Order in the case at hand. As such, given the fact that the Union has obtained the appropriate support, a Certification Order will be issued.

[15] The final question to be addressed is the appropriate unit to be certified. The Union sought a Certification Order which covered all employees of the Employer north of the 51st parallel. The limited evidence confirmed that the Employer had no employees outside of its Regina and area employees other than those in Saskatoon. Given this fact, the Board is prepared to issue a Certification Order similar to the Order granted by the Board relating to this Employer in LRB File No. 228-99.

[16] The Certification Order shall be for all employees employed by Vision Security and Investigations Inc. in or in connection with its places of business located within a 25 mile radius of Saskatoon, Saskatchewan, except managers, assistant managers, site supervisors, office staff, loss prevention personnel, and all those holding positions of equal or higher rank than manager.

SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant v. UNIVERSAL REEL & RECYCLING INC., Respondent

LRB File Nos. 226-01, 227-01 & 228-01; November 2, 2001
Chairperson, Gwen Gray; Board Members: Gloria Cymbalisty and Leo Lancaster

For the Applicant: Larry Kowalchuk
For the Respondent: Brian Kenny

Remedy – Interim order – Criteria – Board reviews criteria for issuing interim order – Employee taking active role in union organizing campaign terminated during organizing campaign after employer made anti-union comments to employees –Board finds arguable case on main application and concludes that balance of labour relations harm favours issuance of interim order – Board orders interim reinstatement of employee.

Remedy – Posting of notice – Board orders employer to post Reasons for Decision, Interim Order and Certification Order in workplace and to leave same posted until hearing and determination of final applications.

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

REASONS FOR DECISION

Facts

[1] **Gwen Gray, Chairperson:** Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Union") applied for unfair labour practice, reinstatement and monetary loss orders for Randy Rasmusen, an employee at the Weyburn plant of Universal Reel & Recycling Inc. (the "Employer"). In addition, it filed a request for interim relief pursuant to s. 5.3 of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the "*Act*"). The Union also filed affidavits of Gord Schmidt, union organizer, and Randy Rasmusen, employee.

[2] The Employer filed an affidavit of Jeff Richards, plant manager at the Employer's Weyburn plant.

[3] The Union's material sets out Mr. Schmidt's efforts at organizing a trade union at the Weyburn and Moose Jaw plants of the Employer commencing with a telephone conversation between Mr. Schmidt and an employee on September 24, 2001. The main organizing effort occurred

between October 6, 2001 and October 8, 2001 according to Mr. Schmidt's affidavit. Mr. Rasmusen assisted the Union in the organizing effort.

[4] It is common ground that the plant manager, Mr. Richards, met with the employees on October 5, 2001 and inquired as to whether a union organizing effort was underway. Mr. Richards deposed that he told the staff that it was his opinion that a union would not gain them anything more than they would likely get from the Employer in the absence of a union. Mr. Rasmusen deposed that such conversations with employees occurred on October 4, 2001 and October 5 and 9, 2001 involving both Mr. Richards and Jason Hopkins, another manager and that the general tone of such conversations reflected the Employer's negative view of the unionizing effort.

[5] It is also common ground in the materials that Mr. Rasmusen was terminated from his employment on October 9, 2001. Mr. Richards deposed that the reasons for termination related to Mr. Rasmusen's poor work performance, and were unrelated to the Union's organizing efforts. Mr. Rasmusen deposed that he had been warned earlier about his work performance and had improved to the point that the plant manager complemented him for his improved performance.

[6] The Union filed for certification on October 22, 2001 and the Employer indicated through counsel that it did not intend to file a reply in opposition to the application for certification.

Analysis

[7] On an application for interim relief under s. 5.3 of the *Act*, the Board requires the Union to demonstrate that it has an arguable case under the *Act* on its main application; and that the labour relations harm that will result if the interim order is not granted will be greater than the labour relations harm that will result if the interim order is granted: see *United Food and Commercial Workers Union, Local 1400 v. Tropical Inn et al.*, [1998] Sask. L.R.B.R. 218, LRB File Nos. 374-97 to 376-97.

[8] 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.*

[9] During a union organizing drive, employees are generally concerned that they may be terminated from their employment if the employer learns of their activities in support of a trade union. The *Act* attempts to mitigate against such a fear by prohibiting employers from taking retaliatory action against employees who do participate in the organization of a union in their workplace. Section 11(1)(e) of the *Act* sets out this protection as follows:

> *11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:*
>
> > *(e) to discriminate in regard to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including discharge or suspension or threat of discharge or suspension of an employee, with a view to encouraging or discouraging membership in or activity in or for or selection of a labour organization or participation of any kind in a proceeding under this Act, and if an employer or an employer's agent discharges or suspends an employee from his employment and it is shown to the satisfaction of the board that employees of the employer or any of them had exercised or were exercising or attempting to exercise a right under this Act, there shall be a presumption in favour of the employee that he was discharged or suspended contrary to this Act, and the burden of proof that the employee was discharged or suspended for good and sufficient reason shall be upon the employer; but nothing in this Act precludes an employer from making an agreement with a trade union to require as a condition of employment membership in or maintenance of membership in the trade union or the selection of employees by or with the advice of a trade union or any other condition in regard to employment, if the trade union has been designated or selected by a majority of employees in any such unit as their representative for the purpose of bargaining collectively;*

[10] In addition, s. 11(1)(a) of the *Act* prohibits an employer from interfering with, restraining, intimidating, threatening or coercing any employee in the exercise of any right conferred by the *Act*. In the present case, the Employer has admitted that it discussed the Union's organizing drive with employees and attempted to ask them questions about the organizing drive. The Employer acknowledged that it was unfamiliar with the provisions of the *Act* set forth above when it made those remarks and inquiries.

[11] There is no question that, on the materials filed, the Union has established an arguable case on its main application. With respect to the second part of the test that requires the Board to balance the labour relations harm of issuing or not issuing an interim order, the Employer argued that since the Union has filed a certification application, there is no suggestion that the termination of Mr. Rasmusen has resulted in a dampening of enthusiasm or support for the Union among the employees. On the other side, the Union argued that the firing will dampen enthusiasm on the part of employees for freely participating in the Union when it is certified.

[12] In the Board's view, the Union has made out its case on the second part of the test. The termination of Mr. Rasmusen, in the context of the organizing effort, his role in that effort and the Employer's known opposition to the Union, sends a very clear negative message to employees about their freedom to join or participate in the Union. Although the organizing drive may have been successful (and this panel of the Board has determined that it was successful and has issued simultaneously the Certification Order), the Union remains in its infancy in this workplace. Employees may now be reluctant to participate in the Union by attending Union meetings, formulating bargaining proposals, sitting on the negotiating committee, taking on roles of shop stewards, and the like.

[13] On the other hand, the Employer may be left with a less than satisfactory employee to deal with until the final applications are heard. This difficulty, however, can be remedied by setting a quick hearing date for the final applications. All parties to the applications agreed that the matters can be heard on November 13, 2001 at 10:00 a.m. and they will be scheduled for hearing on that date by the Board.

[14] Overall, we find that the labour relations harm resulting from not granting an interim order would be greater than the harm resulting from granting the interim order.

[15] An Order will therefore issue as follows:

> (1) The Employer shall reinstate Randy Rasmusen on Monday, November 5, 2001 to his position as labourer at the Weyburn plant of the Employer at the same rate of pay, hours of work, and with other conditions of employment that he enjoyed prior to his dismissal pending the hearing and final determination of these applications or until further order of the Board;

(2) On Monday, November 5, 2001, the Employer shall post these Reasons for Decision and the accompanying Interim Order and Certification Order in both its Weyburn and Moose Jaw plants in locations where the documents may be read by as many employees as possible and leave the said documents posted until the hearing and final determination of these applications;

(3) At a time to be set by the Union, the Employer shall convene meetings of its employees during work time at both work locations for the purpose of permitting the Union to meet with the employees at each workplace. The Union shall provide the Employer with the time it wishes to convene both meetings within 24 hours of receipt of this Order. The Employer shall pay employees their regular wages for attending this meeting. At each meeting, representatives of the Union shall be entitled to address the assembled employees for a period of up to ninety (90) minutes, in the absence of management persons or other representatives of the Employer. The Employer shall provide written copy of the notice of the time and place of the meetings to each employee at least eight (8) hours in advance of the meetings and shall post notice of the meetings adjacent to the copies of the Orders posted in accordance with paragraph (2) above. Employees shall be entitled to attend only the meeting that takes place in the workplace where they are assigned to work on the day of the meeting.

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

LRB File No. 143-00; November 5, 2001
Gwen Gray, Chairperson; Board Members: Donna Ottenson and Don Bell

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

Duty to bargain in good faith – Exclusive bargaining authority – Direct bargaining – Employer negotiated directly with employees with respect to wage increases, implementation of new route system and installation of surveillance system in workplace and satellite tracking devices on trucks – No attempt made by employer to justify changes on business as before basis – Employer therefore obligated to negotiate with union – Board finds failure to bargain in good faith.

Unfair labour practice – Interference – Unilateral change to terms or conditions of employment – Employer's introduction of surveillance system in workplace constitutes significant change and should have been discussed with union – Board concludes that employer's unilateral introduction of surveillance system in workplace violated s. 11(1)(m) of *The Trade Union Act*.

Unfair labour practice – Interference – Unilateral change to terms or conditions of employment – Employer's unilateral change to hours of work of one employee should have been negotiated with union prior to implementation – Shift schedules and hours of work issues form important part of discussions at any bargaining table – Board finds violation of s. 11(1)(m) of *The Trade Union Act*.

Unfair labour practice – Interference – Communication – Direct bargaining – Employer attempted to deal directly with employee in relation to change to method of pay – When employee insisted on union representation, employer responded in angry and hostile tone – Board finds violation of ss. 11(1)(a) and 11(1)(c) of *The Trade Union Act*.

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

REASONS FOR DECISION

Background

[1] Gwen Gray, Chairperson: Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Union") filed an unfair labour practice against Loraas Disposal Services Ltd. (the "Employer") in which it alleged that the Employer violated ss. 11(1)(a), (c), (e) and (m) of *The Trade Union Act*, R.S.S. 1978, c.T-17 (the "*Act*").

[2] In relation to the allegation that the Employer failed to maintain terms and conditions of employment as required by s. 11(1)(m) of the *Act*, the Union alleges the following particulars: (1) installing surveillance cameras in the workplace; (2) altering the start time of Henry Franke and not altering the start time of a more junior employee; (3) not supplying Clayton Bissett with six pairs of overalls; (4) laying off Kevin Wood and Clayton Bissett on March 13, 2000 while retaining junior employees; (5) assigning portable toilet work to Kevin Wood, Henry Franke and Steve Mayer while junior employees were assigned driving jobs; and (6) failing to recall laid off employees in order of seniority.

[3] The Union also claims that the Employer discontinued the regular wage increases of Dale Laturnas and Mark Sali by not moving them from $13.34 per hour/$15.50 per load/18 cents per kilometer to $15.65 per hour/$17.85 per load/ 21 cents per kilometer. The Union claims that the Employer failed to provide Kevin Wood with proper training for the position to which he bumped. In addition, the Union asserts that known union supporters were laid off while junior employees remained working.

[4] The Union also alleges that the Employer continues to promote an atmosphere of harassment, intimidation and discrimination toward union supporters and alleges the following particulars: (1) Carman Loraas attempted to lure Henry Franke into a physical altercation; (2) Kevin Wood was taken off driving and put on the washing of toilets, bins and trucks while a new driver was hired on May 1, 2000.

[5] The Employer filed a reply with the Board on August 29, 2000 and made the following response to the Union's claims: (1) a general denial of the Union's claims; (2) an assertion that the cameras are not focused on employees at any time and do not invade the privacy of employees; (3) an assertion that the application is an abuse of the Board's processes and an attempt to create the impression that the Employer has misconducted itself to support a defence to an application for decertification under s. 9 of the *Act*.

[6] This application was filed after the Board received an application for first collective agreement (LRB File No. 037-99) and an application for rescission (LRB File No. 034-00), both of which were decided by the Board prior to the issuing of these Reasons for Decision.

[7] A hearing of this application was held in Regina on August 31, September 1 and 2, 2000.

Facts

[8] Clayton Bissett testified that he commenced employment with the Employer in September, 1991. Mr. Bissett testified that he had not been laid off work prior to March, 2000. At the time of lay-off, Mr. Bissett was assistant shop steward and bargaining committee member in the bargaining unit. Mr. Bissett testified that at the time of his lay-off, three other employees were also on lay-off – Kevin Wood, Steve Mayer and Jim Wilson. Mr. Bissett indicated that an employee who was junior to him was not laid off – namely, Mark Sali. In addition, he claimed that Jim Wilson, who was junior to him, was recalled to work earlier than Mr. Bissett. Mr. Bissett indicated that the work performed by the junior employees was the same work as he performed prior to his lay-off. This included driving the vacuum truck, one ton truck and the baby freight truck. The one ton truck is now driven by a new employee, Terry Theissen. Mr. Bissett claims that he is qualified to drive this truck and is senior to Mr. Theissen. Mr. Theissen is paid $3.00/hour more than Mr. Bissett.

[9] On cross-examination, Mr. Bissett acknowledged that he does not possess a 3A licence that would entitle him to drive a three axle truck, like Mark Sali and Jim Wilson. At the time of Mr. Bissett's lay-off, both Mr. Sali and Mr. Wilson were junior to him and were customarily employed in operating roll off and front end trucks which required the 3A licence. Mr. Bissett complained that he could not afford to take the course for the 3A licence and was not being provided with the opportunity to work his way up from operating smaller trucks to operating the front end or roll off trucks.

[10] Mr. Bissett also received a lay-off notice on August 28, 2000 just days before the hearing of this matter. To the best of his knowledge, Mr. Theissen did not receive a lay-off notice and no suggestion was made to Mr. Bissett that he displace a more junior employee. Mr. Bissett remains assigned to portable toilets which he delivers and picks up, cleans and empties.

[11] When Mr. Bissett first started working for the Employer he was provided clean overalls for each workday. This practice has recently stopped. According to Mr. Bissett, Mr. Loraas advised him that it cost too much. On cross-examination, Mr. Bissett indicated that Mr. Loraas told him he wanted Mr. Bissett to wear the company uniform when driving truck, not overalls. The company

uniforms are designed to be reflective. Mr. Bissett complained that waste gets spilled on the uniform. He lacks the number of uniforms that would make changing clothes easy when a spill occurs. In addition, employees are required to pay $75 for a shirt and pants whereas Mr. Bissett was not required to pay for overalls.

[12] Kevin Wood testified that despite two previous Board Orders setting his seniority date, Mr. Loraas has not respected the Orders and has not implemented Mr. Wood's seniority date. When Mr. Wood was laid off from the liquid waste division, he elected to bump a position driving a roll off truck with one-half day of front end driving. This position is currently performed by Mr. Henry Franke or Mr. Sali. Mr. Sali is junior to Mr. Wood. Mr. Wood was laid off in March 2000 while Mr. Sali remained at work. Mr. Wood received notice of lay-off again on August 28, 2000 effective October 6, 2000. To the best of his knowledge, Mr. Sali did not receive a similar layoff notice. He indicated that Mr. Sali and Mr. Franke work 4.5 days out of 5 days working on the roll off trucks. The remaining .5 day is spent driving front end truck. Mr. Wood possesses a 1A license that is higher than the licence needed to drive either the roll off or front end trucks. Prior to his lay-off from the vacuum truck division, he drove a vacuum truck and pulled a trailer. This position required a 1A license. Currently, he washes the portable toilets, garbage cans and trucks, which is considered the most undesirable job in the plant.

[13] Mr. Wood was provided with 3 to 4 days of training with John Berner, a fellow employee. Apparently, Mr. Wood then operated the front end truck on his own initially for 45 days which was extended another 30 days after discussions between the Union and the Employer. He was also trained on the roll off truck for half a day by Henry Franke. Mr. Wood asked Mr. Loraas for additional training on the roll off truck but his request was not granted. According to Mr. Wood, he had had one minor accident while driving the front end truck when he backed into a card reader at the Sask Power station causing $100 to $140 worth of damage. After this incident, Mr. Loraas told Mr. Wood that he would not be driving trucks anymore. Mr. Wood testified that other drivers have been involved in accidents and they continue to drive.

[14] Mr. Wood testified that he is qualified to drive a one ton truck and is senior to Terry Theissen who currently drives a one ton truck. In addition, he is senior to Jim Wilson and was not offered Mr. Wilson's position prior to lay-off. Mr. Wilson drives a roll off truck. Mr. Wood was

laid off from March to April 17, 2000. According to Mr. Wood, Mr. Wilson was recalled as a roll off driver before Mr. Wood was recalled to work.

[15] Mr. Wood testified that he was hesitant to testify because, in his experience, what he says at the Board hearings is misconstrued and he had been accused by Carman Loraas of saying things that he did not say. For instance, Mr. Loraas told Mr. Wood that he should receive an academy award for his performance as a witness before this Board on an earlier application. Mr. Loraas also commented that Mr. Wood said at a Board hearing that he started the Union, a fact that Mr. Wood denies. Mr. Wood testified that he did not need to hear Mr. Loraas's criticisms of his testimony. Mr. Wood, Mr. Bissett and Mr. Franke are known union supporters in this workplace. Mr. Wood concluded that his treatment in the workplace, including his assignment to the portable toilet cleaning position and his lay-off, is directly related to Mr. Loraas' view that Mr. Wood started the Union in the workplace.

[16] Henry Franke also testified for the Union. He started working for the Employer in April 1994 as a vacuum truck driver. He holds a class 2A licence which is higher than the license required to drive roll off or front end trucks. Mr. Franke testified that surveillance cameras were introduced in the workplace in November, 1999. They are located in the drivers' room and down the hallway leading from the driver's room and outside the building. The area is used by the drivers to return their time sheets and to talk to their manager. Mr. Franke complained that the cameras have the ability to record the coming and going of trucks and drivers and to record conversations among employees. He also testified that the Employer installed a satellite tracking device on his truck in March, 2000. Other trucks are now having the equipment installed on them. Mr. Franke indicated that Mr. Loraas advised him that the devices would allow him to keep better track of the vehicles in order to give calls out to trucks during the day. This matter and the camera matter were not negotiated with the Union.

[17] On cross-examination, Mr. Franke acknowledged that he did not know where the cameras were pointed or what they recorded. He also indicated that Mr. Loraas had told employees that the cameras were installed so office staff could determine if Mr. Loraas and the shop manager were on the premises, although Mr. Franke did not believe that this was the actual purpose for the cameras. He testified that he came to this belief after Mr. Loraas accused him of going through personnel documents. Mr. Franke agreed with counsel for the Employer that his truck was in the shop for

painting and repair work when the satellite tracking device was installed. At the same time, a tarp roller was installed on his truck.

[18] Mr. Franke also testified that during the months of March, April and May, 2000, his start times fluctuated while the start time of less senior drivers remained the same. After the application was filed with the Board, the start times were made consistent. Mr. Franke testified that he is now on a route system with other drivers. The routes are rotated on a weekly basis.

[19] Mr. Franke is a member of the Union's bargaining committee. He was made aware that some employees received wage increases without the matter having been discussed in bargaining by the Employer. Similarly, Mr. Theissen was hired at the rate of $11/hour without the wage rate having been discussed with the Union. On cross-examination, Mr. Franke was asked about the pre-certification practice with respect to wage increases. He testified that the Employer would hold a meeting with all employees to go over the wage increases. According to Mr. Franke, he does not recall individual employees being offered wage increases. He did not know if the wage increases granted to some employees recently did accord with the Employer's pre-certification practice. He also testified that after the Union was certified, the Employer stopped the practice of granting wage increases. The Union filed correspondence from the Employer to the Board relating to the current wages paid to employees that outlined the increases paid.

[20] Mr. Franke also testified to a very unfortunate incident in the workplace involving him and Carman Loraas. Mr. Loraas called Mr. Franke to attend a meeting to discuss whether Mr. Franke would go to a piece rate system of pay, like other drivers, rather than remain on an hourly rate system. Mr. Franke was resisting changing to the piece rate system because he distrusted Mr. Loraas and was fearful that he would be assigned unprofitable work. Mr. Franke felt that the piece rate system would put him in a more vulnerable position with Mr. Loraas having more control over him. During this discussion, Mr. Loraas accused Mr. Franke of being a chicken shit, at which point Mr. Franke told Mr. Loraas to look in a mirror. Mr. Loraas then challenged Mr. Franke to a fight. Mr. Franke reported the incident to the police but they were unwilling to get involved in the matter. Mr. Franke reported on earlier incidents of Mr. Loraas calling him into the office to berate him about his testimony before this Board. Mr. Franke also noted that he has not been fitted for a new driver uniform although all other drivers have been recently outfitted with new uniforms.

[21] On cross-examination, Mr. Franke was asked if he had attended meetings between the drivers and Mr. Loraas to discuss the piece rate system. Mr. Franke indicated that he had not attended such meetings.

[22] Mr. Franke indicated in his testimony that it is impossible to get new employees to be involved in the Union. In addition, he indicated that he is sick of coming to the Board and he wants to go to work and not be harassed. He noted that some of the matters complained of in this application were not complained of earlier because when the Union brings matters to the Board the employees face repercussions at work. Mr. Franke testified that the confrontation with Mr. Loraas on April 26, 2000 was something that had to be dealt with. He denied that the Union brought the application for the purpose of colouring the Board's view of the Employer on the rescission application.

[23] Carman Loraas testified for the Employer. He explained that he installed cameras in two offices and one on the exterior of the building. The purpose of the cameras was to provide the office staff with the means of determining whether he and the operations manager, Rick Laturnas, were on the premises. The camera is monitored by the office staff. Mr. Loraas denied that the cameras were used to watch or conduct surveillance on the employees.

[24] With respect to Henry Franke's start time, Mr. Loraas testified that he has reviewed the start times of Mr. Franke, Mr. Sali and Mr. Wilson over the past year and Mr. Franke has a start time equivalent to Mr. Sali or Mr. Wilson. On cross-examination, Mr. Loraas acknowledged that he did change the start time on Saturday for Mr. Franke by requiring him to start at 6:30 a.m. every second Saturday while the junior driver started at 8:00 a.m. Mr. Loraas indicated that he made this change to be fair to both employees and to permit Mr. Franke to gain more experience on the front end truck.

[25] Mr. Franke had complained in his evidence that he did not have a shift that was as good as the one given to a more junior employee, Mr. Wilson. Mr. Loraas explained that when Mr. Franke bumped into a position using his seniority, he chose the position then occupied by Jim Wilson. Mr. Wilson was then working from Friday to Tuesday, with Wednesday and Thursday off. The Employer rearranged the shift to give Mr. Franke Thursday and Sunday off. Mr. Loraas also noted that Mr. Franke's position is permanent while Mr. Wilson's position is seasonal.

[26] In relation to the coverall issue for Mr. Bissett, Mr. Loraas explained that he wanted to improve the public image of all of the employees of the Employer and required all drivers who appear in public to wear a uniform. The company shares the cost of the uniforms with the drivers and there is no limit on the number of uniforms that can be ordered. Mr. Loraas explained that he was motivated to make a change in the uniforms as a result of an occupational health and safety audit that was undertaken in his workplace. The new uniforms contain reflective materials that make it easier to see drivers when they are outside of their vehicles. Mr. Loraas testified that he required drivers to be measured for uniforms by the manufacturing representative in order to ensure that the uniforms fit correctly. He noted that Mr. Franke and one other driver were absent from work the day the representative came to take the measurements. This explained why Mr. Franke had not yet received a new uniform. Mr. Loraas denied that he was singling out Mr. Franke for different treatment and noted that Mr. Bissett had been given a uniform.

[27] Mr. Loraas explained that the recent lay-offs were caused by a seasonal reduction in work. He testified that on recall, he first tried to recall Steve Mayer who did not advise him until the last day that he would not be returning to work. He then tried to recall Kevin Wood and was told by Mr. Wood's wife that he was not available to work. As a result, Mr. Wilson was recalled to work first for one day of work on March 24, 2000.

[28] In relation to the altercation with Mr. Franke, Mr. Loraas testified that he met with Mr. Franke to discuss moving Mr. Franke to the piece rate system. Mr. Loraas indicated that the piece rate system had been put in place for drivers before the Union was certified. He told Mr. Franke that this method of payment would increase his pay. Mr. Franke told Mr. Loraas that he did not want to talk to him about it and would charge him with an unfair labour practice if he persisted. Mr. Loraas indicated that when Mr. Franke made the comment about charging him with an unfair labour practice, he lost it. He directed a number of profanities to Mr. Franke and challenged him to a fight. Then he left the building.

[29] Mr. Loraas testified that he hired Terry Theissen on May 1, 2000 as a new seasonal driver. He indicated that Mr. Theissen was finished his employment on September 15, 2000 while Mr. Wood did not commence his layoff until October 6, 2000. Other newly hired employees were laid off on August 30, 2000, September 15, 2000 and September 30, 2000, while Mr. Wood and Mr.

Bissett were both laid off on October 6, 2000. This pattern accords with the seniority of the employees in question.

[30] In relation to the satellite monitoring system, Mr. Loraas testified that the systems are being installed in all of the Employer's trucks as the trucks are being repaired in the shop. Mr. Loraas indicated that the systems will be used in conjunction with computers and are being phased in slowly due to their costs. Mr. Loraas acknowledged that the system can monitor the location of the vehicle and is designed to monitor the vehicle every five minutes.

[31] In relation to Mr. Bissett, Mr. Loraas testified that Mr. Bissett does not possess the driver's licence that is required to operate a three axle truck. Mr. Sali can operate both the roll off and front end trucks.

[32] In relation to Mr. Wood, Mr. Loraas testified that when Mr. Wood made his election to bump into a driving position, Mr. Loraas proceeded to train Mr. Wood by letting him drive in the yard and by letting him go out on the routes with other drivers. Mr. Loraas insisted that Mr. Wood needed to be trained on the more difficult portion of the work which was the front end driving. He testified that the work was stressful for Mr. Wood. According to Mr. Loraas, when Mr. Wood was put on a route on his own, he was disorganized and frantic. Mr. Loraas testified that during this period, he talked to Mr. Wood and asked him to discuss the issue with the Union representative as the work was more difficult than Mr. Wood had realized. There was an exchange of correspondence between the Union and the Employer concerning Mr. Wood's ability to perform the work in question and one or more meetings held between the Employer and the Union to discuss Mr. Wood's performance. On November 26, 1999 the Employer agreed to extend the trial period for an additional 30 day period to train Mr. Wood on the roll off truck. However, the Employer was not prepared to accept that Mr. Wood had adequate skills to perform the front end work assigned to the position he bumped into. On December 31, 1999 Mr. Wood backed into the card entry system at the SaskPower location. On that day, Mr. Loraas removed him from driving duties and assigned him to wash equipment. The commitment to extend Mr. Wood's training by 31 days to be trained on the roll off truck was not completed at the time that Mr. Wood was removed from driving. Mr. Loraas agreed that Mr. Wood is qualified to drive roll off.

[33] Mr. Loraas acknowledged on cross examination that Mr. Wilson was employed in the spring of 1998 to drive roll off trucks only. He is employed on a seasonal basis with the Employer working primarily from April to November. Mr. Wilson was not trained to drive the front end trucks and is not expected to drive front end trucks. Mr. Loraas also acknowledged that the normal progression of drivers is from the vacuum trucks to roll off trucks to front end trucks. He indicated that Henry Franke, who bumped Mr. Wilson, was made aware that he had to drive both types of trucks and he was trained on both. However, it was not a pre-condition for Mr. Franke that he be trained first on front end in order to qualify for the roll off position.

[34] In relation to the allegation that Mr. Loraas has harassed witnesses after a hearing before the Board, Mr. Loraas indicated that he recalled one occasion when Kevin Wood requested to speak to him after the certification hearing. Mr. Wood told Mr. Loraas that he was not the individual who brought the Union into the shop. Mr. Loraas recalled that he advised Mr. Wood that he could not discuss the matter with him. Later, at another Board hearing, Mr. Loraas recalls Mr. Wood testifying that he was being harassed for bringing in the Union. Mr. Loraas later raised the contradiction between Mr. Wood's private conversation with Mr. Loraas and his testimony before the Board to Mr. Wood.

[35] Mr. Loraas testified that, after the filing of the unfair labour practice, he was looking for a way of improving the roll off drivers' situation. He decided to try placing roll off drivers on routes and discussed the matter with the roll off drivers. Mr. Loraas developed routes in each quadrant of the city and rotates drivers through the quadrants. The system does not change the hours of work or days of work. It equalizes the ability of drivers to earn the same amount of money. The change was made in the past year after a meeting with the drivers.

[36] With respect to Mr. Bissett, Mr. Loraas acknowledged that he pays Mr. Bissett $8.25 per hour while a new employee, Mr. Theissen, performing similar light truck work is paid $11 per hour. No negotiations were undertaken with the Union with respect to Mr. Theissen's rate of pay.

[37] Mr. Loraas acknowledged on cross-examination that Mr. Sali and Mr. Laturnas have been paid at a junior rate of pay for longer than the one year time frame that Mr. Loraas had specified for junior drivers in his wage rate proposals. Their incomes had remained at the same rate since 1995.

Mr. Loraas explained that they were not moved to a higher rate of pay because the Union came onto the scene.

[38] In relation to office staff, Mr. Loraas explained that he recently gave office staff a 2% wage increase because a wage increase was overdue for them. He gave the office staff the same wage increase as he had proposed for them in collective bargaining. No similar wage increase was offered to Henry Franke, Clayton Bissett, Kevin Wood, Mark Sali or Dale Laturnas. Mr. Loraas acknowledged that it was a mistake on his part to give office staff a wage increase and not to provide a wage increase to other employees.

[39] Mr. Loraas testified on cross-examination that Syd Glas is classified as a journeyman welder but that he does not possess a journeymen ticket in welding. Mr. Loraas did not know if Mr. Bissett possessed a welding ticket and he did not recall if Mr. Bissett had indicated on his job application that he possessed a journeyman ticket in welding. Mr. Loraas did not recall Mr. Bissett asking for a welding position. He agreed with counsel for the Union that Mr. Bissett's salary is low and added that the matter would be addressed in the first agreement application.

Relevant Statutory Provisions

[40] The statutory provisions relied on by the Union include ss. 11(1)(a), (c), (e) and (m) of the *Act*.

Argument

[41] Mr. Kowalchuk, counsel for the Union, argued that the Union filed the application to deal with the April 26, 2000 incident between Mr. Loraas and Mr. Franke in an appropriate manner and did not bring a further unfair labour practice to unduly influence the Board against granting the most recent rescission application. Counsel noted that Mr. Franke was attempting to assert his rights as a member of the Union to have the question of his method of pay dealt with in the context of the negotiations that were then on-going as opposed to a private deal or discussion with Carman Loraas. For these reasons, the Union views the conduct of Mr. Loraas as intimidation or coercion contrary to ss. 11(1)(a) and (e).

[42] Counsel for the Union noted that the surveillance cameras were installed shortly after Mr. Loraas accused Mr. Franke of looking at the drivers' daily records. He noted that the cameras are installed in the drivers' area and that there has been a change in the terms or conditions of work as a result of their installation. Similar arguments were made with respect to the installation of the satellite tracking device on Mr. Franke's truck. The Union argued that if the Employer wanted to avoid unfair labour practice applications on these matters, it is a simple process to negotiate them with the Union.

[43] The Union argued that Mr. Franke's start time on Saturdays was changed from 8 a.m. to 6:30 a.m. in June, 2000. The Union noted that Mr. Franke was trained on the front end truck in January, 1999. The time sheets record both the start times and the assignment to front end or roll off truck commencing in June, 2000. Counsel asked why Mr. Loraas couldn't say it took 18 months to train Henry Franke on the front end truck. Counsel argued that the change in shift start times was aimed at a union leader and was not a mere coincidence. Similarly, the Union argued that the failure of the Employer to grant Mr. Franke the preferred shift of two consecutive days off, which was assigned to Mr. Wilson who is junior to Mr. Franke, was an unfair labour practice by changing terms and conditions of work. The same argument was made with respect to the change in uniforms for Mr. Bissett.

[44] With respect to the wage increases, the Union argued that failure to negotiate the wage increases paid to office, but not other, staff constituted a violation of s. 11(1)(c) while the failure to move junior drivers to the senior rate after the passage of one year is a violation of s. 11(1)(m). Employees were originally told that the Employer could not grant wage increases because of the Union. The Union also argued that the setting of a rate of pay for Terry Theissen at $11/hour when Mr. Bissett was paid $8/hour also constituted a failure to bargain in good faith because the Employer did not bargain the new wage rate with the Union.

[45] The Union noted that Syd Glas, the leader of two decertification attempts, was paid at the rate of a journeyman welder, that is $15.64/hour, when he does not hold a journeyman welder ticket. Counsel argued that this position ought to have been offered to Clayton Bissett.

[46] With respect to Kevin Wood, the Union argued that the Board fixed Mr. Wood's seniority dates on another application and determined that Mr. Wood has more seniority than Mr. Sali. The

Union argued that the position Mr. Wood bumped into required him to drive a roll off truck. It is not a front end position. Other drivers in the same category are not required to drive front end trucks. The Union complained that Mr. Wood was not provided with an opportunity to perform the position he bumped into – that is, roll off driving. The Union argued that the treatment of Mr. Wood was aimed at getting rid of the Union as no attempt was made by the Employer to accommodate Mr. Wood in the position. Counsel contrasted the treatment of Mr. Wood with the treatment of Mr. Wilson who was assigned solely to roll off trucks. The Union complained that Mr. Wood ought to have been offered Mr. Wilson's position and Mr. Bissett ought to have been offered Mr. Theissen's position before the two new employees were hired. The Union complains that the different treatment accorded Mr. Bissett, Mr. Wood and Mr. Franke is directly related to their involvement in the Union.

[47] The Union concluded that Mr. Loraas refuses to acknowledge the role of the Union in the workplace. The evidence established that the Employer continues to meet with groups of employees to negotiate work conditions with them.

[48] The Union asked the Board to reserve on its remedial orders.

[49] The Employer argued that the Board should restrict its view of the evidence to the case before it and should not consider the cases that have been heard and decided. With respect to s. 11(1)(m), counsel argued that the "terms and conditions" that are preserved under s. 11(1)(m) do not include things like surveillance cameras and the global tracking devices, although the latter matter had been discussed with the drivers, but not the Union. Counsel argued that it was a managerial prerogative whether or not such equipment will be installed in the workplace.

[50] In regards to Mr. Franke's start time, counsel argued that Mr. Franke was initially integrated into the position and during that time, his work schedule started at 8:00 a.m. However, once Mr. Franke was able to work on the front end truck, his Saturday shift was rotated with the other Saturday driver to commence either at 8:00 a.m. or 6:30 p.m. According to the Employer, Mr. Wilson's job entails working on Sundays and is not a preferred schedule to Mr. Franke's work schedule.

[51] The Employer argued that the change from overalls to company uniform for Mr. Bissett was a minor matter that should not attract the attention of the Board under s. 11(1)(m).

[52] In relation to Mr. Bissett's claim regarding the order of return to work following lay-off, the Employer argued that it attempted to call back employees in order of their seniority. It argued that Mr. Wood was not qualified to perform the work in question; Mr. Mayer would not return; and Mr. Bissett was not licensed to perform the work. As a result, Mr. Wilson was called back first.

[53] Counsel also argued that the lay-off of Mr. Wood and Mr. Bissett did occur in order of seniority as they were unable to perform the work of the two more junior employees, namely Syd Glas, a welder, and Mark Sali, a driver. Counsel noted that Mr. Wood had not established himself capable of driving the front end trucks.

[54] In relation to the heated argument between Carman Loraas and Henry Franke, counsel for the Employer argued that Mr. Loraas was pushed to the limit by Mr. Franke's remarks that he would bring an unfair labour practice against Mr. Loraas for discussing a different method of pay for drivers with him directly, as opposed to discussing the matter with the Union.

Analysis

[55] The events described above occurred prior to the imposition of a first collective agreement (LRB File No. 037-99) on November 16, 2000. Some of the issues raised in this proceeding were dealt with by the Board in the Reasons for Decision setting out the terms of the first collective agreement. For instance, the wage increase paid to clerical staff without negotiating with Union was taken into account in fixing wage increases for the clerical staff. In addition, the light truck drivers received a wage increase to bring them up to the $11/hour wage paid by the Employer to a newly hired driver.

[56] There are also other provisions contained in the collective agreement that hopefully provide the employees with greater stability and fairness in their dealings with the Employer, such as the seniority and lay-off provisions, a grievance procedure and the like.

[57] The first collective bargaining agreement provides a vehicle for the parties to build a collective bargaining relationship. However, such a relationship must be founded on mutual respect and acceptance of the process of collective bargaining. While we are hopeful that the parties will be able to engage in more mature bargaining and problem solving in the workplace with the conclusion

of the first collective agreement, this will require the Employer in particular, to take a more sophisticated and intelligent approach to its relations with the Union and with its employees.

[58] The Employer's conduct, as set out above, demonstrates a flagrant disregard for the collective bargaining process and the Union's status as the exclusive bargaining representative of the employees in the bargaining unit. The Board set out the collective bargaining obligation on the Employer in *Schaeffer and Lang v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Loraas Disposal Services Ltd.,* [1998] Sask. L.R.B.R. 573, LRB File No. 019-98, when it quoted *United Food and Commercial Workers, Local 1400 v. Madison Development Group Inc.,* [1996] Sask. L.R.B.R. 75, LRB File No. 131-95 at 108 as follows:

> *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.*

[59] In this case, the Employer has violated s. 11(1)(c) of the *Act* by negotiating directly with employees with respect to their wage increases, notably, the clerical and office employees, Henry Franke, and the new light truck driver, Mr. Theissen. There was no attempt made by the Employer to justify these changes on the basis of "business as before." As a result, the Employer is obligated to deal directly with the Union concerning these matters and cannot deal directly with employees concerning the various workplace issues. This includes, as well, the implementation of a new route system for drivers and the installation of the surveillance system and the satellite tracking devices on trucks. We find that this direct dealing with employees constitutes an unfair labour practice under s. 11(1)(c) of the *Act.*

[60] The Union has made various claims under s. 11(1)(m) of the *Act.* In our view, the installation of the surveillance system is an issue that ought to have been discussed with the Union to avoid the type of misunderstanding that has now occurred. In our view, such a change in the workplace is significant especially if its intended purpose is related to employee discipline. In this case, the Employer assured the Board the system will not be used for disciplinary purposes. This undertaking may impact on the

type of remedial order that the Board will ultimately make. However, we find that the introduction of the surveillance system did violate s. 11(1)(m) of the *Act*.

[61] We also find that the alteration of Mr. Franke's start time on Saturdays is a matter that ought to have been negotiated with the Union prior to its implementation. Shift schedules and hours of work issues form an important part of the discussions at any bargaining table. "Hours of work" is specifically mentioned in s. 11(1)(m) as an element of the conditions of employment that are frozen between the time of certification and the conclusion of a first collective agreement. The Employer is obligated to raise its concerns regarding work schedule with the Union during negotiations. If a matter requires immediate attention to accommodate a particular change of circumstance, the Union may agree to the change prior to the conclusion of collective bargaining. The important part of the duty is to communicate with the Union and to stop meeting individually with employees over such issues.

[62] Mr. Bissett likewise has a legitimate concern with the change to his uniform which raises occupational health and safety concerns. The Employer may think that the change is minor and perhaps it is in the overall scheme of things. Nevertheless, employees are entitled to retain their pre-certification terms and conditions unless and until the matter has been raised in collective bargaining with the Union.

[63] In relation to the lay-off of Kevin Wood and Clayton Bissett, the Board does not find that there is any substance to the allegation that Mr. Bissett ought to have been considered for the welding position held by another employee. The lay-off of Kevin Wood raises the difficult issue of whether Mr. Wood was provided with an adequate and fair opportunity to establish his ability to drive the roll off and front end trucks. Mr. Sali, who is a junior employee to Mr. Wood, drives roll off trucks 4.5 days per week and front end trucks for .5 days per week. There is no real dispute as to whether Mr. Wood can drive a roll off truck. The dispute centres around his ability to drive the front end truck. Mr. Loraas acknowledged that drivers normally progress from vacuum trucks to roll off trucks to front end trucks. Henry Franke, who formerly operated a vacuum truck, now operates the roll off and front end trucks. He was trained over a lengthy period to operate the front end truck. In relation to Mr. Wood, Mr. Loraas testified that he was of the opinion that Mr. Wood was incapable of operating the front end truck. He indicates that he came to this conclusion after Mr. Wood had operated the truck for an extended period of time. Mr. Wood denies that he had proper instruction or assistance in learning the routes and in operating the front end vehicles. Mr. Wood's opportunity to bid on a roll off driver

position came about as a result of the Board's earlier Orders in LRB File Nos. 208-97 to 227-97, 234-97 and 239-97.

[64] In its decision dated August 6, 1998 *(Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Loraas Disposal Services Ltd. et al.,* [1998] Sask. L.R.B.R. 556, LRB File Nos. 208-97 to 227-97, 234-97 to 239-97), the Board made the following ruling at 570:

> *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.*

[65] In a subsequent hearing, the Board dealt with the seniority dates of Kevin Wood and Mark Sali and held that Kevin Wood's seniority date was earlier than Mark Sali's seniority date (see *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Loraas Disposal Services et al.,* [1999] Sask. L.R.B.R. 205, LRB File Nos. 208-97 to 227-97, 234-97 to 239-97). In the same Reasons, the Board also dealt with the reinstatement of Mr. Franke, Mr. Wood and Mr. Mayer and directed that they be reinstated to driver positions as follows at 215:

> *The Board therefore directs the Employer to assign Mr. Franke to the driver position selected by Mr. Franke based on his seniority date of April 25, 1994. After Mr. Franke has selected a driver position, Mr. Wood shall similarly select a driver position based on his seniority date of July 19, 1994. Finally, Mr. Mayer shall select a driver position based on his seniority date of November 21, 1995. Mr. Franke, Mr. Wood and Mr. Mayer shall commence the actual work of the selected positions within seven days of making their selection. If any further training is required for the three employees, it shall take place while they are performing the actual duties of the positions they have selected.*

[66] The Board appointed a Board agent to assist the parties in determining the bumping schedule. In relation to Mr. Franke and Mr. Wood's positions, the Board agent reported to the Board on September 7, 1999, as follows:

A bumping schedule was established by the parties. It is described below:

Mr. Henry Franke selected a position now occupied by Mr. Jim Wilson driving a roll off truck. Mr. Franke will be placed in the position on September 7, 1999. He will undergo a three month training period. The position is seasonal and has days off assigned on Thursdays and Sundays of each week to meet workload, scheduling and customer demands. The position is currently paid on an hourly basis, but the employer indicated future intentions are to have all drivers paid on a piece rate basis which increases their earnings potential. Negotiations may need to take place on the conversion from an hourly to piece rate structure for this position.

Mr. Kevin Wood selected a position now occupied by Mr. Mark Sali driving front end load and roll off trucks in a permanent position. Days off assigned to the position are Sunday and Monday of each week. The position is now compensated on a piece rate basis, but during a three month training period following placement in the position Mr. Wood will be paid on an hourly basis. Mr. Wood will be placed in the position on September 7, 1999.

[67] The Board then ordered the implementation of this bumping schedule by Order dated February 11, 2000. In our view, the overall effect of the Orders issued were to permit the employees in question to occupy the positions they selected through the bumping process and learn the positions by actually performing the work assigned to each position. In relation to Mr. Wood, the Employer selected another method of training Mr. Wood that required him to become proficient on the front end trucks before he was permitted to perform his regular duties, most of which entailed work on a roll off truck. This method of assessing Mr. Wood did not comply with the Board's Order. As a result, in our view, Mr. Wood was improperly demoted from his position as a roll off driver. He ought to have remained in the position performing the work normally assigned to the position for the three month trial period. To date, he has not been permitted to work the normal duties of the position, which primarily relate to roll off driving.

[68] Mr. Loraas justified the treatment of Mr. Wood by arguing that Mr. Wood really needed to master the harder part of the position first, that is, master the front end driving. However, Mr. Franke who now drives both roll off and front end was provided with a much more extensive period in which to master the front end trucks.

[69] As a result, we find that Mr. Wood was improperly laid off contrary to the earlier Board rulings that set his seniority date ahead of Mr. Sali's seniority date and assigned him to a training period of three months in the position occupied by Mr. Sali at the time of the earlier Orders.

[70] The Union also complained about the assignment of portable toilet work to Mr. Wood, Mr. Franke and Mr. Mayer while more junior employees were assigned to driving positions. We have dealt with Mr. Wood's situation above. Mr. Franke has been assigned a regular driving route. No evidence was given concerning Mr. Mayer's duties. We believe that this complaint arose out of the original application made to the Board pursuant to the technological change provisions contained in s. 43 of the *Act* (referred to above) when the three employees had elected to bump into sales, dispatch and accounts receivable positions, as opposed to driving positions. The Board, in its Reasons issued on June 10, 1999, assigned the three employees to driving positions, as opposed to sales, dispatch and accounts receivable positions. Prior to the Board directive, the Employer had occupied the time of these three employees in work related to the cleaning and supplying of portable toilets. The Board agent described the agreement reached on implementing the bumping provisions set by the Board, which we have summarized above. With the exception of the treatment of Mr. Wood, which we have dealt with above, no further order will be made in relation to the earlier assignment of Mr. Franke, Mr. Wood and Mr. Mayer to the portable toilet work.

[71] The Union also complained that the Employer failed to recall employees in order of seniority. We do accept in this case the evidence of Mr. Loraas who explained that Mr. Jim Wilson was recalled one day earlier than other employees to perform work. Mr. Bissett was unable to perform the work in question, and Mr. Mayer and Mr. Wood, the other laid-off employees, were not available to return to work when requested by the Employer. As a result, we do not find that the Employer violated s. 11(1)(c) or (m) in relation to this aspect of the lay-off and recall in March, 2000.

[72] In relation to the pay of Dale Laturnas and Mark Sali, the Union complained that they were not paid in accordance with the Employer's proposed wage scale. Both had been paid as junior drivers in excess of one year. In this regard, we find that the Employer did not violate s. 11(1)(m) as it was required to negotiate any wage increases with the Union prior to implementation, in the absence of any evidence of a past practice that would see drivers' wages increase after one year. No such evidence was presented to the Board on the issue of the Employer's past practice with the exception of some evidence from Henry Franke who testified that he was really unsure of the Employer's past practice.

[73] Finally, we will address the altercation between Mr. Loraas and Mr. Franke. Mr. Loraas attempted to convince Mr. Franke that he would be "better off" accepting a commission based pay system, as opposed to an hourly pay system. This issue had been noted by the Board agent in that

portion of his report cited above. The Board agent's report flags the method of payment as an issue that would require "negotiations." In the Board's remedial Order on LRB File No. 208-97 to 227-97, 234-97 to 239-97 dated August 6, 1998, the Board made the following Order:

> *Orders the Applicant and Respondent Loraas Disposal Services Ltd. to negotiate any changes in pay or other conditions of work affecting the employees of the Respondent Loraas Disposal Services Ltd.*

[74] The Employer was forewarned of its obligation to bargain such matters with the Union and not with individual employees. Mr. Franke stood his ground with Mr. Loraas with respect to this matter and he was justified in doing so. In our view, Mr. Loraas interfered with Mr. Franke's s. 3 rights to be represented by the Union by dealing with Mr. Franke directly in relation to his method of pay and by responding in an angry and hostile tone when Mr. Franke insisted on his right to Union representation with respect to his pay. Despite being reminded on more than one occasion, Mr. Loraas has yet to accept that he must deal with the Union and not deal directly with the employees over matters of pay, hours of work and the like. As a result, we find that the Employer violated ss. 11(1)(a) and (c) of the *Act.*

[75] The Union asked that the remedial order be left for a further hearing. As a result, we will issue a cease and desist Order and ask the Employer to file a plan for rectifying the violations within 10 days of receiving this Order.

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1594, Applicant v. REGINA PUBLIC LIBRARY, Respondent

LRB File No. 096-01; November 5, 2001
Chairperson, Gwen Gray; Members: Donna Ottenson and Mike Carr

For the Applicant: Mike Keith
For the Respondent: Brian Kenny

Duty to bargain in good faith – Exclusive bargaining authority – Direct bargaining – Employer used workplace committee to convince part of union's membership to back collective bargaining proposal inconsistent with union's overall bargaining position and strategy – Union did not consent to formulation of bargaining proposals in this manner – Board finds violation of s. 11(1)(c) of *The Trade Union Act*.

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

REASONS FOR DECISION

Background

[1] **Gwen Gray, Chairperson:** Canadian Union of Public Employees, Local 1594 (the "Union") has been certified for many years as the bargaining agent for all employees of the Regina Public Library (the "Employer"). The Union entered into a collective agreement with the Employer for the period commencing January 1, 1998 to December 31, 2000 and currently the parties are in negotiations for the conclusion of a revised agreement.

[2] On May 14, 2001, the Union filed an unfair labour practice with the Board alleging that the Employer breached s. 11(1)(c) of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the "*Act*") by attempting to bargain the introduction of a new class of employees directly with employees. At the hearing of this matter, the Union asked to amend its application by including an alleged breach of s. 11(1)(b) of the *Act* arising from the same factual matters. The Employer did not oppose the amendment and it was granted by the Board.

[3] The Employer disputes that the factual matters in question constitute a violation of s. 11(1)(b) or s. 11(1)(c) of the *Act.*

[4] A hearing was held in Regina on August 23, 2001.

Facts

[5] The Employer provides library and reference services to the population of Regina through various branch operations and a main library. Library services are organized into various units, a number of which serve the public directly and are collectively called the public service group. The heads of this group meet regularly to discuss matters of mutual concern. The public service group is headed by the Deputy Library Director, Cathy Matyas. Ms. Matyas reports to the Library Director.

[6] Most of the heads of units in the public service group are in-scope members of the Union who have supervisory responsibility over other Union members. Unit heads are responsible for scheduling of work and for call-in of additional staff. Rosemary Oddie, head of the reference and independent learning centre of the library and first vice-president of the Union, is a member of the public service group. Ms. Oddie was acting president throughout most of the period under consideration in this application and she also participated on the labour management committee and the bargaining committee.

[7] Prior to May 9, 2000, Ms. Matyas forwarded an agenda and a proposal for dealing with call-in problems to members of the public service group. Apparently, there had been extensive discussion at the public service group meetings concerning the inadequate number of call-in staff available to fill in for evenings, weekends and vacation leaves. Ms. Matyas undertook to draw up a report on the issue for discussion at the May 9, 2000 meeting.

[8] The proposal formulated by Ms. Matyas identified benefit costs as a major barrier to meaningful expansion of the call-in list. She proposed that a new "casual" category of staff be recommended without payment of benefits for some period of time. The concluding portion of the proposal read "The recommendation to expand the spare board through the creation of a casual category of staff will be shared with the public service group and forwarded to the Labour-Management Committee for discussion."

[9] Prior to attending the May 9, 2000 meeting, Ms. Oddie forwarded an email to Ms. Matyas to suggest to her that it was inappropriate to make a proposal to the public service group concerning a matter that was covered by the collective agreement. Ms. Oddie assumed that Ms. Matyas had read

her email prior to the meeting of May 9, 2000 but this assumption was incorrect. In addition, Union President, Suzanne Posyniak raised the issue with the Library Director on May 9, 2000 and was told by him that he would speak to his employees anytime he wants to. The matter was then placed on the agenda of the labour-management committee for May 10, 2000.

[10] Ms. Matyas brought the proposal forward to the public service group and invited a round table discussion of the issue. Those present, which included mostly in-scope unit heads, agreed to the proposal and the suggestion that it be referred to the labour – management committee. Ms. Matyas asked Ms. Oddie to take it to the labour-management committee. Ms. Oddie indicated that she felt some conflict of interest as she attended labour – management committee meetings on behalf of the Union, not the public service group. She did agree to take the matter to the labour – management committee but she informed Ms. Matyas that she would do so in her capacity as a Union representative.

[11] As indicated above, the parties have been engaged in collective bargaining for a renewal agreement. In September, 2000, both bargaining teams participated in interest based bargaining and they approached bargaining from this perspective for several months. In June 2001, the Union decided that poor progress was being made in bargaining and it decided to revert to positional bargaining. In the current round of negotiations, the Employer has not proposed the creation of a new "casual" classification for employees. Several serious workplace issues were alluded to in relation to the lack of progress in collective bargaining.

[12] Article 7.06 of the collective agreement between the Union and the Employer establishes the labour-management committee. This committee is empowered to discuss matters of mutual concern. It is expressly not empowered to amend the collective agreement or to settle grievances, although it is permitted to deal with complaints that may give rise to grievances.

[13] Ms. Oddie explained that the public service group would often deal with operational issues, such as the difficulty in finding sufficient call-in staff. In her opinion, however, the public service group should not be asked by the Employer to formulate changes to the collective agreement. In Ms. Oddie's view, such a task placed the in-scope unit heads in a conflict of interest with other members of the Union. Ms. Oddie agreed that some issues are discussed at both the public service group and

labour – management committee meetings, one example being the way in which call-in hours count towards the probationary period.

[14] On May 10, 2001, the labour-management committee met. At that time, the Union raised its concerns with the spare board proposal put forward by Ms. Matyas at the public service group on May 9, 2001. The matter was discussed and an apology was offered by the Library Director to the Union President.

[15] Ms. Posyniak testified that management of the Employer was relatively new and unfamiliar with labour relations laws in Saskatchewan. She recalled that the Union's negotiating committee felt it was necessary to clarify its role as the exclusive representative of employees with the Employer's bargaining committee in March, 2001.

[16] Ms. Posyniak also explained that the process of dealing with the proposal for the new classification of casual employees through the public service group caused a problem for the Union. She noted that half the membership of the Union work part-time and they have growing concerns over their hours of work. In her mind, the proposal coming from the public service group compromised the Union by seeking support from part of the Union's membership for a bargaining proposal that would diminish benefits for part-time workers. Ms. Posyniak testified that the Union leadership works hard to keep the membership of the local united and the casual issue upset part time workers. Some time earlier the Union had won an arbitration concerning the Employer's attempt to create a new job classification without benefits. The arbitration award was issued prior to the proposal to create a new classification, again without entitlement to benefits.

[17] Ms. Matyas testified that she was open to discussing the proposal on casual employees with members of the public service group but she did not consider that this constituted collective bargaining. She was aware that the matter would need to be referred to the labour – management committee and she was aware that the current collective agreement did not provide for casual employees. Ms. Matyas also indicated that she had consulted briefly with the Employer's Human Resources Manager and he seemed quite comfortable with the proposal.

Relevant Statutory Provisions

[18] Sections 11(1)(b) and (c) 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:*
>
> . . .
>
> *(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;*

Analysis

[19] This case raises the unique issue of whether an employer can seek the approval from part of a union's membership for a proposed change to the collective agreement. Does the union need to be involved in such discussions? What is the role of the union representatives in workplace committees when such discussions take place?

[20] The Employer in this instance insists that it was taking a modern approach to labour relations by taking a collaborative approach to problem solving. Employees were asked to participate in designing a solution to the call-in problem. The recommendation was then directed to the labour-management committee for further discussion.

[21] The Union insists that the Employer is deliberately interfering with the Union's role as bargaining agent for employees by getting supervisory staff on board with a managerial proposal to significantly alter the terms of the collective agreement to the detriment of the part-time members of the Union.

[22] In *Retail, Wholesale and Department Store Union v. Canadian Linen Supply Limited,* [1991] 1st Quarter Sask. Labour Rep. 63, LRB File No. 029-90, the Board described the limits placed on employer communications with employees in the following terms at 67:

> *It is settled law in this Province that an employer is entitled to communicate with its employees, even with respect to matters that are the subject of collective bargaining negotiations, so long as the communication:*
>
> *(a) does not amount to an attempt to bargain directly with the employees and circumvent the union as the exclusive bargaining agent;*
>
> *(b) does not amount to an attempt to undermine the union's ability to properly represent the employees; and,*
>
> (c) *does not interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of any rights conferred by the Act.*

[23] In this instance, Ms. Matyas attempted to and succeeded in seeking approval for changes to the collective agreement from the supervisory members of part of the Union's membership. Although Ms. Matyas did not view her activities as "bargaining collectively," she did engage the public service group in a bargaining process of recommending a substantial change to the collective agreement. The Union was faced with rather unusual circumstances and did attempt, albeit unsuccessfully, to head off the discussion of the call-in proposal before it occurred. There was clearly no agreement between the Union and the Employer to permit the development of joint bargaining proposals at the public service group meetings. This was not part of the interest based bargaining process and was not a method of determining proposals for collective bargaining that had been agreed to by the parties.

[24] In such circumstances, we do not think that the Employer can defend its actions by claiming to be involved in a collaborative style of collective bargaining that would permit it to communicate directly with members of the Union to formulate joint collective agreement proposals. Such a collaborative approach is possible, but it must be undertaken with the consent of the bargaining agent, not solely on the initiative of the Employer.

[25] If the shoe were on the other foot, one can imagine that the Employer would feel undermined and "put out" should a Union committee obtain the agreement of part of the Employer's management

to make a submission to the labour-management committee supporting a bargaining proposal of some consequence to the Employer, and opposite to the Employer's overall bargaining position.

[26] In our view, the Employer violated s. 11(1)(c) by seeking the approval of the public service group membership for a bargaining proposal. The process undermined the role of the Union as the exclusive representative of the employees by getting part of the Union's membership to sign onto a collective bargaining proposal that was inconsistent with the Union's overall bargaining strategy and position.

[27] We find that the Union did not consent to the formulation of bargaining proposals in this manner. We do not find that Ms. Oddie's attendance at the meeting and her failure to object to the contents of the proposal lead to the conclusion that the Union consented to the process. Ms. Oddie and Ms. Posyniak made their objections known prior to the meeting. Ms. Oddie was attending the meeting in her capacity as an employee, and not as a Union representative. As is often stated in the arbitral case law, the workplace is not to be a debating society – disputes need to be channeled in the proper manner. In this case, Ms. Oddie and Ms. Posyniak took pro-active steps to prevent the discussion and followed up with further discussions at the labour-management committee meeting. They demonstrated respect for the processes established in the workplace for resolving disputes of this nature and should not be faulted for not being more assertive in the public service group meeting.

[28] We are certain, as well, that the Employer did not mean to breach the provisions of the *Act.* Rather, the Employer lacked knowledge about the process of collective bargaining and how interest-based bargaining applied to day-to-day operational concerns. The Board is hopeful that the parties can continue to engage in productive collective bargaining. The Employer will now understand that it must direct collective bargaining concerns through the formal negotiating committees and not through workplace committees that are not intended to deal with collective bargaining matters.

[29] In relation to the Board's remedial authority, we are of the view that no order is necessary in these circumstances as the Employer had already conveyed its apology to the Union for the conduct in question.

ADMINISTRATIVE AND SUPERVISORY PERSONNEL ASSOCIATION, Applicant v. UNIVERSITY OF SASKATCHEWAN and CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1975, Respondents

LRB File No. 108-01; November 5, 2001
Vice-Chairperson, James Seibel; Members: Clare Gitzel and Duane Siemens

For the Applicant:	Gary Bainbridge
For the University:	Neil Gabrielson, Q.C.
For CUPE, Local 1975:	Jim Holmes

Union – Company dominated – Certified trade union applies to amend Certification Order to reflect various Board decisions since Certification Order issued – Second trade union argues that certified trade union company dominated and cannot, as such, amend Certification Order – Board previously determined that second union lacked standing to make allegation of company domination on part of certified trade union – Second union not permitted to advance same argument in context of amendment application – Amendment application granted.

***The Trade Union Act,* ss. 2(e), 2(l), 5(i) and 5(k).**

REASONS FOR DECISION

[1] James Seibel, Vice-Chairperson: The Administrative and Supervisory Personnel Association ("ASPA") has been the designated bargaining agent for a group of employees of the University of Saskatchewan (the "University") since 1978. ASPA applied to update its original Certification Order dated October 31, 1978, to reflect the amendments made by various Orders of the Board with respect to the scope of the bargaining unit in the intervening years. The application was filed during the open period mandated by s. 5(k) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"). The University did not object to the application.

[2] There are several other bargaining units of employees of the University, largest among them being that represented by Canadian Union of Public Employees, Local 1975 ("CUPE"). CUPE objected to the application by ASPA asserting that ASPA is not a "trade union" within the meaning of s. 2(l), and is a "company dominated organization" within the meaning of s. 2(e), of the *Act*.

[3] At the hearing before the Board, Mr. Bainbridge, counsel for ASPA, raised as a preliminary issue, that CUPE ought not to be allowed to advance its objection to the application. Mr. Bainbridge pointed out that CUPE recently had made the identical allegations in a specific application to the Board pursuant to ss. 11(1)(b) and (k) of the *Act* asserting that the University was committing an unfair labour practice by bargaining with a company dominated organization. That application was dismissed by the Board, in *Canadian Union of Public Employees v. University of Saskatchewan and Administrative & Supervisory Personnel Association*, [2001] Sask. L.R.B.R. 475, LRB File No. 154-00.

[4] In its decision in that case, the Board determined that CUPE did not have standing to make the application. The Board stated as follows:

> *[25] Does CUPE have any direct or material interest in the issue at this stage? CUPE argues that its membership is unduly affected by the fact that ASPA is company dominated. CUPE asserts that ASPA has an advantage because its members can create new positions and design them to fit the criteria of belonging to ASPA. In essence, CUPE complains that ASPA members are provided too many managerial or supervisory responsibilities and they use them for the benefit of ASPA and to the detriment of CUPE.*
>
> *[26] In our view, this issue is insufficient to give CUPE a real or direct interest in attacking the status of ASPA. In previous cases before the Board, CUPE has raised many questions regarding the appropriateness of the ASPA bargaining unit and its relationship to the CUPE bargaining unit. The Board has noted that the line drawn between the two units is somewhat haphazard and difficult to administer. Nevertheless, a test has evolved for determining placement of new positions in one or the other bargaining unit and CUPE has access to the Board for assistance in relation to the assignment of new positions. The power to create new positions almost always rests with the Employer who can design new positions to fall in either bargaining unit, or out-of-scope and structure its workforce in the manner it thinks most suitable. The fact that CUPE views the Employer as favouring ASPA in the creation of new positions is not one that gives rise to a real or direct interest on the part of CUPE in challenging the status of ASPA as a trade union. It would seem to the Board that CUPE's real interest, in this case, is limited to the assignment of positions between bargaining units.*

[5] When asked by the Board to explain why CUPE should be allowed to advance the same argument in the context of the present application, CUPE's representative, Mr. Holmes, responded that the core issue is whether ASPA is a trade union within the meaning of the *Act*, because, if it is not, it cannot apply to amend its Certification Order. Mr. Holmes stated that CUPE would be asking

the Board in the present case to decide counter to its decision in LRB File No. 154-00. Mr. Holmes confirmed that CUPE had not taken any steps to seek to set aside that decision.

[6] The present application is simply a request to bring the ASPA Certification Order in line with prior Board decisions that have determined certain positions to be within the scope of the ASPA bargaining unit. The issue of the standing of CUPE to adduce evidence and advance argument with respect to the allegation of company domination of ASPA has been decided by the Board in LRB File No. 154-00. While CUPE does not agree with that decision, it has not applied for reconsideration or judicial review. We have decided to allow the preliminary objection by Mr. Bainbridge on behalf of ASPA and find that CUPE shall not be allowed to advance the same argument in these proceedings.

[7] ASPA rests on the material filed in support of the application. CUPE did not adduce any other evidence in opposition to the application. The application is granted.

CANADIAN UNION OF PUBLIC EMPLOYEES, Applicant v. BOARD OF EDUCATION OF THE SOURIS MOOSE MOUNTAIN SCHOOL DIVISION No. 122 OF SASKATCHEWAN, Respondent

LRB File Nos. 041-01, 042-01 & 043-01; November 6, 2001
Chairperson, Gwen Gray; Members: Mike Carr and Maurice Werezak

For the Applicant: Eden Guidroz and Harold Johnson
For the Respondent: LaVonne Black

Unfair labour practice – Burden of proof – Discharge – Employer terminated employment contract under terms of contract – Employer's stated reasons for termination relate to longstanding dispute between employee and employer over hours of work – Employer's explanation coherent and credible and Board cannot infer from employer's explanation that employer motivated by anti-union animus – Board dismisses applications.

***The Trade Union Act*, s. 11(1)(e).**

REASONS FOR DECISION

Background

[1] Gwen Gray, Chairperson: The Canadian Union of Public Employees (the "Union") applied for certification of school secretaries, teacher associates, care aides, library aides and student service workers on February 27, 2001. An Order was issued on April 4, 2001 after a vote was conducted among the employees in question. Prior to filing the application for certification, the Union filed an unfair labour application claiming that Ms. Bonnie Brooks was terminated from her employment as a student service worker contrary to s. 11(1)(e) of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the "*Act*") and seeking her reinstatement and monetary loss. The Board of Education of the Souris Moose Mountain School Division No. 122 of Saskatchewan (the "Employer") filed a reply denying the general allegations. A hearing was conducted in Regina on September 14, 2001.

Facts

[2] The Souris Moose Mountain School Division No. 122 of Saskatchewan (the "School Division") comprises a large area of southeast Saskatchewan, including the main towns of Stoughton, Arcola, Carlyle, Wawota, Redvers, Carnduff and Oxbow. The School Division contains 17 schools

and services 2,400 students and was formed in 1997 as a result of the amalgamation of two smaller school units, namely the Arcola School Division and the Oxbow School Division.

[3] Initially, Ms. Bonnie Brooks was an employee of the Arcola School Division. She commenced her employment as a student services worker in November, 1994 and provided services of a social work nature to students in Stoughton, Arcola, Carlyle, Wawota and Redvers. Ms. Brooks holds her bachelor degree in social work. She testified that when she was hired, she asked if she would be able to commence work at 8:30 a.m. as opposed to 8:00 a.m. as it was not possible for her to obtain child care services before 7:50 a.m. and arrive at the Arcola office of the Employer until 8:30 a.m. Ms. Brooks resides in Alameda, which is approximately a 30 minute drive from Arcola, and a one hour drive from Stoughton or Redvers. Ms. Brooks was assured that her workday could commence at 8:30 a.m. until 4:30 p.m. She understood that her travel time from the Arcola office to division schools would be "paid" time. As a result, for schools on the edges of the division, she could not arrive at the school until 9:00 a.m.

[4] Ms. Brooks signed a contract of service with the Board of Education of the Arcola School Division No. 72. The contract provision dealing with hours of work permitted Ms. Brooks to establish her own work schedule under the supervision of the Director of Education according to the needs of students. This type of clause was referred to as the professional clause. It was expected that Ms. Brooks would be required to work outside of the ordinary 8:00 a.m. to 4:00 p.m. schedule in order to accommodate the needs of students, families and teachers.

[5] In the School Division, Ms. Brooks reports to Ms. Joanne Cunningham, Assistant Director of Education. Ms. Brooks was on maternity leave when the two divisions merged together in the fall of 1997. At that time, the Employer decided to add a second student services position to service students in the former Oxbow School Division. It was decided that when Ms. Brooks returned to work in February, 1998, she would be assigned the schools located in the former Oxbow School Division while her replacement continued to provide services in the old Arcola School Division schools.

[6] On November 13, 1998, Ms. Cunningham and Ms. Brooks met with the principal from one school who complained about Ms. Brooks' hours of work. Ms. Cunningham then instructed Ms. Brooks to arrange her work schedule so that she was available to the staff of each school and to

students between the hours of 8:30 a.m. and 4:30 p.m. Ms. Brooks emailed Ms. Cunningham on the following Monday to point out that she was hired on the basis that her work day would commence at 8:30 a.m. and that travel time was considered work time. She pointed out her continued problems in obtaining childcare for her children prior to 7:50 a.m. This made it impossible for Ms. Brooks to be present in some schools at 8:30 a.m. Ms. Brooks indicated that she would attempt to be at schools by 8:30 a.m. but she could not do so in all instances. She attempted to make up any time by meeting with teachers during lunch hours and after school.

[7] Over the course of the school years 1998-1999, 1999-2000, Ms. Brooks' hours of work continued to be an on-going issue between her and Ms. Cunningham. In June, 2000, the student services worker who was assigned to schools in the old Arcola School Division resigned her position. At that time, Ms. Cunningham decided that the assignment of schools between the two student services workers should be reassessed. Ms. Cunningham developed different assignment scenarios that took into account travel distance, enrollment numbers, types of students, and other matters.

[8] At the same time, the Employer was attempting to formulate new employment contracts for Ms. Brooks and Mr. Stadnick, the new student service worker, which contained more detailed provisions on hours of work. Ms. Brooks apparently was asked if she would agree to sign an averaging permit in order to obtain an averaging permit for her hours of work. Such a permit would allow the Employer to have Ms. Brooks work more than 8 hours in a day or 40 hours in a week without attracting overtime costs. The Employer was unsure of the status of Ms. Brooks under *The Labour Standards Act*, R.S.S. 1978, c. L-1 as it considered that she may be exempt from the hours of work provisions under the Regulations which exempt professionals who are registered or licensed under a statute (SR 1995, c. L-1, s. 5). Ms. Brooks indicated to the Employer that she would agree to an averaging permit if the Employer would give her driving time from her office to schools and from schools to her office.

[9] Ms. Cunningham and the Director of Education, Mr. Keating, met with the two student service workers on October 6, 2000 to discuss school assignments and hours of work. Ms. Cunningham described the two work scenarios and indicated the reasons for establishing new offices at Carnduff and Carlyle. Ms. Cunningham and Mr. Keating indicated that they had not yet decided on the specific assignment of student services workers. On October 10, 2000, Ms. Brooks wrote to Ms. Cunningham outlining the reasons why she should be assigned to the Carnduff office. Again,

she noted her childcare difficulties and the difficulty of meeting their expectation that she be in attendance at school at 8:30 a.m.

[10] Ms. Cunningham raised the issue at the Employer's board meeting on October 16, 2000. At that time, the Employer passed a motion to terminate Ms. Brooks' contract of employment by giving her the required three months notice. The Employer also provided Ms. Brooks and Mr. Stadnick with their assignments of work – Ms. Brooks was assigned to the Carlyle office with school allocations of Alameda, Arcola, Carlyle, Manor, Stoughton and Wawota. Mr. Stadnick was assigned to the Carnduff office with school allocations of Alida, Carievale, Carnduff, Gainsborough, Oxbow and Redvers. The Employer indicated its willingness to enter into negotiations for a new agreement, but noted in its letter to Ms. Brooks that if no agreement could be reached, her employment would be terminated effective January 31, 2001.

[11] On November 17, 2000, Ms. Brooks wrote to Ms. Cunningham asking for the reasons for her assignment to the Carlyle office and reiterating her need for accommodation due to her childcare problems. Ms. Brooks also notified Ms. Cunningham that she had filed a complaint with the Saskatchewan Human Rights Commission. By that time, the relationship between Ms. Brooks and Ms. Cunningham had seriously deteriorated. Ms. Brooks asked to tape record her meetings with Ms. Cunningham. On December 5, 2000, Ms. Brooks made a presentation to the Employer explaining her reasons for filing a complaint with the Human Rights Commission. Ms. Brooks explained to the Employer that she is unable to attend the office in Carlyle at 8 a.m. due to her child care arrangements.

[12] Ms. Brooks wrote Ms. Cunningham on January 8, 2001 seeking a copy of the proposed contract that was mailed to her on January 11, 2001. In the proposed contract, the Employer set out two options regarding hours of work. The first option would apply if an averaging permit was obtained from the Department of Labour. The second option would apply if no averaging permit was obtained. It provided for an eight hour work day commencing at 8:00 a.m. and requiring the student service worker to be available in schools between the core hours of 8:30 to 11:30 a.m. and 1:00 p.m. to 4:00 p.m. Ms. Brooks suggested some changes to the contract and ultimately she signed the contract on January 26, 2001 with the same provisions dealing with the hours of work issue. The contract commenced on February 1, 2001 and purported to be a year-to-year contract terminable without cause on three months notice by the Employer.

[13] On January 26, 2001 Ms. Brooks emailed Ms. Cunningham a work schedule for the month of February. The schedule was a surprise to Ms. Cunningham as it showed Ms. Brooks' intention of splitting her visits to Stoughton and Wawota into half-day visits, thereby requiring her to drive to both locations twice in each six work day cycle. Ms. Cunningham objected to the added costs and the loss of counseling time resulting from the increased travel. Ms. Cunningham testified that she consulted with the Director of Education and some of the school principals in her efforts to attempt to find a resolution to the problem. As a result, she decided to approach Ms. Brooks and ask her if she was willing to take on the costs of the extra trips. She met with Ms. Brooks to discuss this proposal but Ms. Brooks was unwilling to agree to this compromise. As a result, Ms. Cunningham developed her own schedule for Ms. Brooks and delivered it to her on February 2, 2001. The schedule was to commence on February 5, 2001. On that date, Ms. Brooks phoned in and indicated that she was sick. She produced a sick leave slip from her doctor for one week. Ms. Brooks indicated that she was too stressed to work. Ms. Cunningham was unable to reach Ms. Brooks during that week.

[14] On February 12, 2001, Ms. Cunningham attended the Employer's board meeting and set out a description of the events since the Employer terminated Ms. Brooks' first contract of employment. During the meeting, the Employer decided to terminate Ms. Brooks' contract without cause with three months' pay in lieu of notice. Ms. Brooks was provided a letter to this effect, along with her termination cheque, on February 13, 2001. Ms. Cunningham and Mr. Keating testified that there was no discussion at the board meeting of the Union or the organizing campaign. As far as they were concerned, the Employer acted on Ms. Cunningham's report to it and for no other reason.

[15] On February 28, 2001, the Employer was notified that the Union had applied to be certified. The Director of Education, Mr. Keating, testified that he had knowledge that the Union was attempting to organize the employees since the amalgamation in 1997 but he was unaware of any change in the state of that campaign in November, 2000 when the Union claims it stepped up its campaign to sign union cards. Mr. Keating also testified that he was unaware that Ms. Brooks was involved in the Union's campaign. He indicated that no other employees had been terminated by the Employer during this period and that several of the employees who supported the Union were friends of his.

[16] Ms. Cunningham indicated that as far as she was aware, Ms. Brooks followed the February, 2001 schedule that Ms. Cunningham had imposed on her during the work days of February 12 and 13, 2001. The Employer did not provide Ms. Brooks with a warning letter or other form of discipline in relation to the hours of work issue prior to her termination.

[17] In addition, in relation to Ms. Brooks' human rights complaint, the Employer had advised the Human Rights Commission that it was agreeable to attempting early resolution as the way of resolving the complaint. No mediation efforts had taken place prior to the termination of Ms. Brooks.

[18] Ms. Brooks did not deny that she had a serious dispute with the Employer over her hours of work and her evidence did not differ to any great extent with that of Ms. Cunningham. Ms. Brooks felt that she had an agreement with the Employer from the outset that would permit her to work different hours of work to take into account the fact that she was unable to obtain child care prior to 7:50 a.m. This circumstance placed restrictions on Ms. Brooks' ability to attend schools at Stoughton and Wawota at 8:30 a.m. as both are one hour or more drive from her home in Alameda.

[19] Patricia Brockman testified on behalf of the Union. Ms. Brockman was hired by the Union as a temporary organizer and she was responsible for organizing the employees in the School Division. Ms. Brockman outlined how Ms. Brooks had assisted her in meeting with School Division employees and how she had circulated information about the Union through School Division schools. Ms. Brockman testified that after the termination of Ms. Brooks, the organizing drive came to a halt. The Union decided to file for certification without sufficient support (according to its count) and ask for a vote to be conducted. A vote was conducted and the Union was ultimately successful.

Relevant Statutory Provision

[20] Section 11(1)(e) 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:*
>
> > *(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;*

Employer's Argument

[21] The Employer argued that the Board is not required to find that the reasons for termination constituted "just cause" for dismissal; rather, the Board's task is limited to determining if the Employer has established a credible and coherent explanation for the dismissal. The Employer referred the Board to *The Newspaper Guild v. The Leader-Post, a Division of Armadale Co. Ltd.*, [1994] 1st Quarter Sask. Labour Rep. 242. The Employer noted that it had an on-going concern with Ms. Brooks' scheduling arrangements and initially brought the matter to a head in October, 2000 when it gave notice of termination of her existing contract effective January 31, 2001. The Employer maintains that its conduct in negotiating a new contract with Ms. Brooks in January, 2001, demonstrates that it was not motivated by anti-union animus. The Employer was prepared to continue Ms. Brooks' employment although, on different terms, with respect to the scheduling of work. The Employer argued that there is no evidence suggesting that the Employer was motivated by anti-union animus in the treatment of Ms. Brooks.

Union's Argument

[22] The Union argued that the Employer failed to demonstrate that it had "good and sufficient reason" for terminating the employment of Ms. Brooks. The Union noted that the reasons for termination set out in Ms. Cunningham's report to the Employer did not constitute "good and sufficient" reasons for termination. According to the Union, the only dispute over Ms. Brooks'

February schedule was the question of who would pay for the additional travel costs occasioned by Ms. Brooks' proposal to attend Stoughton and Wawota Schools two days in each six day period. The Union argues that no significant reason for termination occurred after February 1, 2001 except that Ms. Brooks went on sick leave. On her return to work, Ms. Brooks followed the calendar proposed by Ms. Cunningham. The Union pointed out that the dispute was a minor dispute and that it could have been resolved with the assistance of the Human Rights Commission through its early resolution mediation mechanisms. The Union points out the coincidence of timing between Mr. Keating's refusal to permit the union organizer to meet on the Employer's premises on January 10, 2001 and the timing of Ms. Brook's termination.

Analysis

[23] In *Hotel Employees and Restaurant Employees Union, Local 206 v. 7-Eleven Canada Inc.*, [2001] Sask. L.R.B.R. 665, LRB File No. 224-00, the purpose of s. 11(1)(e) of the *Act* was described as follows at 671:

> *[31] Section 11(1)(e) of the Act is designed to prevent employers from discriminating against employees, or using coercion or intimidation to discourage employees from joining or organizing a trade union. In Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Courtyard Inns Ltd. (c.o.b. Regina Inn), [1996] Sask. L.R.B.R. 719, LRB File Nos. 154-96, 155-96 & 156-96, the Board discussed the role of s. 11(1)(e) as follows at 725-726:*
>
> > *The Board has often alluded to the critical role of s. 11(1)(e) of The Trade Union Act in providing protection to employees when they or others are exercising the rights conferred upon them under the statutory scheme laid out in the Act. In Saskatchewan Government Employees' Union v. Regina Native Youth and Community Services Inc., [1995] 1st Quarter Sask. Labour Rep. 118, LRB File Nos. 144-94, 159-94 and 160-94, the Board made the following comment, at 123:*
> >
> > > *It is clear from the terms of s. 11(1)(e) of The Trade Union Act that any decision to dismiss or suspend an employee which is influenced by the presence of trade union activity must be regarded as a very serious matter. If an employer is inclined to discourage activity in support of a trade union, there are few signals which can be sent to employees more powerful than those which suggest that their employment 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.*

[24] As we have explained in other cases, such as *7-Eleven Canada Inc., supra,* the Board considers whether the Employer's reasons for termination provide a coherent and credible explanation for the dismissal. This enables to Board to judge whether the Employer may have been motivated by anti-union animus in deciding to dismiss the employee in question.

[25] We do not assess whether the Employer's reasons would constitute "just cause" for dismissal, as required in the common law or under the terms of a collective agreement. Nor does the Board judge the sufficiency of the notice provided to the employee, if the dismissal is made with notice and not cause, under the general common law applicable to non-union employment.

[26] In the present case, the Employer did not purport to terminate Ms. Brooks employment for cause. Rather, it purported to terminate the employment contract under the terms of the written contract – that is, by giving Ms. Brooks three months pay in lieu of notice. The reasons for the termination relate to the longstanding dispute between the Employer and Ms. Brooks over her hours of work. Both parties acknowledge the seriousness of the dispute and the disruption it caused to their working relationship.

[27] In our view, the Employer's explanation is coherent and credible. Several attempts were made by both sides to resolve the outstanding issue of Ms. Brooks' work schedule. The hostility between Ms. Brooks and Ms. Cunningham, in particular, was increasing, thereby limiting the ability of the parties to achieve a mutually satisfactory arrangement. The Employer's evidence can be summarized by saying that it was at the end of its rope in dealing with Ms. Brooks on this issue.

[28] We find that the Employer has established that it had good and sufficient reasons for terminating Ms. Brooks' employment. This does not mean that the Employer has established "just cause" or that the Employer provided adequate pay in lieu of notice, as required by the common law. These issues do not fall to the Board for determination.

[29] However, in attempting to discern if the Employer was motivated by anti-union animus in dismissing Ms. Brooks from her employment, the Board cannot infer from the reasons provided by the Employer that it was so motivated. In other words, the reasons do not lack the coherence or credibility to lead the Board to conclude that they simply mask an anti-union motivation.

[30] The termination of Ms. Brooks' employment occurred before the Employer was officially aware that a union organizing drive was reaching its peak. The Employer admitted that it was aware that a campaign to organize its employees had been on-going for several years; however, this fact did not concern the Employer as it was already partially unionized. There is no other indication that the Employer was engaged in an attempt to discourage employees from joining the trade union.

[31] In these circumstances, the Board does not find that the Employer violated s. 11(1)(e) and, as a result, dismisses the Union's application.

INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 739, Applicant v. L.C.M. SANDBLASTING AND PAINTING LTD., Respondent

LRB File No. 152-01; November 6, 2001
Vice-Chairperson, James Seibel; Members: Ken Hutchinson and Patricia Gallagher

For the Applicant: Angela Zborosky
For the Respondent: Glen Dowling

Bargaining unit – Appropriate bargaining unit – Construction industry – Proposed painter bargaining unit includes sandblasting work and therefore differs from standard painter bargaining unit – No evidence that jurisdictional bodies in construction industry have assigned sandblasting work to painter craft but both sandblasting and painting preparation work have been included in scope of provincial painter collective agreement – Board concludes that proposed bargaining unit appropriate under circumstances.

Certification – Statement of employment – Persons listed on statement of employment should have sufficiently regular and substantial or tangible connection with employer on date application for certification is filed – Casual workers with no regular or tangible connection to employer, infrequently called in for small bits of work and with no real expectation of future recall not properly listed on statement of employment.

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

REASONS FOR DECISION

Background

[1] James Seibel, Vice-Chairperson: International Union of Painters and Allied Trades, Local 739 (the "Union") applied to be certified as the designated bargaining agent for a group of employees of L.C.M. Sandblasting and Painting Ltd. ("LCM") comprising "all painters, painter apprentices, sandblasters and painter foremen." The unit description is not the standard unit for the painter trade division in the construction industry established by the Board in *Construction and General Workers Union v. International Erectors and Riggers, a division of Newbery Energy Ltd.*, [1979] Sept. Sask. Labour Rep. 37, LRB File No. 114-79, colloquially referred to as a "Newbery unit."

[2] The shareholders and directors of LCM are Darren Mosewich, who is most actively involved in the management of the company, and his father, Lawrence Mosewich, who is largely retired from actively working. In its application filed August 1, 2001, the Union estimated there were approximately nine (9) employees in the proposed bargaining unit. The statement of employment filed on behalf of LCM lists nine (9) persons as employees, however, the Union disputed that four (4) of the names should not be included for the purposes of determining majority support for the application on the grounds they were not "employees" within the meaning of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") when the application was filed. Those names are Lloyd Isted, Irene Hall, Dan Hunter and Bill Holmes. The Union also took the position that three (3) names that do not appear on the statement of employment should be included. Those names are Gary Elek, Ian Wereley and Richard Desnomie.

[3] During preliminary submissions at the hearing by the Board on September 7, 2001, counsel for LCM, Glen Dowling, did not take issue with the description of the proposed bargaining unit and agreed that the names of Gary Elek, Ian Wereley and Richard Desnomie should be added to the statement of employment for an alleged total of 12 employees in the proposed unit.

[4] The issues joined before the Board at hearing were: (a) the description of the bargaining unit; (b) the composition of the statement of employment; and (c) the status of each of Isted, Hall, Hunter and Holmes.

Evidence

[5] John Beddome has been the business manager of the Union for some 15 years. He testified about the painting trade and the structure of collective bargaining for the trade division referring to the provincial agreements in both Saskatchewan and Manitoba. Mr. Beddome described the sandblasting function as preparatory to, and an integral part of, the industrial painting process. He said that while painters often do sandblasting work, not all painters do so, and not all persons engaged in sandblasting do painting. He said that the Saskatchewan provincial agreement for the painters trade division has included sandblasters within its scope for perhaps 25 years.

[6] Gary Elek has been a member of the Union for some 25 years. He does both painting and sandblasting. He was engaged by LCM as an employee on May 4, 2001 and worked pretty much full-time from Monday to Friday until he was purportedly laid off for lack of work on July 31, 2001.

[7] Mr. Elek testified that he believes the person he knows simply as "Lloyd" is the Lloyd Isted whose name is in issue on the statement of employment. He said that while he did not know whether Mr. Isted had a regular work schedule, he saw him working two or three times a week in the late afternoon for an hour or two each time. He said that while Mr. Isted appeared to help with preparation, he did not see him painting. Mr. Elek testified that he did not know who Dan Hunter and Bill Holmes were and he did not see anyone by those names working at LCM. Mr. Elek said that Irene Hall was introduced to him as a friend of Lawrence Mosewich but he did not see her working at LCM.

[8] Mr. Elek said that Darren Mosewich summoned him to a meeting of employees on the morning of July 31, 2001. He said that neither Lloyd Isted nor Irene Hall was present at the meeting and neither was anyone named Dan Hunter or Bill Holmes. At the meeting, those assembled were advised that there would be some layoffs for lack of work, purportedly occasioned by the retirement of Lawrence Mosewich planned for the end of November. Later that day, Mr. Elek was advised that he was immediately laid off.

[9] Richard Desnomie, a second-year painter apprentice, was employed by LCM mostly doing sandblasting and preparation work for approximately five (5) months until he was purportedly laid off for lack of work on July 31, 2001. He worked pretty much full-time hours from Monday to Friday and some overtime during evenings and weekends.

[10] Mr. Desnomie described his technical college training for the painter trade and said that it included specific training in sandblasting and preparation work.

[11] Mr. Desnomie testified that he observed Lloyd Isted to work variably two or three times a week for an hour or two each time in the late afternoon. He said that he did not know any of Irene Hall, Dan Hunter or Bill Holmes and had never seen anyone by those names working at LCM.

[12] Mr. Desnomie also testified that, although he was off work for a work-related injury on July 31, 2001, he was summoned to an employee meeting by Darren Mosewich on one hours' notice. He testified that while all other persons on the statement of employment were at the meeting, plus himself, Mr. Elek and Mr. Wereley, none of Isted, Hall, Hunter or Holmes was present. He said he was advised that day that he was immediately laid off for lack of work.

[13] Darren Mosewich, along with his father, Lawrence, is one of the principals of LCM. He has been involved in the management of the business since 1987. He asserted that he and his father should be excluded from the description of the proposed bargaining unit.

[14] Mr. Mosewich said that each of Lloyd Isted, Dan Hunter and Bill Holmes were employed part-time by LCM doing sanding, fine taping and masking and "shot blasting." He said that Irene Hall who worked 120 hours a month also did "fine painting" work. He said that all four persons had no regularly scheduled hours of work and had "flexible hours based on requirements and their ability to come in."

[15] Mr. Mosewich produced LCM's payroll ledger for June, July and August, 2001. The records purport to simply show a total number of hours worked by each person each month but do not show on what days they worked or which or how many hours were worked each day. The entries he referred to show that the following nine (9) persons worked full-time or close to full-time hours in June and July:

Trent Lasko	Mike Ogrodnick
Merle Melenychuk	Richard Desnomie
Bruce Ehrmentraut	Gary Elek
Ian Wereley	Donald Bonneau
Mike Anaka	

[16] Mr. Mosewich testified that Lloyd Isted, who had another job, started working part-time in April, 2000 at LCM for 20 to 30 hours a month in late afternoons and on weekends. Mr. Isted, he said, is allowed to choose when he works.

[17] Referring to the payroll records, Mr. Mosewich testified that Dan Hunter worked six (6) hours in June, 14 hours in July and five (5) hours in August, 2001, doing taping and shotblasting. He had also worked for LCM in 2000 for approximately 30 hours over nine (9) months. Mr. Mosewich said that Bill Holmes did not work in June and worked for eight (8) hours in July and four (4) hours in August, 2001. He said that the reason the full-time employees did not know of Mr. Hunter or Mr. Holmes was because they worked in the evening or on weekends.

[18] Mr. Mosewich said that he did not think it was necessary that Isted, Hunter or Holmes be at the meeting of July 31, 2001 because layoffs would not substantially affect them.

[19] With respect to Irene Hall, Mr. Mosewich testified that she had worked for LCM for some six (6) years doing fine painting and preparation. He said Ms. Hall lived in his father's house and that they were friends, but denied any other knowledge of the nature of their relationship. Mr. Mosewich testified that Ms. Hall had variable hours that included evening and weekend work and that was most likely why Mr. Elek and Mr. Desnomie, who worked mostly full-time daytime hours had not seen her working. The payroll ledger showed that Ms. Hall purportedly worked exactly 120 hours each month. Her earnings for 2000 showed that she purportedly worked the equivalent of exactly the same number of hours each month that year.

[20] In cross-examination, it was pointed out that there was no specimen signature provided for Bill Holmes. Mr. Mosewich said that Mr. Holmes was on holidays when the signatures were taken and he had simply neglected to obtain it later.

Argument

[21] Ms. Zborosky, counsel for the Union, citing the Board's decision 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, asserted that in order to be listed on the statement of employment as an employee for the purposes of determining the level of support for a certification application alleged "part-time" employees must have "a sufficiently regular and substantial connection with the employer" while "casual" employees should not be listed. In the context of construction, Ms. Zborosky referred to the decision of the Board in *International Union of Operating Engineers, Hoisting, Portable & Stationary, Local 870 v. K.A.C.R. (A Joint Venture)*, [1983] Sept. Sask. Labour Rep. 37, LRB File No. 106-83, in support of her argument that the Board should look at a reasonable period of perhaps two weeks prior to the filing of the certification application to determine the employment status of disputed individuals.

[22] Ms. Zborosky argued that if these principles are applied in the present case, none of the four (4) persons in dispute should be considered for the purposes of determining the level of support for the application.

[23] More specifically, with respect to Ms. Hall, Ms. Zborosky pointedly stated that except for the assertion of her employee status by Darren Mosewich, there was no evidence that she actually did any work for LCM; and, citing the Board's decision in *Saskatchewan Joint Board Retail, Wholesale and Department Store Union v. Choiceland Auto Service Ltd.,* [1986] Feb. Sask. Labour Rep. 66, LRB File No. 249-85, argued that, in any event, she ought to be excluded from the statement of employment as being as effectively tied to management as a spouse.

[24] With respect to the description of the bargaining unit, Ms. Zborosky referred to the following decisions in support of the unit applied for: *Construction and General Workers' Union, Local No. 180 v. Summit Pipeline Services Ltd.*, [1996] Sask. L.R.B.R. 770, LRB File No. 326-96 and also *International Brotherhood of Painters and Allied Trades, Local 1996 v. D & T Mechanical Ltd., et al.*, [1995] 2nd Quarter Sask. Labour Rep.132, LRB File No. 076-95.

[25] Mr. Dowling, counsel for LCM, argued that the four (4) persons in dispute were all employees of LCM, albeit on a more casual basis than the rest of those on the statement of employment, and should be included for the purposes of determining the level of support for the Union. Citing the Board's decisions in *University of Saskatchewan Faculty Association v. University of Saskatchewan*, [1986] Apr. Sask. Labour Rep. 34, LRB File No. 070-85, *Service Employees International Union, Local 299 v. Cadillac Fairview Corporation Limited*, [1986] Apr. Sask. Labour Rep. 32, LRB File No. 308-85, and *International Alliance of Theatrical Stage Employees and Moving Pictures Machine Operators of the United States and Canada v. Saskatchewan Centre of the Arts*, [1992] 3rd Quarter Sask. Labour Rep. 127, LRB File No. 126-92, he asserted that the Board's general policies include favouring larger bargaining units to smaller fragmented units and to refrain from segregating small groups of part-time employees from a larger group of full-time employees when to do so would effectively deprive them of the right to organize and bargain collectively unless differences in their community of interest would impair collective bargaining.

[26] With respect to the Ms. Hall in particular, Mr. Dowling said there was no evidence to establish a common law relationship with the elder Mr. Mosewich and asserted, therefore, that the *Choiceland Auto* case, *supra*, ought to be distinguished. He said that the elder Mr. Mosewich was not in good enough health to testify and Ms. Hall was unavailable as she was on holidays.

[27] Mr. Dowling did not take a position against the bargaining unit description applied for.

Analysis and Decision

[28] We must determine two issues: whether the non-standard proposed bargaining unit is appropriate in the circumstances, and the composition of the statement of employment for the purposes of determining the level of support for the application.

[29] The bargaining unit established for the painters trade division of the construction industry in the Board's seminal decision in *Newbery Energy, supra,* is "all painters, painter apprentices, and painter foremen." In *D & T Mechanical Ltd., supra*, the Board considered whether another non-standard unit applied for by the Union, namely, "all employees employed in hazardous material abatement" was appropriate. Several unions representing different trade divisions appeared as interested parties at the hearing of the case. It was noted in that case that this relatively new area of activity had not been assigned by the jurisdictional bodies in the construction industry in craft terms. In determining that the application should be allowed, the Board stated, at 133-34, as follows:

> *The decision of this Board in Newbery Energy, supra, acknowledged the significance of the craft jurisdictions of the building trades unions in setting out the standard bargaining units for the construction industry. These bargaining units are a clear exception to the pattern set by the Board in other sectors, where a preference for inclusive bargaining units creates a pressure for bargaining unit descriptions which ignore any divisions on the basis of training or specialized skills. The advantage from the point of view of the building trades unions is clear; on the basis of bargaining units defined in terms of craft, they can continue to play their historical role of maintaining standards and controlling access with respect to each particular craft.*
>
> *In light of the exceptional nature of the bargaining units which have been accepted for the construction industry, the Board has been careful to confine the Newbery Energy units to cases which involve the true craft jurisdictions of the building trades unions.*
>
> *This Board has not been involved in making jurisdictional determinations as such. These issues are resolved in forums sanctioned by the parent unions. This stands in contrast to some Canadian jurisdictions where labour relations boards do play a role in determining jurisdictional questions. In a case referred to us by Mr. McDonald, Labourers' International Union of North America v. International Brotherhood of Painters and Allied Trades et al, LRB No. 1408C, the Nova Scotia Labour Relations Board recognized all asbestos removal work in the Province of Nova Scotia as lying within the jurisdiction of the Painters Union, with the exception*

of one company which had a long-standing relationship with another of the building trades.

[30] In the present case, there is similarly no evidence that the jurisdictional bodies in the construction industry have assigned sandblasting work to the painter craft. However, it is clear that both sandblasting and painting preparation work have been included in the painter craft through negotiation of the scope of the provincial agreement and are a specific part of the technical school training program for apprentice and journeyman painters. Also, although notice of the application was given to the Saskatchewan Building Trades Council, no other craft unions appeared as interested parties at the hearing of the application. Accordingly, while we are not about to re-write the unit description for the painter trade division established in *Newbery, supra*, we are of the opinion that is appropriate for the Union to apply to represent persons engaged in sandblasting work.

[31] With respect to the composition of the statement of employment, the Board's jurisprudence clearly requires that the persons listed thereon should have a sufficiently regular and substantial or tangible connection with the employer on the date the application for certification is filed. Mr. Isted has worked regularly part-time for 20 to 30 hours per month since April, 2000 without having to be called in. This was observed by both full-time employees who testified on behalf of the Union, Mr. Elek and Mr. Desnomie. In our opinion, his name is properly listed on the statement of employment.

[32] However, the situation is otherwise as concerns Dan Hunter and Bill Holmes. While Mr. Hunter has purportedly performed work for LCM since March 2000, he has averaged only a few hours of work per month. Similarly, Mr. Holmes, who was first engaged to work for LCM in April, 2001, did not work at all in the month of June, 2001 and worked but eight (8) hours in July; his attendance is so infrequent that LCM apparently had no opportunity to secure his specimen signature for the statement of employment. Neither of these gentlemen works unless called in. And, apparently, they work during unorthodox hours when they are called in: neither was known to, or observed at work by, either Mr. Elek or Mr. Desnomie, and they were not invited to the meeting of employees called by Darren Mosewich on July 31, 2001. In his evidence, Mr. Mosewich did not provide a rational explanation for what he said was their necessity to the way the business operates. In our opinion Mr. Hunter and Mr. Holmes are truly the most casual of workers with no regular or tangible connection to LCM, infrequently called in for small bits of work and with no real expectation of future recall.

[33] The evidence concerning the status of Ms. Hall was insensible, left more questions than it provided answers, and cried out that either she or Lawrence Mosewich testify in clarification. Other than the testimony of Darren Mosewich, there is no evidence that she, in fact, performs any painting or related work at all. While Mr. Elek knew who Ms. Hall was, she once having been introduced to him as a friend of the elder Mr. Mosewich, he had never seen her working; Mr. Desnomie neither knew who she was nor saw her working. It stretches the imagination that someone who purportedly works three-quarters time would not be observed to work by either of these full-time employees; it defies credibility that someone who purportedly works that many hours month in and month out, while setting their own work times has coincidentally managed to always do so when no one else is around. During the hearing it was clear that the Board was puzzled and troubled by this purported scenario, and while Mr. Dowling proffered the explanation that neither Ms. Hall nor the elder Mr. Mosewich was available to testify, he did not seek an adjournment to allow them to do so at a later date. In the circumstances, we have drawn the inference that their testimony would not advance LCM's case. In our opinion, Ms. Hall is not an employee for the purposes of determining the level of support for the application and her name shall be removed from the statement of employment.

[34] Therefore, the statement of employment shall consist of the following names:

Trent Lasko	Mike Ogrodnick
Merle Melenychuk	Richard Desnomie
Bruce Ehrmentraut	Gary Elek
Ian Wereley	Donald Bonneau
Mike Anaka	Lloyd Isted

[35] As the Union has filed evidence that a majority of the employees listed on the statement of employment support the application, an order for certification for the unit applied for will issue.

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA), Applicant v. UNITED CABS LIMITED operating as UNITED CABS AND BLUE LINE CABS, Respondent

LRB File No. 194-01; November 6, 2001
Vice-Chairperson, Walter Matkowski; Members: Gerry Caudle and Clare Gitzel

For the Applicant: Neil R. McLeod, Q.C.
For the Respondent: Larry F. Seiferling, Q.C.

Remedy – Interim order – Criteria – Union supporter's employment status changed from lease operator to rental driver – Change in status will not materially affect bargaining unit status or financial status of union supporter – Evidence did not establish irreparable harm or satisfy Board that balance of labour relations harm falls in union's favour – Board dismisses application for interim order.

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

REASONS FOR DECISION

Background

[1] **Walter Matkowski, Vice-Chairperson:** National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW – Canada), (the "Union") was certified to represent all taxi drivers employed by United Cabs Limited operating as United Cabs and Blue Line Cabs (the "Employer") by Order of the Board dated February 28, 2001 (LRB File No. 236-00).

[2] The Order specifically excludes "those persons who own or control two or more taxi cabs." (See also *National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) v United Cabs*, [2001] Sask. L.R.B.R. 108, LRB File No. 236-00).

[3] This application seeks various interim orders under ss. 5.3 and/or 42 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") in relation to a driver, Bawa Jewad ("Jewad") and a taxi franchise identified as #53 on the top sign of the car.

[4] The Union's unfair labour practice application dated September 21, 2001, sought orders under ss.5(d) and (e) of the *Act* and alleged that the Employer had committed an unfair labour practice within the meaning of ss.11(1)(a) and 11(1)(m) of the *Act.*

[5] The Union's unfair labour practice application also dealt with Jewad, taxi franchise #53 and a change in Jewad's status of employment and in his conditions of employment.

[6] Following a hearing on September 28, 2001, the Board dismissed the Union's interim application and advised the parties that written reasons would follow.

Facts

[7] Since approximately 1991, Jewad has driven a cab by leasing a plate owned by Cliff Kowbel ("Kowbel"). Jewad owned and operated his own car under the plate. Jewad was of the belief that he leased the plate from the Employer while Kowbel, as owner of the plate, deposed in his affidavit that Jewad leased the plate from him, and that Kowbel could terminate the lease at any time.

[8] Kowbel owned six plates at the start of 2000. In approximately April 2000, Kowbel sold five (5) of his six (6) plates (to entities other than the Employer).

[9] Kowbel continued to own the plate associated with franchise #53 driven by Jewad until he entered into an agreement to sell this plate to Ken Bardouh ("Bardouh") effective September 26, 2001.

[10] Bardouh currently owns and operates four other cabs. In his affidavit Bardouh deposed that once he owns the plate, he "intends to put it on to one of his own cars" and then operate it by hiring drivers.

[11] Jewad received a letter from Kowbel informing him of the sale of the franchise and providing him with 30 days notice that his last day driving under the plate would be September 26, 2001.

[12] The Employer also provided correspondence to Jewad confirming its knowledge of the sale of the plate and its knowledge that the new owner of the plate would be "running the plate himself."

[13] Bardouh approached Jewad following the latter's purchase of the franchise and offered Jewad a driver's job on a full time basis utilizing one of Bardouh's vehicles under the plate. Jewad refused this offer as he wanted to utilize the car which he owned under either plate #53 or any other plate.

[14] Jewad has been a Union supporter dating back to a failed certification application at the Employer's workplace in 1995. Jewad is on the Union's bargaining committee and attended an August 13, 2001 bargaining session.

[15] Kowbel attended before the Board without counsel, having filed an affidavit confirming his ownership of the plate, his sale of the plate to Bardouh, and his financial need for the money from the sale of the plate.

[16] Bardouh attended before the Board without counsel, having filed an affidavit confirming his purchase of the plate from Kowbel, his intention to utilize one of his own vehicles under the plate and his offer of full time employment to Jewad as a driver. At the hearing, Bardouh confirmed that Jewad could operate one of Bardouh's vehicles under the plate as a driver.

[17] The Union seeks the following relief from the Board:

> *An order prohibiting the Respondent employer from transferring the taxi franchise, identified as #53 on the top sign of the car driven under the said franchise, owned on the date of this application by Wendy Kowbel or Cliff Kowbel or another member of the Kowbel family: and thereby maintaining a lease arrangement of that franchise with Bawa Jewad until such time as the Unfair Labour Practice is heard and determined.*
>
> *In the alternative, an Order in the terms above to be effective until the application is heard and determined or until such time that the Respondent employer makes available to Bawa Jewad the opportunity to lease a franchise that would enable him to continue to drive his car and function as an owner operator under the banner of United/Blue Line Taxis.*

[18] Currently there is a list of approximately 20 to 30 drivers who are waiting to become a lease operator. The Employer indicated that Jewad will now go on this list.

Statutory Provisions

[19] Section 5.3 of the *Act* reads:

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.

[20] Section 42 of the *Act* reads:

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.

[21] Sections 11(1)(a) and (m) of the *Act* read:

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;

. . .

(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;

Analysis

[22] The Employer concedes a change in Jewad's status as a result of the sale of the plate. However, the Employer argues that because it does not own the plate it has no control over Jewad's change of status from a lease operator to a rental driver. Both status levels bring Jewad under the Certification Order issued by the Board.

[23] The Board in the decision *United Cabs, supra,* reviews the many unique features of the taxi-cab industry at 109 through 111. Included in the Board's analysis in *United Cabs, supra,* is a review of the acknowledged status of rental drivers and lease operators.

[24] It is against this setting that the Board must consider whether or not to grant the Union's request for an interim order. The legal test for the Board to consider as to whether or not the interim relief should be granted is set out in *Hotel Employees and Restaurant Employees Union, Local 206 v. Canadian Hotels Income Properties Real Estate Investment Trust #19 Operations Ltd.*, [1999] Sask. L.R.B.R. 190, LRB file No. 131-99, at 194:

> *The Board is empowered under ss. 5.3 and 42 of the Act to issue interim orders. The general rules relating to the granting of interim relief have been set down in the cases cited above. Generally, we are concerned with determining (1) whether the main application reflects an arguable case under the 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 Tropical Inn, supra, at 229). This test restates the test set out by the Courts in decisions such as Potash Corporation of Saskatchewan v Todd et al., [1987] 2 W.W.R., 481 (Sask. C.A.) and by the Board in its subsequent decisions. In our view, the modified test, which we are adopting from the Ontario Labour Relations Board's decision in Loeb Highland, supra, focuses the Board's attention on the labour relations impact of granting or not granting an interim order. The Board's power to grant interim relief is discretionary and interim relief can be refused for other practical considerations.*

[25] The first part of the test as set out in *Canadian Hotels*, *supra* is whether the main application reflects an arguable case under the *Act*. The Board is of the view that the Union has demonstrated that there is an arguable case to be made on the main application.

[26] As stated earlier, the Employer concedes a change in Jewad's status of employment as a result of the sale of the plate. The Employer argues that because it does not own the plate, the change in status cannot be attributed or linked to any of its actions. Nonetheless, given Jewad's accepted change in status and change in working conditions, an arguable case is available to the Union in the main application.

[27] Moving to the second part of the test as set out in *Canadian Hotels*, *supra*, when considering what labour relations harm will result if the interim order is not granted, the Board is cognizant of the fact that Jewad will not be removed from the workplace. Jewad's status will change, from a lease operator to a rental driver, but judging from Kowbel's affidavit, this is not an unusual occurrence at this workplace given the sale of five (5) of Kowbel's plates in the year 2000. In spite of Jewad's change in status, he can still continue in his Union activities, he can continue to sit on the Union's bargaining committee and he can continue to earn income as a rental driver.

[28] In *United Foods Commercial Workers, Local 1400 v Tropical Inn, operated by Pfeifer Holdings Ltd. and United Enterprises Ltd.*, [1998] Sask. L.R.B.R. 218, LRB File Nos. 274-97, 375-97 & 376-97, and in other cases, the Board often considers whether or not the dismissal of an employee for alleged union activity has "a chilling effect" on the union's organizing drive or activities so that an interim order is necessary. As stated, in this case, the Union supporter, Jewad is not being removed from the workplace and can continue on the Union's bargaining committee. There was no evidence of a chilling effect on the Union at this workplace. There was little or arguably no evidence to demonstrate that any labour relations harm would result if the interim order was not granted. When the Board considered this fact, together with the fact that Jewad could suffer little or no financial harm, and that if Jewad did suffer a financial loss that it could be quantified and remedied on a final order, the Board refused to grant the interim order requested.

[29] For all of the foregoing reasons, the Union's application for interim relief was dismissed.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1985, Applicant v. GABRIEL CONSTRUCTION LTD., Respondent

LRB File No. 167-01; November 9, 2001
Chairperson, Gwen Gray; Members: Maurice Werezak and Leo Lancaster

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

Certification – Statement of employment – Employees worked for employer outside Saskatchewan on date certification application filed but worked for employer within Saskatchewan both before and after time period spent working out of province – Employees not working within scope of bargaining unit on day application for certification filed and no exceptional circumstances surrounding their absence that day – Board removes names of employees from statement of employment.

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

REASONS FOR DECISION

Background

[1] Gwen Gray, Chairperson: United Brotherhood of Carpenters and Joiners of America, Local 1985 (the "Union") applied for certification on August 22, 2001. The matter was heard by the Board on October 18, 25 and 26, 2001. At the hearing on October 26, 2001, the parties indicated to the Board that they had resolved all outstanding matters on the application with the exception of the inclusion of five persons listed on the statement of employment. The Board heard evidence and argument with respect to the five persons.

[2] The bargaining unit description agreed to by the parties includes: "all journeymen carpenters, carpenters, carpenter apprentices and carpenter foremen employed by Gabriel Construction Ltd., directly or indirectly, including those nominally employed by 608295 Saskatchewan Ltd., within the Province of Saskatchewan."

Facts

[3] Gabriel Construction Ltd. (the "Employer") is a general contractor that operates primarily in Saskatchewan. It is owned and managed by Gabriel Grenier. 608295 Saskatchewan Ltd. is the payroll company used by the Employer to pay its staff.

[4] The Union applied for certification on August 22, 2001 for a unit of carpenters employed by the Employer. At that time, the Employer was primarily performing construction work in Saskatchewan, although it did have one crew of carpenters working on a job in Ontario. The employees in question commenced work in Ontario on August 16, 2001 and completed it around September 19, 2001. Prior to commencing the project in Ontario, they had all been employed by the Employer on projects in Saskatchewan and they returned to work for the Employer in Saskatchewan when the Ontario project was completed.

Argument

[5] The Employer argued that the five employees had a reasonable expectation that they would return to work for the Employer in Saskatchewan at the conclusion of the Ontario project and, as such, should be included on the statement of employment as employees with a substantial connection to the workplace. The Employer relied on *Schan v. Little-Borland Ltd. et al.,* [1986] Feb. Sask. Labour Rep. 55, LRB File No. 221-85 & 275-85; *International Brotherhood of Electrical Workers, Local 529 v. Mudjatik Thyssen Mining Venture,* [2000] Sask. L.R.B.R. 332, LRB File No. 140-99, *International Association of Bridge, Structural and Ornamental Iron Workers v. Metal Fabricating Services Ltd.*, [1990] Spring Sask. Labour Rep. 70, LRB File Nos. 166-89, 193-89 to 195-89, 214-89 to 216-89.

[6] The Union argued that the employees in question were not employed in the bargaining unit at the time of the certification application and should not be included on the statement of employment. The Union referred the Board to *International Union of Operating Engineers v. Little Rock Construction,* [1995] 4th Quarter Sask. Labour Rep. 102, LRB File No. 190-95; *Sheet Metal Workers' International Association Local 296 v. KD Mechanical Ltd.*, [1995] 4th Quarter Sask. Labour Rep. 127, LRB File No. 242-95; *International Union of Operating Engineers et al. v. Henuset Pipeline Construction Ltd.,* [1991] 4th Quarter Sask. Labour Rep. 64; LRB File Nos. 146-91, 188-91 & 195-

91; *United Steelworkers of America v. Develcon Electronics Limited,* [1981] March Sask. Labour Rep. 35, LRB File No. 263-80, *International Union of Operating Engineers v. Flynn Bros. Construction Inc.,* [1999] Sask. L.R.B.R. 73, LRB File No. 182-98; *United Brotherhood of Carpenters and Joiners of America, Local 1985 v. Patent Scaffolding Co. – Canada A Division of Harsco Canada Limited,* [1993] 3rd Quarter Sask. Labour Rep. 98, LRB File No. 127-93; *Canadian Union of Public Employees v. City of Lloydminster,* [1985] Jan. Sask. Labour Rep. 33, LRB File No. 011-84; *Canadian Union of Public Employees, Local 3432 v. Lloydminster School Division No. 99,* [1990] Winter Sask. Labour Rep. 70, LRB File No. 013-90; *Sheet Metal Contractors Association of Alberta et al. v. Sheet Metal Workers International Association, Local Union No. 8,* [1986] Alta. L.R.B.R. 291.

Analysis

[7] Both parties to this application agreed that the Board has no constitutional jurisdiction to extend the scope of a bargaining unit to employees who work entirely in another province: see *MacLean's Magazine* (1983), 1 CLRBR (NS) 289 (Ont. LRB); *Labour Relations Board v. Eastern Bakeries Ltd.* (1960), 26 D.L.R. (2d) 332 (S.C.C.).

[8] The Union argues that since the employees in question were working outside Saskatchewan on the date the application was filed and for a substantial period following the date of application, they should be excluded from the statement of employment as they cannot be said to fall within the bargaining unit description during the relevant time frame.

[9] The Employer argues that the Board must assess if the employees in question have a substantial connection with the workplace in the period.

[10] In *Mudjatik Thyssen Mining, supra,* the Board summarized its practice in relation to statements of employment on applications for certification in the construction industry as follows at 339:

> *In International Association of Bridge, Structural and Ornamental Iron Workers v. Metal Fabricating Services Ltd., [1990] Spring Sask. Labour Rep. 70, LRB File Nos. 166-89, 193-89 to 195-89, 214-89 to 216-89 at 71, the Board held that employees, who are not employed on the date the application for certification is filed, are not*

> *entitled to participate in the representation question unless there are exceptional circumstances. In the construction sector, employees are hired to perform work on a job-by-job basis, there is little permanency to the work and no general expectation that employees will be recalled by the employer when the work situation improves. In this environment, the Board is reluctant to apply the "reasonable expectation of recall" principle set out in the Schan v. Little-Borland Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 1805, [1996] Feb. Sask. Labour Rep. 55, LRB File Nos. 221-85 & 275-85. In our view, the Schan decision is not in line with the decisions of the Board set out in Metal Fabricating Services Ltd., supra. If the principle were applied, the Union would be required to file support evidence from employees who, at the time, were not at the workplace and who may well be unknown to the Union. Unless there is demonstrated regular employment with the Employer, and very short periods of lay-off, the Board is unlikely to accept that an employee on lay-off prior to the date of application for certification should be included on the statement of employment.*

[11] In *Metal Fabricating Services Ltd., supra,* the Board considered the likelihood of re-employment after a lay-off and concluded at 71:

> *In our view, there is nothing exceptional about the circumstances of the 6 employees. There were laid off for lack of work prior to the date on which the application was filed. We are satisfied that if and when the employer has need of them, they will probably be offered re-employment, which of course they may or may not accept; however, that fact in itself does not change their status relative to the certification application.*
>
> *Accordingly, the Board finds that the six individuals listed cannot be accorded the status of employees for the purpose of the certification application and their names should not be taken into account in determining majority support.*

[12] In the present case, the employees in question were working for the Employer outside the province on the date of the certification application and therefore, were not working within the scope of the bargaining unit applied for by the Union. Even though it may be likely that the employees would eventually return to work for the Employer in the proposed bargaining unit, under the *Metal Fabricating Services Ltd.* rule, they are not considered "employees" for the purpose of the certification application because they were not at work on the day the application for certification was filed and there are no exceptional circumstances surrounding their absence from work on that date.

[13] As a result, the Board finds that the employees who worked for the Employer in Ontario on the date the application for certification was filed are not "employees" for the purposes of the statement of employment and will be removed from the statement.

[14] As the Union filed support of a majority of employees in the bargaining unit, a certification order will issue.

RODNEY McNAIRN, Applicant v. UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 179, Respondent

LRB File No. 278-99; November 13, 2001
Vice-Chairperson, James Seibel; Members: Duane Siemens and Brenda Cuthbert

For the Applicant: Warren Martinson
For the Union: Rick Engel

Duty of fair representation – Contract administration – Union fairly and adequately investigated circumstances of applicant's complaints and arrived at informed and rational view that grievances were not supportable or in best interests of union or its membership – Board dismisses application.

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

REASONS FOR DECISION

Background

[1] **James Seibel, Vice-Chairperson:** The Applicant, Rodney McNairn, is a welder and a member of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 179 (the "Union"). He filed an application alleging that the Union had failed to represent him fairly in grievance or rights arbitration proceedings in violation of s. 25.1 of *The Trade Union Act*, R.S.S. 1978, C. T-17 (the "*Act*") by refusing to file grievances on his behalf. Mr. McNairn had requested that the Union file grievances of his allegations that his then employer, Comstock Canada Ltd. ("Comstock"), (a) violated hiring hall rules in July, 1999, (b) wrongfully terminated his employment in August, 1999; and (c) failed to pay him all monies owing at the time of his discharge in violation of the collective agreement with the Union.

Evidence

[2] Mr. McNairn has been a member of the Union since 1992. He testified that the Union maintains an "unemployment board" and has dispatch rules governed by its bylaws and working rules (the Union's "bylaws"). He described the general hiring hall procedure as follows. A member arranges to have his or her name listed as available for work on the board in Regina. When the member's name rises to the top of the unemployment board, he or she becomes eligible to exercise a right of first refusal to be dispatched to the next job opening. Contractors requiring workers call the

hiring hall, and during the day, the Union's business agent contacts people on the out of work board as requests come in. After hours, contractors' requests for workers for jobs starting the next day are placed on a recording that can be accessed remotely. A member has overnight to consider whether he or she wants an available job. If the member refuses the job, he or she remains at the top of the unemployment board.

[3] Mr. McNairn acknowledged that as a welder he knows that if he accepts the call for work, he will usually have to take a welding performance test ("job test") administered by the contractor in order to actually obtain the job. The hiring hall dispatcher provides information about what kind of test(s) will be administered. When a member arrives at the job site, he or she "signs on" and goes through orientation; the contractor's quality assurance officer reviews the job test procedure; and, employment is actually secured when the member passes the test. Mr. McNairn maintained that according to the Union's bylaws, if a member passes the job test, his or her name comes off the unemployment board, but if the member does not pass, his or her name remains in its original position[1].

[4] Mr. McNairn testified that it took him more than six months to get to the top of the unemployment board. He received a call from the Union's dispatcher on Friday, July 23, 1999 for a job with Comstock at the Trans-Canada Pipeline compressor station near Burstall, Saskatchewan. The Union's business agent told him he would be tested on "small bore" and "large bore" welding and repair of each. Mr. McNairn accepted the call and attended at the site the next day, reporting to the foreman and quality assurance manager for the project manager, Campbell Cox. He received his orientation and did the small bore welding test, but failed to pass this test. Mr. McNairn said that he knew that as a result he would not secure employment, so he loaded up his gear, without taking the large bore tests, and went to the foreman's office to advise that he had failed the small bore repair test and was leaving the site. However, the general foreman, Dan McGee, offered him immediate employment on small bore welding anyway. He said he asked Mr. McGee if the large bore test was going to be given and was told that it wasn't. Mr. McNairn said he was confused by Mr. McGee's

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[1] Art. 11(d) of the Union's bylaws (amended Dec. 17, 1994) provides as follows:

> *Members laid off from a job within (1) calendar day of this job commencement shall be allowed to retain their position on the unemployment board, provided member not subject to same recall, or if member is a welder subject to a job test, only after successful completion of job test shall a welder be removed from the employment board.*

offer, declined it, and said he was leaving the site. He said that Mr. McGee told him that in that event, he was being laid off.

[5] On Monday morning, July 26, 1999, Mr. McNairn called the Union's dispatcher, explained he had not passed the welding test, and asked to have his name reinstated to the unemployment board. That afternoon, Mr. McNairn received a call from the Union's business agent, Rick Diederich, who told him that the contractor said he had quit. Mr. McNairn advised Mr. Diederich that, in his opinion, according to the Union's bylaws, he should be reinstated to his original position on the unemployment board. He said Mr. Diederich told him he was waiting to receive the "termination record" required by the collective agreement from Comstock that would specify the reason for layoff. The next day, July 27, Mr. McNairn said that he called a Comstock manager to complain that a mistake had been made and was told by that person that he would take it up with Mr. McGee. Later that day, Mr. McNairn called Mr. Diederich to inform him of the discussion, and said that he was advised by Mr. Diederich that his name would be reinstated to the unemployment board for a few days until the situation was straightened out. Mr. McNairn said that when he called Mr. Diederich on August 4, 1999, he was told that his name was at the bottom of the unemployment board. That same day, Mr. McNairn completed a grievance form alleging a violation of Art. 11(d) of the Union's bylaws (see, f.n. 1, *supra*) and submitted it to the Union.

[6] On Friday, August 6, 1999, Mr. McNairn submitted a grievance form to the Union alleging a violation of the plumbers' and pipe fitters' Saskatchewan provincial collective agreement ("the provincial agreement") by Comstock in not providing him with a "termination sign-off form" in a timely fashion. He testified that he received a phone call later that day from another business agent for the Union, Barry Nicholson, who told him he would be reinstated to the unemployment board to the position he held on July 23, 1999.

[7] Mr. McNairn said Mr. Nicholson called him on Monday morning, August 9, 1999, with notice of a job at the Comstock site, but he declined the call-out. Mr. McNairn said he spoke with the Union's dispatcher that day and learned that there had been a previous call-out to a different job given to two other persons on the unemployment board on August 4 or 5, 1999. Mr. McNairn was concerned because the job had not been on the Union's job information recording. When he spoke to Mr. Nicholson about it later that day, he said that Mr. Nicholson claimed he had had a sleepless weekend over the situation.

[8] Mr. McNairn testified that he received a call-out on Tuesday morning, August 10, 1999 to a Comstock job site at Loreburn, Saskatchewan, for the welding of large bore pipe. He passed the job tests the next day, and started work on August 13, 1999 with an orientation by the Comstock safety officer. On August 14, he was verbally reprimanded by Comstock site superintendent, Larry Balcaen, for allegedly failing to follow the instructions of the quality assurance officer with respect to the cleaning of welds, and was further advised that three reprimands would result in termination. Mr. McNairn was accompanied at the time by shop steward, Joe Nagy.

[9] Mr. McNairn received a second reprimand on August 23, 1999 as part of written discipline of the four persons on his welding team regarding a certain work deficiency. It was delivered to the team by Joe Nagy. On August 26, 1999, Mr. McNairn, accompanied, by Joe Nagy, was reprimanded a third time by Mr. Balcaen, this time for failing to wear the required safety equipment while welding inside a large bore pipe and his employment was terminated. While he admitted that he had not worn the safety equipment, he said that he was not aware of the requirement to do so. Although he had signed an acknowledgment that he had read and understood the Comstock safety policy that specified the requirement, he said that he in fact had not taken the time to read the whole document. His employment was terminated that day.

[10] Mr. McNairn prepared a form of grievance regarding his discharge and submitted it to the Union on August 31, 1999. In it he maintained that all three instances of discipline were unfounded. He received a call from Mr. Diederich the next day who said he would look into it. Mr. Diederich responded to Mr. McNairn by letter dated September 9, 1999, advising that he had spoken with shop steward, Joe Nagy, Mr. McNairn's welding partner, Ron Gross, and a Comstock representative, Ron Kish, and had reviewed the Comstock site safety policy and regulations as well as Mr. McNairn's written acknowledgement that he read and understood same. The letter advised Mr. McNairn that as a result Mr. Diederich was of the opinion that a grievance of the termination had no chance of success.

[11] Mr. McNairn further maintained that, in any event, he was not properly paid by Comstock in accordance with the collective agreement, and he submitted another form of grievance to the Union reiterating same on September 15, 1999. It was Mr. McNairn's contention that the provincial collective agreement provided that he was entitled to receive eight hours' pay for each working day following termination until fully paid by Comstock. However, when asked by Mr. Diederich for

some proof as to when payment was received, he admitted that he had discarded the envelope bearing the postmark.

[12] With respect to the call-out to the Burstall site in July, Mr. McNairn said he accepted it because it was for small bore *and* large bore work. When counsel for the Union suggested to him in cross-examination that he quit when he found out he would only be doing small bore work, Mr. McNairn replied that he had not passed the prerequisite small bore repair test. Mr. McNairn admitted, however, that had he been given small and large bore tests and passed them both, there was no guarantee that he would be given only large bore work, or a combination of small and large bore work, and Comstock could, nonetheless, have assigned him to small bore work exclusively.

[13] Further, in cross-examination, Mr. McNairn acknowledged that he was invited to meet with the Union's executive board to discuss his grievances, but he declined to do so.

[14] Joe Nagy is a pipe fitter and has been a member of the Union for 28 years. At all material times he was the shop steward at the Loreburn site, where he worked half time at pipe fitting and half time as the assistant safety officer. Mr. Nagy described how he discussed each reprimand with Mr. Balcaen and that he was in agreement with him. In particular, he explained the rationale for the safety equipment requirement when welding in confined spaces, and emphasized the seriousness and potential for harm to that worker and others who might be required to try and rescue him that could result from a failure to adhere to the procedure. In his opinion, given the ready availability of the safety manual and the appropriate equipment, there was no excuse for being unaware of the requirement or failure to comply. He said that the procedure has been standard in the industry for about ten years.

[15] Rick Diederich has been a member of the Union for 21 years and its business manager since 1998. He testified that when he offered Mr. McNairn the call-out to the Burstall site, he told him it was for small bore and possibly large bore work. He explained that, according to the Union's hiring hall rules, if a member quits a job, they go to the bottom of the unemployment board. He testified that he received a call on July 24, 1999 from Dan McGee informing him that Mr. McNairn had refused to work, quit and gone home. Mr. Diederich said he had to scramble to find someone else to start work the next day. He said Mr. McNairn phoned him on July 25, 1999 and advised him he had failed the small bore repair test and was laid off. Mr. Diederich took the position that he had refused

to work and would have to go to the bottom of the unemployment board pending Mr. Diederich trying "to work something out".

[16] Mr. Diederich said he discussed the situation with his superiors and then with Mr. McGee. It was agreed that Comstock would retract Mr. McNairn's "quit" status and substitute a layoff. On Friday, August 6, 1999, the Union put Mr. McNairn back into the position he held on the unemployment board on July 23, 1999. He said that a call-out request came in late that day – too late to be placed on the phone-in information tape, which is prepared between 4 p.m. and 5 p.m. each day. Two name-hired members were dispatched as per the provincial agreement. Mr. McNairn was sent on the next call-out, that is, to the Comstock Loreburn site.

[17] With respect to the instances of Mr. McNairn's discipline at the Loreburn site, and Mr. McNairn's grievance submitted August 31, 1999, Mr. Diederich described discussions regarding same that he had with Mr. Nagy, Mr. Kish, Mr. Gross, Mr. Balcaen and legal counsel, and said he reviewed the Comstock safety policy. As a result of his investigation, he formed the opinion that a grievance of Mr. McNairn's termination would not succeed. He explained that he was not aware that the Union had ever grieved a confirmed violation of safety regulations. After his termination, Mr. McNairn was put back on the unemployment board. Shortly afterwards he took out his "travel card" to work in another province and was then not called out by the Union.

[18] In cross-examination, Mr. Diederich admitted that he was aware, at the material time, of the publication of a newsletter entitled "The Stinger" that was critical of the Union, and that he had described its anonymous publishers as "bitchers and malcontents." Although the identity of its publisher or publishers was not known, Mr. Diederich admitted that he was aware that it contained Mr. McNairn's telephone number. He said he asked Mr. McNairn about the newsletter, but accepted his word for it that he was not involved in its publication.

Statutory Provisions

[19] 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.*

Argument

[20] Mr. Martinson, counsel for Mr. McNairn, argued that the Board should examine the incidents that attracted discipline and determine, first, whether Mr. McNairn ought properly to have been disciplined for same, and, secondly, what the Union ought to have done for him.

[21] Mr. Martinson said that the Union ought to have more vigorously questioned whether Comstock could properly simply offer Mr. McNairn other work when he failed the welding test and, whether, when he refused same, claim he had quit; instead, he said, the Union accepted Comstock's word for it. Mr. Martinson asserted that the Union's actions in that regard, as well as the handling of the subsequent call out to the Loreburn job, were arbitrary.

[22] Mr. Martinson referred to Mr. Nagy's dual status as shop steward and safety officer as "shocking," and asserted that he was in a position of irreconcilable conflict of interest. He asserted that neither Mr. Nagy, nor subsequently Mr. Diederich, properly interpreted the safety manual provisions for wearing a harness, and that because termination of employment was the result, Mr. McNairn ought to have been afforded the benefit of any ambiguity in the requirements. Counsel described the Union's investigation of Mr. McNairn's alleged workplace infractions as arbitrary and perfunctory. He said that the Union ought to have filed and prosecuted grievances of at least the last two incidents.

[23] With respect to the timing of the payment of monies owing to Mr. McNairn after his termination, Mr. Martinson said that the Union ought to have filed a grievance as well. Counsel urged the Board to accept that Mr. Diederich did not like Mr. McNairn and that the publication of The Stinger newsletter influenced him in deciding not to go ahead with a grievance such as to constitute discrimination and bad faith.

[24] In support of his arguments, Mr. Martinson cited the following decisions: *Radke v. Canadian Paperworkers Union, Local 1120*, [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92; *Berry v. Saskatchewan Government Employees' Union*, [1993] 4th Quarter Sask. Labour Rep. 65, LRB File No. 134-93; *Chrispen v. International Association of Fire Fighters, Local 510*, [1992] 4th Quarter Sask. Labour Rep. 133, LRB File No. 003-92.

[25] Mr. Engel, counsel for the Union, argued that the appropriate standard by which the Union's conduct ought to be measured is whether its officials took an informed and rational view of the situation in arriving at the decision not to proceed with a grievance. With respect to issues of safety in particular, counsel said that because issues of safety can potentially impact not just the delinquent employee but fellow workers as well, the Union is entitled to take an approach that strictly interprets the safety requirements of the workplace. There is no evidence, he said, that Mr. Diederich's view that the alleged grievances were not meritorious or were not likely to be successful was not derived honestly.

[26] With respect to the situation regarding the unemployment board, Mr. Engel said that the issue of Mr. McNairn's status was resolved fairly quickly, and that in any event it was not a grievable matter under the collective agreement but an issue between he and the Union regarding its work rules. However, because the present application did not allege a violation of s. 36.1 of the *Act* the Board ought not to consider whether there was breach of that section in the circumstances.

[27] Mr. Engel asserted that it is not for the Board to determine whether the alleged workplace infractions merited discipline or what that discipline should be, but rather to examine whether the Union's assessment was honest and rational. He asserted that the evidence disclosed that Mr. Diederich had conducted an adequate investigation by interviewing everyone connected to the incidents in question. Counsel argued that the Union is justified in putting the safety of all employees above the employment interests of a single employee.

[28] With respect to payment to Mr. McNairn after his discharge, Mr. Engel said that the Union was reluctant to take a grievance when Mr. McNairn was unable to objectively show when he received payment, having discarded the envelope.

[29] In support of his arguments, Mr. Engel cited the following decisions: *Fisher v. Amalgamated Transit Union, Local 615*, [1999] Sask. L.R.B.R. 86, LRB File No. 203-98; *Wionzek v. International Brotherhood of Electrical Workers, Local 2067*, [1998] Sask. L.R.B.R. 765, LRB File No. 101-98; *Meaden v. Saskatchewan Union of Nurses*, [1997] Sask. L.R.B.R. 45, LRB File No. 174-96; *Bussiere, et al. v. Grain Services Union*, [1996] Sask. L.R.B.R. 475, LRB File Nos. 222-94 & 223-94.

Analysis and Decision

[30] The Board's approach to applications alleging a violation of the duty of fair representation pursuant to s. 25.1 of the *Act* was summarized in *Berry, supra*, at 71-72, as follows:

> *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 favoritism. 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 favoritism. 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.*

[31] In *Fisher, supra*, in addressing the proposition that the union may in certain circumstances take a position that is contrary to the interests of a member, the Board stated at 95, as follows:

> *Once a union has taken an informed and rational view of a grievance, it is entitled to take a position in support of one point of view which may conflict with the interests of some of its members. The duty of fair representation does not require the union to provide representation for all points of view that its members may wish to assert.*

[32] In the present case, we are of the opinion that the Union fairly and adequately investigated the circumstances of Mr. McNairn's complaints. It arrived at an informed and rational view that his grievance or grievances were not supportable or in the best interests of the Union and its membership. There is no evidence that Mr. Diederich or the Union discriminated against Mr. McNairn or arrived at its decisions arbitrarily or in bad faith. We accept the evidence of Mr. Diederich that the publication of The Stinger newsletter did not cloud his judgment or prejudice his assessment. Mr. McNairn was offered the opportunity to meet with the Union's executive board, but declined to do so.

[33] Mr. McNairn's complaint about his treatment on the unemployment board is a concern about the application of the Union's work rules and bylaws, but does not relate to his application under s. 25.1 of the *Act*, and does not demonstrate bad faith, discrimination or arbitrariness with respect to the Union's obligation to fairly represent him.

[34] The application is dismissed.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1985, Applicant v. PCL CONSTRUCTION HOLDINGS LTD., PCL EMPLOYEES HOLDINGS LTD., PCL CONSTRUCTION GROUP INC., PCL CONSTRUCTION MANAGEMENT INC., PCL WESTERN INC., PCL INDUSTRIAL CONSTRUCTION LTD., PCL FABRICATORS INC., PCL CIVIL CONSTRUCTORS INC., PCL CIVIL CONSTRUCTORS (CANADA) INC., PCL INDUSTRIAL CONSTRUCTORS INC., PCL ENGINEERING CONSTRUCTION LTD., PCL CONSTRUCTORS WESTERN INC., PCL CONSTRUCTORS PRAIRIE INC., PCL CONSTRUCTORS (CANADA) INC., PCL CONSTRUCTION RESOURCES INC., PCL-MAXAM, A JOINT VENTURE, MAXAM CONTRACTING LTD., GREENRIDGE HOLDINGS LTD., WORKFORCE CONSTRUCTION LTD. (o/a WORKFORCE CONSTRUCTION and/or QUADRA CONSTRUCTION), PAYCOM CONSULTING SERVICES LTD., MAXAM DEVELOPMENTS LTD., QUADRA CONSTRUCTION and CORAM CONSTRUCTION LTD., Respondents

LRB File No. 192-01; December 6, 2001
Vice-Chairperson and Executive Officer, James Seibel

For the Applicant:	Drew Plaxton
For PCL Industrial Constructors Inc.:	Larry Seiferling, Q.C.
For PCL Construction Management Inc. and PCL-Maxam, A Joint Venture:	Hugh McPhail,Q.C.
For PCL Construction Holdings Ltd., PCL Employees Holdings Ltd., PCL Construction Group Inc., PCL Western Inc., PCL Industrial Construction Ltd., PCL Fabricators Inc., PCL Civil Constructors Inc., PCL Civil Constructors (Canada) Inc., PCL Engineering Construction Ltd., PCL Constructors Western Inc., PCL Constructors Prairie Inc., PCL Constructors (Canada) Inc., PCL Construction Resources Inc.:	Albert Lavergne
For Maxam Contracting Ltd., Greenridge Holdings Ltd., Workforce Construction Ltd. (o/a Workforce Construction and/or Quadra Construction), Paycom Consulting Services Ltd. and Maxam Developments Ltd.:	Jean Torrens
For Quadra Construction and Coram Construction Ltd.:	No one appearing

Practice and procedure – Particulars – Executive Officer considers applications for particulars made by respondents to related employer application pursuant to s. 18 of *The Construction Industry Labour Relations Act, 1992* – Executive Officer orders certain particulars to be provided and sets out proper procedure to be followed by respondents relating to filing of replies/requests for particulars.

***The Trade Union Act*, s. 4(12).**
***The Construction Industry Labour Relations Act, 1992*, s. 18.1.**

REASONS FOR DECISION: PRACTICE AND PROCEDURE

Background

[1] James Seibel, Vice-Chairperson and Executive Officer: United Brotherhood of Carpenters and Joiners of America, Local 1985 (the "Union") filed an application seeking relief pursuant to *The Trade Union Act*, R.S.S. 1978, c. T-17, and *The Construction Industry Labour Relations Act*, 1992, S.S.1992, c. C-29.11, alleging, *inter alia*, that the respondents are successors, and/or are related or common employers, being parent, subsidiary or "spin-off" corporations, of one or more of the respondents or predecessor corporations in respect of which the Union holds certain Certification Orders. The Union further alleges that various of the respondents have committed unfair labour practices, or have aided and abetted such practices, in failing to recognize union security obligations pursuant to *The Trade Union Act*.

[2] Counsel for the respondents (with the exception of Quadra Construction and Coram Construction Ltd., which to date are not represented) have submitted that each is unable to file an adequate reply to the application for want of particulars and have previously forwarded letters requesting same to counsel for the Union. Counsel for the Union rejected the requests, countering that the specificity of the application was adequate to enable reply and requesting that the respondents file replies as they are past the time allowed therefor pursuant to the Regulations under *The Trade Union Act* by nearly 60 days.

[3] Pursuant to s. 4(12) of *The Trade Union Act* a conference telephone call was held by the Executive Officer of the Board with counsel for the Union and counsel for all respondents (except the unrepresented respondents) on November 26, 2001, with respect to the issue.

[4] The Union's application and the respondents' requests for particulars are voluminous and it is not necessary to recite them here verbatim. The Union is the designated bargaining agent for the carpenters' trade division in the construction industry in Saskatchewan. It holds several Certification Orders in respect of Poole Construction Company Limited or Poole Construction Limited (the "Poole Construction companies") obtained at various times between 1946 and 1980. After undergoing a change of ownership, Poole Construction changed its name to PCL Construction Limited in December, 1978. The Union alleges that, since 1984, PCL Construction Limited has been wound down and PCL

Construction Group Inc. and other respondents have carried on its construction business. The Union also holds province-wide Certification Orders in respect of the Respondents, PCL Industrial Construction Ltd. and PCL Industrial Constructors Inc. (the "certified companies"), obtained in 1983 and 1995, respectively.

[5] The crux of the Union's allegations, which run to some eight pages, is that each of the respondents identified as the "PCL Group of Companies" is a successor to, or a related or associated business or undertaking of, the Poole Construction companies or the certified companies operating under common direction and control and is a unionized employer pursuant to the legislation. Similar allegations are made as concerns several of the respondents identified as the "Maxam Group of Companies," alleged to be related as among themselves and to the PCL Group of Companies. The Union's application purports to describe the varied corporate organizational relationships between the respondents including identification of certain "key personnel." The allegations are not particularly detailed, but are sufficient to demonstrate that the relationships are labyrinthine.

[6] Only one reply to the application has been filed, that being on behalf of the respondents represented by Ms. Torrens. The other respondents are well out of time for filing replies as required by s. 18(1) of the Regulations to *The Trade Union Act* (Sask. Reg. 163/72, as amended). The requests for particulars made by some counsel for the respondents are extensive. For example, on behalf of those respondents represented by Mr. Lavergne, the request runs to some 70 paragraphs over 14 single-spaced pages.

Argument

[7] Counsel on behalf of each of the respondents uniformly objected that the application lacks the material facts, and specification of applicable statutory provisions, necessary to enable their clients to know the case they must meet, to marshal evidence to assess and mount a defence, and to file an appropriate reply. One counsel ventured so far as to describe the application in its present form as an abuse of the Board's process. In the case of PCL Industrial Constructors Inc., counsel for the company, Mr. Seiferling, said that the company, which is certified by the Union, has complied with its union security obligations, but the application makes no distinction between it and the other respondents as far as allegations of unfair labour practices; counsel asserted that the Union ought to be required to specify which, if any, statutory provisions the company is alleged to have violated. All counsel cited the

decision of the Board in *Graham Construction, infra*, in support of their applications for the furnishing of particulars.

[8] Mr. Plaxton, counsel for the Union, countered that the respondents have sufficient particulars to enable them to reply to the application and that most of the additional information they have requested is within their own knowledge. Counsel asserted that the bona fides of the respondents' applications to the Board for an order requiring the Union to furnish further and better particulars is belied by the fact that they waited for more than one month to make the application after they received the response from the Union that it would not accede to their respective requests, and that they are attempting to hinder, delay and obstruct the Union's application.

Analysis and Decision

[9] The Union's application in the present case bears certain similarity to the application by the Union in *United Brotherhood of Carpenters and Joiners of America, Local 1985 v. Graham Construction and Engineering Ltd., et al.*, LRB File No. 014-98. In the latter case, the Board had occasion to consider requests for particulars by the respondents to that application. The Board's Reasons for Decision are reported at [1999] Sask. L.R.B.R. 220, LRB File No. 014-98. It was noted in *Graham Construction, supra*, that neither the successorship nor related employer provisions of *The Trade Union Act* or *The Construction Industry Labour Relations Act, 1992*, have been the subject of much direction by the Board with respect to the issue of particulars, and while the general propositions enunciated by the Board with respect to the issue in other types of cases were instructive, they must be applied in the context of the type of application under consideration.

[10] *Graham Construction, supra*, was decided prior to the legislative amendments in 2000 to *The Construction Industry Labour Relations Act, 1992* (see, S.S. 2000, c. 69). The amendments included, by the addition of s. 18.1, an expansion of the Board's powers in relation to the type of application in the present case. These powers include any examination of records and inquiries as the Board considers necessary; the Board may authorize its investigating officer to carry out these tasks. In my opinion, the amendments reflect a recognition by the legislature that much of the information crucial to establishing the factual basis necessary for this type of application may often be in the sole possession of the responding parties and unknown, complex or confusing to outsiders. The labyrinthine nature of the relationships that may exist in such cases, and which may exist in the present case in particular, is

reflected by the extensive description of the corporate history and structure of certain PCL companies (including some of the respondents in the present case) in the decision of the Ontario Labour Relations Board in *International Association of Bridge, Structural and Ornamental Iron Workers, Local 765, et al. v. PCL Constructors Eastern Inc., et al.*, [1995] OLRB Rep. October 1277. Indeed, that case is strikingly similar in its issues to the present case.

[11] The Board's processes do not include examination for discovery or written interrogatories. Many of the queries made by certain counsel for the respondents in their requests for particulars are reminiscent of such procedures. Much of the information requested as particulars would constitute evidence, which the Union is not obliged to disclose. It is noted that the respondents have not asserted that the information they have requested as particulars is not within their knowledge. It is apparent that much of it, even if within the knowledge of the Union, is most certainly within the knowledge of the respondents.

[12] The sincerity of the respondents in making their requests for particulars is somewhat suspect given the delay in making application. The application is mostly sufficient in its specificity, in the context of the particular nature of the application, to allow a reply thereto by the respondents. Exceptions include the failure by the Union to specify: (1) the statutory provisions alleged to have been violated by PCL Industrial Constructors Inc., and in what manner, given that it is subject of an existing Certification Order; (2) in certain references to statutory provisions, whether it is *The Trade Union Act* or *The Construction Industry Labour Relations Act, 1992*, that is referred to; (3) in references to collective bargaining agreements, identification (e.g., as by parties and date) of the agreement(s) referred to. These particulars shall be provided by the Union to the respondents within seven (7) days of the date of these Reasons for Decision.

[13] In the present case the Board has appointed its investigating officer to make certain inquiries. The respondents will have the opportunity to respond to any report(s) or disclosure made by the investigating officer to the Board. In the meantime, the respondents are directed to file their replies to the application within seven (7) days of the receipt of the particulars ordered to be furnished by the Union, if they have not already done so.

[14] In keeping with the intended expedited nature of proceedings before the Board, in future cases, parties are advised that replies to applications should be filed within the time allowed by s. 18(1) of the Regulations to *The Trade Union Act*, notwithstanding a perceived deficiency in the particulars of the application unless an application for an extension of time is made to the Board Registrar before the expiry of the time for filing; requests for particulars may be made before or after the reply is filed and leave requested to file an amended reply when the particulars are received or the issue is otherwise determined.

PUBLIC SERVICE ALLIANCE OF CANADA, Applicant v. ARAMARK CANADA LTD., Respondent

LRB File No. 202-01; December 7, 2001
Chairperson, Gwen Gray; Members: Don Bell and Pat Gallagher

For the Applicant: Blaine Pilatzke
For the Respondent: Susan Barber

Certification – Statement of employment – Test to apply to casual employees whether they have sufficiently tangible employment relationship with employer – Casual employees in this case worked average of slightly over six hours per month – Board finds no sufficiently tangible employment relationship and removes casual employees from statement of employment.

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

REASONS FOR DECISION

Background

[1] Gwen Gray, Chairperson: Public Service Alliance of Canada (the "Union") applied for certification of all employees of Aramark Canada Ltd. (the "Employer") with certain exceptions. The Employer's statement of employment listed 47 employees in the bargaining unit. The only issue is whether six general help casual employees should be included on the statement of employment.

Facts

[2] The Employer provides food, beverage and housekeeping services to the Department of National Defence at 15 Wing Moose Jaw. It employs food service and housekeeping staff. The food services department employs thirteen full-time, four part-time and six casual employees.

[3] Casual employees are called in as needed to cater to various events on the base and to assist the part-time staff. They are also used to replace other employees who are sick or on leave. The pay-roll records of the employees in question indicate that the casual staff worked between 9.5 hours and 25.5 hours in the three month period preceding the application for certification. All of the casual employees are high school students.

Argument

[4] The Union argued that the casual employees lacked a community of interest with the remaining employees because they worked very few hours in the three month period leading up to the application for certification.

[5] The Employer argued that the casual employees are included in the bargaining unit and ought to be included in the support count on the application. If the test applied is whether the employees have a sufficiently tangible employment relationship, then the Board should consider the amount of work performed by these employees, in light of other Board decisions on the same issue.

Analysis

[6] The Union has applied for an "all employee" bargaining unit, which includes casual employees. For the purposes of determining the Union's support amongst employees in the proposed bargaining unit, the Employer is required to provide the Board a list of its employees in a document called a statement of employment. In order to determine if the Union has support from a majority of employees in a bargaining unit, the Board must determine the names of individuals who are employed on the date the application for certification is filed. The Board takes a view of the workforce that attempts to identify the employees who had a significant connection to the workplace at the time the Union applied to be certified.

[7] Often the Board is required to determine if casual employees should be included on the statement of employment because their pattern of work is not as great and not as predictable as the work of other employees. The Board set out the test for determining when casual employees will be included on a statement of employment in *Service Employees' International Union, Local 299 v. Vision Security and Investigation Inc.*, [2000] Sask. L.R.B.R. 147, LRB File No. 228-99. The Board summarized its approach to this issue at 153 and 154, as follows:

> *Overall, the Board attempts to set the criteria for determining "employee" status to ensure that persons who have a "sufficiently tangible employment relationship" with the Employer are included on the statement of employment: see United Cab Ltd., supra.*
>
> *In the Lakeland Regional Library Board case, supra, Chairman Ball stated the Board's policies in the following terms at 74:*

> *It has long been established that larger bargaining units are preferred over smaller ones, and that in an industrial setting all employee units are usually considered ideal. As a general rule the Board has not excluded casual, temporary or part-time employees from the bargaining unit.*
>
> *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.*

[8] In applying the "sufficiently tangible employment relationship" test, the Board looks to the hours worked by casual or part-time employees in the period leading up to the certification application and makes an assessment as to the significance of that work compared in a general sense to other employees in the particular workplace. For instance, in the *Vision Security and Investigation Inc.* case, *supra*, the Board determined that a measurement of 35 hours in the 14 week period prior to the date of application for certification was appropriate given the casual nature of the events work in the security industry.

[9] In this case, the workforce does not contain a high number of casual employees. The majority of employees work on a regular basis with the Employer. In comparison, the six casual employees in question work very few hours over the course of a month - some received no hours in some months, while others had up to 19 hours in one month. On average, the hours/month is slightly over 6 hours, or less than one 8 hour shift per month.

[10] We find that the casual hours of the employees in question do not establish a sufficiently tangible employment relationship between the employees in question and the Employer to justify their inclusion on the statement of employment and their names will be removed from the statement of employment.

[11] A vote will be conducted to determine whether a majority of the employees in the bargaining unit wish to be represented by the Union.

CAROL McKNIGHT, Applicant v. CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 3833, Respondent

LRB File No. 204-00; December 11, 2001
Vice-Chairperson, James Seibel; Members: Don Bell and Duane Siemens

For the Applicant: Tom McKnight
For the Respondent: Harold Johnson

Duty of fair representation – Contract administration – Union carefully investigated circumstances of grievance and thoughtfully considered relevant factors in deciding to withdraw same – Union also sought opinion from experienced staff representative on timeliness issue – Union's officers believed they were acting in best interests of all members – Union did not breach duty of fair representation.

Duty of fair representation – Practice and procedure – Grievance withdrawn pursuant to decision of grievance committee – Union then permitted applicant to request review of decision by executive committee and general membership, although no constitutional requirement to do so – Union did not abdicate duty to make decision to membership.

Union – Constitution – Board's approach to scrutiny of internal union processes restrained, particularly where neither membership nor discipline involved – Board will not act as body of routine review of union's internal decisions and any review will be in direct relation to seriousness of matter in issue – Union's meeting procedure did not violate s. 36.1 of *The Trade Union Act*.

***The Trade Union Act*, ss. 25.1 and 36.1.**

REASONS FOR DECISION

Background

[1] James Seibel, Vice-Chairperson: Canadian Union of Public Employees, Local 3833 (the "Union") is designated as the bargaining agent for a unit of all employees of the Prince Albert District Health Board (the "Employer.") Carol McKnight (the "Applicant"), is a member of the bargaining unit and has been employed as a certified home health aide for approximately nine years. The Applicant filed an application alleging that the Union had violated ss. 25.1 and 36.1(1) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") in failing to fairly represent her in grievance proceedings against the Employer and in failing to apply the principles of natural justice to her internal appeal of the Union's decision to withdraw the grievance.

Evidence

[2] The Applicant testified that, in November, 1999, she became aware that overtime work had been offered and assigned to less senior employees than herself since March of that year. She believed the practice to be a violation of the collective agreement between the Union and the Saskatchewan Association of Health Organizations. The Applicant believed that because home health aides work out in the community, they must trust that overtime is being offered and assigned in accordance with the collective agreement. It was only by word of mouth that she discovered the alleged violation. The Applicant raised her concern with central team manager, Wendy Crouch, but said that Ms. Crouch never got back to her. She then approached Jeanette Andersen, a Union second vice-president, about filing a grievance. The Union filed a grievance dated December 2, 1999. Following meetings with the Union, the Employer denied the grievance in April, 2000 on the grounds that it was not filed within the time limits specified in the collective agreement. The Union withdrew the grievance on May 3, 2000.

[3] The Applicant believed she was not invited to any of the grievance meetings between the Union and the Employer. She said she learned after the fact from Ms. Andersen that the Union grievance committee decided to withdraw the grievance. The committee was composed of first vice-president, Theresa Meredith, as chair, recording secretary, Marg Morgan and Ms. Andersen. The Applicant spoke to a Union staff representative, Brian Brotzel, about the situation. Mr. Brotzel indicated to her that he agreed with the decision of the grievance committee that the grievance was out of time and that an arbitrator would likely agree that the Employer would suffer substantial prejudice by the delay. However, Mr. Brotzel advised her that, while there was no formal process to appeal the decision, he would nonetheless assist her to appeal to the Union executive. The Applicant testified that she did not accept Mr. Brotzel's offer, however, because she was not comfortable with him representing her, given that he agreed with the initial decision of the grievance committee.

[4] The Applicant drafted and submitted her own appeal document dated May 28, 2000, directed to the Union executive and general membership. In the document, the Applicant argued, *inter alia*, that she could not have learned of the alleged violation of overtime assignment any earlier than she did and that the grievance was filed within the collective agreement time limits when it did come to her attention.

[5] The issue of the withdrawal of the grievance was considered and upheld by the Union's executive committee on June 6, 2000. It was further put to a vote on a motion at a meeting of the local Union membership on June 20, 2000, as to whether to uphold the decision of the grievance committee. The Applicant testified about the procedure followed at the meeting. She claimed that when only a few persons voted in favour of the motion, the chair, local president Stella Hickie, asked aloud whether everyone understood the motion and opened it for further discussion. According to the Applicant, this happened twice. The motion was ultimately carried.

[6] The Applicant intimated that the Union executive bore some animosity towards her because she was outspoken at Union meetings with respect to financial matters, and had requested to view the local Union's financial statements and an independent audit of the books. She had also run unsuccessfully for election against the present local Union president, Ms. Hickie, in April, 1999.

[7] Michelle Hoey and Carla Matheson, home care aide co-workers of the Applicant, were called to testify on her behalf. The evidence of each of them dealt with two main points. They each provided testimony that intimated that the Applicant was somewhat of a thorn in the side of the Union executive through her questioning of Union finances at membership meetings. They each proferred the opinion that it was difficult for home care aides to know when and to whom overtime opportunities were offered.

[8] Jeanette Andersen, who at the time of hearing was on long term disability leave, testified by conference telephone call. She testified that, at the material time, a home care aide could only find out about overtime assignments from a co-worker or a manager. The Employer has since changed its practice and now posts notice of overtime offers and assignments.

[9] Ms. Andersen said that, when the Applicant raised her concern about overtime assignment with her, she in turn discussed it with Ms. Hickie. She said Ms. Hickie asked her to investigate and, if warranted, to file a grievance. This she did and the grievance was filed on December 2, 1999.

[10] Ms. Andersen described the membership meeting of June 20, 2000 as a "schmozzle" but stated her opinion that Ms. Hickie did not make any unfair comment to the assembled meeting. Ms. Hickie read the Applicant's letter to the meeting as well as an opinion letter on the merits of the grievance from Mr. Brotzel. She confirmed that the motion was opened for further discussion after the first show of

hands. Ms. Andersen said that it was her impression that the motion to uphold the decision of the grievance committee and executive committee to withdraw the grievance was not carried although Ms. Hickie declared that it was.

[11] Theresa Meredith is the first vice-president of the Union. She testified that she first learned of the Applicant's grievance in late November, 1999, when it was brought to her attention by Ms. Andersen. She filed the grievance with the Employer. She said the grievance was discussed by herself and Mr. Brotzel at a meeting on March 9, 2000, where they also discussed approximately one hundred other grievances. The Union received notice from the Employer on April 29, 2000 that the grievance was denied. Ms. Hickie advised Ms. Meredith to discuss it once again with Mr. Brotzel, who recommended that it be withdrawn. The Union grievance committee decided to withdraw the grievance on May 3, 2000.

[12] Ms. Meredith testified that there is no internal Union procedure to appeal a decision of the grievance committee. In recalling the June 20, 2000 meeting of the membership, Ms. Meredith gave the opinion that there seemed to be some confusion about what the motion meant. Her recollection was that there was only one vote: the first two calls were suspended when persons on the floor indicated they did not understand the motion. When at one point there was a question about the potential cost of an arbitration, she said that Ms. Hickie indicated that it could be ten thousand dollars.

[13] Stella Hickie has been the local Union president for some 12 years. Her testimony about what happened up to the point of the decision by the grievance committee was similar to that of Ms. Meredith. Ms. Hickie was not on the grievance committee. She described the meeting of the executive committee that reviewed the decision of the grievance committee. The Applicant's submission was read to the committee; Mr. Brotzel answered questions regarding his opinion on the chances of success; the committee voted unanimously to uphold the decision to withdraw.

[14] At the June 20, 2000 meeting of the membership, Ms. Hickie said that certain Union business was pre-empted at the request of the Applicant so that her matter could be dealt with early. The Applicant agreed that Ms. Hickie could read her submission to the meeting. Ms. Hickie then read Mr. Brotzel's written opinion to the meeting. Following some thirty minutes' discussion, a member called for the question, but it was delayed by more discussion. Ms. Hickie felt that some members did not understand the question process. She said that the first two votes concerned whether to end debate on

the motion. Eventually the motion that the grievance remain withdrawn was put to a vote. Ms. Hickie testified that the motion was carried by a clear majority.

[15] Brian Brotzel is a Union staff representative assigned to assist certain locals, including Local 3833, with issues in collective bargaining, grievances and labour-management meetings. He said he was specifically consulted by Ms. Meredith about Ms. McKnight's grievance after the Employer denied it in April, 2000. He provided a verbal opinion prior to the meeting of the grievance committee, and later a written opinion, prior to the meeting of the membership on June 20, 2000 regarding the likelihood of success at arbitration. Mr. Brotzel felt that success was unlikely because the grievance was out of time and he did not think that the facts supported the considerations that an arbitrator would look at in determining to grant an extension of time pursuant to s. 25(2)(f) of the *Act*. He discussed his opinion and reasoning with the Applicant after the grievance committee made its decision and advised her that she could appeal the decision to the executive committee and the membership although there was no formal right or procedure for doing so. He offered his assistance, which she did not accept.

Statutory Provisions

[16] Sections 25.1 and 36.1(1) of the *Act* provide as follows:

> *25.1 Every employee has the right to be fairly represented in grievance or rights arbitration proceedings under a collective bargaining agreement by the trade union certified to represent his bargaining unit in a manner that is not arbitrary, discriminatory or in bad faith.*
>
> . . .
>
> *36.1(1) Every employee has a right to the application of the principles of natural justice in respect of all disputes between the employee and the trade union certified to represent his bargaining unit relating to matters in the constitution of the trade union and the employee's membership therein or discipline thereunder.*

Argument

[17] Tom McKnight, representing the Applicant, argued that the Union had failed to fairly represent the Applicant within the meaning of the *Act* and asserted that the Board should order that the grievance be re-filed and submitted for arbitration, and that the Union provide for someone outside its organization to represent the Applicant at the arbitration hearing.

[18] He pointed out that neither the grievance committee nor the executive committee met with the Applicant. Citing the decision of the Board in *Johnson v. Amalgamated Transit Union, Local 588*, [1997] Sask. L.R.B.R. 19, LRB File No. 091-96, Mr. McKnight attacked the propriety of the Union's action in submitting the motion to the membership meeting regarding the grievance. He charged further that the refusal of the Union to carry the grievance forward was politically motivated.

[19] Mr. Johnson, counsel for the Union, referring to the well-known decision of the Supreme Court of Canada in *Canadian Merchant Services Guild v. Gagnon*, [1984] 84 C.L.L.C. 14,043 (S.C.C.), asserted that, as the exclusive representative of all employees in the bargaining unit, the right to take a grievance to arbitration is reserved to the union which enjoys a considerable discretion. He argued that in the present case the Union took a number of steps to ensure that the merit and circumstances of the grievance were fully considered, before deciding not to proceed to arbitration including, the initial factual investigation by Ms. Andersen, the obtaining of an opinion from Mr. Brotzel regarding the legal issues, and a review by the grievance committee. After the grievance was withdrawn, that decision was reviewed and confirmed by both the executive committee and the general membership. Mr. Johnson argued that the Union was entitled to consider the relative seriousness of the issue in dispute – it was a monetary matter rather than, for example, a loss of employment – and the cost of arbitration. In the circumstances, he said, the Union did not act arbitrarily, in a discriminatory fashion or in bad faith.

Analysis and Decision

[20] The basic principles involved in considering cases of alleged failure to fairly represent an employee were succinctly summarized in *Canadian Merchant Services Guild v. Gagnon*, *supra*, at 12,188, as follows:

> *The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.*
>
> *1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.*
>
> *2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.*
>
> *3. This discretion must be exercised in good faith, objectively and honestly after a thorough study of the grievance and the case, taking into account the*

significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.

4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.

5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.

[21] In *Kowal v. Communications, Energy and Paperworkers Union of Canada*, [1995] 2nd Quarter Sask. Labour Rep. 115, LRB File No. 001-95, the Board described the general nature of the duty as follows, at 126:

In determining whether a trade union has met the obligation to provide an employee with fair representation, the task of this Board is not to act as a substitute for a board of arbitration. The issue before us is not whether a particular grievance would have succeeded at arbitration on its merits, and the basis of our conclusions is not the evidence which would be used in adjudicating the grievance. Our role is rather to examine whether the trade union handled the grievance in a manner which was not arbitrary, discriminatory or in bad faith. This determination must be made in light of a number of considerations, including the information which was available to the trade union at the time, legitimate concerns about allocation of union resources, the significance of a particular issue in the context of other issues and interests competing for the attention of the union, and the relationship between the employee and the trade union. In this context, the strength or weakness of the merits of the grievance may suggest that the case has or has not been treated fairly, but the particulars of the grievance are not the only factors which are considered by the Board.

[22] In *Chrispen v. International Association of Firefighters*, [1992] 4th Quarter Sask. Labour Rep. 133, LRB File No. 003-92, at 150, the Board commented on the competing interests between the Union and the aggrieved employee and the limits, and rationale for the limits, of the Board's intervention in such cases, as follows:

In order to make this system work, the legislature recognized that union representatives must be permitted considerable latitude. If their decisions are reversed too often, they will be hesitant to settle any grievance short of arbitration. Moreover, the employer will be hesitant to rely upon any settlement achieved with the union if labour boards are going to interfere whenever they take a view different from that of a union. The damage this would do to union credibility and the resulting uncertainty would adversely affect the entire relationship. However, at the same time, by voluntarily applying for exclusive representative status, the union must be prepared to accept a significant degree of responsibility for employees, especially if an employee's employment depends upon the grievance.

> *In an effort to accommodate these competing interests, the American courts, then the various labour relations boards (in Saskatchewan see Doris Simpson, 1980 (July), Sask. Labour Report, Vol. 31, No. 7, p. 43), and finally the Legislatures, determined that the appropriate standard of care for union representatives was a negative one; a union must not represent its members in a manner that is arbitrary, discriminatory or in bad faith. The Board's inquiry is limited to a search for arbitrariness, discrimination and bad faith. If the union's decision is free from these three elements, there is no violation of the duty of fair representation and no redress available to the employee, even though the Board might be of the view that the union made an error in the handling or disposition of the grievance.*
>
> (Emphasis added)

[23] In *Ward v. Saskatchewan Government Employees' Union*, [1988] Winter Sask. Labour Rep. 44, LRB File No. 031-88, the Board succinctly differentiated between the three kinds of conduct proscribed by s. 25.1 of the *Act*, 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.*

[24] In *Johnson, supra*, it was not alleged that the union had acted with subjective ill will or malice, or had treated Mr. Johnson in a discriminatory way, but rather that it had acted arbitrarily in determining not to proceed to arbitration with his grievance. With respect to the general standard for determining whether conduct is arbitrary, the Board in *Johnson* quoted with approval, at 37, the following observation by the British Columbia Labour Relations Board in *Rayonier Canada (B.C.) Ltd. and International Woodworkers of America and Ross Anderson*, [1975] 2 Canadian L.R.B.R. 196, at 201:

> *Finally, a union cannot act arbitrarily, disregarding the interests of one of the employees in a perfunctory manner. Instead, it must take a reasonable view of the problem before it and arrive at a thoughtful judgment about what to do after considering the various relevant and conflicting considerations.*

[25] In *Johnson, supra*, rather than the union's grievance committee or executive committee making the decision whether to proceed to arbitration as provided for in the union's constitution, the question was put to a secret-ballot referendum of the membership. Despite the fact that the executive committee

made it known that it supported going to arbitration, the membership voted against it and the executive committee obeyed their wishes. In finding that the union's conduct was arbitrary, the Board alluded to the fact that at the heart of the satisfaction of the duty of fair representation is the notion that the union's decisions should reflect a consideration of all relevant factors and not be based on irrelevant factors. The Board held that in the context of the circumstances in *Johnson* – that is, of decision by membership referendum – it was impossible to know what factors were relied upon in making the decision. The Board explained its decision as follows, at 43 - 44:

> *The roots of the duty of fair representation lie in a recognition that, in addition to an expression of the will of the majority, democratic principles must provide for the protection of individuals and minorities from the excesses of majoritarianism. An individual, in the scheme of collective bargaining, cannot assert that his or her interest should prevail over others, or that it represents an entitlement of an absolute kind. The duty of fair representation requires, however, that he or she can require that any decision which is made concerning those interests does not reflect malice, ill will, or denigration on discriminatory grounds. More importantly for our purposes here, those decisions should, to use language which has become common in the discourse concerning the duty of fair representation, reflect a consideration of all of the factors which are relevant to the decision and of no factors which are not relevant.*
>
> *A decision-making process of the kind followed here falls afoul of the duty of fair representation, in our view, because it is impossible to know whether the decision was based on the appropriate considerations and only those considerations. . . .*
>
> *The problem with the use of a referendum ballot as a means of making this kind of decision is that there is no way of knowing whether either of these explanations played a role in the decision, or what range of other factors the voters may have taken into account. The decision is neither amenable to explanation nor accountable to Mr. Johnson or to the Union executive which had reached a contrary conclusion through a process of investigation and careful thought. Mr. McCormick made considerable efforts, as apparently did other officers, to persuade the employees to support the executive recommendation; it cannot be said, however, whether their activity had any influence at all, or whether the employees considered another set of considerations entirely.*
>
> . . .
>
> *Mr. McCormick and the other members of the executive took what steps they could to ensure that the members of the bargaining unit were properly briefed prior to the vote, and that they understood that the executive was in favour of proceeding to arbitration. The mechanism of the vote among the entire group of employees, many of whom had not participated in the discussion at the membership meeting, and some of whom may not have been in possession of any information beyond what was on the notice, was, in our opinion, inherently arbitrary as a means of making a decision about the fate of an individual employee, however useful it might be as a means of obtaining direction about issues of more general significance.*

[26] In *Johnson, supra*, while the Board found that the union had made a sufficient investigation and thoughtful consideration of the relevant factors, it found that the union executive, in essence, abdicated its duty to make the necessary decision and referred it to a procedure that made it impossible to explain and justify the result on a reasoned basis.

[27] In the present case, we are of the opinion that the Union carefully investigated the circumstances of the grievance itself and its grievance committee thoughtfully considered only relevant factors in arriving at its decision to withdraw the grievance. Despite the ostensible merit of the substance of the grievance itself, the Union's grievance committee did not act inappropriately (indeed, quite the opposite) in seeking a more experienced and informed opinion regarding the potential procedural difficulty presented by the issue of timeliness. In doubting the wisdom of proceeding to arbitration in the face of Mr. Brotzel's opinion and the cost to the local, and proceeding instead to convince the Employer to change its procedure for assigning overtime, the Union's officers believed they were acting in the best interests of all of the Union's members.

[28] Whether or not we agree with the view taken by the Union of the merits of the timeliness issue is of little importance in determining whether it violated the duty of fair representation in making its decision. We find no hint of bad faith or discrimination in its conduct in dealing with Ms. McKnight's grievance. The assertion that the Union's officers, and in particular the president, Ms. Hickie, were unfairly biased against the Applicant is pure speculation and conjecture and was not supported by the evidence adduced. While there may be some tension between them that is exhibited as friction from time to time, there was no evidence that the decision to withdraw the grievance was motivated by bad faith or discrimination. Ms. Hickie was not a member of the grievance committee that made the decision. The evidence of the careful consideration of the information at hand by the grievance committee belies the suggestion of arbitrariness in making its decision.

[29] In our opinion, the present case is not analogous to *Johnson, supra*. The Union did not abdicate to the membership its duty to make the decision about whether to proceed to arbitration. The grievance was withdrawn pursuant to the decision of the Union's grievance committee in accordance with the Union's constitution and bylaws. There was no Union constitutional requirement or mandate for the subsequent "appeals" to the executive committee and the general members' meeting. These reviews were non-binding. What the result would have been had either of those bodies arrived at a different conclusion is not clear. The Union provided an opportunity for review when there was no constitutional

duty to do so. The Union acted within the bounds of the duty of fair representation and did not breach s. 25.1 of the *Act*.

[30] The Applicant takes issue with the manner in which the meeting was conducted and the result of the show-of-hands vote. Despite some cautious movement towards closer scrutiny of internal union processes, nonetheless, the Board's approach has been restrained. In *Alcorn and Detwiller v. Grain Services Union, Local 1000*, [1995] 2nd Quarter Sask. Labour Rep. 141, LRB File No. 247-94, a case decided shortly after the 1994 amendments to s. 36.1 of the *Act*, the Board observed, at 154, as follows:

> *Our stance continues to be one of considerable deference to the internal decision-making of trade unions. We have concluded, nonetheless, that the specific limitations placed by the statute on their authority to make certain kinds of decisions must be taken seriously.*

[31] A short time later in *Stewart v. Saskatchewan Brewers' Bottle & Keg Workers, Local Union No. 340*, [1995] 2nd Quarter Sask. Labour Rep. 204, LRB File No. 029-95, the Board expanded on this view, at 212-213:

> *The principle of trade union autonomy is an important one. As the Board stated in the Grain Services Union case, we continue to maintain a position of considerable deference to the procedures and practices followed by trade unions in their dealings with their members. As the Board pointed out in the Moose Jaw Sash and Door decision, such deference is particularly appropriate when it is an employer who seeks to press an inquiry into internal trade union affairs.*
>
> *It is our view, however, that provisions now included in The Trade Union Act, such as Section 36.1, signify an acknowledgement on the part of the legislature that there is an important public interest at stake in the proceedings of trade unions. Under the scheme set out in the Act, trade unions have exclusive authority to represent employees with respect to issues of crucial significance in the lives of those employees, namely the terms and conditions under which they will be employed. We understand the premise of legislative provisions such as Section 36.1 to be that, if these matters are to be confined to the complete control of trade unions, it is in the public interest to ensure that those trade unions treat the employees whom they represent equitably and with fairness.*
>
> *Employees and trade union members have traditionally been able to pursue some of these questions in the common law courts, although this is not a feasible avenue for many individual employees. The significance of Section 36.1, in our view, is that it gives employees recourse to the Board to express concerns about their status or treatment within the trade union which represents them. As we have indicated in the decisions quoted earlier, the Board has no intention of becoming a body of appeal or of routine review from every decision made pursuant to a trade union constitution or*

> *internal procedural rules. Where an allegation is made, however, that a violation of The Trade Union Act has occurred, the Board must be prepared to scrutinize the internal workings of the trade union to the extent necessary to determine whether the Act has been breached.*
>
> *Counsel for the Union argued that an employee should have no recourse to the Board if internal trade union procedures have not been exhausted. As a general proposition, we agree that the Board should not be regarded as a substitute for internal trade union procedures, or a means of avoiding the outcome of normal controversy or disciplinary action which is the proper domestic business of the trade union.*

[32] The *Stewart* case involved an issue of trade union membership. Section 36.1(1) of the *Act* makes specific reference to issues of membership and discipline. In *Stewart*, *supra*, at 214, the Board commented on the relative difficulty of scrutinizing the fairness of union processes in such cases:

> *With respect to Section 36.1(1), the applicable principles of natural justice are clearly more easy to identify when the question is raised in the context of a specific proceeding, such as disciplinary action taken against a member. The question of what constitutes natural justice when this issue arises in the context of a claim to be allowed to participate in the general democratic machinery of the trade union is more amorphous, and less capable of precise analysis.*

[33] In our opinion, the question of what constitutes natural justice when the issue arises in the context of internal union processes other than those related to the two classes specifically mentioned in the legislation is even more amorphous and even less capable of precise analysis. The Board has been more loath to interfere in such cases. In *Staniec v. United Steelworkers of America*, [2001] Sask. L.R.B.R. 405, LRB File No. 205-00, the Board recently confirmed the sentiments expressed in *Stewart, supra*, that the Board will not act as a body of routine review of every internal decision made by a union and that a union's duty to apply the principles of natural justice in respect of disputes between an employee and the union is generally restricted to matters of membership and internal discipline.

[34] The extent of a review by the Board of internal union matters will generally be in direct relation to the seriousness of the matter in issue. The Applicant's claim of impropriety is not in relation to membership or discipline, nor is it in relation to a more serious matter such as termination of employment. It is in relation to a matter of meeting procedure. In the present case, the evidence about

what occurred at the meeting and the result of the vote is contradictory. However, Ms. Hickie's recitation of events was the most detailed and her explanation of the motion, debate, question and vote process at the meeting made the most sense. In our opinion, the process that was followed was within the bounds of procedural fairness and the Union did not violate s. 36.1(1) of the *Act*.

[35] The application is dismissed.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1985, CONSTRUCTION & GENERAL WORKERS, LOCAL 890, CONSTRUCTION & GENERAL WORKERS, LOCAL 180, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 771, INTERNATIONAL UNION OF OPERATING ENGINEERS, HOISTING, PORTABLE AND STATIONARY, LOCAL 870 and OPERATIVE PLASTERERS & CEMENT MASONS INTERNATIONAL ASSOCIATION, LOCAL 222, Applicants v. GRAHAM CONSTRUCTION AND ENGINEERING LTD., GRAHAM CONSTRUCTION AND ENGINEERING (1985) LTD., B F I CONSTRUCTORS LTD., BANFF LABOUR SERVICES LTD., JASPER LABOUR SERVICES LTD., BANFF FINANCIAL CO. INC., PETER BALLANTYNE CONSTRUCTION LTD., POINTS NORTH CONSTRUCTION LTD., GRAHAM INDUSTRIAL CONTRACTORS LTD., GRAHAM INDUSTRIAL SERVICES LTD., Respondents

LRB File No. 227-00; December 13, 2001
Vice-Chairperson, Walter Matkowski; Members: Duane Siemens and Tom Davies

For the Applicants: Drew Plaxton

For Graham Construction and Engineering Ltd., Graham Construction and Engineering (1985) Ltd., BFI Constructors Ltd., Graham Industrial Contractors Ltd., and Graham Industrial Services Ltd.: Larry Seiferling, Q.C.

For Banff Labour Services Ltd., Jasper Labour Services Ltd., and Banff Financial Co. Inc.: Larry LeBlanc, Q.C.

For Points North Construction Ltd.: Jay Watson

For Peter Ballantyne Construction Ltd.: Carl Nahachewsky

Practice and procedure – Preliminary objection – Board agrees to hear evidence and argument on certain aspects of complicated case before hearing remainder of case – However, Board advises parties to be prepared to present entire case on previously scheduled dates to avoid delay.

REASONS FOR DECISION AND BOARD ORDER

Background

[1] Walter Matkowski, Vice-Chairperson: United Brotherhood of Carpenters and Joiners of America, Local 1985 (the "Union") filed an unfair labour practice application, LRB File No. 014-98 (the "first application") dated January 30, 1998 seeking relief against a host of entities including

Graham Construction and Engineering Ltd. and Graham Construction and Engineering (1985) Ltd. ("Graham") pursuant to ss. 36, 37 and 42 of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the "*Act*") and s. 18 of *The Construction Industry Labour Relations Act, 1992*, S.S. 1992, c. C-29.11.

[2] Three previous Board decisions set out the background of what has already transpired on the first application. Vice-Chairperson Seibel, in Reasons for Decision dated June 22, 1999, September 2, 1999 and November 24, 1999 dealt with such preliminary issues as pre-hearing disclosure and production of documents, severing the hearing of the issues of liability and damages, *res judicata,* issue estoppel, abandonment and particulars.

[3] The Union, together with a number of other unions, filed an unfair labour practice application, LRB File No. 227-00, (the "second application") dated August 18, 2000 seeking relief against the same entities pursuant to essentially the same statutory provisions listed in the first application.

[4] A pre-hearing was held on May 1, 2001 with Vice-Chairperson Matkowski. The pre-hearing could not proceed as counsel for certain parties refused to participate, as they did not wish to "taint" Vice-Chairperson Matkowski, thereby preventing him from hearing the main applications.

[5] At the pre-hearing, the parties were asked to submit position papers on a host of issues that they wished to advance including the issue of the composition of the Board panel to hear this case.

[6] The Board assigned a panel to hear LRB File No. 227-00. The assigned panel provided Board Directives dated May 29, 2001 as to how the first and second applications should proceed.

[7] Noble J., in a Judgment dated August 3, 2001, pursuant to the application of some of the Respondents to the first and second applications, granted a writ of prohibition without actually issuing the writ, preventing the Chairperson of the Board from taking part in the adjudication of the first and second applications before the Board.

[8] As a result of the Judgment of Noble J., Vice-Chairperson Matkowski was assigned to chair the panel of the Board hearing and the Board Directives dated May 29, 2001 became ineffective. The newly constituted panel heard arguments from the various parties on November 1, 2001 as to how

the hearings of the first and second applications should proceed. The Board provides the following instructions to the parties on LRB File Nos. 014-98 and 227-00.

Status of LRB File No. 014-98

[9] A common sense approach to dealing with LRB File Nos. 014-98 and 227-00 would be to amalgamate the two applications into one hearing. There are most definitely overlapping issues as set out in the previous Board Directives.

[10] Counsel for some of the Respondents questioned whether the Board should amalgamate the two applications into one hearing. For example, it was argued that Vice-Chairperson Seibel's panel had somehow seized jurisdiction over the first application. With respect, this is not correct. Vice-Chairperson Seibel's panel provided procedural rulings on the first application. The panel did not hear any evidence dealing with the first application. As such, Vice-Chairperson Seibel's panel did not seize jurisdiction over the first application.

Successorship and Abandonment Argument

[11] Graham argues that the two issues of successorship and abandonment could be determinative of the entire applications or, if not determinative, could lessen the length of the hearing greatly. Graham estimates that the successorship and abandonment evidence and argument could take two or three days.

[12] The Board will hear evidence and arguments on the Graham successorship and abandonment issues. Vice-Chairperson Seibel's panel, in its second procedural ruling, refused to hear and determine the abandonment issue separate and apart from the successorship issue in the first application. However, given that Graham is now prepared to deal with both issues, the Board is prepared to hear evidence and argument on these two issues.

[13] The parties must be aware that the Board is not giving away any of the dates which it has presently set aside for this case. There has been far too much delay on this file for the Board not to proceed as Noble J. provides "in a timely manner." It is possible that the Board may not be able to provide either a timely ruling on these issues or a ruling which is totally determinative of the entire

applications. Therefore, the main hearing will proceed on the assigned dates following the successorship and abandonment evidence and arguments.

Other Matters

[14] Mr. Plaxton, on behalf of the Applicants, sought a ruling from the Board similar to the decision of Vice-Chairperson Seibel's panel dated November 24, 1999 in the first application dealing with severing the issue of quantum and calculation of damages from the main hearing. This Board applies the November 24, 1999 ruling in the first application to both applications on this issue.

[15] The Board will not hear any other preliminary issue arguments. The parties can address these during their final arguments.

[16] Given the unacceptable delay which has occurred on this file, together with the potential that Graham might lose on the successorship and abandonment issues, and given that, even if Graham is successful on the preliminary issues, the hearing could still proceed, the Board adopts the ruling provided in the Board Directives dated May 29, 2001 in regard to disclosure of documents and confidentiality and the role of the Investigating Officer, save and except that the parties have ten (10) days from the date that the Board issued its verbal Order (December 6, 2001) to produce all records relating to the matters in issue and to make such documents available to the solicitor opposite at the office of their solicitors.

[17] Leave is granted to the parties allowing them to return to the Board prior to the hearing itself if there should be any difficulties concerning compliance with Board Orders, including production of documents.

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant v. PAUL LALONDE ENTERPRISES LTD., operating as ASHLY CABINETS & WINDOWS (SASKATOON), Respondent

Vice-Chairperson, Walter Matkowski; Board Members: Gerry Caudle and Tom Davies
LRB File Nos. 236-01, 237-01 & 238-01; December 13, 2001

For the Applicant: Drew Plaxton
For the Respondent: Jay Watson

Remedy – Interim order – Criteria – Balancing of labour relations harm – Union representative terminated by employer from workplace where parties working toward first collective agreement – Union in newly certified unit where no first collective agreement in vulnerable position – Potential labour relations harm to union greater than potential harm to employer caused by having to employ employee employer finds unacceptable pending disposition of final applications – Board grants interim order.

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

REASONS FOR DECISION

Facts

[1] Walter Matkowski, Vice-Chairperson: United Food and Commercial Workers, Local 1400 (the "Union") applied for unfair labour practice, reinstatement and monetary loss orders relating to James Cooley, an employee employed by Paul Lalonde Enterprises Ltd. operating as Ashly Cabinets & Windows (Saskatoon) (the "Employer"). In addition, the Union filed a request for interim relief pursuant to s. 5.3 of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the *"Act"*). The Union filed affidavits of Donald Logan, union representative and Mr. Cooley, in support of its interim application.

[2] The Employer filed an affidavit of John Giesbrecht, president of the Employer.

[3] The Union's initial material indicates that the Union was certified as the collective bargaining representative of the employees of the Employer on October 4, 2000. There are approximately eight employees in the bargaining unit.

[4] The Employer dismissed Mr. Cooley ("Cooley") by letter dated October 19, 2001, which provided:

> *This is a letter to inform James Cooley that his job at Ashly Cabinets & Windows (Saskatoon) is terminated as of October 19, 2001 – 4:30 p.m.*

[5] Cooley is one of the most senior workers at the workplace and a well-known Union supporter. Cooley is one of two members on the Union's bargaining committee, the other being Wayne Suderman. Cooley, at the time of his dismissal, held the position of shop foreman.

[6] Cooley's affidavit indicates that Mr. Giesbrecht ("Giesbrecht") was less than ecstatic that the Union had entered the workplace and that Giesbrecht blamed Cooley for unionizing "his shop."

[7] At a collective bargaining session held on August 21, 2001, the Employer proposed that Cooley's position of shop foreman be removed from the collective bargaining unit and be placed "out of scope." Cooley would be able to apply for the new out of scope position. The Union refused this proposal.

[8] Cooley claimed that a number of other employees had received wage increases while he and Suderman had not. Cooley questioned Giesbrecht as to why he had not received a raise and was advised that if he had not certified the Employer's shop he would have received a wage increase. Geisbrecht told Cooley that Giesbrecht would close the shop before he would let the Union in.

[9] Cooley's initial affidavit is dated October 30, 2001. At that time Cooley had been given no reason as to why his employment had been terminated.

[10] Cooley speculated that the Employer could raise an incident that occurred a few days prior to his dismissal where there had been some screening material damaged at the workplace. Giesbrecht had held a meeting with employees and had indicated that he wanted to know who was responsible for the damage by October 19, 2001 or he would do something at that time. Cooley said that he was not responsible for the damage.

[11] Mr. Logan ("Logan"), in his affidavit, confirmed Cooley's status on the bargaining committee, the fact that Cooley is a well-known Union supporter and the Employer's attempt at the bargaining table to have Cooley's position moved out of scope.

[12] Logan deposed that negotiations between the Union and the Employer had been brought to a standstill due to the Employer's refusal to provide information. Logan also claimed that Cooley's dismissal will have a severe and irreparable effect on other members of the bargaining unit and on negotiations and the viability of the bargaining unit.

[13] Giesbrecht acknowledged that he and Cooley had some differences of opinion but that these differences of opinion and Cooley's Union activities were not the reason for Cooley's dismissal.

[14] Giesbrecht stated that Cooley "was terminated because he has left work without permission even after being warned and for purposefully trying to stir up trouble among other employees working at the business."

[15] Giesbrecht stated that Cooley was not dismissed because of the "damage incident" even though Giesbrecht believes that Cooley was responsible for the damage.

[16] Giesbrecht claimed that if Cooley is reinstated he will disrupt the whole working atmosphere of the business.

[17] Cooley and Logan filed affidavits in response to Giesbrecht's affidavit.

[18] At the hearing, the Union sought the following relief from the Board:

> *An interim and/or interlocutory order reinstating James Cooley to his employment with the Employer under the same terms and conditions prior to any changes made by the Employer without negotiation.*

[19] Following a hearing on November 16, 2001, the Board verbally ordered the Employer to reinstate Cooley to his position with the Employer effective November 19, 2001, and indicated that a formal order would be issued followed by written reasons.

Relevant Statutory Provisions

[20] Section 5.3 of the *Act* reads:

> *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.*

Analysis

[21] The issue before the Board is whether or not the Board should grant interim relief in these circumstances by ordering the reinstatement of Cooley.

[22] The test for granting interim relief is set out in *Hotel Employees and Restaurant Employees Union, Local 206 v. Canadian Hotels Income Properties Real Estate Investment Trust #19 Operations Ltd.*, [1999] Sask. L.R.B.R. 190, LRB File No. 131-99, at 194:

> *The Board is empowered under ss. 5.3 and 42 of the Act to issue interim orders. The general rules relating to the granting of interim relief have been set down in the cases cited above. Generally, we are concerned with determining (1) whether the main application reflects an arguable case under the Act, and (2) what labour relations harm will result if the interim order is not granted compared to the harm that will result it is granted. (see Tropical Inn, supra, at 229). This test restates the test set out by the Courts in decisions such as Potash Corporation of Saskatchewan v Todd et al., [1987] 2 W.W.R., 481 (Sask. C.A.) and by the Board in its subsequent decisions. In our view the modified test, which we are adopting from the Ontario Labour Relations Board's decision in Loeb Highland, supra, focuses the Board's attention on the labour relations impact of granting or not granting an interim order. The board's power to grant interim relief is discretionary and interim relief can be refused for other practical considerations.*

[23] The first part of the test as set out in *Canadian Hotels, supra*, is whether the main application reflects an arguable case under the *Act*. The Board is of the view that the Union has demonstrated that there is an arguable case to be made on the main application and counsel for the Employer, to his credit, conceded this point.

[24] In assessing the labour relations harm of not granting interim relief, the Board takes into account the fact that this is a newly certified, small bargaining unit. No collective agreement has been achieved and, according to the Union, talks are at a standstill. Cooley, the dismissed employee, is an integral part of the Union and sits on its bargaining committee.

[25] In *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, LRB File Nos. 274-97, 375-97 & 376-97, and in other cases, the Board has considered whether or not the dismissal of an employee for alleged union activity has a "chilling effect" on a union's organizing drive or activities so that an interim order is necessary.

[26] The Board accepts that a newly certified bargaining unit that has not yet achieved a first collective agreement is often in a vulnerable position (see *Hotel Employees and Restaurant Employees Union, Local 206 v Chelton Suites Hotel (1998) Ltd.,* [2000] Sask. L.R.B.R. 434, LRB File No. 091-00 at 446). The Board accepts that, in this case, if an interim order is not granted, employees may conclude that involvement on the Union bargaining committee could lead to their termination of employment. The result of this employee fear could restrict employee participation in the Union at a vital stage in the Union's formation.

[27] The labour relations harm if the interim order is granted is difficult to assess. The Employer provided no reasons for the October 19, 2001 dismissal of Cooley until November 6, 2001.

[28] If the Board grants the interim order, the Employer will have to continue to employ a senior employee, who attained the position of shop foreman and who the Employer was prepared on August 21, 2001 to have apply for a new proposed out of scope shop foreman position. The harm from the Employer's perspective would be to employ Cooley who it now no longer finds acceptable.

[29] In balancing what labour relations harm will result if the interim order is not granted compared to the harm that will result if the interim order is granted, the Board finds that there will be much greater harm if the interim order is not granted for the reasons as set out earlier herein.

[30] At the hearing, the Board asked to parties for their first available dates for the hearing of the final applications, thus minimizing the harm to the Employer in the event it is successful on the final applications.

[31] For all of the foregoing reasons, the Union's application for interim relief was granted.

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL 922, Applicant v. POTASH CORPORATION OF SASKATCHEWAN INC., Respondent

LRB File No. 265-01; December 13, 2001
Chairperson, Gwen Gray; Members: Bruce McDonald and Clare Gitzel

For the Applicant: Neil R. McLeod, Q.C.
For the Respondent: Melissa Brunsdon

Lock-out – Notice – In order to meet notice requirements under *The Trade Union Act*, party must serve written notice of strike or lock-out on other party and Minister of Labour stating date and time after which party will engage in strike or lock-out activity and party must refrain from engaging in strike or lock-out activity until 48 hours after giving notice – Party not required to list type of activity intended – Board finds lock-out notice sufficient and dismisses unfair labour practice application.

***The Trade Union Act*, ss. 2(j.2), 11(6) and 11(7).**

REASONS FOR DECISION

Background

[1] Gwen Gray, Chairperson: Communications, Energy and Paperworkers Union of Canada, Local 922 (the "Union") filed an application for an unfair labour practice alleging that the Potash Corporation of Saskatchewan Inc. (the "Employer") was engaged in an unlawful lock-out contrary to s. 11(7)(a) of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the "*Act*".) The Union sought relief in the form of an interim order and, on a final basis, a declaration and monetary loss for employees affected by the lock-out. At the hearing of the interim application, the parties agreed that the Board could deal with the application as a final application based on the material filed on the interim application.

Facts

[2] The Union and the Employer are currently negotiating for the renewal of their collective agreement. Their previous agreement expired on January 31, 2001. The Union conducted a successful strike vote on September 6, 2001 and served strike notice on the Employer on September 18, 2001. The strike notice advised the Employer that strike action in the form of a restriction on overtime would commence at 8:00 a.m. on Friday, September 21, 2001. The overtime ban was implemented by the Union in accordance with its strike notice.

[3] On September 25, 2001, the Employer served the Union with lock-out notice. The notice read as follows:

> *This is written notice pursuant to Section 11(7) of The Trade Union Act that effective 8:00 a.m. on Friday, September 28, 2001 and thereafter, the Company will be in a legal position to lock out its employees who are members of the collective bargaining unit between PCS Inc., Lanigan Division and C.E.P.U., Local 922. At that date and time, the Company may take one or more of the following actions, as set out in Section 2(j-2):*
>
> *(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.*
>
> *This notice will further advise that although we may not lock out anyone at the specific time and date listed above, we reserve the right to do so at any time after the effective date of this notice, without further notice to you under Section 11(7) of The Trade Union Act.*
>
> *This lock-out notice shall remain in effect until revoked by the Company. Should you have any questions regarding this matter, please contact the undersigned.*

[4] The Union alleges that the Employer did not commence any lock-out activity until December 2, 2001, when it effected a total lock-out at 6:00 p.m. Workers were sent home from the mine and the on-coming shift was cancelled.

[5] Subsequently, a new lock-out notice was served on the Union on December 4, 2001. The Employer claims that it did engage in lock-out activity after it served its lock-out notice by engaging members of its management team to perform bargaining unit work when members of the bargaining unit refused to perform overtime work.

[6] The Board must determine if the Employer's lock-out notice complied with s. 11(7) of the *Act*. The parties have agreed to defer arguments on any remedial issues to a further hearing, if needed.

Relevant Statutory Provisions

[7] The strike notice and lock-out notice provisions of the *Act* provide as follows:

> *11(6) Where the majority of the employees voting on a strike vote under clause 11(2)(d) vote in favour of a strike, no strike may commence unless the trade union representing a majority of the employees:*
>
> > *(a) gives the employer or employer's agent at least 48 hours written strike notice of the date and time that the strike will commence; and*

(b) promptly, after service of the notice, notifies the minister or his designate of the date and time that the strike will commence.

11(7) No employer may cause a lock-out unless:

(a) he gives the union or union's agent at least 48 hours written notice of the date and time that the lock-out will commence; and

(b) promptly, after the service of the notice, notifies the minister or his designate of the date and time that the lock-out will commence.

[8] The term "lock-out" is defined in s. 2(j.2) of the *Act* 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;

Arguments

[9] The Union argued that s. 11(7) of the *Act* requires the Employer to provide 48 hours notice of the date and time that a lock-out will commence. The purpose of the notice is to permit orderly planning for the work stoppage, to allow a cooling off period and to provide an opportunity to government to intervene to assist the parties to settle the dispute, through conciliation, mediation or otherwise. To achieve these purposes, the notice must relate to an intention to engage in lock-out activity on the date and time specified in the notice. The words used in s. 11(7) – "will commence" – mean that something must happen. The notice is insufficient if it is contingent, equivocal or indefinite. In this case, the Union notes that the Employer did not indicate that it would engage in lock-out activity, only that it may engage in such activity. The Union disputed that the use of management personnel to fill in for striking workers was a lock-out as it is defined in the *Act*.

[10] The Employer argued that it was entitled to issue a lock-out notice and not engage in immediate lock-out activity. The goal of a lock-out can be to compel the employees to agree to the Employer's proposed agreement (an offensive lock-out) or to defend against strike activity (a defensive lock-out). When responding to strike activity, the Employer will issue a lock-out notice to place itself in a position to respond immediately to the strike activity. Under earlier decisions of the Board, strike activity can take the form of an intermittent strike. In order to respond quickly to an escalation in such activity, the Employer would be required under the Union's interpretation to give daily lock-out notices, which

would defeat any purpose of such notice. There is no labour relations sense in requiring the Employer to engage in lock-out activity after lock-out notice has been served as it would unnecessarily escalate the conflict. In the alternative, the Employer argued that it did engage in a lock-out when it assigned management personnel to perform bargaining unit work.

Analysis

[11] The *Act* imposes few restrictions on the exercise of the right to strike or lock-out. Unlike other statutes, it does not adopt a conciliation model to the resolution of industrial disputes. The only prerequisites to strike or lock-out activity are (1) the existence of an open period (s. 33(4)); (2) in the case of a union, the holding of a successful strike vote; and (3) the provision of the requisite 48 hours notice of strike or lock-out as set out in ss. 11(6) and (7).

[12] Prior to 1984, the *Act* did not require any prior notice of strike or lock-out. In addition, it did not prohibit strikes or lock-outs during the term of a collective agreement. The only statutory prerequisite for conducting a strike was the need for a successful strike vote. The parties may have incorporated no strike – no lock-out provisions in their collective agreements but the *Act* did not require such provisions.

[13] The 1984 amendments to the *Act* (Bill 104) altered the landscape by removing the right to strike or lock-out during the term of a collective agreement and mandating the use of grievance and arbitration procedures for disputes arising during the life of a collective agreement (s. 25). The 1984 amendments also added the requirements set out in ss. 11(6) and (7) to provide advance notice of strike or lock-out. The amendments, however, did not move to a conciliation model in relation to the settlement of collective bargaining disputes. The *Act* does not require the parties to engage in mandatory conciliation prior to engaging in strike or lock-out activity.

[14] In the context of the evolution of Canadian labour law, the *Act* is remarkably non-interventionist in its regulation of strike and lock-out activity. The *Act* adopts an industrial conflict model of dispute resolution, as opposed to the predominant conciliation model that exists in other Canadian jurisdictions. It is against this historical background that the Board interprets the meaning of ss. 11(6) and (7).

[15] The other interpretative tools arise from the case law and were summarized by the Board 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, at 717 as follows:

> *This Board is of the view that the contextual approach is the most appropriate methodology to apply in interpreting the provisions of the Act. In doing so we will start by identifying the purpose of the Act and any interpretative guidance that flows from that purpose. We will then address the plausibility of the competing interpretations to determine which is more consistent with the legislative text contained in the Act. The Board will also consider the efficacy of the interpretations proposed in terms of their ability to promote the objectives of the Act and the acceptability of both interpretations.*

[16] We have set out above the interpretative gloss that flows from an historical view of the *Act*. The use of the strike and lock-out weapons is the accepted method of settling industrial disputes that arise during collective bargaining for renewal agreements. In our view, provisions of the *Act* regulating strike and lock-out activity should receive an interpretation consistent with this statutory approach.

[17] The plausibility of the Union's interpretation, based on the language used in s. 11(7), is strong. The section uses the phrase "written notice of the date and time that the lock-out will commence." A similar phrase is used in relation to the strike notice requirements in s. 11(6). The words on their face suggest that the notice must relate to an actual event that can be located in terms of date and time.

[18] However, the difficulty with this "plain meaning" approach, if we can give it that label, is that strikes and lock-outs do not occur in a manner that is always capable of being defined in a precise "time and place" fashion. For instance, in *Retail, Wholesale and Department Store Union, Local 454 v. Bi-Rite Drugs Ltd.*, [1987] Fall Sask. Labour Rep. 35, LRB File Nos. 293-86 & 294-86, the Union conducted a one-hour study session and then informed the Employer that it would also engage in an overtime ban. The Employer took the position that the Union was required to serve new strike notice each time it changed the form of its strike. In *Bi-Rite Drugs*, *supra*, the Board found, at 43, that "the Act neither contemplates nor requires that a strike be continuous or, if it is intermittent, that each instance of concerted action is a separate strike requiring the entire process to be repeated." In the *Bi-Rite Drugs* case, the strike commenced with some action (study session) and a stated intention (overtime ban). In the present case, the Union commenced its strike with a stated intention of refusing overtime work, which, by its nature, does not occur until overtime work is assigned to a bargaining unit member and is refused by him or her. This leads to the dilemma of determining when the strike commenced? Did it commence with the stated intention of the Union or when the first overtime assignment was

refused? Production slow downs present a similar dilemma in relation to time and place – it may be the Union's intention to implement a production slow down as its form of strike but when does it start? How can an objective outsider determine when (and if) a strike has commenced? If the activity does not commence at the time and place specified in the notice, is the Union required to serve a new notice?

[19] Similar scenarios develop with the concept of lock-outs. An employer may use the lock-out weapon as a defensive tool to respond in kind to a union's strike activity. In *Retail, Wholesale and Department Store Union v. Pioneer Co-operative Association Limited,* [1988] Winter Sask. Labour Rep. 49, LRB File Nos. 155-87 & 157-87, and in *Retail, Wholesale and Department Store Union, Local 635 v. Weyburn Co-operative Association Ltd.,* [1989] Fall Sask. Labour Rep. 43, LRB File No. 232-88, the Board approved the use of a retaliatory lock-out of employees who had engaged in strike activity. Again, the intention to engage in such activity may have been present at the time of issuing the lock-out notice, but the intention may not be manifested in terms of concrete action for some time and is dependent upon the occurrence of other events.

[20] In terms of the statutory requirement that unions and employers give notice of the "date and time" that a strike or lock-out will commence, it is clear from the very nature of strikes and lock-outs that, in some circumstances, strike or lock-out action may not take place at the time and date stated in the notice, although a present intention to engage in strike or lock-out activity on the occurrence of some other event may exist (such as an overtime ban or a defensive lock-out). The strike or lock-out notice serves to warn the other party that the intention is present and will be acted upon as required by either the union or the employer.

[21] In our view, an interpretation of strike or lock-out notice that requires an intent to engage in strike or lock-out activity, but not actual activity on the date and time set out in the notice, is consistent with the overall purpose of issuing strike or lock-out notice. In *Bi-Rite Drugs, supra,* the Board identified a two-fold purpose for the statutory notice requirements at 41:

> *In the Board's opinion, the Legislature likely recognized that all too often strikes and lock-outs result in severe disruptions, personal hardship and financial loss, not only to employees and employers directly involved, but also to innocent bystanders. It therefore enacted Sections 11(6) and (7) to attempt to accomplish at least two things. Firstly, it created a statutory "cooling off" period which gives both sides an opportunity to reconsider their intentions and their respective positions at the bargaining table before commencing the kind of hostilities from which retreat may be difficult. Secondly, by requiring a copy of each strike or lock-out notice to go to the*

> *Minister of Labour, it creates a mechanism for ensuring that the Government, as the trustee of the public interest, receives prior notice of all impending disputes and at least some opportunity to investigate and, if warranted, intervene by way of conciliation, mediation or arbitration.*

[22] Whether the strike or lock-out notice period is viewed as a "cooling off" period or a "pressure cooker" period, as described by Chairperson Sims of the Alberta Labour Relations Board in *V.S. Services Ltd.*, [1991] C.L.L.C. ¶ 16,019, the effect is to put the other side and government on notice that collective bargaining has reached a critical stage and that industrial action is clearly contemplated by the party serving the notice.

[23] This interpretation of s. 11(6) and (7) avoids the dilemma of sorting out when strike or lock-out actually commenced and avoids disputes, such as the present one, over the adequacy of the notice. We find that the interpretation proposed by the Employer in this instance is preferred over the interpretation proposed by the Union.

[24] To summarize the Board's conclusion, in order to meet the requirements set out in s. 11(6) or s. 11(7), a party must serve written notice of strike or lock-out on the other party and the Minister of Labour stating the date and time after which the party will engage in strike or lock-out activity, and the party must refrain from engaging in strike or lock-out activity until the passage of the 48 hour period after giving notice. The intention of the party to engage in industrial action in relation to the bargaining dispute can be assumed from the giving of the notice. Nothing more is required. The parties are not required to list the type of strike activity or lock-out activity that they will engage in, although they may wish to do so in the notice provided. In our view, this rather simple approach to strike and lock-out notices accords with the overall scheme of the *Act* which accepts strikes and lock-outs as acceptable methods of resolving collective bargaining disputes.

[25] In the present case, the Employer did serve written lock-out notice on the Union and the Minister of Labour and did withhold its lock-out activity until after the passage of 48 hours. In our view, it complied with s. 11(7). It is not necessary for the Board on this application to determine if the Employer's use of managerial personnel to replace striking employees constituted a lock-out.

[26] The Union's application for an unfair labour practice is dismissed.

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

LRB File Nos. 259-01, 260-01 & 261-01; December 14, 2001
Chairperson, Gwen Gray; Members: Gloria Cymbalisty and Leo Lancaster

For the Applicant: Larry Kowalchuk
For the Respondent: Rob Garden, Q.C.

Remedy – Interim order – Criteria – Balancing of labour relations harm – Union representative terminated by employer – Union established in workplace – Essence of dispute relates to collective bargaining position of parties and parties have agreed to expedite arbitration – Potential labour relations harm from continuing confrontation in workplace exceeds potential harm from removal of union representative from workplace – Board dismisses application for interim order.

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

REASONS FOR DECISION

Background

[1] Gwen Gray, Chairperson: Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Union") filed an unfair labour practice and an application for monetary loss and reinstatement relating to the termination of Wayne Murrell from Raider Industries Inc. (the "Employer") at its plant at Drinkwater, Saskatchewan. The Union claims that Mr. Murrell was fired for union activity contrary to s. 11(1)(e) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"). In this application, the Union seeks an interim order from the Board reinstating Mr. Murrell and granting other remedies pending the final disposition of the unfair labour practice application.

Facts

[2] The Union is certified to represent employees of the Employer at Drinkwater and Moose Jaw, Saskatchewan. The first collective agreement expired on November 30, 2000 and the parties have been negotiating a renewal agreement. The Union and the Employer have met twenty or more times during the present round of bargaining. The Employer initiated a request for assistance from conciliation services at Saskatchewan Labour to deal with the slow progress at the bargaining table.

[3] Mr. Murrell is the chief shop steward in the Drinkwater plant where he works as a masker. He is also a member of the Union's bargaining committee and is familiar with bargaining issues. There is one other shop steward in the Drinkwater plant, Mr. Miller, who is also on the Union's bargaining committee.

[4] On November 5, 2001, Mr. Murrell was terminated from his employment. In his affidavit, he noted that there were serious issues at the bargaining table relating to the Employer's requirement that employees remain at work when there is no work to perform; that employees work overtime hours without pay; and that employees not leave the workplace when their work is finished. Mr. Murrell is affected by these requirements and he claims that the Employer is attempting to unilaterally implement its bargaining proposals. The Union suggests that this conduct amounts to an unlawful lock-out because the Employer has not served lock-out notice in accordance with the *Act*.

[5] Mr. Murrell also attempted to call a meeting of employees at Drinkwater to discuss the progress of negotiations and to clear up some matters for employees. According to Mr. Murrell, he asked the Employer if a meeting could be scheduled on work premises during the morning coffee break and was told that no meeting could be held on company property. He then set up the meeting to be held off company property during a coffee break. On the meeting day, he was suspended from his job and the meeting could not take place. Later, he was fired from his job. While Mr. Murrell's affidavit does not directly relate these incidents as cause and effect, he makes the claim that the Employer is using the discipline to attempt to get employees to agree to its bargaining proposals and that the discipline is related to Mr. Murrell's union activities.

[6] Mr. Murrell has not been allowed to attend at the workplace since his termination. He is unable to attend grievance or other meetings at the workplace as a result.

[7] In its affidavit material, the Employer tells a different story in relation to Mr. Murrell. Mr. McQuarrie, production manager of the Drinkwater plant, outlined the incidents that gave rise to the imposition by the Employer of verbal warning, written warning, suspension and termination of Mr. Murrell. According to Mr. McQuarrie, Mr. Murrell and his work partner, Mr. Beler, were instructed in writing on October 2, 2001 to change the manner in which they performed their team work as maskers. The change was to be implemented on October 9, 2001. Prior to that time, the maskers had been permitted to divide their work between their team and to start work at different times. Either

Mr. Murrell or Mr. Beler would commence work at 6:45 to 7:00 a.m. and work until one-half of the day's production quota was completed. The first employee to arrive at work would leave the plant between 9:00 a.m. and 10:00 a.m. The second employee would come to work shortly before the other employee left for the day and would stay until he finished his half of the daily production. The new direction required Mr. Murrell and Mr. Beler to perform their work as a team, both starting at the same time and working side-by-side to mask their daily component of tonneau covers. Both employees were required to stay until all the work was completed.

[8] According to Mr. McQuarrie, Mr. Murrell and Mr. Beler resisted the change. Although they both reported to work at 7 a.m., one of the two would remain in the coffee room until the other masker had finished his share of work. Then, the other employee would mask the remaining tonneau covers. On October 9, 2001, Mr. McQuarrie informed Mr. Murrell that the intent of the October 2, 2001 memo was to have both maskers on the floor working at the same time. When directed to perform work, Mr. Murrell refused. This continued for the week of October 9, 2001. Mr. McQuarrie attempted through informal discussion to persuade Mr. Murrell to work in accordance with the directive.

[9] On October 15, 2001 Mr. McQuarrie met with Mr. Murrell and Mr. Beler and informed them again of the Employer's directive. Neither followed the instruction during this week. On October 17, 2001 Mr. McQuarrie gave Mr. Murrell two warning letters relating to his insubordinate conduct. Following the warning, Mr. Murrell continued to work as he had prior to the October 2, 2001 memorandum. On October 25, 2001 the Employer suspended Mr. Murrell and Mr. Beler for three days. On November 5, 2001 Mr. Murrell returned to work and continued to work as he had prior to the suspension. On that occasion, his employment was terminated.

[10] The Union filed grievances with respect to the discipline imposed on Mr. Murrell and both parties have agreed to expedite the arbitration of these matters.

Argument

[11] The Union argues that it has demonstrated that Mr. Murrell was engaged in union activity and that he was terminated from his employment. Under s. 11(1)(e) of the *Act*, the burden of proof then shifts to the Employer. Having established its *prima facie* case under s. 11(1)(e), the Union argues that it has met the test on an interim application of establishing that it has an arguable case.

On the second part of the test, the Union argues that the labour relations harm arising from Mr. Murrell's termination and resulting absence from the workplace relates to his inability to perform the duties of a shop steward and union leader in the workplace.

[12] The Employer argues that this is a case of obey now – grieve later that ought to be settled through the grievance and arbitration procedures set out in the collective agreement. The Union is attempting to erode the arbitration process by bringing this application. The labour relations harm claimed by the Union is not significant as Mr. Miller, the other shop steward, can attend to the matters normally handled by Mr. Murrell. Mr. Murrell should not be "bullet-proof" from normal disciplinary measures simply because he is a shop steward. The Union also delayed filing this matter under the Board's interim order powers as Mr. Murrell was fired on November 5, 2001 and the application was not brought until November 29, 2001.

Analysis

[13] On an application for interim relief, the Board requires the Union to demonstrate that it has an arguable case under the *Act* on its main application, and that the labour relations harm that will result if the interim order is not granted will be greater than the labour relations harm that will result if the interim order is granted: see *United Food and Commercial Workers Union, Local 1400 v. Tropical Inn et al.,* [1998] Sask. L.R.B.R. 218, LRB File Nos. 374-97 to 376-97.

[14] In the present case, there is no argument that the Union has met the first portion of the test, that is, that there is an arguable case that Mr. Murrell was terminated for reasons that are in violation of the *Act.*

[15] How should we balance the labour relations harm? We recognize that the material filed by the parties is contradictory in key respects and the factual issues cannot be resolved by the Board at this stage of the proceedings. As a result, the Board looks to broad principles based on the undisputed evidence.

[16] In relation to an organizing drive, the Board accepts that the termination of an employee during a period of union activity has a chilling effect on remaining employees. As a result, the Board frequently reinstates employees who are terminated during this period pending the final hearing of the unfair labour practice application. The interim remedy is intended to prevent the termination

from discouraging other employees from participating in the union in the event that the termination constituted a violation of the *Act*. In this sense, it is a remedy designed to prevent harm that results from the action of the Employer until it is established that the Employer did not violate the *Act* in terminating the employee in question.

[17] During the period between certification and the conclusion of a first collective agreement, the union remains in a vulnerable position. It must recruit members to sit on various workplace committees, including the negotiating committee, and elect persons to act as representatives or shop stewards in the workplace. The union will have a more difficult time accomplishing these tasks if the employer terminates the employment of a shop steward or other elected person. Other employees may be reluctant to let their names stand for office in the union for fear of retaliation by the employer. The process of establishing the union's presence in the workplace will be delayed or undermined altogether. The evidence may also suggest that the employer is acting out of anti-union animus in terminating the union official. These factors may persuade the Board to grant an interim order to prevent harm to the union's development in the workplace even though the union is certified to represent employees in the workplace and is not vulnerable at this stage to losing a representational campaign.

[18] At later stages where the union is more established in the workplace and the elected structure is functioning through the shop steward system and elected officers, the termination of a union official may not be expected to cause the same turmoil or harm to the union in the workplace. The absence of the official may cause some reassignment of union work, but it will be less likely to threaten the existence of the union, prevent its development or chill employee participation in the union.

[19] However, where the material suggests that the employer relied on events that occurred when the employee was acting in his or her capacity as a union representative (such as conduct in a grievance meeting or collective bargaining session), the Board will be more concerned with limiting any chilling effect that anti-union animus may have on the participation of employees in the union and may issue an interim order to prevent such an effect. In *A.T.U. Local 1624 v. Coach Canada,* [2000] 60 C.L.R.B.R. (2d) 76, the Canada Industrial Relations Board held that the termination of the chief spokesperson for the union's negotiating committee on the date of his re-election and during a difficult round of negotiations was likely to have a serious adverse impact on collective bargaining

and the union's ability to bargain collectively with the employer. In that case, the Canada Board ordered the interim reinstatement of the union spokesperson.

[20] In this case, if the Union's allegations are accepted, the Employer is discriminating against Mr. Murrell for his union activity and his resistance to a workplace directive that the Union believes violates the collective agreement and constitutes a form of lock-out contrary to the *Act.* If the Employer's allegations are accepted, Mr. Murrell was disciplined for refusing to obey a workplace order. In our view, the issues underlying this dispute relate directly to collective bargaining and are not likely to be resolved outside of the collective bargaining process.

[21] The Union has let this matter stew for some time as the initial alleged discriminatory action took place on October 2, 2001. We note that the Employer did not terminate Mr. Murrell immediately after the first instance of alleged insubordination, as was the case in the *Coach Canada* case, *supra.* It afforded the Union some leeway to challenge the lawfulness of the workplace directive without putting the employee in jeopardy.

[22] In these circumstances where the essence of the dispute relates to the collective bargaining positions of the parties, we approach the balancing of interests with some care. If we do not return Mr. Murrell to the workplace pending a hearing of the unfair labour practice application or the arbitration, other employees may be discouraged from actively participating in collective bargaining and union representation duties as a result of the dismissal of Mr. Murrell. While this chilling effect is not as great as it would be during the original certification or first agreement period, it can still play a role in the decision of other employees to participate fully in the Union.

[23] On the other hand, if Mr. Murrell remains in the workplace pending the hearing of the unfair labour practice or the arbitration, the workplace dispute will continue and may well escalate.

[24] Both scenarios are unattractive. Overall, however, we find the prospect of a continuing confrontation on the workplace floor more harmful to labour relations between these parties than the harm caused by removing Mr. Murrell from the workplace. A "cooling off" period may assist the parties to re-assess their positions and make whatever compromise might be required in collective bargaining to settle the outstanding matters.

[25] Mr. Murrell remains an "employee" for the purposes of the *Act* under s. 2(f)(iii). He is entitled to participate in any collective bargaining sessions between the Union and the Employer. If he has been improperly terminated, his income loss can be compensated by an order of the Board or an arbitrator. The "chill" on other employees can be limited in part by the agreement to expedite the arbitration process. If the parties are unable to expedite that process, they can return to the Board for an early date to hear the unfair labour practice application.

[26] As a result, the Board dismisses the application for interim relief.

THE NEWSPAPER GUILD CANADA/COMMUNICATION WORKERS OF AMERICA, CLC, AFL-CIO, IFJ, Applicant v. CANWEST GLOBAL COMMUNICATIONS CORP. operating THE LEADER-POST and LEADER STAR NEWS SERVICES, Respondent

LRB File No. 179-01; December 17, 2001
Chairperson, Gwen Gray; Board Members: Patricia Gallagher and Mike Carr

For the Applicant: Drew Plaxton
For the Respondent: Eileen Libby

Unfair labour practice - Union security – Dues check-off - Union requested termination of individual employee for non-payment of dues – Under circumstances, employer required to act on union's request for termination – Board gives individual employee final opportunity to pay dues and directs employer to terminate employee if dues not paid within time specified.

***The Trade Union Act*, s. 36.**

REASONS FOR DECISION

Background

[1] Gwen Gray, Chairperson: The Newspaper Guild Canada/Communication Workers of America, CLC, AFL-CIO, IFJ (the "Union") filed an unfair labour practice application against CanWest Global Communications Corp. operating The Leader-Post and Leader Star News Services (the "Employer") alleging that the Employer had failed to comply with the union security clause set out in s. 36(1) of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the "*Act*"), and requesting that the Board order the Employer to comply with the provision and terminate the employment of Darrell Davis.

[2] Mr. Davis was given notice of the hearing and was given standing at the hearing to bring evidence and argument to the Board.

Facts

[3] The factual basis of this application is undisputed. The Union was certified to represent employees in the editorial department of The Leader-Post on February 2, 1999. It requested that the Employer comply with the union security provision contained in s. 36(1) of the *Act* on February

5, 1999. In addition, in their collective agreement, the parties agreed to a union dues clause. The Union commenced collecting union dues on May 10, 2001. The dues required to be paid by all employees covered by the Certification Order are 1.5% of salary. The Union asked members to sign dues authorization cards, which most did, to allow the Employer to deduct and remit union dues from its payroll.

[4] Mr. Davis is a member of the editorial department. He opposes the Union and, until September 1, 2001, he refused to authorize the Employer to deduct and remit union dues. Mr. Davis indicated to the Board that he thought he was entitled to pay his dues to a charity and made payments to the Regina Food Bank for the period from May 10, 2001 to September 1, 2001. Subsequently, he was advised to sign the dues authorization card and remit his dues to the Union. Mr. Davis owes $266.40 in union dues to the Union. Mr. Davis does not claim any religious exclusion.

[5] When Mr. Davis refused to authorize the Employer to deduct his dues, the Union asked the Employer to terminate Mr. Davis' employment. The Employer asked the Union to refer the matter to the Board for an order.

[6] The issue for the Board to determine is whether the Employer has violated s. 36 of the *Act* by not terminating the employment of Mr. Davis as a result of his failure to pay to the Union the periodic dues uniformly required to be paid by members of the Union.

Relevant Statutory Provisions

[7] This application is governed by ss. 36(1) and (2) of the *Act* which provide as follows:

> *36(1) Upon the request of a trade union representing a majority of employees in any appropriate unit, the following clause shall be included in any collective bargaining agreement entered into between that trade union and the employer concerned, and, whether or not any collective bargaining agreement is for the time being in force, the said clause shall be effective and its terms shall be carried out by that employer with respect to such employees on and after the date of the trade union's request until such time as the employer is no longer required by or pursuant to this Act to bargain collectively with that trade union:*

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

*and the expression **'the union'** in the clause shall mean the trade union making such request.*

(2) Failure on the part of any employer to carry out the provisions of subsection (1) shall be an unfair labour practice.

Analysis

[8] Section 36(1) of the *Act* requires all employees who are covered by the terms of a certification order to pay periodic dues to the certified union as a condition of their employment. The only exception relates to employees who claim religious exclusions under s. 5(l) of the *Act.* The provision ensures that all those who receive a benefit from union representation, whether or not they are members of the union, make financial contributions to the union. Employees who are not members of the union are required to pay the periodic dues uniformly required to be paid by members of the union.

[9] In this case, the Union has established that it requested the union security provision contained in s. 36(1) of the *Act;* that it assessed a fee structure of 1.5% of salary on all employees effective May 10, 2001; that it requested Mr. Davis to sign an authorization card; and that it requested the termination of Mr. Davis for non-payment of dues.

[10] In these circumstances, it is clear that the Union's application must succeed. Mr. Davis has been given ample warning by the Union of the consequence of not paying union dues. The Employer is required to act on the Union's request that Mr. Davis be terminated from his position at The Leader-Post for failing to tender the periodic dues uniformly required to be paid by members of the Union. In this case, the amount of non-payment amounts to $266.40.

[11] Mr. Davis will be given an opportunity to pay the sum of $266.40 to the Union on or before January 15, 2002 failing which the Employer is directed to terminate his employment for failing to tender periodic dues to the Union.

[12] An order will issue accordingly.

BEN SCHAEFFER and R. SYDNEY GLAS, Applicants v. SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION and LORAAS DISPOSAL SERVICES LTD., Respondents

LRB File No. 209-01; December 19, 2001
Vice-Chairperson, Walter Matkowski; Members: Pat Gallagher and Mike Carr

For the Applicants: Larry Seiferling, Q.C.
For the Union: Larry Kowalchuk

Decertification – Interference – Employer has no legitimate role to play in determining outcome of union representation question – Employer took steps to undermine and ridicule union supporter and conduct had an influential, interfering and intimidating effect at workplace – So long as employer's actions continue to play role in determining outcome of union representation question, true wishes of employees will be difficult, if not impossible, to determine - Board dismisses application for rescission.

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

REASONS FOR DECISION

Background

[1] Walter Matkowski, Vice-Chairperson: Ben Schaeffer and R. Sydney Glas, employees of Loraas Disposal Services Ltd. (the "Employer"), filed an application for rescission of the Order certifying Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Union") as the bargaining agent for employees of the Employer. The application was filed in the open period on October 5, 2001.

[2] The Employer replied to the application and filed a statement of employment listing 30 employees.

[3] The Union filed a reply in which it asserted that the application was made under conditions that constituted employer influence, interference or intimidation under s.9 of *The Trade Union Act*, R.S.S 1978, c. T–17 (the "*Act*"). The Union in its reply relied on the fact that the Board had dismissed three previous rescission applications.

[4] A hearing of the matter was held in Regina on October 31, 2001.

[5] Since that time, the Board has rendered a decision finding the Employer guilty of numerous unfair labour practices in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union* v *Loraas Disposal Services Ltd. et al.*, [2001] Sask. L.R.B.R. 814, LRB File No. 143-00.

Facts

[6] Ben Schaeffer ("Schaeffer") testified in support of the rescission application. Schaeffer is not new to the decertification process. He testified that he brought this application because he saw no benefit having the Union at the workplace and because the Union had recently increased its dues.

[7] Schaeffer knows that Carman Loraas ("Loraas"), the principal owner of the Employer is not happy with the Union's presence in the workplace and that Loraas would probably be happy if the rescission application was successful. Prior to the Union coming to the workplace, Loraas had expressed his unhappiness with unions, according to Schaeffer, but has not discussed that issue with him since.

[8] Henry Franke ("Franke") testified on behalf of the Union at this hearing and the three prior rescission applications. Franke has a difficult relationship with Loraas. Since the last decertification application Loraas has accused Franke of causing damage to a building structure. At that time, Franke was under the impression that Loraas wanted to beat him up again.

[9] At a meeting on December 30, 2000, Loraas ridiculed Franke in front of a number of other employees. Loraas was unhappy with Franke's productivity; Franke's reluctance to switch from an hourly rate to a piece rate; and Franke's filing of unfair labour charges making Loraas look bad.

[10] Franke is the most active member of the Union at the workplace and people know he is the "Union guy." According to Franke, Loraas does not like the Union and Loraas does not like Franke testifying against him.

[11] Franke testified that he is treated differently at the workplace in that he doesn't get two consecutive days off like drivers more junior to him. He gets sent home during slow periods before junior drivers and he does not get preferential trips to locations outside Regina.

Relevant Statutory Provision

[12] Section 9 of the *Act* reads:

> *9 The board may reject or dismiss any application made to it by an employee or employees where it is satisfied that the application is made in whole or in part on the advice of, or as a result of influence of or interference or intimidation by, the employer or employer's agent.*

Analysis

[13] We must determine if the application is being made in whole or in part on the advice of, or as a result of influence of or interference or intimidation by the Employer. In the event the Board does not find employer influence pursuant to s. 9 of the *Act*, the Board must then determine whether or not a rescission application could be brought forward, given the fact that the Board has imposed a first collective agreement with a term of December 1, 2000 to November 30, 2002.

[14] In the decision *Shuba v Gunner Industries Ltd., et al,* [1997] Sask. L.R.B.R. 829, LRB File No. 127-97, the Board sets out the factors to consider when determining whether to grant a rescission vote at 832 through 834:

> *In determining whether to grant a rescission vote, the Board must balance the democratic rights of employees to select a trade union of their own choosing, which is enshrined in s. 3 of the Act, against the need to ensure that the employer has not used coercive power to improperly influence the outcome of the democratic choice. In Wells v. United Food and Commercial Workers, Local 1400 and Remai Investment Corp., [1996] Sask. L.R.B.R. 194, the Board described its approach to the balancing task as follows, at 197-198:*
>
> > *Section 3 of The Trade Union Act reads as follows:*
> >
> > > *3. Employees have the right to organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing; and the trade union designated or selected for the purpose of bargaining collectively by the majority of the employees in a unit appropriate for*

> *that purpose shall be the exclusive representative of all employees in that unit for the purpose of bargaining collectively.*

The Board has often commented on the significance of the power which is accorded to employees under this provision to make their own choices concerning representation by a trade union. We have also stated that the rights granted under Section 3 include the right to decide against trade union representation as well as the right to undertake activities in support of a trade union. In the decision in United Food and Commercial Workers v. Remai Investment Corporation and Laura Olson, LRB Files No. 171-94 and 177-94, the Board made the following observation:

> *Counsel for the Employer urged the Board to take the same view of Ms. Olson's conduct as we took in Brandt Industries Ltd., LRB File No. 095-91. In Brandt Industries Ltd. the Board recognized the right of employees to debate the representation question vigorously and to campaign against the Union. We still regard this as an important right. In F. W. Woolworth Co. Limited, LRB File No. 158-92, the Board returned to this theme and stated that charges against individual employees of interfering in an organizing drive are particularly serious because of the chilling effect that they can have upon the democratic process which is at the heart of The Trade Union Act.*

Earlier decisions have made it clear, however, that the Board is alert to any sign that an application for certification has been initiated, encouraged, assisted or influenced by the actions of the employer, as the employer has no legitimate role to play in determining the outcome of the representation question. In the Remai Investment Corporation decision from which the above quotation was taken, the Board went on to say:

> *However, there is a distinction between two employees debating the representation question as they work side by side or while they ride to work and what Ms. Olson did. Brandt Industries Ltd. does not stand for the proposition that one of those employees can enlist the coercive power of management in order to gain the support of other employees for his or her position.*

In the case of Kim Leavitt v. Confederation Flag Inn (1989) Limited and United Food and Commercial Workers, LRB File No. 225-89, the Board made the following comment:

> *The Board has frequently commented upon the relationship between Section 3, which enshrines the employees' right to determine whether or not they wish to be represented by a union, and Section 9 of the Act. These sections are not inconsistent but complimentary. Section 3 declares the employees' right and Section 9 attempts to guard that right against applications that in reality reflect the will of the employer instead of the employees.*

The Board proceeded to make the following statement:

> *Generally, where the employer's conduct leads to a decertification application being made or, although not responsible for the filing of the application, compromises the ability of the employees to decide whether or not they wish to be represented by a union to the extent that the Board is of the opinion that the employees' wishes can no longer be determined, the Board will temporarily remove the employees' right to determine the representation question by dismissing the application.*

In Susie Mandziak v. Remai Investment Corp., LRB File No. 162-87, the Board made a similar point:

> *While the Board generally assumes that all employees are of sufficient intelligence and fortitude to know what is best for them and is reluctant to deprive them of an opportunity to express their views by way of a secret ballot vote, it will not ignore the legislative purpose and intent of Section 9 of The Trade Union Act. Section 9 is clearly meant to be applied when an employer's departure from reasonable neutrality in the representation question leads to or results in an application for decertification being made to the Board. In the Board's view, this application resulted directly from the employer's influence and indirect participation in the gathering of necessary evidence of employee support.*

This statement makes clear that Section 9 is directed at a circumstance in which an employer departs from a posture of detachment and neutrality in connection with the issue of trade union representation. There have been cases where an employer has taken a direct role in initiating or assisting an application for rescission of a certification order, and in these cases, it is fairly easy for the Board to identify the conduct on the part of the employer which constitutes improper interference. On the other hand, as the Board pointed out in

> *Rick Poberznek v. United Masonry Construction Ltd. and International Union of Bricklayers and Allied Craftsmen, LRB File No. 245-84, employer interference is rarely of an overt nature, and the Board must be prepared to consider the possibility that subtle or indirect forms of influence may improperly inject the interests or views of the employer into the decision concerning trade union representation.*

[15] In the decision *Schaeffer and Lang v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union et. al,* [1998] Sask. L.R.B.R. 573, LRB File No. 019-98, where the first decertification application relating to this workplace was dismissed as a result of employer influence, the Board concluded at 592 and 594:

> *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 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.*

[16] In its decision *Glas v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union et. al.,* [1999] Sask. L.R.B.R. 456, LRB File Nos. 031-99 to 034-99, wherein the second decertification application relating to this workplace was dismissed as a result of employer influence, the Board found at 468 and 469:

> *In the present case, we have heard no evidence that convinces us that there has been any change in the situation; indeed, we have concluded that rather than cease the subtle, and not so subtle, manipulations of the past that have so poisoned the atmosphere in the workplace, Loraas has continued to trod the same path and to employ questionable strategies.*

> *Loraas' cynical treatment of Messrs. Mayer, Wood and Franke is distasteful and, if not specifically or consciously intended to foster division among the employees, fear, loathing and insecurity in the workplace, and subject the Union to derision and ridicule for its perceived ineffectiveness, it almost certainly has had that result.*
>
> *We are convinced that in all of the circumstances a vote on the application for rescission would not accurately reflect the true wishes of the employees.*

[17] The Board imposed a first collective agreement on the parties in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Loraas Disposal Services Ltd.,* [2000] Sask. L.R.B.R. 663, LRB File No. 037-99. The duration of the first agreement was for two years commencing December 1, 2000. The Board expressed the hope that "the parties can develop a more mature and productive bargaining relationship."

[18] However, it does not appear to the Board that the Employer has changed its approach to the Union. This Board finds that this rescission application was made in part as a result of influence, interference and intimidation by the Employer. The Board findings relating to the first and second rescission applications unfortunately continue to apply to the case at hand.

[19] Loraas continues to take steps to undermine and ridicule a key Union supporter, Franke, as seen in the meeting of December 30, 2000. His conduct continues to be reprehensible and most definitely continues to have an influential, interfering and intimidating effect at the workplace. While it is true Schaeffer testified that Loraas had not discussed his anti-union sentiments once the Union came to the workplace, Loraas' actions speak louder than words.

[20] As the Board found in *Shuba, supra,* the employer has no legitimate role to play in determining the outcome of the representation question. So long as Loraas' actions continue to play a role in determining the outcome of the representation question, the true wishes of the employees will be difficult, if not impossible, to determine.

[21] We will not decide the question of whether a rescission order may be granted during the term of an imposed first collective agreement as that issue is not necessary to decide given our findings under s. 9 of the *Act*.

Conclusion

[22] For the reasons set out herein, the Board finds employer influence pursuant to s. 9 of the *Act* and dismisses the rescission application.

[23] Mr. Carr dissents from these Reasons for Decision. A written dissent will be forwarded to the parties in due course.

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 287, Applicant v. CITY OF NORTH BATTLEFORD, Respondent and NORTH BATTLEFORD FIREFIGHTERS' ASSOCIATION, LOCAL 1756 (affiliated with the INTERNATIONAL ASSOCIATION OF FIREFIGHTERS), Interested Party

LRB File No. 054-01; December 20, 2001
Vice-Chairperson, James Seibel; Members: Bruce McDonald and Leo Lancaster

For the Applicant:	Andy Iwanchuk
For the Respondent:	Kevin Wilson
For the Interested Party:	Gerry Huget

Bargaining unit – Appropriate bargaining unit – Community of interest – Part-time fire fighters do not have sufficient community of interest with general civic employees to justify labour relations imbalances which would result from addition of part-time fire fighters to general civic bargaining unit – Board dismisses application to amend general civic bargaining unit description to include part-time fire fighters.

***The Trade Union Act*, ss. 5(a), 5(i), 5(j) and 5(k).**

REASONS FOR DECISION

Background

[1] James Seibel, Vice-Chairperson: In a Certification Order dated April 4, 1968, Canadian Union of Public Employees, Local 287 ("CUPE") was designated as the bargaining agent for a unit comprising all employees of the City of North Battleford excepting, *inter alia*, ". . . all paid full-time members of the North Battleford Fire Department." In a Certification Order of the same date, North Battleford Fire Fighters' Association, Local 1756, affiliated with the International Association of Firefighters (the "Association") was designated as the bargaining agent for all paid full-time members of the North Battleford Fire Department (the "Fire Department"), with certain exceptions. Part-time members of the Fire Department are not represented by a trade union.

[2] Pursuant to ss. 5(i), (j) and (m) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), CUPE has applied to amend its Certification Order by adding thereto all by-law enforcement officers and part-time fire fighters. At the date of application there were three (3) bylaw enforcement officers and twenty (20) part-time fire fighters.

[3] In its reply to the application, the City of North Battleford (the "City"), opposed the addition of the part-time fire fighters to the bargaining unit on three grounds: that the proposed expanded bargaining unit was not an appropriate unit for the purposes of collective bargaining; that the part-time fire fighters do not share a sufficient community of interest with other civic employees; and, that there is the potential for labour relations instability if full-time fire fighters and part-time fire fighters are in two separate bargaining units. The City did not oppose the addition of the bylaw enforcement officers and admitted at the commencement of the hearing before the Board that they had a community of interest with other members of the existing CUPE bargaining unit. The City also requested a "housekeeping" amendment to the CUPE Certification Order to specifically exclude the position of Parks Director on the grounds that the exclusion had been earlier negotiated by the parties. At the commencement of the hearing before the Board, CUPE agreed to the exclusion of the Parks Director from its bargaining unit.

[4] The Association filed a reply to the application but, at the commencement of the hearing, Gerry Huget, representing the Association, sought leave to withdraw the reply, which was granted. The Association does not seek to represent the part-time fire fighters.

[5] The statement of employment filed on behalf of the City included some nineteen (19) part-time fire fighters; at the commencement of the hearing before the Board, the parties agreed to the addition of the name of Wayne Brown to the statement of employment.

Evidence

[6] Barb Plews has been the President of the CUPE local union for the past four years. She is employed by the City as an engineering technologist at the airport in the public works department. She testified that her own interaction with other City employees is fairly limited because of her outlying work location. Other City employees, some part-time, also work at locations – for example, art galleries, sewage and water plants and swimming pool – where they have limited contact with the bulk of fellow City employees.

[7] According to Ms. Plews, the bylaw enforcement officers report to the fire chief. She was unsure as to whether all of the so-called "part-time fire fighters" were actually part-time employees or, more accurately, casual employees.

[8] Don Amos has been the fire chief for the City since 1985. He oversees the entire administration of the fire department and acts as commander at larger incidents. His duties also include supervision of the bylaw enforcement officers. The City's general policing is contracted to the RCMP. The duties of the bylaw enforcement officers include parking violation enforcement, animal control and provincial court liaison.

[9] Chief Amos described the fire department as a quasi-military organization with unique job duties. Full-time fire fighters have unique hours of work and working conditions pursuant to *The Fire Departments Platoon Act,* R.S.S. 1978, c. F-14. For example, in North Battleford they work ten-hour and fourteen-hour shifts and, under that statute and their collective agreement with the City, have no right to strike in exchange for binding arbitration. There are twelve (12) full-time fire fighters in four platoons, a minimum of three of whom are on each shift. Chief Amos confirmed that the part-time fire fighters are not represented by a trade union. He maintained that neither the full-time nor part-time fire fighters have much contact with other civic employees.

[10] Chief Amos described the recruitment process and job qualifications for both, full and part-time fire fighters. The part-time recruitment process consists of seven (7) stages including, interviews, criminal record check, practical physical fitness test, medical assessment, selection, orientation and probation. Candidates are required, among other things, to complete a basic training program within one year, attend weekly fire practice and on-going training, and be available for one five-hour "duty night" in every twenty days, to be "on-call" 24 hours a day for certain weekly periods. Part-time fire fighter training does not include all of the components of the training for full-time fire fighters; it is designed to provide adequate skills to work safely at fire emergencies under the direct supervision of a full-time fire fighter or chief officer. They do not assist in inspections, public education activities, fire investigations, or vehicle and equipment inspection, testing, maintenance or repair.

[11] Apparently there had been an "agreement" between the City and an informal organization called the "North Battleford Part-time Fire Fighters Association" with respect to terms and conditions of employment. This was superseded by a City policy document dated April 28, 1997 that is signed by each part-time fire fighter. There are two types of part-time fire fighters: "outside" and "live-in." The five (5) "live-ins" are essentially "in-waiting" to become full-time fire fighters - they have full-time training, but lack fire fighting experience. They maintain their primary residence at the fire hall, where they are expected to spend most nights; they are required to work one ten-hour Sunday shift per month

without pay in lieu of payment of rent. Live-ins work 250 scheduled hours per year (330 hours including training time; 819 hours including on-call hours in the fire hall). However, they are also required to respond to emergencies as requested while in residence. They are usually recruited by career fire department within one year. By contrast, outside part-time fire fighters maintain other careers and by and large are not interested in full-time career fire fighting. They work approximately 90 scheduled hours per year (170 hours including training time) primarily in operating the alarm room and assisting full-time fire fighters as required. They have no promotional opportunities.

[12] Part-time firefighters receive a retainer fee of $65.00 per month, increasing by $5.00 per month after four (4) years of continuous service, and a further $10.00 per month after eight (8) years. In addition, they receive between $15.00 and $20.00 (depending on length of service) for each two-hour weekly practice (they must attend at least three (3) such practices each month). They are also paid between $7.50 and $10.00 per hour for each scheduled duty period or other attendance at a fire. They receive holiday pay as per *The Labour Standards Act*, R.S.S. 1978, c. L-1. They receive a federal $1,000 "volunteers" tax deduction. They do not participate in any City benefit plans except for a life insurance plan separate from other civic employees.

[13] Chief Amos expressed concern should the part-time fire fighters be included in the CUPE bargaining unit, as they would have the right to strike while the full-time fire fighters do not. He intimated that job action by the part-time fire fighters would create severe problems for the Fire Department and increase the potential risk to the full-time fire fighters the part-time fire fighters would normally assist and to the community.

Argument

[14] On behalf of CUPE, Mr. Iwanchuk argued that any potential problems associated with including the part-time fire fighters in the CUPE bargaining unit could be resolved through collective bargaining. He expressed the opinion that, given the refusal of the Association to represent the part-time fire fighters, a stand-alone unit of part-time fire fighters would present greater labour relations problems.

[15] Mr. Iwanchuk referred to *Canadian Union of Public Employees, Local 1902-08 and Service Employees' International Union, Local 333 v. Young Women's Christian Association*, [1992] 4th Quarter Sask. Labour Rep. 71, LRB File No. 123-92, where the Board stated, at 73, that one of the

factors considered in determining the appropriateness of a bargaining unit is the wishes of the employees. He also referred to the decision of the Board in *Canadian Union of Public Employees, Local 1975 v. University of Saskatchewan and Administrative and Supervisory Personnel Association*, [2000] Sask. Labour Rep. 207, LRB File No. 297-99, where it was determined that "tag-end" groups that remain outside of bargaining units as a result of failure by the employer to have the matter determined when the positions were created will be assigned by the Board to a bargaining unit without support evidence.

[16] Mr. Wilson, counsel for the City, filed a written argument that we have reviewed. He argued that the proposed amended bargaining unit would not be appropriate for the purposes of collective bargaining. Counsel referred to several of the Board's decisions regarding the factors considered by the Board in determining whether a proposed unit is appropriate, including the following: *Health Sciences Association of Saskatchewan v. Board of South Saskatchewan Hospital Centre (Plains Health Centre)*, [1987] Apr. Sask. Labour Rep. 48, LRB File Nos. 421-85 & 422-85; *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; *International Alliance of Theatrical Stage Employees and Moving Pictures Machine Operators of the United States and Canada 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. Prairie Micro-Tech Inc.*, [1994] 3rd Quarter Sask. Labour Rep. 87, LRB File No. 088-94.

[17] Mr. Wilson stressed the importance of community of interest among the members of a bargaining unit and the effect of the lack of same on the coherence and stability of the unit. Counsel emphasized the differences between the characteristics of the job of fire fighting and those of other jobs typical of general civic employment. He pointed out that CUPE does not otherwise represent bargaining units composed of or including fire fighters in Saskatchewan.

[18] Mr. Wilson referred to a decision of the New Brunswick Industrial Relations Board in *Canadian Union of Public Employees, Local 188 v. Town of Dalhousie*, [1989] NBIRD No. 6. The town's full-time fire fighters were organized, but its "call-in" fire fighters were not. Full-time fire fighters were prohibited by statute from taking strike action. Like *The Fire Departments Platoon Act, supra*, the New Brunswick legislation was silent on the status of other-than-full-time fire fighters in this regard. The New Brunswick Board dismissed an application for certification of a unit comprising the

"call-in" fire fighters as inappropriate in that the call-in fire fighters could obtain rights through collective bargaining that the town's full-time fire fighters did not have by virtue of their existing collective agreement with the town. The New Brunswick Board stated, at 2:

> *The New Brunswick Legislature, in prohibiting full time firemen from striking presumably thought fire protection an essential service and thus provided arbitration as a means for resolving the terms of a Collective Agreement.*
>
> *As such, to create a bargaining unit of call-in firemen with the result that a segment of employees within the fire department have another means available to settle bargaining differences is not consistent with the intent of the Legislature to ensure the public's expectation that fire protection will not be threatened by labour management disputes.*

[19] Mr. Wilson argued that if the Board were to dismiss the application in respect of the part-time fire fighters, they would not be denied the opportunity to organize, but rather would only be precluded from belonging to the CUPE bargaining unit. He said that the City would not oppose a bid by the Association to add them to its bargaining unit. The fact that the Association does not care to organize the part-time fire fighters is no different, he asserted, than a case where the designated bargaining representative for a particular trade division in the construction industry declines to organize tradespersons within its jurisdiction even though those employees seek to be represented.

Relevant Statutory Provisions

[20] Relevant provisions of the *Act* include 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;*
>
> . . .
>
> *(i) rescinding or amending an order or decision of the board made under clause (d), (e), (f), (g) or (h), or amending an order or decision of the board made under clause (a), (b) or (c) in the circumstances set out in clause (j) or (k), notwithstanding that a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;*
>
> *(j) amending an order of the board if:*

> *(i) the employer and the trade union agree to the amendment; or*
>
> *(ii) in the opinion of the board, the amendment is necessary;*
>
> *(k) rescinding or amending an order or decision of the board made under clause (a), (b) or (c) where:*
>
> *(i) there is a collective 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 that a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;*

Analysis and Decision

[21] We have determined to treat the application as being an application to amend CUPE's Certification Order pursuant to s. 5(k) of the *Act*. Treatment as such was not opposed by counsel for the City.

[22] In our opinion, however, inclusion of the part-time fire fighters in the bargaining unit of other civic employees represented by CUPE would result in a unit that is not appropriate for the purposes of collective bargaining.

[23] In *Plains Health Centre, supra*, the Board stated, at 50, as follows:

> *Whenever the Board is faced with a choice of two or more bargaining structures, both of which are appropriate for the purposes of bargaining collectively, it will choose the one most appropriate for the promotion of long-term industrial stability. Beyond that it has not established an exhaustive set of rules for determining an appropriate bargaining unit. Depending on the nature of the case, it may look at any number of factors, including the history of collective bargaining, the nature of the employer's operations, the size and viability of the proposed unit, the nature of the work performed*

by the employees and any particular community of interest they may have, the interchangeability of personnel, the expressed views of the employees, the union and the employer, any agreements between the parties, and so forth.

[24] In *Regina Exhibition Association, supra*, at 77, the Board recognized that the list of factors that may be considered had continued to expand as evidenced by the accumulating jurisprudence of labour relations tribunals:

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 a sufficient community of interest among the employees concerned, whether recognition of a unit will result in undue fragmentation of the total complement of employees, whether there is a history of successful collective bargaining between an employer and a union or unions, and whether other groups of employees may be disadvantaged in some way by the description of the 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.

[25] With specific reference to the community of interest factor, in *Saskatchewan Centre of the Arts, supra*, at 130, the Board identified certain items considered relevant to the underlying principle:

The Board will also have regard to a number of factors generally grouped under the heading community of interest: essentially this requires the Board to examine the employees' skills, duties, working conditions and interests in order to ensure that two groups of employees with a serious conflict of interest are not placed in the same bargaining unit.

[26] The Board has often stated that its approach to assessing the appropriateness of a proposed bargaining unit is to attempt to balance a policy interest in stable and coherent bargaining units as a basis for healthy collective bargaining with the statutory right of employees to have access to collective bargaining. The Board has also stated that the promotion of industrial stability may be an overarching consideration in determining the shape of a bargaining unit: See, *Prairie Micro-tech Inc., supra*, and *Communications, Energy and Paperworkers Union of Canada v. Arch Transco Ltd.*, [2000] Sask. L.R.B.R. 633, LRB File No. 060-00.

[27] Firefighting is, undeniably, a unique occupation among the diverse services often provided by the employees of a municipal corporation. The City's part-time fire fighters have very different terms and conditions from civic employees in the CUPE bargaining unit: they have unorthodox work schedules; they are paid by a combination of stipend and hourly wage; the status of the "live-in" part-time fire fighter is almost a kind of indentured service, part of which is offered in lieu of rent; the "outside" ones are essentially volunteers who do not aspire to make their work a career; they have little or no interaction with other civic employees; there are no career advancement opportunities for them in the general civic service and they do not aspire to same.

[28] Quite simply, the part-time fire fighters do not have a sufficient community of interest with other civic employees to justify the labour relations imbalances that would occur if they were placed in CUPE's bargaining unit. Placing them with general civic employees will alienate the part-time fire fighters from their full-time counterparts and create potentially serious operational difficulties for the Fire Department, particularly in the event of job action by the CUPE bargaining unit. The resulting complexity of labour relations between the City and its unionized employees could potentially become unacceptably unstable.

[29] It is indeed unfortunate that the Association does not seek to represent the part-time fire fighters, but the uniqueness of their position and the instability that would result from their inclusion in the CUPE civic employee bargaining unit outweighs the competing policy of their right to be represented and bargain collectively.

[30] We, therefore, find as follows:

a. The application to amend the CUPE Certification Order with respect to the part-time fire fighters is dismissed.

b. There is no issue that the classification of bylaw enforcement officer is within the scope of the bargaining unit and on that the parties agree. It is not necessary to demonstrate majority support among the three (3) employees in the classification.

c. The parties are agreed that the Parks Director should be excluded and the Certification Order will be amended accordingly.