**LINDA SMITH, Applicant v. CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1975, Respondent, and FOUR STAR MANAGEMENT and COUNTRY CLASSIC FASHIONS LTD. (each o/a "TREATS" at the University of Saskatchewan), Respondents**

LRB File No. 256-01; January 14, 2002
Vice-Chairperson, James Seibel; Members: Brenda Cuthbert and Bob Todd

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| The Applicant: | Linda Smith |
| For C.U.P.E., Local 1975: | Jim Holmes and Glenn Ross |
| For Four Star Management: | Ron Cummings |
| For Country Classic Fashions Ltd.: | No one appearing |

**Decertification – Interference – Refusal to accept or implement terms of first collective agreement imposed by Board and unilateral change to employee wages prior to filing of rescission application constitute influence, interference or intimidation within meaning of s. 9 of *The Trade Union Act* – Board exercises discretion to refuse vote and dismisses application for rescission.**

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

## REASONS FOR DECISION

### Background and Facts

**[1] James Seibel, Vice-Chairperson:** In a Board Order dated November 24, 1997, Canadian Union of Public Employees, Local 1975 (the "Union") was designated as the bargaining agent for a unit comprising all employees of Treats at its locations at the University of Saskatchewan, Saskatoon, excepting the general manager and the manager of Treats Emporium. Treats is a purveyor of coffee and baked goods with two locations at the University: a food court location with bakery in the lower level of the Place Riel complex ("lower Treats"), and a smaller sales-only outlet – the Treats Emporium – located in the upper level of the same complex ("upper Treats"). The Applicant, Linda Smith, is employed as head baker at lower Treats. She applied for rescission of the certification Order on November 27, 2001.

**[2]** At the time of certification, both upper Treats and lower Treats were owned by Four Star Management, a closely-held company owned by Ron and Faye Cummings, who also owned a non-unionized Treats location in a shopping mall elsewhere in Saskatoon. Following certification and unsuccessful attempts to bargain a first collective agreement, the Union obtained a strike mandate and applied to the Board for assistance in achieving a contract. In *Canadian Union of Public*

*Employees, Local 1975 v. Treats at the University of Saskatchewan*, [2001] Sask. L.R.B.R. 715, LRB File No. 220-98, the Board imposed a first contract with a two-year term expiring December 31, 2001.

**[3]** In her application and testimony, Ms. Smith claimed that Four Star Management sold lower Treats to Country Classic Fashions Ltd. effective April 14, 2001. According to Ms. Smith, the principal of Country Classic Fashions Ltd. is one Debbie Mitchell. Jim Holmes, a Union representative, contacted Ms. Mitchell in early summer, 2001, with respect an employee who had been terminated. She advised Mr. Holmes that she was unaware that lower Treats was unionized and referred him to her solicitors.

**[4]** Ms. Mitchell filed a statement of employment with respect to employees at lower Treats listing 13 names. No statement of employment was filed with respect to the employees at upper Treats. In preparing her application for rescission, Ms. Smith attempted, unsuccessfully, to obtain information about who was employed at upper Treats. She estimated that there were approximately 18 employees in total at both locations. Neither Four Star Management nor Country Classic Fashions Ltd. filed a reply to the application. No application has been filed with the Board relating to successorship pursuant to s. 37 of *The Trade Union Act*, R.S.S. c. T-17 (the "*Act*").

**[5]** Mr. Holmes testified that both Four Star Management and Country Classic Fashions Ltd. have consistently refused to sign, or implement the provisions of, the collective agreement imposed by the Board although Four Star Management has provided notice to terminate the agreement. Both Ms. Smith and Mr. Holmes testified that Country Classic Fashions Ltd. unilaterally increased the wages of employees at lower Treats in early May, 2001. The employees' wages, with the exception of Ms. Smith, were again unilaterally increased on December 1, 2001. Ms. Smith said that her wage was unilaterally decreased on December 1, 2001, stating that the reason offered by Ms. Mitchell was that "her lawyer told her she had to." She also claimed that the title of "assistant manager" that she had while employed by Four Star Management, was removed by Ms. Mitchell, although her duties did not change and she, in fact, assisted Ms. Mitchell to learn the operation of the business and acts as manager in her absence.

**[6]** In her application, Ms. Smith alleged, among other things, that the Union failed to make an appropriate effort to represent the employees in the bargaining unit. In its reply, the Union denied the allegation and alleged that the application was brought as a result of employer influence. The bulk of the evidence adduced at the hearing before the Board was in respect of these issues. However, because of the view that we have taken of this case, it is not necessary to set forth a summary of the evidence or the arguments of the parties.

**Analysis and Decision**

**[7]** The application seeks rescission of the certification Order applying to both upper and lower Treats at the University of Saskatchewan. The uncontradicted evidence is that neither Four Star Management nor Country Classic Fashions Ltd. has accepted or implemented the provisions of the collective agreement imposed by the Board. In addition, Country Classic Fashions Ltd. made unilateral changes to employees' wages prior to the filing of the rescission application. In our view, the conduct of both companies constitutes influence, interference or intimidation in the making of the application within the meaning of s. 9 of the *Act*. In the circumstances we exercise our discretion to refuse to order a vote on the application for rescission.

**[8]** Accordingly, the application is dismissed.

**GARY BRESCH, Applicant v. SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Respondent, and 617400 SASKATCHEWAN LTD. cob as ALBERT STREET GARDEN MARKET IGA, Employer**

LRB File No. 162-01; January 15, 2002
Chairperson, Gwen Gray, Q.C.; Members: Leo Lancaster and Maurice Werezak

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

**Decertification – Interference – Employer discriminated against union members by assigning unfavourable shifts and engaged in intimidating tactics by commenting on union buttons, inquiring into union activity and communicating employer's opposition to union to bargaining unit members – Employer's position in collective bargaining has unduly delayed achievement of first collective agreement – Under circumstances, impossible to canvass employees through vote to determine true wishes – Board dismisses application for rescission.**

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

## REASONS FOR DECISION

### Background

**[1] Gwen Gray, Q.C., Chairperson:** Gary Bresch, is an employee of 617400 Saskatchewan Ltd. carrying on business as Albert Street Garden Market IGA (the "Employer" or "Albert Street IGA") and he brought an application to rescind the certification Order relating to the Employer in favour of Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Union"). The Board issued the certification Order on September 22, 1999. The Union filed for first collective agreement assistance on July 12, 2001 and that application remains pending before the Board. No first collective agreement has been concluded.

[2] The issue on this application is whether a vote should be conducted among employees of the Employer to determine if they still support the Union. The Union alleges that the application for rescission has been made in part on the advice of, or as a result of the influence or intimidation of the Employer and should be dismissed under s. 9 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*").

## Facts

[3] Mr. Bresch is the produce department head at Albert Street IGA. He campaigned in the workplace to decertify the Union by circulating leaflets to other employees in the workplace, on their cars and in the coffee and smoking areas of the workplace. Mr. Bresch hired lawyers to assist him with the application and he obtained the name of a lawyer through a high school friend. Mr. Bresch has appealed to other employees for financial assistance but to date has not received any money to help pay the legal fees of the application. Mr. Bresch denied that management of the Employer played any role in the campaign to decertify the Union.

[4] Mr. Bresch indicated that he opposed the Union from the outset. He was not present at the workplace when the original certification drive was underway. He was convinced not to join the Union by his mother and other relatives who had experience with the Union at other workplaces. As a non-member, he is not entitled to attend Union meetings except the strike vote meeting. At this meeting, he objected to the manner in which the strike ballots were counted. Mr. Bresch complained that the Union did not keep employees informed about collective bargaining and he found the information provided by the Union to be confusing.

[5] Mr. Bresch believes that most employees at Albert Street IGA are not interested in union issues, particularly those dealing with pensions, benefits and seniority. The Employer hires a large contingent of students and has a high turnover rate in its employee complement. Mr. Bresch thought that employees are also frustrated by the Union's lack of progress in achieving a first collective agreement.

[6] Mr. Bresch circulated information to employees in the course of the decertification campaign that suggested that the Union was involved in criminal activity. He attached information obtained from a website relating to a strike in Ontario involving RWDSU. Mr. Bresch was not aware that the website did not pertain to the Union in this application which is not affiliated with RWDSU in Ontario. In addition, Mr. Bresch circulated information accusing the Union of engaging in improper organizing tactics. The material also criticized the character of the first chief shop steward. Mr. Bresch's material was highly inflammatory in its tone towards the Union.

[7] Mr. Bresch denied that he had any knowledge of the views of Wayne and Joan Zook, who are the franchisees of Albert Street IGA, in relation to the Union. He did recall overhearing a conversation between Mr. Zook and Patricia Paslowski, about the Union at a social gathering at Boston Pizza but claims that he did not participate in the conversation or pay much attention to it.

[8] In contrast to Mr. Bresch's evidence, all of the remaining witnesses, including a witness called by the Employer, understood that the franchise owners, Mr. and Ms. Zook, opposed the unionization of their employees. One witness, Ms. Paslowski, recalled one conversation at Boston Pizza where Ms. Paslowski and Mr. Zook engaged in a heated discussion about the benefits of unionization. The occasion was a social occasion involving Mr. Zook, Ms. Paslowski, her spouse, Mr. Bodnar, who was then a department head at Albert Street IGA, and Mr. Bresch. Ms. Paslowski is not an employee of the store. Her evidence left the impression that Mr. Bresch could not have helped but know from this conversation that Mr. Zook was opposed to unions.

[9] In addition, Ms. Paslowski and her spouse, Mr. Bodnar, recalled a conversation with Mr. Bresch in which Mr. Bresch repeated the Employer's view of unions to Ms. Paslowski and Mr. Bodnar. They understood from what Mr. Bresch was saying that he was repeating a conversation he had had with Mr. Zook. Mr. Bresch denied that he was repeating a conversation he had with Mr. Zook as he denied in general discussing the union issue with the Employer. He claimed that he was speculating on what the Employer would do if the Union was successful. However, according to Ms. Paslowski and Mr. Bodnar, the statements made by Mr. Bresch were similar to the statements made by Mr. Zook.

[10] Mr. Bodnar has been terminated from his employment with the Employer and his termination is before the Board on an application brought by the Union.

[11] Mr. Bodnar, as a member of the supervisory team, attended regular Monday meetings with the department heads and managers. He recalled that, prior to the organizing drive, Mr. Zook encouraged department heads and store managers to ask questions on store or union activity in the store. He also recalled that Ms. Zook approached him after the organizing drive and asked him how he had voted. He indicated that he had signed a card in favour of the Union. Later, Ms. Zook asked him who had attended a Union meeting. As a result of these occurrences, Mr. Bodnar stopped attending Union meetings.

[12] Mr. Bodnar recalled conversations with Mr. Zook where Mr. Zook told Mr. Bodnar to assign unfavourable shifts to a member of the bargaining committee. Mr. Bodnar did so and the person stopped participating in the Union. He also recalled that Mr. Zook talked with him a number of times about the Union consisting of a bunch of radicals, that it was costing him a pile of money and that he would close the doors.

[13] Barry Davidson, a former department head who no longer works at Albert Street IGA, testified that he recalled Mr. Zook telling department heads and store managers to be aware of any union activity at the store and to report it to him. He also recalled Mr. Zook saying that the place would be a parking lot before he signed a collective agreement. Mr. Davidson quit his employment because of the stress related to the unionization of the workplace.

[14] Randy Hoffman is the Union representative responsible for negotiating a collective agreement with the Employer. Mr. Hoffman painted a picture of negotiations characterized by very slow progress on most items, including scope. Mr. Hoffman had the impression that the Employer was holding out for a first collective agreement application. At the time of applying for first collective agreement assistance, a majority of the collective agreement provisions were outstanding. The Employer insists that its business is more comparable to the highly unorganized fast food industry, as opposed to the highly organized retail food store industry. On the other hand, at the outset of bargaining, the Union was attempting to bargain on a multiple location basis.

[15] Susan Buxton, an employee in the bakery department, testified that James Dally, an out-of-scope manager, handed out the decertification literature that Mr. Bresch had prepared to employees in the store. Ms. Buxton recalled that this incident occurred at the end of her shift while she was talking to one of her co-workers near a sampling station. She did not recall the name of the co-worker. She recognized the literature that Mr. Dally was handing out because of its distinctive title page which read "Albert Street Garden Market IGA Employees – Decertifying Our Store" in large print. Ms. Buxton testified that she saw employees take literature from Mr. Dally and that, after he went into a back area of the store, he returned carrying fewer copies of the decertification literature.

[16] Ms. Buxton also testified that she saw copies of the decertification literature prepared by Mr. Bresch at the customer service department. She saw an employee take a copy of the literature from this station.

[17] Ms. Buxton supports the Union and she attempted to post Union literature at the workplace. Mr. Zook told her to take it down and to get his approval before placing any more Union literature in the workplace. Ms. Buxton also noted the Mr. Bresch was also told not to post any more literature in the workplace.

[18] Ms. Buxton noted that when she wore a Union button to work, Ms. Zook remarked to her that she read the button as "we hate Joan and Wayne." Ms. Buxton was not personally intimidated by the remark but she felt that Ms. Zook had intimidated other employees by such remarks.

[19] One other employee, Trina Lovis, testified that Ms. Zook made similar snarly comments to her about wearing a Union button.

[20] The Employer called Mr. Dally as a witness. He denied that he had handed out decertification material to employees at the store. Mr. Bresch works under Mr. Dally and they are friends. He was aware of Mr. Bresch's feelings toward the Union. However, he denied that he played any role in the rescission application. He recalled Mr. Zook asking managers and department heads report on any union activity; however, Mr. Dally did not see any such activity and did not report on any events to Mr. Zook. Mr. Dally was candid in admitting that he knew that Mr. Zook preferred not to have a union in the store.

## Relevant Statutory Provisions

[21] The right of employees to choose a trade union is set out in s. 3 of the *Act* 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.*

[22] Section 9 provides the Board with discretion to reject an application for rescission as follows:

> *9 The board may reject or dismiss any application made to it by an employee or employees where it is satisfied that the application is made in whole or in part on the*

*advice of, or as a result of influence of or interference or intimidation by, the employer or employer's agent.*

## Argument

[23] Mr. Bresch argues that he has provided the Board with evidence of majority support for the application for rescission and the Board ought to order a vote among employees. The Union's attempts to show employer intimidation were refuted by its own witnesses who testified that they were not intimidated by Ms. Zook's comments. In addition, the evidence of Ms. Buxton should not be preferred over the evidence of Mr. Dally. In relation to the work environment, the workplace is not poisoned by prior unfair labour practices on the part of the Employer, nor was the Employer unduly delaying bargaining.

[24] The Employer disputes the characterization of its conduct as constituting intransigent bargaining. It notes that the Union had proposed a rich agreement, including provisions such as multiple location sites that it could not press to impasse.

[25] The Union argues that the test for credibility of witnesses does not require the Board to determine that one witness is lying. The test requires the Board to assess the likelihood of the evidence in light of the total evidence heard by the Board to determine which version of the facts is more likely or probable. The Union asks the Board to dismiss the application for rescission because an application for first collective agreement assistance is pending before the Board. If a first collective agreement is issued, it is for a mandatory period of two years. A rescission application, if granted, would conflict with the Board's remedial authority under s. 26.5 of the *Act* by ending or terminating the collective agreement. The Union also argues that the Employer influenced or interfered with the application by engaging in discriminatory conduct against Union members and by supporting the rescission application. The Union also argues that the Employer has bargained to rescission by pressing unreasonable positions at the bargaining table.

### Analysis

[26] The Board has established a general policy that applications for rescission and first collective agreement assistance will be determined in the order received by the Board: see *Glas v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union,* [1999] Sask. L.R.B.R. 123, LRB File No. 031-99 at 126; *National Automobile, Aerospace, Transportation and General*

*Workers Union of Canada (CAW Canada) v. Saskatchewan Indian Gaming Authority Inc.*, [2001] Sask. L.R.B.R. 42, LRB File No. 092-00. In the present case, this would result in the Board deferring its decision on the rescission application until the first collective agreement application is heard and determined.

[27] In this case, however, having heard the evidence on the rescission application, the Board has concluded that the rescission application ought to be dismissed under s. 9 of the *Act* as it has been brought in whole or in part as the result of the Employer's influence or interference or intimidation. As a result, there is no practical reason for deferring the Board's decision until the conclusion of the application for first collective agreement assistance.

[28] The evidence demonstrates that the Employer has engaged in a course of conduct that makes clear its opposition to the Union and to the employees' choice of unions. The Employer has engaged in discriminatory conduct against members of the Union by directing that they be assigned unfavourable shifts. Mr. and Ms. Zook have engaged in intimidating tactics in relation to known Union supporters by commenting on Union buttons; by inquiring into Union activity; and by communicating the Employer's opposition to the Union to employees in the bargaining unit. We also find that the positions taken by the Employer in collective bargaining have unduly delayed the achievement of a first collective agreement. This is particularly the case in relation to the Employer's assertion that its place of business is more comparable to the fast food industry than the retail grocery industry.

[29] While Mr. Bresch denied that the Employer's opposition to the Union influenced the bringing of the application for rescission, we do note that one of the reasons given by Mr. Bresch for employee frustration with the Union was the delay in achieving a first collective agreement. This delay was caused by the Employer's bargaining strategy and no doubt contributed to employee frustration with the unionization process. In these circumstances, it is not possible to canvass employees through a vote to determine their true wishes as the Employer's conduct has rendered that assessment impossible through its bargaining stance and through its intimidating and interfering conduct.

[30] For these reasons, the application for rescission is dismissed.

# CAROLYN MCRAE, Applicant v. SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, Respondent

LRB File No. 002-02; January 16, 2002
Chairperson, Gwen Gray, Q.C.; Members: Bob Todd and Don Bell

The Applicant: Carolyn McRae
For the Respondent: Rick Engel

**Union – Constitution – Union must follow principles of natural justice in relation to union run benefit plans – Applicant's allegations do not raise specific complaint in relation to union's handling of long term disability claim but directed toward changing internal union structure – Matters of internal union structure not reviewable under s. 36.1 of *The Trade Union Act* – Board dismisses interim and final applications.**

***The Trade Union Act*, ss. 5.3, 25.1 and 36.1.**

## REASONS FOR DECISION

### Background

**[1] Gwen Gray, Q.C., Chairperson:** The applicant, Carolyn McRae, filed an application for interim relief seeking orders from the Board placing the Saskatchewan Government and General Employees' Union (the "Union") in trusteeship. Ms. McRae is a former government employee and she has had an ongoing dispute with the Union relating to her claim for long term disability benefits. The Union runs its own long term disability plan for its members. At the hearing of this matter, we concluded that Ms. McRae's application for interim relief and her application for final relief ought to be dismissed. These Reasons explain the Board's decision.

**[2]** Ms. McRae applied earlier to the Board for an unfair labour practice order against the Union for its failure to fairly represent her in relation to her long term disability claim. This matter was settled by the parties in a pre-hearing meeting with the Vice-Chairperson of the Board. A further hearing of the Board was sought by Ms. McRae in relation to the matter but, on September 7, 2000, the Board held that the pre-hearing settlement included the withdrawal of the duty of fair representation application and declined to hear the matter further: see *McRae v. Saskatchewan Government and General Employees' Union*, [2000] Sask. L.R.B.R. 527, LRB File No. 077-00.

**[3]** In the settlement agreement, the parties agreed to refer Ms. McRae's outstanding claims against the long term disability plan to an arbitrator acting under the plan. At the time of the last hearing, the arbitrator had just rendered his award granting Ms. McRae certain retraining benefits. The arbitrator retained jurisdiction to deal with any disputes arising from his award.

**[4]** In the present application, Ms. McRae details in point form much of the history of her dispute with the Union. In relation to her present circumstances, Ms. McRae has been cut off further benefits by the Union for her failure to continue in the retraining program. The Union is willing to refer this matter back to the arbitrator to determine if Ms. McRae was properly suspended from long term disability benefits but Ms. McRae has not taken up this offer.

**[5]** The Board has a long-standing practice of deferring to arbitration where the issue in dispute can be resolved by an arbitrator and this practice has been approved by the Saskatchewan Court of Appeal in *United Food and Commercial Workers v. Westfair Foods Ltd.* (1992), 95 D.L.R. (4th) 541 (Sask. C.A.). Normally, the type of arbitration that is deferred to is arbitration established under the terms of a collective agreement or the mandatory provisions contained in *The Trade Union Act*, R.S.S. 1978, c. T-17.

**[6]** In this case, the arbitration is established under the provisions of the long term disability plan, which itself is a creation of the conventions of the Union and forms part of the Union's constitution. Arbitration is the method chosen in the plan for resolving disputes between Union members and the plan administrator over entitlement to plan benefits. According to an Order of the Saskatchewan Court of Queen's Bench in *McRae v. Saskatchewan Government Employees Union*, unreported, May 30, 2000, arbitration awards that are issued under the Union's long term disability plan are subject to *The Arbitration Act, 1992*, S.S. 1992, c. A-24.1. This entitles a member to seek judicial review of an arbitration award in the Saskatchewan Court of Queen's Bench on grounds set out in *The Arbitration Act, 1992.*

**[7]** In these circumstances, where the plan itself establishes arbitration as the dispute resolution mechanism and the arbitration itself is subject to review under *The Arbitration Act, 1992* by a superior court, the Board will take special care to avoid delving into the merits of the applicant's long term disability claim and will focus instead, as we must, on the statutory grounds that are available

under *The Trade Union Act*, R.S.S. 1978, c. T-17 to review the applicant's complaints against the Union.

**[8]** The only provision contained in *The Trade Union Act* that touches internal union matters is s. 36.1 which reads 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.*

**[9]** The duty of fair representation provision contained in s. 25.1 of *The Trade Union Act* refers to the right to be fairly represented in grievance or rights arbitration proceedings under a collective agreement, that is, in disputes between a union member and the employer, not between a union member and the union itself: see *Lien v. Chauffeurs, Teamsters and Helpers Union, Local 395,* [2001] Sask. L.R.B.R. 395, LRB File No. 203-00.

**[10]** We will assume for the purpose of this application that s. 36.1(1) applies to disputes between members, the Union and the plan administrator, and that it requires the Union to apply the principles of natural justice in relation to members' claims for benefits under the long term disability plan. In *Staniec v. United Steelworkers of America, Local 5917,* [2001] Sask. L.R.B.R. 405, LRB File No. 205-00, the Board noted at 419 that "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." We do think, however, that the operation of union benefit plans is a matter of great significance to union members and constitutes a matter of membership that would attract Board supervision under s. 36.1(1).

**[11]** A useful discussion of fair procedure principles is set out in M. MacNeil et al., *Trade Union Law in Canada* (Aurora: Canada Law Book, 2000) at 9-8 as follows:

> *The principle behind rules of procedure is that individual rights are more likely to be respected and correct decisions made when a decision-maker follows procedural rules which enable the individual to participate through a hearing in the decision-making*

> *process, and where the decision-maker is not biased, in the sense of having prejudged the issue. The precise content of a duty to act fairly varies with the circumstances of the particular cases, but there are a number of criteria that are often referred to. The first requires notice to be given to the individual if there is an intention to act in a way that will affect his or her interests. The second requires that an individual be given an opportunity to make representations about the proposed decision. This may require, in some cases, a hearing in which the individual has the right to be represented by counsel, to present evidence and to cross-examine witnesses. The decision-maker must make the decision on the basis of evidence that was presented at the hearing, and not on the basis of information that may have become available by some other means. In addition, fairness requires that the decision-maker not be biased or have the appearance of bias, in the sense of having a material interest in the outcome of the case. . . .*

**[12]** In the context of trade unions, the courts have imposed standards of fair procedure on internal union matters, notably disciplinary matters. In relation to union run benefit plans, similar standards may be imposed by the Board acting on its supervisory powers under s. 36.1(1). The requirements of natural justice in this context are that a union member be provided an opportunity to present his or her evidence and given an opportunity to respond to evidence that may be used against him or her in the determination of his or her benefit entitlements. There is no statutory or public policy requirement that the member be given an oral hearing, nor is there any requirement that the member be given a right of appeal, although these processes may be required under the union's constitution or the plan documents and, if so, will be considered in determining if fair processes have been applied to make decisions on benefit entitlements.

**[13]** The issue on this application is whether the Board's supervisory role under s. 36.1(1) is in any way engaged by the applicant in her application. On the interim application, this discussion is framed in the first part of the test for the granting of interim relief which asks if the applicant has presented an arguable case. In the context of the main application, the question is framed by the question of whether, if the applicant proved all of the matters alleged in the application, could he or she establish a violation of s. 36.1(1) of *The Trade Union Act*?

**[14]** We have not taken a strict approach to our examination of the material filed in this application by Ms. McRae. Instead, we have attempted to decipher the substance of her complaints, ignoring the peculiar claims she has made with respect to possible legal interpretations, particularly those related to tenancy in common and the like. We recognize that Ms. McRae is not legally trained, nor is she a union staff representative. We also recognize that she has suffered an illness that she claims has affected her cognitive abilities. In this context, it is important for the Board to attempt

to "get to the bottom" of the complaints and determine if there is anything of substance that would engage the Board's jurisdiction under s. 36.1(1) of *The Trade Union Act.*

**[15]** In our view, none of the matters raised by Ms. McRae fall within the purview of the Board's jurisdiction under s. 36.1(1). Ms. McRae fundamentally disagrees with the arbitration award issued under the terms of the plan documents and with the Union's subsequent actions in discontinuing her benefits during the retraining period. Ms. McRae also raised issues relating to the payment of life insurance premiums, pension plan benefits and the like. All of these matters are within the jurisdiction of the arbitrator or a court on application for judicial review of the arbitrator's award, not this Board. The determination of eligibility for various benefits under the long term disability plan itself remains with the plan administrator and the arbitrators who are appointed to hear such disputes.

**[16]** The only allegations that may give rise to some concern under s. 36.1(1) are Ms. McRae's claims that there is no shop steward system available to long term disability claimants for the filing of grievances, no system of keeping them informed of activities within the Union which affect them, and no notification of or voice at Union meetings or convention. Ms. McRae concludes, therefore, that there is no representation of long term disability claimants by the Union. At the same time, the material discloses that she was represented in the arbitration process by Betty Pickering, a staff representative of the Union. In our view, the allegations do not raise a specific complaint in relation to the Union's handling of Ms. McRae's long term disability application but are rather directed toward changing the internal structures of the Union. In this regard, Ms. McRae indicated at the hearing that she was more interested in getting the Union straightened out than she was in resolving her long term disability problems. As the Board noted in the *Staniec* case, *supra*, not all decisions made by a union will be reviewable under s. 36.1(1). In our view, matters of internal structure are not reviewable under that provision.

**[17]** In conclusion, we find that Ms. McRae did not raise an arguable case such that the Board could entertain an interim application. Secondly, we find that even if the facts asserted by Ms. McRae were proven, the application does not raise any matters which could constitute a breach of s. 36.1(1).

**[18]** For these reasons, the interim and final applications are dismissed by the Board.

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

LRB File No. 092-00; January 21, 2002
Chairperson, Gwen Gray, Q.C.; Members: Brenda Cuthbert and Bob Todd

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

**Collective agreement – First collective agreement – Where parties have engaged in extensive and protracted negotiations, outstanding issues are complex, employer not typical employer and bargaining at an impasse despite considerable movement by one party, Board concludes that collective bargaining has broken down – Under circumstances, appropriate for Board to assist parties to conclude first collective agreement.**

**Collective agreement – First collective agreement – After reviewing Board agent's recommendations and positions of parties on outstanding collective bargaining issues, Board imposes collective agreement terms relating to outstanding issues.**

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

## REASONS FOR DECISION

### Background and Facts

**[1] Gwen Gray, Q.C., Chairperson:** National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (the "Union") applied for certification of employees of Northern Lights Casino (the "Casino") on May 11, 1999 and was certified on November 30, 1999. On December 6, 1999, the Union served notice to bargain on the Saskatchewan Indian Gaming Authority Inc., (the "Employer"). Before bargaining actually commenced, the Union applied for an unfair labour practice in relation to allegations concerning the Employer's bargaining conduct and the Employer's conduct in relation to permitting an employees' association to organize on company time in opposition to the Union. On March 14 or 15, 2000, the parties met to commence collective bargaining. On March 24, 2000, the Employer filed an unfair labour practice against the Union alleging that the Union was bargaining in bad faith by making various public statements against the Employer and its counsel. After the second bargaining meeting which was held on March 28, 2000, the Union applied for first collective agreement assistance from the Board pursuant to s. 26.5 of *The Trade Union Act*, R.S.S. 1978, c.T-17 (the *"Act"*).

**[2]** Both unfair labour practice applications were originally scheduled to be heard before the Board on May 1, 2000. On that date, however, the parties entered into an agreement to settle both applications. The terms of this agreement are set out in the Reasons for Decision issued on this application on January 25, 2001, reported at [2001] Sask. L.R.B.R. 42. In the agreement, the parties agreed to seek the assistance of a conciliator from Saskatchewan Labour and set 5 days in May, 2000 for collective bargaining. The Employer also agreed to convene a meeting of employees on May 21, 2000; to advise the employees that the employees' association had no jurisdiction in the Casino; and to permit the Union to meet separately with employees to discuss bargaining issues and the role of the Union. The Executive Director of the Labour Relations & Mediation Division of Saskatchewan Labour was also present to explain the role of the Union.

**[3]** The parties held twelve conciliation sessions between May 1, 2000 and September 26, 2000. On September 28, 2000, the Union renewed its request for first collective agreement assistance from the Board and filed supplementary material with its request. At that time, the Union complained in its request that the Employer's bargaining committee did not have authority from the Employer to negotiate wages and classifications.

**[4]** In its reply to the supplementary material filed by the Union on this application, the Employer disputed that first collective agreement assistance was required.

**[5]** On October 13, 2000, Charmaine Evans, an employee in the bargaining unit, applied to rescind the Union's certification Order. In the Reasons for Decision referred to above, the Board ruled that the application for first collective agreement assistance would be heard and determined before the application for rescission.

**[6]** A further list of disputed issues was filed by the Union on November 23, 2000.

**[7]** On January 25, 2001, the Board appointed a Board agent to assist the parties in the resolution of their first collective agreement and, failing such agreement, to report to the Board on (a) whether the Board should intervene to assist the parties to conclude a first collective agreement; and (b) if so, what terms should the Board impose in the first collective agreement.

**[8]** The Board agent met with the parties on March 22 and 23 and April 26, 2001 and filed his report with the Board on June 5, 2001. The Board agent made various recommendations to the Board for settling the outstanding issues which include (1) union security; (2) hours of work; (3) bulletining and filling of positions; and (4) wages.

**[9]** The Board convened to hear the application on August 20, 2001 at which time the Employer raised three preliminary issues. The Board addressed these issues in Reasons for Decision dated September 18, 2001 reported at [2001] Sask. L.R.B.R. 704, LRB File No. 092-00. The Board provided the following directions to the parties with respect to the hearing of this matter at 714:

> *(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.*
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> *(3) the Board agent will not be called by either party as a witness in the proceedings.*

**[10]** Doug Olshewski, national representative of the Union, was the chief negotiator for the Union until July, 2000 when he went on temporary leave from the Union. He was replaced by Dale Paterson, area director of the Union, for Saskatchewan and Manitoba. Mr. Olshewski and Mr. Paterson testified on behalf of the Union. Mr. Seiferling led the negotiations for the Employer.

**[11]** Mr. Olshewski described the difficult nature of the bargaining commencing with opening delays caused in part by the Employer's applications seeking judicial review of the Board's decision on the certification application. After the certification Order was issued, Mr. Olshewski telephoned Dutch Lerat, chief executive officer of the Employer, and left a message for Mr. Lerat to call him to

arrange bargaining dates. According to Mr. Olshewski, Mr. Lerat returned his phone call and left a voice message saying that "he didn't give a damn if you [Mr. Olshewski] returned his phone call." Some time after this inauspicious start, Mr. Olshewski received a letter from the Employer indicating that he should deal with Sharon Agecoutay, vice-president – human resources of the Employer and Mr. Seiferling in relation to collective bargaining.

**[12]** The Employer filed for judicial review of the Board's decision on the certification application and initially advised the Union that it did not wish to commence collective bargaining while the matter was before the courts. However, on January 27, 2000, Mr. Seiferling told Mr. Olshewski that he was going to be leading the negotiating team and asked Mr. Olshewski to call his office the week of February 2, 2000 to arrange bargaining dates. As a result, a half-day was scheduled for March 14, 2000.

**[13]** On March 14, 2000 bargaining proposals were exchanged between the parties. A second meeting was arranged for March 28, 2000. Mr. Olshewski testified that the tone of the initial bargaining meetings was not good. According to Mr. Olshewski, the Employer warned the Union that First Nations' status was an important issue in the negotiations and that it would take priority over seniority in hiring and promotion clauses and that, if the Union was not prepared to agree with this proposal, there was no point in continuing to bargain. The Union was also informed that the Employer was prepared to go to the Supreme Court of Canada on the issue of constitutional authority over its gaming operations.

**[14]** The seniority issue was tied to the Employer's mandate of providing employment to First Nations' peoples and to its desire to achieve a target of 80% First Nations' employment in each classification within its casinos. Part of the controversy surrounding this issue was the Employer's conduct in seeking an exemption from the Saskatchewan Human Rights Commission. Mr. Olshewski testified that the Employer indicated during a court hearing that an exemption application had been sought from the Canada Human Rights Commission. Later, the Union was informed that an exemption had been obtained from the Saskatchewan Human Rights Commission. The Union was not consulted by the Employer or the Saskatchewan Human Rights Commission in the course of applying for or granting the exemption.

**[15]** In its May 26, 2000 letter to the Employer the Saskatchewan Human Rights Commission set out the history of its exemption orders for the Employer along with the terms of its most recent order as follows:

> *The Saskatchewan Indian Gaming Authority (SIGA) was first granted an exemption by letter to Lester Lafond dated September 14, 1995. The exemption allowed SIGA to give preference to First Nations peoples in employment and job advertisements. The exemption was later amended to provide preference to be given until the workforce was comprised of 80% First Nations' persons in each classification. That exemption was extended up to September 30, 1999 at which time it lapsed because we did not receive any indication that SIGA wished it to continue.*
>
> *Up to the time of lapsing, the exemption did not provide for preference to be given to First Nations in "training, promotional opportunities and retention" as referred to in your letter. You have requested a broader exemption than was granted in the past.*
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> *The Commission is well aware of the very high unemployment rate of First Nations and other Aboriginal peoples. We strongly support employment equity programs that seek to address this. If equity is to be achieved, Aboriginal peoples should be employed throughout a workforce, including decision-making positions.*
>
> *Therefore, the Commission supports an initiative for First Nations peoples to be given preference to achieve up to 80% proportion of every job classification in the four casinos and the head office. To accomplish this, you may establish a policy that 80% of the "retraining, mentoring and promotional opportunities" will be given to First Nations peoples. You have flexibility in developing the policy. However, the end result must be that at least 20% of the non-First Nations individuals also receive the benefit of training, mentoring and promotional opportunities. Otherwise, the preference goes beyond that granted by the Commission and could result in a complaint being filed with us.*
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> *This is in addition to the exemption that allows SIGA to advertise for and hire First Nations peoples up to 80% of the workforce.*
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> *This exemption is granted for a two-year period, ending May 31, 2002.*

**[16]** Mr. Olshewski testified that, in his opinion, a union needs to achieve three goals in first collective bargaining – a seniority clause, union dues and a grievance procedure. He testified that the parties made progress in other areas but did not make progress in these three key areas. The Employer wanted First Nations' status to take precedence over seniority, and the Employer wanted an elder to be used to solve employee grievances. In addition, the Employer refused to deduct union dues unless the Union provided it with a dues authorization card. On the second issue, Mr. Olshewski testified that one of his committee members broke down at the bargaining table over the

Employer's proposal that grievances first be heard by an elder. In relation to the dues issue, Mr. Olshewki was of the view that the Employer was forcing the Union to chase down employees for union dues and threaten them with termination of their employment, in order to collect the dues in question. Mr. Olshewski also noted that the Employer took the position that it was not required to provide employees' telephone numbers and addresses to the Union.

**[17]** In Mr. Olshewski's opinion, the Employer was engaged in surface bargaining. He testified that the Employer was prepared to offer what was already contained in its employee manual with one or two other items thrown in but nothing more. He complained that most of the movement in collective bargaining came from the Union side of the table.

**[18]** Mr. Paterson also gave evidence on behalf of the Union. Mr. Paterson took over bargaining for Mr. Olshewski during the summer months of 2000 and on April 26, 2001. In relation to the collective bargaining on wages, the Union originally made a wage proposal seeking a $3/hour wage increase. The Employer responded to the offer with a sliding scale for each classification, which the Union found to be somewhat incomprehensible. In bargaining meetings in August, 2000, Mr. Paterson told Mr. Seiferling to "quit stalling and to make the Union a final offer." The Union was concerned with the extensive delays in reaching an agreement and was sensing that the Employer was delaying bargaining in order to encourage the filing of a rescission application in the upcoming open period. The Union understood that the Employer would provide it with a complete proposal package in September, 2000.

**[19]** However, during bargaining meetings on September 25, 2000, the Employer informed the Union that it was without a mandate to discuss wages. In June, 2000, the chief executive officer of the Employer had been terminated and government had intervened with the Employer's board of directors to address various financial matters. The Employer explained that it was unable to obtain a mandate until meetings with the board of directors were held either on October 9 or 16, 2000. These dates fell after the open period for the filing of a rescission application. A rescission application was actually filed on October 13, 2000.

**[20]** As a result of the slow pace of collective bargaining, Mr. Paterson decided to revive the application for first collective agreement. He was warned by Mr. Seiferling at the time that, if the Union proceeded with its application before the Board, the Employer would not meet with the Union

to continue collective bargaining until the application was determined. Mr. Paterson concluded that the Employer's unwillingness to present a wage package in September was a major stalling tactic. The period for applying for rescission was coming open and, according to Mr. Paterson, everyone knew what was going on. Mr. Paterson concluded at that time that the parties could not make any progress at the table. The parties had already met on 13 occasions and were going around in circles on the outstanding issues.

**[21]** No bargaining took place between September, 2000 and March 22 and 23, 2001 when the parties met with the assistance of the Board agent. The Employer presented a wage proposal to the Union on March 22, 2001 based on a merit pay system. The Employer indicated that this proposal was the same as the wage system being proposed for the remaining casinos. Under the terms of the proposal, adjustments to wages would occur after an assessment of performance. Any dispute over the assessment could be referred to the grievance process.

**[22]** The Union found the proposed merit pay system totally unacceptable. On March 23, 2001, Mr. Olshewski, on behalf of the Union, made a "final without prejudice" offer covering all outstanding matters to the Employer. Mr. Olshewski testified that he made the offer as low as he could possibly go to see if the Employer was at all serious about reaching an agreement. The wage proposal put forth by the Union was cost neutral to the Employer, in the sense that it rolled into the offer the Christmas and annual bonuses already paid to employees at the Casino. The proposal called for wage adjustments at the conclusion of a three-month probationary period, at the end of 12 months and at the end of 21 months of service. In addition, the Union sought general increases of 4% effective March 1, 2002 and 4% on March 1, 2003. The Union told the Employer that this was its final offer – that it could not go any lower than what was set out in these proposals. Mr. Olshewski testified that he made the offer conditional on it settling all outstanding issues and he reserved the right to place alternative proposals before the Employer should the proposal not be accepted in total. When the Employer did not accept the offer, Mr. Olshewski took the non-acceptance as a sign that the Employer was not genuinely interested in obtaining a collective agreement.

**[23]** On April 26, 2001, the Employer made a similar "without prejudice" offer to the Union. The offer moved away from the merit pay proposal and offered a wage progression from start, probation, completion of 2000 hours and completion of 4000 hours, along with a 3% increase effective May 1, 2002 and a 3% increase effective May 1, 2003.

**[24]** At that time, Mr. Paterson had stepped into the negotiations in place of Mr. Olshewski. Mr. Paterson testified that he attempted to move bargaining along by setting aside various issues that the Union had been unwilling to give up prior to this time. The Union agreed to the grievance procedure containing a step to include meetings with elders; it agreed to limit the non-discrimination clause to the extent permitted by an affirmative action plan; and it agreed to the principle of First Nation's status as generally trumping seniority in the workplace. In Mr. Paterson's opinion, the Union had no further room to move on the outstanding issues. He concluded that the Union would have no ability to obtain a ratification of any agreement reached if the settlement went any lower than what already had been proposed. In his view, the need for Board assistance in reaching a collective agreement was obvious. The Employer's proposal was, as far as the Union was aware, its final offer and he concluded that it was time to pull the plug on collective bargaining, which had then gone on for over a year. Mr. Paterson indicated that he tried as hard as he could on April 25 and 26, 2001 to get an agreement but he was not satisfied with the progress.

**[25]** Ken Cameron, acting manager of human resources, testified on behalf of the Employer. Mr. Cameron was present during collective bargaining. Mr. Cameron testified that the mandate of the Employer is to operate and manage casinos, to employ and train First Nations' people, and to use the gaming profits to benefit First Nations' people.

**[26]** In relation to the collective bargaining with the Union, Mr. Cameron testified that there was a lot of difference in the negotiating styles of Mr. Olshewski and Mr. Paterson. In relation to the negotiation of wages, Mr. Cameron testified that in September, 2000, the Employer told the Union that it had presented a merit pay system in its other casinos and wanted a similar system at the Casino. The Employer also noted that it was having difficulty obtaining instructions from its board of directors as a result of the termination of the chief executive officer and the change in the board of directors. The bargaining committee did commit, however, to come back to the bargaining table with its offer after meeting with the board of directors on October 9 or 15, 2000. Mr. Cameron testified that the parties had agreed to meet again on November 1 and 2, 2000 to discuss wage issues. However, by that time, the Union had applied to return the application for first collective agreement assistance to the Board's agenda. As indicated above, the parties did not return to the bargaining table until March, 2001 with the assistance of the Board agent. In cross-examination, Mr. Cameron did acknowledge that it was impossible for the Employer to negotiate the collective agreement prior to the open period because of the lack of instructions from the board of directors to the bargaining

committee. The committee was unable to finalize its proposals for a three-month period just prior to the open period.

**[27]** At that time, the Employer's wage offer remained a merit pay proposal. The proposal was discussed at the beginning of the meeting on March 22, 2001. The Employer agreed after the discussion to return to the bargaining table in April with a different wage proposal – one based on a step progression of wages. When the Employer came back with its offer on April 26, 2001, the Union was not in agreement with the proposal and was not prepared to negotiate wages further. Mr. Cameron testified that the Employer's committee was taken aback by the Union's position and they were surprised that negotiations broke off. According to Mr. Cameron, there was still room for movement on the Employer's side and apparently still remains lots of room for movement. Mr. Cameron testified that in his opinion there was no need for Board assistance in concluding the collective agreement.

**[28]** At the end of the day, the Board agent reported to the Board on five items – union security, call-in hours, shift rotations, bulletining and filling of positions, and wages. The Union agreed with the Board agent's report. The Employer did not agree with the report. In addition, the Employer raised an issue with respect to the management rights clause that it believes remains outstanding.

**Union's argument on need for first collective agreement assistance**

**[29]** The Union argues that the Board should intervene to impose a collective agreement on the parties in accordance with the Board agent's report because it is obvious from the evidence and the report that the parties have reached an impasse. The Union notes that almost 2 years have passed since the Union was certified. The Union views the delay as excessive and argues that the Employer spent most of this period in a fierce court battle over the legitimacy of the certification Order. The Union notes that the original delay from date of application to date of certification, some six months, was caused by the Employer's highly publicized fight over the constitutional jurisdiction of the Board and the Board's institutional delay in holding and deliberating on the matter. The second delay in bargaining, from November 30, 1999 to March 1, 2000, was solely the fault of the Employer. No real serious bargaining occurred until after the May 1, 2000 agreement was reached, which was already one year from the date of the certification application. Then, in September, 2000, the Employer came to the bargaining table without a mandate to make a wage offer. The Union found

this position to be untenable given the length of time the Employer had to formulate its wage package. Once the Union revived the first collective agreement application, the Employer refused to negotiate outside of the system established on first collective agreement applications. The Employer then raised an issue with respect to the order of proceeding in relation to the rescission application filed by Ms. Evans and took the position that the rescission application should be heard first. These issues were decided by the Board in the Reasons for Decision dated January 25, 2001 referred to above. The Employer then raised more preliminary issues on the application for first collective agreement on August 20, 2001 resulting in the Board's Reasons for Decision dated September 18, 2001, *supra*. Finally, the application for first contract assistance was heard on September 24, 25, and 26, 2001. The Union argues that the delays in obtaining a first collective agreement and in obtaining Board assistance in concluding the first collective agreement has led to a demoralized and disgruntled membership. It is important to ensure that the relationships involved in the collective bargaining process can survive the onslaught of procedural wrangling and delays that occurred in this case.

**[30]** The Union also referred to the unfair labour practice applications filed earlier and the agreement reached between the parties to set bargaining dates and to permit the Union's application for first collective agreement assistance to proceed to the Board without regard to the prerequisites set down in s. 26.5(1)(c) of the *Act*. The Union noted that a rescission application was filed after the application for first collective agreement assistance. The Union argued that the Employer delayed engaging in meaningful bargaining prior to the open period to allow for the filing of a rescission application.

**[31]** The Union also argues that bargaining is difficult because of the nature of the Employer's business – a large First Nations' business in the service sector. Many employees and the Employer are unfamiliar with the process of collective bargaining. In addition, the Employer has argued that the Union is unable to bargain with respect to the filling of vacancies through seniority as a result of the exemption granted to the Employer by the Saskatchewan Human Rights Commission. The Union disagrees with the Employer's interpretation of the effect of the exemption as it relates to its ability to bargain. Nevertheless, this fundamental difference has led to a serious impasse. The Union also points out the Employer's lack of bargaining with respect to wages and its inability to conclude a first collective agreement before the expiration of the open period. At the same time, the Union

compromised its position extensively as can be seen by its willingness to agree to unusual collective agreement provisions.

**[32]** The Union put forward the view that s. 26.5 sets out a very clear time frame for concluding a first collective agreement and sends the clear message that the parties are expected to conclude a first collective agreement without delay. Once the preconditions for first agreement assistance have been met or waived, the only statutory requirement is that the Board concludes that it is appropriate to assist the parties. The purpose of the provision is to get the parties to develop a sound collective bargaining relationship both in terms of the relationship between the employer and the union, but also, the relationship between the union and its members in the workplace. The pre-conditions set out in s. 26.5(1)(a) are the requirement of a strike vote or lock-out notice or a finding of bad faith bargaining. In the context of the strike vote or lock-out notice, the first agreement provisions are designed to avoid industrial disputes in the first round of bargaining and to attempt to preserve or develop the bargaining relationship. In relationship to the unfair labour practice finding, the provisions are meant to remedy bad faith bargaining.

**[33]** The Union maintains that the Board does not need to find that there has been a complete breakdown in the bargaining relationship before it can intervene; rather, the Board should intervene prior to the destruction of the relationship in order to preserve it.

**[34]** In relation to the application, the Union concludes that it is unable to reach a first collective agreement with the Employer without Board assistance. It was prepared to accept the Board agent's report and to settle the contract on the basis of that report. The Employer rejected all Board agent recommendations. The parties remain deadlocked even with the assistance of the Board agent, conciliation assistance and months of direct bargaining.

**[35]** The Union relied on Board decisions in *Saskatchewan Government Employees' Union v. Namerind Housing Corporation,* [1998] Sask. L.R.B.R. 542, LRB File No. 189-97; *Operating Engineers v. R.M. of Coalfields,* [1998] Sask. L.R.B.R. 280, LRB File No. 326-97; *Off the Wall Productions v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union,* [1999] Sask. L.R.B.R. 393, LRB File No. 209-98.

**Employer's argument on need for first collective agreement assistance**

**[36]** The Employer argued that the Board should not intervene in this dispute. First collective agreement assistance should be given cautiously and in limited circumstances to avoid undue interference in the process of free collective bargaining. The purpose of Board assistance is to promote, not to replace, collective bargaining. In support of this proposition, the Employer referred the Board to *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Prairie MicroTech Inc.,* [1996] Sask. L.R.B.R. 36, LRB File No. 201-95; *Board of Education of Tisdale School Division v. C.U.P.E. Local 3759,* [1996] Sask. L.R.B.R. 503, LRB File No. 078-96; *Canadian Union of Public Employees v. Treats,* [2000] Sask. L.R.B.R. 301, LRB File No. 220-98.

**[37]** The Employer also argues that the fact that a first collective agreement has not been reached does not automatically necessitate first contract assistance. The Board was referred to *United Food and Commercial Workers v. Madison Development Group,* [1997] Sask. L.R.B.R. 68, LRB File No. 053-96 for the proposition that first contract assistance is not intended "to provide a means of escape from the difficulties of vigorous collective bargaining" and to *Retail Clerks International Union, Local 206 v. Maclean-Hunter Cable T.V. Limited, Guelph, Ontario (*1981), 1 Can LRBR 454 (CLRB); *Saxum Canada Inc.,* [1999] O.L.R.B. No. 1511; *Atway Transport Inc.,* [1991] OLRB Rep. April 425. The Employer also relied on *Prairie MicroTech Inc., supra* for the proposition that the purpose of first contract assistance is to promote vigorous and sustainable collective bargaining, not to shore up power imbalances.

**[38]** The Employer concludes that the factors set out for determining if first contract assistance is required in *Namerind Housing, supra,* do not justify intervention in this instance. The Employer notes that the Board agent's report does not provide any reason for Board intervention. The bargaining unit in this instance is relatively large and the normal tools of industrial conflict, that is – strike and lock-out – are available to be used with some effect by the parties, unlike the situation in *Namerind Housing.*

**[39]** The Employer disputes that it was responsible for any delay in collective bargaining. The Employer responded to the Union's allegations of unfair labour practices by agreeing with the Union that the Union is the exclusive bargaining agent in the workplace and by advising employees at the meetings held in May, 2000, that the employees' association had no role to play in the workplace. The Employer noted that it had carried out its part of the May 1, 2000 agreement.

**[40]** The Employer points out that there had been no finding that the Employer had bargained in bad faith and no illegal proposals had been raised in collective bargaining. In addition, the Employer notes that significant progress was being made at the bargaining table in April, 2001 when the Union broke off collective bargaining. The Employer argues that the parties should return to collective bargaining and be left to their own devices. Employees no longer support the Union because of its failure to communicate with employees, not as a result of the Employer's actions in support of the employees' association. In this case, according to the Employer, the Union lacks bargaining strength and that power imbalance with the Employer should not be changed by Board intervention.

## Analysis

***Is it appropriate for the Board to assist the parties in the conclusion of the first collective agreement?***

**[41]** In the Reasons for Decision issued by the Board on January 25, 2001, the Board summarized its approach to providing assistance in the conclusion of a first collective agreement as follows at 53:

> *[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.*

**[42]** The reasons that may lead to the breakdown of collective bargaining are varied. In the *Prairie Micro-Tech Inc.* case, *supra,* the Board identified the following factors that may result in Board intervention at 47:

> *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.*

**[43]** Again, in its Reasons for Decision issued on September 18, 2001, *supra,* the Board reiterated its overall approach to first collective agreement assistance as follows at 707:

> *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., [supra]. 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 stressed the need to reinforce the collective bargaining system through its intervention under s. 26.5, rather than replace that system.*

**[44]** Unlike the Ontario counterpart contained in s. 43(1) and (2) of the *Labour Relations Act,* S.O. 1995, c. 1, Schedule A, our s. 26.5 does not require the Board to determine the reasons why the process of collective bargaining has been unsuccessful. Section 43(2) of the Ontario *Act* states:

> *43(2) The Board shall consider and make its decision on an application under subsection (1) within thirty days of receiving the application and it shall direct settlement of a first collective agreement by arbitration where, irrespective of whether section 17 has been contravened, it appears to the Board that the process of collective bargaining has been unsuccessful because of,*
>
> *(a) the refusal of the employer to recognize the bargaining authority of the trade union;*
>
> *(b) the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;*
>
> *(c) the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; or*
>
> *(d) any other reason the Board considers relevant.*

(emphasis added)

**[45]** The Ontario Labour Relations Board in *United Steelworkers of America v. Metro Taxi Ltd.,* [1996] O.L.R.D. No. 3226 discussed its approach to determining the threshold question of whether the process of collective bargaining has been unsuccessful for the reasons enumerated in s. 43. The Board stated at paras. 76 through 78:

> *¶ 76 In our view, the observations in YARROW are of assistance in re-examining the Act, following the passage of Bill 7. The practical consequences of the amendments in Bill 7 were to remove "automatic" access to a first contract direction and to restore the necessity of examining the conduct of the parties during negotiations. The legislature must have intended by this change to strengthen the obligation to "stick with" the negotiated process, until such time as the process itself was jeopardizing the right to have access at all to collective bargaining. Given the primacy of this obligation, if the threshold for access were to be set too low, the "narcotic" and "corrosive" or "chilling" effects of easier access to arbitration might adversely affect the structure of the collective bargaining process early on.*
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> *¶ 77 As the jurisprudence suggests, there are no "mandatory" steps or numbers of negotiating sessions that parties must have before the Board may determine that collective bargaining has been unsuccessful. What must an applicant then show to*

> *discharge the onus of demonstrating that collective bargaining has been unsuccessful?*
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> *¶ 78 We would expect that at a minimum, an applicant should be able to show that it has attempted to seriously explore with the respondent all of the significant issues that exist between the parties. Of course, if the respondent has in fact rendered such attempts pointless, then that would be sufficient to determine that bargaining has been unsuccessful. Are further discussions possible and if so would they be helpful or fruitful? These are the types of questions that have been posed in the Board's jurisprudence. There is no specific number of bargaining sessions that parties must participate in before these questions can be answered. In some cases, many unproductive sessions may be indicative of a lack of success, but it is not necessarily so.*

**[46]** While s. 26.5 of *The Trade Union Act* does not require the Board to ask the questions set out in paragraph 78 in the *Metro Taxi Ltd.* decision, *supra*, this Board in its September 18, 2001 Reasons for Decision in this matter, *supra*, described the threshold inquiry under s. 26.5 in very similar terms at 711:

> *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.*
>
> *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.*

**[47]** At para. 18, the Board indicated the type of evidence that it would consider when determining the threshold issue:

> *[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.*

**[48]** The tenor of this Board's approach is very similar to the approach set out by the Ontario Labour Relations Board in that we try to discern if the applicant has engaged in a serious and concerted effort to achieve a collective agreement with the respondent. If there is any suggestion that the applicant is withholding offers for the purpose of maintaining some wiggle room on an application for first collective agreement assistance, the Board will be reluctant to provide assistance under s. 26.5. The Board agent's intervention is an effective means of determining if the parties are serious about arriving at a collective agreement, or whether they are going through the motions of bargaining while holding back potential settlement offers in the hopes of achieving more from the Board. The "narcotic effect" that may occur if access to the first collective agreement provisions is granted too readily can be counteracted by the intervention of an experienced conciliator in the form of a Board agent who can provide the Board with an assessment of the genuineness of the collective bargaining efforts.

**[49]** Unlike the Ontario Board, however, we are not required by our statute to determine the reason why collective bargaining has not been successful. We are not required to assess blame for the failure of the collective bargaining process and can focus instead on assessing the efforts of both parties to conclude the first collective agreement. Obviously, in cases where one party does not engage in the process in a fair and thorough manner, the Board will note how the behaviour contributed to the breakdown of the process. Overall, however, the Board is not required to determine who or what is responsible for the breakdown in the process of collective bargaining so long as the parties have engaged in serious and genuine collective bargaining.

**[50]** In the present case, there are a number of factors, which lead the Board to the conclusion that first collective agreement assistance should be provided to the parties. The parties have engaged in extensive and protracted negotiations. They voluntarily accessed the services of a conciliation officer

from Saskatchewan Labour prior to seeking first contract assistance from the Board. The Board agent noted that "during all meetings the parties worked towards resolving the outstanding issues in an effort to reach a collective bargaining agreement." There is no doubt in the Board's mind that the Union, in particular, made substantial efforts in order to achieve a first collective agreement. We are most concerned with the Union's efforts to ensure that it has not accessed the first collective agreement provisions prematurely.

**[51]** Second, the issues that are outstanding are complex and difficult. The parties have not referred simple issues to the Board. Among the more contentious issues is the interplay of affirmative action and seniority provisions. These are difficult issues to resolve even in mature bargaining relationships.

**[52]** Third, the bargaining has been atypical because of the First Nations' context. In addition, the Employer is not a typical private sector employer – the Employer is more akin to a public sector employer. It is responsible for implementing policies in support of economic development for First Nations' people in Saskatchewan and its mandate is broader than simply making profits through its business operations. It is also involved in a highly regulated industry. These factors make collective bargaining unusually complex.

**[53]** Fourth, the Union made significant moves in collective bargaining, and in particular, during the last bargaining session. It concluded that it had come to the end of its ability to compromise while maintaining a position that would be acceptable to members of the bargaining unit. The Employer does not share this view and insists that there is still room to move. This "room," however, has not been communicated to the Union or the Board. Despite the number of meetings, there have been insignificant negotiations on the wage issue due in large part to the Employer's insistence on a merit pay system. While the Employer moved off the merit pay proposal in the last sessions of bargaining, this movement came rather late in the process. The Union was largely left to bargain with itself on the wage issue. The Employer was represented in bargaining by experienced labour relations personnel who would understand the likelihood of any union accepting a merit pay system in a collective agreement. We find that the Union's assessment that collective bargaining is at an impasse is accurate and that little would be gained by requiring the parties to return to the bargaining table.

**[54]** Overall, for the reasons stated above, we find that, despite their concerted efforts, collective bargaining has broken down between the parties. They are unlikely to a reach collective agreement if

left to their own devices. Section 26.5 is designed to overcome the type of difficulties that prevent the achievement of a first collective agreement. In our view, it is appropriate for the Board to assist the parties to conclude a first collective agreement.

## Collective Agreement Provisions

**[55]** The principles applied by the Board in determining which collective agreement provision it should implement when settling a first collective agreement were also set out in the Board's Reasons for Decision of September 18, 2001, *supra*, where the Board concluded at 712:

> *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.*

**[56]** We will address the collective bargaining issues in the order of their appearance in the proposed collective agreement.

### Article 3.02 – Union Security

**[57]** The parties agreed to a basic union security provision in article 3.02. Originally, the Union sought a provision that would require the Employer to deduct union dues and forward them to the Union without written authorization from employees.

**[58]** The Employer objected to such a provision and relied on s. 32 of the *Act* to support its assertion that the Employer can only deduct union dues when it has an authorization signed by the employees.

**[59]** The Union countered by requesting that the Employer provide it with the names, addresses and telephone numbers of all employees in order that it could obtain the employee's authorization for dues deduction.

**[60]** The Employer argued that the Union could obtain the information directly from employees in the new employee orientation meeting agreed to in article 19 and through the Employer's agreement to provide the Union on a monthly basis with the names of employees hired during the preceding month; the employees who have been terminated during the month; a change of status of any employee; the dues deducted for each employee during the month; and a list of members who did not have union dues deducted and the reasons why no dues were deducted. The Employer was of the view that the matter was settled by article 3.06 and article 19. The Employer also took the position that the disclosure of employee home addresses and telephone numbers was a violation of employee rights of privacy.

**[61]** The Board agent proposed that the agreed-upon article 3.02 be amended by adding the sentence: "Upon the request of the Union, the company shall provide the current names and addresses of all bargaining unit employees."

**[62]** The Board has dealt with a union's right to information concerning employees in a number of cases including *Canadian Union of Public Employees, Local 4195 v. Board of Education of the Saskatchewan Rivers School Division,* [2000] Sask. L.R.B.R. 104, LRB File No. 202-98. After reviewing the Board's earlier cases, the Board set out the employer's obligations under the union security provisions contained in s. 36 and the dues provisions contained in s. 32 of the *Act* as follows at 114 and 115.

> *Accordingly, we interpret the Board's jurisprudence as having established that, pursuant to s.36(1) of the Act, upon the request of the union, the duty of the employer includes the obligations, inter alia:*
>
> *1. To advise newly hired employees of the obligation, as a condition of continued employment, to apply for, and maintain membership in, the union within 30 days of the commencement of employment;*
>
> *2. Where the union offers to provide membership application for new employees, but the employer declines to agree to obtain their completion, to provide the union, upon request, with information regarding new employees, including their names, addresses and telephone numbers;*
>
> *And under s. 32(1), upon the request of the union to deduct union dues from employees' wages and remit them to the union, the duty of the employer includes the obligations, inter alia:*
>
> *1. To seek to obtain the written requests of all employees at the time of certification, and, subsequently, of new employees, authorizing the deduction and remittance of dues, assessments and initiation fees;*

*2. To deduct from employees' wages, and remit to the union, dues, assessments and initiation fees, of those employees who have furnished a written authorization to do so, and to provide their names to the Union.*

**[63]** In our view, it is appropriate for a collective agreement to contain similar provisions. The Board's case law requires the employer to provide address and telephone information relating to its employees to the union. At a minimum, the collective agreement should conform to the statutory requirements. We would amend the proposed article 3.02 to read as follows:

*3.02 Upon the written request of the employee and during the life of this agreement, the Employer will deduct from the earnings of each employee covered by this Agreement, Union initiation fees and dues prescribed by the Constitution and Bylaws of the Union. At the end of each calendar month and prior to the tenth ($10^{th}$) day of the following month, the Employer shall remit by cheque to the financial secretary of the Local Union, the total of the deductions made. The Employer shall provide the names, addresses and telephone numbers of all its employees who are covered by the terms of this agreement to the Union.*

**Article 4 - Management Rights**

**[64]** The Board agent did not refer to article 4 in his report. The Employer took the position that the management rights clause was outstanding. The Employer proposed the following management rights clause:

*4.01 The Union acknowledges it is the exclusive function and right of the Employer to operate and manage its business in all respects, including without limiting the generality of the foregoing, the right to plan, direct and control the Employer's operation, to contract out work, the right to decide on the number of employees, the mode, method, equipment to carry out the work, the right to make and alter from time to time rules and regulations to be observed by the employees (such rules not to be inconsistent with the specific provisions of this agreement), the power and right to maintain and improve the efficiency of the operations; to hire, classify, transfer, promote, demote, lay off, assign work, and duties, jobs, shifts or employees, to suspend, discipline or discharge employees for just cause, recognizing that just cause for immediate discharge (at the discretion of the Employer and subject to EAP programs) shall include loss or suspension of gaming license, use of alcohol, unlawful drugs or chemical substances during working hours, intoxication on the job, actual or attempted conversion of property of the Employer, any supplier, other employees or any other person at the Casino or conviction of an offense under the Criminal Code involving honesty and subject to the rules below, other criminal convictions. However, the Employer's right to discipline and discharge shall not be limited to the above and can include other unacceptable conduct as provided in the Employer's rules and regulations.*

*4.02 In criminal convictions not involving honesty, the following rules will apply:*

*(a) For the criminal offences committed at the workplace, the Employer shall have the right to choose the penalty up to and including discharge;*

*(b) Where the offence is committed away from the workplace, the Employer's right to choose the penalty is limited to situations where it may affect the employee's ability to carry out their job duties or it affects the Employer's reputation in the community to the extent that continued employment may affect business at the Casino;*

*(c) For all criminal charges, if the Employer feels it appropriate it may suspend the license of the employee and remove their right to work while criminal investigations are pending.*

**[65]** The Union's last proposal was as follows:

*4.01 The Union acknowledges it is the exclusive function and right of the Employer to operate and manage its business in all respects that are not specifically abridged or modified by this Agreement. Management shall exercise its rights in a manner that is fair and consistent with the terms of this Agreement.*

**[66]** In justifying its position, the Employer referred to the need for security in the Casino operation and for trustworthy and honest employees. The Employer also referred the Board to three collective agreements negotiated between different unions and employers in the hotel industry that adopt management rights clauses similar to the clauses proposed by the Employer. The Employer is attempting to avoid having an arbitrator substitute different penalties in place of discharge for certain workplace disciplinary events.

**[67]** We would agree that trustworthiness and honesty are essential characteristics required of casino employees. On the other hand, the Employer's proposed management rights clause seriously reduces employees' access to the grievance and arbitration provisions by removing arbitrator discretion over penalty in many serious disciplinary grievances. Access to the grievance and arbitration process is generally considered one of the main benefits of unionization.

**[68]** Legislative policy contained in the *Act* supports the significance of the grievance and arbitration systems as key rights to be gained when employees form a trade union. Section 26.2 provides access to the arbitration process to employees during the period from date of certification until a collective agreement is reached and permits employees who have been discharged or suspended during this pre-agreement period to have their termination or suspension reviewed by an arbitrator on a standard of just

cause. Section 25(3) of the *Act* allows such an arbitrator to substitute "such other penalty for the discharge or discipline as the arbitrator or arbitration board seems just and reasonable in the circumstances."

**[69]** While it may be possible for certain employers to achieve collective agreements that contain a specific penalty for the infraction that is the subject matter of the arbitration (as is contemplated in part in s. 25(3)), a clause of this nature is uncommon. Generally, it would not be achieved at a bargaining table and, in light of the legislative policy granting ready access to arbitration during the pre-collective agreement period, we find the Employer's proposal to be unreasonable.

**[70]** The Union's proposed management rights clause is more in keeping with the usual management rights provision achieved in collective agreements. We note that it is similar to the management rights clause contained in the collective agreement between Saskatchewan Gaming Corporation and Public Service Alliance of Canada for Casino Regina (June 1, 2000 to May 31, 2003).

**[71]** The Board determines that the management rights clause shall read as follows:

> *4.01 The Union acknowledges it is the exclusive function and right of the Employer to operate and manage its business in all respects, which are not specifically abridged or modified by this Agreement. Management shall exercise its rights in a manner that is fair and consistent with the terms of this Agreement.*

**[72]** There will be no article 4.02.

**Article 7 – Hours of Work**

**[73]** The Employer made the following proposal:

> *7.07 Call-ins for additional hours of work shall be given to casual, unscheduled employees for the hours required. If insufficient casual unscheduled employees are available to fill the need of a call-in, part-time employees would be called in.*

**[74]** The Board agent proposed the following:

> *7.07 Call-in for additional hours of work shall be given to senior qualified part-time employees who have been scheduled to less than 32 hours that week. If part-time employees are unavailable, casual employees may be called in.*

> *7.07 In recognition of the operational needs of the casino, only the above mentioned employees who are accessible and have previously indicated their availability and willingness to attend a call-in will qualify to be called in.*

**[75]** The Employer argued that its proposal maintains the status quo – it represents the current system of call-ins. The justification for giving call-ins to casual, unscheduled employees is to allow them to maintain a level of skill and to obtain a degree of experience in the Casino. The Employer argued that many First Nations' employees start out their employment as casual employees and that they need the flexibility of this arrangement. The Employer also noted that many of its employees do not have telephones and are not easily contacted by the Employer for call-in work. The present practice allows employees to inquire at the workplace if they will be required for work on any particular day and to be informed at that time if call-in work is available. The Employer asked the Union for suggestions as to how to overcome the lack of telephone problem but no resolution was proposed by the Union.

**[76]** The Union argued that the Board agent's recommendations represent a compromise between the Union's proposal, which would assign call-in hours strictly on a seniority basis, and the Employer's proposal which would assign call-in hours without regard for seniority. The Union argued as well that the Board agent addressed any operational concerns by providing more casual shifts for part-time employees and the remainder of those shifts for casual employees. The Union noted that there was no evidence before the Board from which we could conclude that assigning shifts to senior qualified part-time employees would be detrimental to First Nations employees.

**[77]** The Board concludes that the Board agent has struck a reasonable balance between the competing positions. Seniority is a key aspect of a first collective agreement. In relation to the assignment of call-in hours, it is not unusual to find reference to the principle of seniority as a method of assigning such hours of work.

**[78]** On the other hand, the Employer's need for a well-trained and experienced casual staff is understood, as is its operational need to have quick access to call-in staff.

**[79]** We are of the view that the Board agent has taken into account the Employer's operational needs to require employees who wish call-in hours to be "accessible" and to previously indicate their availability and willingness to attend a call-in. These restrictions should assist the Employer in

determining which of the part-time employees are available to work call-in hours and a method for contacting the employee in question.

**[80]** Article 7.07 will read as follows:

> *7.07 Call-in for additional hours of work shall be offered to senior qualified part-time employees who have been scheduled to work less than 32 hours in that week. If part-time employees are unavailable, the Employer may call-in casual employees.*
>
> *In recognition of the operational needs of the casino, only the above-mentioned employees who are accessible and have previously indicated their availability and willingness to attend a call-in will qualify to be called.*

**[81]** The Board agent also recommended article 7.14, which was proposed by the Union, as follows:

> *7.14 Where there is a practice of shift rotation, the current practices shall continue. In departments where there has not been a past practice or where the rotation is problematic, the employer shall consult with the Union regarding implementation of equitable shift rotations.*

**[82]** The Employer opposed this provision. It argued that the proposal is simply an "agreement to agree" and does not address any issues related to shift schedules. The Employer argued that the matter should be deferred to later collective bargaining if there is no more concrete proposal coming from the Union.

**[83]** The Union cited one example of a member who has been assigned to a permanent night shift when previously she had worked on a rotation between day and night shift. The Union argued that the proposal simply permits the Union to have some input into the question of equitable shift arrangements to ensure that employees are not stuck on permanent unfavourable rotations. The Union argued as well that there was no inconvenience to the Employer in relation to the proposal as it maintained the status quo.

**[84]** In our view, the Board agent's proposal is reasonable. It addresses a concern of the Union in a manner that is fair while taking into account the operational needs of the Employer to maintain shift arrangements. The Board orders that article 7.14 set out above be included in the agreement.

**Article 9 – Bulletining and Filling of Positions**

**[85]** Before beginning the discussion of this issue, we note that article 6.01 states as follows:

> *6.01 The parties recognize that as a First Nations Casino with a mandate to provide employment opportunities to First Nations that, while seniority will be a factor in decisions, First Nations' status will be the primary consideration.*

We have also set out the terms of the exemption granted to the Employer under *The Saskatchewan Human Rights Code,* S.S. 1979, c. S.-24.1

**[86]** The Board agent recommended the following provisions:

> *9.01 – Employment Equity Plan*
>
> *(a) The Employer and the Union are committed to developing and maintaining an Employment Equity Plan;*
>
> *(b) To this end, the parties will establish a Joint Union Management Employment Equity Committee (JUMEEC). The Union will appoint one person from each of the four departments (table games, bank, security and slots) to serve on the JUMEEC. There will be an equal number of Union and Employer representatives.*
>
> *(c) Time spent on the JUMEEC committee by employees shall be considered as time worked.*
>
> *(d) The JUMEEC will have the responsibility of developing a comprehensive employment equity plan including qualitative measures and strategies to remove barriers as well as corrective measures to achieve a representative workforce.*
>
> *(e) Upon achievement of 50% First Nations employment for all in-scope levels, the JUMEEC will maintain that level.*
>
> *(f) The JUMEEC will address the representation of the other equity groups parallel to the requirement of #5.*
>
> *(g) All expenses related to the development, implementation and monitoring of the Employment Equity plan shall be the responsibility of the Employer, save and except the salaries of people in the employ of the Union.*
>
> *9.02(a) As previously agreed to in 9.01*
>
> *9.02(b) As previously agreed to in 9.02*
>
> *9.03 (a) The Employer agrees to fill positions within the bargaining unit from employees within the bargaining unit by seniority, if such employees apply, provided*

*that the applicants have the necessary knowledge, skills and ability to perform the work.*

*(b) In those instances where there are more qualified candidates than available positions, an eligibility list will be created and used to fill subsequent vacancies for a 90 day period.*

*(c) When JUMEEC determines vacancies are to be filled to comply with Article 9.01(e) or (f), Article 9.03(a) and (b) will be suspended.*

**[87]** The Employer opposed the Board agent's recommendations. It argued that one of its key mandates is to provide employment opportunities for First Nations' people as part of the overall strategy of the FSIN and the Government of Saskatchewan to alleviate high unemployment for First Nations' people. The Employer noted that the Saskatchewan Human Rights Commission had authorized affirmative action for First Nations' people to the extent of 80% of hiring, promotion and training opportunities in each department. The Employer argued that seniority based hiring is an obstacle to achieving workplace equity for First Nations' employees and it ought to be set aside in the agreement to the extent of the exemption granted by the Saskatchewan Human Rights Commission.

**[88]** The Employer also opposed the recommendations of the Board agent because they diluted the exemption already granted from 80% to 50%. In addition, the Employer noted that article 9.03(a) in the Board agent's proposals established a "senior, if qualified" provision on seniority, whereas the parties had previously been working with a skill and ability clause with seniority being the deciding factor if skill and ability are relatively equal.

**[89]** The Employer noted that the Board agent's recommendation was drawn from the agreement between Casino Regina and the Public Service Alliance of Canada. It noted that Casino Regina did not have an affirmative action plan in place prior to the signing of the collective agreement, whereas this Employer does have an affirmative action plan in place that is approved by the Saskatchewan Human Rights Commission. The Employer viewed the purpose of the JUMEEC in the Casino Regina agreement was to develop the affirmative action plan.

**[90]** The Employer sought an employment equity provision as follows:

*9.03 In filling positions, the Employer, under the terms of an affirmative action program, will consider First Nations' status, seniority, qualifications and skill and ability of all applicants until eighty (80%) of the persons filling any positions are First Nations. Until eighty (80%) percent is achieved in any classification, if a First*

*Nations' person from in or outside the bargaining unit applies for the position and, in the opinion of the Employer that person is able to acquire the qualifications, skill and ability within a reasonable period of time suitable to meet the needs required by the Employer, the job may be awarded to the First Nations' applicant over any other applicant. In such circumstances, if two First Nations people are equally qualified to meet the needs of the Employer, the senior First Nations person will be selected.*

*After eighty (80%) percent of each position is filled with a First Nations' person, all future jobs in the classification will be filled on the basis of qualifications, skill, ability and seniority. If qualifications, skill and ability of applicants are relatively equal, the senior applicant will be awarded the position.*

**[91]** The main differences between the Employer's proposals and the Board agent's proposals relate to the level of First Nations' hiring in each classification; the type of seniority clause; and the role of the Union in developing and monitoring the affirmative action program. In the Employer's proposal, the level of First Nations' hiring is set at 80% of each classification; the role of seniority is more restricted; and the Union does not play a role in the development or monitoring of the affirmative action program.

**[92]** In the Board agent's report, the level of First Nations' hiring is set at 50%; the role of seniority for the remaining positions is stronger; and the Union has a role through the JUMEEC in developing and monitoring the affirmative action program.

**[93]** We will address each of these three areas. First, in relation to the level of First Nations' hiring, we are of the view that the 80% level ought to be used. The Employer's principal mandate is to provide employment and training opportunities to First Nations' persons. To achieve this goal, the Employer has obtained a human rights exemption permitting it to extend this preference to 80% of each classification. In our view, it is proper to reflect this commitment in the collective agreement as the goal of any employment equity plan even if it is possible to conclude that the target could be reached without an express inclusion of it in the employment equity provisions.

**[94]** Second, in relation to the role of seniority for positions that are filled outside of the affirmative action program, the parties have agreed through collective bargaining to accept a competitive clause – that is, one that examines the qualifications, skill, ability and seniority of the applicants and selects the most senior only in the event that qualifications, skill and ability are relatively equal. The parties both approached the application of the seniority principle from the competitive approach, as opposed to the

senior, if qualified, approach proposed by the Board agent. We will adopt the approach agreed to in principle by the parties.

**[95]** Finally, we view the role of the Union in the affirmative action development and monitoring to be key to its overall success. Through the JUMEEC, the parties can develop different training and recruitment programs to assist First Nations' employees to obtain and retain employment at the Casino. The Union is kept informed as a partner in the process of the success of the program and can assist in identifying barriers and training needs. The Union is also afforded an opportunity to keep its membership informed of promotional and training opportunities available for First Nations' employees. The type of clause proposed by the Board agent has been used in Casino Regina and is similar to employment equity clauses set out in Sack & Poskanzer, *Contract Clauses*, 3rd ed. (Toronto: Lancaster House, 1996).

**[96]** We have married part of the Employer's proposal with part of the Board agent's proposal to arrive at the following provisions for insertion in the collective agreement.

> *9.01 – Employment Equity Plan*
>
> *(a) The Employer and the Union are committed to developing and maintaining an Employment Equity Plan;*
>
> *(b) To this end, the parties will establish a Joint Union Management Employment Equity Committee (JUMEEC). The Union will appoint one person from each of the four departments (table games, bank, security and slots) to serve on the JUMEEC. There will be an equal number of Union and Employer representatives;*
>
> *(c) Time spent on the JUMEEC committee by employees shall be considered as time worked;*
>
> *(d) The JUMEEC will have the responsibility of developing a comprehensive employment equity plan including qualitative measures and strategies to remove barriers as well as corrective measures to achieve a representative workforce;*
>
> *(e) Upon achievement of 80% First Nations employment for all in-scope levels, the JUMEEC will maintain that level;*
>
> *(f) The JUMEEC will address the representation of the other equity groups parallel to the requirement of (e);*
>
> *(g) All expenses related to the development, implementation and monitoring of the Employment Equity plan shall be the responsibility of the Employer, save and except the salaries of people in the employ of the Union.*

*9.02(a) As previously agreed to in 9.01*

*9.02(b) As previously agreed to in 9.02*

*9.03(a) The Employer agrees to fill positions within the bargaining unit from employees within the bargaining unit on the basis of qualifications, skill, ability and seniority. If qualifications, skill and ability of the applicants are relatively equal, the senior applicant will be awarded the position.*

*(b) In those instances where there are more qualified candidates than available positions, an eligibility list will be created and used to fill subsequent vacancies for a 90 day period.*

*(c) When JUMEEC determines vacancies are to be filled to comply with Article 9.01(e) or (f), Article 9.03(a) and (b) will be suspended.*

**Article 39 – Wages**

**[97]** As we indicated above, the parties did not engage in serious or protracted bargaining on the wage issue. It is difficult for the Board to apply the replication theory in circumstances where the parties have not engaged in constructive bargaining on an issue. The Board is left guessing to a great extent on where the parties would have ended up if bargaining had been successful. There are few clues in the history of bargaining to lead us to a logical answer given the lack of meaningful bargaining on this issue. In the circumstances, we prefer to look instead to other agreements in the industry that were achieved through collective bargaining. They provide a picture of what other unions and employers have achieved through collective bargaining in environments that are similar to the ones facing the parties to this application.

**[98]** In this case, the Board agent recommended wage scales taken from the Casino Regina collective agreement. The Board agrees with this recommendation. Casino Regina is a directly comparable employer to the Employer in terms of the type of industry and type of positions. Casino Regina is also a relatively new employer. Although the Employer opposes the imposition of the Casino Regina rates of pay, there are no factors which lead us to conclude that the rates are unreasonable or unfair to the Employer, or the employees, in question.

**[99]** The one area that we would address, however, relates to the manner of sharing tips between dealers and pit bosses. In the Casino Regina agreement, tips are shared between dealers and pit bosses. Hence, the difference in pay under the Casino Regina agreement is less than that proposed by the Employer here. The Employer's concern is that if the rates of pay are too similar and pit bosses do not

receive tips, then no dealer will want to be promoted to be a pit boss. To address this concern, we will require the dealers to share their tips with pit bosses. Article 18.01 will be amended by adding:

> *Article 18.01(d) Pit bosses will share in the live game tip pool commencing on January 1, 2002.*

**[100]** The second issue relates to the payment of bonuses. The Board agent recommended the continuation of bonus payments to employees at the Casino if employees in the Employer's other casinos were paid bonuses. In our view, the institution of a collective agreement ought to remove bonus systems unless the parties wish to develop a mechanism for determining bonuses for some other purpose, such as an attendance bonus. This matter should be left for future discussion and collective bargaining. No provisions will be made for bonuses in the collective agreement.

**[101]** The wage schedule referred to in article 39.01 will be as follows:

| Job Classification | **Probation Rate | Permanent Rate June 1, 2001 | **Probation Rate | *Rate June 1, 2002 |
|---|---|---|---|---|
| Custodian | $8.50 | $9.50 | $8.78 | $9.78 |
| Hard/Soft Count<br>Change/Coin Seller<br>Cage Cashier<br>Security Officer | $10.85 | $11.85 | $11.13 | $12.13 |
| Slot Tech Associate | $11.45 | $12.45 | $11.73 | $12.73 |
| Dealer | $12.05 | $13.05 | $12.33 | $13.33 |
| Slot Tech | $12.65 | $13.65 | $12.93 | $13.93 |
| Casino Tech<br>Pit Boss<br>Account Clerk<br>Trainer<br>Surveillance Operator | $13.85 | $14.85 | $14.13 | $15.13 |

***Note:**

> *Red-circled employees maintain their rate and will receive the economic increase of $0.38 per hour in a lump sum every six months during the first year of the Collective Bargaining Agreement and $0.28 per hour lump sum during the second year.*

**Note:

*The probation rate of up to six months will apply to new hires. Permanent employees occupying a permanent higher job classification will receive the permanent rate for that classification.*

*A retroactive payment of $650.00 will be paid as follows:*

A. *Full-time employees who have worked in the full year between June 1, 2000 and June 1, 2001;*

B. *Full-time employees who have worked less than a full year as above, will receive pro rated pay based upon their regular hours worked in the year as compared to 2080 hours for a full-time employee.*

C. *Part-time and casual employees will receive pro rated pay based upon hours worked in a year as compared to 2080 hours for full-time employees.*

**Term of Agreement**

**[102]** The collective agreement will be composed of the terms agreed to by the parties and those imposed in these Reasons for Decision. The collective agreement will be effective from June 1, 2001 to May 31, 2003.

**Dissent of Member Brenda Cuthbert**

**[103]** Ms. Cuthbert dissents from the majority Reasons. She does not agree that the state of negotiations between these parties warrants Board intervention under s. 26.5. Ms. Cuthbert would decline to impose a first collective agreement.

**GRAIN SERVICES UNION (ILWU — Canada), Applicant v. SASKATCHEWAN WHEAT POOL, HEARTLAND LIVESTOCK SERVICES (324007 ALBERTA LTD.) and GVIC COMMUNICATIONS INC., Respondents**

LRB File No. 003-02; January 22, 2002
Chairperson, Gwen Gray, Q.C.; Members: Bob Todd and Leo Lancaster

| | |
|---|---|
| For the Applicant: | Ronni Nordal |
| For Saskatchewan Wheat Pool: | Rob Garden, Q.C. |
| For Heartland Livestock Services (324007 Alberta Ltd.): | Jeff Grubb, Q.C. |
| For GVIC Communications Inc.: | Susan Barber |

**Remedy – Interim order – Criteria – Balancing of labour relations harm – Employer failed to recognize role of union in resolving pension issues arising upon sale of business – Without interim order, pension issue might be fixed by predecessor and successor employers without union's input – Importance of pension issue justifies Board intervention to maintain pension status quo pending resolution of issues through negotiations or final hearing of Board – Board issues interim order maintaining status quo while negotiations occur.**

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

## REASONS FOR DECISION

### Introduction

**[1] Gwen Gray, Q.C., Chairperson:** This is an application seeking interim relief from the Board until a final application can be heard under s. 5 and s. 37 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"). The issue for the Board to determine is whether an interim order should issue to prevent changes to a negotiated pension plan where businesses have been sold pending a hearing of the final application.

### Facts

#### Sale of Heartland Livestock Services

**[2]** Grain Services Union (the "Union") is certified by this Board to represent employees at Heartland Livestock Services. Saskatchewan Wheat Pool was a partner in Heartland Livestock Services until September 20, 2001 when it sold its interest to 324007 Alberta Ltd., which is owned by Nilsson Bros. Inc.

**[3]** The new owner of Heartland Livestock Services recognizes that it is a successor employer within the meaning of s. 37 of the *Act*. It also accepts that it is bound by the most recent collective agreement between the Union and Heartland Livestock Services.

**[4]** The current dispute centers around the pension provisions contained in the collective agreement. Article 9 of the collective agreement sets out the following obligation with respect to pensions for members of the Heartland Livestock Services bargaining unit:

> *The Saskatchewan Wheat Pool/Grain Services Union (ILWU – Canada) Pension Plan, effective January 1, 1981, arises out of and forms part of the Collective Agreement between the Company and the Union.*
>
> *Ninety (90) days form the date of employment with the company, all employees engaged on or after January 1, 1981 shall, as a condition of employment, join the Saskatchewan Wheat Pool/Grain Services Union (ILWU – Canada) Pension Plan.*

**[5]** Saskatchewan Wheat Pool informed the Union of the sale and advised the Union that employee pension benefit accruals and contributions to the Saskatchewan Wheat Pool/Grain Services Union (ILWU-Canada) Pension Plan (the "SWP/GSU Pension Plan") stopped on September 20, 2001 and that Nilsson Bros. Inc. was required by the terms of the sale agreement to establish a pension plan exactly like the SWP/GSU Pension Plan. The agreement required the new pension plan to recognize all Saskatchewan Wheat Pool service for the purposes of attaining pension benefits and proposed to transfer assets from the SWP/GSU Pension Plan to cover the greater of the going concern or solvency value to the new plan.

**[6]** The Union became concerned that Saskatchewan Wheat Pool had unilaterally changed the terms of the pension plan set forth in article 9 of the collective agreement and it filed a grievance with Saskatchewan Wheat Pool with respect to that alleged violation.

**Sale of Western Producer Publications Division**

**[7]** On December 21, 2001, Saskatchewan Wheat Pool announced the sale of Western Producer Publications Division to GVIC Communications Inc. ("GVIC"). The Union filed its application with the Board prior to the effective date of this sale, but subsequently the sale date was moved forward and it actually took effect prior to the first hearing date scheduled for the interim application.

**[8]** Again, GVIC acknowledges that it is a successor employer to Saskatchewan Wheat Pool under s. 37 and that it is bound by the collective agreement between Saskatchewan Wheat Pool and the Union pertaining to the employees at Western Producer Publications Division. That agreement contains the same pension provisions as the collective agreement pertaining to Heartland Livestock Services.

**[9]** The Union met with Western Producer Publications Division prior to the sale to discuss the pension issues arising on the sale. The Union took the position that the SWP/GSU Pension Plan was owned by the members and beneficiaries of the plan and that Saskatchewan Wheat Pool could not unilaterally transfer assets out of the SWP/GSU Pension Plan or terminate a member's entitlements in the SWP/GSU Pension Plan. The Union notified the acting publisher of Western Producer Publications Division on December 27, 2001 that it did not believe that Saskatchewan Wheat Pool had the ability to transfer assets of the SWP/GSU Pension Plan without Union approval.

**[10]** The Union took the position that its members at Western Producer Publications Division had been denied their right to the pension set out in article 9 without consultation and that the unilateral amendment of article 9 constituted an unfair labour practice. In a letter to Saskatchewan Wheat Pool, the Union advised Saskatchewan Wheat Pool against taking any steps to amend the SWP/GSU Pension Plan or otherwise affect pension benefit accrual, continuation etc. of employees of Western Producer Publications Division who are represented by the Union. At the same time, the Union asked to meet with Saskatchewan Wheat Pool to discuss the pension matters.

**[11]** Part of the Union's concern with the transfer of pension plan funds was summarized in a letter from Mr. Wagner, general secretary of the Union, to Ms. Susan Engel, vice-president of Saskatchewan Wheat Pool, as follows:

> *As you are no doubt aware, the SWP/GSU Pension Fund has a surplus. And, surpluses have traditionally been used to increase the unit benefit and pay for other pension improvements. In addition, a portion of investment surplus is earmarked to offset the current service cost shortfall in relation to employee/employer contributions to the Pension Fund. Without limiting the scope of GSU's concerns or ability to bargain, the foregoing concerns and considerations in relation to Pension Fund surpluses are substantial.*

**[12]** The actuarial material filed to the end of December, 2000, indicates that the SWP/GSU Pension Plan had a surplus slightly in excess of 25 million dollars. According to the affidavit of Mr. Wagner, this surplus now stands at around 10 million dollars.

**[13]** Saskatchewan Wheat Pool responded to the Union's letter by indicating that the purchaser of Western Producer Publications Division would provide a pension plan with an identical calculation as the SWP/GSU Pension Plan and that the plan would recognize service prior to the transfer.

**Union's application and Employers' responses**

**[14]** In its application, the Union alleges that Saskatchewan Wheat Pool has violated s.11(1)(c) of the *Act* by terminating the SWP/GSU Pension Plan for employees at Heartland Livestock Services and the Western Producer Publications Division and amending the collective bargaining agreement without negotiating the same with the Union.

**[15]** The Union also alleges that the successor employers, Heartland Livestock Services (324007 Alberta Ltd.) and GVIC have failed to comply with the collective agreements in place for their respective employees and the Union seeks an order under s. 37 in relation to these employers.

**[16]** The Union's material also demonstrates that members of the bargaining units in question are concerned about the change in the pension plan. Some employees have been told that they cannot obtain print outs of their pension status because they are no longer members of the SWP/GSU Pension Plan.

**[17]** The Union pointed out that there has been a history of negotiations between the Union and Saskatchewan Wheat Pool respecting pensions for employees in divisions of the Saskatchewan Wheat Pool that are sold. Mr. Wagner referred to the sale of M.C. Graphics by the Saskatchewan Wheat Pool and its continued inclusion in the pension plan. In addition, the parties have negotiated employees out of the plan as was the case with PrintWest employees and employees of AgPro Grain Inc.

**[18]** On the interim application, the Union seeks an order prohibiting the termination of membership of the employees of Heartland Livestock Services and Western Producer Publications

Division in the SWP/GSU Pension Plan pending resolution of the main application; an order prohibiting the transfer of any funds from the SWP/GSU Pension Plan to pension plans established by successor employers; an order requiring Saskatchewan Wheat Pool to negotiate with the Union regarding the effect of the sale of Western Producer Publications Division and Heartland Livestock Services on article 9 of the collective agreement; and an interim order directing the successor employers to pay pension contributions required under article 9 of the collective agreement to the SWP/GSU Pension Plan pending final resolution of the main applications.

**[19]** The Respondent, Saskatchewan Wheat Pool, confirmed in its material the details of the sales between it and Heartland Livestock Services and GVIC. Saskatchewan Wheat Pool's basic position on this application is that it is not required to bargain collectively with the Union with respect to the pension issue. It acknowledged that the Union filed a grievance relating to the pension matters for Heartland Livestock Services employees and replies that it has met with the Union and negotiated with respect to the grievance. The grievance is now headed to arbitration. In addition, it points out that it is no longer the employer of employees at Heartland Livestock Services or the Western Producer Publications Division. Saskatchewan Wheat Pool indicates that it required the successor employers to provide mirror plans for employees in both businesses in order to meet the obligations set out in the collective agreement for benefit plans, including a pension plan. It also indicated that it was prevented from involving the Union in the sale agreements because of the disclosure requirements set out in the applicable securities laws. Saskatchewan Wheat Pool asserts that it is impossible under the terms of the SWP/GSU Pension Plan and under the applicable pension legislation for employees of Heartland Livestock Services and Western Producer Publications Division to remain members of the SWP/GSU Pension Plan.

**[20]** Since the sale of Western Producer Publications Division, Saskatchewan Wheat Pool has written to the Union proposing that the parties meet to sort out the pension asset transfer issues concerning the sale of both Heartland Livestock Services and Western Producer Publications Division, failing which Saskatchewan Wheat Pool notified the Union that it will bring forward a proposal for the transfer of assets to the trustees of the SWP/GSU Pension Plan. If no agreement can be reached on the transfer, then the employees of both companies would remain as deferred pensioners under the SWP/GSU Pension Plan. Saskatchewan Wheat Pool also suggested that if agreement could not be reached on the asset transfer, the trustees could refer the matter to an umpire appointed by the Chief Justice of Saskatchewan.

**[21]** The Union responded to the proposal by indicating that it wishes to engage in collective bargaining with Saskatchewan Wheat Pool in relation to the pension issues, including the question of surplus distribution, contribution rates, continued participation in the SWP/GSU Pension Plan, and asset transfers, if agreed. The Union did not understand that Saskatchewan Wheat Pool was prepared to "bargain collectively" in relation to the pension matters and it refuses to meet without such a commitment.

## Argument

**[22]** The Union argues that it has an arguable case on the main application and that the labour relations harm of not granting an interim order is greater than the harm that will result if the order is granted. The Union points out that its members whose employers have changed are worried that their pension benefits may be changed by the change of employers. The Union argues that either Saskatchewan Wheat Pool unilaterally amended article 9 of the collective agreements by substituting mirror plans for the existing plan, or the new employers have failed to respect the terms of the collective agreements by not continuing to contribute to the SWP/GSU Pension Plan. The Union noted that the current pension plan surplus has been funding many costs of the plan and the plan members who are employees of Heartland Livestock Services and Western Producer Publications Division would lose the benefit of these payments if they are forced to join new plans.

**[23]** Saskatchewan Wheat Pool argued that the only possible obligation that it has to bargain collectively with the Union is with respect to the grievance filed in relation to the sale of Heartland Livestock Services. It is willing to proceed with that arbitration. Otherwise, it argues that the pension matters should be resolved through the terms set out in the SWP/GSU Pension Plan and in the statutes that apply to the SWP/GSU Pension Plan. Saskatchewan Wheat Pool cautioned the Board against intervening in an area of benefit law that is complex and subject to other regulatory schemes. In particular, it argued that the successor employers and the employees are no longer entitled by the terms of the SWP/GSU Pension Plan to contribute to the plan. In addition, it noted that the trustees of the SWP/GSU Pension Plan have control over the assets of the plan and that Saskatchewan Wheat Pool could not cause the assets of the plan to be forwarded to the successor employers.

**[24]** Heartland Livestock Services (324007 Alberta Ltd.) argued that it is caught in the middle of a dispute between Saskatchewan Wheat Pool and the Union that has little to do with its ability to provide benefits that mirror those contained in the collective agreement. Heartland is in the process of establishing a defined benefit plan that mirrors the SWP/GSU Pension Plan. It argues that there is no urgency to the matter as the sale took place in October, 2001 and no action has been taken by the Union to date. Heartland noted that the issue in dispute is monetary only and no irreparable harm is alleged by the Union.

**[25]** GVIC argued that it cannot pay contributions on behalf of the employees in question to the SWP/GSU Pension Plan under the terms of the SWP/GSU Pension Plan. It is willing to place employee contributions into a fund with an institution selected by the Union until a mirror pension plan can be established. GVIC also disputed that there was any urgency to the matter and no impending harm as the employees' pension rights cannot be terminated and funds cannot be removed from the SWP/GSU Pension Plan without the Union's agreement. GVIC argued that the ordinary process of a sale of business should be allowed to take its course.

## Analysis and Decision

**[26]** The Board set out the test for determining if interim relief ought to be granted on an application in *Hotel Employees and Restaurant Employees Union, Local 206 v. Canadian Hotels Income Properties Real Estate Investment Trust #19 Operations Ltd. (operating as Regina Inn Hotel and Convention Centre),* [1999] Sask. L.R.B.R. 190, LRB File No. 131-99 at 194 as follows:

> *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.*

**[27]** In the present case, the Union's main application raises an arguable issue, either under s. 5 or s. 37 of the *Act*. Section 37 of the *Act* provides the clearest direction to the parties where the collective agreement of a predecessor employer does not fit perfectly with the successor employer. Section 37(2)(f) allows the Board to "give 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)." In *Estevan Coal Corporation et al. v. United Mine Workers of America, Local 7606 and United Steelworkers of America, Local 9279,* [1998] Sask. L.R.B.R. 709, LRB File No. 186-96, the Board applied s. 37(2)(f) to provide directions to the parties on the application of seniority provisions to a successor's bargaining unit where significant intermingling of the members of two unions occurred through a corporate takeover. In the present case, the Union has asked for directions from the Board under s. 37 to ensure the continuity of employees' collective bargaining rights upon the occasion of a sale, transfer or other disposition of a business.

**[28]** In relation to the question of balancing labour relations harm, the parties have very different views as to the nature of the pension problem. The Union views the problem as a complex one involving discussion of the current pension surplus; how it can be accessed by employees of Heartland Livestock Services and Western Producer Publications Division; how it could be used to improve their pension entitlements over the long run; and the like. In its view, the pension is not simply an undertaking by the Employer to provide a set retirement benefit to the employees in question.

**[29]** To the successor employers in particular, the pension issue is simply a matter of transferring current assets of the pension plan to the new pension plans sufficient to pay the benefits required to be paid under the terms of the current plan.

**[30]** In essence, the Union views the pension issue as an on-going dynamic issue while the employers view the pension issue as a static and defined issue. One or the other view may be correct in the long run, however, at this stage of the proceedings, it is certainly not clear which view is correct.

**[31]** It is clear, however, that the current terms of the collective agreement do not fit perfectly with the successor employers – that is, they cannot fulfill the terms of the current collective agreement by continuing the SWP/GSU Pension Plan as it is in all aspects for the employees in question. Some changes must be made to the manner and method of providing a pension plan to the employees in question. The employers acknowledge that they will need to set up new pension plans and obtain approval for those plans from the appropriate pension regulators and Revenue Canada. They cannot simply move into the shoes of Saskatchewan Wheat Pool and take over the existing plan.

**[32]** The policy set out in s. 37 of the *Act* suggests that unilateral action is really not the preferred method of resolving disputes of this nature on the sale, transfer or disposition of a business. Under s. 37(1) a collective agreement entered into between a predecessor employer and a union is deemed to apply to a successor employer unless the Board otherwise orders. Under the scheme of s. 37, a gap in the successor's ability to abide by the terms of a collective agreement can be resolved either through negotiations with the Union or by referring the matter to the Board for determination under s. 37(2)(f).

**[33]** The labour relations harm in this instance relates to the employers' failure to recognize the role of the Union in resolving the pension matters. The s. 37 application, in particular, engages the parties in a process of resolving the collective bargaining issues that arose on the disposition of the businesses. Ultimately, a Board hearing may be necessary on the application and the Board may be required to give direction to the parties regarding the application of article 9 in the collective agreements. In the meantime, it is essential that the respondents recognize the role of the Union in reaching a decision on the manner and method of providing pension benefits to the employees in question. The Union and the Employers must negotiate a resolution to the problem or seek resolution through the main application under s. 37. Although primary responsibility for this matter rests with the successor employers and the Union, it is essential in this case to include Saskatchewan Wheat Pool in the negotiations as it controls the existing pension plan for the employees in question, along with the Union.

**[34]** If no interim order is issued, the respondents could continue on the path of fixing the pension issue without input from the Union pending the final hearing of this matter. While any pension plans, which the Employers may unilaterally implement, can be subject to review by an arbitration

board or this board and any breach of the agreements or *Act* corrected after the fact, the importance of the pension issue to employees on the sale of a business, in our view, justifies Board intervention to maintain the pension status quo as far as possible pending resolution of this issues through negotiations between the parties, and failing such negotiations, a final hearing by the Board. The balance of labour relations harm falls in favour of intervention.

**[35]** We will issue an interim order to maintain the status quo as far as is possible while negotiations are carried on by the parties. If agreement is not achieved, then the matter can come to the Board on the main application.

**[36]** The Board will not require the successor employers to pay pension contributions to the existing SWP/GSU Pension Plan as it is not clear that such payments may be made at this time to the plan in question.

**[37]** An order will issue on the following terms:

(1) Saskatchewan Wheat Pool is restrained from requesting the transfer of any funds from the SWP/GSU Pension Plan to pension plans established by the successor employers, Heartland Livestock Services (324007 Alberta Ltd.) and GVIC, until the final application filed herein is heard and determined by the Board, or agreement is reached between the Union and the successor employers on the transfer of such funds;

(2) Saskatchewan Wheat Pool, Heartland Livestock Services (324007 Alberta Ltd.) and GVIC are directed to commence negotiations with the Union with respect to the SWP/GSU Pension Plan and the manner of carrying out the pension plan obligations contained in the collective agreements between the Union and Heartland Livestock Services and the Union and Saskatchewan Wheat Pool respecting the employees of Western Producer Publications Division;

(3) Heartland Livestock Services (324007 Alberta Ltd.) is directed to continue to collect pension contributions from employees of Heartland Livestock Services and to hold all such pension contributions in trust for the benefit of the employees in

question until the Union and Heartland Livestock Services (324007 Alberta Ltd.) agree on the manner of carrying out the pension obligations set out in article 9 of the collective agreement between Heartland Livestock Services and the Union;

(4) GVIC is directed to continue to collect pension contributions from employees of the former Western Producer Publications Division and to hold all such pension contributions in trust for the benefit of the employees in question until the Union and GVIC agree on the manner of carrying out the pension obligations set out in article 9 of the collective agreement between Saskatchewan Wheat Pool and the Union respecting employees of Western Producer Publications Division; and

(5) The Board Registrar is directed to set a hearing date of the application no sooner that 30 days after the parties have commenced negotiations as set out in paragraph (2) above on the request of any party.

**KAREN MANYK, Applicant v. COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA and HOLLINGER CANADIAN NEWSPAPERS, LP, o/a THE SASKATOON STAR-PHOENIX NEWSPAPER, Respondents**

LRB File No. 246-01; January 24, 2002
Vice-Chairperson, Walter Matkowski; Members: Mike Carr and Gloria Cymbalisty

| | |
|---|---|
| The Applicant: | Karen Manyk |
| For the Respondent Union: | Neil McLeod, Q.C. |
| For the Respondent Employer: | Clint Weiland |

**Decertification – Interference – Employer committed unfair labour practice when it paid year-end bonus to all employees except those seeking to be certified – Employer thereby encouraged resentment toward union and influenced and intimidated employees into not supporting union – Employer's actions also constituted violation of s. 9 of *The Trade Union Act* – Board dismisses application for rescission.**

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

## REASONS FOR DECISION

### Background

**[1]** **Walter Matkowski, Vice-Chairperson:** Karen Manyk, an employee of Hollinger Canadian Newspapers, LP, o/a The Saskatoon Star-Phoenix Newspaper (the "Employer") filed an application for rescission of the Order certifying Communications, Energy and Paperworkers Union of Canada (the "Union") as the bargaining agent for certain employees of the Employer. The application was filed in the open period on November 13, 2001.

**[2]** The Employer replied to the application and filed a statement of employment listing 76 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 pursuant to s. 9 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*").

**[4]** A hearing of the matter was held in Saskatoon on December 3, 2001. At the hearing, the Union and the Employer confirmed that there were court challenges pending or to be filed in regard to the certification Order and in regard to a decision of the Board finding the Employer guilty of an unfair labour practice: see *Communications, Energy and Paperworkers Union of Canada v. Hollinger Canadian Newspapers, LP, o/a The Saskatoon Star-Phoenix Newspaper*, [2001] Sask. L.R.B.R. 689, LRB File No. 331-99. Counsel for the Union and the Employer advised the Board that there were no stays in effect in regard to either matter.

**[5]** All parties urged the Board to hear the application in spite of the actual or possible court challenges. The Board agreed to hear the application.

## Facts

**[6]** Ms. Manyk, Ron Bitz and Blair Livingston testified in support of the rescission application. Following their testimony, counsel for the Union conceded that there was no overt activity on the part of the Employer in the normal sense in regard to the Union's allegations of employer influence, except for the "bonus issue."

**[7]** Ms. Manyk, Mr. Bitz and Mr. Livingston testified that employees were unhappy because the Employer refused to pay the 1999 Christmas/year end bonus (the "bonus") to employees in the proposed bargaining unit. The bonus was paid to other employees at the Star Phoenix who were not applying for unionization. Mr. Bitz and Mr. Livingston were angry at the Union for applying for certification prior to the payment of the 1999 bonus and they sent emails to the Union criticizing it for applying for certification. In their opinion, the Union ought to have known from its experience with organizing the Employer's newspapers in Calgary and Regina, that the Employer would refuse to pay a bonus to any employees seeking unionization. Mr. Livingston and Ms. Manyk believed that other employees were also upset at the Union as a result of losing their 1999 and 2000 bonuses. The Employer also refused to pay the 2000 bonus to unionized staff. Livingston felt that the employees had a better chance of receiving the bonuses for both years if there was no union in the workplace.

**[8]** Ms. Manyk testified that during the decertification campaign employees asked her about the bonus issue. She contacted a member of the Employer's human resource department about the issue and was informed that the Employer was appealing the Board's finding that the Employer had committed an unfair labour practice by refusing to pay the 1999 bonus.

**[9]** Unionized staff did not receive any bonuses for the years 1999 or 2000, while non-unionized staff did. The Union filed an unfair labour practice application in regard to the non-payment of the 2000 bonus to the unionized staff. The parties to that application agreed to place that application on hold, pending receipt of the Board's decision in regard to the 1999 bonus application.

## Relevant Statutory Provision

**[10]** Section 9 of the *Act* provides:

> *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

**[11]** The Board must determine if the application was made in whole or in part on the advice of, or as a result of, influence of or interference or intimidation by the Employer.

**[12]** In the decision *Shuba v Gunner Industries Ltd., et al,* [1997] Sask. L.R.B.R. 829, LRB File No. 127-97, the Board set out the factors to consider when determining whether to grant a rescission vote at 832:

> *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.*

**[13]** Accepting the legal analysis in *Shuba, supra*, the ultimate issue for the Board to determine is whether or not the Employer's actions in not paying its unionized staff a bonus in 1999 or 2000, amounted to employer influence, interference or intimidation pursuant to s. 9 of the *Act.*

**[14]** In its decision in LRB File No. 331-99, *Communications, Energy and Paperworkers Union of Canada v. Hollinger Canadian Newspapers, supra*, the Board found the Employer guilty of committing an unfair labour practice and determined that the Employer's actions were motivated by a desire to punish and discourage the employees who supported the Union.

**[15]** In LRB File No. 331-99, *Communications, Energy and Paperworkers Union of Canada v. Hollinger Canadian Newspapers, supra*, the Board also concluded at 701 and 702:

> *. . . 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.*
>
> *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.*

**[16]** Since the Board's decision in LRB File No. 331-99, *Communications, Energy and Paperworkers Union of Canada v. Hollinger Canadian Newspapers, supra*, the Employer has not paid its unionized staff the 1999 bonus. The Employer has suggested that it will apply for judicial review of the Board's decision but, as at the date of the hearing, no application had been filed and no stay was in effect.

**[17]** The end result before this Board is that the Employer has been found to have committed an unfair labour practice in regard to the bonus issue and that the Employer has taken no steps to right this wrong.

**[18]** The evidence before this Board was clear that the unionized staff were both painfully and angrily aware that they did not receive a bonus in either 1999 or 2000. Both Mr. Bitz and Mr. Livingston confirmed their own level of anger with the Union in regard to not receiving a bonus while Mr. Livingston and Ms. Manyk confirmed that other unionized employees were angry at the Union for not having received a bonus.

**[19]** The Board concludes that, through its action in not paying the 1999 bonus, the Employer was encouraging resentment towards the Union. The message was clear, support the Union and you will be treated differently, you will not receive a bonus while non-unionized employees will. As Mr. Livingston so astutely suggested, unionized employees would have a better chance of receiving a bonus without the Union.

**[20]** It is the Board's determination that the Employer's actions in not paying unionized employees the 1999 bonus, besides being an unfair labour practice, had the effect of influencing and intimidating employees into not supporting the Union.

**[21]** The Board finds that the Employer's actions in regard to the bonus issue constitute a breach of s. 9 of the *Act*. As such, the application is dismissed.

**[22]** Mr. Carr dissents from these Reasons for Decision. A written dissent will be forwarded to the parties in due course.

**CLAYTON WALTERS, Applicant and XPOTENTIAL PRODUCTS INC. operating as IMPACT PRODUCTS and UNITED STEELWORKERS OF AMERICA, LOCAL 5917, Respondents**

LRB File No. 214-01; January 25, 2002
Vice-Chairperson, Walter Matkowski; Members: Maurice Werezak and Leo Lancaster

| | |
|---|---|
| The Applicant: | Clayton Walters |
| For the Respondent Employer: | Jeff Grubb, Q.C. |
| For the Respondent Union: | Angela Zborosky |

**Decertification – Interference – Employer directly negotiated wages with applicant and paid applicant significantly more than provided by collective agreement without union's knowledge – Employer thereby undermined union, leading other employees to conclusion that union was unnecessary – Board finds employer influence, interference or intimidation within meaning of s. 9 of *The Trade Union Act* – Board dismisses application for rescission.**

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

## REASONS FOR DECISION

### Background

**[1] Walter Matkowski, Vice-Chairperson:** Clayton Walters, an employee of XPotential Products Inc. operating as Impact Products (the "Employer") filed an application for rescission of the Order certifying United Steelworkers of America, Local 5917 (the "Union") as the bargaining agent for the employees of the Employer. The application was filed in the open period on October 16, 2001.

**[2]** The Employer replied to the application and filed a statement of employment listing 11 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*").

**[4]** A hearing of the matter was held in Regina on November 30, 2001.

## Facts

**[5]** Mr. Walters testified in support of the rescission application. Mr. Walters testified that he approached Frank McMaster, the general manager of the Employer and advised Mr. McMaster that he did not like the Union. Mr. McMaster told Mr. Walters to contact the Board with regard to his anti-union feelings and also told Mr. Walters that he could not talk to him about any applications to the Board.

**[6]** Mr. Walters believed that "the Union was holding all the guys back" and that the employees would be paid more money without the Union. Mr. Walters stated that he didn't like paying union dues even though he was unable to recall the exact amount of dues that he paid.

**[7]** Mr. Walters is the lead hand on an evening crew, which works a 3:30 p.m. to midnight shift. Normally, no management personnel is at the workplace after approximately 5:00 p.m. and he is in charge. Mr. Walters is to contact management for instructions if significant problems arise. Mr. Walters indicated that he earns $15.00 per hour. He negotiated this wage rate directly with the Employer and has received this rate of pay for the last six months. Mr. Walters did not previously disclose this higher rate of pay to the Union. The only job classification under the collective agreement is that of an operator, which has a rate of pay of $9.00 per hour.

**[8]** During an evening shift, prior to the filing of the decertification application, Mr. Walters called each of the other five unionized employees on shift individually, up to an area just outside of the management offices. Mr. Walters talked to each employee for approximately 15 minutes about his anti-union beliefs. One of Mr. Walters' beliefs was that people could negotiate their own wage rates and obtain more money without a union. Mr. Walters showed employees a graph at these meetings, which set out the Union's and Employer's wage proposals for the latest round of bargaining. The graphs confirmed that a lead hand would earn significantly less that $15.00 per hour. Mr. Walters obtained these graphs from Mr. McMaster's office without permission, then photocopied them. Mr. Walters asked employees to sign a document in support of the rescission application. Mr. Walters did not believe that production was shut down while he met with employees.

**[9]** Mr. Walters indicated that, prior to the filing of the decertification application, he also met with the day shift employees at the end of their shift and at the beginning of his shift. Mr. Walters showed these employees the wage proposal graphs and told them that it was possible to make more money without the Union. Mr. Walters may have been late for his scheduled shift as a result of the meeting with the day shift employees.

**[10]** Two other employees, Tyler Nadon and Jonathan Bolton testified in support of the rescission application. Both employees testified that they did not know exactly what hourly rate Mr. Walters received but that they believed he made more money than they did and that they wanted to earn more money like Mr. Walters.

**[11]** Jeff Kallichuk, Union staff representative, testified on behalf of the Union. Mr. Kallichuk testified that, in approximately April or May, 2001, he became aware that Mr. Walters was receiving a higher wage rate than the one provided for in the collective agreement. Mr. Kallichuk decided that he would fix this problem at soon-to-be scheduled bargaining sessions with the Employer. Mr. Kallichuk sent a letter to Mr. McMaster dated May 25, 2001 asking for information necessary for the Union to bargain with the Employer and included a request that the Employer provide them with a list of employees, job titles and wage rates. The Employer did not respond to this request.

**[12]** At the bargaining table, Mr. Kallichuk again asked the Employer for the wage rates of every employee. The Employer representative at the bargaining table advised that Mr. Walters was paid more than $10.25 per hour.

**[13]** At the bargaining table, Mr. Kallichuk informed the Employer that he had received information that Mr. Walters had removed graphs and other bargaining materials from Mr. McMaster's office. Mr. Kallichuk was not aware of any discipline imposed on Mr. Walters by the Employer as a result of Mr. Walters removing materials from Mr. McMaster's office.

**[14]** The evidence of numerous witnesses indicated that lead hands were receiving a premium payment for their services though, without the Union's knowledge, Mr. Walters was receiving a significantly higher wage rate than anyone else. Mr. Kallichuk was new to this group of employees but indicated that he had never experienced a situation where the Employer was not adhering to

provisions of a collective agreement in regard to wages unless a letter of understanding had been negotiated to deal with the wage rate for a new classification.

**[15]** The Union called witnesses who indicated that production was shut down on the evening that Mr. Walters met with employees.

## Relevant Statutory Provision

**[16]** 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

**[17]** The Board must determine if the application was made in whole or in part on the advice of, or as a result of influence of or interference or intimidation by the Employer.

**[18]** 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:

> *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.*

**[19]** The Board accepts the legal analysis in *Shuba*, *supra*, in that employer interference is rarely of an overt nature. In the case at hand, the evidence indicated that the Employer and Mr. Walters had negotiated a separate and significantly higher wage rate for Mr. Walters a short time prior to Mr. Walters filing the decertification application. The Employer told Mr. Walters to contact the Board with regard to his anti-union beliefs. Mr. Walters testified that it was just good fortune that he contacted the Board shortly before the "open period." All of these factors, taken together, lead this Board to the inescapable conclusion that there has been employer influence pursuant to s. 9 of the *Act*.

**[20]** Even without all of the unusual circumstances listed above, the fact that the Employer negotiated wages directly with Mr. Walters and was paying Mr. Walters a significantly higher rate of pay without the Union's knowledge, clearly had the effect of undermining the Union at the workplace. The evidence confirms the obvious, that other employees wanted to negotiate a higher wage rate directly with the Employer much like Mr. Walters had done. By bargaining directly with Mr. Walters, the Employer undermined the Union and the conclusion that some employees drew was that they did not need the Union, just as Mr. Walters was advising them. The Board has previously determined that such Employer conduct is unacceptable.

**[21]** In the decision *McNutt v. I.W.A and Moose Jaw Sash and Door (1963) Ltd.*, [1980] July Sask. Labour Rep. 37, LRB File No. 033-80, the Board notes at 37:

> *If the Board granted the application, it would sanction the practice of an employer inducing applications for decertification by an employer offering wage increases directly to employees without reference to the Union. Section 9 of the Act was enacted to permit the Board to prevent the success of such tactics.*

**[22]** The Employer attempted to argue that the Union could have made itself aware of Mr. Walters' higher wage rate through its dues records and that the Union was falsely alleging that the Employer paid benefits or compensation to Mr. Walters outside the provisions of the collective agreement for the purpose of undermining the Union. However the evidence was uncontroverted that

Mr. Kallichuk twice asked the Employer to provide him with Mr. Walters' wage rate and the Employer first refused to provide this information and then inaccurately advised the Union what that wage rate was.

**[23]** The Board, therefore, finds that there has been employer influence pursuant to s. 9 of the *Act*. As such, the application is dismissed.

# UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant v. VISION SECURITY AND INVESTIGATIONS INC., Respondent

LRB File No. 219-01; January 25, 2002
Vice-Chairperson, Walter Matkowski; Board Members: Bruce McDonald and Brenda Cuthbert

For the Applicant: Drew Plaxton
For the Respondent: Randy Johnson

**Duty to bargain in good faith – Collective agreement – Employer cancelled several bargaining sessions at last minute and failed to show up for others – Where representative of employer did attend bargaining sessions, did not always have authority to bind employer – Employer raised new proposals in mid-bargaining – Board finds failure to bargain in good faith and orders parties to bargain on specified dates.**

**Remedy – Unfair labour practice – Collective bargaining – Union suffered monetary loss as result of employer's failure to attend certain bargaining sessions and last minute cancellation of other bargaining sessions – Employer given opportunity to review its records and union's records to confirm amount of union's monetary loss – Board reserves jurisdiction on monetary loss award in event parties cannot agree.**

***The Trade Union Act*, ss. 5(g) and 11(1)(c).**

## REASONS FOR DECISION

### Background

**[1] Walter Matkowski, Vice-Chairperson:** United Food and Commercial Workers, Local 1400 (the "Union") alleged that Vision Security and Investigations Inc. (the "Employer") committed an unfair labour practice within the meaning of s.11(1)(c) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"). The Union relied on the testimony of Donald Logan, in support of its application while the Employer called no evidence.

**[2]** Mr. Logan testified that the Union and the Employer were having a difficult time in attempting to arrive at a new bargained contract. The parties would agree to bargaining dates and the Employer would either not show up or would cancel the negotiation session at the last minute. This occurred on February 27, April 9, June 12, July 9 and 10, and October 2 and 3, 2001. The parties did bargain on certain dates with some progress being made. Unfortunately, on many of these occasions,

no one was present on the Employer's side of the table who possessed the power or had the authority to bind the Employer.

**[3]** The Union had two employees of the Employer on its bargaining committee. When these employees missed work to attend at scheduled bargaining sessions, the Union would either pay these employees their lost wages or an honorarium. On the occasions when the Employer did not attend for bargaining, the Union was still forced to pay the employees, either their lost wages or an honorarium.

**[4]** In addition, at a bargaining session held on June 13, 2001, the Employer attempted to raise new proposals in mid-bargaining, after it had not previously raised any proposed changes to the existing collective agreement.

**[5]** At the hearing, the Employer recognized that it must resume bargaining with the Union despite the occurrence of a strike in December, 2001 and despite the fact that the Employer had lost two significant contracts. The loss of the two contracts dramatically reduced the number of employees in the bargaining unit to approximately eight. Nonetheless, the parties committed to recommence bargaining on February 22, 25, 26 and 27, 2002. Both a conciliator and a senior official for the Employer were contacted and their availability to attend on the proposed dates was confirmed.

**[6]** The Employer also recognized that the Union suffered economic loss as a result of the Employer not attending bargaining sessions or cancelling bargaining sessions at the last minute. The Employer asked for the opportunity to review its records and the Union's records to confirm the Union's loss. This opportunity will be granted.

**[7]** The Employer also agreed to remove any new proposals which were brought up during bargaining on June 13, 2001 save and except what had already been agreed to by the parties or already removed by the Employer. From the Employer's perspective, the only stumbling block to attaining a new contract was wages.

**[8]** Given what occurred at the hearing, including hearing the evidence of Mr. Logan and the comments by the Employer's representative, the Board finds the Employer guilty of the unfair labour practice and in breach of s. 11(1)(c) of the *Act*. The Board issued an Order on January 11, 2002, which is intended to assist the parties. The Order requires, among other things, that the parties resume bargaining on the agreed upon dates and that the Employer make good all monetary loss suffered by the Union as a result of the Employer's non-attendance at scheduled bargaining dates.

# BOB STALLARD, Applicant v. SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, Respondent

LRB File No. 067-00; January 30, 2002
Vice-Chairperson, James Seibel; Members: Ken Hutchinson and Donna Ottenson

For the Applicant: Warren Martinson
For the Respondent: Rick Engel

**Duty of fair representation – Scope of duty – Applicant alleges that union representative privately promised applicant preferred seniority status in exchange for support for union – After considering all evidence, Board does not accept that arrangement alleged by applicant was made – Board dismisses application brought under s. 25.1 of *The Trade Union Act*.**

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

## REASONS FOR DECISION

### Background

**[1]** **James Seibel, Vice-Chairperson:** Saskatchewan Government and General Employees' Union (the "Union") is designated as the bargaining agent for a unit comprising certain employees (the "PS/GE" bargaining unit) of the Government of Saskatchewan (the "Government"), including persons employed in forest fire suppression as fire bomber pilots by the Northern Air Operations ("NAO") division of Saskatchewan Environment and Resource Management ("SERM"). The applicant, Bob Stallard, is a member of the bargaining unit. Mr. Stallard filed an application alleging that the Union had committed an unfair labour practice in violation of s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*").

**[2]** 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.*

**[3]** Much of the historical background of the industrial relations of the fire bomber pilots is described in detail in two previous decisions of the Board – *The Canadian Association of Fire Bomber*

*Pilots and James Stockdale v. The Government of Saskatchewan and Saskatchewan Government Employees' Union*, [1993] 1st Quarter Sask. Labour Rep. 202, LRB File No. 164-92 (upheld on judicial review at (1993), 119 Sask. R. 161 (Sask. Q.B.) and by Sask. C.A. (unreported), leave to appeal to S.C.C. refused, [1994] S.C.C.A. No. 287) and *Saskatchewan Government Employees' Union and the Government of Saskatchewan v. The Canadian Association of Fire Bomber Pilots and James Stockdale*, [1996] Sask. L.R.B.R. 539, LRB File No. 302-95 – and is only outlined briefly in these Reasons.

**[4]** For several years prior to 1976, the Government obtained aerial forest fire protection services by contracting with commercial air transportation companies. In 1976, the Government acquired a number of aircraft for use in forest fire suppression that it initially operated in conjunction with other aircraft supplied by private contractors. From 1977 to late 1996, succeeding agencies representing the Government entered into contracts with the fire bomber pilots each year to secure their services for the summer fire season.

**[5]** NAO was housed successively between 1977 and 1987 in the Department of Government Services, the Department of Northern Saskatchewan, the Department of Supply and Services and Saskatchewan Supply and Services. In 1987, administrative responsibility for NAO was transferred to Saskatchewan Property Management Corporation ("SPMC"), a crown corporation. In 1992, this responsibility was transferred back to Saskatchewan Parks and Renewable Resources and in 1993, to SERM. The pilots and other employees in NAO engaged in forest fire suppression were not organized by a union. Throughout this period and to the present time, the Government operated other air services, including the executive air service and the air ambulance service, which employed pilots who were either members of the Union or were out-of scope.

**[6]** While NAO was under the auspices of SPMC, the fire bomber pilots formed an association – the Canadian Association of Fire Bomber Pilots ("CAFBP") – which held discussions with SPMC regarding certain employment issues including wages and benefits. In 1991, most probably because of preparations for the transfer of NAO from SPMC to Saskatchewan Parks and Renewable Resources, the Union approached the fire bomber pilots to sign union cards. The CAFBP filed an application for certification with the Canada Labour Relations Board. The Union took the position that the NAO employees, including the fire bomber pilots, were included within the scope of its existing certification Order. When control of NAO was returned to the Government in 1992, the Union concluded a letter of understanding with SPMC and Saskatchewan Parks and Renewable Resources setting out the terms and

conditions of employment governing the employees who were being transferred back into government employment.

**[7]** The Union, the Government and CAFBP ultimately agreed that the question of constitutional jurisdiction over the labour relations of the fire bomber pilots should be referred to this Board. In the two decisions referred to above, the Board determined, *inter alia*, that the labour relations of the fire bomber pilots were within the jurisdiction of this Board, and that they could not be "swept-in" to the Union's existing certification Order, but rather, the Union must demonstrate majority support among the members of the group.

**[8]** Following some months of negotiation between the Union and CAFBP a majority of the pilots indicated their support for the Union. By an Order dated December 23, 1996 (LRB File No. 331-96), the Board included "the fire bomber pilots, chief pilot and flight watch co-ordinators employed by the Government of Saskatchewan in Northern Air Operations" within the scope of the PS/GE bargaining unit represented by the Union. The Union then negotiated with the Public Service Commission (the "PSC") with respect to the terms and conditions that would pertain to the pilots' employment upon entry into the bargaining unit and the public service. Among the special terms negotiated was provision for a form of "fenced-in" seniority for the pilots in the NAO section for the purposes of annual recall, work assignments, overtime opportunities, extra work and layoffs. General public service seniority would apply to the filling of vacancies subject to necessary qualifications.

**[9]** This internal seniority system had been selected by a majority vote of the pilots; the Union then successfully negotiated for it on their behalf with the PSC. Mr. Stallard, who had been with NAO but a short time, and who had little internal seniority under this system, claimed that he had a private arrangement with the Union whereby the whole of his prior lengthy service in the public service would be recognized, an agreement that he says the Union has not honoured. That is the basis for his application.

## Evidence

**[10]** Mr. Stallard testified about his employment history. From 1979 to 1983 he was employed as a fire bomber pilot by NAO. From 1981 to 1983, Mr. Stallard was on contract to NAO as a fire bomber pilot during the forest fire season and worked in the Government's executive air service the balance of the year. In 1983, he was given the option to transfer to the executive air service in

Regina or the air ambulance service operated out of Saskatoon. Mr. Stallard chose the air ambulance service, where he worked until September, 1994, when he lost his job because of a medical problem that resulted in the suspension of his pilot's license. As an employee of the air ambulance service, Mr. Stallard was a member of the Union. With the assistance of the Union he grieved his termination. Although he regained his license in early 1995, his status with the air ambulance service was pending arbitration. While awaiting the outcome of the arbitration, he worked as a pilot in the private sector and on contract with NAO as a fire bomber pilot through the 1995 and 1996 fire seasons. Mr. Stallard succeeded in his arbitration with the air ambulance service in June, 1996, and as a result was granted leave of absence for his time away during which he continued to accrue seniority. Mr. Stallard said that, in August, 1996, the air ambulance service experienced a shortage of pilots and an arrangement was struck whereby he was allowed to work for both NAO as a fire bomber pilot and as an air ambulance pilot during alternating weeks until the end of the fire season, when he rejoined the air ambulance service on a full-time basis.

**[11]** When Mr. Stallard worked on contract with NAO during the fire seasons in 1995 and 1996, the fire bomber pilots were not part of a bargaining unit organized by a trade union. The decision by the Board in LRB File No. 302-95, *supra*, dated July 10, 1996, determined that the Union was required to show that it had the support of a majority of NAO employees, including the fire bomber pilots, before they could be included in its bargaining unit. Mr. Stallard testified that during 1996 there were numerous meetings among the pilots with respect to joining the Union and at some point during the summer they invited Union representatives to come and speak to them.

**[12]** Mr. Stallard said that seniority was an important issue for him. Whereas he was one of the most junior employees at NAO as an unorganized workplace, having joined it as a contract employee in 1995, because he had been a member of the Union for a long time as a result of his employment with NAO when it was within a department of the Government and then with the air ambulance service, he expected to be at the top of the seniority list if the pilots' group selected the Union as their bargaining representative.

**[13]** Mr. Stallard testified that, at the end of a meeting of the pilots with representatives of the Union in the spring of 1996, he approached Kevin Yates, who was then chairperson of the Union's PS/GE negotiating committee, to discuss whether he could bring his seniority over from his prior government employment to the NAO seniority list if NAO employees selected the Union as their

bargaining representative. He said that it was a short conversation and Mr. Yates "did not have any real reaction at the time." Mr. Stallard said he was looking for some assurance, but that Mr. Yates "gave him no yes or no answer at that time."

**[14]** Mr. Stallard testified that he next met with Mr. Yates in June, 1996, at the Union's office in Saskatoon, when he went to see Margot Wallace, then an agreement administration advisor with the Union, about the status of his grievance with the air ambulance service. He said he explained his employment history to Mr. Yates and that he did not want to leave the air ambulance service for the NAO if his grievance was successful unless he could bring his seniority over. Mr. Stallard testified that he specifically asked Mr. Yates whether he could bring his seniority across to NAO and that Mr. Yates indicated that he could. Mr. Stallard said that Mr. Yates placed a Union membership card in front of him. Mr. Stallard said he signed it and dated it February, 1979.

**[15]** In cross-examination, Mr. Stallard was clearly confused about the dates upon which he says he spoke with Mr. Yates. However, he was clear that Mr. Yates made no assurances about the transfer of his seniority during the conversation he said they had following a pilots' meeting attended by Mr. Yates. He agreed that such a meeting probably did not take place prior to July 18, 1996, which was the date on which the general membership of CAFBP voted to pursue discussions with the Union. Mr. Stallard was unable to explain why Mr. Yates might want to solicit him to sign a Union card when he was already a Union member and before the Board had ruled as to whether the pilots could be swept into the PS/GE bargaining unit without evidence of majority support. Ms. Wallace, who was called to testify by Mr. Stallard, recollected that their meeting was sometime after the Board's July 10, 1996 decision in LRB File No. 302-95.

**[16]** Peter Byl, the CAFBP president, posted a memorandum dated July 20, 1996, soliciting submissions from the CAFBP membership with respect to matters they would like to see raised with the Union. The memorandum provides as follows:

> *After the meeting of July 18, 1996 there was a brief executive meeting and the following was proposed.*
>
> *The executive will receive written submissions from members on items they would like to be on the table when we talk to SGEU regarding entry into the union. We would like to give everyone some time to gather their thoughts on this and put pen to paper but we would also like to do this by July 26, 1996.*

*If there are any problems with this please advise me ASAP.*

*It is very important for everyone to realize that this may be the last direct chance we have to set a course for the future, and that decisions made now will have a long term impact and/or consequences. As it has always been Assoc. policy to listen to everyone's point of view, (as cumbersome as it may seem to make our decision making process) please avail yourselves of this opportunity.*

**[17]** Mr. Stallard did not make any submission to, or raise any concerns with, the CAFBP executive at that time. By memorandum at about this time, Mr. Byl shared some of his personal thoughts with CAFBP members as to important issues. The memorandum reads, in part, as follows:

. . .
*Years of contract should be counted as years of seniority in government service.*
. . .
*There should be fences built in to protect those employees currently in these positions from any bumping from outside this work unit. As new positions come open then the current union provisions for bidding and bumping rights would apply. Any new positions within this work unit are to be available to existing employees of the units for first right of refusal.*

*The existing seniority list within this group of employees [i.e., as prepared by the Chief Pilot] should be adjusted to reflect current and legal requirements. If there was more than one position filled in any contract year then there should be a double draw made for all the employees hired in that year for their seniority number. The number of years under contract should be used as criteria and not days of service i.e. extensions, etc.*

*Once the seniority question is resolved then the bidding process should be initiated to determine flight crew and base assignments. . . .*

*All of the above items require consensus amongst the members and approval by SGEU.*

**[18]** In a memorandum dated July 29, 1996, Mr. Byl reported on submissions received from members, which reads, in part, as follows:

*8. Seniority list to be confirmed and positions and seniority numbers firmly established by August 14, 1996.*

*9. Open bid for all flying positions based on seniority list.*

*10. Senior people on type to get first opportunity at extensions, overseas work etc.*

*12. Seniority to be based on most recent year of hire and subsequent contracts served.*

*13. Full seniority to be carried over to SGEU.*

**[19]** Mr. Stallard admitted that he was aware at that time that a majority of the pilots were agreed that seniority for the purposes of work allocation within NAO should be based on whole consecutive years of contract service with NAO rather than all time employed in Government. On such a basis, Mr. Stallard would have but two years' seniority for such purposes.

**[20]** The CAFBP executive had a meeting with Mr. Yates on August 3, 1996, by conference call, during which a number of issues of concern for the CAFBP members were discussed. The minutes of the meeting indicate that CAFBP was interested in a separate bargaining unit, or at least a separate section within the larger unit. Mr. Yates indicated that the latter structure was a possibility. The CAFBP was also concerned about protecting NAO pilot positions from bumping by employees outside the NAO unit. Mr. Yates agreed that all negotiations with the Government would be conducted with the input of the CAFBP.

**[21]** A general meeting of the CAFBP membership was set for August 7, 1996, which Mr. Yates was to attend. The proposed agenda, posted in advance of the meeting, reads in part as follows:

*Introduction of guest speaker, Mr. Kevin Yates, head of negotiating committee of SGEU with responses to list of questions presented to him by CAFBP executive on Aug. 3/96. As well Mr. Yates will answer any questions from the floor on matters of interest or concern to CAFBP members.*

*Note: PLEASE take some time to think about what your concerns are and have them ready for the meeting.*

**[22]** Mr. Stallard was one of five CAFBP members who did not attend the meeting.

**[23]** The minutes of the meeting indicate that among the issues of most concern were the conditions of entry to benefits and superannuation plans and bumping by persons outside the unit. Mr. Yates indicated that the Union would attempt to negotiate recognition of years of NAO service with respect to the benefits plans. The minutes clearly indicate that Mr. Yates explained that the Union would respect the decision of the CAFBP members as to whether to join the Union or not, and

that the Union was not going to pursue the members to attempt to get them to join. Blank membership cards were left with Mr. Byl; the Union did not attempt to sign up anyone at the meeting.

**[24]** In a memorandum distributed to all CAFBP members, Mr. Byl reported briefly on some of the issues discussed at the August 7, 1996 meeting, and twice stressed that any concerns should be raised with a member of the executive. Although Mr. Stallard did not commit his own concerns to paper, he said that he raised them with Mr. Byl at about this time. At the August 7, 1996 meeting, by a vote of the general membership it was resolved to strike a three-person CAFBP seniority committee mandated to prepare a seniority list for the purposes of work allocation within the NAO unit, which list ultimately would be voted on by the membership. Prior to coming within the Union's bargaining unit, work allocation or assignment was made according to an internal seniority list prepared by the chief pilot, the last of which was dated 1995 (the "1995 seniority list").

**[25]** The seniority committee posted a draft list for signature by the members that they had read it. The committee then solicited submissions from the members for their comments on the draft seniority list. Mr. Stallard made a written submission to the committee dated August 16, 1996, which reads, in part, as follows:

> *I would like to carry all of my seniority with the Saskatchewan Government over if possible and would like the committee to know I will pursue this. It is my understanding that certain people were allowed their NAO time into the seniority list. I would like to do this also. I have 7 1/2 years with NAO (Feb 1st 1979 – July 1st 1983, 1995 & 96 fire seasons).*

**[26]** At a general meeting of the CAFBP membership on August 16, 1996, attended by Mr. Stallard, a vote was held to determine whether to have the Union represent the group, and if so, whether to enter directly into the existing collective agreement or enter as their own association tied onto the PS/GE unit. The members voted for direct entry to the Union. The minutes of the meeting concerning the issue of seniority indicate that there was a discussion as to seniority being based on "unbroken years of service" with NAO. It was stated that it was necessary that everyone be clear as to where the group was heading and that the Union was only interested in dealing with the pilots as a group and not individually. Input was solicited as to what the group should seek to obtain from the Union as assurances in its negotiations with the Government. It was decided to have another meeting

the following day to strike a negotiating committee. Mr. Stallard expressed interest in being on such a committee.

**[27]** The minutes of the August 17, 1996, meeting indicate that Mr. Stallard was the last of 11 persons placed on the committee and was designated as a "floater"; however, he said that he was never informed of any subsequent meetings of the committee and did not attend any.

**[28]** Later that day, after the negotiating committee was struck, the CAFBP executive met with Mr. Yates and another Union representative, Bob Vilam. The minutes of the meeting indicate that Mr. Yates stated that the Union did not require any signed membership cards at that time, but was prepared to wait "until [the CAFBP] was happy with everything." The issue of seniority was a significant item of discussion. Mr. Byl explained to Mr. Yates that pilots wanted a local seniority list for the purposes of annual recall and for work assignment, extensions and layoffs. The minutes indicated some description by Mr. Yates of the rules on seniority for the larger public service, but indicated that it was possible to negotiate a local list for certain purposes. Mr. Stallard's situation was specifically addressed during this meeting; Mr. Yates indicated that his years in government service outside NAO would not count towards seniority on the local list. Mr. Byl explained that the group's seniority committee was in the process of developing a list based on years of NAO contract service that would be provided to the Union when it was ready. Mr. Yates explained that the group could determine what they wanted and their representatives would negotiate alongside him with the PSC to set up their section.

**[29]** On August 21, 1996, Mr. Byl sent a letter to Mr. Yates outlining certain concerns respecting the stance that would be taken in negotiations with the PSC. The letter reads, in part, as follows:

> *. . . please accept this letter without prejudice a basis for a letter of understanding between the Canadian Association of Fire Bomber Pilots and SGEU in regards to entry of the association members into SGEU. This letter also encompasses some points that SGEU will recognize as a negotiating stance [vis a vis the Public Service Commission] to be undertaken for the positions currently represented by the members of the association.*
>
> . . .
>
> *No. 2) Full recognition of a year of seniority for each year of unbroken contract service for all association members.*
>
> *No. 3) Recognition of the CAFBP work allocation list as approved by the association.*

. . .
*No. 11) SGEU will negotiate with full input from the CAFBP negotiating committee.*

**[30]** Mr. Yates replied by letter dated August 28, 1996, which reads in part as follows:

*We are prepared to negotiate with the employer, a separate section within Part 6 of the collective agreement and include within those negotiations:*

- *recognition of the CAFBP work allocation or assignment list approved by the association*

. . .

*The final issue of concern, that of seniority, I am now in a position to give you an answer. The bargaining unit is prepared to recognize your unbroken contract service as seniority within the Public Service in keeping with the belief you should always have been members of the Public Service.*

**[31]** Mr. Byl posted a memorandum, dated August 28, 1996, attaching Mr. Yates' response, that reads as follows:

*Attention: All CAFBP Members*
*Re: SGEU*

*Please find attached a letter from Mr. K. Yates stating SGEU's position in regards to our letter of concerns and issues dated August 21/96.*

*After due consideration of SGEU's position we ask that each member make a personal decision on whether to sign SGEU union cards or not. On Thursday Aug. 29/96 we will count the cards and if a majority of the members still approve of joining SGEU we will ask the remaining members to sign cards to protect their positions for next year.*

*This will be the final vote on this question. If there are any questions please contact a member of the executive ASAP.*

**[32]** The seniority committee considered the submissions made by members to its draft seniority (work allocation) list and prepared a second draft to be voted on by the employees. The seniority committee prepared a memorandum outlining the parameters used to develop the final draft as well as its decision with respect to each submission, including that made by Mr. Stallard. The memorandum reads in part as follows:

*In making decisions the following definitions and premises were consistently followed:*

*2. Prior Service – Any service whether with NAO or any other government body was not recognized.*

*3. Uninterrupted Service – defined as working in each consecutive contract year.*

*4. Interrupted Service – defined as not working during one or more contract years.*

*This list, known as the Work Allocation List, is separate and distinct from any other list that might be developed in the future regarding seniority or years of service with the Government of Saskatchewan.*

*Stallard, R.T. It is the committee's decision that your start date reflect April 95, Work Allocation Number 27. Decision based on 2 [i.e., item 2, above].*

**[33]** On this basis, the seniority committee allotted Mr. Stallard two years' seniority.

**[34]** Mr. Byl posted a memorandum, dated August 25, 1996, advising as to how the CAFBP executive proposed to deal with the work allocation list issue. The memorandum reads, in part, as follows:

*Not everyone will be happy with the results of the new list just as not everyone was happy with the old list [i.e., the 1995 list]. The executive will not jeopardize our entry into SGEU or our year for year seniority over this issue and we would ask that all members agree with this stance. To ensure this does not happen the executive believes the following system should be put in place. We will present SGEU a seniority list based on year of hire with consecutive/unbroken years of contract service with NAO. Along with this will go the old seniority list to prove the employer did use a list. All positions originally disputed with the Seniority Comm. from the old list will be marked as such. The Work Allocation List will be put up for a vote and if passed will become the new list.*

**[35]** The seniority list was put to a secret ballot vote by the CAFBP members on August 26, 1996. It resulted in a tie. Accordingly, the CAFBP executive did not submit the list to the Union for the anticipated negotiations with the PSC. Mr. Byl explained this in a memorandum to the members dated August 31, 1996, as follows:

*Based on [the results of the vote] the executive has decided that this list cannot be used or presented to SGEU or PSC. We will turn in the NAO 1995 seniority list minus the work allocation numbers. All those who have issue with the NAO/95 list may present grievances to SGEU for their consideration.*

**[36]** On August 29, 1996 a general meeting of the CAFBP membership was held for the purposes of voting on whether to sign Union cards. Some signed Union support cards at the meeting. Later that day, the CAFBP executive released the results of the vote to its members and encouraged those who had not already done so to sign cards.

**[37]** The work season for the fire bomber pilots ended in early September, 1996. In a memorandum to the CAFBP membership dated September 3, 1996, Mr. Byl advised that members should continue to consider how they wanted to deal with the issue of seniority during the off season as it would need to be resolved before spring 1997. He exhorted the members to keep in touch with the negotiating committee over the winter.

**[38]** Mr. Stallard testified that he tried to contact Mr. Yates several times during September, 1996, and afterwards, but received no response to his messages to call back. However, he said he did contact several other Union officials about the matter of the transfer of his seniority; although he said that none of them provided him with any assurances regarding a transfer of seniority should he elect to go to NAO rather than continue with the air ambulance service, they did not rule out the idea.

**[39]** Ms. Wallace testified that Mr. Stallard simply showed up at the Union's office on September 17, 1996, and related to her that he was contemplating leaving the air ambulance service and joining NAO permanently. By coincidence, Mr. Yates was meeting there with the CAFBP and PSC negotiating committees. Ms. Wallace thought that perhaps Mr. Stallard could join their meeting. However, Mr. Yates did not agree. Ms. Wallace testified that during her discussion with Mr. Yates about Mr. Stallard's circumstances, he advised her that he had made no promises to Mr. Stallard with respect to the transfer of his seniority. She said that Mr. Yates did not speak directly with Mr. Stallard at that time. In cross-examination, Mr. Stallard admitted that Ms. Wallace advised him that the transfer of his seniority for NAO purposes was not automatic and would have to be negotiated. She counseled him to attempt to have it recognized.

**[40]** Dorian Hassard, at all material times a staff representative with the Union, testified that he received a telephone call from Ms. Wallace, accompanied by Mr. Stallard on speaker, sometime in September, 1996. He said that she raised the issue of the transfer of his seniority with the public service to NAO. He said that he advised them that it would have to be a matter of negotiation between the Union and the PSC. He said he expressed his reservations about such a result.

**[41]** The Board included the fire bomber pilots in the Union's bargaining unit in December, 1996. In March, 1997, Corey Nordal, chair of the pilots' negotiating committee, provided an update on negotiations and the method to resolve the pilots' seniority list to be submitted to the Union, as resolution of the issue was becoming critical. Mr. Nordal's memorandum reads, in part, as follows:

> *Seniority of the [NAO] unit will be on a sectional basis for both pilots and flightwatch co-ordinators. This will be used for vacancies, permanent layoffs and non-permanent or seasonal layoff.*
>
> *That brings up the seniority word. Up till yesterday it was not included in the bargaining table mainly due to the fact we have been unable to present Kevin [Yates] with a group seniority list. Well, the PSC has given us one more chance to come up with a list. If we do not present them with one in the near future, they will prepare one for the group. We also require the seniority list to allow Gus and Ross to fill the aircraft assignments for the year, so we only have one more chance to have our own say as to what we view our seniority to be as we enter SGEU from an outside organization. We have not fulfilled our agreement with SGEU to present a list and as we have said before many times there will be one made for us if we do not act. We are therefore calling for another vote on which seniority list to present to Kevin. The vote will be the same question as the last vote, that is which list to present to Kevin: [The Chief Pilot's] list revised as of Nov. 29, 1995, or the list prepared by our CAFBP representatives August 22, 1996 which includes work allocation numbers. . . . We will hand a list to Kevin and the PSC for the purposes of bargaining seniority. We will be in touch to tell you where to send your vote as soon as we make arrangements for scrutineers.*

**[42]** The vote as between the two list options was by write-in ballot. Mr. Stallard voted in favour of the following ballot option:

> *I wish the CAFBP negotiating committee to present the list prepared by G.T. Rowan (revised Nov. 29, 1995) and flightwatch coordinators (Aug. '96) to SGEU for the purpose of collective bargaining seniority issues on our behalf.*

**[43]** The majority of CAFBP members voted in favour of this option. It was included by the Union in bargaining with the PSC. It was ultimately agreed to as part of the letter of understanding between the Union and the PSC relating to terms and conditions of employment of the pilots as part of the PS/GE bargaining unit.

**[44]** Mr. Stallard testified that he had no idea about the Union's position on seniority in its negotiations with the PSC, and said he relied upon what he said Mr. Yates had told him in their

meeting the previous summer. However, he said that he believed it was ultimately up to the pilots to determine their seniority list.

**[45]** On March 27, 1997, before he knew the results of the vote, Mr. Stallard tendered his resignation from the air ambulance service effective April 28, 1997, in the following terms:

> *I hereby give notice of my intention to leave my position at SPMC effective April 28th, 1997. I wish to actively work through my shift pattern until April 21st, 1997 and with my seven days off this effects my departure on April 28th, 1997.*
>
> *I have accepted recall to the Fire Suppression Unit at Northern Air Operations.*
>
> *I wish to be considered for a leave of absence without pay, which I have already applied for, and would like to discuss with you as soon as possible. The leave I have requested is for 63 days and then return to work on a casual basis until mid-April 1998. If [SPMC] is unable to grant me a leave of absence I hereby tender my resignation.*
>
> *It is with a heavy heart that I take this action, since Air Ambulance has been a major part of my life for many years, however I feel it is time for me to move on.*

**[46]** The seniority list appended to the letter of understanding between the Union and the PSC for the entry of the NAO pilots into the bargaining unit has Mr. Stallard in the next to last position with a seniority date of April 18, 1995, corresponding to his engagement by NAO under a contract during the hiatus in his employment with the air ambulance service.

**[47]** Mr. Stallard said he was upset. He raised his concerns with officials of the Union. He was variously assisted with his complaint by Sandor Jerkovits, chair of the Union's SPMC negotiating committee, and Larry Dawson, a Union agreement administration advisor, each of whom raised the matter with the Union's President, Barry Nowoselsky. In April 1998, a grievance was filed on his behalf. Mr. Stallard said he met with Mr. Yates and Mr. Jerkovits and two other Union officials, Dorian Hassard and Bob Beamon, in June, 1998. He said that Mr. Yates advised him that the Union was bound by the letter of understanding (and appended seniority list) with the Government. The Government denied the grievance in December, 1998. At the time of the hearing before the Board, the grievance had not yet been withdrawn, however, Mr. Engel, on behalf of the Union, advised the Board that the grievance would not proceed to arbitration.

**[48]** Mr. Yates testified that the Union's discussions with the CAFBP started in 1995 after the judicial review and appeals of the initial Board decision regarding jurisdiction over their labour relations. There was a hiatus in discussions after August, 1995, until the Board's July, 1996 decision, when he contacted Mr. Byl to see if there was any interest in re-opening discussions. He said that the Union did not conduct a typical organizing drive of the pilots but left it up to their group to determine their own fate; he said he simply answered their questions, described the options and left the decision up to them.

**[49]** With respect to the seniority issue, Mr. Yates testified that he made it clear that while the pilots' group could work out their own seniority for local work allocation purposes, the Union would have to secure the agreement of the Employer. He said that, at the meeting of August 17, 1996, several pilots in attendance were concerned that Mr. Stallard would be able to exercise seniority rights among their group based on the whole of his public service employment. He explained that that would not be correct, except that under the existing collective agreement there is a process to obtain recognition of that service time after one has been back in the bargaining unit for 5 years.

**[50]** Mr. Yates testified that by August 28, 1996, he had the agreement of the Union and the PSC that they would recognize the pilots' unbroken contract service with NAO for local purposes if that is what they chose. This he related to Mr. Byl in his letter of that date referred to above.

**[51]** With respect to the signing of Union cards, Mr. Yates denied that he had met privately with Mr. Stallard or that Mr. Stallard had signed a card in his presence. He said he received signed cards from the CAFBP for all of the affected employees and that those same cards were submitted to the Board with the application for certification. He did not recall ever meeting with Mr. Stallard after any meeting with the CAFBP members.

**[52]** Mr. Yates adamantly denied that he made a private deal of any kind with Mr. Stallard regarding his seniority and that the Union's position, consistently represented by him, was that the pilots' group itself would determine the basis of local seniority, and so long as it was fair and acceptable to the Union, the Union would negotiate same with the PSC. He said that Mr. Stallard was not the only CAFBP member with prior government service who was affected by the group's decision to base local seniority on consecutive years of contract service – he thought there were perhaps 11 or 12 others.

## Argument

**[53]** Mr. Martinson, counsel for Mr. Stallard, argued that if Mr. Stallard's evidence is accepted over that of Mr. Yates, then the Union is guilty of an unfair labour practice in violation of s. 25.1 of the *Act*. In support of his argument, Mr. Martinson referred to the following decisions of the Board: *Mary Banga v. Saskatchewan Government Employees Union*, [1993] 4th Quarter Sask. Labour Rep. 88, LRB File No. 173-93; *Laurence Berry v. Saskatchewan Government Employees' Union*, [1993] 4th Quarter Sask. Labour Rep. 65, LRB File No. 134-93; *Douglas Woodside v. Regina Police Association*, [2000] Sask. L.R.B.R. 896, LRB File Nos. 167-99, 168-99 & 169-99. Mr. Martinson also argued that the failure by Mr. Yates to return Mr. Stallard's telephone calls also constituted a separate failure to fulfill the duty.

**[54]** Mr. Engel, counsel for the Union, argued that there was no substance to the claim and it did not meet the requirements to found a violation of s. 25.1. He stressed that there was little advantage to be gained, and a great deal to lose, for Mr. Yates to make the alleged deal with Mr. Stallard: it makes no sense that he would take such a risk.

**[55]** Mr. Engel argued that the evidence belied Mr. Stallard's assertion in that it established that he was aware of the position of the majority of the pilots' group on the issue of seniority, and had himself voted in favour of the adoption of the 1995 seniority list.

## Analysis and Decision

**[56]** The present case is unusual amongst duty of fair representation cases that have been considered by the Board. It involves serious allegations of a secret deal and of betrayal. Mr. Stallard, alleges that a representative of the Union, Mr. Yates, privately promised him a preferred seniority status in exchange for support for the Union in its attempt to garner the support of NAO personnel to join its provincial government bargaining unit. If the allegations are true, Mr. Stallard himself is a willing participant in a reprehensible scheme. From his point of view, the only thing that went wrong was that the Union representative did not follow through on his promise and failed to secure his special status in its bargaining with the PSC.

**[57]** Having considered all of the evidence we simply do not accept that an arrangement was made of the nature alleged by Mr. Stallard in this case. Mr. Stallard's evidence was uncertain,

inconsistent, uncorroborated and contradicted with respect to when he says he met with Mr. Yates. For example, Mr. Stallard testified that he spoke to Mr. Yates about his seniority after a meeting with the pilots that Mr. Yates attended in La Ronge. However, the CAFBP meeting minutes disclose that Mr. Stallard did not attend the one meeting that Mr. Yates had with the pilots in La Ronge on August 7, 1996. All other meetings between the pilots' representatives and Mr. Yates were in Prince Albert or by conference telephone. While it is possible that Mr. Stallard spoke with Mr. Yates after the meeting on August 7, 1996, even though he did not attend the meeting itself, Mr. Stallard testified in any event that Mr. Yates made no promise or representation to him at that time regarding his request for NAO section seniority recognition of all of his government service time.

**[58]** Mr. Stallard's testimony that he met with Mr. Yates at the Union's office in Saskatoon sometime in June, 1996, after he first met with Ms. Wallace about his air ambulance arbitration – the meeting when he alleges that Mr. Yates agreed to protect his seniority in exchange for signing a membership card – was not substantiated or corroborated. Although Ms. Wallace was called to testify on behalf of Mr. Stallard, she did not support that part of his testimony. She referred only to the September, 1996, event when she asked Mr. Yates whether Mr. Stallard could join the meeting with the CAFBP negotiating committee and the PSC. Her evidence was that Mr. Yates refused and became somewhat irate. Mr. Yates' evidence was that he did not speak to Mr. Stallard that day (or, indeed, privately at any time).

**[59]** Mr. Stallard clearly knew, as is evident from the minutes of meetings of the CAFBP and Mr. Byl's ongoing reporting of events, that the Union was taking pains to allow the pilots to choose their destiny independently, including the design of seniority for work assignment purposes. He also clearly knew the position of the majority of his co-workers on the seniority issue with respect to work assignment, that is, that they were not in favour of counting the whole of government service time. And, ultimately, in March, 1997, notwithstanding whether he believed he had some other "understanding" with Mr. Yates, Mr. Stallard voted in favour of unit seniority based on the 1995 seniority list: he did not vote against it; he did not abstain from voting. Furthermore, before he knew the results of the vote, and before he knew what the negotiated provision stated, he elected to resign from the air ambulance service. His actions do not support his assertion that had he known that he could not use his entire years of government service for the purposes of work assignment on a seniority basis, he would not have resigned his position with air ambulance to go to NAO.

**[60]** While, as we have said, Mr. Stallard's own evidence does not support his allegations, where his evidence contradicts that of Mr. Yates, we accept the evidence of Mr. Yates. That is, we accept that Mr. Yates did not meet with Mr. Stallard at the Union's office in Saskatoon, did not induce him to sign a support card, and did not make any promise or representation with respect to his seniority. Indeed, the evidence discloses that the Union took a very reasonable and low-key approach to the recruitment of the pilots' group. The Union did not actively solicit the signing of support cards and afforded the group a great deal of independence in the decision-making regarding the terms and conditions of entry into the bargaining unit.

**[61]** In our opinion, the Union's conduct throughout the period of July, 1996 to May, 1997, demonstrates a fair and reasonable approach to securing the pilots' support for joining the Union and in its subsequent negotiations with the PSC. With respect to the specific issue of NAO section seniority for work assignment and layoff purposes, it allowed the pilots' group to design its own procedure after a great deal of consideration over a considerable period of time and after a ballot vote. The only condition was that the procedure itself should be fair and acceptable to the Union generally and the PSC.

**[62]** The Union fulfilled its representations to the pilots' group. The NAO seniority procedure applies only to the internal assignment of work and the order of layoffs. Mr. Stallard's entire government service seniority applies for all other matters under the general collective agreement. Apparently, there is also a mechanism in the collective agreement that may allow for recognition of his entire seniority for all purposes after the NAO pilots have been five years in the bargaining.

**[63]** On the whole of the evidence, we are of the opinion that the Union did not act in a manner that was arbitrary, discriminatory or in bad faith as alleged or otherwise.

**[64]** The application is dismissed.

# INTERNATIONAL UNION OF OPERATING ENGINEERS HOISTING AND PORTABLE AND STATIONARY, LOCAL 870, Applicant v. RURAL MUNICIPALITY OF ESTEVAN NO. 5, Respondent

LRB File No. 006-02; February 1, 2002
Chairperson, Gwen Gray, Q.C.; Members: Bruce McDonald and Leo Lancaster

For the Applicant: John Peterson
For the Respondent: Greg Hoffort

**Certification – Employee – Test for exclusion from bargaining unit is whether person actually performs job functions related to the power to discipline and discharge, the ability to influence labour relations and, to a lesser extent, the power to hire, promote and demote - Foreman does not hire, fire or discipline and does not regularly act in confidential capacity with respect to employer's labour relations – Foreman is employee and will not be excluded from bargaining unit.**

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

## REASONS FOR DECISION

### Background

**[1] Gwen Gray, Q.C., Chairperson:** International Union of Operating Engineers Hoisting and Portable and Stationary, Local 870 (the "Union") applied to be certified for a bargaining unit composed of "all employees employed by the Rural Municipality of Estevan No. 5 in Saskatchewan, except the administrators, administrative assistant and building inspector." The Rural Municipality of Estevan No. 5 (the "Employer") seeks the exclusion of the foreman, Mr. Blaine Stropko, on the grounds that he is a managerial employee.

**[2]** The sole issue on this application is whether or not Mr. Stropko is a managerial employee.

### Facts

**[3]** Mr. Stropko is employed as the foreman of the road maintenance crew. He directs the work of one full-time equipment operator, two or more seasonal equipment operators and one part-time equipment operator and assigns their work on a daily basis. He also works along side the other employees performing road maintenance and repair work.

**[4]** The Employer in its policy manual sets work hours. Mr. Stropko and all other operators must receive permission from the Employer to work overtime.

**[5]** The Employer hires employees, although Mr. Stropko may refer them to the Employer.

**[6]** Mr. Stropko provides the council of the Employer with his assessment of individual employees and relates various work performance issues to council or the reeve of the council as required. The council of the Employer relies on Mr. Stropko's information to make decisions about employees.

**[7]** According to the Employer's policy manual, which sets out a progressive disciplinary procedure, the reeve and the foreman are required to conduct disciplinary interviews and to impose discipline up to and including termination. In practice, the reeve or council makes decisions on disciplinary matters and they communicate the decisions directly to employees with Mr. Stropko in attendance on some occasions, but not all occasions.

**[8]** Mr. Stropko reports directly to the council of the Employer. Operators are expected to relay their work problems through Mr. Stropko to the council of the Employer.

**[9]** Employees in the road maintenance area, including Mr. Stropko, negotiated a three-year agreement with the Employer as a group, prior to their attempts to join the Union.

**[10]** Mr. Stropko is not involved in budgetary matters, nor does he assist the reeve or council in setting wages or conditions of work for the other operators.

## Relevant Statutory Provision

**[11]** Section 2(f)(i) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") defines "employee" as follows:

> *2 In this Act:*
>
> *(f) "employee" means:*

> *(i) a person in the employ of an employer except:*
>
> > *(A) a person whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character, or*
> >
> > *(B) a person who is regularly acting in a confidential capacity with respect to the industrial relations of his or her employer.*

## Argument

**[12]** Both parties made helpful presentations to the Board.

**[13]** Mr. Peterson, for the Union, argued that Mr. Stropko is a working foreman, who is responsible for supervising employees in road maintenance, but who is not responsible for hiring, firing or disciplining employees. The Union argued, as well, that Mr. Stropko had no role to play in determining the wages and working conditions of other employees and played no confidential role in relation to labour relations on behalf of the Employer.

**[14]** Mr. Hoffort, for the Employer, argued that Mr. Stropko is a key person representing the interests of the Employer to the road maintenance crew. The Employer argued that Mr. Stropko would be placed in a conflict of interest between his role as foreman and his role as a member of the Union, and that he ought to be excluded from the Union. Mr. Hoffort also pointed to Mr. Stropko's role in informing the council of the Employer of performance issues, his role in the progressive discipline policy, and his role in hiring employees.

## Analysis and Decision

**[15]** In determining whether a person ought to be excluded from a bargaining unit under s. 2(f)(i) of the *Act*, the Board considers whether the person actually performs job functions related to the power to discipline and discharge, the ability to influence labour relations and, to a lesser extent, the power to hire, promote and demote.

**[16]** Functions such as directing the workforce, training staff, assigning work, approving leaves and scheduling of work are considered to be supervisory functions that do not place the employee in the category of "managerial." See *Saskatchewan Government Employees' Union v. Saskatchewan Liquor and Gaming Authority,* [1997] Sask. L.R.B.R. 836, LRB File Nos. 037-95 & 349-96.

**[17]** In the present case, the Board concludes that Mr. Stropko is not excluded from the bargaining unit under the test for "employee." He does not perform the key functions of hire, fire or discipline and he does not regularly act in a confidential capacity with respect to the Employer's labour relations.

**[18]** Mr. Stropko's role in hiring employees is limited to referring various candidates to the Employer for consideration. He is not involved in the selection process.

**[19]** Although the foreman position is referred to in the progressive discipline policy, in practice Mr. Stropko does not make decisions about the discipline to be imposed on employees. His role is to report on work performance matters to the reeve and council and he may attend discipline meetings without taking an active role. The reeve and council make disciplinary decisions, up to and including dismissal.

**[20]** In relation to confidential matters pertaining to the Employer's labour relations, the foreman does not get involved in the negotiation of wages, benefits or other work conditions for employees in the road maintenance area except to the extent that he relays to the reeve and council any employee complaints and to the extent that he participates with his co-workers in making a joint submission to council for pay raises. Council makes these decisions without input from Mr. Stropko.

**[21]** For these reasons, we conclude that the foreman does not perform functions that take him outside the definition of "employee" and he will not be excluded from the bargaining unit.

**[22]** As the Union has provided evidence of majority support among employees in the bargaining unit, a certification order will issue.

# PHIL GRIFFITHS, Applicant v. CONSTRUCTION AND GENERAL WORKERS' UNION, LOCAL 890, Respondent

LRB File No. 044-01; February 6, 2002
Vice-Chairperson, James Seibel; Members: Leo Lancaster and Bruce McDonald

The Applicant: Phil Griffiths
For the Respondent: Neil McLeod, Q.C.

**Duty of fair representation – Contract administration – Union representatives investigated facts and circumstances of member's complaints, filed grievances, presented grievances to employer and industry grievance panel – Union made decision not to pursue grievances to arbitration based on decision of grievance panel, likelihood of success at arbitration and cost associated with arbitration – Union took reasonable view of situation and made thoughtful decision - Board dismisses application brought under s. 25.1 of *The Trade Union Act*.**

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

## REASONS FOR DECISION

### Background

**[1] James Seibel, Vice-Chairperson:** The Construction and General Workers' Union, Local 890 (the "Union"), represents labourers in the general construction and pipeline construction industries[1]. At all material times, the Union had a collective agreement with the unionized employer members of the Pipeline Contractors Association of Canada (the "Contractors Association") – the Laborers Mainline Pipeline Agreement for Canada (the "collective agreement").

**[2]** The applicant, Phil Griffiths is an experienced construction labourer and a member of the Union. He began work on a pipeline construction project with Waschuk Pipeline Construction Ltd. (the "Employer") on May 10, 1999. He was laid off on October 7, 1999. He alleged he had been appointed by the Union as a job steward and as certified health and safety representative ("safety representative") on the project, and that, as such, pursuant to the collective agreement, he was entitled to certain protections from lay-off. Mr. Griffiths alleged that his lay-off was in violation of the terms of the collective agreement.

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[1] The jurisdiction of Local 890 covers the area north of the 51st parallel in Saskatchewan. The jurisdiction of its sister Local 180 is the area south of the 51st parallel.

**[3]** The collective agreement provides for a grievance procedure (see, *infra*) that includes adjustment of grievances, by mutual agreement of the parties to the collective agreement, by a Pipeline Industry Grievance Panel (the "grievance panel"). The grievance panel is composed of an equal number of members representing the Contractors Association and certain unions representing workers engaged in pipeline construction, including the Union. The grievance panel members are drawn from the members of the Canadian Pipeline Advisory Council, (the "Advisory Council"), itself comprising an equal number of members representing the Contractors Association and industry unions. If either party disputes the decision of the grievance panel, it may progress the dispute to arbitration.

**[4]** The Union took Mr. Griffiths' complaints to a hearing before the grievance panel. The grievance panel unanimously dismissed the grievance. The Union refused to progress the grievance to arbitration. Mr. Griffiths filed the present application with the Board alleging that the Union had committed an unfair labour practice in violation of s. 25.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*").

**[5]** The Union denied that Mr. Griffiths was the job steward or safety representative at the time he was laid off, and asserted that his alleged grievance was without merit and that it had acted responsibly and in fulfillment of its duty under s. 25.1 of the *Act*.

**[6]** Mr. Griffiths testified on his own behalf. Boris Slipchuk, the Union's local business manager, and Robert Hart, an international representative of the Union, testified on behalf of the Union.

## Relevant Statutory Provisions and Provisions of the Collective Agreement and Union Constitution

**[7]** Certain statutory provisions and provisions of the collective agreement and the Union's constitution were referred to frequently in the testimony of the witnesses at the hearing. For ease of reference, the provisions are reproduced below.

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

> *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.*

B. *The Occupational Health and Safety Act, 1993*, S.S. 1993, c. O-1.1, s. 15(4):

*15(4) No person may be designated as a member of an occupational health committee who represents workers unless the person:*

. . .

*(b) has been appointed from the place of employment in accordance with the constitution of the trade union of which the workers are members;*

C. Excerpts from the collective agreement:

*ARTICLE 3 RECOGNITION AND SECURITY*

*3.7 The Union shall select one of its Members who is an employee and who shall be recognized as Job Steward. . . .*

*3.8 The Job Steward shall be the last man laid off provided he is willing to perform the work to be completed. The Job Steward shall not be excluded from overtime provided he is willing and able to perform the work that is required.*

*ARTICLE 6 WORKING RULES*

*6.12 The Job Steward or another employee so designated by the Union shall represent the Union as a member of any Job Safety Committee . . . .*

*6.13 The certified health and safety representative, where required by legislation and when employed under the terms of this Agreement, will not be excluded from overtime work, by crew or project, provided he is able to perform the work required and shall be one of the last three employees retained by the Employer if competent to perform the available work remaining.*

*ARTICLE 15 GRIEVANCE PROCEDURE*

*15.1 Where a difference arises between the Employer and the Union or a Local Union relating to the interpretation, application or administration of this Agreement or where an allegation is made that a discharge of an employee is unjust or that this Agreement has been otherwise violated, the difference of opinion or dispute, including any question as to whether the matter is arbitrable, shall be resolved without stoppage of work in the following manner.*

*15.2 The Job Steward or Business Manager of the Local Union shall attempt to resolve the difference on the job with the Foreman or Superintendent of the Employer.*

*15.3 If the difference is not resolved within forty-eight (48) hours of the occurrence, the aggrieved party shall submit the difference and the remedy sought in writing to the Executive Director of the Association and the International Representative of the Union within sixty (60) days of the occurrence, or in the case of alleged unjust discharge, within ten (10) days of the occurrence. . . . .*

*15.4 Upon receipt of the matter complained of in writing, the Executive Director and the International Representative shall take such steps within forty-eight (8) hours as they deem necessary to attempt to adjust such difference of opinion or dispute. If the difference is not resolved within five (5) days of receipt of written submission, the Executive Director and the International Representative may upon mutual agreement of the parties, refer the matter to a Pipeline Industry Grievance Panel.*

*15.5 Where the parties agree to refer the matter to a Pipeline Industry Grievance Panel, such Panel shall be drawn from among the regular and alternate members of the Canadian Pipeline Advisory Council or their substitutes. The Chairman of the Advisory Council shall appoint two (2) representatives of the participating Unions and the Chairman of the National Labour Relations Committee shall appoint two (2) representatives of the participating Association Members to serve on the Panel. . . .*

*15.6 The Pipeline Industry Grievance Panel shall meet and render a decision within five (5) days of appointment.*

*15.7 In the event that the parties do not agree to the Panel procedure or the Panel arrives at a majority decision which either party to the dispute is unwilling to accept or the Panel is unable to arrive at a decision within the prescribed time limits, the matter shall be referred to an Arbitration Board consisting of two (2) members, one to be named by the Employer and one by the Union. These two (2) members shall choose a third member as Chairman. . . .*

*The decision of the majority of the Arbitration Board shall be final and binding. If there is no majority decision, then the decision of the Chairman shall constitute the decision of the Board. Each party shall bear the expense of its appointee and both parties shall share equally the expense of the Chairman.*

*15.8 The time limitations specified herein may be extended only by mutual agreement of the parties or by order of the Chairman of the Arbitration Board.*

*ARTICLE 16 CANADIAN PIPELINE ADVISORY COUNCIL*

*There shall be maintained throughout the term of this Agreement a Canadian Pipeline Advisory Council consisting of one International Representative of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada; one International Representative of the International Union of Operating Engineers; one International Representative of the Laborers International Union of North America; and one International Representative of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, together with an equal number of Officers*

*of the [Pipeline Contractors Association of Canada]. The Council shall act, whenever possible, to settle matters of dispute which arise from time to time and any other matters concerning the harmonious relationships between the parties hereto under the terms and provisions of this Agreement.*

D. Excerpts from The Laborers International Union of North America Uniform Local Constitution (September, 1996):

*IV. E – BUSINESS MANAGER*

*(1) The Business Manager shall be the recognized representative of the Local Union.*
*It shall be the duty of the Business Manager of a Local Union to see to it that the affairs and business of the Local Union are being properly conducted in accordance with the Constitutions and with the rules, regulations, policies, practices and lawful orders and decisions.*

*(2) Specifically, but not in limitation thereof:*

*(b) It shall be the duty of the Business Manager to see to it that the provisions of all agreements are enforced and respected by all persons affected thereby. All instances of non-compliance which are not amicably adjusted by him, shall be reported to the Executive Board of the Local Union.*

*(3) He shall have the authority to appoint and supervise Stewards.*

## Evidence

**[8]** Mr. Griffiths was dispatched from the Union's hiring hall to work for the Employer on the subject project on May 10, 1999. The dispatch slip indicates that he was a "shop steward." In a letter to the Employer dated May 12, 1999, Boris Slipchuk, the Union's business manager, advised that Mr. Griffiths was appointed as shop steward representing the Union. Mr. Griffiths testified that, pursuant to article 6.12 of the collective agreement, it was customary in Saskatchewan for the Union's job steward also to act as its safety representative on the occupational health and safety committee ("OH&S committee") required by legislation. In his testimony, Mr. Slipchuk confirmed that, as job steward, Mr. Griffiths was also considered to be the Union's safety representative.

**[9]** The minutes of the meetings of the OH&S committee on June 24, July 22, August 12 and September 15, 1999, filed with the Occupational Health and Safety Branch of Saskatchewan Labour, indicate that Mr. Griffiths, representing the Union, and Alvin Hunter, representing the Construction and General Workers' Union, Local 180, were OH&S committee representatives of the Union's member

employees. In his testimony, Mr. Slipchuk explained that, because of the geographic route of the pipeline under construction, jurisdiction over the labourers' work was divided by agreement between the Union and Construction and General Workers' Union, Local 180 on a 60/40 basis. Mr. Hunter was the job steward for Construction and General Workers' Union, Local 180. He also confirmed that the appointment as job steward has customarily carried with it the responsibility to act as safety representative as well, and that there is no separate letter of appointment as safety representative.

**[10]** Mr. Slipchuk testified that he was first informed that Mr. Griffiths was having problems on the job on approximately August 31, 1999, when Mr. Griffiths called him to advise that he had been laid off with some other labourers resulting from a reduction in the work available. Mr. Slipchuk traveled to the jobsite on September 1, 1999 and met with the Employer's project superintendent, Jim Kilgour. Mr. Kilgour told him that none of the crews wanted to work with Mr. Griffiths and he gave Mr. Slipchuk examples of the complaints. However, Mr. Slipchuk took a hard line with Mr. Kilgour and convinced him that Mr. Griffiths had to be returned to work, which was done. Mr. Slipchuk said that before he left the jobsite he "checked out" the complaints about Mr. Griffiths and hoped that the issue would be at an end.

**[11]** On September 10, 1999, Mr. Griffiths refused to perform a work task within the labourers' work jurisdiction, he got into an argument with the strawboss, and when the foreman went to find him to discuss the situation, he found Mr. Griffiths asleep in his truck. Mr. Kilgour issued Mr. Griffiths a written warning notice that was also copied to the Union.

**[12]** Mr. Slipchuk met with Mr. Griffiths and Mr. Kilgour at the jobsite to investigate and discuss the situation. Mr. Slipchuk testified that he determined that Mr. Griffiths should be removed as job steward and so advised the Union's executive board, of which he is a member, at its meeting on September 19, 1999. By letter dated September 20, 1999, personally delivered to Mr. Griffiths, he was advised that his appointment as job steward was rescinded effective that date. The letter reads as follows:

> *It is the position of the Executive Board of Local 890 that your appointment as job steward is rescinded as of this date.*
>
> *This decision was reached due to your failure to protect our jurisdiction as laborers, as noted in the letter of reprimand from Waschuk Pipeline Construction Ltd. dated September 12, 1999, which refers to an incident on September 10, 1999.*

*Your conduct was unbecoming as a job steward and therefore, your position has been rescinded.*

*Your continued employment as a laborer shall be determined by your attitude and work performance.*

**[13]** Mr. Slipchuk contacted the business manger for Construction and General Workers' Union, Local 180, Mr. Lyons, and arranged for Mr. Hunter, the job steward and safety representative appointed by Construction and General Workers' Union, Local 180, to act as job steward and safety representative on behalf of the Union as well. Mr. Griffiths remained on the job as a labourer. He said that he continued to be paid the wage premium afforded a job steward under the collective agreement. Mr. Slipchuk testified that Mr. Griffiths did not complain about his removal as job steward until after he was laid off.

**[14]** Mr. Griffiths testified that on October 8, 1999, the day following his lay-off, he met with Mr. Slipchuk and advised him that he intended to grieve the lay-off and the September written warning. On October 18, 1999, Mr. Griffiths provided Mr. Slipchuk with two written statements dated October 15, 1999. The first statement purported to grieve the warning, on the basis that it allegedly violated the Employer's progressive discipline policy and resulted in the loss of his appointment as job steward. The second statement purported to grieve the lay-off as being contrary to article 6.13 of the collective agreement, in that he ought to have had security from lay-off as the safety representative on the job. Mr. Griffiths further alleged that he had been excluded from certain overtime work from his first day on the job, May 10, 1999, contrary to the same provision.

**[15]** Mr. Griffiths said that Mr. Slipchuk expressed doubts about the grievances, both because he felt they were out of time and on the merits. He was concerned that the discipline precipitating the removal of Mr. Griffiths' status as job steward was justified. Without that status Mr. Griffiths had no enhanced protection from lay-off. Nonetheless, he submitted the grievances to the Employer and advised the international union. In a letter to the Union dated January 4, 2000, the Employer denied the grievance of the warning asserting that, in accordance with its disciplinary policy, Mr. Griffiths had indeed been given several previous verbal warnings. With respect to the second grievance, the Employer's position was that Mr. Griffiths' loss of job steward status automatically meant loss of safety representative status as well, with the result that he had no security from lay-off beyond that of an ordinary employee.

**[16]** In addition, Mr. Griffiths filed charges under the Union's constitution against Mr. Slipchuk and the executive board alleging that he had been improperly stripped of his job steward status. The charges were dismissed after a trial before an independent hearing officer, David C. McPhillips, according to the procedure in the constitution.

**[17]** The grievances were heard by the grievance panel on January 25, 2001. The grievances were presented by Robert Hart, an international representative of the Union. The Employer was represented by its principals. In a unanimous decision dated February 5, 2001, the grievance panel dismissed the grievances and specifically determined that ". . . Waschuk was correct in assuming that Griffiths lost his position as certified safety representative when he was removed from his position as Job Steward." The grievance panel also dismissed Mr. Griffiths' claim that he was excluded from overtime during his tenure as job steward.

**[18]** Because the subject collective agreement is a national agreement, Mr. Hart was assigned to handle the matter by Kelly Reardon, the Union's sub-regional manager. Through his investigation, which started in February, 2000, he concluded that the lay-off *per se* was bona fide as the project was in the process of winding down. He formed the opinion that Mr. Griffiths was not improperly relieved of his job steward status and had not been improperly laid off. However, he said that Mr. Slipchuk requested that the grievances be pursued to a grievance panel in order that the facts might be fully aired. Although Mr. Hart presented the grievances at the grievance panel hearing, Mr. Griffiths was allowed to make his own submissions.

**[19]** Mr. Hart testified that Mr. Griffiths was not pleased with the decision of the grievance panel and advised him that he wanted to proceed to arbitration. He said that because the grievance panel decision was unanimous, and because he himself did not believe the grievances had merit or that there was much chance of success at arbitration, and because of the significant costs of arbitration, he declined to process the grievances further. He adamantly denied that Mr. Griffiths' charges against Mr. Slipchuk and the executive board members of the Union had any influence on the decision.

## Argument

**[20]** Mr. Griffiths argued that the Union had not fulfilled its duty to fairly represent him at arbitration pursuant to s. 25.1 of the *Act*. In support of his position he cited the decision of the Board in

*Mary Banga v. Saskatchewan Government Employees' Union*, [1993] 4th Quarter Sask. Labour Rep. 88, LRB File No. 173-93.

**[21]** The balance of Mr. Griffiths' argument concerned the alleged merits of his grievances and general dissatisfaction with the way he had been treated by the Union.

**[22]** Mr. McLeod, counsel for the Union, argued that the Union had fulfilled its duty of fair representation. He asserted that the root of Mr. Griffiths' complaints was that he did not agree that his removal as job steward included his removal as safety representative. That issue, Mr. McLeod said, was between Mr. Griffiths and the Union, and was not a collective agreement issue. The Union's interpretation of its constitution was that Mr. Griffiths had been removed as safety representative as well as job steward. The bona fides and fairness of that action and the Union's position was upheld by the independent hearing officer at the trial under the constitution. Mr. McLeod pointed out that, despite misgivings as to the merits of Mr. Griffiths' grievances, the Union processed them through to a hearing before the grievance panel. The grievance panel found the lay-off to be justifiable and the Union reasonably decided not to proceed to arbitration. In support of his arguments, counsel referred to the following decisions: *Glynna Ward v. Saskatchewan Union of Nurses*, [1988] Winter Sask. Labour Rep. 44, LRB File No. 031-88; *John Chrispen v. International Association of Firefighters, Local 510*, [1992] 4th Quarter Sask. Labour Rep. 133, LRB File No. 003-92; *Gilbert Radke v. Canadian Paperworkers Union, Local 1120*, [1993] 2nd Quarter Sask. Labour Rep. 57, LRB File No. 262-92; *Vladimir Mravcak v. Communications, Energy and Paperworkers Union, Local 594*, [1995] 1st Quarter Sask. Labour Rep. 103, LRB File No. 221-94; *Don Lien v. Chauffeurs, Teamsters and Helpers Union, Local 395*, [2001] Sask. L.R.B.R. 395, LRB File No. 203-00.

## Analysis and Decision

**[23]** 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.*

**[24]** In *Lien, supra*, the Board determined that the duty of fair representation required by s. 25.1 of the *Act* does not apply to disputes arising under the constitution or bylaws of a trade union. This is a view held by the labour relations tribunals of several other Canadian jurisdictions. The issue as to whether the Union properly relieved Mr. Griffiths of his status as job steward and/or safety representative in accordance with its constitution is an internal union matter. It was not an issue raised in the present application.

**[25]** In *Mark D. Stevenson v. United Food and Commercial Workers, Local 226*, [2000] Sask. L.R.B.R. 517, LRB File No. 006-99, the Board held that it was not improper for a union to consider the chances of success and the cost of arbitration in arriving at its decision whether to process a grievance.

**[26]** It is our opinion that, on the whole of the evidence, the Union did not violate s. 25.1 of the *Act*. Its representatives investigated the facts and circumstances of Mr. Griffiths' complaints. They analyzed those facts. Despite his misgivings, Mr. Slipchuk filed the grievances. He consulted with the union. An experienced international representative, Mr. Hart, was assigned to present the case to the grievance panel. The grievance panel unanimously dismissed the grievances. The Union's representatives considered the decision of the grievance panel, formed an opinion as to the merits of the grievances, considered the costs of arbitration, and determined that arbitration of the grievances was not in the best interests of the Union and its members. There was neither hint of animosity towards Mr. Griffiths nor any suggestion that his prosecution of charges under the constitution against Mr. Slipchuk and the executive of the local Union played any part in the decision not to proceed to arbitration. Indeed, in

spite of the charges against him and the doubts about the merits of the grievances expressed by Mr. Hart, Mr. Slipchuk requested that the hearing before the grievance panel proceed.

**[27]** In deciding not to proceed to arbitration, the Union took a reasonable view of the situation and made a thoughtful decision. It did not act arbitrarily or in bad faith and did not discriminate against Mr. Griffiths in taking this course of action and making its decisions respecting the grievances.

**[28]** For the foregoing reasons, the application is dismissed.

# DAVID SMITH, Applicant v. CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1975, Respondent

LRB File No. 093-01; February 8, 2002
Vice-Chairperson, James Seibel; Members: Tom Davies and Gerry Caudle

For the Applicant: Robert Smith
For the Respondent: Harold Johnson

**Duty of fair representation – Contract administration – Union had longstanding policy favouring creation of full-time permanent positions filled through posting and bidding process over unposted successive term appointments which ignore seniority as factor in filling of positions – Policy based on belief that former process in best interests of members of bargaining unit as a whole – Union did not breach duty of fair representation by declining to grieve termination of applicant's term employment.**

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

## REASONS FOR DECISION

### Background and Facts

**[1] James Seibel, Vice-Chairperson:** Canadian Union of Public Employees, Local 1975 (the "Union"), is designated as the bargaining agent for a unit of employees of the University of Saskatchewan ("the "Employer"). At all material times, the applicant, David Smith was a member of the bargaining unit. He alleged that the Union committed an unfair labour practice in violation of s. 25.1 of *The Trade Union Act*, R.S.S., 1978, c. T-17 (the "*Act*"), by failing to fairly represent him in grievance and arbitration proceedings under the collective agreement between the Union and the Employer (the "collective agreement") arising out of the termination of his employment on April 30, 2001. The application was argued on the basis of agreed facts stated orally at the hearing by counsel for the parties. Following is a summary of the facts.

**[2]** The collective agreement contains provisions defining permanent and term employees and describes the conditions that must exist for a term employee to be made permanent other than by bidding on a vacant permanent position posting. The collective agreement contains the following provisions:

*ARTICLE 1 - SCOPE*

*1.4 Types of Employees*

*1.4.1 A permanent employee is an employee who has been appointed to a permanent position and who has successfully completed the required probationary period.*

*1.4.5 University of Saskatchewan*

*A term employee is an employee appointed for a specific term and who works on a full-time or regular part-time basis. ...*

*...For all term employees, "current continuous service" is from the last date of hire from which time there has been no break in employment... .*

*Termination of term employees, during the initial period on the job equivalent to the length of the probationary period for permanent employees or at the time the term position is discontinued, is not subject to the grievance procedure.*

***When an employee ... has been in a term position continuously for more than thirty-six months ... the employee's status will be changed to permanent.***

*ARTICLE 8 – VACANCIES AND PROMOTIONS*

*8.1 Posting*

*All vacant positions,* ***excluding terms of less than four months, summer staff term positions and casuals,*** *will be posted weekly in places in places accessible to employees. . . .*

(Emphasis original)

**[3]** Mr. Smith started working for the Employer on September 28, 1995 as a full-time employee in the materials handling section of the facilities management division. All of Mr. Smith's service since has been as a casual employee or term employee. The term appointments have been for less than four months. The term appointments have not been posted as per article 8.1 of the collective agreement, *supra*, and he has not been required to apply for them. When he was working as a term employee, he was required to join the Union and pay union dues.

**[4]** Mr. Smith's employment ended shortly after he was first hired, on November 8, 1995. He returned to work on December 8, 1995 until January 31, 1996. He returned to work on June 15, 1996 until August 30, 1996. He returned to work on November 15, 1996 until early May, 1997. He returned to work on May 10, 1997 and was enrolled in the Employer's dental plan, subject to the

ordinary contribution. His employment ended just short of a year later on May 5, 1998. He returned to work on May 29, 1998 and was enrolled in the pension plan and other benefit plans, subject to the ordinary deductions. He worked on a series of less-than-four-month term appointments until he was terminated on April 30, 2001, approximately 30 days short of 36 months' continuous service. The shortfall in continuous service barred him from the opportunity to acquire a change to permanent status pursuant to article 1.4.5 of the collective agreement, *supra*.

**[5]** Mr. Smith had applied for a permanent position with the same duties in response to a job posting on February 7, 2001. He was not successful. The position was awarded to a more senior employee. Similarly, he applied for, but was not successful in obtaining, a posted term position with the same duties in March, 2001.

**[6]** The Union generally does not approve when the Employer keeps an employee working for a long period on a series of term appointments. When it becomes aware of the practice it pressures the Employer to create a permanent position and fill it through the bid process. The Union favours the posting and bid process, as opposed to the change-in-status mechanism under article 1.4.5 of the collective agreement, to fill permanent positions, because it allows for the exercise of seniority by any employee in the bargaining unit in filling the position. The Union became aware of Mr. Smith's circumstances in February, 2001. It pressured the Employer to end its practice of successive term appointments in his case and to create a permanent position to be filled through the bid process.

**[7]** By a letter dated March 28, 2001, Mr. Smith received notice of "termination" of his employment effective April 30, 2001. There is no question that he was not terminated for cause: the letter from his manager spoke of his performance in glowing terms. It provided in part as follows:

> *Please be advised that I am forced to terminate your employment with the University of Saskatchewan, Facilities Management Division effective 4:30 P.M. Monday, April 30, 2001. As per the CUPE 1975 Collective Agreement, Article 8.1 states all vacant positions excluding terms of less than four months will be posted. We no longer have any choice or latitude regarding your continued employment in Materials Handling, and for that we are truly sorry. Over the years we have been extremely satisfied with your work, and I want to assure you that if we had any way of changing the outcome of this situation, we would.*

**[8]** On April 20, 2001, Mr. Smith requested in writing that the Union grieve his upcoming termination and requested that he be returned to work on a permanent full-time basis. The Union declined. Jim Sharman, local Union president, and Glenn Ross, chair of the Union's grievance committee, had met with Mr. Smith to discuss his situation shortly before he sent the letter.

**[9]** In a letter dated April 23, 2001, Mr. Sharman responded as follows:

> *The Union is prepared to discuss your situation with you at any time the Grievance Committee meets, which is every Tuesday at 12:00 noon in the Union Office. . . .If this is not possible, please contact the office. . . to arrange another time.*
>
> ***We are unaware of any grievance we could file, as we know of no violation of the Collective Agreement.***
>
> *It is not accurate to say that your employment was with the knowledge and consent of the union. The union had consistently insisted that the University post all permanent positions and all term positions longer than four months. (Article 8.1).*
>
> *As a term employee you have bidding rights and can exercise your seniority for any posted position. You retain these bidding rights for thirty days after your last day of work (Article 8.2.2).*
>
> *It may be an unfortunate outcome that you may not have sufficient seniority to get the exact job you desire. However, when a position is not posted it means no other employee can apply for that position. Posting positions insures fair access to opportunity.*
>
> *It is not accurate to characterize your situation as a* ***layoff****, since term employees do not have layoff and recall rights (Article 12). Your employment has been* ***terminated****, but you retain seniority for bidding purposes for 30 days (Article 8.2.2).*
>
> *Again, if you need to speak to a member of the grievance committee, please call the union office and ...the union secretary will arrange for you to see one of the committee members.*
>
> (Emphasis original)

**[10]** Mr. Smith filed the present application with the Board shortly after on May 1, 2001.

## Argument

**[11]** Mr. Robert Smith, counsel for David Smith, argued that David Smith had been treated unfairly by the Employer in that he had been treated as any other full-time permanent employee during the last nearly three years of continuous employment: he had been subject to the same deductions for pension, benefits and union dues as a permanent employee; there was no break in employment for approximately 35 months. Counsel asserted that his termination just short of 36 months of continuous service, barring him from acquiring permanent status, was extremely unfair and that the Union had a duty to represent him in grieving his termination and, if necessary, proceeding through arbitration. Counsel questioned whether the Union could place the ostensible interest of the collective membership above that of the individual member in the circumstances of the present case.

**[12]** Mr. Johnson, counsel for the Union, argued that the Union had fairly arrived at the decision that the matter was not arbitrable given its policy favouring the creation of permanent positions filled by the bid process over the practice of an extended series of term appointments resulting in a change in status after 36 months. While expressing regret that Mr. Smith suffered personally as a result of the Employer's action in ending its practice in his case, resulting in his dismissal, he said that there was no arbitrable breach of the collective agreement.

## Analysis and Decision

**[13]** The issue to be determined in the present case is not whether the Employer breached the collective agreement, but whether the Union failed in its duty to fairly represent Mr. Smith in a manner that is not arbitrary, discriminatory or in bad faith. The duty extends to the determination by the Union as to whether the matter complained of is arbitrable and, if so, whether it will process a grievance. Arguably, in the present case, the duty also extends to the conduct of the Union that directly led to the Employer terminating Mr. Smith's term employment without cause, that is, the decision to pressure the Employer to end its practice of successive term appointments and the creation of a permanent position filled via the bidding process.

**[14]** 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.*

**[15]** Principles and policies favouring the creation of as many full-time permanent positions as possible and seniority as a major factor in the filling of positions are fundamental and cherished in the context of organized labour. Emphasis on both of these principles by a certified trade union in the interests of the members of the bargaining unit as a whole at the expense of the status of an individual member is not surprising and is well documented in the jurisprudence.

**[16]** In *Mary Banga v. Saskatchewan Government Employees' Union*, [1993] 4th Quarter Sask. Labour Rep. 88, LRB File No. 173-93, the Board confirmed that when considering issues regarding the duty of fair representation it is appropriate to consider the background and context in which the union made its decisions. The Board stated, at 98, as follows:

> *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.*

**[17]** In *Brian Lymer v. Saskatchewan Insurance Office and Professional Employees' Union, Local 397 (O.P.E.I.U.)*, [2000] Sask. L.R.B.R. 174, LRB File No. 176-99, the applicant complained that the union had breached its duty of fair representation, *inter alia*, by emphasizing seniority in the

selection process allegedly resulting in discrimination against job applicants (such as the applicant) who met the posted qualifications by fulfilling educational requirements over those job applicants that qualified through job experience and a test procedure. In determining that the union had not breached its duty, the Board stated, at 182, as follows:

> *[26] In the present case, it is not necessary for us to assess whether the issue raised by Mr. Lymer is or is not grievable under the collective agreement. We have determined on all of the evidence that the Union did not violate s. 25.1 of the Act. The Union was forthright with Mr. Lymer in relation to the issue about its interpretation of the collective agreement and its philosophy and practical emphasis. There is no general duty upon a union to seek an opinion from a legal professional regarding such matters. The essence of the Union's position was that there was no violation of the collective agreement, and that, in any event, the interest of Mr. Lymer was secondary to that which it perceived to be in the best interest of the membership as a whole.*
>
> *[27] The evidence establishes to our satisfaction that the Union arrived at its decision not to investigate further or file a grievance after fairly considering the facts and the competing interests at stake. A union, after giving the matter due consideration, is not obliged to represent a member in grievance proceedings where to advance the position would be detrimental to the union itself or to its interests in bargaining; it is entitled to support the interest that it feels is consistent with the proper application and/or administration of the collective agreement. This may result in "discrimination" as between individual employees, but this type of discrimination is not improper if it results from an informed consideration of the facts and a choice based upon well-founded reasons that are not arbitrary or otherwise offensive. In Shipowich, supra, a duty of fair representation case that arose out of a selection complaint, the Board approved of the following statement by the Ontario Labour Relations Board in Mlakar v. CUPE, Local 79, [1989] OLRB Rep. Dec. 1246:*
>
> > *12. ...Unions are often placed in the position of having to deal with competing rights and interests as between individual members of the bargaining unit for which they hold bargaining rights. Invariably there are situations where there is "discrimination" as between individuals. For example, one is discriminating in conferring a preference to one employee over another based on seniority. It is discriminatory to confer a preference to a better qualified employee over another. However, that "discrimination" is, in and of itself, in no way improper. Choices as between individuals must be made. What gives rise to concern is where that choice is made based on arbitrary or other improper considerations. This Board has said on many occasions that making those difficult decisions is very much a part of the responsibility which a union bears in the representation of employees.*

> *[28] We are of the opinion that the Union did not act arbitrarily or in bad faith in arriving at its decision. And to the extent that any detriment to Mr. Lymer is based upon the Union's promotion of seniority as the primary consideration in selection, there was no improper discrimination against Mr. Lymer within the meaning of s. 25.1 of the Act.*

**[18]** *Sandi Shipowich v. Service Employees' International Union, Local 333*, [1999] Sask. L.R.B.R. 56, LRB File No. 271-98, referred to in *Lymer, supra*, involved another selection grievance situation. The Board concluded that the union did not violate its duty of fair representation when it elected to represent one employee, but not another, in grievance and arbitration proceedings based upon an interpretation of the collective agreement that the union felt was in the best interests of the bargaining unit as a whole. The Board stated as follows, at 69-70:

> *[48] In the present case, we are of the opinion that the Union has decided to support the interests at arbitration that it, after due consideration, believes support the proper application and administration of the collective agreement and the Framework Agreement. We also find that the Union gave due consideration to the competing interests of Ms. Shipowich in arriving at this decision. It has chosen the path that it believes is best for the welfare of the bargaining unit and the bargaining process. To the extent that the Union has distinguished between members of the bargaining unit, it has demonstrated that it has well founded reasons for doing so; in the absence of any evidence to suggest otherwise, we are not prepared to second guess this decision.*

**[19]** In the present circumstances, whether or not the issue raised by Mr. Smith with the Union concerning the termination of his term employment is grievable or arbitrable is not relevant and not one that we will determine. The Union has a longstanding policy that favours the creation of full-time permanent positions filled through the posting and bidding process over a practice of making unposted successive term appointments that may result in an automatic change in status for the incumbent but which ignore the factor of seniority in the filling of positions. The Union's position is based upon the belief that the former process is in the best interests of the members of the bargaining unit as a whole. It arrived at its position after consideration of the significance of the principle of seniority in selection matters and the competing interests of individual term employees and the membership as a whole. It did not act arbitrarily or in bad faith.

**[20]** The Union's decision to support one collective agreement mechanism for the creation of full-time permanent positions over another has the effect of generally distinguishing against those members of the bargaining unit who are term employees, in that they tend to have less seniority than permanent employees. However, as in *Lymer*, *supra*, to the extent that it is based upon encouragement to create permanent positions and the promotion of seniority as a primary consideration in the filling of vacancies it does not improperly discriminate against Mr. Smith within the meaning of s. 25.1 of the *Act*.

**[21]** For the foregoing reasons 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 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., PCL CONSTRUCTION MANAGEMENT INC., PCL INDUSTRIAL CONSTRUCTORS INC., PCL-MAXAM, A JOINT VENTURE, MAXAM CONTRACTING LTD., GREENRIDGE HOLDINGS LTD., WORKFORCE CONSTRUCTION LTD. OPERATING AS WORKFORCE CONSTRUCTION OR QUADRA CONSTRUCTION, PAYCOM CONSULTING SERVICES LTD., MAXAM DEVELOPMENTS LTD., QUADRA CONSTRUCTION AND CORAM CONSTRUCTION LTD., Respondents**

LRB File No. 192-01; February 11, 2002
Chairperson, Gwen Gray, Q.C.; Members: Ken Hutchinson and Gerry Caudle

| | |
|---|---|
| For the Applicant: | Drew S. Plaxton |
| For PCL Construction Holdings Ltd. et al: | F. Albert X. Lavergne |
| For PCL Construction Management Inc.: | Hugh McPhail, Q.C. |
| For PCL Industrial Constructors Inc.: | Larry F. Seiferling, Q.C. |
| For Maxam Contracting Ltd. et al: | Larry B. LeBlanc, Q.C. |
| For Coram Construction: | Brian M. Thompson |

**Practice and procedure – Particulars – Respondents apply to Board to review decision of Executive Officer on issue of particulars – Board conducts *de novo* hearing based upon written submissions from parties and orders applicant to provide certain particulars and respondents to file replies once particulars provided.**

***The Trade Union Act*, s. 4(12).**

## REASONS FOR DECISION

### Background

**[1] Gwen Gray, Q.C., Chairperson:** United Brotherhood of Carpenters and Joiners of America, Local 1985 (the "Union") filed an application against 23 respondents on September 19, 2001 claiming that the respondents are successor corporations of Poole Construction Company Limited, PCL Industrial Construction Ltd. and PCL Industrial Constructors Inc. and are related or

common employers. The respondents variously requested extensions of time for filing replies, which were granted by the Board Registrar to October 19, 2001.

**[2]** On October 17, 2001, Maxam Contracting Ltd., Greenridge Holdings Ltd., Workforce Construction Ltd., Paycom Consulting Services Ltd. and Maxam Developments Ltd. (the "Maxam Group") asked the Board to strike the application for its lack of material facts and confusing allegations. In the alternative, the Maxam Group asked the Board to order particulars.

**[3]** On October 18, 2001, 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. and PCL Construction Resources Inc. (the "PCL Group") wrote the Union seeking particulars of its application. The PCL Group suggested that the Union respond to the request by November 16, 2001 and that they be granted a deadline of December 14, 2001 for filing a reply to the particularized application.

**[4]** On October 18, 2001, the Board Registrar advised counsel for the PCL Group of the Board's procedures for requesting particulars. She advised that particulars, if desired, should be requested in writing of the Union giving the Union a reasonable period in which to reply. The Board Registrar directed further "if Mr. Plaxton's client does not reply within the fixed time period or if the reply is not sufficient in your opinion, immediately make a written request for a conference call hearing before the Board's Executive Officer to deal with the issue." The Board Registrar also instructed "if Mr. Plaxton's client does reply sufficiently within the fixed time period, you should then file your client's reply forthwith, and, in any event, within the ten (10) day time period set out in the Regulations to *The Trade Union Act*." Similar letters were forwarded to the remaining respondents who sought particulars.

**[5]** On October 18, 2001, PCL Construction Management Inc. and PCL-Maxam, A Joint Venture sought further particulars of the Union's application. These respondents adopted the time frames for receiving particulars and filing replies as set out in the particulars request of the PCL Group.

**[6]** On October 19, 2001, PCL Industrial Constructors Inc. sought particulars from the Union and asked for a reply within ten (10) days of the date of the letter.

**[7]** On October 22, 2001, the Union replied to the demands for particulars by stating that the application was sufficient and did not require further particulars. In addition, counsel for the Union specifically indicated that the time table set forth in the respondents' correspondence was not agreeable to the Union and it sought an order from the Board directing the parties to file their replies as soon as possible.

**[8]** On October 30, 2001, the Maxam Group filed an unsworn reply raising the issue of the lack of material facts and seeking an order from the Board dismissing the application without a hearing on its merits. A sworn copy of the same was filed with the Board on November 9, 2001.

**[9]** On November 13, 2001, the Board Registrar advised the parties that the Board Chairperson had appointed Peter Suderman as Board Investigating Officer on the application, in accordance with the Board's Resolution on Investigation of Related Employer Applications (which was passed by the Board on October 17, 2000). The Registrar also forwarded scheduling information forms to the parties in order to arrange the hearing schedule of the application.

**[10]** Nothing further was heard from the respondents until November 13, 2001, when counsel for PCL Industrial Constructors Inc. wrote the Union to ask if the Union intended to reply to the demand for particulars.

**[11]** The Union replied to this letter on November 13, 2001 by reiterating its position of October 22, 2001 that no particulars were required and asking the respondents to file their replies.

**[12]** On November 14, 2001 the Union wrote the Board asking that the matter be set before a panel of the Board or the Executive Officer, to have the application determined on the basis of the material filed as no replies had been filed by the respondents or, in the alternative, asking the Board to direct the respondents to file replies.

**[13]** On November 15, 2001, the Board Registrar wrote to the Union with copies to the respondents advising that the Board would not set a hearing of any preliminary issues on the

application and that the panel of the Board which heard the matter as a final application would deal with the timeliness of the respondent's replies or lack thereof.

**[14]** On November 15, 2001, PCL Construction Management Inc. and PCL-Maxam, A Joint Venture wrote the Board claiming that they had been following the Board's procedures for seeking particulars, set out in the Board Registrar's letter of October 18, 2001 and agreeing with the Union's request to place the request for particulars before a hearing panel or the Executive Officer of the Board.

**[15]** On November 16, 2001, the Board Registrar advised the parties that a conference call would be arranged among the parties and the Executive Officer of the Board to deal with the question of particulars.

**[16]** On November 16, 2001, the Union noted in correspondence to the Board that it was not seeking a resolution of the particulars issue from the Executive Officer but wished for an order granting summary relief in light of the respondents' failures to file timely replies.

**[17]** On November 19, 2001, the PCL Group wrote the Board claiming that it had followed the Board's procedures for seeking particulars and requesting a conference call with the Executive Officer to deal with the request for particulars.

**[18]** On November 20, 2001, PCL Industrial Constructors Inc. requested a hearing on the issue of particulars.

**[19]** The Executive Officer held a conference call with the parties on November 26, 2001 and rendered a written decision on December 6, 2001. In his decision, the Executive Officer directed the Union to file further particulars in relation to: (1) the statutory provisions alleged to have been violated by PCL Industrial Constructors Inc., and (2) in certain references to statutory provisions, whether it is *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") or *The Construction Industry Labour Relations Act, 1992*, S.S. 1992, c. C-24.1 (the "*CILRA*") that is referred to; and (3) in references to collective bargaining agreements, identification (e.g., as by parties and dates) of the agreement(s) referred to. The particulars were ordered to be filed within seven (7) days of the decision and the replies were ordered to be filed within seven (7) days of receipt of the particulars.

**[20]** On December 12, 2001, the Union filed particulars as ordered.

**[21]** On December 13, 2001, PCL Construction Management Inc. and PCL-Maxam, A Joint Venture appealed the decision of the Executive Officer to a panel of the Board. Similar appeals were received from the PCL Group and PCL Industrial Constructors Inc.

**[22]** On December 14, 2001, the Board Registrar advised the parties that the appeal would be heard by a panel of the Board based on written submissions. Any party wishing to make a written submission relating to the application was directed to file its submission with the Board and with all other parties on December 21, 2001. Any replies to materials filed were to be submitted to the Board and the other parties by December 28, 2001.

**[23]** On December 14, 2001, the PCL Group requested an oral hearing of its appeal of the Executive Officer's decision on the particulars application or an extension of time to January, 2002 for filing written submissions. The reason cited for requesting the adjournment was the holiday plans of counsel for the PCL Group. The PCL group also requested that the Executive Officer not sit on the panel hearing the matter.

**[24]** On the same date, the Board Registrar advised the PCL Group that the procedure used to deal with the application for review of the Executive Officer's decision would remain as set out in her letter of December 14, 2001.

**[25]** On December 14, 2001, PCL Industrial Constructors Inc. indicated that it was unable to file written material with the Board by December 21, 2001 because of its counsel's busy schedule and vacation plans. The Board Registrar responded by facsimile on December 17, 2001 indicating that the procedure for dealing with the request for review will be as set out in her correspondence of December 14, 2001.

**[26]** On the same day, the PCL Group sought a telephone conference with a panel of the Board to deal with its request for an extension of time for filing materials on the appeal submission and request for an oral hearing.

**[27]** The Board Registrar reiterated in correspondence sent by facsimile to the PCL Group that the procedure for hearing the appeal remained as set out in her initial letter and that any process issues relating to it should be raised in the materials filed.

**[28]** On December 21, 2001, PCL Industrial Constructors Inc. wrote the Board to complain that no panel of the Board had decided the procedure for the appeal of the Executive Officer's decision. Subsequently, on the same date, this respondent requested an extension of time into January for filing submissions on the appeal. Counsel indicated that they would not be filing any material until "we hear exactly what procedure is going to be followed by the panel that is going to make the ultimate decision on the appeal."

**[29]** By December 21, 2001, submissions on the application to review the Executive Officer's decision were received from the Union, the PCL Group, and PCL Construction Management Inc. and PCL-Maxam, A Joint Venture. No submissions were received from the Maxam Group or PCL Industrial Constructors Inc. except the latter's request for an extension of time for filing materials.

**[30]** No replies to materials filed were received from any party.

## Issues

**[31]** The issues on this application are as follows:

(1) Does the Board possess a power to order particulars and to review the decision of the Executive Officer?

(2) Should an oral hearing be granted on the application to review the Executive Officer's decision?

(3) Should an extension be granted for filing submissions on the application to review the Executive Officer's decision?

(4) If (2) and (3) are refused, should further particulars be ordered?

## Analysis

### (1) Board's powers to order particulars and the procedure for seeking particulars and review of the Executive Officer's decision

**[32]** The *Act* and Regulations do not contain any explicit power for the Board to order an applicant to provide particulars of its claim. The power arises from the rules of natural justice, which require that the parties to an application be provided with sufficient information to permit them a fair opportunity to know the case that is brought against them and be given a fair opportunity to reply to it. We will refer to these requirements more fully later in these Reasons.

**[33]** Since there is no statutory guidance for dealing with requests for particulars, the Board has established its own procedures to guide parties who seek better particulars. First of all, the Board Registrar directs the respondent to make a request for particulars from the applicant and to set a reasonable time for the applicant to respond. If the applicant's response does not satisfy the party seeking particulars, the respondent is required to immediately seek a conference call hearing with the Executive Officer to have the matter of particulars settled. Similarly, if the applicant fails to respond to the request for particulars, the party seeking particulars must apply immediately for a conference call hearing with the Executive Officer.

**[34]** The Executive Officer, who is also the senior Vice-Chairperson of the Board, has been delegated the task of hearing requests for particulars pursuant to a resolution of the Board passed on February 11, 1998. The Executive Officer's decision may be reviewed by a panel of the Board in accordance with s. 4(12) of the *Act,* which provides as follows:

> *4(12) The board may delegate to the executive officer any of its powers or functions but any employer, employee or trade union affected by any act done by the executive officer in the exercise or purported exercise of any such delegated power may apply to the board to review, set aside, amend, stay or otherwise deal with the act and the board upon the application or, of its own motion, may exercise its powers or perform its functions with respect to the matter in issue as if the executive officer had not done such act.*

**[35]** The Board has not set a standard procedure for dealing with requests for review of the Executive Officer's decisions as such requests have seldom been made. On this application, the Board will deal with the review as a *de novo* hearing and will consider all questions relating to the

application for particulars afresh. The Executive Officer's Order requiring certain particulars will, however, remain in force.

**[36]** Our lack of experience in dealing with appeals of the Executive Officer's decisions has perhaps also contributed to some confusion with respect to the manner of conducting this review. There is no specific requirement in the *Act* or Regulations for conducting hearings on preliminary matters that arise in an application. Section 23 of the Regulations, however, states:

> *23 The secretary shall give notice to the applicant, to any trade union intervening in an application, and to any trade union, labour organization or person replying to an application, of the time when and the place where the application will be heard by the Board.*

**[37]** Although the Regulations reference the position of "secretary," the Board Registrar's position includes the duties formerly performed by the Board secretary. On all other applications before the Board, the Board Registrar sets the date for hearing. In the case of a hearing on a preliminary matter, such as the issue of particulars, the Board may decide to hear the matter based on written submissions as opposed to an oral hearing. This will be dictated by the nature of the issues that require determination. The decision to hold an oral hearing is made by the Chairperson in the ordinary course of managing applications before the Board. The Board Registrar is then required to set out the time frames for making submissions and will arrange a hearing panel to sit on the matter once all the submissions are received.

**[38]** PCL Industrial Constructors Inc. complained that the Board Registrar had no authority to determine that the hearing would take place based on written submissions and no authority to set the deadlines for filing submissions and replies to the submissions. On this basis, it refused to provide any written submissions to the Board on the application to review the Executive Officer's decision.

**[39]** In our view, the Board Registrar has the necessary authority under s. 23 of the Regulations to set hearings, and, in the course of arranging a hearing based on written submissions, it is also necessary for the Board Registrar to set dates for the filing of written submissions. In our view, this is a matter concerning the administration of the Board and does not require a decision by a Board panel.

**[40]** In selecting the dates for requiring the filing of submissions, the Board Registrar should take into account the nature of the application and any statutory time frames that may provide guidance. Section 18 of the Regulations to the *Act* specifies that replies must be filed within twelve (12) days after the date on which the application was received in the office of the Board, or within ten (10) days after the date on which a copy of the application was forwarded to the respondent. Applications for particulars, which are generally requested prior to the filing of replies, ought to be dealt with in a similar time frame, that is, expeditiously. Within this context then, the Board expects that particulars, if needed, will be requested early in the proceedings and, if a ruling on particulars is required, it will be applied for at the earliest opportunity. Similarly, the deadlines for filing written submissions on applications for review will be short.

**(2) Is an oral hearing required on the application to review the Executive Officer's decision on particulars?**

**[41]** There are no matters of evidence to be determined on an application for particulars. The issues are confined to questions of law relating to the sufficiency of the allegations raised in the application. There are no issues of credibility to be determined on an application of this nature. The matters at issue in this application can be fairly and adequately addressed through written submissions without an oral hearing. The request for an oral hearing is therefore denied.

**(3) Should an extension be granted for filing of written submissions on the application for review of the Executive Officer's decision?**

**[42]** In the present application, the various respondents delayed making the request for a conference call with the Executive Officer until the expiry of the period some of them had set for receiving the Union's reply to their request (November 14, 2001 and onward).

**[43]** The Union, however, had made it clear in its October 22, 2001 correspondence that it did not agree that particulars were required and it put the respondents on notice that it did not accept their time frame for replying to the application.

**[44]** In this circumstance, the Board's procedures as set out by the Board Registrar required the respondents to immediately seek a conference call with the Executive Officer shortly after the Union's reply of October 22, 2001 and not following the arbitrary deadlines set by some of the respondents for obtaining the Union's response.

**[45]** The respondents who requested extensions of time for filing materials on this application cited as reasons the unavailability of counsel due to work commitments and vacations. In some circumstances, we may be persuaded by these reasons to grant extensions of time for filing submissions. However, in this case, the respondents have created their own time problems by delaying their request for a hearing before the Executive Officer. In light of the respondents' failure to proceed with due diligence in seeking a hearing before the Executive Officer, no extension of time will be granted for the filing of submissions on this application for review.

**(4) Should more particulars be ordered by the Board?**

**[46]** As indicated above, the Board exercises a power to order further particulars as part of its obligation to ensure that hearings before it are conducted in a manner consistent with the principles of natural justice or procedural fairness. The Board has set out its method of assessing the need for particulars in *United Food and Commercial Workers, Local 1400 v. P.A. Bottlers Ltd.,* [1997] Sask. L.R.B.R. 249, LRB File No. 017-97, at 251 which takes into account the need for fair, but flexible and informal, proceedings:

> *The Board has thus made it clear that it is necessary for an applicant to state with some precision the nature of the accusations which are being made, both in terms of the specific events or instances of conduct which are considered objectionable, and of the provisions of the Act which have allegedly been violated. The Board has linked this requirement with the capacity to provide a fair hearing to a respondent.*
>
> *On the other hand, the Board must balance the requirement for a fair hearing with other values which are also of pressing importance to the Board, including those of expedition in the hearing of applications, and maintaining relative informality in Board proceedings. Whatever might be the case in a civil court, the nature of the proceedings before this Board cannot accommodate extensive pre-hearing or discovery processes without running the risk that the ability to respond in a flexible and timely way to issues which arise in the time-sensitive context of industrial relations will be seriously impaired.*
>
> *We do not interpret the requirement for the provision of sufficient particulars, in any case, to contemplate a complete rehearsal of evidence and argument in the exchange between the parties prior to a hearing. What is necessary is that an applicant make it clear what conduct of the respondent is the subject of their complaint, and how this conduct, in the view of the applicant, falls foul of the Act. In assessing the degree to which an applicant has met this requirement, the Board must be guided not only by our desire to ensure a fair hearing, but by the demands placed upon us by the objectives of efficacy and timeliness in our proceedings.*

**[47]** In addition, the requirement for provision of particulars must consider the knowledge of the applicant and the respondents. The Board has noted in previous cases that an assessment of the adequacy of an application must take into account the shortcomings of information that is available to a trade union: see *Service Employees' International Union, Local 333 v. Calgarian Retirement Group Ltd.,* [1997] Sask. L.R.B.R. 351, LRB File No. 006-97.

**[48]** The decision to order further particulars must also take into account the different types of applications that may be filed under the *Act* or under the *CILRA*. Generally, applications can be divided into two broad categories: (1) conduct complaints; and (2) status complaints.

**[49]** In the first category, the applicant alleges that certain conduct of the respondents constitutes a breach of the *Act* or the *CILRA*. In relation to conduct complaints, the applicant needs to identify what conduct is complained of, when it occurred, who was involved, where it occurred and how the conduct constitutes a breach of the *Act*. In the present application, a conduct complaint is raised in relation to the non-payment of union dues under s. 36 of the *Act*.

**[50]** In the second category – i.e. status complaints, the applicant raises a claim against the respondent relating to the status of the respondent. For instance, in the present application, two status complaints are raised, that of successor employer under s. 37 of the *Act,* and related or common employer under s. 37.3 of the *Act* or s. 18 of the *CILRA*.

**[51]** In many applications, status issues are raised simply by making the bare assertion of fact. For instance, in certification applications, unions generally simply assert that XYZ Corporation is the "employer" of the employees in question. It is not required to provide more detail to its claim than the bare assertion of status as an employer.

**[52]** Certain evidence will need to be placed before the Board at the hearing to establish the status issue if it is in dispute. This evidence, however, does not need to be described in the application.

**[53]** In status complaints, the common questions of what, when, who, where and how are less important. The central assertion relates to the question of status and the application must be assessed from the point of view of the elements, which determine status as they are set out in the relevant statute.

**[54]** The statutory elements of a successorship application under s. 37 of the *Act* are:

1. A predecessor employer who is certified by an order of the Board or who is party to a collective agreement;

2. A sale, lease, transfer or other disposition of the predecessor employer's business or part of its business to the alleged successor employer; and

3. A refusal by the alleged successor employer to recognize either the certification order or the collective agreement.

See *United Brotherhood of Carpenters and Joiners of America, Locals 1805 and 1990 v. Cana Construction Co. Ltd. and Pan-Western Construction Ltd. and Butchner Construction Inc.* (1984), 9 CLRBR (NS) 175, LRB File Nos. 199-84, 201-84, 202-84 & 204-84.

**[55]** The requirements for a related employer declaration were set out by the Board 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 at 281, as follows:

> *Section 37.3 of the Act describes three requirements for its application:*
>
> *1. There must be more than one corporation, partnership, individual or association involved;*
>
> *2. These entities must be engaged in associated or related businesses, undertakings or other activities; and*
>
> *3. These entities must be under common control or direction.*

**[56]** We would add a fourth element that one of the corporations, partnerships, individuals or associations be a unionized employer, either pursuant to an order of the Board or pursuant to a collective agreement. These elements are the same in s. 37.3 of the *Act* and s. 18 of the *CILRA*.

**[57]** In relation then to the application for particulars, we will assess the need for further particulars in light of the factors set out above.

**a. General points to clarify in the application:**

**[58]** The application filed by the Union is confusing by its lack of consistent descriptions of the various categories of respondents. The Union is directed to clarify who are the "originally certified corporations." It is also directed to clarify the terms "above-listed corporations," "above-noted corporations," "said corporations" and "above-noted employers" where those terms are used. The Union may wish to categorize the respondents into identifiable groups such as (1) predecessor employers; (2) successor employers; (3) related employers or other categories that make clear which corporations or enterprises are being referred to in each paragraph of the application.

**b. Irrelevant pleadings:**

**[59]** The Board has jurisdiction in the province of Saskatchewan and this application is brought only by the carpenters' Union. Unless events in other provinces are relevant to the issues in dispute, we would ask the Union to delete from its application claims that are not relevant to the issues at hand.

**[60]** For instance, paragraph 8 on page 6 of the application asserts that "in addition to this, PCL has a number of corporations active in eastern and northern Canada." It is unlikely that this paragraph has any relevance to the issues in dispute and should be deleted as unnecessary. The same comment can be made with respect to paragraph C-4 on page 8 relating to the certification Orders held by other trade unions. Unless some relevance can be asserted, the paragraph ought to be deleted.

**[61]** The Board asks the Union to consider its request to delete irrelevant paragraphs from the application.

**c. Successorship application (s. 37):**

**[62]** We have indicated above the need for clearer references with respect to the categories of respondents, such as successor employers and predecessor employers.

**[63]** The Union has made assertions in paragraphs 4(A)(2), 4(A)(3), 4(C)(1) to (3), setting out the predecessor employer who is certified or party to a collective agreement. The details of the agreements relied on are further set out in the particulars filed by the Union in response to the

Executive Officer's decision. Although the organization of the application is confusing, nevertheless, the essential elements of this factor are present in the application.

**[64]** The second factor relates to the "sale, lease, transfer or other disposition of the predecessor employer's business or part thereof to the alleged successor employer(s)." The Union makes this general assertion in paragraph 4(A)(5) and provides additional details of the alleged sale, transfer or other disposition in paragraphs 4(B)(1), 4(B)(1)(1 to 9), 4(D)(2), (3), (4), 5 and 6. We find that the Union has provided sufficient particulars of this aspect of the successorship application in the paragraphs cited and no further particulars are required.

**[65]** The last element relates to the refusal by the alleged successor employers to recognize either the certification Orders or the collective agreements. Paragraphs 4(A) (11) to (20) set out with sufficient detail the basis of the Union's claim that the alleged successor employers have refused to recognize the certification Orders and collective agreements.

**d. Related employer application (s. 37.3 *Act* or s. 18 *CILRA*):**

**[66]** The first factor is met by the naming of multiple corporations and joint ventures.

**[67]** The second factor, that is, the claim that the various corporations are engaged in associated or related businesses, undertakings or other activities is set out by the Union in paragraphs 4(A)(6), (7), (8), (9); paragraph 4(B)(1), (2) and (3); and paragraph 4(D). These paragraphs also set out the details of the Union's claims with respect to common control and direction. Both factors are set out with sufficient particulars.

**[68]** The Union has identified the unionized employers in paragraph 4(A)(2), (3), and 4(C)(1) to (3) and, in the further particulars provided, it set out the relevant collective agreements. The essential elements of the fourth factor are therefore met, with the noted requirement set out in paragraph (1) above that the Union sort out the references to the various categories of respondents.

**[69]** The timeliness issue under s. 37.3, if relied on by the Union, is set out in paragraph 4(A)(6) of the application. This relates to the issue of whether the businesses of the respondents became associated or related after the coming into force of s. 37.3 of the *Act*.

**e. Sections 3, 11(1)(a), 11(1)(c) and 12:**

**[70]** The Union claims relief in paragraph 7 of its application under these sections but it has not clearly identified the particular conduct it is relying on in relation to these alleged violations. The Union is required to specify what conduct is relied on for the breach of each provision.

**f. Union security claim – s. 36:**

**[71]** The Union has provided sufficient details of its claim against the various respondents in paragraphs 4(A)(11) to (20). Section 36 requires (1) a request of a trade union to include the statutory union security provision in a collective agreement; (2) the failure of an employer to carry out the provision. These are adequately set out in the paragraphs mentioned.

**g. Section 42:**

**[72]** Section 42 is a catch-all provision which expands the Board's remedial authority in some instances. The Union's reference to s. 42 adds little to the overall remedial requests. It is commonly referred to by applicants appearing before the Board to ensure the incidental powers are available to the Board. No particular elaboration of the s. 42 request is required.

**h. Definition of employer – ss. 2(f)(i.1) and 2(g)(iii):**

**[73]** These provisions provide an alternate argument for the Union arising out of the facts set forth under s. 37 (successorship) and s. 37.3 of the *Act* or s. 18 of the *CILRA* (related employer). No additional facts are required under this claim. For a discussion of the contractor/principal cases see *Wayne Bus Ltd., supra.*

**i. Claim for employee losses:**

**[74]** The Union seeks an order in paragraph 13 "to make good all loss occasioned by employees as a result of the employers failing to recognize their collective bargaining rights and/or collective bargaining agreements . . ." The Union is required to specify the period during which such damages are claimed. The agreements are set out in the particulars already provided by the Union.

**j. Claim for union dues:**

**[75]** The Union must specify the period of time that union dues are sought.

**k. Unnamed respondents:**

**[76]** There may be an issue at the hearing of the application as to the propriety of the request that is set out in paragraph 15 of the application. However, it will be dealt with at the hearing of the matter.

## Conclusion and Order

**[77]** The Board has carefully reviewed the requests for particulars made by the various respondents and the materials filed by them in relation to their request for particulars and their applications to review the decision of the Executive Officer. We find that the majority of the requests for particulars are not required, as they do not pertain to the essential elements of the claims made by the Union under the various statutory provisions, which we have set out above. Many of the requests also pertain to matters of evidence, not fact, and are not required to be provided for in the application.

**[78]** The Union is directed to provide particulars as set out above to the Board and to each respondent within 15 days of the date of these Reasons.

**[79]** The respondents are directed to file their replies to the application within 15 days of receipt of the Union's particulars.

**[80]** The Board will schedule a pre-hearing meeting with the parties to discuss the role of the Investigating Officer and other procedural matters once the replies have been filed at a time and place to be set by the Board Registrar.

# INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 529, Applicant v. SUN ELECTRIC (1975) LTD., ALLIANCE ENERGY LIMITED and MANCON HOLDINGS LTD., Respondents

LRB File No. 216-01; February 12, 2002
Chairperson, Gwen Gray, Q.C.; Members: Ken Hutchinson and Gerry Caudle

For the Applicant: Drew Plaxton
For the Respondent: Sue Barber

**Practice and procedure – Particulars – Respondents apply to Board to review decision of Executive Officer on issue of particulars – Board conducts *de novo* hearing based upon written submissions from parties and orders applicant to provide certain particulars and respondents to file replies once particulars provided.**

***The Trade Union Act*, s. 4(12).**

## REASONS FOR DECISION

### Background

**[1] Gwen Gray, Q.C., Chairperson:** International Brotherhood of Electrical Workers, Local 529 (the "Union") applied for orders seeking to have Alliance Energy Limited and Mancon Holdings Ltd. declared successor employers to Sun Electric (1975) Ltd. The Union also alleges that the respondents are related or common employers under *The Trade Union Act*, R.S.S. 1978, c. T-17 (the *"Act")* or *The Construction Industry Labour Relations Act*, 1992, S.S. 1992, c. C-24.1 (the *"CILRA").*

**[2]** In addition, the Union makes alternative claims under s. 2(g)(iii) of the *Act* raising issues pertaining to contracting out or sub-contracting and the status of the contracting parties. Various claims are also made in relation to the payment of union dues and wage rates set out in collective agreements.

**[3]** The respondents requested various particulars from the Union, which the Union refused to provide. The respondents then sought an order from the Executive Officer for particulars. The Executive Officer conducted a conference call with the parties and rendered his decision on

December 7, 2001. The Union was required to provide particulars of the statutory provisions and the collective agreements referred to in the application.

**[4]** The respondents asked for a review of the Executive Officer's decision by a panel of the Board. This panel of the Board considered the application, the request for particulars, the Executive Officer's decision, and the submissions of both parties in conducting its review.

## Issues

**[5]** The Board must decide if further and better particulars are required from the Union. We discussed the Board's powers to order particulars and the procedure for seeking particulars and for seeking review of a decision of the Executive Officer in *United Brotherhood of Carpenters and Joiners of America, Local 1985 v. PCL Construction Holdings Ltd. et al.*, [2002] Sask. L.R.B.R. 120, LRB File No. 192-01. The Board panel reviewing a decision of the Executive Officer may approach the matter as a new hearing on the issue of particulars. We have decided to take that approach in this case.

## Analysis and Reasons

**[6]** In *PCL Construction Holdings Ltd. et al.*, *supra*, the Board set out its approach to requests for particulars. The Board noted that there are two primary types of complaints before the Board. The first type of complaint is a conduct complaint which requires the applicant to specify the conduct complained of, when it occurred, who was involved, where it occurred and how the conduct constitutes a breach of statute. In the present case, the Union's allegations alleging violations of s. 36 of the *Act* fall into this category.

**[7]** The second type of complaint is a status complaint where the applicant raises issues pertaining to the status of the respondent, for instance, as an employer or, in this case, as a successor employer or as related and common employers. Status complaints must be assessed from the point of view of the elements that determine status as they are set out in the relevant statute(s).

**[8]** In *PCL Construction Holdings Ltd. et al., supra,* the statutory elements of a successor application under s. 37 of the *Act* were described as follows at para. 54:

> *1. A predecessor employer who is certified by an Order of the Board or who is party to a collective agreement;*
>
> *2. A sale, lease, transfer or other disposition of the predecessor employer's business or part of its business to the alleged successor employer; and*
>
> *3. A refusal by the alleged successor employer to recognize either the certification order or the collective agreement.*

**[9]** Similarly, the elements of a common or related employer application were described as follows at para. 55:

> *1. There must be more than one corporation, partnership, individual or association involved;*
>
> *2. These entities must be engaged in associated or related businesses, undertakings or other activities; and*
>
> *3. These entities must be under common control or direction.*
>
> *We would add a fourth element that one of the corporations, partnerships, individuals or associations be a unionized employer, either pursuant to an order of the Board or pursuant to a collective agreement. These elements are the same in s. 37.3 of the Act and s. 18 of the CILRA.*

**[10]** In assessing the need for further particulars in the Union's application, we will consider the factors listed for each type of application.

**(a) Name of applicant:**

**[11]** The application filed by the Union does not identify the name of the applicant. In the first paragraph, the applicant is described as "the below listed applicant trade union." The application names an officer of the Union, but not the actual Union. The Union must state clearly which local or locals of the International Brotherhood of Electrical Workers is the "applicant." The Union is directed to provide this particular to the respondents and the Board.

(b) **General references to respondents in the application:**

**[12]** The application uses several terms that lack clear references. For instance, in paragraph 3(j), the Union refers to the "above-noted order of the Board." There are two Orders of the Board listed in the preceding paragraphs. The Union is directed to identify the specific Order referred to by the term "above-noted."

**[13]** Similarly, in the same paragraph, the Union refers to the "above-noted corporations." The preceding paragraphs refer to the respondents and to another corporation that is not named as a respondent (Sun Electric Limited). The Union is directed to provide particulars of the corporations referred to when the term "above-noted" or similar generic references are made to the various respondents.

**[14]** Similar clarification is required with respect to paragraph 3(p), which refers to "above-noted," "the originally certified corporations," and "the above-noted employers." Again, the Union is directed to provide particulars of these references. Paragraphs 3(q), (r), (s), (t), (v), (x), (y), and 5 contain further examples of unclear references and the Union is similarly directed to provide details of its references to "employers," and "above-noted certification orders."

(c) **Successorship application – s. 37 of the *Act*:**

**[15]** The Union has set out the details of its bargaining rights with the respondent, Sun Electric (1975) Ltd., and with Sun Electric Limited, which is not named as a respondent, in paragraphs 3(e), (f), (g), (h) and (i) of the application. It would assist the parties if the Union would indicate which of the two certification Orders it has referred to is being relied on in this application. The Union is directed to provide this particular to the respondents and the Board.

**[16]** The details of the sale, lease or other disposition of the predecessor's business is set out in paragraphs 3(i), (j), (k), (l), (m), (n), (o), and (p) in sufficient detail. It must be kept in mind that the Union does not have access to the corporate minutes of the corporations in question. Its ability to plead the details of a sale, transfer or other disposition is necessarily limited by its lack of knowledge. The details provided in the paragraphs referred to are adequate to permit the respondents to answer the allegations in question.

**[17]** The third element of a successorship application relates to the refusal of the successor employers to recognize the Union. The details of the Union's allegations are adequately set out in paragraph 3(a), (b), (c), (u), (v), (w), (x) and (y). There is no need for further particulars relating to this aspect of the successorship application.

**[18]** We note that our comments on this aspect of the Union's pleadings are subject to our general comments made above in relation to the need for the Union to clarify the various generic terms used in the pleadings.

(d) **Related or common employer – s. 37.3 of the *Act* or s. 18 of the *CILRA*:**

**[19]** The first requirement of a related or common employer application is set out in paragraphs 2, 3(d) and (e) of the application. The one point that requires clarification is the role of Sun Electric Limited. The application is unclear as to whether the Union is claiming that Sun Electric Limited is one of the related or common employers. The Union is directed to provide clarification of its claim in this respect.

**[20]** The second element of the related or common employer application that requires the Union to set out the details of its claim that the respondents are engaged in associated or related businesses is set out in paragraphs 3(d), (h), (k), (l), (m), (n), (o), (q), (r), and (s).

**[21]** These pleadings provide sufficient detail of the Union's claim under this aspect of the application.

**[22]** The third element relating to common control or direction is set out in paragraphs 3(d), (l), (m) and (n) of the application in sufficient detail.

**[23]** The fourth element relating to the need for one of the corporations to be unionized is set out in paragraph 3(h) and (i) in sufficient detail.

**[24]** Again, our rulings under this aspect of the Union's claim are subject to the requirements set out above that the generic references be clarified by the Union.

(e) **Sections 3, 11(1)(a), 11(1)(c) and 12 of the *Act*:**

**[25]** The Union claims relief in paragraph 4 of the application under these provisions but it has not clearly identified the particular conduct it is relying on in relation to these alleged violations. The Union is required to specify what conduct is relied on for the breach of each provision.

(f) **Union security claim – s. 36 of the *Act*:**

**[26]** The Union has provided sufficient detail of its claim against the respondents in relation to this alleged violation in paragraphs 3(u), (v), (w), (x) and (y) subject to our comments above that the Union clarify any confusing references.

(g) **Sections 2(f)(i.1) and 2(g)(iii) of the *Act*:**

**[27]** These provisions provide an alternative argument for the Union arising out of the facts set forth on the successorship application or the related or common employer application. No additional facts are required to be included in the application relating to this alternative claim.

(h) **Section 42 of the *Act*:**

**[28]** As we commented in the *PCL Construction Holdings Ltd. et al.* case, *supra,* s. 42 of the *Act* adds incidental remedial authority to the Board's general powers and can be included in an application without further elaboration. It is a catch-all provision.

(i) **Claims for employee losses:**

**[29]** Paragraph 10 seeks an order for employee losses. The Union should specify the time period during which such losses are sought and identify the collective agreements that were in effect during the relevant time period.

(j) **Claim for union dues:**

**[30]** Paragraph 11 seeks an order for payment of union dues. The Union should specify the time period during which such dues are sought.

## Conclusion

**[31]** The Board has carefully reviewed the request for particulars filed by the respondents and has addressed many of the respondents' requests in the Reasons set out above. However, some of the other requests relate to matters of evidence, not factual claims. For instance, the respondents sought

a list of employees for whom union dues were remitted by Sun Electric (1975) Ltd. The Union is not required to provide evidence at this stage of the proceeding.

**[32]** The respondents also sought information from the Union that is clearly within the knowledge of the respondents. For instance, the respondents sought particulars of the projects performed by Alliance Energy Limited in the north half of the province of Saskatchewan. Information of this nature, which is fully within the knowledge of the respondents, will not be the subject of an order for particulars from this Board.

**[33]** Elsewhere in the request for particulars, the respondents asked the Union to provide details of its response to allegations that the respondents may raise in their reply. For instance, the respondents sought details of the efforts the Union made to enforce its collective bargaining rights against Alliance Energy Limited. Presumably, the respondents will claim in their replies that the Union slept on its rights. This matter, however, does not become an issue until the respondents file their replies. It is not an essential part of the information that is required to be provided by the Union in its application.

**[34]** The Union is directed to provide the particulars ordered above to the respondents and to the Board within 15 days of the date of these Reasons.

**[35]** The respondents are directed to file their replies to the application within 15 days of receipt of the Union's particulars.

**[36]** The Board will schedule a pre-hearing meeting with the parties to discuss the role of the Investigating Officer and other procedural matters once the replies have been filed. The time and place of the pre-hearing meeting will be set by the Board Registrar.

**[37]** The Order for particulars made by the Executive Officer remains in effect.

**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 NO. 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. and POINTS NORTH CONSTRUCTION LTD., GRAHAM INDUSTRIAL CONTRACTORS LTD., GRAHAM INDUSTRIAL SERVICES LTD., Respondents**

LRB File Nos. 014-98 & 227-00; February 27, 2002
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. 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 – Production of documents – Board confirms earlier order relating to production of documents – Board applies same production rules to applicants as applied to respondents – Counsel for applicants must review all documents to ensure that all relevant documents produced, failing which all documents must be produced in their entirety.**

## REASONS FOR DECISION

### Background

**[1] Walter Matkowski, Vice-Chairperson:** This is the second decision of the Board dealing with the production of documents. The first decision dated December 13, 2001 required the parties to produce all records relating to the matters in these proceedings. The December 13, 2001 decision coincided with earlier decisions of the Board in LRB File No. 014-98 as listed in the December 13, 2001 decision. The Board also put the parties on notice that the delay which had occurred on these applications was unacceptable and it was the Board's desire that this hearing be concluded during the hearing dates set from January 28, 2002 to February 8, 2002.

**[2]** During the week immediately preceding those hearing dates, full disclosure of all relevant documents had not been made. A conference call was held with Vice-Chairperson Matkowski wherein the parties discussed how the production of documents could be accomplished. The applicants were still in the process of producing certain documents. A dispute arose as to whether or not the applicants had to produce minutes that they held. The applicants apparently had deleted portions of minutes that they deemed irrelevant. Counsel for the respondents expressed their frustration at receiving documents so late in the process and further advised that they would be potentially seeking an adjournment on January 28, 2002. Mr. LeBlanc took the position on behalf of his clients that, so long as counsel for the applicants had reviewed the minutes and ascertained what was relevant and what was not relevant, his clients would be satisfied. All respondents took the position that it was not appropriate for the applicants themselves to make the determination as to whether the documents were relevant or not. Counsel for the applicants had not reviewed the minutes in question and advised that he would not have time to review the documents, given the upcoming hearing date of January 28, 2002. In fairness to counsel for the applicants, he had only just recently received a large number of documents from the respondents after numerous demands and it is recognized that he was under significant time pressures. The parties agreed that the hearing would not proceed on January 28, 2002 and that, instead, the parties would deal with the production of documents on January 28, 2002.

**[3]** On January 28, 2002 the applicants advised that they had retained an independent solicitor to review the minutes in question. The respondents expressed their concerns over whether or not the independent solicitor was aware of all of the relevant issues and, therefore, aware of what documents were relevant. The Board agreed with the respondents' position and ordered the applicants to produce to the respondents the minute books and available financial statements along with any requested source documents. The Board further ordered that the identical rules would apply to the applicants' documents as to the respondents' documents. The Board further ordered that the hearing would proceed on Monday, February 4, 2002. Unfortunately, the respondents received over 1000 pages of documents during the week of January 28, 2002, with the result being a general agreement to have a further procedural hearing on February 5, 2002.

**[4]** At the procedural hearing on February 5, 2002 the applicants arrived at an agreement with the respondents whereby the applicants were not going to rely on any economic duress arguments during the hearing proper. As such, the respondents agreed to return to the applicants the financial

records produced by the applicants and any source documents. The applicants had produced executive minutes to the respondents and requested those documents back. The respondents wished to retain these documents and advised the Board that the minutes had some broad relevance to the case and would be used by the respondents during the hearing. This Board will not order that the respondents return the executive minutes to the applicants. The executive minutes have been disclosed as being broadly relevant. Nothing has transpired which would change this finding.

**[5]** The applicants have not disclosed membership minutes to the respondents and requested that the Board reconsider its disclosure Order as it related to membership minutes. Counsel for the applicants argued that, among other things, the membership minutes may contain general bargaining strategies or other sensitive details of the applicants' operations. The Board will not reconsider its earlier production Orders. The Union must produce relevant membership minutes or portions of relevant membership minutes on or before March 28, 2002. If certain membership minutes contain information that is both relevant and irrelevant, counsel for the Union is permitted to block out the irrelevant portions. This Board accepts the logic of Mr. LeBlanc that counsel for the applicants must go over the documents and produce to the respondents what is relevant. This is a normal practice in regard to production of documents and ensures full relevant disclosure. In the event counsel for the applicants does not vet the membership minutes, the said minutes must be produced in their entirety to the respondents on or before March 28, 2002.

**[6]** The matter was adjourned peremptorily to May 22, 23, 29, 30, 31, June 3, 4, 25, 26, 27 and July 9, 10, 11 and 12, 2002. The starting time for the hearings will be 9:00 a.m.

**[7]** Finally, certain parties were still discussing production of relevant documents. Vice-Chairperson Matkowski advised the parties that a further conference call would be held to ensure that all relevant documents were produced. The Board does not want the reoccurrence of what has just happened, namely that two weeks of pre-scheduled hearing dates were not used. All parties were warned that full disclosure must be forthcoming and that this hearing must proceed. To that end, the Board Registrar will be directed to arrange a conference call with all of the parties on Friday March 8, 2002 to deal with any outstanding production issues.

**SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant v. SASKATCHEWAN GAMING CORPORATION, Respondent**

**SASKATCHEWAN GAMING CORPORATION, Applicant v. SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, PUBLIC SERVICE ALLIANCE OF CANADA and MOOSE JAW EXHIBITION COMPANY LTD., Respondents**

LRB File Nos. 163-01 & 164-01; February 28, 2002
Chairperson, Gwen Gray, Q.C.; Members: Patricia Gallagher and Leo Lancaster

| | |
|---|---|
| For S.J.B.R.W.D.S.U.: | Larry Kowalchuk |
| For Sask. Gaming Corporation: | Larry LeBlanc, Q.C. |
| For P.S.A.C.: | Rick Engel |

**Technological change – Collective bargaining – Union alleges that crown corporation exerting economic control over employer should be required to bargain with union pursuant to s. 43 of *The Trade Union Act* – Union does not allege that crown corporation and employer are "related" employers or are in principal-contractor arrangement pursuant to s. 2(g)(iii) of *The Trade Union Act* – In absence of such a relationship, crown corporation cannot be required to bargain collectively with union with respect to closure of employer's business.**

**Unfair labour practice – Discrimination – Discrimination in hiring – Employer's hiring preferences cannot be influenced by union membership – Employer indicated it would offer employment to former employees of workplace represented by particular union – Under circumstances, withdrawal of this offer of employment would constitute discriminatory treatment under s. 11(1)(e) of *The Trade Union Act*.**

**Successorship – Practice and procedure – Advance rulings – Board concludes that plans for new casino sufficiently crystallized to enable Board to make advance ruling on successorship issue – Board also finds independent labour relations purpose for making advance successorship ruling in this case.**

**Successorship – Transfer of business – Definition of business – Alleged successor is not deriving real tangible benefit from agreement with alleged predecessor in terms of physical assets, licenses, equipment, or managerial expertise – At most, alleged successor will capture part of alleged predecessor's market share, which it would do without agreement with alleged predecessor employer and will employ former employees of alleged predecessor employer – Board does not find that a "business" or part thereof has been sold or otherwise disposed of.**

**Successorship – Transfer of business – Section 37 of *The Trade Union Act* – Employer subject to certification order expanding operations to new location – Board finds that union's certification order does not extend to new location – If union wishes to represent employees at new location, it must engage in organizing campaign when new location opens.**

***The Trade Union Act,* ss. 11(1)(a), 11(1)(c), 11(1)(e), 12, 37 and 43.**

## REASONS FOR DECISION

### Background

**[1]** **Gwen Gray, Q.C., Chairperson:** These applications deal with the proposed closure of the Golden Nugget Casino in Moose Jaw and the development of a new casino in Moose Jaw ("Casino Moose Jaw").

**[2]** In LRB File No. 163-01, Saskatchewan Joint Board, Retail, Wholesale and Department Store Union ("RWDSU") applied for an order requiring Saskatchewan Gaming Corporation ("SGC") to bargain collectively with RWDSU concerning the closure of the Golden Nugget Casino, then owned and operated by Moose Jaw Exhibition Company Ltd. ("MJEX"); an order requiring SGC to provide employment to employees of MJEX at Casino Moose Jaw; and an order requiring SGC to recognize RWDSU as the bargaining agent for employees at Casino Moose Jaw.

**[3]** RWDSU alleges that SGC has violated ss. 11(1)(a), (c) and (e), 12 and 37 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") by structuring its negotiations with MJEX to avoid the successorship rights of RWDSU and to avoid hiring and training employees of MJEX at Casino Moose Jaw. It also alleges that SGC controls critical aspects of the collective bargaining between MJEX and RWDSU and is unwilling to be at the bargaining table to address the issues over which it exercises economic control.

**[4]** In LRB File No. 164-01, SGC applied to the Board for a determination of whether it will become the successor employer to MJEX in relation to the opening of Casino Moose Jaw.

**[5]** Public Service Alliance of Canada ("PSAC") represents gaming employees at SGC's Casino Regina and it claims bargaining rights over gaming employees at the proposed Casino Moose Jaw.

**[6]** In an earlier ruling, the Board held that a party may apply for an advance ruling on a successorship application where the transaction in question is finalized or close to being finalized, and the impact of the transaction is known with some certainty. In addition, the party must advance a compelling labour relations reason for seeking an advance ruling.

## Issues

**[7]** The issues to be determined by the Board are:

1. Does SGC have an obligation to bargain with RWDSU with respect to the closure of the Golden Nugget Casino at MJEX?

2. Did SGC violate ss. 11(1)(a) or (e) of the *Act* by changing its position on the successorship issue?

3. Are the business plans relating to Casino Moose Jaw sufficiently finalized and are the impacts sufficiently known to justify making an advance ruling on the successorship issue?

4. If so, is there an independent labour relations purpose for making such an order?

5. If the answer to points (3) and (4) are yes, is SGC a successor employer to MJEX or do the bargaining rights assigned to PSAC at Casino Regina extend to Casino Moose Jaw?

## Relevant Statutory Provisions

**[8]** The relevant statutory provisions include ss. 11(1)(a), (c), (e), 12, 37 and 43 of the *Act.*

## Facts

**[9]** SGC is a crown corporation established under *The Saskatchewan Gaming Corporation Act,* S.S. 1994, c. S-18.2 and operates Casino Regina. Food and beverage employees at Casino Regina are represented by RWDSU, while gaming employees are represented by PSAC. Head office employees, located in Regina, are not represented by a union.

**[10]** In addition to SGC, Saskatchewan Indian Gaming Authority Inc. ("SIGA") also operates casinos in Saskatchewan, as do various exhibition associations. The exhibition association casinos are generally run on exhibition association grounds and are relatively small casinos compared to SGC's Casino Regina and SIGA's four casinos. All casinos are licensed by the Saskatchewan Liquor and Gaming Authority ("SLGA").

**[11]** Before a new casino can be established in Saskatchewan, the sponsoring agency must obtain approval from the local municipal government and the provincial cabinet and various conditions may be imposed by both levels of government.

**[12]** MJEX operates the Golden Nugget Casino in Moose Jaw and its employees are represented by RWDSU. The Golden Nugget Casino is similar to other exhibition casinos that operate in Saskatchewan in that it operates table games and video lottery terminals ("VLT's"), but no slot machines. The Golden Nugget Casino remains open from Thursday to Sunday each week.

**[13]** In the fall of 1999, SGC was approached by the City of Moose Jaw and some local businesses to join them in developing a proposal for a downtown casino in Moose Jaw. This group became known as the Downtown Development Project Group (the "Downtown Group").

**[14]** At the same time, SIGA was considering expanding its gaming operations into the Moose Jaw market. It developed plans to take over the Golden Nugget Casino on a temporary basis while it built a new casino on the outskirts of Moose Jaw. SIGA was active in discussions with MJEX prior to SGC joining the Downtown Group.

**[15]** On April 18, 2000, SGC met informally with MJEX to discuss the casino operation in Moose Jaw. MJEX indicated to SGC that MJEX and SIGA had been in discussions to determine if SIGA could take over the operations of the Golden Nugget Casino. At that time, SGC indicated to MJEX that it had no authority to enter into negotiations with MJEX with respect to the take-over of the Golden Nugget Casino.

**[16]** On May 9, 2000, MJEX informed RWDSU at the bargaining table that it had reached an agreement-in-principle with SIGA whereby SIGA agreed to take over the existing operations of the Golden Nugget Casino, pending the completion of a new casino. SIGA agreed as well to recognize

RWDSU's bargaining rights, both at the Golden Nugget Casino and at SIGA's proposed casino. As a result of this information, RWDSU and MJEX concluded a collective agreement with a term from January 1, 1999 to December 31, 2000. SIGA's plans were subject to the approval of Moose Jaw city council and the provincial cabinet.

**[17]** On May 18, 2000, SGC met again with MJEX to discuss possible arrangements concerning the sale or continued operation of the Golden Nugget Casino. At that time, MJEX made it clear that it wanted to get out of the gaming business by the end of 2000. MJEX informed SGC that SIGA had offered to run the casino operations for MJEX pending completion of its proposed casino. By this time, MJEX had already endorsed SIGA's proposal for a new casino.

**[18]** Joe van Koeverden, president and chief executive officer of SGC, testified that, at that time, SGC thought that it should gain a presence in Moose Jaw as soon as possible. SIGA could achieve this goal by taking over the operations of the Golden Nugget Casino at MJEX prior to the opening of a new casino. This plan coincided with MJEX's expressed desire to get out of the gaming business.

**[19]** SGC proceeded to prepare a proposal for development of a downtown casino for presentation to Moose Jaw city council. Along with its partners in the Downtown Group, SGC made its presentation to council on June 12, 2000.

**[20]** Moose Jaw city council then requested that both SGC and SIGA file detailed proposals on casino development for consideration by council.

**[21]** During this period, in mid to late June, 2000, the provincial government placed a moratorium on further casino development because of auditing issues that arose at SIGA. Mr. van Koeverden predicted that SLGA, the regulating body, and SIGA would work quickly to clear up the problems as SIGA had two agreements to renew with the provincial government by the end of December, 2000. Mr. van Koeverden estimated that the moratorium would be lifted by January, 2001. In the end, the moratorium on new development was not lifted until July, 2001.

**[22]** In its written proposals to city council in Moose Jaw, SGC proposed to employ 86 full-time and 88 part-time employees at the new casino. The physical space for the casino would be leased

from Temple Gardens Mineral Spa and would be adjacent to the spa. SGC proposed to enter into a 25-year lease at which time SGC would assume ownership of the casino building.

**[23]** SGC also indicated that it would enter into an agreement with MJEX to provide MJEX with transition funding and annual compensation in the range of $400,000 to $500,000 per year for a proposed 25 year period to coincide with SGC's proposed lease of physical space for the new casino.

**[24]** In addition, SGC advised Moose Jaw city council that all employees of the Golden Nugget Casino at MJEX would be offered employment and training at the new casino. SGC also indicated at this time that RWDSU would have successor rights at the proposed casino. There was no specific mention in the document, however, that SGC planned to operate the Golden Nugget Casino on an interim basis.

**[25]** Mr. van Koeverden testified that, at that time, it was the intention of SGC to assume operations of the Golden Nugget Casino on January 1, 2001 and to operate it for 18 months, the time it would take to get the new casino up and running. Based on this assumption, SGC advised the Moose Jaw city council that it would recognize successor rights for RWDSU. Mr. van Koeverden understood that RWDSU's successorship rights would flow as a matter of law from SGC's take-over of the Golden Nugget Casino.

**[26]** SGC recognized that there were advantages to taking over the Golden Nugget Casino. Mr. van Koeverden recognized that the take-over of the Golden Nugget Casino would give SGC an early presence in the Moose Jaw market. In addition, SGC could use the time to train Golden Nugget employees on slot machines and other SGC procedures.

**[27]** Mr. van Koeverden testified that SGC required at least an 18-month period to make the take-over of the Golden Nugget Casino worthwhile. Otherwise, the take-over would be uneconomical. SGC assumed that the new casino could be open by June, 2002.

**[28]** On July 31, 2000, Moose Jaw city council approved SGC's proposal for a downtown casino. As a condition of approval, it required SGC to reach a satisfactory agreement with MJEX "including, but not limited to, compensation to them for lost casino revenues."

**[29]** In correspondence written at the time of approval by Mr. van Koeverden to Deb Thorn, CEO of Temple Gardens Mineral Spa, Mr. van Koeverden noted "our next step in this process will be the negotiations with the Exhibition over the transfer of the Golden Nugget operations." This plan was in keeping with SGC's expectation that the new casino would receive provincial government approval in time for the new casino to open in June, 2002.

**[30]** In September, 2000, Mr. van Koeverden reported to SGC's board of directors on the progress made in locating an alternative site for the temporary casino operations. At that time, SGC was contemplating properties other than the Golden Nugget Casino's existing premises for operating it during the period prior to the opening of the new casino.

**[31]** By October, 2000, SGC had decided not to seek an alternate site for operating Golden Nugget Casino prior to the opening of the new casino.

**[32]** By mid-February, 2001, SGC had decided not to operate Golden Nugget Casino on a temporary basis prior to the opening of the new casino. In a memorandum prepared by Twyla Meredith, senior vice-president of finance and administration, the decision was summarized as follows (Exhibit E-20):

> *In previous discussions, SGC was to either operate the Golden Nugget or a temporary casino in Moose Jaw, which would have given succession rights to the present bargaining unit (RWSDU). However, the plans are to operate a brand new facility with no transfer of assets, name or license from the MJEX. This would allow an opportunity to have our PSAC bargaining unit from Casino Regina also represent the Moose Jaw employees. This would be a much easier labour situation allowing workers to move between the two properties if required and the same agreement for both operations.*
>
> *This position has been clearly communicated to MJEX negotiating team and their consultant Judy Bell who will be assisting with the further union negotiations. They will communicate this to the union in mid-March at the next meeting to start the negotiations.*
>
> (underlining added)

**[33]** Mr. van Koeverden indicated that SGC made the decision not to take over the operations of the Golden Nugget Casino because of the provincial government's delay in removing the moratorium on the construction of new casinos. SGC predicted that the moratorium would have been lifted prior to January 1, 2001. With the continued uncertainty, SGC did not think it was possible to successfully

operate the Golden Nugget Casino for a shorter period than 18 months. This window closed in January, 2001.

**[34]** Mr. van Koeverden denied that the decision to not take over the operations of Golden Nugget Casino was motivated by anti-union sentiment against RWDSU. He noted that SGC enjoys a positive relationship with RWDSU at Casino Regina. The main motivation for not operating the Golden Nugget Casino was the outside considerations relating to the continuation of the moratorium on casino expansion.

**[35]** Mr. van Koeverden also denied that SGC was influenced negatively against RWDSU by management of Temple Gardens Mineral Spa although SGC did note that the working relationship between Temple Gardens Mineral Spa and RWDSU was not a good relationship.

**[36]** In relation to Ms. Meredith's memo outlining SGC's preference for PSAC, Mr. van Koeverden explained that SGC understood that if RWDSU did not acquire successorship rights at the new casino, then it might be possible for one union to represent all employees at Casino Moose Jaw. He noted that it was difficult at Casino Regina to arrange promotional opportunities for employees from food and restaurant services to gaming positions because the two groups of employees were represented by different trade unions and covered by different collective agreements. This problem could be avoided at Casino Moose Jaw because Temple Gardens Mineral Spa would provide most food and beverage services.

**[37]** Mr. van Koeverden also indicated that it would be difficult to meet equity hiring goals in Moose Jaw. However, SGC was aware that some First Nations' employees at Casino Regina would accept transfers to Casino Moose Jaw. This transfer of staff from Casino Regina to Casino Moose Jaw would be easier to arrange if all gaming staff were to be represented by PSAC and work under one collective agreement.

**[38]** While these long-term labour relations issues were considered by SGC, Mr. van Koeverden denied that they were the motivating factor that caused SGC to reverse its decision to temporarily operate the Golden Nugget Casino and to recognize RWSDU as the representative of employees at Casino Moose Jaw.

**[39]** The collective agreement between RWDSU and MJEX expired on December 31, 2000. The parties were engaged in collective bargaining when MJEX was informed by SGC that SGC would not require the Golden Nugget Casino to close; that it would not be taking over the gaming license of MJEX; and that, as a result, RWDSU's bargaining rights would not transfer to the new casino. MJEX communicated this information to RWDSU at its bargaining meeting on March 12, 2001.

**[40]** On June 28, 2001, SGC's board of directors approved the business plan for Casino Moose Jaw and gave their go-ahead to request approval for Casino Moose Jaw from the provincial cabinet. At this time, the terms of the development agreement between Temple Gardens Mineral Spa/Harvard Development were approved in principle but SGC had not finalized an agreement with MJEX. An agreement was finally signed between SGC and MJEX on September 17, 2001.

**[41]** The general terms of the agreement between SGC and MJEX provide that SGC will pay MJEX an amount in recognition of the initial impact Casino Moose Jaw will have on the operations of MJEX. This sum is payable in two installments, one upon SGC receiving final approvals for the operation of Casino Moose Jaw, and the second, to be paid upon indemnification of SGC by MJEX "against any claims by or on behalf of any employee relating to employee or business transition."

**[42]** SGC also undertook to pay MJEX an annual sum for 25 years to compensate MJEX for the loss of gaming revenues caused by the establishment of Casino Moose Jaw. This sum represents the amount of earnings currently received by MJEX from its casino operations, less the amounts received from the Community Initiatives Fund and any continued gaming operations carried on by MJEX.

**[43]** SGC also agreed to pay MJEX an annual fee for marketing and sponsorship for the 25 year period.

**[44]** The agreement between SGC and MJEX did not require MJEX to close its casino operations, although it was clear to all parties that MJEX had little reason to continue to operate the Golden Nugget Casino and had expressly indicated that it would close the Golden Nugget Casino. In addition, the initial payment by SGC to MJEX to compensate MJEX for the initial impact of Casino Moose Jaw on the Golden Nugget Casino was calculated based on the costs of closing the Golden Nugget Casino.

**[45]** None of the physical gaming assets, such as table games, VLT's or the like will transfer from MJEX to SGC.

**[46]** The provincial government announced its approval of Casino Moose Jaw on July 26, 2001. At that time, SGC took the position that it was not required to recognize RWDSU as the representative of employees at the new casino because SGC did not take over the operations of the Golden Nugget Casino. It also maintained that employees of the Golden Nugget Casino were welcome to apply for positions at the new casino, but it did not agree at that time to actually employ former employees of the Golden Nugget Casino.

**[47]** By the time these applications came to the Board, SGC had reversed its position and agreed to offer to employ all of the former Golden Nugget Casino employees on the conditions that (1) employees be available for a minimum of 20 to 24 hours of work per week without excluding themselves from weekend work; (2) employees participate in and successfully complete SGC's training program; and (3) employees possess a valid SLGA gaming license at time of hiring. SGC also indicated that it would be offering its staff at Casino Regina opportunities to transfer to Casino Moose Jaw and it views its labour force at Casino Regina as a significant source of trained staff for the new casino. The conditions for all employees are the same as those set out above.

**[48]** Construction of the new casino commenced in September, 2001 and is scheduled for completion in the fall of 2002.

**[49]** In relation to the operation of Casino Moose Jaw, there will be considerable overlap between the management teams for Casino Regina and Casino Moose Jaw. The general manager of Casino Moose Jaw will be required to work closely with the directors of various departments at Casino Regina in order to coordinate marketing and gaming plans. The head of security at Casino Moose Jaw will report to the executive director of security in Regina. The general manager of Casino Moose Jaw will report to the vice-president of gaming at head office in Regina. The bank manager at Casino Moose Jaw will report to the vice-president of finance at head office in Regina.

**[50]** Marketing, administration, corporate affairs and human resource functions will be carried out for both casinos at the head office in Regina. Technical services will be headquartered in Regina. Staff training will be coordinated at the head office in Regina. The corporate "branding" of the casinos will be along a similar theme although elements of it may differ.

**[51]** SGC predicts that part of the business currently enjoyed by Casino Regina will transfer to Casino Moose Jaw. Currently, Casino Regina's trade area includes Moose Jaw. This reduction in the demand for gaming at Casino Regina is part of the reason SGC pushed for casino development in Moose Jaw. It did not want to lose market share to a SIGA operated casino.

**[52]** Kelly Miner and Mark Hollyoak, RWDSU staff representatives, testified for RWDSU. They believed that SGC had agreed to recognize the successor rights of RWDSU flowing from RWDSU's representation rights at the Golden Nugget Casino without any qualifications. RWDSU did not understand that SGC intended to take over the operation of the Golden Nugget Casino prior to the opening of Casino Moose Jaw. As far as RWDSU was aware, SGC simply offered successor rights to RWDSU and continued employment for the Golden Nugget Casino employees. RWDSU representatives at Casino Regina met with SGC to plan the transition of work from the Golden Nugget Casino to Casino Moose Jaw and no suggestion was made to them that the transfer was dependent on SGC taking over the operations of the Golden Nugget Casino. RWDSU was generally pleased with SGC's initial position on successorship as it avoided problems that RWDSU had experienced when Casino Regina opened which resulted in the eventual closure of an RWDSU-organized casino operated by the Regina Exhibition Association Ltd.

**[53]** On March 12, 2001, when MJEX informed RWDSU of SGC's change of position in relation to RWDSU's successor rights at the new casino, Mr. Hollyoak recalled that MJEX could not explain to RWDSU why SGC had changed its position on the successorship issue. Mr. Hollyoak indicated that RWDSU has never been given an explanation for SGC's change of heart.

**[54]** RWDSU was aware that SGC and MJEX were negotiating an agreement related to the closure of the Golden Nugget Casino and it became concerned that it would be unable to bargain the closure of the Golden Nugget Casino without SGC at the table since it was responsible for paying for the closure costs.

**[55]** Mr. Hollyoak also recalled the Moose Jaw city council meeting in July, 2001 at which SGC submitted revisions to its first proposal and indicated to city council that it wanted council to waive the requirement that SGC and MJEX conclude an agreement on lost compensation. Mr. Hollyoak noticed that SGC was proposing to pay MJEX $75,000 as a transition grant. He felt that SGC and MJEX were negotiating the closure of the Golden Nugget Casino without RWDSU present at the bargaining table.

**[56]** On July, 27, 2001, RWDSU sent MJEX and SGC a letter asking both to bargain collectively with RWDSU with respect to the benefits, retraining and jobs to be made available to RWDSU members on the closing of the Golden Nugget Casino. RWDSU asked that these negotiations occur prior to the signing of any agreements between SGC and MJEX. SGC responded to RWDSU's request by indicating that it would request a ruling from this Board to determine if RWDSU or PSAC have bargaining rights over employees in the new casino.

**[57]** Mr. Hollyoak is also the negotiator for employees at Temple Gardens Mineral Spa. He has attempted to obtain disclosure of information relating to the expansion of the spa from Temple Gardens Mineral Spa and has filed an unfair labour practice against the spa in relation to its alleged failure to provide RWDSU with the requested information.

**[58]** Mr. Hollyoak testified that MJEX has always maintained that it will close the Golden Nugget Casino when Casino Moose Jaw opens. However, RWDSU and MJEX have not entered into negotiations with respect to workplace adjustment issues. He noted that bargaining between MJEX and SGC would determine the resources available to MJEX to deal with the issues on closure.

**[59]** Judy Bell, negotiator for MJEX, was called as a witness by RWDSU. Ms. Bell indicated that she was retained in January, 2001, by MJEX to assist with negotiations after MJEX learned that SGC no longer wished to take over the Golden Nugget Casino and accept the transfer of RWDSU's bargaining rights. Ms. Bell attended a meeting with SGC in late January or early February, 2001. Ms. Bell recalled that SGC did not take the position that the Golden Nugget Casino needed to close on the opening of the new casino. MJEX made it clear to SGC that it hoped that SGC would consider MJEX's employees for employment at the new casino. Ms. Bell noted that the agreement between MJEX and RWDSU remains open and that no notice of technological change has been received in part because the closure date for the Golden Nugget Casino has not been set by MJEX.

**[60]** Blaine Pilatzke testified on behalf of PSAC. Mr. Pilatzke was aware of RWDSU's attempts to negotiate wider language in RWDSU's scope clause at Casino Regina in order to sweep in employees at other casinos. PSAC opposed this approach, although it thought that RWDSU would hold bargaining rights at Casino Moose Jaw as a result of SGC taking over the operations of the Golden Nugget Casino.

**[61]** PSAC was generally unaware of the arrangements made by SGC for the opening of the new casino and was only provided with detailed information on the filing of SGC's application before this Board. Mr. Pilatzke noted that the inclusion of Casino Moose Jaw in the bargaining unit assigned to PSAC in Regina would increase the bargaining power of the unit and would allow for increased opportunities for many part-time workers.

## Position of the Parties

### (a) RWDSU

**[62]** RWDSU argued that SGC has an obligation to bargain the closure of the Golden Nugget Casino with RWDSU and MJEX. On its theory, SGC, by using its clout as a crown corporation, is causing the Golden Nugget Casino to close. It cannot negotiate the terms of its economic deal relating to the closure only with MJEX – it must also involve RWDSU. This includes an obligation to negotiate the items set out in s. 43 of the *Act* – that is, retraining, re-employment and the like. RWDSU argued that s. 43(8) – workplace adjustment issues – cannot be the subject of useful negotiation unless SGC is made a party to the collective bargaining.

**[63]** RWDSU disputes that the business plans for Casino Moose Jaw are sufficiently crystallized to permit the Board to make a s. 37 determination. RWDSU pointed out the changes that have occurred to the business plan between June, 2000 and the present plan. It also pointed to the gaps in the plan, such as the lack of reference in the business plan to food and beverage workers, who at Casino Regina are represented by RWDSU.

**[64]** RWDSU maintains that the Board should require SGC to bargain collectively with RWDSU and MJEX over the closure issues. Once the closure issues are resolved, then the successorship application can be finalized. RWDSU argued that the negotiations may result in significant changes

that would impact on the successorship application. RWDSU argues that there is no independent labour relations purpose for making a successorship order at this time.

**[65]** RWDSU also asserts that SGC has designed its business plan in order to avoid becoming a successor employer to MJEX. According to RWDSU, SGC has adopted a union (particularly, RWDSU) avoidance strategy to ensure that workers at the new casino are not represented by RWDSU, and to encourage the representation of workers at the new casino by PSAC.

**[66]** If the Board decides to make a successorship order, then RWDSU argues that the order should be granted to it. RWDSU points out that s. 37 is worded in a broad fashion that could be interpreted to include the type of disposition occurring in this case where one business causes the closure of another business through various legal arrangements. RWDSU argued that everyone but SGC acknowledges that MJEX will need to close the Golden Nugget Casino when Casino Moose Jaw opens. The only purpose for not requiring closure is to enable SGC to maintain a legal position that it did not require closure of the Golden Nugget Casino and was not paying MJEX to close its casino.

**(b) SGC**

**[67]** SGC argues that it does not have any obligation to bargain with RWDSU with respect to the closure of the Golden Nugget Casino. SGC points to the evidence indicating its intention to operate the Golden Nugget Casino on a temporary basis pending the opening of the new casino and, based on that business assumption, it proposed that it would be a successor employer to MJEX. SGC reversed its decision to take over the Golden Nugget Casino for legitimate business reasons, not for anti-union reasons. SGC argued that even if motivation was a factor, a "non-deal" cannot give rise to any bargaining obligation. Bargaining is the responsibility of the employer, which in this case is MJEX.

**[68]** SGC argued that the business plan is sufficiently crystallized to permit the Board to make an order under s. 37. The city of Moose Jaw and the provincial cabinet have approved the plan. SGC asserts that there is a need for clarification of the rights of RWDSU and PSAC.

**[69]** SGC takes no formal position on the successorship ruling. It argues that the Board has three choices – RWDSU, PSAC or no union. It points out that a s. 37 transfer depends on more than a transfer of work. It requires the transfer of something that is identifiable as a "business or part of a business."

(c) **PSAC**

**[70]** PSAC took no position on the unfair labour application brought by RWDSU against SGC other than to oppose any remedial order that may grant RWDSU successor rights at Casino Moose Jaw.

**[71]** In relation to the crystallization of the agreements and transactions to open the new casino, PSAC argues that it wants to know as soon as possible if it has successor rights flowing from its certification at Casino Regina.

**[72]** PSAC argued that the agreements between SGC and MJEX are a political arrangement between an economic crown corporation and a business. SGC entered into an agreement with MJEX to compensate MJEX for setting up a casino in Moose Jaw in competition to the Golden Nugget Casino as a condition of obtaining approval from the provincial cabinet for the construction of Casino Moose Jaw. PSAC characterized RWDSU's claim against SGC as a "common employer" application that attempts to sweep SGC into bargaining with MJEX and RWDSU over the closure of the Golden Nugget Casino. PSAC noted that even if this characterization is correct, it does not result in successorship rights for RWDSU at the new casino.

**[73]** PSAC based its claim for bargaining rights on the language of its certification Order at Casino Regina. It noted that the Board favours large bargaining units, especially in the public sector. PSAC invited the Board to interpret its Order at Casino Regina as applying to all casino operations established by SGC in Saskatchewan. If the Board refuses to interpret the Order in this manner, then PSAC asked the Board to amend its Order to include Casino Moose Jaw. PSAC argued that the expanded bargaining unit would add to the industrial stability of the bargaining unit, would keep rates of pay and benefits stable across the corporation, and would permit portability of benefits for employees of SGC.

## Analysis

**Does SGC have an obligation to bargain with RWDSU with respect to the closure of the Golden Nugget Casino at MJEX?**

**[74]** RWDSU is seeking to have SGC found guilty of an unfair labour practice for failing to negotiate an agreement with RWDSU and MJEX relating to the closure of the Golden Nugget Casino and a workplace adjustment plan that may be required under s. 43(8) of the *Act*.

**[75]** The Board addressed a similar issue in *Saskatchewan Government Employees' Union v. Government of Saskatchewan et al.*, [1999] Sask. L.R.B.R. 307, LRB File No. 109-98. In that case, the Government of Saskatchewan transferred certain health programs to health districts. It was acknowledged by all parties that the transfer fell under the successorship provisions contained in s. 37 of the *Act*. The union in that instance claimed that the successor employers were required to negotiate transfer issues with the union and government prior to the actual date of transfer. The Board rejected this position at 349 and 350, as follows:

> *We must determine if SAHO and the Northern District Health Boards failed to bargain in good faith with SGEU by refusing or failing to enter into a transfer agreement. In our view, this aspect of the application must fail. SAHO and Northern District Health Boards did not become successor employers until the actual transfer date, which occurred on April 1, 1998. Although the Act would not prevent a successor employer from negotiating a transfer agreement prior to the actual date of transfer, the Act itself does not mandate collective bargaining until the successorship relationship actually arises. . . .*

If the obligation to bargain a transfer agreement does not arise in a case of successorship prior to the actual date of transfer, does it arise in other circumstances?

**[76]** RWDSU argued that SGC exerts economic control over MJEX and that only SGC could effectively negotiate with RWDSU over workplace adjustment issues arising under s. 43 of the *Act*. Section 43 of the *Act* requires employers who are permanently closing their operations to negotiate workplace adjustment issues with the union. This duty, however, only falls on entities that are "employers" within the meaning of the *Act*.

**[77]** There are circumstances where the Board may declare more than one entity to be the "employer" for the purposes of the *Act*. Such a declaration then requires all entities named in the declaration to bargain collectively with the union in question.

**[78]** For instance, in circumstances where two or more corporations under common control and direction carry on businesses, a union may apply to have the Board declare the entities to be related employers for the purposes of the *Act* (see s. 37.3)

**[79]** Similarly, if the relationship between two or more entities is that of principal and contractor, a union may bring an application to have the principal declared the "employer" for the purposes of the *Act* under s. 2(g)(iii). The Board considered s. 2(g)(iii) in *RWDSU v. Sask. Gaming Corp. and Marwest Food Systems Ltd.,* [1996] Sask. L.R.B.R. 523, LRB File No. 083-96, and found that in order for the principal to be designated as the "employer" there must be a sound labour relations footing for separating the responsibility for bargaining wages from the responsibility for paying wages. In that instance, s. 2(g)(iii) was not applied to SGC to require it to bargain collectively with the union for employees of the contracting food and beverage services company at Casino Regina.

**[80]** In *Monaghan v. Delta Catalytic Industrial Services Ltd.,* [1996] Sask. L.R.B.R. 429, LRB File No. 187-95, the Board suggested some circumstances in which it would find an owner responsible for anti-union sanctions taken by a contractor against employees of the contractor. However, it would seem to us that the Board was referring to the type of circumstance that would give rise to an order under s. 2(g)(iii) – that is, that the owner exerted sufficient control over wages and working conditions of the employees of the contractor to apply s. 2(g)(iii) and designate the owner as the "employer."

**[81]** In this case, RWDSU has not asked the Board to consider whether SGC is a related employer or is in a principal-contractor arrangement with MJEX such that it should be designated the true employer of employees at Golden Nugget Casino. This is not surprising as there is little factual basis for concluding that either provision would apply.

**[82]** However, in the absence of such a relationship, SGC cannot be required to bargain collectively with RWDSU with respect to the closure of the Golden Nugget Casino. MJEX remains the "employer" of the employees at Golden Nugget Casino and it is responsible for negotiating all matters under s. 43(8) when and if notice of closure is required to be given to RWDSU.

**[83]** Although there is no legal obligation on SGC to negotiate a transfer of employees from the Golden Nugget Casino to the new casino, there is also nothing in the *Act* that prevents SGC from discussing the issue with RWDSU and with MJEX to ensure an orderly transfer. In fact, this is the preferred method of ensuring that employees of the Golden Nugget Casino are not lost in the process of re-organizing gaming operations in Moose Jaw.

**Did SGC violate s. 11(1)(a) or (e) of the *Act* by changing its position on the successorship issue?**

**[84]** RWDSU asserts that SGC is attempting to organize its operations in Moose Jaw so as to avoid having a bargaining relationship with RWDSU. In essence, RWDSU's claim is that SGC is interfering in the selection of a trade union and is discriminating against RWDSU and its members by refusing to accept RWDSU as a successor union and by refusing to hire members of RWDSU at the new casino.

**[85]** RWDSU has some reason to be concerned with SGC's change of heart with respect to its relationship with RWDSU at the new casino. At first, SGC was committed to an on-going relationship with RWDSU as the successor employer to MJEX. SGC no doubt understood the importance of that decision to RWDSU and to its members at the Golden Nugget Casino. As far as RWDSU was aware, SGC undertook responsibility as a successor employer without qualification. It was not aware that SGC based its offer of successorship on the premise that it would take over operations of the Golden Nugget Casino.

**[86]** On the other side, SGC viewed its successorship obligations as arising as a matter of law from its decision to take over the operation of the Golden Nugget Casino. Once this decision was reversed, it withdrew its offer of successorship and viewed its labour relations options in a different light. SGC recognized that its labour relations would be made simpler if Casino Regina and Casino Moose Jaw operated under one collective agreement.

**[87]** SGC also changed its position with respect to the hiring of employees of the Golden Nugget Casino. At first, it recognized their continued employment at the new casino. When SGC decided not to operate the Golden Nugget Casino, it publicly indicated in its reporting to Moose Jaw city council that the former employees would be considered for employment at the new casino like other applicants for employment. Finally, SGC has indicated before this Board that the former employees

of the Golden Nugget Casino will be hired, provided they meet the conditions that are standard for SGC employees, that is, be available to work a minimum of 20 to 24 hours per week, participate in SGC training programs, and possess a valid SLGA license.

**[88]** In *Kitchener-Waterloo Hospital v. Ontario Nurses' Assoc.* (1991), 14 C.L.R.B.R. (2d) 1, the Ontario Labour Relations Board dealt with a similar application involving a refusal by a non-union hospital to transfer employees from a union hospital on a transfer of services from one hospital to the other. The Ontario Board concluded as follows at 40 – 42:

> *The Hospital's evidence was that it was concerned that hiring nurses from St. Mary's on any transfer arrangement would result in a situation where O.N.A. represented some of the nurses in obstetrics and pediatrics units and other nurses working beside those nurses would be unrepresented. In the Hospital's view, this would present significant administrative difficulties. The Hospital denied that this concern formed any part of the reason for its decisions to first offer all the positions internally or to subsequently treat St. Mary's applicants on the same basis as new hires from the general community. But we must assess this evidence in the context where the Hospital had previously been prepared to give some preference to these nurses. In all the circumstances, we conclude that the Hospital did not hire St. Mary's nurses, at least in part, only because they were represented by a trade union. Kitchener-Waterloo had been quite prepared to hire them, indeed to prefer them in some fashion, when it did not realize that O.N.A. was asserting representation rights. It was of this view as late as May 23, 1989. On that date, it learned that O.N.A. would be asserting successor rights. Shortly thereafter, it decided not to hire them. That decision was in breach of s. 66.*
>
> . . .
>
> *In our view, it treated St. Mary's nurses as new hires on the same basis as strangers because it was trying to structure the transaction in such a fashion that it would not look like a "sale" under s. 63 of the Act. It wanted to create a staffing of the expanded services that did not look as though any employees from St. Mary's had "transferred" over from that hospital to Kitchener-Waterloo. This decision was also in contravention of s. 66. We do not suggest that parties engaging in transactions that might be the subject of s. 63 applications cannot structure the transaction in a manner they consider appropriate. Indeed, the provisions of ss. 63 and 1(4) of the Act are designed to preserve bargaining rights, regardless of the structuring by the parties of such transactions. Ordinarily, parties so structuring their transactions will not commit a breach of the Act through that structuring alone. However, here Kitchener-Waterloo had earlier decided that the St. Mary's nurses ought to be afforded some preference in hiring over external candidates. They had decided so for sound business reasons, as the St. Mary's nurses were the most qualified and could provide the best patient case at the lowest cost. Those were the reasons then motivating Kitchener-Waterloo. Then, after deciding to give preference to St. Mary's nurses, Kitchener-Waterloo made the*

> *decision to treat St. Mary's nurses the same as new hires who were strangers because it did not want O.N.A. to be successful in its s. 63 application.*
>
> . . .
>
> *There is no doubt that had the nurses at St. Mary's been unrepresented, Kitchener-Waterloo would have afforded them some form of transfer or seniority rights or preferential opportunities to bid for the new jobs, compared to outside hires.*

**[89]** In this case, SGC justified its flip-flop on the issue of successor rights and the hiring of Golden Nugget Casino employees on the grounds that its plan to take-over the Golden Nugget Casino became impractical and uneconomical. We accept Mr. van Koeverden's evidence in relation to this underlying reasoning for reversing its agreement to accept RWDSU as the successor union. His testimony was consistent with the memorandum and board minutes filed with the Board and was credible in all respects.

**[90]** However, in relation to the decision to give preference to employees from the Golden Nugget Casino, we are not persuaded that that the decision was made free of all considerations relating to union membership.

**[91]** As outlined above, SGC initially offered employment to all employees of the Golden Nugget Casino. After SGC decided not to take-over the Golden Nugget Casino, it changed its position and indicated that Golden Nugget Casino employees would simply be encouraged to apply for employment at the new casino. At the same time, Ms. Meredith's memorandum indicates that SGC preferred its employees at Moose Jaw to be represented by PSAC instead of RWDSU.

**[92]** Although there may be administrative reasons for preferring one union over the other, s. 11(1)(e) prohibits discrimination in hiring based on union membership and, as a result, SGC's hiring preferences cannot be influenced by union membership. We find that SGC did improperly take the union affiliation of the Golden Nugget Casino employees into account in changing its offer of employment.

**[93]** At the time of hearing, SGC filed an amended reply indicating that it would offer employment to all current employees at the Golden Nugget Casino on conditions that are standard for all employees of SGC. In our view, SGC is required to employ former employees of the Golden

Nugget Casino once Casino Moose Jaw opens. Otherwise, the withdrawal of the offer of employment will constitute discriminatory treatment under s. 11(1)(e) having been influenced, in part, by the union affiliation of the employees.

**Are the business plans relating to Casino Moose Jaw sufficiently finalized and are the impacts sufficiently known to justify making an advance ruling on the successorship issue?**

**[94]** After hearing extensive evidence from Mr. van Koeverden, we are satisfied that the plans for Casino Moose Jaw are sufficiently crystallized to enable the Board to make an advance ruling on the successorship issue.

**Is there an independent labour relations purpose for making an advance ruling on the successorship application?**

**[95]** In this instance, both PSAC and RWDSU make claim to representational rights at Casino Moose Jaw. SGC has placed these completing claims before the Board in the form of an application under the successorship provisions set out in s. 37 of the *Act.* Given the dispute that exists between SGC and RWDSU over the closure of the Golden Nugget Casino and the establishment of Casino Moose Jaw, and that a dispute exists between RWDSU and PSAC over representation rights for employees at Casino Moose Jaw, we are of the view that there are sufficient independent labour relations reasons for making an advance ruling. RWDSU will be able to finalize its negotiations with MJEX knowing where it stands in relation to the opening of Casino Moose Jaw. Similarly, PSAC will know how to advise its members who may be thinking of transferring to Casino Moose Jaw.

**Is SGC a successor employer to MJEX or do the bargaining rights assigned to PSAC at Casino Regina extend to Casino Moose Jaw?**

**[96]** We will first address the successorship issue. Section 37 of the *Act* preserves the bargaining rights of a union when "a business or part thereof is sold, leased, transferred or otherwise disposed of." Given the broad wording of the provision, the Board is not concerned with the legal form of the transaction, but will consider whether, in substance, there is a continuation of the business previously carried on by the predecessor employer by the successor employer: see *Saskatchewan Government Employees' Union v. Headway Ski Corporation,* [1987] Aug. Sask. Labour Rep. 48, LRB File No. 396-86.

**[97]** Continuation of a business is determined by looking at a number of factors, including the transfer of tangible and intangible assets. The Board attempts to discern whether the business as a going concern was transferred as opposed to a mere collection of assets. In *Canadian Union of Public Employees, Local 1975-01 v. Versa Services Ltd.,* [1993] 1st Quarter Sask. Labour Rep. 174, LRB File No. 170-92, the Board found that the transfer of a distinctive space, a large pool of customers, and the established habits of customers, did constitute a transfer of "part of a business" from the University of Regina to Versa Services Ltd.

**[98]** Not all transfers of work, however, have been held to be transfers of "business": see *Retail Wholesale and Department Store Union, Local 454 v. Westfair Foods Ltd.,* [1993] 1st Quarter Sask. Labour Rep. 102, LRB File Nos. 232-92 & 233-92 and *Canadian Union of Public Employees, Local 59 v. City of Saskatoon et al.,* [1998] Sask. L.R.B.R. 376, LRB File No. 164-97 where the Board distinguished cases involving the contracting out of work by the predecessor employer to a contractor for a fixed fee from cases where the predecessor transfers a "profit center" to a successor employer. In the latter case, the Board will find that a business or part thereof has been transferred to the successor employer.

**[99]** We must decide if the agreements between SGC and MJEX will give rise to any transfer of a business or part thereof from MJEX to SGC. MJEX is not required to close the Golden Nugget Casino, but, in substance, the agreement is one compensating MJEX for the loss of its gaming revenue and the immediate costs of closure. SGC was required to enter into a compensation agreement with MJEX as a condition of its approval, both from the city of Moose Jaw and the provincial cabinet.

**[100]** There is no transfer of gaming licenses, equipment, buildings or other physical assets from the Golden Nugget Casino to SGC. In addition, there is no transfer of managerial expertise. The employees of the Golden Nugget Casino would form a skilled labour pool for the new casino and, for the reasons stated above, they will be employed by SGC at the new casino. At the same time, employees at Casino Regina will also form a pool of skilled labour, which SGC will tap to staff the new casino.

**[101]** The patrons of the Golden Nugget Casino, particularly the table patrons, will transfer to SGC although part of the market of the Golden Nugget Casino will follow the VLT's to other venues in the city of Moose Jaw. However, SGC also estimates that a good part of the Moose Jaw market will transfer from Casino Regina.

**[102]** Overall, we find that there are insufficient indicia of a transfer of a business or part of a business from MJEX to SGC. The agreement between SGC and MJEX is part of a political arrangement to allow for the development of large casinos while keeping the various exhibition associations "whole." While there is financial support flowing from SGC to MJEX, it does not amount to a sale of a business. SGC is not deriving any real tangible benefit from the agreement with MJEX in terms of physical assets, licenses, equipment, or managerial expertise that will flow through to the new casino. At most, Casino Moose Jaw will capture part of the market share previously held by MJEX (which it would do without an agreement with MJEX and is the reason why a "make whole" agreement was required as part of the approval process for establishing new casinos) and will employ former employees of MJEX. These factors are insufficient to establish that a "business" has been sold or otherwise disposed of.

**[103]** In the end result, we find that SGC's proposed Casino Moose Jaw will not be a successor employer to MJEX.

**[104]** In relation to PSAC's certification Order at Casino Regina, PSAC urged the Board to conclude that the Order extends to employees at Casino Moose Jaw. PSAC argues the Board generally favours large bargaining units, particularly in the public sector.

**[105]** PSAC's certification order describes the bargaining unit as "all employees employed by Saskatchewan Gaming Corporation in or in connection with the operation of Casino Regina, except corporate head office staff, [various managerial exclusions], and any employees employed in food and/or beverage services."

**[106]** Could gaming employees at the proposed Casino Moose Jaw be considered part of the existing PSAC Order? On one side of the argument, there are strong labour relations reasons for establishing a single bargaining unit for all gaming employees of SGC. A single bargaining unit permits the transfer of employees between casinos; it keeps wages and working conditions consistent

for employees at the two casinos; it recognizes the shared activities of the two casinos in terms of human resource planning, training, security, managerial and technical support, and the like.

**[107]** On the other hand, organizing in the casino industry in Saskatchewan has taken place on a casino-by-casino basis. For instance, CAW-Canada is certified to represent employees at the Northern Lights Casino, one of four casinos owned and operated by SIGA. We note that casinos are developed in relatively distinct urban or rural markets and rely primarily on local labour markets for their pool of employees. Although there may be more worker mobility between Moose Jaw and Regina than at other locations, this mobility will likely be restricted to the opening of the new casino and will likely stabilize once the casino has been operating for some time. We note as well that there is not one predominant union that represents employees in casinos in Saskatchewan. Currently there are four unions that represent casino employees.

**[108]** In our view, bargaining units composed of all employees of an individual casino are the appropriate units, at this time, for gaming employees in Saskatchewan. We are also of the view that the original certification Order issued to PSAC was intended to apply only to employees at Casino Regina. If it had been intended to apply throughout the province the wording of the Order would not have included the words "in or in connection with the operation of Casino Regina." As such, PSAC does not have any automatic right to represent employees at Casino Moose Jaw.

**[109]** There are no successorship issues pertaining to PSAC's certification Order. SGC is simply expanding its operations to a new location over which we have determined that PSAC's certification Order does not extend. In these circumstances, if PSAC wishes to represent employees at Casino Moose Jaw, it must engage in an organizing campaign when the casino opens.

## Summary of Findings

**[110]** The Board finds as follows:

1. SGC is not required to bargain with RWDSU in relation to the closure of the Golden Nugget Casino or any obligations arising for employers under s. 43(8) of the *Act.*

2. SGC cannot refuse to employ employees of the Golden Nugget Casino who meet conditions that are standard for all employees of SGC.

3. The proposed transaction between SGC and MJEX does not result in the sale, lease, transfer or other disposition of a business and does not attract successorship rights under s. 37 for RWDSU; and

4. PSAC's current certification Order at Casino Regina does not extend to cover employees at the proposed Casino Moose Jaw.

# CHRISTINE THOMPSON, Applicant v. SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, Respondent

# CAROLYNE POLETZ, Applicant v. SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION, Respondent

LRB File Nos. 199-00 & 210-00; March 14, 2002
Vice-Chairperson, Walter Matkowski; Members: Brenda Cuthbert and Maurice Werezak

| | |
|---|---|
| For the Applicants: | Representing themselves and assisted by Carolyn McRae |
| For the Respondent: | Rick Engel |
| For Prairie West Regional College: | Kevin Wilson |

**Practice and procedure – Application – Irregularities and technicalities – Miscommunication between applicant and counsel resulted in counsel withdrawing application – Applicant did not intend to withdraw application – Section 19 of *The Trade Union Act* gives Board broad procedural powers to ensure real issues in controversy determined – Board permits applicant to rectify error so that application remains properly before Board.**

**Duty of fair representation – Scope of duty – Duty of fair representation provision does not apply to dispute between union member and union itself but to right to be fairly represented in grievance or rights arbitration proceedings under collective agreement as result of dispute between union member and employer – Board has no jurisdiction to deal with applicants' complaints about union run benefit plan pursuant to s. 25.1 of *The Trade Union Act*.**

**Union – Constitution – Union must follow principles of natural justice in relation to union run benefit plan – Board has supervisory role under s. 36.1 of *The Trade Union Act* which could, in some circumstances, come into play with respect to how union administers union run benefit plan – Board permits applicants to proceed with applications pursuant to s. 36.1 of *The Trade Union Act*.**

**Practice and procedure – Application – Amendment – Amendments sought by applicants merely expansion of claims and do not prejudice respondent – Proposed amendments will hopefully define issues more clearly for parties – Board allows amendments.**

***The Trade Union Act*, ss. 19, 25.1 and 36.1.**

## REASONS FOR DECISION

### Background

**[1] Walter Matkowski, Vice-Chairperson:** The applicant, Christine Thompson, filed an unfair labour practice application on July 17, 2000 (LRB File No. 199-00), against Saskatchewan Government and General Employees' Union (the "Union") claiming that the Union breached ss. 25.1 and 36.1(1) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") in that the Union failed to represent her effectively in her application for long term disability benefits on the grounds that her disability may be workplace related. Ms. Thompson claims that the Union's long term disability plan ("LTD Plan") has repeatedly declined her application for long term disability over a period of two years, with appeals, arbitration and rehabilitation referrals not proceeding in a timely manner.

**[2]** The applicant, Carolyne Poletz, filed an unfair labour practice application against the Union on July 26, 2000 and alleged that the Union breached ss. 25.1 and 36.1(1) of the *Act* in that the Union failed to represent her effectively in her application for long term disability benefits on the unstated grounds that her disability may be workplace related. Ms. Poletz claims that the LTD Plan has repeatedly declined her application for long term disability over a period of two years with appeals, arbitration and rehabilitation referrals not proceeding in a timely fashion.

**[3]** At some point in time the applicants retained the same counsel. By letters dated June 28, 2001, relating to each of their respective cases, their counsel sought to make broad amendments to their respective applications. With respect to Ms. Thompson's application, the requested amendments were as follows:

> *1. The Union violated Section 25.1 and 36.1 of the Act by failing to grieve, or in the alternative, failing to advise that a grievance was possible with respect to, the following:*
>
> *a) workplace harassment;*
> *b) denial of LTD benefits; and*
> *c) dismissal;*
>
> *2. The Union violated section 36.1 of the Act by denying the Applicant's rightful and meritorious claim to LTD benefits, and by unduly delaying the appeal and arbitration of same.*

*3. The Union violated section 11(2)(a) and 36.1 of the Act by facilitating or otherwise encouraging, to the benefit of the employer and the detriment of the Applicant, the resignation of the Applicant.*

*4. The Employer, Prairie West Regional College violated Section 11(1)(e) and (l) of the Act by failing to remedy harassment issues in the workplace and by compelling and otherwise procuring the resignation of the Applicant when she attempted to encourage the employer to so remedy.*

**[4]** The amendments sought on Ms. Poletz's behalf were as follows:

*1. The Union violated Section 25.1 and 36.1 of the Act by failing to grieve, or in the alternative, failing to advise that a grievance was possible with respect to, the following:*

*a) workplace harassment;*
*b) denial of LTD benefits;*
*c) dismissal; and*
*d) job reassignment*

*2. The Union violated section 36.1 of the Act by denying the Applicant's rightful and meritorious claim to LTD benefits, and by unduly delaying the appeal and arbitration of same.*

*3. The Union violated section 11(2)(a) and 36.1 of the Act by facilitating or otherwise encouraging, to the benefit of the employer and the detriment of the Applicant, the resignation of the Applicant.*

*4. The Employer, Prairie West Regional College violated Section 11(1)(e) and (l) of the Act by failing to remedy harassment issues in the workplace and by compelling and otherwise procuring the resignation of the Applicant when she attempted to encourage the employer to so remedy.*

**[5]** Both the Union and Prairie West Regional College (the "Employer") objected to the proposed amendments and advanced a number of preliminary arguments, which were dealt with by way of a number of conference calls with the Board's Executive Officer.

**[6]** During a conference call with the Board's Executive Officer held on July 23, 2001, the record indicates that counsel for the applicants withdrew Ms. Thompson's application.

**[7]** By letter dated July 25, 2001, counsel for the applicants advised the Board that he was withdrawing as their counsel.

**[8]** During an August 31, 2001 conference call with the Board's Executive Officer, the issue of whether the Board would hear Ms. Thompson's application (LRB File No. 199-00) was added to the list of items to be dealt with by the Board at the preliminary hearing of these matters, which took place on October 22, 2001.

**[9]** The preliminary issues to be decided by the Board are as follows:

i) Was Ms. Thompson's application withdrawn?

ii) Does the Board have jurisdiction to deal with the applicants' complaints?

iii) Should the proposed amendments be granted?

iv) Should the applicants' applications be dismissed?

## Facts

**[10]** The parties were able to agree on certain facts for the Board to consider in relation to the applications of Ms. Thompson and Ms. Poletz.

**[11]** Ms. Thompson, with assistance from the Union, entered into an agreement with the Employer dated April 9, 1999, whereby, in return for a severance package of 15 months' salary, she would submit a letter of resignation. Ms. Thompson received the monies (approximately $60,000), submitted a resignation letter and executed releases in favour of both the Employer and the Union.

**[12]** Ms. Poletz, with assistance from the Union, entered into an agreement with the Employer dated April 20, 1999, whereby, in return for a severance package of 15 months' salary, (approximately $60,000), she would submit a letter of resignation. Ms. Poletz received the monies, submitted a letter of resignation and executed releases in favour of both the Employer and the Union.

**[13]** The Union controls the LTD Plan. Both Ms. Thompson and Ms. Poletz applied for long term disability benefits in 1998 pursuant to the provisions of the LTD Plan. The Co-operators, the LTD Plan's adjudicator, initially denied Ms. Thompson's claim but, in October 1999, it paid Ms. Thompson benefits from January 13, 1999 up until the date of her resignation. The Union claims that Ms. Thompson received a salary from the Employer from August 1998 until January 12, 1999.

**[14]** Ms. Thompson disputes the time periods for which she believes she is entitled to long term disability benefits. Ms. Thompson acknowledges that the Union advised her not to resign from her employment as it would affect her long term disability claim. Ms. Thompson indicated that she had no economic options and that she was, in her words "forced to take the severance package."

**[15]** The Co-operators also denied Ms. Poletz's long term disability claim. Ms. Poletz did not recall if the Union advised her not to resign from her employment on the basis that it would affect her long term disability claim. Ms. Poletz claimed that she was forced to take the package due to economic circumstances. As well, in her own words, she took the package in order to "heal herself and move on." The Union claims that Ms. Poletz suffered no loss of income up to her resignation date and that Ms. Poletz was strongly advised by the Union not to resign.

**[16]** Both Ms. Thompson and Ms. Poletz have appealed the decisions to deny and/or restrict their rights to benefits under the LTD Plan and have been waiting a lengthy period of time to have their long term disability claims decided through the arbitration process set out in the LTD Plan.

**[17]** At the hearing of this matter, counsel for the Union undertook to contact a listed arbitrator from the LTD Plan roster to immediately deal with Ms. Thompson's and Ms. Poletz's appeals.

**[18]** The Board received a copy of correspondence sent by counsel for the Union dated October 23, 2001 to an arbitrator confirming the arbitrator's availability to hear Ms. Thompson's and Ms. Poletz's appeals prior to the end of the year 2001.

**[19]** The Union agreed to provide Ms. Thompson and Ms. Poletz with the Union representative of their choosing to represent them at the arbitrations.

**[20]** Ms. Thompson claimed that she had not instructed her counsel to withdraw her application during the July 23, 2001 conference call. Ms. Thompson was of the belief that her counsel would no longer represent her as she could not afford legal assistance and that he would "withdraw as her solicitor," and not "withdraw" her application before the Board.

**[21]** Following the hearing, the Board received a copy of joint correspondence to counsel for the Union written by Ms. Thompson and Ms. Poletz wherein the Union was advised that Ms. Thompson and Ms. Poletz would not proceed with their arbitrations until their respective applications were dealt with by the Board. In subsequent correspondence to the Board, Ms. Thompson filed an affidavit in support of her application and requested that her application be severed from Ms. Poletz's application. Ms. Thompson's affidavit is not properly before the Board and will not be considered by the Board in rendering a decision.

## Relevant Statutory Provisions

**[22]** Section 25.1 of the *Act* 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.*

**[23]** Section 36.1 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.*
>
> *(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.*

**[24]** Sections 19(1) and (2) of the *Act* read:

> *19(1) No proceedings before or by the board shall be invalidated by reason of any irregularity or technical objection, but the board may, at any stage of proceedings before it, allow a party to alter or amend his application, reply, intervention or other process in such manner and upon such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy in proceedings.*
>
> *(2) The board may at any time and on such terms as the board may think just, amend any defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings.*

## Analysis

### Was Ms. Thompson's application withdrawn?

**[25]** Ms. Thompson claims that a mistake occurred in that she instructed her counsel to withdraw as her solicitor and not withdraw her application. The Union, to its credit, was not prepared to take advantage of this error, which occurred as a result of some level of miscommunication between Ms. Thompson and her counsel and took no position on the jurisdictional consequences of Ms. Thompson's apparent withdrawal. The Board accepts that an error occurred as a result of a misunderstanding between Ms. Thompson and her counsel and that Ms. Thompson had no intention of withdrawing her application. Sections 19(1) and (2) of the *Act* give the Board broad procedural powers to ensure that the Board determines the real questions in controversy. To that end, Ms. Thompson is allowed to rectify the error whereby her application was incorrectly withdrawn before the Board so that her application remains properly before the Board.

### Does the Board have jurisdiction to deal with the applicants' complaints about the operation of the LTD Plan?

**[26]** In *McRae v. Saskatchewan Government and General Employees' Union*, [2002] Sask. L.R.B.R. 11, LRB File No. 002-02, the Board found that s. 25.1 of the *Act* does not apply to a dispute between a union member and the union itself but that s. 25.1 refers to the right to be fairly represented in grievance or rights arbitration proceedings under a collective agreement as a result of a dispute between a union member and an employer. In *McRae, supra*, the Board was also dealing with the LTD Plan. As such, this Board finds that it has no jurisdiction to deal with the applicants' complaints against the Union pursuant to s. 25.1 of the *Act.*

**[27]** With respect to s. 36.1(1) of the *Act*, the Board in *McRae, supra*, commented at 13:

> *[10] We will assume for the purpose of this application that s. 36.1(1) applies to disputes between members, the Union and the plan administrator, and that it requires the Union to apply the principles of natural justice in relation to members' claims for benefits under the long term disability plan. In Staniec v. United Steelworkers of America, Local 5917, [2001] Sask. L.R.B.R. 405, LRB File No. 205-00, the Board noted at 419 that "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." We do think, however, that the operation of union benefit plans is a matter of great significance to*

*union members and constitutes a matter of membership that would attract Board supervision under s. 36.1(1).*

. . .

*[12] In the context of trade unions, the courts have imposed standards of fair procedure on internal union matters, notably disciplinary matters. In relation to union run benefit plans, similar standards may be imposed by the Board acting on its supervisory powers under s. 36.1(1). The requirements of natural justice in this context are that a union member be provided an opportunity to present his or her evidence and given an opportunity to respond to evidence that may be used against him or her in the determination of his or her benefit entitlements. There is no statutory or public policy requirement that the member be given an oral hearing, nor is there any requirement that the member be given a right of appeal, although these processes may be required under the union's constitution or the plan documents and, if so, will be considered in determining if fair processes have been applied to make decisions on benefit entitlements.*

*[13] The issue on this application is whether the Board's supervisory role under s. 36.1(1) is in any way engaged by the applicant in her application.*

**[28]** The Board therefore accepts that it has some type of supervisory role under s. 36.1(1) which could, depending on the evidence presented at the hearing proper, come into play with respect to the LTD Plan and how it was run in relation to Ms. Thompson's and Ms. Poletz's claims. A review of the process is requested in the applicants' materials as the applicants complain about the excessive delay in having their respective long term disability claims dealt with. This excessive delay is linked by the applicants to their claims of being forced to resign in order to receive severance packages. The applicants also complain about a potential conflict of interest in that a Union official helped them negotiate severance packages while the Union was denying them long term disability benefits. As stated earlier, the applicants will be allowed the opportunity to have their "day in court" and to present both evidence and argument relating to their s. 36.1(1) claims against the Union.

**Should the amendments be allowed?**

**[29]** Both Ms. Thompson and Ms. Poletz filed applications complaining about the Union's failure to represent them effectively in their applications for long term disability benefits. Both applicants complain about the delay in having their claims processed. The amendments sought by the applicants in paragraphs 2 and 3 of the June 28, 2001 letters from their counsel are merely an expansion of their claims and do not prejudice the Union. The amendments, prepared by counsel, will hopefully define the

issues more clearly for the parties. As such, the amendments set out in paragraphs 2 and 3 of the June 28, 2001 letter are allowed.

**[30]** The amendments requested by the applicants in paragraphs 1 and 4 of the June 28, 2001 letter are denied. As stated earlier, s. 25.1 does not apply to the facts of these cases while s. 36.1(1) may apply, depending on the evidence presented at the main hearing. In any event, the s. 36.1(1) argument does not involve the Employer, only the Union.

**Should the applicants' applications be dismissed?**

**[31]** As stated earlier, the applicants will be entitled to present evidence and argument in relation to their s. 36.1(1) claims against the Union.

## Conclusion

**[32]** Ms. Thompson has asked that her application not be heard concurrently with Ms. Poletz's application. As such, the applications of Ms. Thompson and Ms. Poletz will be scheduled for the same dates, with Ms. Thompson's application to be heard first, immediately followed by Ms. Poletz's application.

**THE NEWSPAPER GUILD CANADA/COMMUNICATION WORKERS OF AMERICA, CLC, AFL-CIO, IFJ AND THE SASKATCHEWAN MEDIA GUILD, LOCAL 30199, Applicant v. STERLING NEWSPAPERS GROUP, A DIVISION OF HOLLINGER INC. and CANWEST GLOBAL COMMUNICATIONS CORP., OPERATING THE LEADER-POST AND LEADER-STAR NEWS SERVICES, Respondents**

LRB File No. 006-01; March 22, 2002
Chairperson, Gwen Gray, Q.C.; Members: Tom Davies and Maurice Werezak

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

**Collective agreement - First collective agreement – Application for first collective agreement not subsuming all matters relating to bonuses when parties expressly reserve that matter to be resolved on unfair practice application.**

**Unfair labour practice – Unilateral change – Business as before - Board not distinguishing bonus from any other term or condition of employment – All contractual matters continue in place under s.11(1)(m) of *The Trade Union Act* until agreement is reached.**

***The Trade Union Act*, ss. 11(1)(m) and 26.5**

## REASONS FOR DECISION

### Background and Facts

**[1] Gwen Gray, Q.C., Chairperson:** On February 2, 1999, the Newspaper Guild Canada/Communication Workers of America, CLC, AFL-CIO, IFJ (the "Union") was certified to represent employees at the Leader-Star News Services and the editorial department at the Leader-Post and Regina Sun.

**[2]** Sterling Newspapers Group, A Division of Hollinger Inc. ("Hollinger" or the "Employer") was the owner of the Leader-Post newspaper at the time of certification. The current owner is CanWest Global Communications Corp. ("CanWest Global" or the "Employer"). All parties agreed that CanWest Global is the successor to Hollinger and the certification Order will be amended to reflect the change of ownership.

**[3]** The Union brought three earlier applications to the Board. In *The Newspaper Guild Canada/Communication Workers of America v. Sterling Newspapers Group, a Division of Hollinger Inc., operating The Leader-Post and Leader-Star News Services*, [2000] Sask. L.R.B.R. 558, LRB File Nos. 272-98 & 003-00, the Employer was ordered to pay a three percent wage increase to employees in the bargaining unit, retroactive to November 2, 1998; two weeks' pay to employees on the editorial payroll during the month of December, 1998 (Christmas bonus); and two weeks' pay to employees on the editorial payroll during the month of December, 1999 (Christmas bonus), with interest on all monies owing. Hollinger applied for judicial review of the Board's decision and its application for judicial review was dismissed by the Court of Queen's Bench on January 19, 2001 (see *Sterling Newspapers Group, a Division of Hollinger Inc. v. The Newspaper Guild Canada/Communication Workers of America and Saskatchewan Labour Relations Board*, [2001] Sask. L.R.B.R. c-1, LRB File Nos. 272-98 & 003-00).

**[4]** In the Board's Reasons for Decision relating to LRB File Nos. 272-98 & 003-00, the Board dealt with the issue of Christmas bonuses and held as follows at 577:

> *Under the "business as before" rule, the Employer is required to continue its pre-certification practice of granting Christmas bonuses to employees in the editorial department in the same manner and in the same amount that such bonuses were paid to all other employees of the Leader Post, until a first collective agreement is concluded. As a result, the Board concludes that a Christmas bonus of two weeks' pay that was granted to other employees in December, 1999 is due and payable to the employees in the editorial department.*

**[5]** On March 15, 2000 (LRB File No. 274-99), the Union sought Board assistance in concluding a collective agreement. In its proposals, in addition to other proposals, the Union sought a "me too" clause relating to bonuses given to other employees of the Employer outside the bargaining unit.

**[6]** The Board file on LRB File No. 274-99 indicates that an initial hearing of the matter was scheduled for August 30, 2000. Sometime prior to that date, Dennis Ball, Q.C., who was counsel for Hollinger on the application, sought an adjournment of the application because of the impending sale of the newspaper chain from Hollinger to CanWest Global. The Union opposed the adjournment and the matter was argued before Vice-Chairperson (Executive Officer) Seibel who granted an adjournment to October 23, 2000.

**[7]** On October 23, 2000, the Board appointed an agent to assist the parties with collective bargaining. The parties met with the Board agent on December 5, 6 and 7, 2000 to negotiate with respect to the first agreement. When no agreement was reached, the Board agent filed his report with the Board on December 20, 2000, and the matter went to a hearing before the Board on March 16, 2001. The Board issued its Order finalizing the collective agreement on March 19, 2001, after the filing of this application.

**[8]** On January 5, 2001, the Union filed the present application (LRB File No. 006-01). In this application, the Union alleges that, during December, 2000, the Employer gave another Christmas bonus to all employees at the Leader-Post except for the editorial employees covered by the certification Order issued to the Union, and perhaps the pressroom employees who are represented by a different trade union.

**[9]** At the time of the hearing of the first collective agreement application on March 16, 2001, Drew Plaxton, counsel for the Union, remarked, "There was a further bonus in December of 2000 that is mentioned in our materials, however, we're asking if they could be taken out of this application without prejudice and left in the unfair [labour practice application] that is presently before the Board, but set for another day and another time. It again is a stand-alone issue, just: Do you get this Christmas bonus or not?"

**[10]** Mr. Ball, for the Employer, during the same hearing, remarked, "[The Union] raised as well the question of a Christmas bonus which was already the subject of a separate unfair labour practice, the point of which I think Mr. Plaxton has quite rightly this morning acknowledged should be dealt with as a separate matter."

**[11]** As a result, the Board finalized the first collective agreement application without reference to the dispute relating to the Christmas bonus for the year 2000. The Board implemented the Board agent's report without amendment. The report set a wage grid for employees in the bargaining unit; added 3% to the wage base to take into account the amount ordered to be paid by the Board in LRB File Nos. 272-98 and 003-00; and increased the wages set forth in the grid by 3% on November 2, 1999 and 3% on November 1, 2000.

**[12]** Mr. Plaxton explained that he intended in his comments on the first collective agreement application to hive off the bonus issue from the matters that required settlement by the Board on that application. This was done "without prejudice" to the Union's unfair labour practice application on the bonus issue.

**[13]** On LRB File No. 006-01, it was agreed at the hearing that the Employer paid a Christmas bonus to employees at the Leader-Post in December, 2000, except those employees who were represented by the Union. The Employer wrote a letter addressed to the editorial staff on December 15, 2000 indicating that the December, 2000 Christmas bonus would not be paid to them. The letter stated in part as follows:

> *The past year has been a time of continued uncertainty for staff in the Editorial department. The imposition of a first collective agreement is pending. It has already been agreed that the commencement of the three-year term of the agreement will be retroactive to November, 1998. The only remaining issue is the wage package, including bonuses, which is before the Saskatchewan Labour Relations Board as part of the first contract application.*
>
> *Meantime, the Saskatchewan Court of Queen's Bench will hear arguments on January 4, 2001 regarding wages and bonuses previously awarded by the Board.*
>
> *As a result of the above facts, as well as the costs associated with labor issues in the department throughout the year, there will be no payment of bonuses to Editorial staff for 2000.*

**[14]** The Employer claimed that the matter of the Christmas bonus for 2000 was before the Board on the application for assistance with the first collective agreement. The parties had agreed that the collective agreement would come into effect on November 1999 and conclude on November, 2001. The Employer replied that ss. 11(1)(a) and (c) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") did not apply as the Employer has bargained collectively with the Union and reached agreement on all matters except wages and shift premiums.

## Relevant Statutory Provisions

**[15]** The relevant statutory provision is contained in s. 11(1)(m) of the *Act* which reads as follows:

> *11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:*
>
> > *(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;*

## Issue

**[16]** The Board must decide if the Employer violated s. 11(1)(m) of the *Act* by refusing to pay to employees in the bargaining unit the Christmas bonus paid to other employees at the Leader-Post in December, 2000.

## Argument

**[17]** The Union argued that the application involved a very straightforward application of the "business as before" principle. The Board had already found that Christmas bonuses were "terms or conditions of employment" that existed for the employees of the editorial department prior to the certification of the Union. As a result, the Employer was obligated under s. 11(1)(m) to continue to pay the bonus until the Union and the Employer agreed to a first collective agreement or until the Board imposed a first collective agreement under s. 26.5. The Union argued that the s. 26.5 application did not grant any form of immunity to the employer to allow it to refuse to live up to the existing contractual terms. In addition, the Union argued that the first collective agreement did not apply to this issue as the non-payment of the Christmas bonus for 2000 arose in a non-contract period.

**[18]** The Employer argued that once the application for first collective agreement was filed with the Board, the Board, through the first agreement process, subsumed all matters relating to bonuses in the application that required determination. As such, the matter is resolved by the imposition of the first collective agreement. If the Union wants to have the matter determined, it should file a grievance under the collective agreement to determine if the agreement requires the payment of the Christmas bonus. The Employer noted that if s. 26.5 had been followed to the letter, the application for first collective agreement assistance would have been determined within 45 days of the date of the application. The Employer is put at greater jeopardy by the Board's failure to follow the time frame set out in the *Act*. The Employer pressed the Board to interpret s. 11(1)(m) in the context of s.

26.5 – that is, that once a matter is raised before the Board on the first collective agreement application, it cannot be the subject of a s. 11(1)(m) application because it is the subject of collective bargaining.

## Analysis

**[19]** The facts of this case are similar to those considered by the Board in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Regina Exhibition Association Limited,* [2001] Sask. L.R.B.R. 615, LRB File No. 179-00 where the union and employer negotiated a collective agreement that provided for retroactive wage increases and the removal of gratuities. In that case, the union agreed to forego gratuities in exchange for increases to pay rates. The agreement was signed on February 2, 2000 but its effective term commenced on September 1, 1999. The employer, however, decided unilaterally to cease payment of gratuities after September 1, 1999 even though the collective agreement was not then concluded. The Board held at 623 and 624:

> *[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.*

**[20]** In the present case, the Board already determined in LRB File Nos. 272-98 and 003-00 that Christmas bonuses constituted a pre-certification term or condition of employment. This finding is set out at 577 of the Board's Reasons for Decision dated September 27, 2000 cited above. Like any other term and condition of employment, s. 11(1)(m) requires the Employer to continue payment of the bonus until a collective bargaining agreement is concluded between the parties.

**[21]** Is this position altered at all by the fact that the Union had applied to the Board for first collective agreement assistance and the application was pending before the Board at the time the bonus would normally be paid?

**[22]** The statutory purpose of s. 11(1)(m) is to require the employer to maintain the status quo with respect to the pre-certification terms and conditions of employment unless the union consents to a change: see *Regina Exhibition Association Limited, supra,* at 619. It stabilizes the bargaining relationship by fixing the terms and conditions of employment at their pre-certification state. The union is not required to bargain from a sliding scale and can anticipate that employees will retain their current level of pay and benefits until the union and the employer agree to something else.

**[23]** In this case, it is clear on the facts that the Union did not agree to waive the payment of Christmas bonuses in December 2000 but maintained its bargaining position on the bonus issue before the Board agent. Prior to the conclusion of the first agreement application, the Union had filed its unfair labour practice application with respect to the non-payment of the bonus and the parties expressly reserved the matter on the first collective agreement application to be resolved on the unfair labour practice application.

**[24]** It would seem to the Board that the Employer was obligated to either pay the Christmas bonus in December 2000 or reach an explicit agreement with the Union, at that time, to waive the bonus payment and have all monetary issues for the year 2000 decided by the Board on the first collective agreement application. The Employer was not able to unilaterally declare that the bonus payment for 2000 would be decided by the Board on the first agreement application and, as a result, could be withheld from employees. The evidence does not indicate that the Union agreed to waive the payment of the Christmas bonus and we do not think that such waiver can be inferred from the Union's bargaining package at the time, or from the agreement reached between the Union and the Employer on the retroactive effect of the agreement.

**[25]** In our view, the bonus issue cannot be distinguished from any other term or condition of employment. For instance, the Employer could not take the position that because the issue of wage rates was before the Board on the first collective agreement application, it could suspend the payment of wages until the Board issued its decision on the first agreement application. All contractual matters continue in place under s. 11(1)(m) until agreement is reached.

**[26]** The Employer argued that it should not be penalized for the delay in concluding the first agreement application. We note, however, that the only delay was caused by an adjournment request made by the Employer. In addition, once the Board decided the threshold question of whether or not it would impose a collective agreement, it did so within the time frame set out in s. 26.5 (6)(b)(i).

**[27]** For the reasons stated, we find that the Employer violated s. 11(1)(m) of the *Act* by failing to pay employees in the editorial department a Christmas bonus in December, 2000 equivalent to the bonus paid to other employees at the Leader-Post in December, 2000. The Employer is directed to pay the bonus. The Board reserves jurisdiction to determine any matters arising from its Order, including the calculation of the amounts owing. No order is made with respect to interest on the amounts owing.

# UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400 Applicant v. THE CORPS OF COMMISSIONAIRES, NORTH SASKATCHEWAN DIVISION, Respondent

LRB File No. 276-00; March 26, 2002
Vice-Chairperson, James Seibel; Members: Gerry Caudle and Brenda Cuthbert

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

**Successorship – Transfer of business – General principles – Obligation on successor employer arises on transfer from predecessor whether union has applied to Board for successorship declaration or not – Section 37 of *The Trade Union Act* abrogates effect of change of ownership so bargaining rights are not restricted to single employer but become attached to business – Collective bargaining obligations run with business regardless of who owner is.**

**Successorship – Deemed successorship – Section 37.1 of *The Trade Union Act* – Emphasis of s. 37.1 of *The Trade Union Act* on building or site where services provided and on employees who provided services for predecessor employer, rather than on contract for services – Fair, large and liberal interpretation of provision may lead Board to conclude that usual considerations in successorship cases do not apply.**

**Bargaining unit – Appropriate bargaining unit – Transfer of obligation – In case pursuant to s. 37.1 of *The Trade Union Act*, involving stable workforce with little or no interchange with other locations, Board finds limited form of contract-specific bargaining unit to be appropriate – Appropriate unit includes employees performing services at building or site that is their principal place of work.**

**Duty to bargain in good faith – Collective agreement – Wording of s. 37 of *The Trade Union Act* makes it clear that legislature intended collective agreement to be binding on successor employer until Board declares otherwise – Admitted successor employer refused to acknowledge union or apply collective agreement, thereby violating s. 11(1)(c) of *The Trade Union Act*.**

***The Trade Union Act*, ss. 11(1)(c), 37 and 37.1.**

## REASONS FOR DECISION

### Background and Facts

**[1] James Seibel, Vice-Chairperson:** United Food and Commercial Workers, Local 1400 (the "Union") brings this application pursuant to s. 37.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the

"*Act*"). The Union asserts that a deemed sale of a business has occurred from Inner-Tec Security Consultants Limited ("Inner-Tec") to The Corps of Commissionaires, North Saskatchewan Division (the "Corps") in relation to the provision of security services to the City of Saskatoon (the "City") asset management division. The Union also alleges that the Corps has committed an unfair labour practice in violation of s. 11(1)(c) of the *Act* by refusing to bargain with the Union. The Union also claimed compensation for economic loss for work not performed by its members, and for loss of union dues, but agreed that any consideration of those issues should be reserved for a separate hearing.

**[2]** The Union was certified on April 24, 1991 (LRB File No. 231-90) as the bargaining agent for a province-wide unit of employees of Inner-Tec, a private company that provides security services under contract to various customers at various locations. The bargaining unit, which comprises approximately 100 employees, is described as follows:

> *...all employees...except Managers, Assistant Managers, Site Supervisors, office staff, loss prevention personnel, and all those holding positions of equal or higher rank than Supervisors...*

**[3]** The Union has a collective agreement with Inner-Tec.

**[4]** The Corps is a non-profit organization that, *inter alia*, contracts to provide security services in the north half of the province. It has between 300 and 400 employees, as does a counterpart division in the south half of the province. There are no certification orders regarding any of its employees in Saskatchewan.

**[5]** Section 37(1) of the *Act,* commonly referred to as the "successorship" provision, provides for the transfer of collective bargaining obligations from one employer to another upon the sale, lease, transfer or other disposition of a business or part thereof. Section 37.1 was added to the *Act* in the 1994 amendments. Under certain circumstances, s. 37.1 has the effect of deeming a sale of a business to have occurred with respect to security services, cafeteria or food services, or janitorial or cleaning services, provided to the owner or manager of provincial or municipal government buildings and certain public institutions.

**[6]** Sections 37 and 37.1 of the *Act* provide 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.*

. . .

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

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

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

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

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

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

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

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

**[7]** At the commencement of the hearing, counsel for the Corps confirmed that it was not disputed that the Corps was a successor to Inner-Tec pursuant to s. 37.1 of the *Act*, but took the position that there should be an "otherwise" order made under s. 37 of the *Act* declaring that the Corps is not bound by the Inner-Tec certification Order or the terms of the collective agreement between Inner-Tec and the Union for a variety of reasons, including: the para-military origin and structure of the Corps; that in the circumstances a province-wide bargaining unit is not appropriate; and, that neither is a single-site bargaining unit appropriate. In the alternative, counsel for the Corps asserted that there should be a vote to determine whether a majority of the Corps employees affected by the Order support the Union. Counsel for the Union conceded that it would not be appropriate to apply the certification Order to the Corps on a province-wide basis, where the small number of employees at issue are all employed at a few sites all within the City.

**[8]** The essential facts are not in dispute. Over the course of many years, the Corps has provided diverse services to the City pursuant to many contracts, including, security services, parking enforcement, process service and mobile patrol door and boiler checks. Security services are provided to the City's asset management division under one contract at four City buildings – City Hall (10.5 hours/day, 5 days/week) the Frances Morrison Library (58 hours/week), the J.S. Wood Branch Library (15 hours/week) and the Avenue P Greenhouses (seasonal, 8 hours/day, 7 days/week) – and mobile property, door and boiler checks at up to thirty other City sites.

**[9]** Prior to April, 2000, the Corps provided security services for the City's asset management division using nine employees at the four building sites and its six-person "patrol members team" to perform the mobile checks in the course of performing similar duties pursuant to contracts with other customers. Commencing in April, 2000, Inner-Tec successfully tendered to provide the services previously provided by the Corps to the City with respect to the asset management division security services. It used four employees plus mobile patrols. The City's contract with Inner-Tec was terminated a few months later in August, 2000. Effective August 21, 2000, the City entered into a new contract with the Corps to provide the same or substantially the same services as had been provided by Inner-Tec. The Corps used the same employees to perform the work as had done so prior to April, 2000. The wage rates paid by Inner-Tec pursuant to its agreement with the Union were generally lower than those paid by the Corps for the same work. The Corps subsidizes the wages of its employees performing the work at the four building sites over and above what it could otherwise pay given the amount of the contract with the City.

**[10]** Greg Eyre is assistant to the president of the Union. He has been a Union representative for approximately 14 years. The Union holds a number of certifications for security companies in the province. Mr. Eyre described contracts between security companies and their clients, and the collective agreements between the security company employers and the Union, as unique in certain respects. For example, the contracts with customers may specify what rates the employees performing the work will be paid. Under the collective agreement, these are designated as "special pay sites." The collective agreement provides for a "base rate" of $6.50 per hour, but employees working at special pay sites are paid more than the base rate – up to $13.00 per hour. Customarily, the contracts may be cancelled on 30 days' notice. While a client may have input into which employees will work at its premises, the collective agreement with Inner-Tec provides for assignment of work and recall from lay-off based on qualifications, performance and seniority. All full-time positions are posted except when Inner-Tec takes over work that had been performed by another security company and the client requests that the personnel that had been performing the work for the previous contractor be retained – the newly-acquired personnel are required to join the Union and accrue seniority from that date.

**[11]** The work schedules of security employees vary substantially: some employees work regular shifts at a single site; others change sites frequently or work variable shifts; others perform mobile property, door and boiler checks; others work temporary sites, such as the annual Exhibition.

**[12]** By letter to the Corps dated August 25, 2000, the Union requested a meeting to facilitate the implementation of the Inner-Tec collective agreement and the transfer of employees to the Corps with respect to the work taken over from Inner-Tec in relation to the asset management division security services for the City. The Corps responded through its solicitors by letter dated October 2, 2000, asserting the same position outlined above, that is, that even if there had been a successorship, it was not appropriate that it be bound by the Inner-Tec certification Order and collective agreement. None of the employees of the Corps performing the work for the City that had previously been performed by employees of Inner-Tec has joined the Union and no dues have been paid or remitted on their behalf.

**[13]** Mr. Eyre confirmed that all of the certifications held by the Union for security companies are province-wide, except for one unit of employees south of the 51st parallel and a site-specific unit at two hospitals in Saskatoon, issued when one unionized security company took over the work at those institutions from another unionized security company.

**[14]** Walter Turk has been the chief executive officer of the Corps for more than four years. He retired from the RCMP as a staff sergeant after 29 years' service. He described the history, structure and hiring practices of the Corps. The Corps is a non-profit organization founded in England in 1867 to provide employment for disabled destitute veterans of the Crimean War. It was organized in Canada in 1925 and has been present in Saskatoon for the past 53 years. There are many divisions across the country. In Saskatchewan, there is a north and a south division, each with 300 to 400 employees.

**[15]** Originally, employees of the Corps were required to be former members of the military or RCMP. However, according to Mr. Turk, in keeping with modern standards of equity in hiring, the military/RCMP service requirement has been relaxed to allow for the hiring of more women and minorities. At present, he estimated that 70% of the Corps employees are ex-service persons or ex-RCMP; the remaining 30% are mostly women and minorities that do not have such service. The latter group also includes approximately 18 persons who have been employed by the Corps specifically because they have some special skill. In cross-examination, Mr. Turk confirmed that while these criteria are preferred in hiring, they are not mandatory and presently anyone can apply for employment with the Corps.

**[16]** Approximately 60% of the work performed by the Corps is security work; the balance includes parking enforcement, process service, courier service, residential and commercial mobile patrol, boiler and equipment checks, security surveys and contract security training. All Corps employees have first aid and CPR training and the Corps is ISO 9002 certified. Employees engaged in security are provided training to CGSB standards. Since October, 2000, the employees of the Corps who are engaged in security work must comply with provincial licensing requirements. The Corps pays the costs of licensing.

**[17]** The Corps has a number of separate contracts with the City to provide different types of services. It has had a relationship with the City for over 20 years. The Corps performed the asset management division security work that is the subject of this application for more than five years before losing it to Inner-Tec after a tendering process. While the same employees of the Corps consistently work pursuant to the contract with the City at the four building sites, the mobile checks, the number of which varies seasonally, are performed by its patrol member team employees providing similar services pursuant to a number of contracts with different clients.

**[18]** Mr. Turk confirmed that bargaining units of Commissionaires have been certified in St. Johns, Newfoundland and in Quebec. He was not sure about Ontario.

## Argument

**[19]** Mr. Plaxton, counsel for the Union, argued that under the *Act* the Corps is bound automatically by the Inner-Tec certification Order and collective agreement unless and until the Board orders otherwise. In support of this contention, counsel cited the decisions of the Board in *Robert Flaman v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and Western Automatic Sprinklers (1983) Ltd.*, [1989] Spring Sask. Labour Rep. 45, LRB File No. 045-88 and *Saskatchewan Government Employees; Union v. Headway Ski Corporation* [1997], Aug. Sask. Labour Rep. 48, LRB File No. 396-86.

**[20]** Mr. Plaxton further argued that the Board does not have jurisdiction to terminate bargaining rights in successorship situations, but may only amend a certification order in such cases pursuant to s. 37(2)(e) of the *Act*. In *Headway Ski, supra, Saskatchewan Government Employees Union v. Mission Ridge Ski Development Inc.*, [1987] Aug. Sask. Labour Rep. 46, LRB File No. 179-86 and *Saskatchewan Government Employees Union v. Golf Kenosee Inc.,* [1987] Sept. Sask Labour Rep. 34, LRB File No. 180-86, the Board held that the successor employer was bound by the certification order relating to the predecessor employer but re-defined the bargaining unit description.

**[21]** In arguing that there were no compelling reasons in the present case to exempt the Corps from being bound by the certification Order or collective agreement based on its quasi-military origins and preferences in hiring, Mr. Plaxton referred to the decisions of the Ontario Labour Relations Board in *United Steelworkers of America v. Canadian Corps of Commissionaires (Toronto and Region)*, [1994] OLRB Rep. April 353 (the *"Toronto Commissionaires* case") and of the Newfoundland Labour Relations Board in *United Steelworkers of America v. Canadian Corps of Commissionaires (Newfoundland Division)*, [2000] Nfld. L.R.B.D. No. 3 (the *"Newfoundland Commissionaires* case"). In the former case, in circumstances similar to the present case, the Ontario Board applied successorship provisions to the Corps in relation to security services provided to a condominium building manager. In the latter case, the Newfoundland Board recently rejected the employer's argument that the appropriate bargaining unit was a province-wide unit and certified an all-employee bargaining unit of employees of the Corps in St. John's and two nearby communities.

**[22]** Mr. Plaxton argued that the onus is on the Corps to establish that an "otherwise" order should be made. He said that, because the groups of persons affected in s. 37.1 situations would mostly be small groups of cleaning or security persons employed by contractors at specific government or institutional sites under contracts that come and go, it did not lie for the Corps to argue that it should not be bound by the Inner-Tec certification Order because it affects a small number of employees out of its total employee complement of more than 300. Counsel asserted that there was no evidence that it was impossible or impractical to implement or apply the collective agreement to the employees at the subject workplace.

**[23]** Mr. Plaxton asserted that the certification Order should be amended to apply to the Corps with respect to only the asset management division security services for the City, not province-wide. He also argued that the collective agreement should apply in the same manner as any transfer of a business where the new owner takes the previous owner's employees.

**[24]** Mr. Seiferling, counsel for the Corps, argued in response to Mr. Plaxton's assertion that the Board cannot terminate bargaining rights in successorship cases, that s. 37.1 of the *Act* simply deems a sale for the purposes of s. 37 and does not abrogate or restrict the Board's powers in s. 37 to order "otherwise" with respect to the application of the certification Order and collective agreement. He pointed out that s. 37(2) was not yet part of the *Act* when *Headway Ski*, *Mission Ridge* and *Kenosee*, all *supra*, were decided.

**[25]** Mr. Seiferling said that the issue was how s. 37 should be applied in this situation. He argued that the Corps should not be bound by either the Inner-Tec certification Order or collective agreement because of the para-military nature of the Corps. In the alternative, he argued that a province-wide bargaining unit is not appropriate in the circumstances as only a handful of the Corps' employees out of several hundred are affected. He also argued that an essentially site-specific bargaining unit was not appropriate, citing in support the Board's decision in *United Food and Commercial Workers, Local 1400 v. Argus Guard and Patrol Ltd.*, [1998] Sask. L.R.B.R. 113, LRB File No. 292-97. In the further alternative, counsel argued that if the certification Order is found to apply, the Board should re-define an appropriate bargaining unit. In relation to the last point, counsel asserted that the Union must demonstrate that it has majority support in the appropriate unit, and the Board should order a vote. He referred to the decision of the Board in *Saskatchewan Union of Nurses v. Prince Albert District Health Board*, [1996] Sask. L.R.B.R. 368, LRB File No. 304-95, as support for the contentions, firstly, that it

was inappropriate and impractical to define a single-site bargaining unit in the present case, and that, in any event, the Union would have to establish that it enjoyed the support of the majority of the employees in such a unit.

**[26]** Counsel said that the definition of an appropriate unit is complicated by the fact that the Corps' six-member patrol team employees perform the mobile site checks required under the contract with the City while they perform similar checks for other clients under other contracts.

**[27]** Counsel pointed out that in its decision in *Board of Education of the Saskatchewan Rivers School Division No. 119 of Saskatchewan v. Canadian Union of Public Employees, Local 4195,* [1998] Sask. L.R.B.R. 478, LRB File Nos. 303-97 & 364-97, the Board described the relevant factors to be considered when amalgamating groups of employees in successorship situations, as follows, at 488:

> *When amalgamating bargaining units under the successorship provisions in s. 37 of the Act, the Board is primarily concerned with maintaining bargaining rights of employees. In ...Headway Ski Corporation ... the Board outlined the factors to consider when merging bargaining units in the following terms, at 57:*
>
> > *In deciding whether a bargaining unit can be appropriately maintained after the transfer of part of a business, the Board on the one hand will wish to honour existing bargaining rights and on the other will wish to maintain its preference for larger and ideally single all employer units. Where there is conflict between these two goals, the interest of maintaining industrial peace should prevail and undue fragmentation should be avoided.*

**[28]** Mr. Seiferling referred to two decisions of the Ontario Labour Relations Board – *Canadian Union of Industrial Employees v. Bermay Corporation Limited,* [1980] OLRB Rep. February 166, and *London & District Service Workers' Union, Local 220 v. Caressant Nursing Home of Canada Limited,* [1984] OLRB Rep. August 1060 – and the decision of the British Columbia Labour Relations Board in *Bell Farms Ltd. v. Canadian Farmworkers Union, Local No. 1* (1985), 8 CLRBR (NS) 243, as authority for the assertion that a vote ought to be ordered in the present situation. *Bermay* dealt with the sale of a business that resulted in the intermingling of employees in two bargaining units represented by two different unions; in both *Caressant* and *Bell Farms*, a sale resulted in the intermingling of the predecessor's unionized employees with the purchaser's non-unionized employees. Counsel further

argued that *Bell Farms* is also authority for the proposition that a non-union successor does not have to hire the employees of the unionized predecessor.

**[29]** In rebuttal, Mr. Plaxton countered this last point by arguing that there is no issue of "dovetailing" intermingled employees represented by two different unions in the present case.

## Analysis and Decision

**[30]** The present application is the first time that the Board has considered some of the issues involved in the application of s. 37.1 of the *Act*, which was added with the 1994 amendments to the *Act*. The Board has made passing reference to the provision in two previous decisions. In *Saskatchewan Joint Board, Retail Wholesale and Department Store Union v. Saskatchewan Gaming Corporation and Marwest Food Systems Ltd.*, [1996] Sask. L.R.B.R. 523, LRB File No. 083-96, the Board stated, in *obiter*, at 531, that s. 37.1 "... is intended to ensure the continuation of union representation when cafeteria or food service contractors or janitorial or cleaning service contractors working in public institutions change." In *Argus Guard, supra*, the Board found that s. 37.1 had no application in determining an appropriate bargaining unit in initial certification applications regarding security services.

**[31]** Section 37 of the *Act* provides that when a business, or part thereof, is sold, leased, transferred or otherwise disposed of, the transferee acquires the business subject to the collective bargaining rights of the transferor; the union retains bargaining rights for the employees in that part of the business and the new owner is required to recognize those rights. The obligation upon the transferee arises upon the transfer occurring whether or not the union has applied to the Board for a declaration that the transferee is a successor. The effect of s. 37 is to abrogate the effect of a change in ownership so that the bargaining rights are not restricted to a single employer, but rather become attached to the business. Catching transactions that are not a "sale" in the ordinary sense, the collective bargaining obligations run with the business regardless of who the owner is.

**[32]** The seminal decision of the Ontario Labour Relations Board in *Metropolitan Parking Inc.*, [1979] OLRB Rep. December 1193, held that a change of a service subcontractor at a particular site would not constitute a "sale of a business" for purposes of successorship even if the same work was performed at the same site by many of the same employees, there being no transfer of anything from the predecessor to the alleged successor.

**[33]** However, s. 37.1 of the *Act* changes this approach with respect to certain services under certain circumstances. It supersedes the *Metropolitan Parking* analysis and deems there to be a successorship even though there is no direct or indirect transaction or dealings between the deemed predecessor and the deemed successor. There is a sale because the statute deems that there is. Section 37.1(1) defines the services to which s. 37.1 applies. Section 37.1(2) stipulates the three prerequisites that must be established before "a sale of a business is deemed to have occurred" for the purposes of s. 37. Standing on its own, s. 37.1 provides no protection for unions that have organized employees in the contract service sector; the protection is obtained by the legislation deeming that a sale of a business has occurred to which s. 37 applies. Bargaining rights with respect to the listed services, including security services, become attached to particular buildings and sites owned by the provincial or a municipal government, or public institutions such as hospitals and universities. The Board has no discretion to exempt the services or any site or building described in s. 37.1 from the deeming provision.

**[34]** The initial argument advanced on behalf of the Corps was that it ought to be "otherwise" exempted from the application of s. 37 because of its military origin, and para-military structure and hiring preferences. Quite simply, there is no basis for the assertion. Municipal police forces and fire departments, which are run on a para-military model, are routinely organized for the purposes of collective bargaining. With respect to the Corps itself there are several precedents:

1. The *Newfoundland Commissionaires* case, *supra*, is an example of a certification of Corps employees geographically restricted to, essentially, a municipality.

2. In *Labourers International Union of North America, Local 837 v. Canadian Corps of Commissionaires (Hamilton),* [1994] OLRD No. 2920, (the "*Hamilton Commissionaires* case"), the Ontario Labour Relations Board issued a site-specific certification order relating to Corps employees at the Hamilton Airport.

3. In *Labourers International Union of North America, Local 837 v. Canadian Corps of Commissionaires (Hamilton)*, [1994] OLRD No. 3802, the Ontario Board certified a unit of Corps employees employed at the Hamilton Board of Education buildings.

4. In *Labourers International Union of North America, Local 837 v. Canadian Corps of Commissionaires (Hamilton)*, [1994] OLRD No. 4593, the Ontario Board certified a unit of Corps employees employed for the city of Brantford.

5. In *International Union, United Plant Guard Workers of America, Local 1956 v. Canadian Corps of Commissionaires*, [1994] OLRD No. 7, the Ontario Board certified a unit of Corps employees employed for the town of Goderich.

6. In *Public Service Alliance of Canada v. Canadian Corps of Commissionaires – Ottawa Division*, [2001] OLRD No. 4335, the Ontario Board recently certified a unit of Corps employees at the Canada Customs and Revenue Agency Sudbury Taxation Centre.

7. In *Public Service Alliance of Canada v. Canadian Corps of Commissionaires – Ottawa Division*, [2001] OLRD No. 4822, the Ontario Board certified a unit of Corps employees in the districts of Sudbury and Timiskaming.

8. In *Public Service Alliance of Canada, Local No. 05/20500 v. British Columbia Corps of Commissionaires*, BCLRB No. B184/2001, the British Columbia Board recently certified a unit of Corps employees at the Burnaby/Fraser Tax Services Office.

9. In *Public Service Alliance of Canada, Local 05/20500 v. Canadian Corps of Commissionaires (Victoria, The Islands and Yukon)*, BCLRB No. 115/2001, the British Columbia Board amended a recent certification of a unit of Corps employees acting as parking and bylaw enforcement officers and as security for the city of Victoria to also include Corps employees at two municipal buildings.

**[35]** Accordingly, the nature of the Corps' structure, operation and hiring preferences is not an obstacle to the organization of its employees for the purposes of bargaining collectively.

**[36]** It was admitted that the Corps is the successor to Inner-Tec with respect to the security services provided with respect to the City's asset management division. How are ss. 37.1 and 37 of the *Act* to be interpreted and applied in the present circumstances?

**[37]** Initially, it is important to recognize that the concept of successorship in s. 37 originates in policy and is not amenable to the application of ordinary commercial law principles. And, because of the equally policy-laden nature of deemed successorship in s. 37.1, it may not be appropriate to apply the principles of ordinary successorship to such cases.

**[38]** In 1992, Ontario enacted legislation similar to s. 37.1 of the *Act* – s. 64.2 of the *Labour Relations Act*, R.S.O. 1990, c. L-2, which provided as follows:

> *64.2(1) This section applies with respect to services provided directly or indirectly by or to a building owner or manager that are related to servicing the premises, including building cleaning services, food services and security services.*
>
> *(2) This section does not apply with respect to the following services:*
>
> *1. Construction.*
> *2. Maintenance other than maintenance activities related to cleaning the premises.*
>
> *3. The production of goods other than goods related to the provision of food services at the premises for consumption on the premises.*
>
> *(3) For the purposes of section 64, the sale of a business is deemed to have occurred:*
>
> *(a) if employees perform services at premises that are their principal place of work;*
>
> *(b) if their employer ceases, in whole or in part, to provide the services at those premises; and*
>
> *(c) if substantially similar services are subsequently provided at the premises under the direction of another employer.*
>
> *(4) For the purposes of section 64, the employer referred to in clause (3)(b) is considered to be the predecessor employer and the employer referred to in clause (3)(c) is considered to be the successor employer.*

**[39]** The statute, and the deemed successorship provision in s. 64.2, was repealed in October, 1995. However, during its nearly three-year lifespan the provision generated a substantial amount of jurisprudence, including several cases regarding the security guard industry.

**[40]** In *Accomodex Franchise Management Inc.*, [1993] OLRB Rep. April 281, the Ontario Board described the policy-laden nature of the then very new deemed successorship provision in relation to ordinary successorship concepts as follows, at 292:

> *[para 51] Finally, if there is any doubt that the concept of successorship is a rather unique, policy-laden creature of statute, one need only consider section 64.2 which came into force on January 1, 1993. It DEEMS a "sale of a business" to have occurred between independent suppliers of services, even though there may be no sale or disposition of anything predecessor, none of the assets, equipment, etc. needed to supply the services [emphasis added in upper case text]. Bargaining rights attach to a relationship between employees, their work, and their workplace, regardless of who happens to be employing them from time to time. Under section 64.2 bargaining rights are maintained so long as there is a continuity of work done by unionized employees in that particular location.*
>
> *[para 52] Of course the fact that section 64.2 was recently added to the Act, suggests that relationships of this kind would not have been caught by the statute before (see for example, the analysis in Metropolitan Parking Inc., [1979] OLRB Rep. Dec. 1193). However, the amendment underlines the proposition that successorship is part of a broader scheme of collective bargaining regulation that addresses a variety of mischiefs; and when the Board is interpreting that statutory scheme, one should not expect commercial law considerations to be paramount.*
>
> (emphasis added)

**[41]** Similarly, because of the distinct policy considerations in cases of deemed successorship, it may not be appropriate to apply principles that are used in ordinary successorship applications. The Ontario Board recognized this early in its consideration of s. 64.2 of the former Ontario *Labour Relations Act*. In *Ensign Security Services v. United Steelworkers of America, et al.*, [1994] OLRB Rep. October 1310, at 1320, the Ontario Board stated that deemed successorship was "clearly a new point of departure for the Board" and that "the blind application" of prior Board jurisprudence and principles applicable to ordinary successorship would be "inappropriate."

**[42]** In several cases the Ontario Board had occasion to consider the parameters and effect of s. 64.2 of the former Ontario *Labour Relations Act* specifically in relation to security services. The *Toronto Commissionaires* case, *supra*, is of particular interest as the facts are foursquare with the present case. In that case, the Ontario Board applied s. 64.2 to retain bargaining rights at a specific site after a change in security contractors. The union held a certification order for a security services company. The company had a contract with the managers of a condominium building to provide 24-hour security and concierge services. The building managers declined to renew the contract and engaged the Corps to

provide substantially the same services. The services required only a small number of employees – one or two per shift. The Ontario Board stated, at 355, that the effect of s. 64.2:

> *... is to extend the reach of the sale of business provisions under [the ordinary successorship provision] to cases where there is a changeover in contracted services, whether or not there is a transaction or nexus between the predecessor and successor employer.*

**[43]** And further, at 356, the Ontario Board stated:

> *Thus the effect of section 64.2 is to protect the stability of bargaining rights even where the contract for certain work changes hands.*

**[44]** There is no doubt that s. 37.1 of the *Act* has a similar effect. And, pursuant to s. 10 of *The Interpretation Act, 1995*, S.S. 1995, c. I-11.2, with the whole of the *Act*, it is required that it "shall be interpreted as being remedial and shall be given the fair, large and liberal construction and interpretation that best ensure the attainment of its objects."

**[45]** Counsel on behalf of the Corps argued that the Corps should not be bound by the Inner-Tec certification Order and contended that the issue of the structure of an appropriate bargaining unit in the present case is part of that determination. The existing certification Order determined that the Union represented the Inner-Tec employees working with respect to the City's asset management division security services contract. It is also clear that from the date of the deemed sale the Corps was bound by the certification Order and the collective agreement between Inner-Tec and the Union with respect to the employees affected by the deemed sale. There are no compelling considerations that lead us to order otherwise. Counsel for the Corps also asserted that, in considering whether the Inner-Tec certification Order should apply to the Corps, application of the Order on a province-wide basis is obviously not appropriate; counsel for the Union agreed with this assertion. But, counsel for the Corps also advanced the argument that neither is a site- or contract-specific bargaining unit appropriate in this case or in the security guard industry in general. At bottom, the position of the Corps is that no bargaining unit is appropriate in the present case.

**[46]** A review of labour relations jurisprudence discloses that union organization of the security guard industry in both Ontario and British Columbia is much more fragmented than in Saskatchewan, where, but infrequently, the certification orders that have been issued are for province-wide bargaining units. In the former two jurisdictions there appears to be little hesitation to certify site-specific units in the industry, except that, by and large, it seems that the labour relations boards are careful that the employers in the industry must deal with only one union. The preferred course of the Ontario Board in cases that involved deemed successorship at sites where the guards employed by the predecessor were represented by one union and the guards employed by the successor were represented by another union, was to order that the employees at the acquired site be represented by the union representing the successor's employees and not to order a representation vote as it would tend to promote undue fragmentation (see, for example, *Ensign Security, supra*).

**[47]** It is not particularly clear why the security guard industry in Saskatchewan has been organized on a more comprehensive basis than in the other jurisdictions referred to. The jurisprudence with respect to certification of bargaining units in the industry in Saskatchewan is meagre. Counsel for the Corps argued that the decision of this Board in *Argus Guard, supra*, indicated that site-specific bargaining units in the security guard industry are not appropriate. However, that is too simplistic an interpretation of the case and ignores both the fundamental reason for rejecting the application to certify a single site bargaining unit in that case and the exigencies created by s. 37.1 of the *Act*.

**[48]** *Argus Guard, supra*, was a case of an initial application for certification. The Union applied to represent a bargaining unit of some 13 security guards at a single site out of the employer's total complement of some 65 guards at some 35 sites. That is, one or a few employees worked most of the employer's other sites. In dismissing the application, the Board did not find that the proposed unit was not viable, but rather, the Board pointed to the facts that the employees in the proposed unit did not have a community of interest distinct from the employer's other employees and the union had not demonstrated that organization of all the employees was beyond its ability – indeed, it held several province-wide certification orders – and the Board found that to certify the unit would tend to lead to piecemeal certification. The Board's decision was predicated upon the policy objectives of the *Act* as they apply to initial certifications, as described as follows in *Hotel Employees & Restaurant Employees Union, Local 767 v. Regina Exhibition Association Ltd.*, [1986] Oct. Sask. Labour Rep. 43, LRB File No. 015-86, at 45:

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

**[49]** The present case is not an initial certification. It is not a case of ordinary successorship. It is a case of deemed successorship where the intent of the operative provision is to provide stability of union representation to the employees working at certain kinds of buildings and sites with respect to services that are often contracted out and subject to changes in contractors or later contracting in. The ordinary principles that apply to the issue of an appropriate unit in cases of initial certification, or even in cases of ordinary successorship, do not necessarily apply or may apply in a modified form in cases of deemed successorship because of the legislative intent of s. 37.1.

**[50]** In the *Toronto Commissionaires* case, *supra*, at 358, the Ontario Board observed that:

> *There is no question that the language of section 64.2 reflects an intention that the premises will provide some kind of physical anchor for the application of the section.*

**[51]** Similarly, in *Group 4 C.P.S. Limited*, [1994] OLRB Rep. April 400, at 417, another case dealing with deemed successorship in the security industry, the Ontario Board stated that:

> *This section of the Act is unique because it attaches or anchors bargaining rights to work at particular premises.*

**[52]** *In United Food and Commercial Workers International Union, Local 175 v. San-Wal Janitorial Ltd.*, [1994] OLRB Rep. April 476, the Ontario Board observed that cases regarding the appropriateness of bargaining units that were decided prior to the enactment of s. 64.2 of the former Ontario *Labour Relations Act* are of little assistance in determining that issue in the context of the deemed successorship provision. The Ontario Board stated, at 481:

> *[para 20] As the employer in this case argued, prior to the introduction of section 64.2, it was to an employer's advantage to have site-specific bargaining units described for certain contracted work, in that if the employer lost the contract, it*

> *could let the employees go. In fact, it appears that to the extent there has been any serious labour relations problem demonstrated by site-specific bargaining units, it was the resulting impermanent nature of the bargaining rights. Enhancing security of both employment and bargaining rights seems the clear aim of section 64.2 which appears, in large measure, to address that identified problem.*
>
> (emphasis added)

**[53]** The Ontario Board considered the issue of whether the s. 64.2 deemed successorship provision necessarily implied that site-specific bargaining units were appropriate in such situations. In *Ensign Security*, *supra*, the Ontario Board considered two different views proffered by the parties. The first view argued that the provision was a "doorway" through which bargaining agents representing workers previously precluded from relying on the ordinary successorship provision (e.g., as under s. 37 of the Saskatchewan *Act*) could now enter in order to take advantage of the protections offered employees in ordinary successorship situations. The argument is predicated upon the concept that the deemed successorship provision itself provides no protection to unions and organized employees in the contract service sector, but is a gateway through which the protection of the ordinary successorship provision can be accessed. The second view argued that s. 64.2 was more than just a "doorway," but rather part of a legislative scheme to provide site-specific bargaining rights to employees in the contract service sector. This argument was based upon the assertion that the concept of the word "premises," as used in the Ontario provision, was synonymous with the concept of "site" in the customary usage of the term in the security guard industry.

**[54]** The Ontario Board agreed that the first proposition was the correct view. But, its conclusion is based upon the fact that the Ontario s. 64.2 uses the word "premises," which it found could encompass more than one "building" or "site." The Ontario Board stated, at 1322, as follows:

> *[para 13] With respect to counsel's first proposition, it is evident from a reading of section 64.2 of the Act that a pivotal concept critical to the applicability of the section is that of "premises". The concept of "premises" is referred to in both section 64.2(1) and section 64.2(3) of the Act. Counsel for the Steelworkers submitted in argument that the concept of "premises" in the security guard industry was synonymous with that of a "site"" and therefore concluded that section 64.2(1) and (3) were predicated on site specific employment. We do not entirely agree. Although section 64.2 may, in certain cases, apply with respect to what in the "contract service" sector would be considered as a particular work "site", it is conceivable that there may be situations where more than one such "site" would constitute "premises" for the purposes of section 64.2.*

> *[para 14] ... there is nothing contained in s.64.2(1) of the Act which precludes the conclusion that the concept of "premises" could be smaller or larger in geographical size than a particular "building". Likewise, there is nothing contained in that same subsection which precludes the conclusion that the concept of "premises" could be smaller or larger in geographical size than a particular "site" at which security guards work.*

**[55]** The use of the word "premises" in the Ontario legislation must be contrasted with the specific references in s. 37.1 of the *Act* to services provided to the owner or manager of "a building" and to services performed at "a building or site." In our view, the concept of a "site" may include an area encompassing, or a conglomerate of, one or more associated buildings or other structures or areas where the work is performed. The services provided by governments, hospitals, universities and other public institutions are often delivered from more than one building; for example, administrative offices or diagnostic services are often in one building, while actual treatment or patient care is provided in another. The buildings, structures and areas comprising a "site" might be geographically separated to an extent but closely associated by their coherent function. It might also be argued that the term "site" connotes a single structure or a primary or major structure and related secondary or minor structures or areas, the function of which is to serve the primary structure (e.g., entry kiosk, garage, workshop, grounds, warehouse, loading dock, etc.).

**[56]** The emphasis of s. 37.1 of the *Act* is on the building or site where services are provided, and the employees that provided the services for the predecessor employer, rather than the contract for services itself. Section 37.1(2) refers to the specific employees who perform the services at the building or site that is "*their* principal place of work" and to the predecessor that is *their* employer. In our view, the employees working at the building or site where the services are provided are intended to be the beneficiaries of the protections provided through s. 37 by the deemed successorship provision. The provision creates a relationship between the physical location where the services are performed and the bargaining rights held by the union with respect to the employees at that location. That being said, however, the provision does not evidence an intention by the legislature that site-specific bargaining rights should necessarily over-ride the ordinary considerations that pertain under s. 37 in order to attain an appropriate result.

**[57]** *The Interpretation Act 1995, supra*, requires that ss. 37 and 37.1 in the context of the whole of *The Trade Union Act* be given a fair, large and liberal interpretation that best attains the objects of the legislation. The Ontario Board specifically agreed with such an approach in *Canadian Corps of*

*Commissionaires (Toronto and Region), supra.* Section 37.1 is more specific than s. 37 and deals with circumstances such as those in the present case. In such cases, a fair, large and liberal interpretation of the provision may lead us to conclude that the usual considerations that pertain to determining an appropriate unit in ordinary successorship cases do not apply in whole or in part to making such a determination in cases of deemed successorship.

**[58]** While the Board generally favours larger more-inclusive bargaining units as being more appropriate, that does not mean that a site-specific or contract-specific bargaining unit is not appropriate. The clear intent of the legislation is that bargaining rights should be preserved in the deemed successorship situation for *an* appropriate unit, not the most appropriate unit. In the present case, the Corps' workforce with respect to the contract for the work with the City's asset management division at the fixed building sites is basically stable with little or no interchange with other locations. In the context of s. 37.1 of the *Act*, the employees working those sites have a sufficient community of interest and a rational and defensible boundary may be drawn around such a unit.

**[59]** We find that in the circumstances of the present case a limited form of "contract-specific" bargaining unit is appropriate. Section 37.1 of the *Act* deems a sale of a business to have occurred if the affected employees perform services at the building or site that is their "principal place of work." In the present case, an appropriate bargaining unit includes only those employees whose principal place of work is City Hall, the Frances Morrison Library, the J.S. Wood Branch Library and/or Avenue P Greenhouses sites; the employees who perform mobile checks of other City sites as part of their work to provide such services to other clients of the employer are not included in the bargaining unit, because those sites are not their principal place of work. The employees at the four sites described above have little or no interaction or intermingling with the Corps' other guard employees.

**[60]** Counsel for the Corps submitted that, in the event that we were to find that the employees providing the services under the contract to the City constituted an appropriate unit for the purposes of bargaining collectively, we ought to order a representation vote among the employees to determine whether they supported the Union. Under s. 37(2)(d) of the *Act*, the Board is provided with authority to order a representation vote. However, the determination of whether to order a vote must be approached from the perspective of whether it makes good labour relations sense in all the circumstances of the particular case, a matter we shall now examine.

**[61]** In *International Union, United Plant Guard Workers of America, Local 1962 v. Meadowvale Security Guard Services Inc.*, [1994] OLRD No. 569, another case under s. 64.2 of the former Ontario *Labour Relations Act*, the Ontario Board considered an application for reconsideration of its decision not to order a representation vote of the affected employees in a situation where a contract for security services performed by six employees at a single site changed hands in circumstances where the predecessor employer was unionized, while the successor was unionized at only certain discrete locations, but not the one in issue. The successor employer sought the representation vote on the ground that intermingling had occurred when it transferred employees into the location after assuming the contract – it used two of its own employees in addition to the six that had worked for the predecessor employer. In rejecting the application, the Ontario Board ruled orally that, even if there were an intermingling on the facts, it was insufficient to warrant the ordering of a representation vote, particularly given the clear intent of s. 64.2 "... to ensure that existing bargaining rights continue at specified premises where services continue to be provided albeit by a new employer." In *Ensign Security, supra*, at 1329, the Ontario board expressly approved of the approach taken by the panel in *Meadowvale Security* in situations where there is no conflict of bargaining rights.

**[62]** Counsel for the Corps asserted that the 1984 decision of the British Columbia Labour Relations Board in *Bell Farms Ltd., supra*, is authority for the proposition that a successor employer need not hire the predecessor's employees. However, after careful review of the case we do not come to the same conclusion. The British Columbia Board determined that not all existing *jobs* must be continued after the transfer of a business, but that any terminations or layoffs must be done in accordance with the applicable collective agreement. In arriving at its decision in *Bell Farms*, the British Columbia Board approved of and applied the following principles articulated by another panel of that Board in *M.M. Pruden and B.C. Assessment Authority*, [1976] 2 Can. LRBR 138, at 143:

> *The thrust of s. 53 is to preserve collective bargaining and collective agreements for the group, and the Board has power to revise units, certifications, and collective agreements for that purpose ... . In addition, the Board now has power under the Labour Code to preserve the seniority rights of employees where it is of the opinion that it would be in furtherance of the objectives of the Code (ss. 53(3)(d) and 27). But it is not a policy of the Code that all existing jobs be continued after a succession. For example, if an employer chooses to integrate separate operations to achieve greater efficiency and economy, there is nothing in the Code which prohibits it from terminating or laying off employees as a result ... .*
>
> *On the other hand, it is implicit in s. 53 ... that any discontinuance of employment must be for a legitimate business reason. That is, it must be for "just cause". A successor*

> *employer must continue to employ those employees whose jobs survive a succession under the Code, notwithstanding its opinion as to their suitability for continued employment. In other words, the Code should not be interpreted so as to give successor employers a licence to weed out "undesirable employees".*

**[63]** The *Prince Albert Health District* case, *supra*, also referred to by counsel for the Corps as authority for the proposition that a single-site unit is not appropriate in the present case, or that a vote should be ordered among the employees to determine support for any unit determined to be appropriate, involved a situation related to the reorganization of the health care sector in the province. It is entirely distinguishable from the present case. The employer health district was created in 1992 by *The Health Districts Act,* S.S. 1993, c. H-0.01. Prior to 1993, there were two separate health care facilities in the community of Birch Hills located in the district, an acute care hospital and a nursing home. The union held a certification order for registered nurses employed by the former, but not the latter. In 1993, the hospital ceased operation as an acute care facility and became a "health center." Seven nurses employed in the acute care hospital were laid off; four of them were hired into new positions at the health center; the union continued to represent them. In 1994, some health centre services were transferred to the nursing home resulting in a reduction in the number of nurses at the health center to two. The union continued to represent the two nurses at the health center. In 1995, the employer began construction of an extension to the nursing home intended to house the health centre. It provided notice to the union that when the existing health centre closed, the two nurses employed there would be laid off, but that there would be two part-time nurse positions at the non-unionized nursing home when it re-opened as a new combined nursing home/health center. The union took the position that the part of the newly combined facility which offered the services previously carried out at the old health centre should be regarded as a separate entity for continued collective bargaining on the basis of the certification order issued to the union in connection with the former hospital. The Board concluded that that part of the new facility where the activities of the old health centre were carried on could not be considered a separate facility, that a bargaining unit of the two part-time nurses was not an appropriate unit, that an appropriate bargaining unit would be a unit including all nurses in the facility, and ordered a vote.

**[64]** The position enunciated by the British Columbia Board in *Bell Farms, supra,* is consonant with that of this Board. In *Service Employees' International Union, Local 333 v. Battlefords Ambulance Care Ltd., et al.*, [1996] Sask. L.R.B.R. 604, LRB File No. 202-95, the Board considered a case of successorship under s. 37 of the *Act* where a non-unionized ambulance services company succeeded a unionized employer. The successor employer refused to negotiate with the union, treated the employees

of the predecessor as new job applicants, subjected them to pre-employment screening, offered some employees continued employment, refused to continue to employ others and refused to acknowledge that the collective agreement applied to the employees prior to their being considered for continued employment. The Board found the successor employer guilty of an unfair labour practice and remained seized for the purposes of considering whether to order the submission of a rectification plan if the parties could not resolve the matter.

**[65]** In the present case, the Corps, the successor employer, refused to recognize the Union and did not offer employment to the employees of Inner-Tec providing the security services under the contract with the City – the Corps replaced them with its own employees. In taking this course, the Corps has effectively ensured that none of the predecessor's employees with experience in working in a unionized environment would participate in a representation vote if one was ordered. In s. 37.1 situations, a successor employer cannot force a vote by refusing or neglecting to employ the predecessor's employees at the subject building or site and arguing that its previously unrepresented employees should have a choice. In the present case there has been no intermingling of employees. There is no conflict with respect to competing bargaining representatives. And, the clear intent of s. 37.1 is to ensure that existing bargaining rights continue at specified buildings and sites where services continue to be provided, albeit by a new employer. To order a vote in these circumstances would effectively defeat the intent of the legislation and we decline to do so.

**[66]** Furthermore, while the Corps could decline to employ the Inner-Tec employees, it could only do so for legitimate business reasons and any lay-off would have to be in accordance with the collective agreement. Obviously, this was not done because the Corps refused to acknowledge the Union or apply the collective agreement. Why the Corps has conducted itself as it has is unclear. It was admitted at the hearing that there was a successorship. The wording of s. 37 of the *Act* makes it clear that the legislature intended that the collective agreement be binding on the successor employer until the Board declares otherwise. Moreover, in acting as it did, the Corps refused to bargain collectively with the Union in violation of s. 11(1)(c) of the *Act* and is guilty of an unfair labour practice.

**[67]** The Board, therefore, declares as follows:

(1) There is deemed to have been the sale of a business for the purposes of s. 37.1 of *The Trade Union Act* from Inner-Tec Security Consultants Limited to The Corps of

Commissionaires, North Saskatchewan Division with respect to the providing of security services to the City of Saskatoon asset management division, and from and after August 21, 2000, The Corps of Commissionaires, North Saskatchewan Division is bound by the certification Order dated April 24, 1991 with respect to Inner-Tec Security Consultants Limited and by the collective agreement between Inner-Tec Security Consultants Limited and United Food and Commercial Workers, Local 1400, which collective agreement shall be the agreement in force for all employees in the bargaining unit described in paragraph (2) below;

(2) All employees of The Corps of Commissionaires, North Saskatchewan Division providing services with respect to the City of Saskatoon asset management division whose principal place of work is City Hall, Frances Morrison Library, J.S. Wood Branch Library and/or Avenue P Greenhouses are an appropriate unit of employees for the purpose of bargaining collectively;

(3) United Food and Commercial Workers, Local 1400, a trade union within the meaning of the *Act* represents a majority of employees in the appropriate unit;

(4) The Corps of Commissionaires, North Saskatchewan Division, the employer shall bargain collectively with United Food and Commercial Workers, Local 1400 with respect to the appropriate unit of employees described in paragraph (2) above;

(5) The collective agreement described in paragraph (1) above shall be amended to reflect its application to the bargaining unit described in paragraph (2) above;

(6) The Board remains seized to determine any issues with respect to the implementation of this Order;

(7) The Corps of Commissionaires, North Saskatchewan Division has committed an unfair labour practice in violation of s. 11(1)(c) of the *Act* by failing or refusing to bargain with the Union, and, pursuant to ss. 5(d) and 5(e)(i) of the *Act* shall cease and refrain from committing such violation and pursuant to s. 5(c) of the *Act* shall bargain collectively with the Union;

(8) The Board remains seized of its jurisdiction to issue a rectification Order under s. 5(e)(ii) of the *Act* if the same is requested by either party within fifteen (15) days from the date of the Order issued with respect to this matter. If such a request is made, the Board will reconvene to address the issue of the need for and contents of a rectification Order.

# SASKATOON PROFESSIONAL FIRE FIGHTERS UNION, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 80, Applicant v. SASKATOON CIVIC MIDDLE MANAGEMENT ASSOCIATION and CITY OF SASKATOON, Respondents

LRB File Nos. 295-00 & 296-00; April 12, 2002
Vice-Chairperson, Walter Matkowski; Members: Leo Lancaster and Duane Siemens

| | |
|---|---|
| For International Association of Fire Fighters, Local 80: | Neil McLeod, Q.C. |
| For Saskatoon Civic Middle Management Association: | Tom Milroy |
| For City of Saskatoon: | Jim Cowan |

**Bargaining unit – Amendment – Collective agreement – Board recognizes changes arrived at by collective bargaining to scope of unit described in certification Order**

**Bargaining unit – Amendment – New position – Board determines that position at issue is new position and may be included in bargaining unit without evidence of support.**

**Bargaining unit – Appropriate bargaining unit – Board policy – Board reviews policy relating to multiple bargaining unit settings.**

**Bargaining unit – Appropriate bargaining unit – Multiple bargaining unit setting – Board determines that position in dispute no longer in middle management bargaining unit – Board relies on history of duties of position at issue – Board determines that there has been a material change in duties and responsibilities – Board determines that position at issue is a new position – Board assigns position to applicant's bargaining unit.**

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

## REASONS FOR DECISION

### Background

**[1] Walter Matkowski, Vice-Chairperson:** Saskatoon Professional Fire Fighters Union, International Association of Fire Fighters, Local 80, ("IAFF") applied to the Board, in LRB File No. 296-00, to amend its certification Order by substituting the following bargaining unit description:

> *All employees of the Saskatoon Fire and Protective Services Department of the City of Saskatoon, except the Fire Chief, Assistant Chiefs, District Chiefs, Administration Coordinator, Support Services Coordinator, Administrative Assistant to the Fire Chief, secretaries and clerks, constitute an appropriate unit of employees for the purpose of bargaining collectively.*

**[2]** The existing certification Order for IAFF dated March 8, 1968 describes the bargaining unit as follows:

> *The Fire Fighters employed by The City of Saskatoon, Saskatchewan, except the Chief of Fire Department, Deputy Chief of Fire Department, Battalion Chiefs and the Secretary to the Fire Department, constitute an appropriate unit of employees for the purpose of bargaining collectively.*

**[3]** The applicable collective agreement entered into between IAFF and the City of Saskatoon (the "Employer" or the "City"), provides in Article 3:

> *The City recognizes that the Union is the sole and exclusive representative of all Saskatoon Fire and Protective Services employees, with the exception of the Fire Chief, Assistant Chiefs, District Chiefs, secretaries and clerks, for the purposes of bargaining with respect to wages, hours of work and working conditions.*

**[4]** The City consented to the amendment requested by IAFF and this Board therefore grants the requested amendment by IAFF. The amendment, for the most part, replicates the bargaining unit as set out in the collective agreement.

**[5]** IAFF applied to the Board, in LRB File No. 295-00, to amend Saskatoon Civic Middle Management Association's ("SCMMA's") certification Order to exclude the Emergency Measures Coordinator (EMO Coordinator).

**[6]** It was agreed that originally, the EMO Coordinator was included in SCMMA's Order, having been included in an interim certification Order issued by the Board in August 1996, but inadvertently left off the final certification Order issued to SCMMA.

**[7]** SCMMA claimed that the EMO Coordinator was properly a SCMMA position and also raised the preliminary objection that IAFF could not seek the requested amendment on LRB File No. 295-00 without filing evidence of support from the employee in question.

**[8]** The Employer took no position on the bargaining unit assignment of the EMO Coordinator.

## Relevant Facts

**[9]** The EMO Coordinator was an out of scope position with the Employer until 1996, when it became a SCMMA bargaining unit position. At that time, the incumbent in the position, Don Litts, was responsible for the operational control of the EMO facility and the EMO budget. Mr. Litts supervised approximately one and one-half employees, was in charge of the EMO offices at the Davies Building and reported directly to the City Commissioner.

**[10]** The job description in place from 1988 to 1999 for the EMO Coordinator provided:

> ***Scope & Major Responsibilities:***
>
> *1. Coordinates the development of a disaster plan for the municipality in cooperation with the civic departments and agencies within the municipality.*
> *2. Organizes and trains municipal personnel and outside agencies in emergency preparedness as required.*
> *3. Develops a public information program for emergencies and an emergency communication plan augmenting existing municipal radio nets with amateur radio, citizens band and industrial nets.*
> *4. Directs and facilitates the implementation and maintenance of the Workplace Hazardous Materials Information System (WHMIS) within the Corporation of the City of Saskatoon in coordination with provincial and municipal Occupational Health and Safety officials.*
> *5. Prepares annually a budget for submission to municipal, provincial and federal governments for financial assistance for emergency planning activities.*
> *6. Acts as Chairman of the Emergency Measures Planning Committee.*
> *7. Directs and supervises the administration and stenographic activities of the Emergency Measures Organization.*
> *8. Ensures that a continuous program of training for local Emergency Measures Organizations personnel is carried out, either by local training classes or attendance at provincial or federal training schools.*
> *9. Maintains close liaison with provincial and federal emergency planners, civic department heads, hospital directors and volunteer agencies such as Red Cross, St. John's Ambulance, Amateur Radio Association, airport management, railroads, etc., concerning emergency planning matters.*
> *10. Performs other related duties as assigned.*
>
> *RELATIONSHIP: Reports to the CITY COMMISSIONER.*

**[11]** In February 1999, the City re-organized its workforce. The EMO Coordinator position was changed in that Mr. Litts was no longer responsible for the EMO budget or the supervision of staff. Mr. Litts no longer maintained operational control of the EMO plan and no longer reported to the

City Commissioner. Mr. Litts' offices at the Davies Building were closed and relocated to the Fire Department. Mr. Litts was thereafter required to report to supervisors within the Fire Department.

**[12]** The new job description for the EMO Coordinator dated April 29, 1999 lists as its department "Fire and Protective Services" and provides:

> ***SCOPE AND MAJOR RESPONSIBILITIES:***
>
> *1. Prepares and maintains the City's Disaster Plan.*
> *2. Provides assistance and coordination for the Emergency Planning Committee and the Emergency Measures Control Committee.*
> *3. Attends quarterly meetings of the Emergency Measures Planning Committee.*
> *4. Conducts risk assessments within the City, which could result in significant major emergencies.*
> *5. Maintains current resource inventories.*
> *6. Reviews and coordinates departmental agency emergency operations plans and integrates them into a Corporate Disaster Response Plan.*
> *7. Communicates with internal and external agencies to ensure a coordinated approach to potential disasters.*
> *8. Develops and delivers disaster-related awareness training and education sessions.*
> *9. Coordinates disaster and emergency preparedness exercises to ensure that all departments, staff and other agencies are aware of their roles.*
> *10. Ensures that appropriate City staff are trained with respect to their specific roles and are qualified to function within those roles.*
> *11. Coordinates the establishment of the mobile command unit and Emergency Operations Centre when required.*
> *12. Develops and maintains liaison with other government and community agencies*
> *13. Performs other related duties as assigned.*
>
> *RELATIONSHIP: Reports to the Assistant Chief, Prevention Services.*

**[13]** SCMMA wrote to the City on March 16, 1999 complaining about the change in duties of the EMO Coordinator as follows:

> *It is our understanding that the Employer has substantially changed the duties and conditions of employment for the position entitled Emergency Measures Coordinator, which is a SCMMA represented position. These material alterations in job duties include significant changes to reporting structure as well as a reduction in the authority and responsibility of the position.*

> *Within the generally accepted parameters of "constructive dismissal", which we believe is present in this case, we would like to arrange to meet with you to negotiate an amicable solution with regard to a severance package for the incumbent in this position.*
>
> *This proposal is without prejudice toward any argument that the SCMMA may have that changes to job duties are in violation of The Trade Union Act.*
> *We look forward to hearing from you, shortly, on this important matter.*

**[14]** While Mr. Litts did not testify, Cary Humphrey, SCMMA president, confirmed that Mr. Litts was of the belief that he had been constructively dismissed and that his EMO Coordinator position was no longer a hands-on operational position.

**[15]** Following discussions with Jim Cowan, a representative of the Employer, Mr. Humphrey abandoned SCMMA's constructive dismissal argument but ensured that Mr. Litts' salary was red circled in the pay grade 8 range. Mr. Litts resigned shortly thereafter and the present incumbent was hired effective June 1, 1999 in the pay grade 6 range. Mr. Humphrey did not check and did not know why the EMO Coordinator position went from a pay grade 8 to a pay grade 6. He agreed that there had to be some level of change in responsibilities to justify the pay grade change for the position.

**[16]** The present incumbent, Bernie Sutton Robertson, testified before the Board. From January 1997 to May 30, 1999 she held the position of community relations coordinator, an IAFF position. When Ms. Sutton Robertson applied for the EMO Coordinator position, she was considered an internal candidate. She had no experience in the EMO area and was advised that the EMO Coordinator position was not an operational position. She relied on Fire Chief Hewitt's emergency planning experience once she became the EMO Coordinator and confirmed that the EMO Coordinator no longer had an operational role to play. The EMO Coordinator was now more of a planning and liaison position.

**[17]** As EMO Coordinator, Ms. Sutton Robertson's office is located at Fire Hall No. 1. She is required to wear a Fire Department uniform and a Fire Department badge. She drives a Saskatoon fire protection services vehicle that has a personalized license plate that reads "Fire." Unlike her predecessor, she is not responsible for the Workplace Hazardous Materials Information System (WHMIS) as the Fire Department now has a hazardous goods team to deal with hazardous goods problems. Unlike her predecessor, she has no supervisory or budgetary responsibilities.

**[18]** As EMO Coordinator, Ms. Sutton Robertson uses a personal and laptop computer, both provided to her by the Fire Department. She is able to assign work to the clerical staff in the Fire Department but, as stated, she possesses no supervisory authority over any employees. She reports to Assistant Fire Chief Russell weekly and has him approve her vacation and other time off. Assistant Fire Chief Russell also provides her with general workplace directions.

**[19]** Ms. Sutton Robertson has represented the Fire Department on numerous occasions, including on a television show dealing with public education and in regard to a community alert magazine. She also represented and worked on behalf of the Fire Department for special events, such as fire protection week and the badge and shield dinner.

**[20]** Ms. Sutton Robertson is taking numerous training courses (e.g. fire inspection courses), which are paid for by the Fire Department and she belongs to the Fire Department pension plan.

**[21]** Ms. Sutton Robertson performs other Fire Department duties as part of her job functions. These duties include helping coordinate special Fire Department events, preparing "formal writings" for the Fire Department and bylaw presentation. Some of these other Fire Department duties are very time consuming.

**[22]** Ms. Sutton Robertson explained how her position continued to evolve from her predecessor's such that the focus of the EMO Coordinator switched from an Emergency Site Management System (ESM) to an Incident Command System (ICS).

**[23]** Ms. Sutton Robertson agreed that the Fire Department and the EMO Coordinator should be closely related and Assistant Fire Chief Russell confirmed that it was not uncommon, in other jurisdictions, for the EMO Coordinator to be attached to the Fire Department.

## Relevant Statutory Provisions

**[24]** Section 5 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") permits the Board to rescind or amend certification orders in the following circumstances:

> *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;*

## Argument

**[25]** While the City took no position as to the bargaining unit in which the EMO Coordinator position belonged, judging from its actions, the City believed that the EMO Coordinator position was a SCMMA position. The evidence before the Board allows for this conclusion given that, in March 1999, the City disagreed with SCMMA's assertion that the EMO Coordinator position had been substantially changed.

**[26]** SCMMA argued that the EMO Coordinator position had been a SCMMA position since 1996. SCMMA acknowledged some changes to the position but argued that the core functions of the position have not changed so that the position remains a SCMMA position.

**[27]** IAFF's position was that the EMO Coordinator position has changed significantly and that it now falls within IAFF's certification Order. IAFF argued that the position should be treated like a new position and that the Board should consider and analyze the nature and duties of the position. IAFF argued that, by doing this, the Board would come to the conclusion that the position is an IAFF position.

## Analysis

**[28]** The Board has analyzed the situation in which a party seeks to have an in-scope position declared out-of-scope because of a material change to the position's job duties. For example, in the decision *City of Regina v. Regina Civic Middle Management Association et al.,* [1990] Summer Sask. Labour Rep. 80, LRB File No. 276-88, the Board stated at 80:

> *When an employer invokes the amendment process for the purpose of having a position removed from the bargaining unit, the onus rests upon the applicant. Furthermore, where the position's relationship to the bargaining unit has already been decided by the Board or by the collective bargaining agreement, the Board has refused to grant amendment applications which seek to reverse the position's status*

> *unless the applicant can show that there has been a material change in the duties and responsibilities of the position since the date of the order or agreement.*

**[29]** The Board accepts that this test can be applied to the case at hand, even though we are dealing with assigning a position to one of two bargaining units. As such, IAFF must show that there has been a material change in the duties and responsibilities of the EMO Coordinator position.

**[30]** The evidence was uncontroverted that the EMO Coordinator position had a change in duties and responsibilities in 1999. SCMMA argued as much on behalf of Mr. Litts in 1999. Mr. Litts had lost his supervisory and budgetary responsibilities. His position had changed locations and departments. Mr. Litts was reporting to a new supervisor and his position had changed so that it was no longer an operational one.

**[31]** In July 1999, the EMO Coordinator position was changed from a pay grade 8 to a pay grade 6. The position was also now responsible for extensive Fire Department duties. The new duties related to the core activities of the Fire Department and included work that one would expect a public relations officer to perform. The EMO Coordinator position was no longer responsible for WHMIS. The very essence of the EMO Coordinator position changed from an operational position to a planning and liaison position.

**[32]** The Board therefore finds that there has been such a material change in the duties of the EMO Coordinator position that it has become a new position. Given this conclusion, the Board must now determine in which bargaining unit the work falls.

**[33]** The Board has set out its approach to determining the boundaries of SCMMA's bargaining unit in the decision *City of Saskatoon v. Canadian Union of Public Employees, Local 59 and Saskatoon Civic Middle Management Association and Amalgamated Transit Union, Local 615*, [1998] Sask. L.R.B.R. 335, LRB File No. 244-97 at 339:

> 1. *In a multi-bargaining unit setting, the Board is primarily concerned with ensuring that the multiplicity of bargaining units does not result in industrial instability;*
>
> 2. *The Board historically favours larger industrial units over smaller specialized bargaining units as being the best vehicles for promoting industrial stability;*

3. *When faced with multiple bargaining units, the Board will take a restrictive approach to defining the scope of the smaller, more specialized unit;*

4. *Middle management units will be confined, in general, to those employees who, if they were included in the large industrial unit, would be placed in a conflict of interest situation between their obligations to perform supervisory and low level managerial functions and their membership in the larger unit;*

5. *The Board may allow for exceptions to the conflict of interest test where there are peculiar historical reasons for excluding persons from the larger unit, but these exceptions will not be permitted to form a spring board for organizing positions that otherwise would be assigned to the larger unit.*

**[34]** The Board confirms the analysis set out in *City of Saskatoon, supra,* and finds that, in the case at hand, there is no evidence that the EMO Coordinator position would have a labour relations conflict with members of IAFF. As set out earlier in this decision, the EMO Coordinator has no supervisory role to play in regard to any employees whatsoever.

**[35]** The Board finds that the work performed by the EMO Coordinator is work which properly falls within the amended IAFF certification order. The duties and functions of the EMO Coordinator relate to the core activities of the Fire Department.

**[36]** Normally, when an employer creates a new position in a multiple bargaining unit setting, the employer must negotiate the assignment of the position with the unions involved. If no agreement can be reached, the matter is submitted to the Board for resolution (see *CUPE v. University of Saskatchewan,* [2000] Sask. L.R.B.R. 83, LRB File No. 218-98).

**[37]** In *University of Saskatchewan, supra,* the Board found the employer guilty of an unfair labour practice because it unilaterally assigned new positions to one union without obtaining either the agreement of the unions or an order from the Board. In the case at hand, the Employer has consistently taken the position, given its response to SCMMA in March 1999, that there was no substantial change to the duties and conditions of employment for the EMO Coordinator position. There is no evidence that the Employer demonstrated any bad faith in arriving at this determination, even though the Board has found this position to be incorrect.

**[38]** SCMMA argued that IAFF must show evidence of support from the EMO Coordinator. With respect, support evidence is not necessary. The Board extensively discusses when membership support is required on an application to amend a certification order in the decision *Saskatchewan Government and General Employees' Union v. Saskatchewan Liquor and Gaming Authority,* [2001] Sask. L.R.B.R. 152, LRB File No. 037-95. In *Saskatchewan Liquor and Gaming Authority, supra,* the Board considered whether the bargaining unit applied for was a "new" bargaining unit. In order to make that determination, the Board examined whether the sought after amendment altered the general scope and nature of the original certification Order. In *Saskatchewan Liquor and Gaming Authority, supra,* the Board provides at pages 168 and 169:

> *[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.*
>
> . . .
>
> *[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.*

**[39]** In the case at hand, the Board has found that there has been a material change in the duties and responsibilities of the EMO Coordinator position such that it has become a new position or classification created by the Employer. As the Board provides in *Saskatchewan Liquor and Gaming Authority, supra,* this type of change does not result in the creation of a "new" bargaining unit. The bargaining unit remains an "all employee" unit and the position of EMO Coordinator is covered by the intended scope of the IAFF certification Order. Therefore, IAFF is not required to show evidence of support from the EMO Coordinator.

## Conclusion

**[40]** The amendment requested by IAFF in LRB File No. 296-00 is granted. IAFF also asked the Board in LRB File No. 295-00 to amend SCMMA's certification Order so that the EMO Coordinator position was an excluded position under the SCMMA Order. It is not necessary to amend the SCMMA Order given that the SCMMA Order, for whatever reason, does not list the EMO Coordinator position as being a SCMMA position. To be clear, this Board has found that the EMO Coordinator position is a new position given the changes that occurred in 1999 and that the new position falls within the IAFF certification Order. As such, no amendment is required and no support evidence is required.

# SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant v. BOARDWALK EQUITIES (SASK.) INC., Respondent

LRB File No. 150-01; April 17, 2002
Vice-Chairperson, James Seibel; Members: Joan White and Bruce McDonald

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

**Collective agreement – First collective agreement – Board reviews mandate of Board agent appointed to assist parties in concluding first collective agreement.**

**Collective agreement – First collective agreement – Board declines to appoint Board agent when parties have exhausted conciliation – Board orders hearing on application for first collective agreement assistance – Board will hear evidence on whether it should conclude terms of a first collective agreement between parties.**

***The Trade Union Act*, ss. 18, 26.5 and 42.**

## REASONS FOR DECISION

### Background and Facts

**[1]** **James Seibel, Vice-Chairperson:** By a certification Order dated November 21, 2000, LRB File No. 268-00, Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Union") was designated as the bargaining agent for a unit of employees of Boardwalk Equities (Sask.) Inc. (the "Employer"). Collective bargaining began on February 15, 2001 but after 9 meetings the parties were unable to conclude a first collective bargaining agreement. The Union obtained a strike mandate from the employees in the bargaining unit on May 29, 2001.

**[2]** On July 25, 2001 the Union filed this application pursuant to s. 26.5 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") seeking the assistance of the Board in concluding a first collective bargaining agreement. At the request of the parties, the application was adjourned *sine die* in October 2001, pending conciliation of the matters in issue. With the assistance of the conciliator, the parties made some progress but failed to conclude a collective agreement.

**[3]** In December 2001, the Union requested that its application be scheduled for a hearing. The application sought to have the Board appoint an agent to assist the parties and to recommend to the Board whether it should intervene and impose terms of a collective bargaining agreement. The Employer opposed the appointment of a Board agent.

## Argument

**[4]** Mr. Burkart, on behalf of the Union, argued that it was an appropriate situation for the Board to appoint an agent because it has been some 15 months since the Union was certified as the bargaining agent and because, despite their best efforts, the parties are at an impasse in bargaining. In support of this position he cited ss. 18 and 42 of the *Act* and the decisions of the Board 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, and *United Food and Commercial Workers, Local 1400 v. Madison Development Group Inc.*, [1996] Sask. L.R.B.R. 469, LRB File No. 053-96.

**[5]** Mr. Seiferling, on behalf of the Employer, argued that it was not appropriate to appoint a Board agent in the present case, but rather that the parties should be left to their own devices, including economic warfare, to resolve the matter as they deem fit. He pointed out that there is presently a case before the court that raises the issue of the status and role of a Board agent appointed in such circumstances. Counsel intimated that if the Board were to appoint a Board agent in this case, and before the court has ruled on the matter in that other case, the Board could expect an application for judicial review.

## Statutory Provisions

**[6]** Relevant provisions of the *Act* include the following:

> *18 The board and each member thereof and its duly appointed agents have the power of a commissioner under The Public Inquiries Act and may receive and accept such evidence and information on oath, affidavit or otherwise as in its discretion it may deem fit and proper whether admissible as evidence in a court of law or not.*
>
> . . .
>
> *26.5(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 or 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.*
>
> . . .
>
> *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.*

## Analysis and Decision

**[7]** A Board agent appointed to assist in concluding a first collective bargaining agreement has a two-fold mandate: to assist the parties in reaching a collective agreement without further intervention of the Board; and to make non-binding recommendations to the Board as to whether the Board should intervene, and if so, with respect to which term or terms that remain in dispute. Generally, the agent's report is required within 60 days of the appointment, but the time has often been extended.

**[8]** The first part of the mandate is in direct furtherance of the Board's desire to promote resolution through collective bargaining without intrusive third-party intervention as far as possible; the second part is designed to expedite proceedings before the Board with respect to determining the appropriateness and degree of further intervention. With respect to those latter proceedings, the parties are generally required to indicate where they disagree with the Board agent's report and the evidence at the hearing is usually limited to defining and establishing the basis for those points of departure.

**[9]** In the present case, the parties have exhausted conciliation. There may be little point in using a Board agent to assist them to explore the possibility of further agreement at this time. Some sixteen months has elapsed since certification and some eight months since this application was filed. While there is no decision that prevents the Board from appointing a Board agent to perform only the second part of the mandate, we are concerned that to do so may have the unintended result of inordinately delaying the determination of the present application.

**[10]** Accordingly, we exercise our discretion to decline to appoint a Board agent. The Board Registrar is directed to schedule the application for hearing. The issues to be heard are whether the Board should undertake to conclude any term or terms of a first collective bargaining agreement between the parties and, if so, how such terms should be concluded. At the hearing the parties should be prepared to call evidence related to both issues.

# CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1975, Applicant v. FOUR STAR MANAGEMENT LTD. o/a TREATS AT THE UNIVERSITY OF SASKATCHEWAN, Respondent

LRB File No. 220-98; April 24, 2002
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 – Board imposed terms of first collective agreement on issues outstanding between the parties – Parties disagree about whether wage rates in imposed agreement apply to employees whose employment ceased between effective date of agreement and date of Board's decision – Board determines that wage rates are retroactive to effective date for all employees, irrespective of their employment status on date of Board's decision.**

***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"). 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. By a decision reported at [2001] Sask. L.R.B.R. 715, the Board imposed the terms to conclude the agreement including, *inter alia*, a two-year term commencing January 1, 2000, and those relating to wages as follows:

> *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]** In its decision, the Board directed the Union to prepare a final draft of the terms of the collective agreement and retained jurisdiction to determine any dispute between the parties as to the wording thereof.

**[3]** The employees in the bargaining unit covered by the relevant certification Order are employed at two Treats outlets in Place Riel at the University of Saskatchewan. In April 2001, the owner of the outlets, Four Star Management Ltd. ("Four Star") apparently sold one of the two outlets to an enterprise called Country Classic Fashions Ltd. ("Country Classic"). A dispute arose between the Union and Four Star as to whether the retroactive wage rates applied only to employees who remained employed by the Employer at the date of the Board's decision, i.e., September 18, 2001, or whether it applied to any employee who had been employed at any time since the effective date of the collective agreement, i.e., January 1, 2000. Four Star has refused to implement the terms as to wages, but nonetheless served notice to terminate the collective agreement on the Union. The Union requested that the Board clarify the application of the retroactive wage rates.

**[4]** Apparently a dispute has also arisen between Four Star and Country Classic as to which is responsible for paying the ordered wage rates. Country Classic was notified of the hearing of the present application but declined to attend.

## Argument

**[5]** Mr. Holmes, on behalf of the Union, argued that the import of the Board's decision is that the wage rates apply to any and all employees employed at either of the Treats outlets covered by the certification Order at any time since the effective date of the imposed collective agreement whether or not they remained employed there at the date of the Board's decision.

**[6]** Mr. Seiferling, on behalf of Four Star, argued that while the arbitral jurisprudence regarding retroactivity is split between those that support the Union's interpretation and those that support the more restrictive interpretation advanced on behalf of Four Star, the "replication theory" of first contract imposition supports the latter.

**[7]** In support of his argument, counsel referred to the labour arbitration decision in *Re Toronto Hospital for the Treatment of Tuberculosis and Service Employees' Union, Local 204* (1970), 22 L.A.C. 119 (Brown) and the decision by the then chairperson of the B.C. Labour Relations Board, Paul Weiler, in *Re Penticton and District Retirement Service and Hospital Employees' Union, Local 180* (1977), 16 L.A.C. (2d) 97, a statutory appeal from an arbitration award. In the former case, the majority of the board of arbitration held that while the collective agreement in question may have been "in effect" as at a retroactive date, the rights established therein were not "vested in the employees" until the date the agreement was actually settled, and therefore, any employee that had ceased to be employed before the agreement was settled could not benefit from retroactive rights and benefits. In the latter case, Professor Weiler specifically rejected the reasoning and the result in the *Toronto Hospital* decision, finding instead, as a general principle, that full retroactivity applies except to certain terms of a collective agreement if retroactivity would "appear to lead to quite impractical or unintended results".

**[8]** Counsel for Four Star asserted that if the Board determined the issue of retroactivity in replication of what the Union might have achieved in collective bargaining, then its interpretation ought to prevail.

## Analysis and Decision

**[9]** On the present application, we are not making any new or additional decision. Counsel for Four Star requests that we declare that the clause respecting retroactive wage increases that we imposed in the decision of September 18, 2001, does not apply to employees that ceased to be employed any time after January 1, 2000 and before that date. In our opinion, the decision is clear as it is and to do as counsel requests would be to change the clause and limit its application.

**[10]** Neither are we now interpreting the wage clause imposed by the Board in the way that a grievance arbitrator would interpret the clause in a collective agreement, as was done by arbitrator Brown in *Re Toronto Hospital, supra.* Nor are we sitting in review or appeal of the original decision as was Professor Weiler in *Re Penticton, supra.*

**[11]** In our opinion, the Board's original decision granting retroactive wage increases in this case is clear. The entitlement to same of any employee who worked since the effective date of the imposed collective agreement, whether or not he or she remained employed at the date of the Board's

decision, is likewise clear and does not lead to an impractical or unintended result. It is exactly the result of the plain and ordinary meaning of the Board's decision.

**[12]** While the arbitral jurisprudence regarding the retroactivity of collective agreements cited by counsel for Four Star is not applicable to the present case, it is instructive in understanding why the wage rate clause in the present case is fully retroactive.

**[13]** While *Re Toronto Hospital, supra*, considered the situation where the parties were bargaining a renewal agreement, *Re Penticton, supra*, considered the case of a first contract, which was made retroactive to a date preceding even the union's certification. In *Re Toronto Hospital, supra*, arbitrator Brown based his determination on the premise that retroactive benefits will only accrue to those employees still employed when the renewal agreement is signed unless they are otherwise specifically identified as entitled to same. By contrast, in *Re Penticton, supra*, Prof. Weiler based his determination on the premise that all employees in either a renewal or first contract situation have an expectation that any retroactive agreement will apply to all employees employed anytime during the retroactive period, unless specifically excepted. Commenting on the arbitral jurisprudence on the issue to that time, Prof. Weiler stated, at 102, as follows:

> *Thus the current approach of Canadian arbitrators is to start from the presumption that the agreement as a whole is made retroactive, as the parties have stated in their duration clause. But specific exceptions may be read into this standard retroactive principle, excluding certain terms of the agreement from the clause, if full retroactivity would appear to lead to quite impractical and unintended results.*

**[14]** And further, at 106, commenting on *Re Toronto Hospital, supra*, and the line of cases that take a similar approach, Prof. Weiler stated as follows:

> *More fundamentally, these arbitration decisions rest on a premise about the nature of a bargaining unit and a union's bargaining rights which is fundamentally unsound. (See the remarks of Chief Justice Laskin in Terra Nova Motor Inn (1974) 74 CLLC 14,253 at pp. 15,148 ff.) The trade-union does not negotiate a contract binding only those employees who happen to be within its constituency at a particular moment of time — the date the collective agreement was finalized. Instead, the union is empowered by the Labour Code to negotiate a contract which establishes the wage rates and other terms of employment for all work performed by employees who come within its unit description. That point is obviously true in the case of individuals who enter the bargaining unit after the new agreement is signed. So-called "privity of contract" is no bar to the operation of this basic principle of labour law. But if that is the case, it is equally no bar to the union negotiating*

> *improved contract terms on behalf of individuals who have left the unit before the agreement is signed, terms which are made applicable for the work they performed within the unit during the retroactive period of the contract.*

**[15]** And further, at 109, as follows:

> *The cumulative force of that analysis supports this conclusion: arbitrators should interpret the general language of a duration clause as conferring retroactivity benefits on all individuals doing work during the period of the contract, even if some of them may have left their employment before the contract was actually signed.*

**[16]** The approach to the issue expressed in *Re Toronto Hospital*, *supra*, has generally not been followed, while the reasoning enunciated by Prof. Weiler in *Re Penticton*, *supra*, has been widely adopted or approved as, for example, in the following cases: *Re Nav Canada and Public Service Alliance of Canada* (2001), 95 L.A.C. (4th) 88 (Brown); *Re Commemorative Services of Ontario and Service Employees International Union, Local 204* (1998), 69 L.A.C. (4th) 11 (Brandt); *The Board of Trustees of School District No. 39 and Vancouver Teachers' Federation*, [1993] BCLRB No. B212/93; *Re Durham Memorial Hospital and London & District Service Workers' Union, Local 220* (1991), 19 L.A.C. (4th) 320 (Kaufman); *Re Bonavista-Trinity-Placentia Integrated School Board and Newfoundland Association of Public Employees* (1985), 22 L.A.C. (3d) 430 (Easton); *Re Board of Commissioners of Police for the Town of Leamington and Leamington Police Association* (1982), 9 L.A.C. (3d) 67 (Saltman); *Pulp and Paper Industrial Relations Bureau, et al. and Canadian Paperworkers' Union, et al.*, [1986] BCLRB No. 150/86.

**[17]** The general reasoning enunciated by Prof. Weiler strikes us as fundamentally sound. Just as there is no magic or design in how long it may take parties to forge an agreement through collective bargaining, ratify and actually sign that agreement, there is no magic in the date that an application to the Board will be heard and a decision issued. It is dependent on a number of contingencies including general application of a first-in-first-out rule to the hearing of applications, availability of the parties, their counsel and of panel members, Board administrative and clerical resources, previous commitments, and intervening priorities, to name a few. It would be unsound to base entitlement to retroactive benefits on the serendipitous signing of a collective agreement or the signing of a Board decision imposing one.

**[18]** Accordingly, the wage rate terms imposed by the Board are fully retroactive and apply to all employees employed during the duration of the contract specified whether or not they were still employed on the date of the Board's decision.

**[19]** 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. TEMPLE GARDENS MINERAL SPA INC., Respondent

LRB File No. 172-00; May 1, 2002
Vice-Chairperson, James Seibel; Members: Gloria Cymbalisty and Tom Davies

For the Applicant: Larry Kowalchuk
For the Respondent: Deb Thorn

**Unfair labour practice – Duty to bargain in good faith – Disclosure – Failure to disclose expansion plans to union at bargaining table constitutes failure to bargain in good faith – Employer's claim to fear that union will use information to employer's detriment not credible and does not justify failure to disclose – Board concludes that information withheld because employer representative personally disliked union representative – Employer violated s. 11(1)(c) of *The Trade Union Act.***

**Unfair labour practice – Duty to bargain in good faith – Disclosure – Exclusive bargaining authority – Board concludes that employer releasing information to group of employees while refusing union's request for same information has effect of undermining union's exclusive bargaining authority – Employer violated s. 11(1)(c) of *The Trade Union Act.***

**Unfair labour practice – Duty to bargain in good faith – Disclosure – Failure to provide employee and wage information to union at bargaining table constitutes failure to bargain in good faith – Board concludes that production of information delayed because employer representative personally disliked union representative – Employer violated s. 11(1)(c) of *The Trade Union Act.***

***The Trade Union Act*, s. 11(1)(c).**

## REASONS FOR DECISION

### Background

**[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 at Temple Gardens Mineral Spa Inc. (the "Employer") in Moose Jaw, Saskatchewan, in an Order of the Board dated September 15, 1999. Following certification, the parties commenced bargaining for a first collective agreement. The Union filed an application with the Board alleging that the Employer committed unfair labour practices in violation of ss. 11(1)(a) and (c) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"). The Union alleges that the Employer failed or refused to disclose information to the Union regarding expansion plans and the status of individual employees including names,

addresses, dates of hiring, rates of pay and recent wage increases. The Union says the information was material to the negotiations for a first collective agreement.

## Evidence

**[2]** Mark Hollyoak has been a representative of the Union for some 12 years. His responsibilities included the collective bargaining with the Employer. He testified that at a bargaining meeting on May 6, 2000, the Union specifically asked the Employer's bargaining representatives if the Employer was considering any plans that could effect collective bargaining. He said that the Union's interest was piqued because the Employer's bargaining representatives wanted the ability to create new departments and were concerned about a clause in a proposed collective agreement regarding the negotiation of new classifications. According to Mr. Hollyoak, the Employer's chief spokesperson, Deb Thorn, responded to the effect that even if there were such plans she would not tell the Union because she was afraid of what the Union might do with the information. He said that he countered by telling her that a failure to disclose would be an unfair labour practice.

**[3]** Mr. Hollyoak testified that prior to June 1, 2000, the next bargaining session scheduled between the parties, he became aware of an advertising feature in the May 28, 2000 edition of the Regina Sunday Sun weekly newspaper entitled "Temple Gardens Developing Expansion Plans". The article briefly describes several different initiatives for downtown re-development in Moose Jaw and reads, in part, as follows:

> *After several successful years of operation, the Temple Gardens Mineral Spa in Moose Jaw is hoping to bring even more tourists to the city by expanding its facilities.*
>
> *Temple Gardens president Brent Boechler says the company will make an official presentation to city council for the necessary approvals on June 12.*

**[4]** Mr. Hollyoak testified that he showed the article to Ms. Thorn at the bargaining session and again asked for disclosure of expansion plans that could affect bargaining. He said that Ms. Thorn responded tersely to the effect that by virtue of the Sunday Sun article, plans were now disclosed. Mr. Hollyoak asked for more specific information regarding numbers of employees, classifications and new areas of operation. Ms. Thorn refused to provide any further information.

**[5]** Mr. Hollyoak followed up with a letter to Ms. Thorn dated June 2, 2000. The letter states:

> *Re: Expansion Plans*
>
> *As I mentioned at the bargaining table on June 1, 2000, I am in receipt of a newspaper advertising feature that appeared in the May 28, 2000, Leader-Post Sunday Sun. On May 6th we asked at the bargaining table "if there are any plans or discussions taking place that may have an impact on the bargaining table". After reading the above mentioned advertising feature we made the same request for information. On both occasions you refused to divulge any information regarding expansion plans or any other plans that may impact on the bargaining table and process. Your only comment at the table with respect to the feature was "there you go – it was disclosed". Your refusal to discuss this matter with the Committee is an unfair labour practice.*

**[6]** Mr. Hollyoak said he received no response.

**[7]** On June 6, 2000, Ms. Thorn held a meeting with employees during which she disclosed certain information regarding the Employer's expansion plans. However, Mr. Hollyoak said the Union itself received no information regarding such plans from the Employer either before or after the staff meeting.

**[8]** Mr. Hollyoak attended the meeting of Moose Jaw City Council on June 12, 2000, at which Ms. Thorn and other persons involved in a proposed expansion made a presentation about how a proposed new casino in the City would tie in with and affect the Employer's operation. The presentation included some information about anticipated increases in the number of employees during and after construction.

**[9]** Mr. Hollyoak received a letter from Ms. Thorn dated July 31, 2000, which, he testified the Employer gave to all employees. The letter reads as follows:

> *This is to advise you that last night at a regularly scheduled meeting of City Council, "Project Moose Jaw" received the municipal approval required to get to the next step. The project still requires approval from the Provincial Government to allow for the expansion of the Regina Casino to Moose Jaw. Without this approval the project will not proceed.*
>
> *I have enclosed a copy of the "Project Moose Jaw" Vision document, which contains information about each of the proposed projects involved, including the expansion of our hotel and spa treatment center along with potential job creation. Given its earliest possible construction start in the spring 2001, assuming approvals occur in a timely manner, it would be the fall of 2002 before our expansion would be completed.*

> *As I am sure you are aware, Temple Gardens' current confrontational relationship with the RWDSU only hampers our ability to attract the new investment required to expand. I am sure you are also aware that the RWDSU's "strike vote", its five Unfair Labour Practices filed with the Saskatchewan Labour Relations Board, unresolved dispute over the scope-status of Bob's Facility Manager position, the un-concluded outcome of the Natasha Stewart Arbitration hearing, and most important, your refusal to present our Company's "Comprehensive Contract" to the employees for ratification is not creating an environment conducive for either financiers or investors interested in our expansion proposal. At this time, I can only urge you to set your personal animosities towards me aside, and work co-operatively to bring closure to this year-long dispute as quickly as possible by giving our employees an opportunity to vote on our June 22nd "Comprehensive Contract" Offer. It is time for both of us to do what is in the best interest of both our Company and its employees.*
>
> *Again, I have provided you with all of the current information available on our expansion, so please let me know if you have any further questions at this time.*

**[10]** The "Vision" document attached to the letter is a glossy promotional brochure intended for public distribution. It very briefly outlines eight proposed projects including a 50-70 room $8 million expansion of the Employer's operation connecting it to a proposed casino. The document provides an estimate of an additional 45 permanent jobs with the Employer worth approximately $850,000 annually.

**[11]** In cross-examination, Ms. Thorn attempted to have Mr. Hollyoak concede that he knew of the Employer's general desire for expansion of its facilities and of the buzz in the general business community regarding a new casino for the City, but Mr. Hollyoak was adamant that he first learned of any proposed expansion by the Employer from the May 28 newspaper article.

**[12]** Mr. Hollyoak also testified that by a letter dated April 17, 2000, the Union requested certain information regarding the employees including a list of employee names, addresses, dates of hiring, wage rates and wage increases during the previous year. He said the Union wanted the information because it had agreed to date-of-hire seniority, wanted to prepare for negotiations on the monetary items of a collective agreement and to be able to communicate directly with the employees it represented. On April 29, 2000, the Employer provided some, but not all, of the information. Still lacking were addresses and dates of hire for all employees except those in food services, and wage increase information for all employees. The Union requested the balance of the information in a letter dated June 1, 2000. Ms. Thorn responded to Mr. Hollyoak in a fax message dated June 1, 2000, which reads, in part, as follows:

> *Based on the volume of your letters of complaints/threats, I assume you are using a well-known "anti-management tactic". I was warned about this, but expected as much from you. Your complaints are not substantiated and lack substance, so appear to be an attempt to bury me in paperwork. I promise I'm trying to do my best to keep up. (Sometimes my job gets in the way. Ha. Ha.).*

**[13]** Although she apparently directed the Employer's accountant to gather the information at that time, it was not all provided to the Union for nearly another six months.

**[14]** Lee Bollinger has been the Employer's head lifeguard for more than three years. She attended the June 6 meeting with employees that Ms. Thorn arranged. Attendance was not mandatory. Ms. Bollinger testified that at the meeting, Ms. Thorn went through expansion plans in some detail and told the approximately 50 employees in attendance that they were the first to hear about it. Ms. Thorn told the group that the plans included a 70 to 100 room expansion, expansion of the "Oasis Centre", a smaller second pool, an expanded fitness center, additional offices, a physician's office, a theatre, renovation of "Sweet Waters" and parking for 600 vehicles. If a casino opened in the downtown, the Employer anticipated an occupancy rate of 70 to 90 per cent. Construction was expected to start in 2001 with an opening in 2003. The construction and expansion would create a significant number of new jobs. Ms. Thorn showed professional sketches of the proposed expansion to the employees. She told the group that the Employer was going to City Council with the plan and would appreciate the employees' support.

**[15]** Deb Thorn is the Employer's founding president and has been chief executive officer since 1995. She testified she was concerned by Mr. Hollyoak's inquiries about the Employer's plans because of her mistrust of Mr. Hollyoak personally and a concern that the Union might "misuse" such information to harm the Employer. She intimated that another reason the Employer was being guarded with respect to expansion was because of a conflict between Casino Regina and the Saskatchewan Indian Gaming Authority over who would operate a new casino; she said the Employer did not really care, but was concerned that it had to be situated downtown in order for there to be any expansion of its facilities.

**[16]** Ms. Thorn said she met with interested employees on June 6 to promote a large show of support at the City Council meeting on June 12 and also to celebrate the Temple Gardens Spa fourth anniversary. She said that all of the expansion ideas discussed at the employee meeting were only

possibilities – she described how a previous expansion proposal called "North Fork" had fallen through – and there was nothing that could effect bargaining except the potential increase in the number of employees. Ms. Thorn testified that she had obtained legal advice that the Employer did not have to disclose the proposal to the Union because it was so preliminary and would not effect bargaining. Ms. Thorn said that she did not provide the Union with the information she imparted to the employees because she simply "did not trust Mr. Hollyoak". In cross-examination, Ms. Thorn admitted questioning an employee at the meeting about whether the employee was taking notes for the Union.

**[17]** With respect to providing the information requested by the Union regarding the employees, Ms. Thorn gave three reasons for the Employer's tardy response: first, the Employer's accounting department was overwhelmed with work and was having difficulty getting the information together; second, she believed it was a tactic by the Union to overwhelm her with paperwork; and third, she was fearful that the Union would use the wage increase information to foment discontent among employees by disclosing who had received what increases.

**[18]** Without going into detail, much other evidence was adduced at the hearing with respect to rather unbecoming behaviour and snide remarks by the representatives of the parties.

## Statutory Provisions

**[19]** Relevant provisions of the *Act* include the following:

> *11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:*
>
> > *(a) 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;*

## Argument

**[20]** Mr. Kowalchuk, counsel for the Union, argued that the Employer had failed in its duty to disclose relevant information to the Union in violation of s. 11(1)(c) of the *Act* and had failed to bargain in good faith. In support of his argument, counsel referred to the decisions of the Board in *Saskatchewan Government Employees' Union v. Government of Saskatchewan*, [1989] Winter Sask. Labour Rep. 52, LRB File Nos. 245-87 & 246-87; *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; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Regina Exhibition Association Limited*, [1997] Sask. L.R.B.R. 787, LRB File Nos. 256-97, 266-97, 279-97, 308-97 & 321-97; and to the decision of the Alberta Labour Relations Board in *United Nurses of Alberta v. Alberta Healthcare Association*, [1994] Alta. L.R.B.R. 250.

**[21]** Counsel asserted that the Employer's reasons for not disclosing its expansion plans to the Union – that they were preliminary and it was fearful of the use that Union officials it deemed unscrupulous might make of the information – were specious and were belied by the fact that it disclosed the plans to employees a few days after the Union made its request and before its own shareholders had received the information. Counsel said that it is obvious that Ms. Thorn was determined not to be open and honest at the bargaining table, and that while she says she wants to be open and honest with the employees, she does not really recognize the Union as their bargaining agent or respect the bargaining process.

**[22]** Ms. Thorn, on behalf of the Employer, argued that the information withheld by the Employer regarding the preliminary expansion plans could not affect bargaining at the time because of the long timeline for construction and completion if it went ahead. She asserted that the cases referred to by the Union were not apposite because the employers' plans in those cases were much more concrete. She also reiterated her mistrust of the Union and Mr. Hollyoak and the use that they might have made of the information.

## Analysis and Decision

**[23]** The Board has considered the issue of the obligation of disclosure during collective bargaining and honesty at the bargaining table on several occasions and has delineated the general scope of the obligation. However, as the individual cases demonstrate, determining the scope of the obligation in

any particular case is a fact-driven exercise. In certain cases, determining whether the duties of disclosure or honesty have been violated is relatively easy, but in others it is more difficult.

**[24]** In *Government of Saskatchewan, supra*, the union alleged that the employer failed to provide adequate information pertaining to plans to reorganize government services while the parties were engaged in bargaining to renew a collective agreement. The Board described the scope of the obligation to make disclosure in the context of bargaining in good faith, as follows, at 58:

> *[The duty to negotiate in good faith] 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 in the employer, the union and the employees.*

**[25]** In concluding that the employer in that case was guilty of an unfair labour practice in violation of s. 11 (1)(c) of the *Act*, the Board stated as follows, at 60:

> *In the Board's view, the employer's response dated November 19, 1987 amounted to a practical refusal to provide the union with any information at all. It did not disclose whether any decisions had or had not been made that would significantly impact on the bargaining unit during the term of the collective agreement. It did not claim any confidentiality in planning, nor suggest that premature disclosure might have an adverse impact on the employer/employee relationship. In the Board's view, the response did not meet the standard of good faith expected of the parties at the bargaining table which includes an obligation to answer honestly when asked.*

**[26]** However, the Board also found, at 62, that the employer had not improperly refused to provide some of the information requested by the union because, "it was not required to adequately comprehend a proposal or response at the bargaining table, and it was not something that could significantly impact upon the existing unit".

**[27]** In *Regina Exhibition Association, supra*, the employer's operations included a casino. The union represented three different bargaining units of the employer's employees including casino workers, operations workers and food service workers. The union alleged that the employer violated the duty to bargain in good faith in failing to disclose, during the course of bargaining the agreements for the casino and operations workers, that it intended to close the casino. During bargaining, there were persistent rumours that the casino was going to be closed and the union had asked the employer pointedly several times during bargaining whether the rumours were true. Each time the employer's representative said that closure was not being considered. Eventually, the employer did in fact close the casino and layoff all the casino workers, 40 operations workers and 23 food service workers. In finding the employer guilty of bargaining in bad faith, the Board approved of the obligations enunciated in *Government of Saskatchewan, supra*, and stated, at 811, as follows.

> *The Trade Union Act establishes a legal framework for the co-determination by an employer and a union of the terms and conditions of work for employees in a bargaining unit. The cornerstone of this framework is the duty to bargain collectively, which entails two related obligations: first, an obligation to bargain in good faith, and second, an obligation to make every reasonable effort to conclude a collective agreement. The duty to disclose pertinent information during the course of collective bargaining is part of the overall duty to bargain in good faith.*
>
> . . .
>
> *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.*

**[28]** In *Loraas Disposal Services, supra*, in bargaining for a first collective agreement, the employer failed to disclose a decision to close one of its divisions and permanently lay off more than thirty percent of its workforce, a decision it in fact implemented without any prior warning while bargaining

was still going on. The employer attempted to justify the failure to disclose the impending sale based on an alleged fear that employees would vandalize the equipment. In finding that the employer failed to bargain in good faith, the Board held, at 17, that an employer has several avenues it may follow in making the required disclosure where it has a legitimate concern that such disclosure might result in untoward actions:

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

**[29]** The foregoing cases paint a rather stark picture of violation of the duties of disclosure and honesty in bargaining. Each of the employers consciously withheld information from the union about decisions that had already been made in circumstances where there was no question that it would significantly impact on bargaining (if it were known to the union) and on the bargaining unit during the term of an agreement. In each of the foregoing cases, decisions had either already been made, or the Employer knew that they were going to be made, that would result in significant reorganization of the bargaining unit and layoffs or job loss. Indeed, in *Regina Exhibition Association* and *Loraas Disposal Services*, both *supra*, the employers' actions appear to demonstrate an element of deception or subterfuge concerning their plans for the workplace.

**[30]** We cannot say that the Employer in the present case is guilty of such clearly delinquent conduct. However, this does not mean that its actions are not censurable. Ms. Thorn asserted that her reasons for withholding the information regarding expansion plans were essentially threefold: first, the idea was merely preliminary and there was no obligation to disclose; second, it was not of a nature that could effect bargaining; and, third, she did not trust that the Union, and more specifically Mr. Hollyoak,

would not use the information to harm the Employer. In her evidence, she only vaguely described the defence on each of these purported grounds.

**[31]** The plans for expansion were indeed at an early stage, but were not, as the Employer alleged, merely preliminary. The plans were a great deal more than a mere concept or "vision". The scope and detail of the project revealed to employees on June 6, 2000, and at City Council on June 12, disclose that a great deal of work had already been done. If the Employer and the several other proponents involved in the overall project obtained City and Provincial approval, the Employer's expansion plan would go ahead. The glossy and obviously professionally prepared brochure entitled "Project Moose Jaw Downtown Revitalization Project 2003" contains eight pages of photographs, artist's drawings, quotations of statements by Ms. Thorn and the City's mayor, the City commissioner, and the president of the local chamber of commerce. It provides details of eight projects with investment of some $47 million. Two of the projects were already under way. The status of the estimated $8 million expansion to the Employer's facilities is described as "committed"; the brochure estimates that the jobs associated with the Employer's expansion would include more than 33 full-time jobs during construction and more than 44 full-time operational jobs after completion. Clearly the project had proceeded past the stage of a mere idea or concept.

**[32]** By May 2000, the parties had been engaged in bargaining terms of a first collective agreement for some time. They had language that addressed the negotiation of new job classifications. The Employer was interested in discussing the issue of the creation of new departments. The parties were getting ready to bargain monetary issues. The Union asked the Employer directly, both orally and in writing, whether there were any plans or discussions that could effect bargaining. Its queries were either ignored or flippantly brushed aside, as when Ms. Thorn tersely informed Mr. Hollyoak that the Sunday Sun article constituted adequate disclosure. At the time of the Union's queries, there was clearly much more particular information available concerning the details of the plan, the magnitude of investment and the creation of new jobs than could possibly be gleaned from the advertising feature, as demonstrated by both the June 6, 2000 meeting with employees and the promotional brochure.

**[33]** Ms. Thorn also asserted that she was concerned that the Union and Mr. Hollyoak might use the information to harm the Employer. This assertion is perhaps even more difficult to understand and less defensible than the claim made in *Loraas Disposal Services, supra,* that the employer was concerned that the employees might vandalize equipment if it disclosed its plan to close a division. First, in her

evidence Ms. Thorn did nothing more than make the bald assertion. She did not provide any detail whatsoever to support the assertion. The nature of the information that was withheld does not come within the exception to the duty to disclose described in the excerpt from *Government of Saskatchewan, supra*, that outlines the duty. The Employer's detailed disclosure of its plans to a group of employees on June 6, 2000, in advance of the City Council meeting belies the alleged motivation for withholding disclosure asserted by Ms. Thorn. She could not have believed that the Union would not discover what went on at the meeting. Second, as was pointed out in *Loraas Disposal Services, supra*, if Ms. Thorn's concern was genuine, there were methods by which disclosure could have been made to allay or minimize her concern. There is simply no excuse for not providing the Union with at least the information provided to the group of employees and City Council such a short time after the Union specifically asked if any plans were under discussion that might affect the bargaining unit during the life of a first collective agreement.

**[34]** Similarly, there was no credible excuse offered by Ms. Thorn for why it took so long to provide the employee and wage information requested by the Union. Following certification, at the request of the union, the employer must provide reasonable information regarding the employees in the bargaining unit within a reasonable period of time. In the present case, the Employer did not object that the information requested was not reasonable or that the Union was not entitled to it. The information was credibly required in order to appropriately bargain the monetary terms of an agreement and to enable the Union, as the exclusive bargaining agent for the employees in the bargaining unit, to communicate and obtain news and information relative to that process and representation in general.

**[35]** In our opinion, on the whole of the evidence, the real motivation for withholding both the expansion plan and employee information was Ms. Thorn's personal dislike for Mr. Hollyoak and an intention to be uncooperative with him.

**[36]** Furthermore, the Employer's unjustified refusal to disclose its expansion plans to the Union while disclosing it to employees a few days later has the tendency to undermine the union's credibility with the employees it represents. A union representing a nascent bargaining unit is in a vulnerable position. It is not difficult for an employer to erect obstacles and create problems in an attempt to make the union look ineffective to employees who do not yet fully understand the dynamics and psychology of the new relationship between their employer and the union as their bargaining agent.

**[37]** In the present case, Ms. Thorn painted her meeting with the employees as a benign effort to garner their support for the Employer's plan at City Council. This may be so. And it may be that she did not intend to undermine the Union. But the effect was to create a situation in which the employees might view their bargaining agent as being "out of the loop" and unable to keep informed of events necessary to properly represent them. Appropriate prior disclosure to the Union would not have prevented the Employer from garnering employee support for the expansion proposal. Indeed, the Union might well have co-operated with the Employer in encouraging its members to do so. But for the Employer to circumvent the Union as it did was unacceptable.

**[38]** In all of the circumstances, the Employer's conduct constitutes a failure to bargain in good faith with the Union as the representative of the employees in the bargaining unit in violation of s. 11(1)(c) of the *Act*.

**BERNADETTE LEUSCHEN, Applicant v. SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 333 and LUTHERAN SUNSET HOME OF SASKATOON, operating LUTHERCARE COMMUNITIES, Respondents**

LRB File No. 029-02; May 2, 2002
Vice-Chairperson, Walter Matkowski; Members: Brenda Cuthbert and Maurice Werezak

For the Applicant Bernadette Leuschen
For the Respondent: Maureen Fryett
For the Employer: Larry Seiferling, Q.C.

**Decertification – Interference – Board finds no evidence of employer interference, threats or intimidation – Board declines to exercise its discretion under s. 9 of *The Trade Union Act* to dismiss application on basis of employer influence – Board orders vote.**

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

## REASONS FOR DECISION

**[1] Walter Matkowski, Vice-Chairperson:** Ms. Bernadette Leuschen applied under s. 5(k) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") for an order rescinding an Order of the Board dated April 12, 2001, designating Service Employees International Union, Local 333 (the "Union") as bargaining agent for certain employees of Lutheran Sunset Home of Saskatoon, operating LutherCare Communities (the "Employer"). There were fifteen employees, including Ms. Leuschen, in the bargaining unit on the date the current application was filed. The Board heard the application on April 25, 2002. Ms. Leuschen testified in support of her application while Donald Kitchen testified on behalf of the Union. Cathy Hinther testified on behalf of the Employer to explain an overpayment made to the Applicant on a pay cheque subsequent to the Applicant bringing her application before the Board.

**[2]** In her application, Ms. Leuschen stated that she was included in the Union against her wishes and that she did not believe the Union could do much for the employees. Ms. Leuschen testified that a majority of the employees employed in the bargaining unit did not want to be represented by the Union any longer. Ms. Leuschen was adamant that the Employer had nothing to do with her bringing this application.

**[3]** Ms. Leuschen, along with a number of other employees from Lutheran Sunset Home, filed unfair labour practice charges against the Union in 2001. The applications (LRB File Nos. 082-01 to 087-01) describe these employees' level of unhappiness with the Union. On August 16, 2001, the day of the hearings for the unfair labour practice charges against the Union, it became clear during preliminary discussions among the parties before the Board that the applicants were not sure how to proceed with their applications. Following these preliminary discussions, the applicants met with a member of the Labour Relations and Mediation Division. Subsequently, all the applicants withdrew their unfair labour practice charges against the Union. Ms. Leuschen testified that during the meeting, her questions about the process for decertifying a Union were answered. Ms. Leuschen later contacted the Board Registrar on a number of occasions to obtain the appropriate information so that she could apply to the Board to decertify the Union.

**[4]** In its reply, the Union alleged that the application by Ms. Leuschen was made as a result of Employer influence, interference and intimidation. During the hearing, counsel for the Union attempted to elicit evidence in support of its allegation of Employer influence. For example, counsel for the Union attempted to show that the Employer interfered by giving Ms. Leuschen what appeared to be an unwarranted increase in her pay after she filed the decertification application. However, the evidence was clear that the Employer had made an honest mistake in overpaying four of its employees. The Union acknowledged that the mistake was an honest one and abandoned any arguments arising from the overpayment to Ms. Leuschen.

**[5]** Counsel for the Union was able to demonstrate that Ms. Leuschen, and for that matter, all the union members who brought the unfair labour practice charges against the Union in 2001, were confused as to the procedures to be followed before the Board. Ms. Leuschen testified that she had the impression that a lawyer would represent the employees at the hearing scheduled for August 16, 2001 and that the Employer would pay for this lawyer. Ms. Leuschen testified that when she and the other applicants realized that there was no lawyer to represent them, they felt foolish as they could not afford a lawyer and they did not know what to do.

**[6]** The Union argued that, because the Applicants were under the impression that the Employer would provide a lawyer for them, somehow the Employer was involved in assisting the Applicant in this decertification application. With respect, this argument is rejected. There is no evidence that the Employer had anything to do with the 2001 applications or with this decertification application.

**[7]** The Board finds nothing to support the exercise of its discretion under s. 9 of the *Act* to dismiss the application as having been made on the advice of, or as a result of, influence, interference or intimidation by the Employer. Ms. Leuschen filed majority support for her application. As a result, an Order will issue directing that a vote be conducted among the employees in the bargaining unit who were employed on the date the application was filed and who remain employed on the date of the vote.

**BRENT AUPPERLE, Applicant v. UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, Local 179 and HONEYWELL LIMITED, Respondents**

LRB File No. 247-01; May 14, 2002
Vice Chairperson, Walter Matkowski; Members: Mike Carr and Gloria Cymbalisty

For the Applicant: Barry Nychuk
For the Respondent: Rick Engel
For the Employer: Larry LeBlanc, Q.C.

**Duty of fair representation – Scope of duty – Union adequately investigated circumstances of applicant's lay off and took reasonable view of them – Union obtained opinion from legal counsel on likelihood of success at arbitration – Union did not breach duty of fair representation – Board dismisses application.**

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

## REASONS FOR DECISION

### Background

**[1] Walter Matkowski, Vice Chairperson:** The Applicant, Brent Aupperle, is a journeyman pipefitter 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"). The Applicant filed an application that alleged that the Union failed to represent him fairly in grievance proceedings against Honeywell Limited (the "Employer"), in violation of s. 25.1 of *The Trade Union Act*, R.S.S. 1978, C. T-17 (the "*Act*"), by refusing to pursue a grievance filed on his behalf.

### Facts

**[2]** The Applicant worked for the Employer in Saskatoon from 1991 until November 2, 2000 and was a member of the Union throughout that time. When the Applicant started working for the Employer, he had no trades or qualifications. During the course of his employment, the Applicant achieved his pipefitter journeyman status as well as his Fire Alarm Verification designation.

[3] The bulk of the Applicant's work consisted of control work, but his Fire Alarm Verification designation qualified him to inspect and certify fire alarm systems, which he did on occasion. In June 2000, the Employer assigned the Applicant full time to the City Hospital site to inspect the Honeywell fire alarm system installed there. On November 2, 2000, the Employer told the Applicant that as a result of a declining volume of work for the company and changes affecting the industry, the Employer was laying him off. The Employer gave the Applicant six weeks pay in lieu of notice.

[4] Prior to and subsequent to the Applicant's lay off, the Employer laid off at least three other Union employees. Two of these employees, William Hastings and Albert Manz, were employed at the Employer's Regina office, while James King was employed at the Employer's Saskatoon office.

[5] The Employer's corporate structure for Saskatchewan also changed significantly in 2000/2001. Three administrative support personnel were let go; only one administrative support person was retained in Regina. The Employer also let go both district general managers, Darrell Driver and Dan Thompson.

[6] The Applicant testified before the Board and alleged that the Employer had not laid him off, but rather, had dismissed him. The Applicant testified that the City Hospital project was approximately 60% complete when he was laid off and that he was the only Honeywell employee in Saskatchewan who could do the work. The Applicant suggested that he was dismissed because while he was conducting the City Hospital job, he uncovered a large number of deficiencies in the fire alarm system which were the Employer's responsibility. He estimated that the deficiencies could cost the Employer $100,000 to correct. The Applicant testified that a non-union employee of the Employer from Edmonton completed the City Hospital project in approximately September 2001 and that this individual had more qualifications than he did.

[7] The Applicant also stated that he was dismissed because of conflicts with management and because he stood up for his Union rights. His description of the conflicts were included in a November 3, 2000 memo prepared by the Union, portions of which read as follows:

*Brent feels that he has been unfairly targeted for dismissal because of his history of standing up for his union rights and bringing problems to the attention of both management and the union. Examples:*

- *1998-Battle School Division fire alarm verification problems – he was threatened with discipline for following the fire code while checking the system.*

- *Nov. 1998 – had a conflict with Brent Dayton (Service Team Lead for Saskatoon at the time) regarding call numbers on service reports.*

- *Apr. 1999 – There was an issue raised by Brent Dayton that the service mechanics were not clearing off outstanding calls. This was resolved by the transfer of Brent Dayton to Regina.*

- *Sept. 1999 – Brent challenged Randy Albers (current Saskatoon Team Lead) as to why the selection of people for training courses was so biased towards only a few individuals.*

- *At the Quarterly meeting in early October Brent confronted Randy Albers about statements that had been made to Dave Grant insinuating that Brent was attempting to "milk" the City Hospital Fire Alarm Verification job to make it last longer.*

- *Oct. 2000 – Brent found a member of management (Grant Goodwin) doing the work of union members. He confronted Grant and brought the issue to the attention of management and the shop steward. He further questioned why a management person like Grant needed to drive a fully stocked service vehicle if he was not doing the service work that is the work of the union members.*

- *June 2000 to Present – The City Hospital in Saskatoon required a fire alarm verification and certification to be done. Brent is the only Honeywell employee in Saskatoon qualified to perform fire alarm verifications and he was assigned to this job. In the course of his work checking the system Brent found a large number of deficiencies that were warranty items which Honeywell Saskatoon was responsible for. Randy Albers had questioned whether all of the reports about the deficiencies were really necessary. Former supervisor Dan Thompson (he was laid off after Honeywell deleted his position) had authorized Brent to give copies of all of his reports directly to City Hospital's Darrell Solely. This appears to have been a source of embarrassment for Honeywell as it exposed their previous mistakes and kept them from being able to bill the hospital for warranty type work. At no time after Dan left Honeywell was Brent instructed to stop providing reports directly to City Hospital. This project is less than 60% complete.*

**[8]** The Applicant acknowledged that he was not disciplined by the Employer in regard to any conflicts with management or when he stood up for his Union rights.

**[9]** The Union filed grievances on behalf of both Mr. Hastings and the Applicant. The grievance filed on the Applicant's behalf read in part:

> *COMPLAINT:*
>
> *The employer provided Mr. Aupperle with the attached Layoff Notice on November 2, 2000. Since that time, the employer has not attempted to recall Mr. Aupperle to perform work coming within the bargaining unit. Accordingly, it is reasonable and fair to conclude that the Layoff Notice was originally intended (or subsequently became) a Notice to severe the employment relationship. In the circumstances, the employer has only paid minimum severance under The Labour Standards Act and owes Mr. Aupperle an adequate severance package that takes into account his seniority, age, and all other factors that are just and reasonable in these circumstances.*
>
> *YOUR RECOMMENDATION:*
>
> *Rehire*
> *or*
> *The employer shall pay reasonable and fair compensation to Mr. Aupperle as determined through the grievance/arbitration process.*

**[10]** Three individuals testified for the Union. They were Brett Godwin, a commercial business agent for the Union who, along with Chris Henrikson, the Union shop steward in Saskatoon, met with the Applicant on November 2, 2000, and Rick Diederich, the Union's business manager. Mr. Godwin prepared the November 3, 2000 memo for Mr. Diederich and contacted the Employer to find out what its position was in regard to the Applicant. The Employer told Mr. Godwin that the Employer did not have any problem with the Applicant, but that Honeywell Saskatchewan had been directed to eliminate two service mechanics' positions, one in Regina and one in Saskatoon. The Employer told Mr. Godwin that Honeywell Saskatchewan had also been directed to reduce its full staff complement including management, middle management and unionized employees.

**[11]** Mr. Henrikson testified before the Board and confirmed that lay offs had occurred at Honeywell and that they continued to occur following the Applicant's lay off. At monthly meetings before the Applicant's lay off, the Employer had informed Mr. Henrikson that the Employer's Saskatoon office was not contributing to the Employer's bottom line as much as it was supposed to. Mr. Henrikson agreed that the Applicant had some conflicts with management and that he (Mr. Henrikson) may have said that if lay offs were to occur, the Applicant would be the first to go. Mr. Henrikson testified that no one currently does fire alarm verification work for the Employer in Saskatoon as no one either in-scope or out-of-scope is qualified to do the work.

**[12]** Mr. Diederich testified on behalf of the Union and explained how the Union's hiring hall worked. If a unionized employee becomes unemployed, the employee's name goes on a list through the hiring hall. When an employer calls, the Union dispatches an employee from the list. Mr. Diederich testified that the Applicant did not put his name on the hiring hall list but that if he had, he would have been working almost immediately under the same terms and conditions that he had enjoyed at Honeywell. Mr. Diederich explained that given a hiring hall format, a collective agreement such as the one covering the Applicant would not typically have either a seniority clause or a bumping clause and would not provide for a severance payment. Mr. Diederich conceded that up until September 2001, he had been looking at the wrong collective agreement in regard to the Applicant's case because the three other employees who had been initially laid off were covered by a different collective agreement than the Applicant.

**[13]** Mr. Diederich discussed the November 3, 2000 Union memo with legal counsel and obtained a number of legal opinions from him. Union counsel exchanged correspondence with counsel for the Employer in an attempt to obtain a better severance package for the affected employees, but to no avail. The final legal opinion letter prepared for the Union was dated April 8, 2002, and reads in part:

> *That brings the union back to its original decision. Under the Collective Agreement, the employer is entitled to lay off pipefitters under Article 6.01. In this case, the union has accepted the employer's rationale for this decision. At a national level, Honeywell decided to downsize its operations due to financial constraints. The Collective Agreement does not contain a seniority clause, and thus there was nothing preventing Honeywell from selecting whichever employees it considered necessary to achieve its objective of downsizing its operations. In return, the employees are protected by the ability to find other work through the union hiring hall.*

**[14]** Mr. Diederich did not conduct an extensive investigation into the Applicant's disputes with the Employer described in the November 3, 2000 memo, though he had some familiarity with the 1998 Battle School Division situation. Mr. Diederich had a number of discussions with the Applicant about his grievance and ultimately concluded, based on the downsizing of Honeywell in Saskatchewan, that the Applicant was laid off. Mr. Diederich did not himself have any conflict with the Applicant. He believed that the Union's finances would have been sufficient to cover the costs of arbitrating the Applicant's grievance. Mr. Diederich testified that the Applicant was not on any Union committees and was not doing any organizing work for the Union. He testified that he did not believe the Union could win an arbitration for the Applicant.

## Relevant Statutory Provisions

**[15]** Section 25.1 of the *Act* 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.*

## Applicant's Argument

**[16]** The Applicant argued that the Union had not conducted a fair and thorough investigation into the circumstances surrounding his lay off and that he was entitled to have an arbitration ordered by the Board. The Applicant alleged that his lay off was nothing more than a dismissal without cause and that he had been dismissed because of run ins with management and because he stood up for his Union rights.

## Union's Argument

**[17]** The Union argued that it had looked at the Applicant's case carefully and come to the conclusion that the grievance would be unsuccessful. The Union retained counsel early in the process and obtained a number of legal opinions in regard to the applicable issues. The Union claimed that under the collective agreement the Employer did not need to give a reason for the Applicant's lay off. In any event, given the extensive lay offs of both in-scope and out-of- scope

employees, the Union accepted the Employer's explanation that the Applicant was laid off and not dismissed without cause.

## Employer's Argument

**[18]** The Employer did not argue the merits of the case but wanted it on the record that in the event the Board ordered the Union to arbitrate the Applicant's grievance, the Employer was reserving all rights and defenses which it possessed.

## Analysis and Decision

**[19]** The parties were in agreement as to the case law that the Board should consider in a duty of fair representation case. The Board's general approach to applications alleging a violation of s. 25.1 of the *Act* was summarized in *Laurence Berry v. Saskatchewan Government Employees' Union*, [1993] 4th Quarter Sask. Labour Rep. 65, LRB File No. 134-93 at 71-72 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.*

**[20]** The Brief of Law submitted on behalf of the Applicant conceded that he was unable to rely upon the common law for damages. The Applicant argued that the Union breached its duty of fair representation when it chose to grieve his lay off solely on the basis that the Applicant was entitled to a larger severance package. According to the Applicant, the Union should have accepted his assertion that he was not laid off, but rather dismissed without cause.

**[21]** One factor supports the Applicant's claim that he was dismissed rather than laid off: the Applicant was arguably the Employer's most important employee in that he was the only Honeywell Saskatchewan employee who had the Fire Alarm Verification certification and therefore, the only Saskatchewan employee who could perform fire alarm verification work. One could therefore understand the Applicant's view that it made little sense for the Employer to pick him to be laid off and that, in reality, he was dismissed without cause. However, the fact remains that the Employer made some significant changes to its Saskatchewan operations. These changes included laying off a number of in-scope and out-of-scope personnel. The fact also remains that the Employer had a more qualified employee than the Applicant complete the City Hospital project. The Union considered these factors in arriving at its decision not to proceed to arbitration with the Applicant's grievance.

**[22]** It is the Board's opinion, based on the evidence, that the Union did not violate s. 25.1 of the *Act*. The Union representatives sufficiently investigated the facts and circumstances surrounding the Applicant's case. The Union retained counsel and obtained legal opinions in regard to the issues and to the Union's chances of success at arbitration. Based on the Employer's significant downsizing of both in-scope and out-of-scope staff in Saskatchewan, the Union accepted that the Applicant was, in fact, laid off. In deciding not to proceed to arbitration, the Union took a reasonable view of the

situation and made a thoughtful decision based on legal advice obtained. The Union did not act in a manner which could be deemed arbitrary, discriminatory or in bad faith.

**[23]** For the foregoing reasons, the application is dismissed.

# CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 4532, Applicant v. FIRSTBUS CANADA LTD., Respondent

LRB File No. 067-02; June 6, 2002
Chairperson, Gwen Gray, Q.C.; Members: Brenda Cuthbert and Bruce McDonald

For the Applicant: Harold Johnson
For the Respondent: M. Jean Torrens

**Bargaining unit – Amendment – Local of national union files raid application to certify bargaining unit comprising membership of two other locals of same union – Board exercises powers under s. 19(2) of *The Trade Union Act* to identify reliance on raid provisions under s. 6 of the *Act* as defect in application – Board deems application to be an amendment application under s. 5(i), (j) and (k) of the *Act* – Union leads no evidence as to appropriateness of proposed bargaining unit and fails to establish that review of existing bargaining structures justified – Board dismisses application.**

**Practice and procedure – Non-suit – Local of national union files raid application to certify bargaining unit comprising membership of two other locals of same union – Board relies on s. 19(2) of *The Trade Union Act* to identify reliance on raid provisions under s. 6 of the *Act* as defect in application – Employer moves for non-suit, claiming applicant failed to establish that review of existing bargaining structures justified – Board accepts motion and dismisses application.**

***The Trade Union Act*, ss. 5(i), 5(j), 5(k), 6(2) and 19(2)**

## REASONS FOR DECISION

### Background

**[1] Gwen Gray, Q.C., Chairperson:** The Board certified the Canadian Union of Public Employees, Local 4441 ("Local 4441") on May 30, 2001 for a bargaining unit comprising all permanent and spare bus drivers employed by FirstBus Canada Limited (the "Employer") under contract to the Battlefords School Division No. 118 in Saskatchewan, except the supervisor and mechanics.

**[2]** On June 19, 2001 the Board certified the Canadian Union of Public Employees, Local 4454 ("Local 4454") for a bargaining unit comprising all transit drivers, mechanics and drivers employed by the Employer in connection with the Battlefords Trade and Education Centre contract.

**[3]** During the respective open periods, employees in both bargaining units applied for rescission of the certification Orders. The Board has ordered that votes be conducted in both units: see LRB File Nos. 066-02 (Beattie) & 079-02 (Labrecque).

**[4]** The Canadian Union of Public Employees, Local 4532 ("Local 4532") made the present application to certify a "new" bargaining unit comprising all employees of the Employer in the Town of Battleford and the City of North Battleford except the supervisor. Counsel for Local 4532 referred to the application as a raid application, that is, Local 4532 was applying to replace Locals 4441 and 4454 in an expanded bargaining unit. Support evidence was filed with this application.

**[5]** There was no indication in Local 4532's application for certification that the applicant was seeking to replace Locals 4441 and 4454. The applicant did not declare in the application that another trade union currently represented the employees in question. On its face, the application appeared to the Board to be a new certification and, as such, was scheduled in accordance with the Board's policy to fast track certifications and rescissions.

**[6]** At the first hearing date on May 13, 2002 the Employer protested that the application was in essence an application to amend the bargaining unit by amalgamating two locals of the Canadian Union of Public Employees ("CUPE") into one bargaining unit. The Employer argued that the application was improperly scheduled on the fast track for new certifications and that it was an abuse of the Board's process. The Employer sought an adjournment of the application to May 21, 2002.

**[7]** Counsel for Local 4532 argued that the application was a raid application and should be dealt with under the Board's quick certification rules. Counsel argued that the matter should be dealt with as an in-camera matter because the Employer failed to file its reply within the time specified in the regulations.

**[8]** The Employer denied that its reply was filed outside the time frame permitted in the regulations.

**[9]** The Board agreed to adjourn the matter to be heard on Tuesday, May 21, 2002 in conjunction with LRB File No. 079-02. The Board also advised Local 4532 that it would treat the application as an application to amend the bargaining unit, not as a raid or certification application,

as there were not two competing unions involved in the application. The Board also advised that it would hear the applications in the order that they were filed, which meant that Local 4532's application would be heard prior to the application for rescission filed in LRB File No. 079-02 (Labrecque).

**[10]** The Board advised the parties at the time that it viewed the issues on the application as including (1) support evidence; and (2) the appropriateness of the proposed amended bargaining unit.

**[11]** Following the May 13, 2002 hearing, counsel for Local 4532 (who also appeared as counsel for Locals 4441 and 4454 on the rescission applications) wrote the Board to ask for clarification of the Board's ruling that it would treat the application for certification (raid) as an application for an amendment. Counsel also objected to the Board's directive and argued that, had the Board left the matter alone, Local 4532 would automatically be entitled to a vote between Locals 4441 and 4454 and Local 4532 under the raid provisions contained in s. 6(2) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*").

**[12]** The Board replied to counsel for Local 4532's letter as follows:

> *I have Mr. Johnson's letter of May 16, 2002. I indicated at the hearing on Monday, May 13, 2002, that the application for certification (which implicitly is filed as a raid application under s. 6(2) of the Act) will be treated as an application to amend the existing orders under s. 5(i), (j) and (k) of the Act. The Board has jurisdiction under s. 19(2) to amend a defect for the purpose of determining the real question in dispute. The defect is the implicit reliance on the raid provisions under s. 6 of the Act.*
>
> *The issues on an application to amend are similar to a certification – that is, the appropriateness of the bargaining unit, the degree of support for the proposed amendment, and the timeliness of the application.*
>
> *If the Applicant Local wishes to argue the matter as a raid, then I would expect that separate counsel would represent the two existing locals of CUPE and some evidence would be presented with respect to the issue of whether the Applicant Local in LRB File No. 067-02 is a different trade union from the existing locals of CUPE. Since the Applicant indicated in paragraph 6(a) of the application that no other trade union claims to represent employees in the proposed bargaining unit, we assume that CUPE does not consider each local of its national body to be a distinct trade union. If this is not the case, then the cards filed as support evidence will need to be examined to determine if the Applicant Local is clearly identified as the raiding trade union.*

*On the issue of a vote, the Board has already ordered that a vote occur on LRB File No. 066-02 (Beattie case). There is support evidence filed on LRB File Nos. 067-02 and 079-02. On its face, the support evidence is contradictory as each application purports to be filed with majority support. For these reasons, the Board directed the parties to view the matter as requiring a vote if the amended bargaining unit is accepted as an appropriate unit. The issue requires some thought as there is a potential for three votes (2 rescission votes and one amendment vote). The Board was signaling this as an issue for the parties to address at the hearing of 067-02 and 079-02 on Tuesday, May 21.*

*I trust this assists in clarifying the Board's directions at the May 13 hearing.*

**[13]** The support evidence filed on the "raid" application between Locals 4441 and 4454 did not refer to a local of the national union. The cards simply identified the union as the Canadian Union of Public Employees. If Local 4532 insisted on the matter being dealt with as a "raid" application, it did not have cogent support evidence.

**[14]** On May 21, 2002 the Board conducted a hearing of this matter and LRB File No. 079-02 in Saskatoon. At the opening of the hearing, counsel for Local 4532 requested an adjournment of the application to permit him time to consult with the national offices of CUPE with respect to the Board's comments that Local 4532 is not able to "raid" Locals 4441 and 4454, because it is not a different union. Counsel indicated that he required instructions from CUPE head office to deal with this issue.

**[15]** The Board pressed counsel for Local 4532 to explain why he would need an adjournment to deal with issues that are internal to CUPE. If everyone agreed that Local 4532 was the proposed bargaining agent for the proposed amended bargaining unit, would the consultation with CUPE head office be required?

**[16]** Counsel responded that he wanted to be sure that Local 4532 was the union appearing on any ballot and that the raid application was the only method of ensuring Local 4532's entitlement to be included on a ballot.

**[17]** The Board asked if the Employer opposed the use of Local 4532 as the trade union on the amendment application and counsel for the Employer indicated that it was not concerned with the internal structure of CUPE and would accept that Local 4532 had been designated as the Local for

the proposed amended bargaining unit. With this issue apparently out of the way, the Board proceeded to hear the main application.

**[18]** On the main application, Local 4532 rested on the materials filed. It did not lead any evidence with respect to the appropriateness of the proposed bargaining unit, nor did it address the issue of support. Counsel reiterated that the application was an application for certification and no evidence was required beyond that contained in the application and the support evidence.

**[19]** The Employer then moved for non-suit without electing not to call evidence should the non-suit be unsuccessful. The Employer argued that Local 4532 had failed to lead any evidence showing any material changes to the bargaining structures that would justify the Board setting aside its previous certification Orders and issuing an amended Order for the proposed bargaining unit. In support of her argument that a material change is required to upset existing bargaining structures, counsel referred the Board to *Federated Co-operatives Ltd.*, [1978] July Sask. Labour Rep. 45, LRB File No. 502-77; *Battlefords Regional Care Centre,* [1989] Summer Sask. Labour Rep. 80, LRB File No. 186-88; *Saskatchewan Association of Health Organizations,* [1999] Sask. L.R.B.R. 549, LRB File No. 078-97; *City of Saskatoon,* [2000] Sask. L.R.B.R. 390, LRB File No. 235-98 & 255-98.

**[20]** In reply, Local 4532 argued that there was some evidence in support of the proposed bargaining unit because the statements of employment filed on the three applications relating to these bargaining units shows an overlap of individuals working in the bargaining units.

**[21]** The Board reserved its decision on the motion. In these Reasons, the Board accepts the Employer's motion for non-suit and dismisses Local 4532's application.

## Analysis

**[22]** In the present case, Local 4532 had to address two issues: (1) the appropriateness of the proposed bargaining unit; and (2) the issue of support. Both of these issues required some evidence. The Board identified the issues at the hearing on May 13, 2002 and in its correspondence set out above. There is no evidence before the Board on the first issue of the appropriateness of the proposed bargaining unit. On the issue of support, the Board required some explanation as to the significance of the absence of a reference to Local 4532 on the card support filed with the Board.

**[23]** The application, no matter how it was characterized – that is, as a raid or as an amendment – needed to demonstrate that the bargaining units assigned to Local 4441 and 4454 were no longer appropriate bargaining units or that the proposed bargaining unit was more appropriate. In doing so, Local 4532 also needed to demonstrate that there had been some material change to justify a review by the Board of the bargaining unit structures. The Board addressed this issue in the *City of Saskatoon* case, *supra,* at 410 as follows:

> *It can be argued, as ATU did, that the Board already made this decision when it certified ATU with the supervisors included in its bargaining unit. We would agree that generally, when an application has been determined, a party who seeks to have the Board review and reverse a decision which it already made must demonstrate some compelling reason for revisiting the earlier decision. This rule has been applied by the Board when it has been asked to consider whether employees who were once included in a bargaining unit should now been excluded from the bargaining unit based on their performance of managerial functions: see City of Regina v. Canadian Union of Public Employees, Local 21, [1990] Summer Sask. Labour Rep. 80, LRB File No. 276-88 where the Board stated at 81:*
>
> > *Furthermore, where the position's relationship to the bargaining unit has already been decided by the Board or by the collective bargaining agreement, the Board has refused to grant amendment applications which seek to reverse the position's status unless the applicant can show that there has been a material change in the duties and responsibilities of the position since the date of the Order or agreement.*
>
> *In the present case, SCMMA has not established that the job functions of the supervisors in question have changed significantly over the years. ATU is correct in asserting that the positions have not changed significantly in their functions.*
>
> *The only real change that has occurred in the workplace has been the introduction of the middle management bargaining unit, which did not exist at the time that supervisors in the transit service were included in the general ATU bargaining unit. At that time, access to collective bargaining would be a significant factor in determining if the supervisory employees ought to be included in the large transit bargaining unit. Without inclusion in ATU, the supervisors would have remained outside of a collective bargaining regime, despite the fact that they are "employees" within the meaning of the Act.*
>
> *It would seem to the Board that the introduction of a middle management bargaining unit does permit a re-evaluation of the assignment of supervisory positions to the general bargaining unit. It is an intervening event that may cause the Board to reconsider an earlier decision to include supervisory personnel in a general bargaining unit. The issue no longer is simply a question of access to collective bargaining for this level of supervisory personnel. It is now a question of the appropriateness of the particular bargaining unit for the employees, based on the*

> *nature of their work functions. The test that will be applied, however, to determine which unit is appropriate for the particular supervisory employee remains the strict conflict of interest test set out above. The applicant seeking to remove one group from the general bargaining unit to the middle management unit must demonstrate that there is a labour relations conflict for the supervisory personnel between their obligations to perform supervisory duties on behalf of the Employer and their membership in the union.*

**[24]** As indicated, there was no evidence in the materials filed in the application, the reply or the statement of employment that addresses the issue of material change. The evidence of overlapping membership between Local 4441 and 4454, without more, does not demonstrate a material change of circumstance. This state of affairs may have existed at the time the certification orders were first issued. Without more, the Board is unable to determine (1) if there are grounds for reviewing the bargaining unit structures currently assigned to Locals 4441 and 4454; (2) if the bargaining units should be replaced by an amalgamated bargaining unit; and (3) if a vote should be ordered to determine employee support for the revamped bargaining structure.

**[25]** The Board must dismiss Local 4532's application as it failed to establish that a material change had occurred that justified a review of the bargaining structures and it failed to establish that the proposed bargaining unit was an appropriate bargaining unit.

# INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 2067, Applicant v. SASKATCHEWAN POWER CORPORATION, Respondent

LRB File No. 010-02; June 10, 2002
Chairperson, Gwen Gray, Q.C.; Members: Donna Ottenson and Judy Bell

For the Applicant: Ted Koskie
For the Respondent: Brian Kenny

**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 provision and where complete relief can be obtained through arbitration process – Board defers matter to grievance and arbitration process and adjourns unfair labour practice application *sine die*.**

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

## REASONS FOR DECISION

### Background

**[1] Gwen Gray, Q.C., Chairperson:** International Brotherhood of Electrical Workers, Local 2067 (the "Union") brought an unfair labour practice application against Saskatchewan Power Corporation (the "Employer") alleging that the Employer violated ss. 11(1)(a), (c) and (d) of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the "*Act*") by conducting a disciplinary interview with an employee without a shop steward present, by discouraging the employee from contacting the Union, and by failing to render its disciplinary decision in writing to the Union.

**[2]** The Union also filed a grievance on behalf of the employee in question relating to the same alleged disciplinary meeting. The grievance is working its way through the grievance process and has not yet been referred to an arbitrator.

**[3]** The employee in question filed a harassment complaint as well in relation to the same meeting.

**[4]** At the hearing of this matter, the Employer asked the Board to defer the unfair labour practice application to the grievance and arbitration process. The Employer argued that the central nature of the dispute is whether the meeting in question was a disciplinary meeting and whether the Employer violated the collective agreement provisions relating to the rights of employees to have shop stewards present during such meetings. The Employer denied that the meeting in question was disciplinary. The Employer pointed out that the Board would be required to examine the provisions of the collective agreement in order to decide the issue in this application. As the matter is currently pending in the grievance process, it should be allowed to continue through that process to arbitration, if required.

**[5]** The Union argued that the fundamental issue on the unfair labour practice is different from the fundamental issue on the grievance. In the grievance, the Union is seeking relief for the employee from the alleged discipline; in the unfair labour practice application, it is alleging that the Employer's conduct discouraged the employee from seeking the assistance of the Union and that the Employer's conduct undermined the role of the Union in the workplace. Counsel for the Union noted that although the remedies overlap, the basis of the unfair labour practice is broader than the grievance complaint.

**[6]** At the hearing, the Board advised the parties that it would defer this application to the grievance and arbitration process.

**[7]** The reasons for the decision to defer can be summarized as follows:

> (1) The central issue in the unfair labour practice and the grievance relates to the employee's entitlement to union representation during the meeting in question. This right arises from the collective agreement, and may, on the Union's theory of the effect of s. 2(b) and s. 11(1)(c), also arise under the *Act*. If the Board were to embark on an inquiry, it is possible that it would come to a different conclusion with respect to the nature of the meeting than would an arbitrator. The essential nature of the dispute is the same before this Board and an arbitration board hearing the grievance.
>
> (2) The issues before the Board can be determined in whole under the collective agreement. Legislative policy supports the use of arbitration as the method of resolving all disputes between parties to a collective agreement: see s. 25(1).

> (3) The Supreme Court of Canada in cases like *Weber* and *O'Leary* has significantly expanded both the nature of complaints that may be referred to the grievance and arbitration process and the remedies that may be granted. In the present case, the Union has contractual provisions (Article 1.02, Article 9) relating to its representational rights that could be placed before an arbitration board and remedies could be sought for any alleged representational interference. All of the issues raised by the Union on the application for an unfair labour practice could be raised through the grievance and arbitration provisions. In the present case, the Union argued that the grievance did not address the issue of representational harm to the Union. In our view, this issue is implicit in the grievance.

**[8]** The Board concludes that the three conditions described by the Saskatchewan Court of Appeal in *United Food and Commercial Workers v. Westfair Foods Ltd. et al.* (1992), 95 D.L.R. (4th) 541 entitling the Board to defer an application to the grievance and arbitration process are met.

**[9]** The Board advised the parties at the hearing that the application will be adjourned *sine die* to be brought back to the Board at the conclusion of the grievance and arbitration process by either party on notice to the other party if there are any issues remaining that were not dealt with by an arbitration panel assigned to hear and determine the grievance. An Order will issue accordingly.

# INDUSTRIAL WOOD AND ALLIED WORKERS CANADA, LOCAL 1-184, Applicant v. CABTEC MANUFACTURING INC., Respondent

LRB File Nos. 042-02, 043-02 & 044-02; June 10, 2002
Vice-Chairperson, James Seibel; Members: Mike Carr and Pat Gallagher

For the Applicant: Neil McLeod, Q.C.
For the Respondent: Kevin Lang

**Unfair labour practice – Anti-union animus – Employer acknowledges that discharge of employees motivated by anti-union animus – Board determines that employer's conduct had effect of intimidating employees and interfering with their right to select a trade union – Board finds violations of ss. 11(1)(a), 11(1)(e) and 11(1)(g) of *The Trade Union Act* – Board issues declaratory Order to that effect and directs employer to post Order and reasons in workplace for ten days.**

**Unfair labour practice – Dismissal for union activity – Employer acknowledges that discharge of employees motivated by anti-union animus – Employer's contention that other, non-culpable reasons informed decision to discharge employees not coherent or credible – Board finds violation of s. 11(1)(e) of *The Trade Union Act* and issues declaratory Order to that effect – Order and reasons to be posted in workplace for ten days.**

**Unfair labour practice – Interference – Communication - Employer admits to interrogating employees about their and their co-workers' support for the Union – Board finds violation of s. 11(1)(o) of *The Trade Union Act* – Board issues declaratory Order to that effect and directs employer to post Order and reasons in workplace for ten days.**

**Remedy – Unfair labour practice – Reinstatement and monetary loss – Employer makes whole employees who were unlawfully discharged – Board issues Order declaring that employer violated ss. 11(1)(a), 11(1)(e), 11(1)(g) and 11(1)(o) of *The Trade Union Act* – Board commends employer's efforts to rectify its violation of the *Act* but articulates need to have as matter of record that employer's conduct was unlawful and unacceptable.**

***The Trade Union Act*, ss. 3, 5(d), 5(e), 10.1, 11(1)(a), 11(1)(e), 11(1)(g) and 11(1)(o).**

## REASONS FOR DECISION

### Background

**[1] James Seibel, Vice Chairperson:** On March 21, 2002 Industrial Wood and Allied Workers Canada, Local 1-184 (the "Union") filed an application (LRB File No. 042-02) alleging that Cabtec

Manufacturing Inc. (the "Employer"), a millwork and office furniture manufacturer with a workforce of approximately 45 employees, had committed unfair labour practices in violation of ss. 11(1)(a), (e), (g) and (o) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"). The allegations arose out of conduct by officers of the Employer during the Union's organizing drive, including the questioning of employees as to whether they and/or other employees supported the Union, and the subsequent termination of the employment of six of the employees. The Union also filed applications seeking reinstatement of the employees (LRB File No. 043-02) and compensation for their monetary loss (LRB File No. 044-02). A few days after the impugned conduct, the Union filed an application for certification (LRB File No. 034-02), which is scheduled for hearing in the near future. The Employer subsequently reinstated all of the discharged employees and compensated them for their lost wages.

**[2]** On April 11, 2002 the Union filed similar applications alleging unfair labour practices (LRB File No. 058-02) and seeking reinstatement (LRB File No. 059-02) and compensation for monetary loss (LRB File No. 060-02) with respect to the discharge of two other employees.

**[3]** The Board was scheduled to hear all six applications on May 17, 2002. At the outset of the hearing, the Union sought leave to withdraw the applications for reinstatement and compensation for monetary loss in LRB File Nos. 043-02 & 044-02; the Board granted the request. The parties also advised that they had reached a tentative settlement of the applications in LRB File Nos. 058-02, 059-02 & 060-02, and requested that the hearing on those files be adjourned *sine die;* the Board also granted this request.

**[4]** The Board heard the unfair labour practice application in LRB File No. 042-02 on the basis of agreed facts contained in paragraphs 4(a) through (i) of the Union's application, which is in the form of a statutory declaration.

## Facts

**[5]** The facts on which the parties agreed are as follows:

> (a) The Union engaged in an organizing campaign leading to the filing of a certification application with the Labour Relations Board on March 19, 2002;
>
> (b) On or before March 15, 2002 the Employer and Ken Kowalchuk became aware of the union activity, and identified certain employees as supporting the Union;

(c) On March 15, 2002 Ken Kowalchuk, who is a director and an owner of the Employer, confronted an employee by the name of Jason Sernecky. He called Mr. Sernecky into a meeting with himself and Kim Kowalchuk, his brother and also an owner of the company. They interrogated Mr. Sernecky about the Union, asking, among other things, who had signed cards and the location of the cards. Mr. Sernecky was interrogated for approximately one-half hour;

(d) In the course of questioning Mr. Sernecky, Kim or Ken Kowalchuk said that the company would not tolerate a union coming in, and they would close the operation and move to Alberta. Ken or Kim Kowalchuk also said that they might cut back production, resulting in the loss of some work;

(e) Mr. Sernecky left the meeting, and shortly thereafter Ken Kowalchuk brought Jason Sernecky a termination letter dated March 15, 2002;

(f) On March 15, 2002 Ken Kowalchuk asked another employee, Jason Koshman, to meet with him in his office. Mr. Koshman refused to go unless another employee could accompany him. That request was refused. Shortly after that Jason Koshman received a letter of termination dated March 15, 2002;

(g) On March 15, 2002 Ken Kowalchuk also delivered termination letters to Jason Turner and Curtis Mazenc;

(h) On the morning of March 18, 2002 a letter of termination was delivered to another employee, Robert Iglesias;

(i) On March 15, 2002 Ken Kowalchuk asked another employee, Joell Kowal, if she had signed with the Union. She replied "no", being fearful of the consequences. On March 18, 2002 Ms. Kowal was terminated by means of letter of the same date.

**[6]** All of the letters of termination were identical, providing as follows:

*Due to a re-organization, we no longer require your services as an employee of Cabtec Manufacturing Inc.*

*Accept this as termination of your employment effective immediately. You must return any keys, security codes and property of Cabtec immediately.*

*Please dismiss your self and your personal belongings off the premises immediately and quietly.*

**[7]** Other facts that were not in dispute at the hearing included the following:

(a) The Employer admitted that the activity of the Union in relation to its organizing drive was, if not the primary reason, at least a relevant consideration in the termination of these employees' employment;

(b) Upon obtaining legal advice regarding the terminations, the Employer reinstated each of the 6 employees effective April 1, 2002 and compensated them for lost wages;

(c) The Employer has since co-operated with the Union with respect to the preparation of the statement of employment on the application for certification.

## Statutory Provisions

**[8]** Relevant provisions of the *Act* are as follows:

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

. . .

*5 The board may make orders:*

*(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;*

. . .

*10.1 On an application pursuant to clause 5(a), (b) or (c), the board shall make an order directing a vote to be taken by secret ballot of all employees eligible to vote, and may make an order pursuant to clause 5(g), where:*

*(a) the board finds that the employer or the employer's agent has committed an unfair labour practice or has otherwise violated this Act;*

*(b) there is no evidence before the board that shows that a majority of the employees in the appropriate unit support the application; and*

*(c) the board finds that evidence of majority support would have been obtained but for the unfair labour practice or violation of this Act.*

. . .

*11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:*

*(a) to interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of any right conferred by this Act, but nothing in this Act precludes an employer from communicating with his employees;*

. . .

*(e) to discriminate in regard to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including discharge or suspension or threat of discharge or suspension of an employee, with a view to encouraging or discouraging membership in or activity in or for or selection of a labour organization or participation of any kind in a proceeding under this Act, and if an employer or an employer's agent discharges or suspends an employee from his employment and it is shown to the satisfaction of the board that employees of the employer or any of them had exercised or were exercising or attempting to exercise a right under this Act, there shall be a presumption in favour of the employee that he was discharged or suspended contrary to this Act, and the burden of proof that the employee was discharged or suspended for good and sufficient reason shall be upon the employer; but nothing in this Act precludes an employer from making an agreement with a trade union to require as a condition of employment membership in or maintenance of membership in the trade union or the selection of employees by or with the advice of a trade union or any other condition in regard to employment, if the trade union has been designated or selected by a majority of employees in any such unit as their representative for the purpose of bargaining collectively;*

. . .

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

. . .

> *(o) to interrogate employees as to whether or not they or any of them have exercised, or are exercising or attempting to exercise any right conferred by this Act;*

## Argument

**[9]** Mr. McLeod, counsel for the Union, argued that the evidence on the agreed facts clearly established the alleged violations of the unfair labour practice provisions of the *Act*. The Employer admitted interrogating employees about their support of the Union and also acknowledged that the dismissed employees' support of the union was at least a factor in the decision to terminate their employment.

**[10]** Citing the decisions of the Board in *Saskatchewan Union of Nurses v. Jubilee Lodge Inc.*, [1990] Summer Sask. Labour Rep. 70, LRB File Nos. 021-90, 022-90 & 023-90, and *Canadian Union of Public Employees, Local 3990 v. Core Community Group Inc.*, [2001] Sask. L.R.B.R. 131, LRB File Nos. 017-00 to 022-00, Mr. McLeod submitted that first, the onus rests on the Employer to demonstrate that union activity played no part in the decision to discharge the employees, and second, that it had coherent and credible reasons untainted by any anti-union sentiment for discharging the employees.

**[11]** While Mr. McLeod acknowledged that the Employer had purported to remedy its breach by reinstating and reimbursing the six dismissed employees as soon as it received legal advice, he argued that a declaration that the Employer had committed unfair labour practices is still necessary. In asserting that the unfair labour practice provisions of the *Act* are integral to the recognition and enforcement of the rights of employees, including the right to organize, as set out in s. 3 of the *Act*, counsel referred to the following comments by Bastarache, J., in the recent decision of the Supreme Court of Canada in *Dunmore v. Ontario (Attorney General)* (2001) 207 D.L.R. (4th) 193, 2001 SCC 94, a case that dealt with the repeal of trade union and collective bargaining rights for agricultural workers in Ontario:

> *[22] . . . without the necessary protection the freedom to organize could amount "to no more than the freedom to suffer serious, adverse legal and economic consequences" (see H.W. Arthurs, et al., Labour Law and Industrial Relations in Canada (1993), at para. 431). . . .*
>
> . . . .

> *[36] In assessing the appellant's claim for the repeal of s. 3(b) of the [Ontario Labour Relations Act], it is essential to examine the essential ambition of the LRA. As numerous scholars have pointed out, the LRA does not simply enhance, but instantiates, the freedom to organize. The Act provides the only statutory vehicle by which employees in Ontario can associate to defend their interests and, moreover, recognizes that such association is, in many cases, otherwise impossible. This recognition is evident not only from the statute's protections against unfair labour practices, but from the express "right to organize" it inscribes in s. 5. . . .*

**[12]** Mr. Lang, counsel for the Employer, argued that while the union activity may have been a subordinate factor in the decision to discharge the six employees, the decision was primarily based on their productivity and work quality, and on them being the most junior staff. Counsel asserted that the Board's powers under s. 5 of the *Act* are permissive and that even if the evidence clearly supported the allegations that the Employer had violated the *Act*, there is no need for the Board to make a declaration to that effect, let alone to make any further remedial orders. He argued that for the Board to do so would, in fact, be counter-productive to the parties' labour relations.

**[13]** Counsel requested that the Board exercise its discretion not to issue an order based on consideration of the following factors: the Employer acted quickly to remedy the breach; the legislation has, therefore, already served its purpose; the Employer has "learned its lesson"; the employees are now aware that they cannot be dismissed for union activity; and, given that the application for certification has already been filed, the Employer's actions have not affected the Union's organizing drive or the support it enjoys.

**[14]** In reply, Mr. McLeod argued that it remains in the employees' interests that the Board issue an order. He asserted that the damage done to the Union's organizing efforts has not been completely remedied and that it is important that the Board make it clear to employers generally that they cannot engage in such conduct, and then purport to rectify it, without some sort of sanction.

## Analysis and Decision

**[15]** We must determine two issues: whether the Employer has committed a violation or violations of the *Act*, and if so, whether we should make declaratory or other remedial orders.

**[16]** The first issue is not difficult. On the agreed facts and undisputed evidence it is clear that the Employer committed unfair labour practices.

**[17]** The Employer admitted that it interrogated Mr. Serencky and Ms. Kowal about their support and/or the support of fellow employees for the Union. This conduct clearly violates s. 11(1)(o) of the *Act* and cannot be condoned.

**[18]** With respect to the discharge of the six employees in question and the alleged violation of s. 11(1)(e) of the *Act*, the Board summarized the applicable principles 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 583-85:

> *The Board has always attached critical importance to any allegation that the suspension or dismissal of an employee may have been affected by considerations relating to the exercise by that employee or other employees of rights under The Trade Union Act. In a decision in Saskatchewan Government Employees' Union v. Regina Native Youth and Community Services Inc., [1995] 1st Quarter Sask. Labour Rep. 118, LRB 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 s. 11(1)(e) of The Trade Union Act that any decision to dismiss or suspend an employee which is influenced by the presence of trade union activity must be regarded as a very serious matter. If an employer is inclined to discourage activity in support of a trade union, there are few signals which can be sent to employees more powerful than those which suggest that their employment may be in jeopardy. The seriousness with which the legislature regards conduct of this kind is indicated by the fact that the onus rests on the employer to show that trade union activity played no part in the decision to discharge or suspend an employee.*
>
> *The Board made further comment on the significance of the reverse onus under s. 11(1)(e) in The Newspaper Guild v. The Leader-Post, [1994] 1st Quarter Sask. Labour Rep. 242, LRB Files No. 251-93, 252-93 and 253-93, at 244:*
>
> > *The rationale for the shifting to an employer of the burden of proof under s. 11(1)(e) to show that a decision to terminate or suspend an employee was completely unaffected by any hint of anti-union animus has, in our view, two aspects. The first is that the knowledge of how the decision was made, and any particular information regarding the employment relationship involving that employee, is often a matter available exclusively to that employer. The trade union knows of the termination or suspension, knows of the union activity, and asserts that there is a link between them of anti-union animus. A decision that this link does in fact exist can often only be established on the basis of information provided by the employer. Whether this is described as a legal onus of proof, which is the basis of the challenge made by the*

> *Employer to the courts, or whether it is seen as an evidentiary burden, an employer must generally be able to provide some explanation of the coincidence of trade union activity and the suspension or termination in question.*
>
> *The second aspect of the rationale, which is particularly important in a case such as this one, where union activity with an employer is in its infancy, addresses the relative power of an employer and a trade union. An employer enjoys certain natural advantages over a trade union in terms of the influence it enjoys with employees, and the power it can wield over them, particularly where the power to terminate or discipline is not subject to the constraints of a collective agreement or to scrutiny through the grievance procedure. In these circumstances, the vulnerability of employees, and their anxieties, even if exaggerated, about the position in which they may be put by communicating what they know of the circumstances surrounding the dismissal to trade union representatives, and possibly to this Board, makes it difficult for the trade union to compile a comprehensive evidentiary base from which they may put their application in its fairest light.*

*As the Board has pointed out, it is not sufficient to meet the onus of proof under s. 11(1)(e) for an employer to demonstrate the existence of a defensible business reason for the decision to suspend or terminate an employee. In United Steelworkers of America v. Eisbrenner Pontiac Asüna Buick Cadillac GMC Ltd., [1992] 3rd Quarter Sask. Labour Rep. 135, LRB Files No. 161-92, 162-92 and 163-92, the Board made the following observation in this connection, at 139-140:*

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

*An important element of the task of this Board in assessing a decision which is the subject of an allegation made pursuant to s. 11(1)(e) is the evaluation of the explanation which is offered by an employer in defence of the decision to dismiss. In this respect, the Board has emphasized that our objective is somewhat different than that of an arbitrator determining whether there is "just cause" for dismissal. In The Leader-Post decision, supra, the Board made this comment, at 248-249:*

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

*As the Board has pointed out on a number of occasions, the fact that trade union activity is taking place does not mean that an employer is prevented altogether from taking serious disciplinary steps against an employee. The onus imposed on an employer by s. 11(1)(e) is not impossible to satisfy. There is no question, however, that it is difficult to meet. In order to satisfy ourselves that the grounds stated for a decision to dismiss an employee do not disguise sentiments on the part of an employer which run counter to the purposes of The Trade Union Act, it is necessary for us to evaluate the strength or weakness of the explanation which is given for a dismissal, in the light of other factors, including the kind of trade union activity which is going on, the stage and nature of the collective bargaining relationship, and the possible impact a particular disciplinary action may have on the disciplined employee and other employees.*

**[19]** In *Core Community Group Inc., supra*, the Board explained the nature of the determination with respect to the allegation that an employee was terminated for activity in relation to the exercise of rights under the *Act* as follows, at 149:

> *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 and 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.*

**[20]** In the present case, the Employer did not dispute that its knowledge that the Union was engaged in a campaign to organize its employees was at least a secondary reason for the discharge of the six employees in question. In fact, there was no actual evidence that there was any other reason. It was

simply the submission of counsel for the Employer that issues of productivity and quality of work were involved in the decision. There is no evidence that any of the employees had ever been warned or disciplined in any way for any conduct related to productivity or quality of work; the letters terminating their employment make no mention of such matters. Under the circumstances, the Employer has not satisfied the onus under s. 11(1)(e) of the *Act* necessary to rebut the presumption in favour of each employee that he or she was discharged contrary to the *Act* and not for good and sufficient reason unrelated to union activity. The Employer's explanation that the terminations were for non-culpable reasons in addition to union activity is not coherent or credible. The Employer is guilty of an unfair labour practice in violation of s. 11(1)(e) of the *Act*.

**[21]** The Union further alleges that the Employer's conduct outlined above violated ss. 11(1)(a) and (g) of the *Act* in that it interfered with, restrained, intimidated, threatened or coerced an employee in the exercise of a right conferred by the *Act*, and interfered in the selection of the Union as a representative of employees for the purpose of bargaining collectively.

**[22]** There is no evidence that the employees were discharged for reasons other than union activity and an anti-union animus on the part of the Employer. The agreed and undisputed facts lead to the ineluctable inference that the Employer's conduct, even if not so intended, objectively viewed, would have the effect of interfering with the exercise of rights under the *Act*. Moreover, even if we accepted the assertion of counsel for the Employer that the discharges were primarily for reasons related to productivity and quality of work, termination of employment is out all proportion to such alleged deficiencies, particularly where there has been no prior counselling or discipline.

**[23]** In *International Woodworkers of America, Local 1-184 v. Trail-Rite Flatdecks Ltd.*, [1982] Oct. Sask. Labour Rep. 42, LRB File Nos. 177-82 and 180-82, the Board found the employer guilty of an unfair labour practice under s. 11(1)(a) of the *Act*. The Board determined that while the employer may have been justified in reprimanding an employee for engaging in union activity on company time and premises, the manner and degree of reprimand were so unreasonable as to constitute coercion and were intended to discourage union activity.

**[24]** In the present case, the Employer accepts that Ms. Kowal was intimidated by the interrogation to which she was subjected in that she was "fearful of the consequences" if she said she had signed with the Union. As it turned out, her fear was reasonable. But the Union does not have to demonstrate that

any particular employee was actually intimidated or coerced to establish that there has been a violation of s. 11(1)(a) of the *Act*. In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Saskatchewan Centre of the Arts*, [1996] Sask. L.R.B.R. 67, LRB File Nos. 292-59 and 293-95, a case dealing with alleged interference by means of communication, the Board stated, at 73-74, that the assessment of an employer's conduct in the context of s. 11(1)(a) is objective. The test is whether the conduct would likely interfere with, restrain, intimidate, threaten or coerce "an employee of reasonable fortitude" in the exercise of rights under the *Act*.

**[25]** In our opinion, the assessment of whether there has been interference in the selection of a trade union within the meaning of the *Act* is also made objectively. In *The Newspaper Guild Canada/Communication Workers of America v. Sterling Newspapers Group, a Division of Hollinger Inc., operating 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 (Q.B.), the Board found the employer guilty of an unfair labour practice in violation of s. 11(1)(g) when it provided wage increases and bonuses to its non-union employees but not to its unionized employees, when its pre-certification practice was to provide such increases and bonuses to all its employees. The test is whether the Employer's conduct is likely to interfere with the selection of a trade union; an applicant does not have to prove that selection by any particular employees or group of employees was actually interfered with.

**[26]** Accordingly, on the agreed facts and undisputed evidence, we also find the Employer guilty of unfair labour practices in violation of ss. 11(1)(a) and (g) of the *Act*.

**[27]** The question remains whether, having found the Employer in violation of the *Act*, we should issue an order declaring same or granting any other relief.

**[28]** It is a virtual certainty that the Employer's conduct would have a "chilling effect" on the Union's organizing drive and on the employees' perception of the Union's effectiveness as a bargaining agent able to protect them from unlawful conduct by the Employer. The Employer is to be commended for recognizing its obligations and responsibilities during the organizing and certification process and for attempting to make whole the employees who were unlawfully discharged. However, the depth of the "chill," and the extent to which it may have been ameliorated cannot be measured with nicety.

**[29]** The Union has filed the certification application with such evidence of support as it was able to garner despite the Employer's unlawful conduct. The application was filed before the Employer purported to remedy its breaches of the *Act*. The application has not been heard and determined. This panel does not know whether the Union has majority support for the application. It does not know if or to what extent support for the Union remains affected by these events. It does not know whether the panel of the Board that hears the application will order a vote of the employees to determine support for the application or dismiss the application for lack of support or whether it will exercise its discretion under s. 10.1 of the *Act* should it find that evidence of majority support would have been obtained but for the violations of the *Act* by the Employer.

**[30]** Section 3 of *The Trade Union Act* sets out the purpose and object of the legislation, that is, to establish and preserve the rights of employees to organize and bargain collectively through a trade union of their choosing as their exclusive representative. We agree with the dicta of Bastarache, J. in *Dunmore*, cited *supra*, to the effect that the unfair labour practice provisions of labour relations statutes are what provide the protection for employees in their exercise of the express right to organize free of interference by their employer. It is important that these protections be jealously guarded and applied sincerely and with vigour, not least because of the significant contribution by trade unions to societal debate and their role in social change (see *Retail Wholesale and Department Store Union v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, at para. 35).

**[31]** In the present case, we wish to reiterate that we are impressed by the Employer's prompt action in reinstating the discharged employees and compensating them for their monetary loss. However, despite the Employer's agreement to the facts contained in the Union's application, it still attempted, at the hearing of this matter, to downplay the influence of union activity on its actions. In the circumstances, we find it necessary to state emphatically that there is no evidence that its actions were motivated by any thing other than an anti-union stance. If the Employer has since become educated as to its obligations and responsibilities – and we note with approval its present co-operation with the Union in completing the statement of employment – that is to be commended.

**[32]** An employer is in a position of power and influence over its employees. Beyond question, the actual loss of employment can be devastating for employees and their families. The threat of loss of employment, express or implied, may be used as an insidious and powerful tool to bend an employee to the employer's will. In the present case, it is important that the employees should know that the

Employer has honestly admitted that it violated *The Trade Union Act* and is presently co-operating with the Union. However, it is of overarching importance that the employees be aware that the Employer's conduct was unlawful and that they understand that they are absolutely entitled to exercise and enjoy their rights under *The Trade Union Act* free from interference or retribution by the Employer. It is also of overarching importance that employees and their employers understand that an employer is not entitled under any circumstances to interrogate their employees as to whether they or other employees support a union or are involved in union activity. Employees must know that those matters are matters of confidence between themselves and the union and that they will not be required to reveal them unless they do so voluntarily or are required to do so by operation of law.

**[33]** Finally, in the event that the Board may have occasion to consider the application of s. 10.1 of the *Act* on the application for certification, it is necessary that there be some record of the Employer's unfair labour practices.

**[34]** For these reasons, we will issue an Order declaring that the Employer has committed unfair labour practices in violation of ss. 11(1)(a), (e), (g) and (o) of the *Act*, and ordering that such violations cease. The Order and these reasons for decision shall be posted by the Employer for a period of ten (10) days from the receipt thereof in a place where notices to employees are ordinarily posted and they are likely to be seen and may be read by the majority of the employees in the workplace.

# INTERNATIONAL UNION OF OPERATING ENGINEERS HOISTING AND PORTABLE AND STATIONARY, LOCAL 870, Applicant v. RURAL MUNICIPALITY OF MEOTA No. 468, Respondent

LRB File No. 091-02; June 20, 2002
Vice-Chairperson, James Seibel; Members: Clare Gitzel and Maurice Werezak

For the Applicant: John Peterson and Jim Chisholm
For the Respondent: Clint Weiland

**Certification – Bar – Initial application for certification withdrawn by union – Employer argues that subsequent application for same bargaining unit barred pursuant to s. 5(b) of *The Trade Union Act* – Board confirms that bar applies when Board has already determined first application – Board issues certification Order on subsequent application.**

**Practice and procedure – Initial application for certification withdrawn by union – Applicant's withdrawal of application and subsequent filing of new application is not abuse of Board's process – Board holds that applicant may withdraw application prior to final determination by Board.**

***The Trade Union Act,* ss. 3, 5(a), 5(b) and 5 (c)**

## REASONS FOR DECISION

### Background

**[1] James Seibel, Vice Chairperson:** International Union of Operating Engineers Hoisting and Portable and Stationary, Local 870 (the "Union") has applied to be designated as the certified bargaining agent for a unit of all employees of the Rural Municipality of Meota, No. 468 (the "Employer"). The Union filed a certification application for the proposed bargaining unit but before the application was heard, withdrew it and filed a second application – the present application – for the same proposed unit. The Employer does not dispute that the proposed bargaining unit is an appropriate unit, but takes the position that the present application is an abuse of the Board's process and that the Board should dismiss the application and hear and determine the first application.

## Evidence

**[2]** Jim Chisholm has been an organizer for the Union for two years. He testified that he was responsible for the organizing drive of the Employer's employees. He described the sequence of events that resulted in two applications for certification being filed. The dates of certain uncontroverted facts are from the Board's files.

**[3]** The Union filed the first application for certification (LRB File No. 082-02) on May 8, 2002. In that application, the Union estimated there were three employees in the proposed bargaining unit. The Board Registrar sent a copy of the application to the Employer by registered mail on May 10, 2002; the Employer received it on May 13, 2002. The Employer sent a reply and statement of employment to the Board by facsimile on May 16, 2002. The Employer stated there were six employees in the proposed bargaining unit. The Board received the original reply and statement of employment on May 21, 2002.

**[4]** Before copies of the reply and statement of employment could be sent to the Union, the Union delivered a letter to the Board on May 21, 2002 advising that it was withdrawing the application in LRB File No. 082-02. The Board advised the Employer of the withdrawal by letter dated May 23, 2002. The Board Registrar returned the documentary evidence of support that accompanied the application to the Union on June 10, 2002.

**[5]** On May 21, 2002, the Union filed the present application for certification, accompanied by fresh support evidence in which it estimated there were five employees in the proposed bargaining unit. The Employer filed a reply and statement of employment on June 3, 2002 stating in part as follows:

> *The Employer says that the application made is an abuse of process of the Labour Relations Board. There is presently an application that has been made and responded to which has not been dealt with by the Board. The Employer will ask that that application be proceeded with or dismissed by the Labour Relations Board.*
>
> *The Employer says that the bargaining unit described in this application is an appropriate unit and that there are six employees in the unit on May 21, 2002. The Employer says, however, the application should be dismissed and that the Union should have to proceed with the first application filed.*

**[6]** Mr. Chisholm testified that he first made contact with an employee of the Employer in the summer of 2001 when he dropped off some information about the Union. He followed up a few months

later and traveled to Meota in early May 2002 to obtain cards in support of a certification application. He spoke to two of the employees and learned that a third was on days off. He filed the application in LRB File No. 082-02 in Saskatoon on May 8, 2002. He returned to Meota on May 10, 2002 to speak to the employee who had been on days off about joining the Union. He said he learned from that employee that there might be two more employees, in addition to the three he had spoken to up to that time. One of them worked at the rural landfill and another was off work on long term disability. No one knew whether the former was actually an employee of the Employer.

**[7]** Mr. Chisholm returned to the Union's offices and consulted with his superiors about what to do. He returned to Meota on May 17, 2002 and solicited new cards from the employees to support a new application for certification. On May 21, 2002, Mr. Chisholm filed a letter with the Board withdrawing the application in LRB File No. 082-02. The same day, but after delivering the notice of withdrawal, he filed the present application for certification accompanied by the new evidence of support.

**[8]** Mr. Chisholm stated that neither he nor the Union had received copies of the Employer's reply or statement of employment filed in LRB File No. 082-02, nor did he know that the Employer claimed there were six employees in the proposed bargaining unit before he filed the present application. The statement of employment includes an employee in the classification of "landfill maintenance" and another on "disability." Mr. Chisholm said the Union does not dispute that there are six employees in the proposed bargaining unit.

## Statutory Provisions

**[9]** Relevant provisions of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") include the following:

> *3 Employees have the right to organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing; and the trade union designated or selected for the purpose of bargaining collectively by the majority of the employees in a unit appropriate for that purpose shall be the exclusive representative of all employees in that unit for the purpose of bargaining collectively.*
>
> . . .

> 5 *The board may make orders:*
>
> *(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

**[10]** Mr. Weiland, counsel for the Employer, argued that the Board should properly deal with the merits of the application in LRB File No. 082-02, and dismiss the present application as an abuse of the Board's process. He based his argument first on the provision of s. 5(b) of the *Act* that the Board should make no order for certification "...in respect of an application made within a period of six months from the date of dismissal of an application for certification by the same trade union in respect of the same...unit of employees...," and second, on the general policy of the Board that it does not consider support evidence received after the application for certification has been filed. Mr. Weiland asserted that to do otherwise would be to encourage unions to file an initial application in order to discover who the employees are from the statement of employment, and then withdraw the application, continue organizing, and file a later application. Such a practice, he said, would not be good labour relations policy.

**[11]** Mr. Peterson argued on behalf of the Union that a union has the right to withdraw a certification application prior to the matter being heard and determined by the Board. He also argued that the evidence showed that the alleged abuse of process as described by counsel for the Employer has not occurred in the present case. That is, when the Union withdrew the application in LRB File No. 082-02 and filed the present application, it did not rely on any information about the number or identity of employees set forth in the Employer's reply or on the statement of employment on the first application because the Union never received those documents.

**[12]** No case authorities were cited on behalf of either party in support of their respective arguments.

## Analysis and Decision

**[13]** The issue raised by the Employer in this case is similar to that which was recently considered by the Board in *United Food and Commercial Workers, Local 1400 v. Vision Security and Investigations Inc.*, [2001] Sask. L.R.B.R. 805, LRB File No. 165-01. In that case, the employer argued that the term "dismissal" in s. 5(b) of the *Act* ought to be interpreted to include the withdrawal of a prior application for certification such as to bar a second application for the time period specified in the provision. Relying upon the decision of the Board in *United Steelworkers of America v. VicWest Steel Inc.*, [1989] Summer Sask. Labour Rep. 77, LRB File No. 270-88, chaired by then Chairperson Ball, the Board in *Vision Security, supra*, chaired by Vice-Chairperson Matkowski, rejected the argument.

**[14]** In *VicWest Steel, supra*, the arguments advanced on behalf of the employer were similar to those in the present case: first, the Board's acceptance of the union's withdrawal of its first application amounted to a dismissal within the meaning of s. 5(b) and a second application was thus barred; second, even if the application had not been dismissed, the Board should impose a six-month waiting period before permitting the second application to be made; and third, the Board should order a representation vote. In rejecting the employer's submission, the Board stated, at 78, as follows:

> *In the Board's view a withdrawal, which is voluntary and initiated by the applicant, is something separate and distinct from the dismissal, which can occur only after the Board has heard and determined an application on its merits. The prohibition contained in Section 5, clause (b) of The Trade Union Act expressly arises only upon the dismissal of an application. The language must be given its natural and ordinary meaning unless it appears to have been used in some special or technical way.*

**[15]** The Board in *VicWest Steel, supra,* went on to describe at 79, other jurisdictions' support of its view:

> *The foregoing authorities indicate that Section 5, clause (b) of The Trade Union Act has, or has had, counterparts in British Columbia, Ontario and Federal legislation and that interpretation in all three jurisdictions has been consistent: a second application for certification will not be barred, even when a first application is dismissed, unless the true wishes of employees were determined as a result of the first application.*

**[16]** But is that still the case? In Ontario, *The Labour Relations Act, 1995*, changed its certification procedures from a support card-based system to a vote-based system contemplating a vote within five

days of the application. The new procedures included the declaration that an application for certification could only be withdrawn by application to the board and an express discretion for the board to refuse to consider another application for certification by a trade union for a period of one year from the date of withdrawal where the union withdraws an application for certification before a representation vote is taken[1].

**[17]** In *Sara Lee Bakery Canada*, [1996] OLRB Rep. May/June 480, the Ontario Board declined to reconsider one of the first decisions that considered the effect of these then new provisions of the *Labour Relations Act, 1995*. In that case, the applicant union sought leave to withdraw its application for certification after receiving the employer's response listing the employees in the proposed bargaining unit. The Ontario Board granted leave to withdraw without a bar to another application. The union filed a second application for a bargaining unit reduced in scope. The Board accepted the second application. The employer applied for reconsideration of the Board's decision permitting the union to withdraw the first application without a bar.

**[18]** In *Sara Lee*, *supra*, at 484 the Ontario Board began its explanation for refusing reconsideration by citing its general approach to such situations as set out in *Repac Construction and Material Limited*, [1978] OLRB Rep. Jan. 9, as follows:

> *As a general principle the Board is quite reluctant to either bar, or refuse to entertain, a subsequent application for certification filed by a previously unsuccessful applicant. Indeed, such action is usually only taken either where employee desires have been tested by a representation vote in which the union failed to receive sufficient support to be certified (See: Campbell Soup Company Ltd., [1976] OLRB Rep. Feb. 1091), or where the union has sought to avoid an unfavourable vote result by withdrawing its application following the ordering of such a vote. (See Mathias Ouellette 56 CLLC para. 18,026). . . . In its consideration of any request pursuant to section 92(2)(i), the Board, concerned that the wishes of employees be given effect to, has always been careful not to use its authority under that section merely to punish an unsuccessful applicant union, even in those instances where the union may have engaged in previous irregular or*

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[1] Sections 7(8) and (9) of the Ontario *Labour Relations Act, 1995*, S.O. 1995, c.-1, provided as follows:

> *7(8) An application for certification may be withdrawn by the applicant upon such conditions as the Board may determine.*
>
> *7(9) If the trade union withdraws the application before a representation vote is taken, the Board may refuse to consider another application for certification by the trade union as the bargaining agent of the employees in the proposed bargaining unit until one year or such shorter period as the Board considers appropriate has elapsed after the application is withdrawn.*

> *improper conduct. (See: Fruehauf Trailer Company of Canada Limited [1974] OLRB Rep. Jan. 6.).*

**[19]** In *Sara Lee, supra*, the Ontario Board also cited with approval the similar conclusion of the panel in *R.J.R. MacDonald Inc.*, [1992] OLRB Rep. April 503. The latter referred to the object and purpose of the Ontario *Labour Relations Act* (as it then provided) as underlying the rationale for not generally barring a certification application after another has been withdrawn, even though the subsequent application may rely upon information provided in the employer's response to the first application and may cost the employer some time and inconvenience in responding again. The Ontario Board stated as follows at 505:

> *13. The purpose of The Labour Relations Act is to encourage the practice and procedure of collective bargaining. That purpose is set out on the Preamble to the Act, and is reflected, inter alia, in section 3 which guarantees employees the right to join a trade union and participate in its lawful activities. Certification is the mechanism whereby their union can become established as the employees' bargaining agent if that is the wish of the majority of them. Where there is no subsisting collective bargaining relationship, an application for certification can generally be made at any time.*
>
> . . .
>
> *15. [The discretionary bar provision of the Act] requires the Board to balance the rights of employees to form or join a trade union and the interests of employers (or objectors) to have that matter settled as simply and expeditiously as possible. . . . But the Board has been careful not to use its discretion ... to unduly circumscribe employee rights or "punish" an unsuccessful applicant – especially when such applicant will seldom have complete information about an employer's organization, and no means of acquiring that information apart from the application itself. In that context, it is difficult to ascribe "fault" for the way in which a proceeding develops – even though the employer will inevitably be put to some inconvenience responding to its employees' efforts to organize themselves.*

**[20]** In *Sara Lee, supra*, the Ontario Board held that the 1995 legislative changes to the method of acquiring representation rights and the express provisions regarding withdrawal of a certification application before or after a representation vote was ordered did not affect the applicability of the principles enunciated in its earlier jurisprudence on the issue. Indeed, it confirmed that there is nothing inherently improper, let alone abusive, in a union using information gleaned from an employer's response to a prior application for certification to assist in its preparation and prosecution of a subsequent application. The Ontario Board stated as follows, at 487:

> *45. We reject the employer's argument that the Board should embark upon an inquiry into an applicant's request to withdraw its application. In this case, the request to withdraw was made after receipt of the employer's response to the certification application, and prior to an order of the Board directing a vote. In those circumstances, the Board sees no need to inquire into the reasons for the request to withdraw. The board makes no findings with respect to the applicant's reasons for withdrawing in this case.*
>
> *46. It may often be the case that the applicant trade union will discover information from the employer's response that will cause it to withdraw its application. A trade union's ability to obtain accurate information about the identity of the employer, the configuration of the workplace, the number of employees, and other matters which may be relevant to the certification application, is limited. The employer's response to the certification application may provide new information to the applicant to cause it to reconsider the advisability of pursuing the application. Although an employer may suffer inconvenience in responding to a certification application which is subsequently withdrawn, the employer suffers no prejudice in the withdrawal of a certification application prior to the taking of a vote, and the subsequent refiling of a new application. We recognize that the subsequent application may be based upon information the union has gained from the first application but we see nothing improper in this.*

**[21]** Numerous decisions of the Ontario Board have approved of and followed the decision of the Ontario Board in *Sara Lee, supra*, even though the amendments to the *1995 Act* occasioned by the *Labour Relations Act Amendment Act, 2000*, S.O. 2000, c. 38 appear to eliminate any difference between the consequences of a withdrawal of an application after a representation vote and the dismissal of an application after a representation vote. See *Highview Plumbing & Heating Ltd.*, [2002] OLRD No. 1191; *Graphic Controls Canada Ltd.*, [2001] OLRD No. 2880; *Via Trim & Doors Inc.*, [2001] OLRD No. 2006; *Trust Tile and Hardwood Corp.*, [2001] OLRD No. 944; *Peek Frean, a Division of Christie Brown & Co.*, [2000] OLRD No. 1931; *Canadian Opera Company*, [1999] OLRB Rep. Sept./Oct. 804; *CFM Majestic Inc.*, [1999] OLRB Rep. May/June 378; *Baron Metal Industries Inc.*, [1999] OLRB Rep. May/June 363.

**[22]** In British Columbia, a time bar to further applications for certification is also discretionary, but is generally only imposed to insulate an employer from "substantial and excessive workplace disruptions caused by repeated organizing campaigns": See *Cowichan Valley Association for Community Living v. British Columbia Government and Service Employees' Union* (1993), BCLRB No. B366/93.

**[23]** Section 3 of *The Trade Union Act* setting forth the object and purpose of the *Act* remains unaltered since before the Board's decision in *VicWest Steel, supra.* Those objects include the preferment and protection of the right of employees to organize and bargain collectively through the trade union of their choosing. In *VicWest Steel, supra,* consonant with those objects, the Board concluded, at 79, that as the true wishes of the employees had not been determined as a result of the first application, a second application would not be barred, and that, "even if Section 5(b) were broad enough to bar a 'withdrawn' application, the Board would abridge the period to permit an order to be made".

**[24]** In *Sheet Metal Workers' International Association, Local 296 v. Daycon Mechanical Systems*, [1998] Sask. L.R.B.R. 187, LRB File No. 260-97, the applicant union had no opportunity to withdraw its application for certification prior to the hearing because the employer, who had indicated in its reply to the application that there were no employees in the proposed bargaining unit, changed its position at the hearing. In allowing the union to withdraw the application without conditions, the Board held, at 188, that "an applicant to an application before the Labour Relations Board may withdraw its application prior to a final determination being rendered by the Board where there has not been any abuse of the Board's processes."

**[25]** In the present case, the Union withdrew its first application for certification before it had any knowledge of the contents of the Employer's reply or the statement of employment; it then filed a second application for certification with fresh evidence of support. There is absolutely no evidence that its actions intentionally or otherwise are an abuse of the Board's processes. There is no evidence that the Employer has been harassed, has suffered any disruption of production or deterioration of work relationships, or has otherwise been prejudiced as a result. There has been no adjudication of the first application on the merits; no findings of fact or determination of the rights of the parties have been made.

**[26]** In the absence of evidence that the withdrawal of an application for certification constitutes an abuse of process, an applicant may withdraw the application before it has been determined by the Board. Even if the Union in the present case had had knowledge of the Employer's reply and the statement of employment when it withdrew the first application and used that knowledge to assist in its further organizing efforts to file the second application, without more, we would not find that there had been an abuse of process. As the Ontario Board stated in *Highview Plumbing, supra*, at para. 20:

> *Obviously applicants will file their applications (whether it be a certification application or a termination of bargaining rights application) when it is most advantageous to the applicant. That is not a violation of the Act.*

**[27]** The Ontario cases also reveal that the Ontario Board routinely allows an applicant to transfer the evidence of support from the first application to the second and to add additional evidence of support to the second application. The fact that the applicant union may have relied on material in the employer's response in taking such action is generally immaterial. In *Highview Plumbing, supra,* at para. 22 the Ontario Board approved of the principle enunciated in *Sara Lee, supra*, that:

> *. . . there is nothing improper in a union's subsequent application (after having withdrawn the first application) relying on information obtained in the first application through the employer's response.*

**[28]** We do not have to consider whether this would have been allowed in the present case because the Union did not rely on the Employer's reply and filed fresh evidence of support on the second application.

**[29]** We are of the view that the approach that allows withdrawal of one application for certification and the subsequent filing of a second application, prior to the determination by the Board of the first application, in the absence of any evidence of an abuse of process, is consonant with the protection of employees' rights set out in s. 3 of the *Act*.

**[30]** We find that in the circumstances of this case, a bargaining unit comprising all employees is an appropriate unit. The Union has filed evidence that the Application is supported by a majority of employees in the proposed bargaining unit. An Order for certification will issue in the usual form.

**UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1985, CONSTRUCTION AND GENERAL WORKERS UNION, 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, HOISTING AND PORTABLE AND STATIONARY, LOCAL 870 and OPERATIVE PLASTERERS AND 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; July 5, 2002
Vice-Chairperson, Walter Matkowski; Members: Duane Siemens and Leo Lancaster

| | |
|---|---|
| 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.: | M. Jean Torrens |
| For Points North Construction Ltd.: | Jay Watson |

**Reconsideration – Criteria – Board reviews grounds on which applications for reconsideration may be granted – Board concludes that criteria not met and dismisses application for reconsideration.**

**Reconsideration – Practice and procedure – Original Board ruling was not significant policy adjudication – Board dismisses application for reconsideration.**

**Reconsideration – Practice and procedure – Original Board ruling has not operated in unanticipated manner – Board dismisses application for reconsideration.**

*The Trade Union Act*, s. 13

## REASONS FOR DECISION

### Background

**[1] Walter Matkowski, Vice Chairperson:** United Brotherhood of Carpenters and Joiners of America, Local 1985, Construction and General Workers Union, Local 890, Construction and General

Workers Union, Local 180, International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771, International Union of Operating Engineers, Hoisting and Portable and Stationary, Local 870 and Operative Plasterers and Cement Masons International Association, Local 222 (the "Unions") applied to the Board for reconsideration of a procedural ruling it made on May 22, 2002 in this matter. The Board ruled on May 22, 2002 that witnesses would be excluded, including the Union business managers who were to testify for the successorship and abandonment portion of the hearing. The Unions made the application on the following grounds:

> a) The Board's ruling has operated in an unanticipated way and will have an unintended effect;
>
> b) The Board's ruling is precedential and amounts to a significant policy adjudication which the Board may wish to refine, expand upon or otherwise change;
>
> c) The same was an *ad hoc* ruling made during a hearing which the Board may wish to reconsider after more complete argument and deliberation; and
>
> d) There is no transcript nor written decision concerning the ruling.

**[2]** The background to the Board's May 22, 2002 ruling stems from the Board's decision dated December 13, 2001 that it would hear evidence and argument on the Graham Construction and Engineering Ltd. and Graham Construction and Engineering (1985) Ltd. ("Graham") successorship and abandonment issues. That portion of the case commenced on May 22, 2002.

**[3]** On May 22, 2002 Mr. Plaxton, counsel for the Unions, advised the Board that he proposed to call one or two members from each of the six Unions as witnesses. Mr. Plaxton stated that he was unsure who his advising party would be for two of the Unions but that for the other four Unions, his instructing parties, the business managers, would testify. Mr. Plaxton said that each of the business managers would sit as his advisor and therefore would hear a number of the other business managers testify.

**[4]** Graham and the other Respondents objected to Mr. Plaxton's proposed procedure in that, from their perspective, an injustice would occur given that credibility was an issue and all the witnesses would cover some of the same ground. The Respondents asked for an order excluding witnesses. Mr. Plaxton conceded that credibility would be an issue and did not disagree that the Respondents would suffer an injustice. Mr. Plaxton did not argue that his advisors were indispensable or irreplaceable but asserted that as his advisors, the proposed witnesses had the right or were entitled, as parties to the

application, to be present in the hearing. Mr. Plaxton advised the Board that Mr. Todd, the business agent for the Carpenters Union, would testify on behalf of the Carpenters and on behalf of the five other Unions. Mr. Plaxton advised the Board that the other five Unions' business managers' testimony would be applied in the same manner as Mr. Todd's testimony; that is, to be applied as evidence for all the Unions.

**[5]** The Board agreed that the Unions would enjoy an unfair advantage during the presentation of their evidence and that an injustice would occur if the business managers were allowed to hear each business manager testify prior to their own testimony. The Board exercised its discretion and ruled that witnesses, including the business managers who were to testify, would be excluded.

**[6]** The Unions requested an adjournment to allow them to seek judicial review of the Board's procedural ruling. The Respondents did not object to the adjournment and thus the hearing was adjourned.

**[7]** The Unions have not proceeded with their judicial review application but rather have brought forward an application asking the Board to reconsider its ruling. The Board will provide the parties with a brief decision outlining why it proceeded in the manner it did in making the ruling.

## May 22, 2002 Ruling

**[8]** At the hearing on May 22, 2002, following an adjournment to allow the parties to conduct research, the Respondents asked that the Board follow the logic set out in two previous Saskatchewan decisions dealing with the exclusion of witnesses. In *Simpson v. Chiropractors' Association of Saskatchewan*, [1997] S. J. No. 340, Barclay J. provides at pp. 2 and 3:

> *The general principle is that every person has an inherent right to be present at a trial or any other proceedings to which he was a party. Sissons and Simmons v. Olson (1951), 1 W.W.R. (N.S.) 507 (B.C.C.A.). However, Mr. Justice O'Halloran at p. 510 stated:*
>
> > *Acceptance of this conclusion does not deny jurisdiction in the court at the trial or in the presiding judicial official at any stage of the proceedings to order the physical exclusion of a party, should a violation of an essential of justice occur or be threatened, if exclusion is not directed. What may constitute such a violation depends on the situation in each case appraised in its own atmosphere, see Bird v. Vieth (1899) 7 B.C.R. 31.*

> *The court went on to state that a party may be excluded if their credibility will be a factor. This is reflected in the judgment of Smith J. A. at p. 511:*
>
> > *The cases are well reviewed in Pam v. Gale [1950] 2 W.W.R. 802 (Man.) and I need not go through them. I do not think they establish that a party has a legal right to be present at all times. The weight of authority holds, I think, that either at a trial or on discovery a party cannot be excluded while his co-party testifies, without cause shown. But I do not think the onus of showing cause thus put on the opposite party is a heavy one; and I think the onus is lighter on discovery than at a trial, since the possibility of injustice from exclusion is more remote. Even at a trial, I think the chance of injustice being done in this way is extremely small. But in many cases the chances of injustice to the opposite party from refusal to exclude may be very substantial. I think the benefit of any real doubt should be given to the party asking for exclusion. If from the pleadings or otherwise it appears that the examinations of the co-parties will cover the same ground, and that their credibility will be a factor, then it seems to me their exclusion should be ordered.*

See also: Basu v. Bettschen (1975), 55 D.L.R. (3d) 755 (Sask.Q.B.), per Bence C.J.Q.B.

**[9]** The Board therefore accepts that the respective business managers, as Union advisors and witnesses, are under normal circumstances entitled to be present for this portion or for that matter all portions of the hearing, unless the chance of injustice to the opposite party from refusal to exclude may be substantial.

**[10]** The Respondents then argued that Queen's Bench Rule 272 should be reviewed and its logic applied in the case at hand. Rule 272 states:

> *The judge at the trial may at the request of either party order a witness to be excluded from the court until he is called to give evidence, and may also order any party intending to give evidence to be so excluded, and if the judge does not deem it expedient to order such party to be excluded he may require such party to be examined before the other witnesses on his behalf. Any such witness or party who does not conform to such order shall be liable to be punished, as to the judge may seem just, and the judge may in his discretion, exclude the testimony of any witness or party who does not conform to such order.*

**[11]** The Law of Evidence in Canada, Sopinka, Lederman and Bryant, 2nd Edition (Butterworths: Ontario, 1999), outlines the purpose for excluding witnesses at page 902:

> *Upon the request of a party, the judge will, as a matter of course, grant such an order. The purpose of excluding witnesses is to preserve a witnesses' testimony in its original state. A witness listening to the evidence given by another may be*

*influenced by the latter's testimony and, accordingly, change his or her evidence to conform with it. Also, by being present in the courtroom and listening to testimony prior to giving evidence, he or she may be able to anticipate, and thereby reduce the effectiveness of, the cross-examination that will ultimately be faced. It may also facilitate collusion by allowing a witness to tailor the evidence to fit that of another. An order excluding witnesses seeks to eliminate this potential unfairness. Moreover, exclusion of witnesses may reveal earlier collusion. The similarity of language and phrases used may expose the fact that the witnesses had compared their version of events and memorized consistent stories.*

**[12]** In arriving at its decision to exclude witnesses, the Board considered the following:

a) Counsel for the Unions agreed with counsel for the Respondents that credibility would be in issue, that the Unions' witnesses would cover some common ground and that the Unions have common interests;

b) Counsel all agreed, as is set out in the pleadings, that the Board will hear evidence dealing with incidents or events which occurred in or subsequent to 1985. For example, the Unions' application refers to the "Graham Group of Companies" as being interrelated and to the creation of Graham Construction and Engineering (1985) Ltd. in either 1985 or 1986. Graham, in its reply, states that it operated openly in Saskatchewan from 1985 to 1997 and that the Unions never made contact to suggest that Graham was a unionized contractor. Thus, Graham pleads that the Unions have abandoned any claim that they represent Graham employees;

c) Counsel for the Unions did not successfully contest the Respondents' assertion that there would be some prejudice to the Respondents or some element of unfair advantage to the Unions' witnesses if the Unions' witnesses were able to listen to each other testify;

d) Counsel for the Unions did not point to any specific injustice which would occur if the Unions' witnesses were not allowed to listen to each other testify. He asserted that as counsel for the Unions, he was entitled to six instructing parties. In spite of this assertion, counsel for the Unions led the Board to believe through his representations to the Board that he would not have instructing parties for certain Unions at various stages of the successorship and abandonment hearing. For example, Mr. Todd, who is the Carpenters Union's business agent and the instructing party for the Carpenters Union, would proceed as counsel's first witness, leaving him with no instructing party for the Carpenters Union. Likewise, counsel for the Union stated that he did not know who would be his instructing party for two of the other Unions, with one of those instructing parties probably giving evidence from Edmonton via telephone. From these comments made by counsel for the Union, the Board concluded that the presence of the business managers was not essential for the Unions' case;

e) The Board's ruling would have no effect on a truthful witness for the Unions. The Board's ruling also protects the integrity of the Board's ultimate decision in regard to the successorship and abandonment issues in that "the integrity of a decision is directly proportionate to the reliability of the evidence upon which it

is made." (See: Macaulay & Sprague, Practice and Procedure Before Administrative Tribunals at p. 17-11); and

f) The Board's ruling would not prevent the Unions from fully presenting their evidence before the Board. In addition, the Board's ruling would not prevent the Unions from fully arguing the successorship or abandonment issues before the Board. Likewise, the Board is not interfering with the Unions' right or ability to know the case against them.

**[13]** The Board therefore made a ruling excluding witnesses, including the Union business managers who were to testify, for the successorship and abandonment portion of the hearing. The Board advised Mr. Plaxton that he was entitled to have other instructing parties present from the various Unions who will not be testifying in regard to the successorship and abandonment issues. While the hearing ended abruptly at this stage without further discussion with counsel, if at some stage of the successorship and abandonment portion of the hearing Mr. Plaxton advises the Board that an instructing party or parties cannot adequately instruct him, the Board will entertain Mr. Plaxton's request for an adjournment to allow him to consult with the individual Mr. Plaxton believes can instruct him.

## Reconsideration Criteria

**[14]** The criteria applied by the Board on an application for reconsideration are set out in *Remai Investment Corporation, operating as Imperial 400 Motel v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union et al.*, [1993] 3rd Quarter Sask. Labour Rep. 103, LRB File No. 132-93, as follows at 107-108:

> *Though the Board has the power under Section 5(i) to reopen decisions it has arrived at, this power must be exercised sparingly, in our view, and in a way which will not undermine the coherence and stability of the relationships which the Board seeks to foster. In a comment on an application for reconsideration of a decision of the British Columbia Labour Relations Board in Corporation of the District of Burnaby v. Canadian Union of Public Employees, [1974] 1 Can. L.B.R. 128, at 130, the Board asserted that "speed and finality of decisions are especially imperative in labour relations. Of no area of law is it truer to say that justice delayed is justice denied."*
>
> *In the three jurisdictions we have alluded to above - Canada, British Columbia and Ontario - the recognition of the need to balance the claim for reconsideration against the value of finality and stability in decision-making is reflected in the procedures adopted by labour relations tribunals. In all of them, the procedure followed in connection with an application for reconsideration departs from the procedure employed for other kinds of applications. In all three cases, the applicant is required*

*to establish grounds for reconsideration before a decision is made whether a rehearing or some other disposition of the matter is appropriate.*

*We have concluded that such a two-step approach is appropriate in cases of this kind. We do not agree with counsel for the Employer that we were mistaken in requiring that an applicant who seeks reconsideration of a decision of the Board must persuade us that there are solid grounds for embarking upon that course.*

*Counsel for the Employer argued that we should adopt the alternative of entertaining a full rehearing of the case, rather than establishing this intermediate stage. He predicted that this would not have the effect of an uncontrolled increase in the number of such applications. It is difficult to see, however, why allowing an automatic trial de novo to a disappointed applicant would not expose the Board to a growing number of applications to rehear cases in which the contest is serious or the stakes high.*

*In other jurisdictions, particularly in British Columbia, there has been extensive discussion of the criteria which labour relations boards might use to determine whether an applicant has been able to establish that there are grounds which justify the reopening of a decision. In their decision in the case of Overwaitea Foods v. United Food and Commercial Workers, No. C86/90, the British Columbia Industrial Relations Council set out the following criteria:*

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

> *5. If the original decision is tainted by a breach of natural justice; or,*
>
> *6. If the original decision is precedential and amounts to a significant policy adjudication which the Council may wish to refine, expand upon, or otherwise change.*

**[15]** In the present application, the Unions relied on grounds 3 and 6 to justify their application for reconsideration. As set out in *Remai Investment*, *supra*, the party applying for reconsideration must first establish that there are sufficient reasons to warrant reconsideration before the Board will proceed to hear and determine the application. In the case at hand, the threshold arguments with respect to the sufficiency of the grounds for reconsideration and the actual merits of the reconsideration application were heard by the Board. The Board will therefore initially determine whether the threshold issues on which the Union relied have been met.

**[16]** In our view, this is not an appropriate case in which to grant a reconsideration application. The Board's ruling was for the exclusion of witnesses, and the ruling has not operated in an unanticipated way. Likewise, the ruling of the Board does not amount to a significant policy adjudication, in that as stated earlier, under normal circumstances, the respective business managers, as Union advisors, are entitled to be present for the hearing. However, given the unique and unusual aspects of this case, the Board exercised its discretion in an effort to have a fair hearing process and made a ruling excluding witnesses. The Board accepts, and undoubtedly other Boards will accept, the comments of Allbright J. in the decision *Saskatchewan Indian Gaming Authority Inc. (SIGA) v National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW – Canada)* (24 June 2002), Saskatoon 312 (Sask. Q.B.) [unreported] at p. 24 "that 'fairness' is a fluid concept and will depend on the specific facts and circumstances of each case."

**[17]** The Unions also argued that the Board's ruling was an *ad hoc* ruling which the Board may wish to reconsider after more complete argument. With respect, this is not a ground for reconsideration in the case at hand. The parties were allowed an adjournment to enable them to conduct research and to file any material or make any submissions prior to the Board's ruling.

**[18]** The Unions argued that there was no transcript or written decision concerning the ruling. The Board does not normally issue written reasons in regard to procedural, evidentiary rulings. In any event, the Unions now have a written decision which they can challenge, if they so choose, by way of judicial review.

**[19]** In conclusion, the Unions have failed to establish that reconsideration is warranted in the circumstances of this case and the application for reconsideration is accordingly dismissed.

# SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant v. NORTHERN STEEL INDUSTRIES LTD., Respondent

LRB File No. 114-02; July 16, 2002
Chairperson, Gwen Gray, Q.C.; Members: Gerry Caudle and Clare Gitzel

For the Applicant: Larry Kowalchuk
For the Respondent: Kevin Wilson, Jean Torrens

**Remedy – Interim order – Criteria – Board reviews criteria for issuing interim order – Employee's employment terminated during discussions to assign employees' association's bargaining rights to applicant union – Board finds arguable case on main application – Board would order interim reinstatement based on balance of labour relations harm – Interim order not required as employer has offered to reinstate employee.**

**Remedy – Interim order – Organizing drive – Board notes that employer has inserted itself into discussions between employees' association and applicant union - Board issues interim restraining order against employer.**

**Remedy – Interim order – Practice and procedure – Employee's employment terminated during discussions to assign employees' association's bargaining rights to applicant – Board finds that applicant union has sufficient connection with employee to give it standing before Board even though applicant union is not certified to represent employees of employer**

***The Trade Union Act,* ss. 3, 5.3, 11(1)(a) and 11(1)(e)**

## INTERIM APPLICATION

**[1] Gwen Gray, Q.C., Chairperson:** The Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Applicant") made unfair labour practice, monetary loss and reinstatement applications with respect to the dismissal of Mr. Vlad Slowski from his employment at Northern Steel Industries Ltd. (the "Employer") on June 27, 2002. On July 10, 2002, the Board heard an application for interim relief pending the hearing of the final applications. These Reasons pertain to the application for interim relief.

**[2]** The certified union of employees at Northern Steel Industries Ltd. is the Northern Steel Industries Ltd. Employees Association (the "Association"). Mr. Slowski is the president of that

Association. The Association and the Employer have entered into a collective bargaining agreement with effective dates of April 1, 2000 to March 31, 2003.

**[3]** The affidavit evidence filed by the Applicant indicates that Mr. Slowski, as president of the Association, approached the Applicant to discuss merger, affiliation or assignment options between the Association and the Applicant. Mr. Slowski met with Mr. Schmidt, representative of the Applicant, on June 14, 2002. A further meeting was held between the Applicant and Mr. Slowski on June 21, 2002. After the meeting of June 14, 2002 Mr. Slowski and another member of his executive decided to call a membership meeting of the Association to discuss a possible merger or affiliation with the Applicant. The meeting date was set for July 5, 2002.

**[4]** On June 27, 2002 Mr. Slowski was terminated from his job. The reasons stated for termination of employment were "insubordination and other personality conflicts with management and staff." The Employer asserted that Mr. Slowski refused to perform a task assigned by the Employer and this was the tip of the iceberg in terms of his uncooperative attitude at work.

**[5]** Mr. Slowski attached a copy of his most recent job evaluation form to his Affidavit. The human resources manager had completed the form in mid-June, 2002. The performance evaluation indicates that Mr. Slowski was an outstanding member of the team and a great asset to the company.

**[6]** The Employer deposed in its affidavits that the performance evaluation form was incomplete and had not been signed off by senior management. It also noted that Mr. Slowski's supervisor at the time is no longer his supervisor.

**[7]** The Employer denies having any knowledge of the talks on-going between the Applicant and the Association, through its president, Mr. Slowski.

**[8]** Following the termination of Mr. Slowski's employment, the Association approached the Employer to ask if Mr. Slowski would get his job back with no repercussions. The Employer told the Association to put its request in writing which it did on July 4, 2002. It is understood that this request represents the Association's grievance.

**[9]** According to the Employer, it negotiated with the Association to reduce Mr. Slowski's termination to a one day suspension. At first, the Employer made this offer as a method of settling the outstanding grievance. This offer was refused by Mr. Slowski.

**[10]** On Monday, July 8, 2002 the Employer notified the Association that it would reinstate Mr. Slowski to his former position subject to a one day suspension without pay. The Association would be entitled to grieve the one day suspension. Monetary loss would be paid to Mr. Slowski taking into account, as well, the severance pay paid to him when he was terminated. The Association was asked to notify Mr. Slowski to return to work.

**[11]** At the outset of the hearing on July 10, 2002 the Board attempted to clarify the current work status of Mr. Slowski. Mr. Kowalchuk, counsel for the Applicant, indicated that no offer to return to work had been communicated to Mr. Slowski and he had not in fact returned to work.

**[12]** Mr. Wilson, counsel for the Employer, filed a letter which he had faxed to Mr. Kowalchuk on July 8 or July 9, 2002. In the letter, Mr. Wilson notified Mr. Kowalchuk of the Employer's unconditional offer to return Mr. Slowski to work with a one day suspension. Mr. Kowalchuk was unaware of the letter at the time of the hearing.

**[13]** To be clear, it is the Board's understanding that Mr. Slowski has by now been reinstated in his employment and will be forthwith paid monetary loss for the dates that he was away from work, subject to adjustment for the amounts paid to him as severance and subject to the withholding of one day's pay representing the Employer's attempt to substitute a penalty of a one day suspension in lieu of the dismissal.

**[14]** It is unknown at the time of the interim hearing if the Association intends to file a grievance with respect to the one day suspension.

**[15]** During the hearing, an issue arose as to whether or not the Association had been served with the interim application. Mr. Kowalchuk advised the Board that the matter of this application had been discussed with members of the Association at a meeting held on July 5, 2002 although the actual materials were not provided in a formal manner to the Association.

**[16]** The Board notes that the Association ought to have been formally served with the materials and been given an opportunity to attend at the hearing. However, in the circumstances, where the president of the Association is the subject of the interim application, we find that the Association has actual and effective knowledge of the proceedings and that formal service of the documents is not necessary for this hearing to proceed.

## Test for Interim Relief

**[17]** The test for determining if an interim order should issue was set out by the Board in *Hotel Employees and Restaurant Employees Union, Local 206 v. Canadian Hotels Income Properties Real Estate Investment Trust #19 Operations Ltd. (o/a Regina Inn Hotel and Convention Centre)*, [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.*

## Argument

**[18]** The Applicant argues that Mr. Slowski was exercising his right, as a trade union leader, to discuss and plan the merger, affiliation or assignment of his Association's bargaining rights with the Applicant. This assertion is based on s. 39 of *The Trade Union Act*, which permits the amalgamation, merger and affiliation of unions or the transfer or assignment of bargaining rights between unions. It is also based on s. 3 of the *Act*, which provides:

> *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.*

**[19]** The Applicant's main application alleges that Mr. Slowski was discharged in circumstances the violate s. 11(1)(a) and (e) of the *Act.* The Applicant maintains that the Employer interfered with Mr. Slowski in his attempt to discuss and plan a possible merger of the Association with the Applicant. The Employer's conduct is viewed as an interference in the basic statutory right granted to employees to choose their own trade union. The Applicant notes that the onus of establishing a cause unrelated to Mr. Slowski's union activity is on the Employer under s. 11(1)(e) of the *Act.*

**[20]** The Applicant asserts that it has met the first test established in the *Regina Inn* case, *supra,* by establishing that it has an arguable case under the *Act.* The Applicant notes that, although it is not the certified bargaining representative of the employee in question, it can bring the application on his behalf as it was his attempt to join the Applicant that gave rise to the alleged interference and the application to the Board. In essence, it argues that the exclusivity of representation set out in s. 3 of the *Act* does not apply to the situation in this case and that Mr. Slowski may be represented by the Applicant before the Board, even though his representative in the workplace is the Association.

**[21]** The Employer disputes this assessment of the law and argues that Mr. Slowski may only be represented by the Association. It argues that the Applicant has no standing to bring this matter to the Board and that the Employer is obligated to deal exclusively with the Association in relation to Mr. Slowski's employment.

**[22]** The Employer also argues that the Board should defer to the grievance and arbitration process in this matter. The discipline imposed on Mr. Slowski has been the subject of grievance negotiations between the Association and the Employer and any processes that may be taken pursuant to the grievance and arbitration provisions contained in the collective bargaining agreement ought to be permitted to run their course.

**[23]** In relation to the second aspect of the test, that is, the balance of labour relations harm, the Applicant asserts that the Employer's action in terminating Mr. Slowski's employment chills the merger and affiliation talks between the Applicant and the Association and improperly sends the message to members of the Association that they should not join forces with the Applicant. The Applicant argues that this harm affects the basic statutory right granted to employees to be represented by a trade union of their own choosing. In this case, although the Association was the certified bargaining agent of the employees, the Applicant argues that the employees have a right to

consider and debate the benefits of merging, amalgamating or transferring their bargaining rights to another trade union. In the Applicant's view an interim order is necessary to preserve the s. 3 rights of the employees pending a hearing of the final application. It argues that the Employer will not suffer any harm as a result of the issuing of an interim order.

**[24]** In this regard, the Union seeks full reinstatement for Mr. Slowski, with monetary loss paid for the full time of his removal from the workplace. It also seeks a captive audience meeting with the employees on work time with pay. The Union also asks for an interim order directing the Employer to pay for the costs of the meeting and the legal costs of this application.

**[25]** The Employer disputes the need for an interim order. It argues that the Applicant has not got out of the gate on the first aspect of the test, that is, whether or not there is an arguable case. On the second aspect of the test, the balancing of labour relations harm, the Employer argues that the primary remedy that would be ordered in this circumstance is reinstatement. Since the Employer has unconditionally offered to reinstate Mr. Slowski, no additional remedy is required. The Applicant's concern regarding the loss of their "key person" in the affiliation discussions are met by the reinstatement of Mr. Slowski.

**[26]** In relation to the order sought, the Employer disagrees that the Board should order any monetary loss as that issue can be made whole on a final order, if needed. In addition, it disagrees that the Board should order a captive audience meeting in circumstances where the Applicant is not the certified trade union. The Employer argues that such an order would place the Board in a position of appearing to favour a non-certified union over the certified union.

**[27]** The Employer also opposes any requests for costs, noting that such an order would be punitive and inappropriate to make on an interim application.

## Analysis

**[28]** The Board finds that the Applicant has standing to bring this application. Although the Applicant is not the certified bargaining agent for employees of the Employer, it does have a sufficient connection to Mr. Slowski to bring an application under s. 11(1)(a) and (e) before this Board. The rights alleged to have been violated relate to Mr. Slowski's efforts to merge his Association with the Applicant. In this case, it is the Board's view that either the Applicant or the

Association have sufficient interest in the matter to bring an application to the Board. An application to the Board alleging violations of s. 11(1)(a) and (e) can be brought by any union on behalf of any employee who is attempting to join or to consider joining that union: see *Saskatchewan Joint Board, Retail Wholesale and Department Store Union v. Imperial 400 Motel, Lloydminster, Saskatchewan*, [1993] 1st Quarter Sask. Labour Rep. 183.

**[29]** We also find that the Applicant has met the first part of the test for obtaining interim relief. Its application raises an arguable case. Mr. Slowski's employment is alleged to have been terminated due to his union activity contrary to s. 11(1)(a) and (e) of the *Act*. Based on the material filed by both parties, the factual underpinnings of such allegations are present and they constitute an arguable case.

**[30]** On the second aspect of the test, whether the balance of labour relations harm favours the granting of an interim order, we must consider the facts as they stand at the time of the hearing. In this case, had the Employer not offered to return Mr. Slowski to his employment without conditions (other than the imposition of a one day suspension), the Board would have ordered the interim reinstatement of Mr. Slowski pending the final determination of this application. The termination of an employee's employment in the face of union activity strikes at the heart of the rights established in *The Trade Union Act*. In the absence of some allegation of serious and grave harm to the Employer that may arise on interim reinstatement, the Board finds that the labour relations harm caused by not granting interim relief would outweigh any inconvenience caused by the interim reinstatement. Mr. Slowski's return to the workplace on an interim basis would permit him to carry on his discussions and work in relation to the merger talks and would bring to an end any suggestion that employees need fear repercussions for engaging in such discussions and activity. On the other hand, the reinstatement of Mr. Slowski, if the Employer's allegations prove to be true, inconvenience the Employer by requiring it to retain the employment of an alleged unsatisfactory employee until the determination of the final application. On the whole, the balance favours reinstatement.

**[31]** In this case, however, the Employer has rendered the need for interim relief moot by offering to reinstate Ms. Slowski in his employment, albeit with a one day suspension. An interim reinstatement order is no longer required to prevent further labour relations harm to the Applicant or to Mr. Slowski. Although the Employer maintains its position that some discipline was required to address its concerns with Mr. Slowski's workplace conduct, the harm resulting from the one day

suspension can be remedied in full on the final application. That is, if the Union is successful on the main unfair labour practice application, the Board can order the payment in full of the monetary loss suffered by Mr. Slowski as a result of the imposition of the one day suspension in lieu of the termination, the removal of the suspension from his employment record, and other orders as required to fully address the violation.

**[32]** The Board has also considered whether an interim order ought to be granted to permit the Applicant to meet with and discuss the merger, amalgamation or assignment proposals with employees in the workplace. The difficulty with the proposal is that the Applicant is not the certified bargaining agent for the employees in question. The efforts by Mr. Slowski and the Applicant to push forward a merger, amalgamation or assignment plan must be carried out in a manner that recognizes the existing bargaining rights of the Association. The Association will decide when and if it wishes to meet with the Applicant to discuss such plans. It is essentially a matter of internal operations of the Association. The Board will not intervene in this discussion by directing that a workplace meeting be held by the Applicant with members of the Association.

**[33]** There is one area of concern that the Board will address in an interim Order. In the materials filed by the Employer it is clear that the Employer has engaged members of the Association in discussions about meetings held by the Association and the Applicant relating to the merger plans. In particular, the Employer filed an affidavit from Mr. Curtis Lloyd, a member of the Association, in which Mr. Lloyd disclosed information pertaining to the July 5, 2002 meeting involving members of the Association and the Applicant. The Employer has no business inserting itself into this debate and should stand warned that such conduct constitutes a violation of the *Act*. The employees of Northern Steel Industries Ltd. have the right to engage in merger, amalgamation or assignment talks among themselves, with the Association and with the Applicant, without interference from the Employer. The Board will issue an interim restraining Order against the Employer to prevent a recurrence of this conduct.

**[34]** The Board will not address the issue of deferring this application to the grievance and arbitration process, nor the request for costs. We will deal with both issues at the hearing of the final application.

**[35]** The Board directs that these Reasons and the attached Order be posted in the workplace.

**[36]** An order will issue as follows:

(1) The Employer is restrained from engaging in any communications with its employees about any attempts by the Northern Steel Industries Ltd. Employees Association or members thereof, or the Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, to merge, amalgamate or assign bargaining rights, pending the final hearing of the Applications;

(2) The Employer will post these Reasons and the attached Order in its plant at Tisdale, Saskatchewan in a location generally used by the Northern Steel Industries Ltd. Employees Association to post union notices until the Board has finally disposed of these Applications.

**CHARMAINE EVANS, Applicant v. NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (C.A.W.-CANADA) and SASKATCHEWAN INDIAN GAMING AUTHORITY INC. o/a NORTHERN LIGHTS CASINO, Respondents**

LRB File No. 258-00; July 22, 2002
Vice-Chairperson, James Seibel; Members: Duane Siemens and Tom Davies

| | |
|---|---|
| For the Applicant, Charmaine Evans: | Dean Head |
| For the Certified Union: | Rick Engel |
| For the Employer: | Larry Seiferling, Q.C. and Clint Weiland |

**Collective agreement – First collective agreement – Where rescission and first collective agreement applications concurrently pending, in certain circumstances, Board may exercise discretion to dismiss rescission application – Board declines to dismiss present application and orders vote to be conducted one hundred and eighty days after implementation of first collective agreement.**

**Decertification – Interference – Applicant solicited fellow employees without advice, encouragement, support or assistance from employer – Applicant's views about trade unions not necessarily sound but not implausible as forming basis for motivation to bring application – Board does not find employer interference or influence.**

**Decertification – Practice and procedure – Where rescission and first collective agreement applications concurrently pending, in certain circumstances, Board may exercise discretion to dismiss rescission application – Board declines to dismiss present application under circumstances.**

***The Trade Union Act*, ss. 5(k)(ii), 9 and 26.5**

## REASONS FOR DECISION

### Background

**[1] James Seibel, Vice-Chairperson:** By an Order of the Board dated November 30, 1999 (LRB File No. 122-99) National Automobile, Aerospace, Transportation and General Workers Union of Canada (C.A.W.-Canada) (the "Union") was designated as the bargaining agent for a unit of employees of Saskatchewan Indian Gaming Authority Inc. carrying on business as Northern Lights Casino in Prince Albert, Saskatchewan (the "Employer"). On October 11, 2000 Charmaine Evans, 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. In its

reply to the application, the Union asserted, *inter alia*, 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 or interference by, the Employer. The Union did not dispute the accuracy of the statement of employment filed on November 15, 2000 listing 310 employees in the bargaining unit. The Applicant filed ostensible evidence of support of a majority of the members of the bargaining unit.

**[2]** Following certification, the Union and Employer filed unfair labour practices against each other that were subsequently withdrawn pursuant to an agreement between them. On March 30, 2000 the Union filed an application designated as LRB File No. 092-00 seeking assistance in achieving a first collective agreement (the "FCA application") pursuant to s. 26.5 of the *Act*. The present application for rescission of the certification Order was subsequently filed in the first s. 5(k) "open period" following certification, by which time the parties had not yet achieved a first collective agreement.

**[3]** In the first set of Reasons for Decision in the FCA application, dated January 25, 2001 (reported at [2001] Sask. L.R.B.R. 42), the Board permitted the parties to use s. 24 of the *Act* (the "reference of dispute" provision) by agreement to waive the pre-condition for an application for first contract assistance in s. 26.5(1)(c). A preliminary issue was raised on the FCA application by the Applicant in the present application (as an intervenor) and the Employer that the rescission application should be heard and determined prior to the FCA application. For the policy reasons stated in the decision, the Board held that it would hear and determine the FCA application before determining the rescission application, although the latter application might be heard prior to the final conclusion of the former. The Board appointed an agent for the purposes of assisting the parties to achieve a first collective agreement, or failing same, to report to the Board.

**[4]** The hearing of the present application for rescission was set for March 1, 2001. Prior to the hearing, the Union applied to the Executive Officer of the Board to adjourn the hearing of the application pending determination of the FCA application. In an unreported decision dated February 16, 2001 the Executive Officer, referring to the reasons of the Board in the FCA application, *supra*, declined to grant the adjournment. The present application was heard over the course of two days on March 5 and 6, 2001.

**[5]** Following the Board's subsequent decision in *Mayer v. L.L. Lawson Enterprises, et al. and United Food and Commercial Workers, Local 1400.,* [2001] Sask. L.R.B.R. 485, LRB File No. 013-01, the Board requested the parties to provide such additional written submissions as they deemed appropriate. The Board made this request in light of that case's consideration of the proposition that where there are concurrent applications for first contract assistance and rescission, the Board should exercise its discretion to dismiss the rescission application.

## The Decision to Render a Final Determination in the Present Application

**[6]** Following a hearing of the FCA application, in a decision dated January 21, 2002 (reported at [2002] Sask. L.R.B.R. 16), the Board imposed the terms of a first collective agreement. On February 8, 2002, an application was made to the Court of Queen's Bench for the judicial review of that decision. The application for judicial review was dismissed with reasons on June 24, 2002 (reported at [2002] Sask. L.R.B.R. c-25). However, a limited issue, originally overlooked by the parties, remains to be heard and determined on the FCA application. That issue is scheduled to be heard by the Board on July 19, 2002.

**[7]** While the panel of the Board in LRB File No. 092-00 made an Order regarding the order of hearing and determination of the FCA and rescission applications, it is doubtful that anyone foresaw that the FCA application would take this long. In the present case, one of the members of the panel, Mr. Davies, is retiring from the Board effective July 28, 2002. We find for the following reasons that it is expedient and in the best interests of the administration of justice that the present application be determined at this time:

(a) the FCA application has been substantially, albeit not completely, determined;

(b) the application should be determined on the basis of the evidence presented at the hearing in March 2001, while it was relatively fresh in the minds of the witnesses; and therefore

(c) we wish to ensure that the present application will not have to be re-heard as a result of the retirement of Board Member Davies.

## Evidence

**[8]** At all material times, the Applicant, Charmaine Evans, was employed by the Employer as a dealer at the Northern Lights Casino (the "Casino") and was a member of the bargaining unit. She testified about her perception of the relationship between the Casino's management and the

employees prior to the certification of the Union as bargaining agent. In her opinion, many employees were primarily concerned about the level of wages and the perception of nepotism in hiring and promotion.

**[9]** Ms. Evans testified that she was not involved in the Union's organizing drive in the spring of 1999 and may have attended one meeting around that time. She said that following certification there was an attempt or attempts to form an employees' association but she was not involved. She attended a meeting in or about May 2000, where Ms. Sharon Agecoutay, the Employer's human resources manager, made a statement to the effect that a purported employees' association had no status and confirming that the Union was the employees' sole bargaining agent.

**[10]** Ms. Evans said that she was not interested in the Union or its activities because she did not feel that it was necessary given that she already had certain benefits and a pension plan prior to the organizing drive. She said that if employees were unhappy with their wage, they could deal with management on their own. However, she did concede that she considered some items in the Union's promotional literature, such as better wages and "control over the way some situations are handled," although she did not explain what she meant by the latter.

**[11]** When asked by her counsel about why she wanted to "decertify" the Union, Ms. Evans reiterated that she did not believe that the employees needed a union in the first place and that others felt the same way. She testified to the effect that there were some employees (but did not identify who) that were "unhappy with the union over harassment issues," but did not explain what that was about. She also expressed displeasure with the fact that she had apparently been interviewed about an argument with another employee over a newspaper article regarding the Union that had been posted on a workplace bulletin board and removed, but did not further clarify what that incident was about.

**[12]** Ms. Evans' counsel asked her why she thought she could get a majority of the employees to support an application for decertification when a majority had supported an application for certification. She said that many of those who had originally supported the Union had done so primarily because they thought it would result in "more money," but they now had "misgivings." She said that some of the employees who approached her also complained about their treatment by Union representatives, but did not expand on what that was. Lastly, she said that she was concerned

about a statement in a memorandum posted by the Union's bargaining committee, dated September 6, 2000, that the Union had "fine tuned [its bargaining proposals] package and made some significant progress so as to be able to see – finally – if the company is serious about taking care of its employees." She said she was concerned because she felt that the Employer did care about the employees. She was also concerned about the Union's position expressed in the memorandum regarding a proposal for a grievance process that included the involvement of a First nations elder.

**[13]** When asked by her counsel why she thought other employees would come to her regarding their similar concerns, Ms. Evans said that she had always spoken up in the staff room and at other meetings to say that the employees did not need a union because they were not treated badly by the Employer.

**[14]** Ms. Evans testified that she first thought about trying to get rid of the Union soon after learning that it had been certified as the bargaining agent. She said she did not know anything about the process of decertification and went to the Board's website for information. She first consulted a lawyer – Mr. Parchomchuk – about the matter in July or August 2000. She said it was he who advised her about the "open period" for application. She said that a co-worker, Kevin Peecatoose, subsequently recommended that she consult her present counsel. She and a co-worker, Loretta Burns, booked a hotel room and held a meeting to start collecting signatures on cards in support of the present application. She said word of the planned application was spread orally "at home, at the bingo hall and in the staff lounge on breaks." She said she did not speak to anyone about it while she was on duty.

**[15]** Ms. Evans said she and others manually counted the employees in the bargaining unit, estimating there were 310. She said that collecting signatures took from late August until October 10, 2000. She denied that she had received a list of employees from the Employer to assist her in her efforts.

**[16]** When asked by her counsel as to why she would want to apply for decertification before a first collective agreement is in place, Ms. Evans said that the only thing she thought might be improved was the wages because the employees "have everything else." She also said that she did not think the Union had "told the truth when trying to get in," but did not describe what she meant.

She said that she had not been promised, nor was it intimated to her, that she would receive any benefit for her efforts to decertify the Union.

**[17]** Ms. Evans testified that the costs of the rescission application were to be borne by herself and fellow supporters, although she indicated her counsel was not going to charge a fee because "he was just starting out as a lawyer."

**[18]** In cross-examination, Ms. Evans admitted that after she filed the present application, she was occasionally assigned to work as a "pit boss" when the Employer was short staffed, at a significantly higher wage than a dealer and even though she was not the most senior dealer. She said that she did not ask to do so and had in fact asked that she not be placed on the rotation for such duties.

**[19]** Ms. Evans confirmed that she attended a meeting in July 1999, after the application for certification was filed but before it was granted, which members of management attended and at which they made strong statements against the Union. She denied that she was assisted in bringing the present application by any of the primary proponents of the ill-fated employees' association. She admitted that while at one time she had voted for what turned out to be officers of the employees' association, she had been under the mistaken belief that she was voting with respect to the "aboriginal part" of the Union. When asked in cross-examination how she could have thought that when she is not aboriginal, Ms. Evans replied, "because everyone gets to vote on everything."

**[20]** When asked in cross-examination whether in August 2000 she had asked one Lillian Michel to sign in support of both the decertification application and in favour of the employees' association, Ms. Evans at first said that she did, but almost immediately retracted that she had made any reference to the employees' association in her conversation with Ms. Michel.

**[21]** When asked in cross examination why she was not happy with what the Union was doing in bargaining, Ms. Evans first replied that she did not know what it was doing and then said she did not believe in seniority and "how unions are run," and that she preferred what could be described as a "merit" system.

**[22]** In cross-examination, Ms. Evans confirmed that one Elton Daniels at one time had been running for a position on the executive of the employees' association and had been part of her drive to garner support for the decertification application. She denied that she had received or sought the advice of anyone in management, specifically Mr. Randy Bear, with respect to the application.

**[23]** Mr. Allan Lanoue has been employed at the Casino since 1996 and is the chairperson of the Union's bargaining committee. He testified that on July 3, 1999 at a general staff meeting of the Casino's employees, at which members of management were present on the dais, there was a discussion about the pending Union organizing drive. Two employees, Calvin McArthur and Helen Crain, read statements critical of the Union and its representatives.

**[24]** The meeting is referred to in a document dated September 17, 1999 entitled "Northern Lights Casino Employees' Association – A Proposed Approach to maintaining First Nations Labour Control & Representation in Contrast to Contemporary Non-First Nations Controlled Labour Unions within a First Nations Organization." The document was distributed in the Casino employees' staff lounge in advance of the continuation of the hearing by the Board of the Union's application for certification. The document criticized the Union's attempt to represent the Casino employees and advocated renunciation of membership in the Union.

**[25]** Mr. Lanoue said that in March 2000, a poster was put up by the employees' time clock advertising a meeting to accept nominations for executive positions in the employees' association. The meeting was to be held in the Casino employees' staff lounge on March 27 and 28, 2000. He said he saw copies of a pamphlet in the Casino staff lounge setting forth the "mission statement" of the Northern Lights Casino Employees' Association (the "Association") and describing, among other things, an informational meeting for April 2, 2000, a vote in the staff lounge for executive positions in the Association on April 3 and 4, 2000 and how to renounce membership in the Union and obtain membership in the Association. At about the same time, he observed employee Brian Carriere in the lounge obtaining employees' signatures to three documents, being respectively, a declaration of membership in the Association, a declaration of renunciation of membership in the Union, and a declaration of nomination for executive positions in the Association. He said that although the Union raised a concern about the matter with the Employer, the Association's vote took place in the staff lounge.

**[26]** Mr. Lanoue testified that while he never saw any members of management at any meetings of the Association, it was hard to get the Employer to stop them from posting material. He testified to the effect that the Association's activities and the Employer's diffident attitude towards it had a negative effect on the employees' perception of the Union and contributed to division and bickering among the employees.

**[27]** Ms. Jennifer Fendelet has been employed at the Casino since 1995 and is a member of the Union's bargaining committee. She testified that at a general staff meeting called by the Employer in December 1999, shortly after the certification Order was issued, a member of the Employer's board, Mr. Ermine, made a statement to the effect that "if the Union comes in, [the Casino] will be paying high prices" and exhorting anyone with anything to say to "speak their mind." She testified that the Employer's then CEO, Mr. Lerat, made a statement to the effect that "conflicts between union members and non-union members would be looked after." She said that after the meeting some employees were asking questions about the statements and seemed confused.

**[28]** In cross-examination Ms. Fendelet agreed that at the meeting Mr. Lerat had also said that the Employer's upper management did not want to get involved in issues regarding the Union's activities.

**[29]** Ms. Fendelet confirmed that at a general staff meeting on May 21, 2000 Ms. Agecoutay, the Employer's human resources manager, read a statement to the effect that the Association had no status and would not be permitted to conduct any business on the premises, and that the Union was the employees' sole bargaining agent. She said that she heard no complaints from employees about the Association after that.

**[30]** Ms. Beverly Primeau has been an employee at the Casino since approximately 1996. She testified that she found out about the decertification application from a report in the local newspaper on October 13, 2000. She said she was upset that Ms. Evans had not told her about the application or asked whether she wanted to sign in support of it. She testified that when she asked Ms. Evans about it, Ms. Evans told her that she could "go upstairs" and sign if she wanted to (the intimation was that by "upstairs" she meant the Casino's general offices). Ms. Primeau said that Ms. Evans then called someone in the human resources department on the phone – she said she could tell from the call display. Although she did not know specifically to whom Ms. Evans spoke, she said that when she

got off the phone Ms. Evans told her that "Randy" said that her signature was not required "because they had enough." Randy Bear is an out-of-scope human resources officer.

**[31]** In cross-examination, Ms. Primeau confirmed that while she and Ms. Evans had been friends, their relationship had cooled. She referred to an incident where they were both called to an interview with management as a result of an argument they had over the Union after the decertification application had been filed.

**[32]** Ms. Paulette Bear has been employed at the Casino since June 1999. She is a member of the Union's bargaining committee. She also testified about the statements critical of the Union that were read at the staff meeting on July 3, 1999. She said that shortly after that meeting she received a document entitled "Union Rights – Questions and Answers" along with her pay stub from the Employer's payroll office. She said that one of the statements in the document caused particular confusion and apprehension among employees who had signed cards in favour of the Union. The statement provided as follows:

> *3. UNION CARD*
>
> *We have been asked by employees about what they could do if they have signed a union card and now want the card back.*
>
> *This is simply a matter of asking the union to give the card back to you. This request should be in writing. Because your card may be filed with the Saskatchewan Labour Relations Board you should also send a copy of that letter requesting the card back to the Saskatchewan Labour Relations Board.*

**[33]** Ms. Bear said that in response to a notice posted by the Employer for volunteers for a Management/Employee Committee, she attended a meeting on December 8, 1999 and was placed on the committee. At the meeting, as the official minutes indicate, all kinds of issues were discussed. Ms. Bear referred to one matter in particular. In response to a question by employee Helen Crain, Ms. Agecoutay advised that the certification Order that had recently been issued by the Board could be appealed, but that it stood until overturned. Ms. Agecoutay also referred to there being "windows of opportunities" with respect to the Union, but appeared reluctant to discuss the matter further.

**[34]** Ms. Bear testified that at the next meeting of the committee in March 2000, when Joe Watson, one of the organizers of the Association, started to talk about having met with management regarding the Association, he was cut off by the Casino's general manager, Mr. Curtis.

**[35]** Following the adducing of the evidence summarized above, counsel for the Employer sought to call Randy Bear to testify. However, counsel for the Union conceded that that would not be necessary as it was agreed that Mr. Bear did not have any control with respect to the present application.

## Statutory Provisions

**[36]** The relevant statutory provisions are:

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

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

## Argument

**[37]** Mr. Head, counsel for Ms. Evans, referred to the decisions of the Board in *Schan v. United Brotherhood of Carpenters and Joiners of America, Local 1805 and Little-Borland Ltd.*, [1986] Oct. Sask. Labour Rep. 48, LRB File No. 221-85, and *Gabriel v. United Food and Commercial Workers, Local 1400 and Saskatchewan Science Centre*, [1997] Sask. L.R.B.R. 232, LRB File No. 345-96. He argued that there was no evidence of influence or interference by the Employer in the making of the application for rescission of a nature or to a degree that could compromise the employees' ability to decide the issue through a vote.

**[38]** Citing the decisions of the Board in *Poberznek v. International Union of Bricklayers and Allied Trades, Local 3 and United Masonry Construction Ltd.*, [1984] Oct. Sask. Labour Rep. 35, LRB File No. 245-84, and *Wells v. Remai Investment Corporation (Imperial 400 Motel, Prince Albert and United Food and Commercial Workers)*, [1996] Sask. L.R.B.R. 194, LRB File No. 305-95 at 198, Mr. Head asserted that Ms. Evans had a plausible explanation for bringing the application for decertification. He said there had always been a significant number of employees in the workplace who were opposed to the Union. He also stated that the evidence was clear that she had not had any involvement in the organization or activities of the Association, nor was it possible to draw an

inference that any members of the by then defunct Association who might have assisted Ms. Evans with her application were agents of the Employer.

**[39]** Finally, Mr. Head submitted that the statement made to the employees by Ms. Agecoutay on behalf of the Employer at the meeting of May 21, 2000 regarding the status of the Union was sufficient to remedy any inappropriate conduct that the Employer might have committed before then.

**[40]** Mr. Engel, counsel for the Union, filed a written brief that we have reviewed. He submitted that the issue was whether the capacity of the employees to make an informed and reasoned decision in any vote on the application for decertification had been compromised. Counsel outlined the various events he deemed relevant, including the vigorous opposition by the Employer to the certification application itself that included judicial review and a subsequent unsuccessful appeal. At the time of the filing of the present application, an application to the Saskatchewan Court of Appeal was pending; at the time of the hearing of the present application, an application for leave to appeal the certification decision to the Supreme Court of Canada was pending.[1]

**[41]** Counsel also referred to what he described as the Employer's tacit approval of the activities of those involved in the Association. Counsel asserted that all of these actions and omissions taken together created an environment that "degraded the glue that holds the bargaining unit together" so as to raise questions in the minds of employees about the Union's competency to achieve and service a collective agreement.

**[42]** Mr. Engel asserted that there was evidence of Employer interference in the representation issue prior to the certification Order and for several months thereafter until May 2000, when the Employer and the Union reached their agreement regarding their respective unfair labour practice charges. The agreement resulted in the statement by Ms. Agecoutay to the meeting of employees regarding the Union's status. Mr. Engel suggested that the issue was whether the damage that had occurred to that time had been remedied before the present application was made such that it was not the result of that Employer influence. He submitted that the employees would not perceive Ms. Evans' application as separate from what had occurred up until mid-May. He further suggested that Ms. Evans was acting at the behest of persons who had been seriously involved with the Association,

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[1] The application for leave was dismissed.

including Mr. Peecatoose, who had suggested that she seek her present counsel. Mr. Engel suggested that the Association was a company dominated organization.

**[43]** Mr. Engel asserted that Ms. Evans' professed reasons for making the application did not bear scrutiny. While she said that favouritism and wages were issues that concerned her and other employees, she was now upset that the Union was not leaving things as they had been; while she professed to be the instigator and primary organizer of the present application, she said that it was filed in her name at the last minute for convenience sake.

**[44]** Mr. Engel argued that the Employer's inappropriate conduct and omissions had resulted in the workplace being too unsettled to provide for a vote that would reflect the true wishes of the employees on the issue of representation. With no collective agreement in place the employees have not had the benefit of seeing what advantages and benefits may be derived from union representation.

**[45]** In support of his arguments, Mr. Engel cited the following authorities: *Lang and Schaeffer 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; *Swan v. Canadian Union of Public Employees, Local 1975 and Treats at the University of Saskatchewan*, [2000] Sask. L.R.B.R. 448, LRB File No. 258-99; *Choponis v. Madison Development Group Inc. and United Food and Commercial Workers, Local 1400*, [1996] Sask. L.R.B.R. 511, LRB File No. 226-95; *Wells v. Remai Investment Corp., supra; Dreher v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Water Group Canada Ltd.*, [1993] 3rd Quarter Sask. Labour Rep. 131, LRB File No. 033-93; *Johnson v. United Food and Commercial Workers, Local 1400 and F.W. Woolworth Co. Limited*, [1994] 1st Quarter Sask Labour Rep. 169, LRB File Nos. 148-93, 151-93, 192-93, 193-93 & 194-93; *Quigley v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Custom Built Ag Industries Ltd. o/a TrailTech*, [2000] Sask. L.R.B.R. 128, LRB File No. 220-99; *Wilson v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Remai Investment Co. Ltd.*, [1990] Fall Sask. Labour Rep. 97, LRB File No. 088-90; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Canadian Pioneer Management Group and Canadian Pioneer Employees' Union,* [1978] May Sask. Labour Rep. 37, LRB File No. 661-77.

**[46]** Mr. Seiferling, counsel for the Employer, asserted that the Employer had complied with the agreement it had made with the Union that resulted in the statement to employees in May 2000. He said there was no evidence of Employer interference in making the application. Counsel submitted that, while we should not hold our decision on the application in abeyance pending the outcome of court proceedings and the determination of the FCA application, it would be appropriate to postpone any vote that might be ordered until after the FCA application was determined or resolved.

**[47]** Because of the view that we have taken of this case as outlined below, it is not necessary to summarize the parties' arguments regarding the issue raised in *Mayer v. L.L. Lawson Enterprises, supra.*

## Analysis and Decision

**[48]** The present application was filed during the "open period" mandated by the *Act* for an application to rescind a certification Order where no collective bargaining agreement exists. Evidence that a majority of employees in the bargaining unit support the application was filed with the Board.

**[49]** The evidence discloses that the Applicant, Ms. Evans, has been against representation by the Union since before the application for certification was filed. Her testimony that she did not receive any advice or assistance from any member of the Employer's management in planning or mounting the present application was not shaken in any way. There was no evidence that such persons were connected with the for-some-time-defunct Association or were acting on the advice or with the encouragement of the Employer. The Association was essentially "outlawed" by the Employer, albeit rather dilatorily in May 2000, pursuant to the agreement with the Union withdrawing their respective unfair labour practice charges. Ms. Evans did not set about garnering evidence of support for this application until the next August.

**[50]** In *Wells v. Remai Investment Corp., supra*, at 199, the Board held that "it is not necessary that an applicant demonstrate that their views of the Union were completely accurate or fair, but that they had given the matter sufficient thought that [the Board] would be confident that they came up with the idea themselves." And in *Mayer v. L.L. Lawson Enterprises, supra*, the Board adopted the same approach where the applicant's views regarding trade unions in general were "extreme and, apparently, entirely uninformed." In the present case, Ms. Evans's espoused reasons for making the

application for rescission are not particularly informed and might be considered by some more experienced observers to be rather shallow and short-sighted. We cannot, however, say that they are so implausible as to be incredible or the result of some bad faith design and not worthy of acceptance as a sufficient basis upon which she might honestly, if not soundly, conclude that the application is appropriate in her circumstances. She expressed confidence that she was capable of adequately representing herself in any relations with the Employer. There was no evidence that she did not decide to initiate the application on her own.

**[51]** While the Board jealously protects the rights of employees to choose a bargaining agent, pursuant to s. 3 of the *Act*, it is vigilant in assessing whether the employer has interfered in that process. In *Wells v. Remai Investment Corp., supra*, at 197-98, the Board summarized its role as follows:

> *In the case of Kim Leavitt v. Confederation Flag Inn (1989) Limited and United Food and Commercial Workers, Local 1400, [1990] Winter Sask. Labour Rep., LRB File No. 225-89 at 66, the Board made the following comment:*
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> > *The Board has frequently commented upon the relationship between Section 3, which enshrines the employees' right to determine whether or not they wish to be represented by a union, and Section 9 of the Act. These sections are not inconsistent but complimentary. Section 3 declares the employees' right and Section 9 attempts to guard that right against applications that in reality reflect the will of the employer instead of the employees.*
>
> *The Board proceeded to make the following statement on 66-67:*
>
> > *Generally, where the employer's conduct leads to a decertification application being made or, although not responsible for the filing of the application, compromises the ability of the employees to decide whether or not they wish to be represented by a union to the extent that the Board is of the opinion that the employees' wishes can no longer be determined, the Board will temporarily remove the employees' right to determine the representation question by dismissing the application.*
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> *In Susie Mandziak v. Remai Investment Co. Ltd (Imperial 400 Motel), [1987] Dec. Sask. Labour Rep 35, LRB File No. 162-87, the Board made a similar point on 36:*
>
> > *While the Board generally assumes that all employees are of sufficient intelligence and fortitude to know what is best for them and is reluctant to deprive them of an opportunity to express their views by way of a secret ballot vote, it will not ignore the legislative purpose*

> *and intent of Section 9 of The Trade Union Act. Section 9 is clearly meant to be applied when an employer's departure from reasonable neutrality in the representation question leads to or results in an application for decertification being made to the Board. In the Board's view, this application resulted directly from the employer's influence and indirect participation in the gathering of necessary evidence of employee support.*
>
> *This statement makes clear that 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, [1984] Oct. Sask. Labour Rep. 35 LRB File No. 245-84, employer interference is rarely of an overt nature, and the Board must be prepared to consider the possibility that subtle or indirect forms of influence may improperly inject the interests or views of the employer into the decision concerning trade union representation.*

**[52]** In the present case, it is certain that the Employer has not been an exemplar of neutrality and detachment regarding the issue of trade union representation for the reasons cited above by counsel for the Union. However, on carefully considering the whole of the evidence, we are not satisfied that the present application is made in whole or in part on the advice of, or as a result of influence or intimidation by, the Employer. And we cannot conclude that the circumstances are such that by the time the application was assembled and filed in the fall of 2000, the Employer's actions and omissions prior to May of that year had created an atmosphere or environment that still existed to the degree that the employees could not make a reasoned and informed decision with respect to the present application.

**[53]** The situation in *Lang and Schaeffer v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, supra*, was much more extreme. In that case, the Employer had been found guilty of several unfair labour practices and of being obstructive in bargaining. By the time of the application for rescission, it had failed to implement the remedial Orders of the Board and was treating identified union supporters in an overtly discriminatory fashion.

**[54]** By contrast, in the present case, the Union achieved an agreement with the Employer that it believed was as good a remedy as the Board might fashion for its alleged unfair labour practice. It included the formal statement by the Employer in May 2000, that the Employees' Association had no

status and could not operate on the premises, and that the Union was recognized as the employees' sole bargaining agent. It would not be stretching it to say that it is most likely that after that date certain employees might continue to believe that the Employer wished that the Union was not in place. However, such wishful thinking on the part of a newly certified Employer is not unusual, and so long as the Employer does not influence an application for rescission in violation of s. 9 of the *Act* or otherwise act on its wish in violation of the *Act*, it is difficult to say that a reasonable employee is not capable of exercising his or her judgment on the representation question free of hope of favour or fear of prejudice.

**[55]** In *Choponis v. Madison Development Group, supra*, the Board reviewed several cases in which it contemplated the possibility that the conduct of an Employer may so affect the status and credibility of a trade union that an expression of opinion by employees concerning whether they wish to continue to be represented by the Union cannot be relied on. The Board made the following observation:

> *With a few exceptions, the conduct of the Employer in this case was not characterized by punitive or discriminatory action against individual employees, or by attempts to influence the thinking of employees through coercive or intimidating communications. Rather, as the quotations from earlier Board decisions involving these parties suggest, the Employer failed and refused to carry on with the Union a collective bargaining relationship of any substance, and approached negotiations with the Union in a way which prevented any substantial progress towards the conclusion of a collective agreement.*
>
> *It is difficult to believe that the conduct of the Employer, which the Board has found on a number of occasions to be in violation of The Trade Union Act, was not a contributing factor to the frustrations of the employees which have resulted in the filing of this application. Indeed, Mr. Choponis acknowledged in his evidence that one of the components of the frustrations of the employees was the fact that the Union did not have anything to show for the negotiations which had been going on for some time.*

**[56]** The Board concluded that the situation could be appropriately remedied by postponing the vote on the application:

> *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.*

**[57]** We have determined that a similar approach in the present case will sufficiently counter the fact that a first collective agreement has been so long in the making.

**[58]** Finally, in *Mayer v. L.L. Lawson Enterprises, supra*, the Board recognized, but did not in the circumstances of that case exercise, a discretion to dismiss an application for rescission where there is a prior and concurrently pending application for first contract assistance. The reasoning is based on a line of cases cited therein that recognizes that the Board will not generally entertain an application for rescission during a strike. Further, because under s. 26.5 an applicant union must either have a strike mandate or successfully assert that the Employer is guilty of a failure to bargain in violation of s. 11(1)(c) of the *Act*, and forfeits its right to strike while the first contract application is pending, the Board should not entertain a rescission application until after a first contract is achieved. In the present case, the Union has no strike mandate nor has the Employer been found guilty of a failure to bargain or of inappropriately impeding the conclusion of a first collective agreement. In our opinion the principle outlined in *Mayer, supra,* has no application to the present case.

**[59]** An Order will issue that a vote on the rescission application will be conducted in the usual manner. The vote shall not be conducted until at least 180 days after the implementation of the terms of a first collective agreement. If the parties are unable to agree on the voters' list, any party may apply to the Board to fix same.

# ADMINISTRATIVE AND SUPERVISORY PERSONNEL ASSOCIATION, Applicant v. UNIVERSITY OF SASKATCHEWAN and CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1975, Respondents

LRB File No. 204-01; July 25, 2002
Vice-Chairperson, Walter Matkowski; Members: Bruce McDonald and Tom Davies

| | |
|---|---|
| For the Applicant: | Gary Bainbridge |
| For C.U.P.E., Local 1975: | Harold Johnson |
| For the University of Saskatchewan: | Collin Hirschfeld |

**Bargaining unit – Appropriate bargaining unit – Multiple bargaining unit setting – Board reviews history of duties of positions in dispute – Board determines that there has been a material change in duties and responsibilities – Board assigns five of six positions to applicant's bargaining unit.**

**Bargaining unit – Appropriate bargaining unit – Administrative and supervisory bargaining unit at University is not middle management bargaining unit – Board relies on history of duties of positions in dispute and similarities between them and positions in applicant's bargaining unit to determine assignment of changed positions.**

***The Trade Union Act*, ss. 5(j)(ii) and 19(2)**

## REASONS FOR DECISION

### Background

**[1] Walter Matkowski, Vice-Chairperson:** The Administrative and Supervisory Personnel Association ("ASPA") applied to the Board pursuant to s. 5(m) of *The Trade Union Act*, R.S.S.1978, c. T-17 (the *"Act"*) for an order determining whether six positions at the University of Saskatchewan should be reassigned from the Canadian Union of Public Employees, Local 1975's (CUPE) bargaining unit to ASPA's bargaining unit.

**[2]** The parties acknowledged that they were aware of the Board's decision in *Canadian Union of Public Employees v. University of Saskatchewan et al.*, [2000] Sask. L.R.B.R. 83, LRB File No. 218-98, in which the Board set out the procedure the parties should follow to determine the bargaining unit assignment of new positions at the University. In fact, the parties advised the Board that they have established an informal process for that purpose.

**[3]** In *University of Saskatchewan, supra*, the Board stated that, if the parties could not agree on the proper placement of a new position, the Employer must apply to the Board to have the matter determined pursuant to ss. 5(j), (k) or (m) of the *Act*.

**[4]** In the case at hand, the parties proceeded under the mistaken belief that ASPA could apply under s. 5(m) of the *Act* to deal with existing positions within CUPE's bargaining unit. While ASPA alleged that the duties associated with the positions had changed to such an extent that they were like new positions, nonetheless, as the evidence unfolded it became clear that the positions were not new positions and as such, s. 5 (m) should have not been used.

**[5]** The Board has the power, pursuant to s.19(2) of the *Act*, to amend any defect or error in any proceeding so as to be able to determine the real question or issue raised by the parties. To that end, the Board will rely on s. 19(2) of the *Act* to amend ASPA's application so that it is brought forward under ss. 5(j)(ii). This will allow the Board to determine into which bargaining unit the six positions in question fall.

## Relevant Statutory Provisions

**[6]** The relevant statutory provisions are:

> *5 The board may make orders:*
>
> *(j) amending an order of the board if:*
>
> . . .
>
> *(ii) in the opinion of the board, the amendment is necessary;*
>
> *notwithstanding a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;*
>
> . . .
>
> *(m) subject to section 5.2, determining for the purposes of this Act whether any person is or may become an employee;*
>
> . . .
>
> *19(2) The board may at any time and on such terms as the board may think just, amend any defect or error in any proceedings, and all necessary amendments shall be*

*made for the purpose of determining the real question or issue raised by or depending on the proceedings.*

## ASPA's Evidence

**[7]** ASPA presented extensive evidence about each position through the testimony of the incumbents. The evidence provided a complete picture of the positions' evolution, the work currently performed in the positions, and the relationship of the positions to others at the University. CUPE did not challenge the factual correctness of the incumbents' testimony nor did CUPE challenge ASPA's evidence that there had been significant change to five of the six positions in question. Likewise, CUPE did not challenge ASPA's evidence that five of the remaining six positions now performed duties and responsibilities similar to ASPA positions.

**[8]** The Board will briefly describe the history and evolution of the positions.

### Position 1: EDP Operations Supervisor (Incumbent Sharon Schreiner)

**[9]** Ms. Schreiner's position falls into the data processing classification under the CUPE collective agreement. She is responsible for the computer operations unit within server and data base services. Ms. Schreiner testified that prior to a major reorganization in 1995, the manager for the unit had been Mr. Brown, an ASPA member. When Mr. Brown left, Ms. Schreiner assumed some of his duties. Mr. Brown was not replaced with an on-site manager, and the off-site managers did not have the ability to handle the operational side of the duties, leading to Ms. Schreiner becoming responsible for the unit. Ms. Schreiner is part of a management committee whose other members all belong to ASPA.

### Position 2: Office Manager, Library Administration Office (Incumbent Rose Rode)

**[10]** Ms. Rode holds the CUPE position of Clerk Steno 3. On October 1, 1999 she became the office manager. Her job duties include managing CUPE staff, directing workflow and identifying projects, as well as responsibility for the budget. Ms. Rode testified that an administrative assistant, that is, a person in an ASPA classification, formerly performed 85% of her current responsibilities, and that a Clerk Steno 2 and a newly hired Clerk Steno 1 have assumed her former duties.

**Position 3: User Support and Database Maintenance Coordinator, Main Library (Incumbent Laura Stewart)**

**[11]** Ms. Stewart holds the CUPE position of Library Systems Operator. In 1994 the library obtained a new operating system (INNOPAC) and the Operations Manager gave Ms. Stewart new duties. Her present duties include help desk-user support functions, which account for 80% of her time. Her remaining duties include database maintenance, which duties were given to her by Mr. Fox, the Department Head for information & technology services, and server maintenance. Ms. Stewart and Bill Wallace, a programmer analyst and past president of ASPA both testified that Ms. Stewart's present duties now resemble ASPA help desk positions. In 1999, during the CUPE reclassification program, Ms. Stewart provided the consultants with a number of ASPA job descriptions, most of which could be called computer support positions, when they reviewed her case. Ms. Stewart received a letter from the University which reads in part:

> *The reclassification results we received from Koenig and Associates state that there are no matches for the position you hold under the current University of Saskatchewan classification system. As you may be aware, the University of Saskatchewan and CUPE, Local 1975 are engaged in a job evaluation project that will result in a new classification system. Under the new system, all jobs will be reviewed.*

**Position 4: Coordinator, Desktop Computer Support, Main Library (Incumbent Glenda Forward)**

**[12]** Ms. Forward became a Library Systems Operator in 1987. In 1993, her department head asked her to take over the desktop support and do all the problem solving. Her duties and responsibilities have evolved since then; she now diagnoses software, hardware and network problems. Desktop user support is her main job. In 1999, Ms. Forward completed a position description questionnaire for CUPE as part of its reclassification process. Ms. Forward received a letter similar to the one Ms. Stewart received. Ms. Forward and Mr. Wallace testified that her position is similar to the help desk positions, which are ASPA positions.

**Position 5: Systems Support and Training Coordinator, Main Library (Incumbent Lori Nizinkevich)**

**[13]** Ms. Nizinkevich has held the CUPE position of Library Assistant 4 since 1978. In 1996 she moved to the systems department and from that point on her job functions and duties bore no resemblance to her pre-1996 job functions and duties. Ms. Nizinkevich's position is now similar to a

help desk position, which is an ASPA position. Her user support work and troubleshooting occupy approximately half of her time. She is also responsible for training individuals on a new database called Y-WHO and for writing training programs. She estimated that she spends approximately 25% of her time in her training role. She is on a Y-WHO Committee along with representatives from each Department, all of who belong to ASPA. When she is on holidays, Anne Marie Moulin, the Operations Manager and an ASPA member, takes over her duties.

**Position 6: Program Administrator, Instructional Design – Department Of Extension (Incumbent Perry Millar)**

**[14]** During argument, counsel for ASPA acknowledged that there had not been a significant change to the duties and responsibilities of this position. Thus, there is no need to review the evidence in regard to this position; the position will remain a CUPE position.

## CUPE's Evidence

**[15]** Jim Sharman, president of CUPE, Local 1975 testified before the Board. He did not challenge the evidence of the five incumbents as to how their job duties had significantly changed. Rather, Mr. Sharman explained to the Board that CUPE's job evaluation process had been unfolding over the last three years. CUPE has established a job rating committee whose task will be to rate positions. CUPE also has a steering committee, which weighs such factors as the education level required for a position. The end result of the job evaluation process will be changes in job descriptions and changes in salary for CUPE employees (the latter are subject to negotiation). During cross-examination, Mr. Sharman agreed that the job evaluation process does not deal with scope issues.

## Argument

**[16]** The Applicant argued that a pattern had been established for position Nos. 1 to 5. That pattern, according to ASPA, was these CUPE positions' duties and responsibilities had evolved and changed to the extent that they are new positions that fall within ASPA's certification Order.

**[17]** Counsel for CUPE argued that ASPA was a middle management unit, much like the one that exists at the City of Saskatoon, and that any Board order removing the positions in question would have the effect of eroding the CUPE bargaining unit and removing promotional opportunities for CUPE members.

## Analysis

### Is ASPA a middle management unit?

**[18]** In *University of Saskatchewan, supra*, the Board definitively rejects the assertion that ASPA is restricted to middle management positions. The Board came to this conclusion because of the generic wording of the ASPA Order and because the positions listed in the ASPA Order do not all have significant supervisory duties. This Board adopts the reasoning and conclusions of the Board as set out in that decision. The Board also accepts that it is difficult to identify the boundaries between CUPE and ASPA but that the Board must nonetheless make its best effort to interpret the original ASPA certification Order.

### Process for determining the assignment of positions that have experienced material changes in a multiple bargaining unit setting

**[19]** The Board in *University of Saskatchewan, supra,* provided the parties with a process for determining the assignment of new positions in a multiple bargaining unit setting. In the case at hand, the Board must look at existing positions whose duties and responsibilities have changed to the extent that ASPA referred to them as new positions.

**[20]** In *International Association of Firefighters, Local 80 (Saskatoon Professional Fire Fighters Union), Saskatoon Civic Middle Management Association and City of Saskatoon*, [2002] Sask. L.R.B.R. 213, LRB File Nos. 295-00 & 296-00, the Board analyzed the process for determining into which unit a position that experienced material change should be placed. The two-fold test as it applies here is as follows:

> 1. Has there been a material change in the duties and responsibilities of the position since the date of CUPE's certification Order? The onus is on ASPA to demonstrate that there has been a material change.
>
> 2. If ASPA is able to demonstrate a material change in the duties and responsibilities of the position, to which bargaining unit is it now properly assigned?

**[21]** The Board finds that the evidence of the incumbents to position Nos. 1, 2, 3, 4 and 5 demonstrates that there has been material change to those positions. The Board must now determine into which unit the work for the five positions falls.

## Assignment of disputed positions

**[22]** In *University of Saskatchewan, supra,* the Board looked at "whether the duties and responsibilities of the new positions could be traced back to either of the bargaining units" and "the similarities between the new positions and ones currently assigned to each bargaining unit" to determine the assignment of the disputed positions.

**[23]** In regard to position Nos. 3, 4 and 5 the evidence was uncontroverted that the positions were similar to help desk positions at the University, which are ASPA positions. The evidence was also uncontroverted for position Nos. 3 and 4 that there were no other CUPE positions similar to them.

**[24]** In regard to position No. 2, Ms. Rode testified that 85% of her job responsibilities came from an administrative assistant who was in the ASPA bargaining unit. The Board in *University of Saskatchewan, supra*, held that " administrative assistants are explicitly included in the ASPA certification Order."

**[25]** Likewise, in regard to position No. 1, Ms. Schreiner assumed duties that had belonged to an ASPA member.

**[26]** The Board finds that incumbents in position Nos. 1, 2, 3, 4 and 5 perform duties and possess responsibilities that are properly described as ASPA bargaining unit work.

## Conclusion

**[27]** As set out earlier, ASPA incorrectly made this application under s. 5(m) when it should have been made under ss. 5 (j) or (k). If the application had been made under s. 5(k), the Board would have dismissed it as it was not brought within the appropriate open period. However, in the case at hand, the Board will exercise its discretion pursuant to s. 5(j)(ii) and assign these five positions to ASPA's bargaining unit.

**[28]** To be clear, if a dispute arises again between ASPA and CUPE as to the bargaining unit assignment of an existing position, the parties must proceed under ss. 5 (j) or (k). The Board confirms that parties applying for amendment or rescission of Board Orders concerning the scope of bargaining units and the representation of employees by trade unions must normally do so within the

open period as set out in s. 5 (k). (see: *Canadian Union of Public Employees v. John M. Cuelenaere Library*, [1996] Sask. L.R.B.R. 732, LRB File No. 052-96 at p. 742).

**[29]** However, in the case at hand, the Board will exercise its discretion pursuant to s. 5(j)(ii) primarily for the reason that the parties mistakenly proceeded with this application and the ensuing two days of evidence under s. 5(m). It would make little practical sense for the parties to present this same evidence at a later date. In addition, the parties have had a high level of uncertainty as to the status of the five positions in question for a significant period of time.

**[30]** As stated earlier, there was no evidence of significant change to the duties and responsibilities of Position No. 6. Thus, the position remains in CUPE's bargaining unit.

**[31]** Following questioning from the Board, Counsel for ASPA confirmed that the incumbents would go with the positions in question and would not be displaced if the Board assigned some or all of the contested positions to the ASPA bargaining unit.

# INDUSTRIAL WOOD AND ALLIED WORKERS OF CANADA, LOCAL 1-184, Applicant v. CABTEC MANUFACTURING INC., Respondent

LRB File No. 034-02; August 7, 2002
Chairperson, Gwen Gray, Q.C.; Members: Pat Gallagher and Don Bell

For the Applicant: Neil R. McLeod, Q.C.
For the Respondent: Kevin A. Lang

**Bargaining unit – Appropriate bargaining unit – Community of interest – Board find that installers, cleaning, office, computer systems and design staff in cabinet making plant have no strong affinity with proposed production unit – Board finds production unit that excludes those staff to be an appropriate unit.**

**Certification – Statement of employment – Board finds that employees hired to replace employees illegally fired during organizing drive not hired for bona fide business reasons – Board concludes that hiring had effect of manipulating employee complement reflected on statement of employment – Board excludes those employees from statement of employment.**

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

## REASONS FOR DECISION

### Background

**[1] Gwen Gray, Q.C., Chairperson:** The Industrial Wood and Allied Workers of Canada, Local 1-184 (the "Union") applied to be certified for a bargaining unit comprising the production workers at Cabtec Manufacturing Inc. (the "Employer"). The Employer opposed the bargaining unit description and proposed that an "all employee" bargaining unit was the unit that ought to be certified. The Union estimated that there were 28 employees in the bargaining unit, while the Employer filed a statement of employment listing 51 employees.

**[2]** The Board's investigating officer conducted an investigation of the positions in dispute and provided her report to the parties on June 5, 2002. The parties agreed to remove June Botkin from the list of employees as she performs managerial functions as the production manager. They also agreed to add the name of Adam Ashton to the statement of employment.

**[3]** In keeping with its proposed bargaining unit structure, the Union also sought the removal from the statement of employment of office, accounting, sales, computer design and payroll staff; installers who work on-site; and janitors. This group includes the following employees: Diane Anderson, Judy Oxtoby, Ashley Hutmacher, Joan Grohs, Alan Kowalchuk, Bernie Blattler, Steve Donsberger, Hans Fitzel, Dale Stebner, Shelley Stanley, Darcy Simon and Larry Vindevoghel.

**[4]** The Union also sought the removal of six employees who were hired one day before the application for certification was filed with the Board and close to the time that a number of union supporters were fired. The Employer has agreed that two of these six employees should not be listed on the statement of employment because their employment was of short duration (King and McBride), leaving four employees in question under this heading (Mitchell, Harreman, Solie, H. Vindevoghel).

**[5]** The Union filed an unfair labour practice in relation to the termination of its supporters. Prior to a hearing of the matter, the Employer returned the employees to work with full restitution of their pay. The Board issued an Order on June 10, 2002 confirming the reinstatement. The Union takes the position on this application that the four employees in question were hired to replace union supporters and should not be considered "employees" for the purposes of this application. The Employer denies that they were hired solely to replace the workers who were terminated. Only Mr. Solie remains employed at Cabtec.

**[6]** The Union questioned the inclusion of Mr. St. Cyr, Mr. McLaren and Mr. Gaw and subpoenaed these employees to the hearing, as they were not known to the Union. At the hearing, the Union withdrew its objections to the inclusion of Mr. St. Cyr and Mr. Gaw, but sought the exclusion of Mr. McLaren based on his work as an installer.

**[7]** The issues before the Board are as follows:

(1) The breadth of the bargaining unit – should it include "all employees", "all production workers including installers" or just "production workers"; and

(2) The inclusion of the four employees hired on the heels of the organizing campaign.

## Facts

### A. Role of Investigating Officer's Report

**[8]** At the outset of the hearing, the Board ruled that the findings contained in the Investigating Officer's report would be considered as evidence before the Board unless they were contradicted through viva voce evidence. Both parties were invited to state any objections to the findings of the Board agent and are permitted to bring forward evidence to contradict the Board agent's report. This practice is adopted by the Board under its quick certification process to provide a neutral assessment of the factual matters in dispute and to promote a quick resolution of the certification issues.

### B. Breadth of the bargaining unit

**[9]** Cabtec designs, manufactures and installs cabinetry in the residential, institutional and commercial sectors. It operates out of a plant located in the City of Regina.

**[10]** Mr. Ken Kowalchuk, president of Cabtec, described the various stages of the design and manufacturing processes. He maintained that employees are used within the plant and on-site, as they are needed to get the work done. He viewed the design, manufacturing and installation process as a seamless process.

**[11]** The office staff members have contact with clients and they are responsible for preparing work orders and details for production and labels for the components of each job. They convey information from clients to the shop staff. Office staff members share the same staff room and change rooms as the shop staff and they all work from the same location. They also keep track of their time in the same fashion as other employees, although some shop employees are testing a computerized time system. All of the employees are paid on an hourly basis. The office staff members spend the majority of their time in the office, rather than in the shop area, and they are supervised by the owners, Ken and Kim Kowalchuk.

**[12]** There is one cleaning person who is responsible for cleaning the offices, show room, bathrooms and staff room. According to Mr. Kowalchuk, this person also fills in and helps out in the shop by cleaning product before it is shipped to a customer. Otherwise the person has little contact

with the shop and is mostly employed on evenings and weekends. In her statement to the Investigating Officer, which Mr. Kowalchuk accepted as accurate, the employee indicated that she does not fill in for other people except occasionally for the receptionist. The Union disputed the Employer's assertion that the cleaning person works on cabinet cleaning in the shop area. We find that the primary duties of this position relate to office cleaning. The employee may, on occasion, perform duties in the plant but these are not of a significant nature.

**[13]** There is a computer systems person at the plant who looks after the various computer systems in the plant, including the computerized saws and drilling machines in the plant area. He works primarily with the owners to develop the systems needs and to implement new programs. He also spends time training employees on new programs. The employee is paid on an hourly basis and is supervised by the owners.

**[14]** There are two designers, Ms. Blattler and Mr. Donsberger. Ms. Blattler is paid on a monthly contract as a matter of personal preference. Mr. Kowalchuk testified that her hours of work are regularly Monday to Friday, 8:00 a.m. to 5:00 p.m. it is not difficult to calculate her hourly pay. She meets with clients, takes site measurements, prepares shop drawings for the cabinetry using computerized design software, and designs and creates new products. Ms. Blattler has little contact with shop employees.

**[15]** The other person in the design area, Steve Donsberger, is a long-term employee with an intimate knowledge of the production process. He ensures the practicality of initial designs, orders product, programs computerized machines and ensures that programs are working properly on the equipment. He also updates production schedules and discusses the schedule with each department. He spends the majority of his time on programming but he also spends time in the shop working on the computer equipment and answering questions of production employees. He occasionally works on assembly. Mr. Donsberger also attends client sites to obtain measurements and other information.

**[16]** The second group of employees who are excluded from the Union's proposed bargaining unit are the installers. These employees install cabinets; attach doors, moldings and hardware to the cabinets; and install countertops. The work requires installers to measure and cut wood on site to complete the assembly of the cabinets on-site.

**[17]** Installers use their own vehicles for work and use their own small tools. The Employer provides the larger tools. Installers may perform some of their functions in the shop, but these functions are related to their installation work. They tend to be qualified as carpenters.

**[18]** Installers are not assigned work in the shop when they are not busy; instead, they are sent home. One installer, Mr. Vindevoghel spends more time in the shop then other installers. He does custom work for Cabtec both in the shop and on-site. Installers attend at the shop in the morning to obtain work orders from Ms. Botkin.

**[19]** Unlike other employees, installers are treated as contractors and are paid a flat hourly rate without any deductions. Mr. Kowalchuk explained that this approach was taken with installers based on accounting advice received by the installers. They are responsible for paying their own income tax and Canada Pension Plan premiums. The Employer provides Workers' Compensation Board coverage for this group of employees.

**[20]** Installers are supervised by June Botkin, and Ken and Kim Kowalchuk. They are required to keep time sheets like other employees. They are paid on an hourly, as opposed to a piece rate, system. Installers' pay rates are, on average, higher than shop employees'. Shop employees earn from $7 to $19 per hour, while installers earn from $14 to $18 per hour.

**[21]** Shop employees are required to work on-site, away from the plant, on various occasions. They deliver product to the site. They may assist installers with part of the work removing old cabinetry, installing drawers, doors, hardware, countertops, backsplashes, and performing caulking, cleaning, repairs and touch-ups. According to Mr. Kowalchuk, most employees at the plant have spent time on-site. The Union did not disagree with the assertion that shop employees perform some work on-site, but it maintained that the work was of a different nature and quantity than installers.

**[22]** The evidence indicated that Mr. McLaren, one of the employees in dispute, performs work as an installer.

## C. Employees hired on heels of organizing campaign

**[23]** In LRB File No 042-02, the Employer admitted in a statement of agreed facts filed with the Board that it terminated the employment of six employees on March 15, 2002 and that the activity of the Union in relation to its organizing drive was, if not the primary reason, at least a relevant consideration in the termination of the employees' employment. After receiving legal advice, the Employer reinstated each of the six employees and paid them for any lost wages. This action was taken on April 1, 2002 before the Board heard the unfair labour practice. The Board found that the Employer violated ss. 11(1)(a), (e), (g) and (o) of the *Act* and issued an order requiring the Employer to refrain from such violations and to post the reasons for decision and order in the workplace.

**[24]** The Union led evidence that the reasons and Orders were not posted as required by the Board's Order. Mr. Kowalchuk testified that he gave instructions to his staff to post the Order and Reasons. He was not present in the workplace during the period of required posting and did not have actual knowledge as to whether or not the posting requirements were met. On the other hand, the Union's witness, Mr. Curtis Mazenc, acknowledged that in summer time, coffee and lunch breaks are often taken out of doors and not in the coffee room where notices would be posted.

**[25]** In relation to the hiring of six additional employees on March 18th, Mr. Kowalchuk testified at this hearing that productivity had dropped significantly by March 15th and the Employer was forced to hire new employees to deal with what appeared to him to be a slow-down of production. An advertisement was placed in the Leader-Post on March 16th. The resumes of the four employees who are in question on this application show that one had experience as a labourer and cook; one as a sales associate in retail clothing; one was a carpenter; one was a shipper/receiver and labourer; one had experience installing low voltage security devices. At the same time, the Employer had three employees who were then working part-time. Mr. Kowalchuk explained that the three part-time employees did not have the ability to perform the work needed. Counsel for the Union asked if it was reasonable to expect that a retail sales clerk would be any better qualified than existing employees to perform the work in question. Mr. Kowalchuk indicated that the Employer was assessing the ability to train the employee in question, not their current readiness to perform the work.

**[26]** Only one of this group of employees remains on the job (Mr. Solie), the rest having quit for a number of reasons.

## Argument

### (1) Breadth of Bargaining Unit

#### (a) Union's Argument

**[27]** The Union argues that a plant unit is normal in this industry. It points to certifications at R. L. Cushing and Moose Jaw Sash and Door Ltd. as examples of similar bargaining units where office staff members are excluded from the bargaining units. In this case, the Union argues that the cleaning person is more closely connected with the office staff and ought to be excluded with the office staff.

**[28]** In relation to the installers, the Union points out that they are paid differently, own their own tools and vehicles, function more independently and have more flexibility in their work arrangements than shop employees. Counsel argued that the Union, by seeking to exclude installers, is not attempting to "tailor" the bargaining unit to match its support, but is basing its bargaining unit description on its historical experiences in the industry where it traditionally represents shop employees.

**[29]** In relation to the issue of intermingling between plant workers and installers, the Union argued that the evidence does not support such a claim. The plant workers do make deliveries, remove old cabinets and install knobs, doors and clean already installed cabinets. Installers, on the other hand, do not perform plant work although they may spend time in the plant in relation to their installation work. The core of the work performed by installers is journeyman carpentry work.

**[30]** The Union argued that there is no evidence that the proposed bargaining unit will lead to difficulties in collective bargaining. It noted that the Employer already accommodates different arrangements for different staff without difficulty.

**[31]** On this issue, the Union relied on *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; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Brown Industries (1976) Ltd. et al.,* [1995] 2nd Quarter Sask. Labour Rep. 71, LRB File No. 010-95 & 012-95; *United Food and Commercial Workers, Local 1400 v. Peak Manufacturing Inc.,* [1996] Sask. L.R.B.R. 234, LRB File No. 011-96; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Custom Built Ag. Industries Ltd.,* [1998] Sask. L.R.B.R. 662, LRB File No. 112-98.

**(b) Employer's Argument**

**[32]** The Employer argued that the proposed unit is under inclusive and should not be certified. The Employer referred to Board policy of supporting large bargaining units and to the rules that may justify a diversion from that policy, as were set out by the Board in *Graphic Communications International Union v. Sterling Newspapers Group,* [1998] Sask. L.R.B.R. 770, LRB File No. 174-98.

**[33]** The Employer argued that the policy permitting less than an all employee unit does not apply to the present case, as there is no discrete boundary separating the plant employees from other employees. It also noted the intermingling of staff, particularly the intermingling of plant staff and installers, both in the plant and on-site. The Employer argued that the work performed by installers is of the same nature as the work performed in the plant, i.e. the fabrication of cabinets. All employees, except for one, are paid on an hourly basis and have their work assignments and hours of work determined by the Employer. No employee works on a piece rate or commissioned system, unlike salesmen considered in *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.

**[34]** The Employer argued that there was no reason why the Union could not have extended its organizing efforts to include the office staff and installers. In its view, there are no labour relations reasons for departing from an all employee bargaining unit.

**(2) Employees hired on the heels of the organizing drive**

**(a) Union's Argument:**

**[35]** With respect to the four employees who were hired on the heels of the organizing drive, the Union argued that they should be excluded from the statement of employment as they were hired as a consequence of the Employer's unfair labour practice. The Union argued that in such circumstances, the Board should exercise a discretion to exclude the new hires to prevent the Employer from manipulating the statement of employment by firing known union supporters and hiring new employees at the time of a certification drive. The Union questioned the bona fides of the Employer's recruitment process, noting that the employees who were hired on March 18th lacked experience or qualifications to perform the work in question. The Union concluded that the Employer hired these employees for the purpose of affecting the Union's support in the bargaining unit.

**[36]** The Union referred to *Custom Aggregates v. Cement Workers,* [1978] OLRB Rep. Mar. 21 and *Betteridge v. Canadian Union of Public Employees, Local 3097,* [1988] Fall Sask. Labour Rep. 75, LRB File No. 083-88, in support of its arguments that stacking a statement of employment with recent hires constitutes a violation of *Act* and may result in the disenfranchisement of such employees.

**[37]** The Union also referred to *Canadian Union of Public Employees, Local 3287 v. University of Saskatchewan,* [1989] Summer Sask. Labour Rep. 37, LRB File No. 063-88 to demonstrate the point that the Board has a discretion to alter the normal rules pertaining to statements of employment when circumstances warrant.

**(b) Employer's Argument**

**[38]** The Employer argued that the normal rules should apply. If the employees have "a reasonably tangible employment relationship with the employer," they should be included in the bargaining unit. The Employer argued that the three employees who are no longer in the plant worked for a reasonable period of time prior to quitting their employment, and they demonstrated a significant connection to the work place.

**[39]** The Employer argued that the primary reason for the termination of the six employees during the organizing campaign was the production slowdown; however, it did acknowledge that anti-union animus was also a factor. The Employer pointed out that it acted quickly to reinstate the employees and to rectify the harm done by its decision to terminate the employees in question.

## Analysis

### (1) Breadth of the Bargaining Unit

**[40]** In plant settings, although the Board does prefer large and inclusive bargaining units, bargaining units comprised of production workers have been held to be viable units: see *Prairie Micro-Tech Inc., supra,* and *Brown Industries (1976) Ltd., supra.*

**[41]** In relation to office clerical staff, the work performed is based on a different set of skills; the employees report to different supervisors; there is no significant intermingling with the production staff; and the proposed bargaining unit is not lacking in bargaining strength. The Union is one that typically represents shop, rather than office, workers. In our view, excluding office employees from the proposed bargaining unit does not render the bargaining unit inappropriate for the purposes of collective bargaining.

**[42]** In addition to the office staff, the Union also proposes to exclude the design staff and the computer systems employee. In our view, these positions are more identified in their interests with the office staff. They work with different skill sets than the production staff; they take direction from the owners, as opposed to the production manager; other than Mr. Donsberger, they have minimal contact with production workers.

**[43]** Although it would be possible to consider Mr. Donsberger's interests as fitting more closely with the production workers (as was done in the *Brown Industries* case, *supra,* with a similar position), his primary responsibility is to ensure the practicality of designs, to program the computer cuts, and to make sure the computerized equipment is working properly. This work is different in nature from the production employees. Mr. Donsberger works primarily in the office area and he takes direction from the owners, not from the production manager. Overall, we view his work as having more in common with the office, design and computer systems employees, than with the production employees and he can be excluded from the bargaining unit.

**[44]** The janitor or cleaning person is also one that could be assigned either to the production unit or the office unit. In this case, the evidence indicates that she cleans the office, staff-rooms, bathrooms and show rooms. She also replaces the receptionist, on occasion. There is little connection between her work and the production workers. For instance, the evidence does not suggest that she works cleaning the production area or works side-by-side with production crews on a regular basis. In our view, this position has more in common with office employees and can be excluded from the proposed bargaining unit without creating undue fragmentation or industrial instability.

**[45]** The exclusion of installers raises a more difficult issue. Installers work primarily as finishing carpenters - installing and finishing the cabinets on-site. They possess a more skills than those required of most production workers, which is reflected in their average pay. There is some intermingling of installers with production workers, both in the plant and on-site. Production workers assist installers in locating the products and tools that they need on the job site and they assist with some of the more minor installation tasks. However, there is a clear division between production workers and installers. As one Union witness stated, he would not have a clue how to go about actually installing a cabinet, although he can assist with minor aspects of the installation job. Installers perform work of a skilled nature in the carpentry trade unlike production workers who possess general skills or specific production skills linked to the use of computerized saws and drills.

**[46]** Installers have a tradesman-like working relationship with the Employer. Some of the features of this relationship include the contract approach to their pay. The Employer does not make deductions for income tax or Canada Pension Plan. Installers are required to use some of their own tools for work and they are required to use their own vehicles to move from site to site. These steps are taken to give some tax advantages to installers, presumably by claiming status as sub-contractors, as opposed to employees. On the other hand, they are paid on an hourly basis and are required to keep track of their time in the same way as the production workers. Like tradesmen in other settings, installers are not reassigned to work on other jobs when they are not engaged in on-site installation. Production workers are moved around the plant if they are not busy and are not sent home when their work is completed.

**[47]** None of these features would make it impossible for the Union to represent installers in the proposed bargaining unit. At the same time, however, there is a distinct skill boundary around installers and distinct terms and conditions of their employment that does not render it inappropriate to exclude them from collective bargaining. The proposed bargaining unit can function in a labour relations sense without the inclusion of installers. We can draw a parallel between installers in this case and the truck drivers considered in *Brown Industries (1976) Ltd., supra.* Both groups of employees worked primarily away from the plant and on terms and conditions different from the plant production workers.

**[48]** There may be some concern that the installers may be left out of a collective bargaining regime as a tag-end group, unable to form an effective bargaining unit of their own. This may be a concern with employees who do not possess specialized skills or qualifications that give them some economic clout on their own outside of a larger bargaining structure. In this case, the type of work performed by installers requires carpentry skills. A small bargaining unit of carpenters would not be lacking in bargaining strength simply due to the skilled nature of their work.

**[49]** For these reasons, we find that the bargaining unit proposed by the Union is an appropriate unit.

(2) **Employees hired on the heels of the organizing campaign**

**[50]** The Board generally requires the Employer to list on the statement of employment all employees who were employed on the date the application for certification was filed with the Board. The purpose of the strict cut-off date was set out in *Health Sciences Association of Saskatchewan v. Royal University Hospital et al.,* [1993] 3rd Quarter Sask. Labour Rep. 128, LRB File No. 210-90 as follows at 129:

> *The general requirement that an employee must be employed on the date the application is filed, in order to be eligible to vote in a representation vote, was developed both for a reason and with the general or typical application in mind. The reasons for selecting the date of the filing of the application as the basis for the voters' list is that experience has shown the Board that it is advisable to use a date that is as early as possible in the representation process, as this minimizes any opportunity for the Employer to influence the outcome of the vote by tampering with the employee complement, or even to be perceived as having done so. The later the date in the process, the more likely it is that every hiring or layoff will be perceived as manipulation and the ensuing litigation would greatly add to the expense and the complexity of the representation issue. Secondly, if the applicant's organizing of the*

> *employees must stop on the date of filing, then logic suggests and fairness to the applicant requires, that the calculation of whether it has a majority must also be based upon the employee complement as it existed on that date, regardless of when the calculation is actually done and what changes to the work force occur during the interval. On a typical application, the interval between the date when the application is filed and the date the vote is conducted is a matter of weeks or perhaps a few months during which the constituency does not change dramatically.*
>
> *These general policies are helpful and as the historical record of this Board illustrates most cases fall well within the factual parameters which were used to develop the criteria. Consequently, the Board's general policy serves the overwhelming majority of cases and enjoys general support from the labour relations community. However, as the Board's decision in Little-Borland and University of Saskatchewan indicate, we recognize that one policy is not sufficient to deal with every conceivable fact situation. When the facts of a case are entirely different from those to which the Board's general policy was developed to apply, the Board must be prepared to consider whether modifications are required.*
>
> *In this case, the interval of two and one-half years between the date the application was filed and the date of the vote and the fact that nearly one-half of the employees have been replaced by new employees, taken together with the complete absence of any suggestion that any of these new employees are anything but legitimate, bona fide members of the bargaining unit makes application of the Board's general policy inappropriate.* [emphasis added]

**[51]** The Union in this case is asking the Board to disenfranchise employees who were hired on the heels of the organizing drive to replace workers who, the Employer admits, were terminated for union activity. The Union argues, in essence, that the hiring of these employees was not for bona fide business reasons. We agree with this assessment. Through the illegal means of the firing of certain employees and the hiring of new employees, the Employer attempted to manipulate the employee complement.

**[52]** We acknowledge that the Employer acted quickly to restore the fired employees to their jobs and it did not object to their inclusion on the statement of employment. At the same time, however, it is arguing that four of the recently hired employees should remain on the statement of employment as they demonstrated some reasonable connection to the workplace.

**[53]** In our view, that is an untenable proposition. The Board's rules on the establishment of employee lists are designed to reduce the opportunities for manipulation by the Employer. Once it is established that such manipulation has occurred, the Board must take appropriate action to prevent such conduct from influencing the outcome of a representational test even if this requires a

suspension of the normal rules. In this case, the Board will not include the four employees hired on the heels of the organizing drive on the statement of employment.

## Conclusion

**[54]** The Union has filed evidence of majority support among the employees in the bargaining unit. The Board will grant the following bargaining unit description which lists exclusions that conform to the current titles used by managerial personnel in the plant (President – Ken Kowalchuk, Treasurer – Kim Kowalchuk, Production Manager – June Botkin) and the exclusion of groups of employees – office staff, computer systems staff, janitorial staff, installers and designers (Bernie Blatter and Steve Donsberger). As the bargaining unit applied for is a production, as opposed to an "all employee" unit, it will be described as such in the Order. The Order will describe the bargaining unit as follows:

> *All production employees of Cabtec Manufacturing Inc. in the City of Regina and within a 25 kilometer radius of Regina, except the President, Treasurer and Production Manager, and except those employees who are employed as office staff, computer systems staff, janitorial staff, design staff or installers.*

# JASON MERONIUK, Applicant v. RURAL MUNICIPALITY OF PREECEVILLE NO. 334, Respondent

LRB File Nos. 063-02, 064-02 & 065-02; August 15, 2002
Chairperson, Gwen Gray, Q.C.; Members: Pat Gallagher and Don Bell

For the Applicant: Randy P. Kachur
For the Respondent: Carmen Gattinger

**Unfair labour practice – Burden of proof – Dismissal – Employee engaged in union activity prior to dismissal – Board examines employer's reasons and motivation for dismissal – Board evaluates sufficiency of employer's reasons for dismissal to determine if union activity played any role.**

**Evidence – Onus – Reverse onus – Employer's reasons for dismissal of employee not coherent and credible – Board finds that employer did not have good and sufficient reason for dismissal – Board finds Employer has committed unfair labour practice pursuant to s. 11(1)(e) of The Trade Union Act and orders reinstatement of employee.**

**Unfair labour practice – Dismissal – Board finds employee dismissed for union activity in violation of s. 11(1)(e) of The Trade Union Act – Board orders reinstatement of employee.**

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

## REASONS FOR DECISION

### Background

**[1] Gwen Gray, Q.C., Chairperson:** Mr. Jason Meroniuk (the "Applicant") filed unfair labour practice, reinstatement and monetary loss applications with the Labour Relations Board relating to the termination of his employment as a patrol operator with the Rural Municipality of Preeceville, No. 334 (the "Employer" or the "Rural Municipality"). The Applicant filed the applications on April 24, 2002. The Employer denied the unfair labour practice in its Reply filed on May 3, 2002. The Board heard the applications on July 29, 2002.

**[2]** The parties agreed at the hearing that the question of monetary loss would be left to be decided at a later date, if needed.

**[3]** The Employer agreed that the threshold requirements of s. 11(1)(e) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") had been met by the application and reply. It did not put the Applicant to further proof of these pre-requisites and accepted that it was required to establish good and sufficient reasons for the termination of the Applicant's employment.

## Facts

**[4]** The Applicant started working as a patrol operator with the Employer in June 1997. He works with five other employees, three of whom (including the Applicant) work year round for the Employer. He is the second most senior equipment operator. The Applicant has no disciplinary record. He did admit to causing two accidents with his grader, neither of which resulted in discipline or traffic charges.

**[5]** In January of each year, the council of the Rural Municipality meets to decide the wages to be paid to employees of the Rural Municipality. In January 2002, the Applicant, along with his winter colleagues, Mr. Jaques and Mr. Nagy, met with council to discuss their wages. They told council that they wanted their winter hours of work guarantee changed from 100 hours to 130 hours for the months of January to March. This was the only change the employees were seeking.

**[6]** Council of the Rural Municipality decided at the January meeting to increase the guaranteed hours to 115 hours. It also agreed to increase the mileage payment by $.05/per kilometer. The administrator informed the employees of these changes by council through contact with one of the three equipment operators.

**[7]** The equipment operators were very disappointed with council's decision. They decided to meet with a representative of the International Union of Operating Engineers (the "Union"), a union with some experience in organizing municipal equipment operators. This meeting was held at the Applicant's home in Sturgis in February before the next scheduled council meeting. All five employees were invited to the meeting but one had to leave before the Union representative arrived. The Union representative talked to the employees about the benefits of joining the Union and shared copies of a draft collective agreement with them. Mr. Meroniuk testified that two employees were prepared to sign union cards at the meeting; one was "on the fence" while another was opposed to joining a union. The employees made no decision at that time.

**[8]** Shortly after, Mr. Ted Wardle, the employees' working foreman, called a meeting of employees at his house. Mr. Wardle had attended the meeting with the union representative and had been part of the union discussion. At this meeting, Mr. Wardle suggested that they give the council of the Rural Municipality another opportunity to discuss the wage issue. He proposed that he attend the meeting as spokesperson for employees and see what could be done. The employees agreed to this proposal.

**[9]** Mr. Wardle spoke with council members Ebel, Sawka and Mitchell about the threatened union drive and the employees' complaints.

**[10]** He then contacted the council and asked for a place on the February meeting agenda. At the meeting attended by all the employees, Mr. Wardle placed a four-point proposal to members of council. The proposal was as follows:

> 1. *For the winter months (Dec. 1 to March 31) the patrol operators want pay for a minimum of 130 hours. (non-negotiable) Retroactive to Jan. 1, 2002;*
>
> 2. *Mileage to be increased to .35 cents per km.*
>
> 3. *A wage increase of $1.00 per hour.*
>
> 4. *A long-term disability health and dental plan (level 3) – R.M. to pay or an increase of wages to cover the cost of the insurance.*

**[11]** Reeve Earl Pottle was upset with the use of the term "non-negotiable" in the employees' first demand and he felt they had a gun to council's head. He did not believe that the employees would join a trade union because he knew three of them personally and did not think they would take this step. He did not know about the Applicant.

**[12]** During the meeting, one council member asked the employees what would happen if they did not agree to the proposal to move guaranteed hours to 130 hours. Mr. Wardle, speaking on behalf of the employees, answered that they would then be dealing with someone else. He meant that the employees would join the Union and commence negotiations through the Union with council.

**[13]** After council met with the employee delegation at its February meeting, it voted to change its guarantee of winter hours to 130 hours, as requested by the employees.

**[14]** The next resolution reported in the minutes of the meeting records the following motion:

> *53/02/02 Ebel: That as the municipality no longer requires three patrol operators to carry out the road maintenance in the municipality that one patrol operator position be terminated and therefore patrol operator Jason Meroniuk be let go and that he be provided with payment in lieu of notice (4 weeks).*

**[15]** In justifying the reduction of patrol operators from three to two, Mr. Ebel testified that he had thought about the matter all of January. He thought it was possible to reduce the number of patrol operators due to the new state of the art snow removal equipment that was now available to the employees. Winter roadwork was reduced in time by approximately 1/3 and hence, now could be done by two workers in the time that it used to take three workers. Mr. Ebel testified that he was concerned with a number of cost increases facing the Rural Municipality, including increased costs of gravel, hospitals, and the like. He viewed his role as trying to keep the tax mill rate as low as possible; the elimination of one operator position would result in savings to the Employer.

**[16]** The Rural Municipality had owned the faster snow removal technology for ten years or more. The last speed plough was bought in 2001.

**[17]** No mention was made to employees who attended the February meeting that if they were given an increase in their guaranteed hours, one patrol operator might be laid off.

**[18]** Mr. Ebel said that council chose the Applicant as the operator to be laid off because he had two accidents and had been the subject of more than one complaint from a ratepayer. Mr. Ebel feels that the new system is working well and he has received no complaints from ratepayers.

**[19]** Lynn Larson, the administrator of the Rural Municipality, gave evidence relating to the February council meeting. She testified that council was faced with rising costs in the area of policing, regional waste management projects, and the gravel contract. It was carrying a deficit from 2001 that needed to be recovered. In addition, in February, the Rural Municipality was unaware of the amount of grants it would receive from the provincial government. Ms. Larson testified that there was a discussion of these costs at the February meeting. At that time, Mr. Ebel made his motion to reduce the number of patrol operators. Ms. Larson stated that the reduction of workers

was proposed as a cost cutting measure. She explained that council was unaware of some of the cost issues at the January meeting, when it normally set the wage rates.

**[20]** Prior to deciding which employee would be laid off, Ms. Larson checked with the Labour Standards Branch, Saskatchewan Labour, to determine if there was any requirement that employees be laid off in order of seniority. She was told that there was no such requirement outside of a union setting.

**[21]** When she conveyed this information to council, council decided to terminate the employment of the Applicant, who was not the most junior patrol operator. Ms. Larson prepared the notice of termination and presented it to the Applicant the next day. The letter stated in part, as follows:

> *This letter is written to advise you that council has made the decision to eliminate one patrol operator position for the municipality as they feel two patrol operators can manage the road maintenance therefore your employment by the municipality has been terminated as of today's date.*

**[22]** Ms. Larson explained that council considered the Applicant's accident record when it was deciding to terminate his employment rather than the employment of another operator.

**[23]** Ms. Larson was aware prior to the February council meeting that the employees had been discussing joining a union. She had received this information from Reeve Pottle. She confirmed that the Rural Municipality still owns three graders. The Applicant's grader was not sold. She also confirmed that Mr. Meroniuk had no disciplinary record.

**[24]** Mr. Ernie Sawka also testified for the Rural Municipality. Mr. Sawka is a member of council and attended both the January and February meetings. Mr. Sawka acknowledged that he was aware that the employees were meeting with a union representative. Mr. Wardle, foreman, told Mr. Sawka this information and explained as well that he did not want to be a member of the Union. Mr. Sawka testified that it would not matter to him if they did join a union but he was convinced at the time that they would not be successful because they were too well paid.

**[25]** Mr. Sawka justified the elimination of one patrol operator position on the basis of fiscal restraint and he justified the selection of the Applicant based on his attitude to manual labour and his method of servicing his grader.

**[26]** Mr. Earl Pottle, Reeve of the Rural Municipality, testified that one operator position was eliminated due to the increased costs in gravel, policing, the waste management project and hospital project of which council was not aware in January when it set the wage rates for 2002.

**[27]** At the same time, council had a surplus equal to or greater than its assessment and normally set its budget in April, after it had received information from the Government on its annual grants.

**[28]** Reeve Pottle testified that some council members were not satisfied with the Applicant's work and that is why he was selected for lay off.

**[29]** Mr. Wardle testified that he thought the selection of the Applicant was wrong. If council needed to lay off one employee, they should have chosen Mr. Nagy who was junior to the Applicant and not as skilled an operator. Council did not consult Mr. Wardle regarding the termination of the Applicant's employment.

**Employer's Argument**

**[30]** The Employer argued that it established good and sufficient reason for the termination of the Applicant's employment. Council was concerned in February with rising costs in the three areas of policing, gravel and waste management and made a decision to reduce costs by reducing the number of patrol operators. In doing so, council considered the Applicant's accident record and work attitude. Council believed that the employees were only using a threat of union as a bargaining chip and it did not believe that the employees would join a union.

**Applicant's Argument**

**[31]** The Applicant argued that the three reasons given for his termination do not hold water. First, the economic reasons relied on by council were suspect, given the normal pattern of setting the budget in April each year after all the information was available. There was no urgency to this decision.

**[32]** Second, the increase in productivity with the new snow removal equipment stretched credibility. The equipment was already in place and the third grader has not been sold. The council "lucked" out this year with road grading because of the dry conditions.

**[33]** Finally, the reasons given for selecting the Applicant lack credibility. He had no disciplinary record. The foreman was not contacted to provide information to council on the relative merits of selecting the Applicant over one of the two other operators and some of the reasons given were petty. The Applicant asked the Board to take into consideration the coincidence of timing between the discussions with the Union, the demands made of council, including the threat of unionization, and the resulting immediate termination of the Applicant's employment.

## Relevant Statutory Provisions

**[34]** Section 11(1)(e) of the *Act* states 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

**[35]** In this case, there is no dispute that the employees of the Rural Municipality were engaged in union activity at or around the time council decided to terminate the Applicant's employment. Council members were aware that employees had met or were meeting with a union representative. They were also told at the council meeting in February that if their demands were not met, the employees would join a union.

**[36]** In these circumstances, the Employer faces the difficult task of establishing that its reasons for terminating an employee were unrelated to the union activity and were for "good and sufficient" reasons. The Board is not concerned with the question of whether the Employer had "just cause" for terminating the employment of an employee, but we will scrutinize the manner of selecting the employee and the justifications put forth to determine if there are credible and coherent reasons for the dismissal: see *International Union of Operating Engineers, Hoisting, Portable & Stationary v. Points North Services Ltd. and Points North Construction Ltd.,* [1995] 4th Quarter Sask. Labour Rep. 115, LRB File Nos. 216-95, 217-95 & 218-95.

**[37]** In addition, the Employer must provide some explanation for the coincidence of timing of the trade union activity and the termination: see *The Newspaper Guild v. The Leader-Post,* [1994] 1st Quarter Sask. Labour Rep. 242, LRB File Nos. 251-93, 252-93 & 253-93.

**[38]** In the present case, the manner of selecting the Applicant for layoff lacks credibility. The Applicant was not the junior employee, his supervisor, Mr. Wardle, did not have any input into the selection of the Applicant and no objective assessment was made of the Applicant's work compared to the work of the more junior employee.

**[39]** Members of council appear to have considered factors that may relate to the Applicant's support for the Union. Reeve Pottle testified that he was aware from his personal knowledge of the other three employees that they would not support the union. This evidence suggests to the Board that perhaps the Applicant was gauged to be the most likely instigator of the union talk and selected for that reason. In any event, the Employer had not met the threshold test in this regard, that the Applicant was selected for layoff based on good and sufficient reasons that are unrelated to any union activity.

## Facts

### A. Role of Investigating Officer's Report

[8] At the outset of the hearing, the Board ruled that the findings contained in the Investigating Officer's report would be considered as evidence before the Board unless they were contradicted through viva voce evidence. Both parties were invited to state any objections to the findings of the Board agent and are permitted to bring forward evidence to contradict the Board agent's report. This practice is adopted by the Board under its quick certification process to provide a neutral assessment of the factual matters in dispute and to promote a quick resolution of the certification issues.

### B. Breadth of the bargaining unit

[9] Cabtec designs, manufactures and installs cabinetry in the residential, institutional and commercial sectors. It operates out of a plant located in the City of Regina.

[10] Mr. Ken Kowalchuk, president of Cabtec, described the various stages of the design and manufacturing processes. He maintained that employees are used within the plant and on-site, as they are needed to get the work done. He viewed the design, manufacturing and installation process as a seamless process.

[11] The office staff members have contact with clients and they are responsible for preparing work orders and details for production and labels for the components of each job. They convey information from clients to the shop staff. Office staff members share the same staff room and change rooms as the shop staff and they all work from the same location. They also keep track of their time in the same fashion as other employees, although some shop employees are testing a computerized time system. All of the employees are paid on an hourly basis. The office staff members spend the majority of their time in the office, rather than in the shop area, and they are supervised by the owners, Ken and Kim Kowalchuk.

[12] There is one cleaning person who is responsible for cleaning the offices, show room, bathrooms and staff room. According to Mr. Kowalchuk, this person also fills in and helps out in the shop by cleaning product before it is shipped to a customer. Otherwise the person has little contact

with the shop and is mostly employed on evenings and weekends. In her statement to the Investigating Officer, which Mr. Kowalchuk accepted as accurate, the employee indicated that she does not fill in for other people except occasionally for the receptionist. The Union disputed the Employer's assertion that the cleaning person works on cabinet cleaning in the shop area. We find that the primary duties of this position relate to office cleaning. The employee may, on occasion, perform duties in the plant but these are not of a significant nature.

**[13]** There is a computer systems person at the plant who looks after the various computer systems in the plant, including the computerized saws and drilling machines in the plant area. He works primarily with the owners to develop the systems needs and to implement new programs. He also spends time training employees on new programs. The employee is paid on an hourly basis and is supervised by the owners.

**[14]** There are two designers, Ms. Blattler and Mr. Donsberger. Ms. Blattler is paid on a monthly contract as a matter of personal preference. Mr. Kowalchuk testified that her hours of work are regularly Monday to Friday, 8:00 a.m. to 5:00 p.m. it is not difficult to calculate her hourly pay. She meets with clients, takes site measurements, prepares shop drawings for the cabinetry using computerized design software, and designs and creates new products. Ms. Blattler has little contact with shop employees.

**[15]** The other person in the design area, Steve Donsberger, is a long-term employee with an intimate knowledge of the production process. He ensures the practicality of initial designs, orders product, programs computerized machines and ensures that programs are working properly on the equipment. He also updates production schedules and discusses the schedule with each department. He spends the majority of his time on programming but he also spends time in the shop working on the computer equipment and answering questions of production employees. He occasionally works on assembly. Mr. Donsberger also attends client sites to obtain measurements and other information.

**[16]** The second group of employees who are excluded from the Union's proposed bargaining unit are the installers. These employees install cabinets; attach doors, moldings and hardware to the cabinets; and install countertops. The work requires installers to measure and cut wood on site to complete the assembly of the cabinets on-site.

**[17]** Installers use their own vehicles for work and use their own small tools. The Employer provides the larger tools. Installers may perform some of their functions in the shop, but these functions are related to their installation work. They tend to be qualified as carpenters.

**[18]** Installers are not assigned work in the shop when they are not busy; instead, they are sent home. One installer, Mr. Vindevoghel spends more time in the shop then other installers. He does custom work for Cabtec both in the shop and on-site. Installers attend at the shop in the morning to obtain work orders from Ms. Botkin.

**[19]** Unlike other employees, installers are treated as contractors and are paid a flat hourly rate without any deductions. Mr. Kowalchuk explained that this approach was taken with installers based on accounting advice received by the installers. They are responsible for paying their own income tax and Canada Pension Plan premiums. The Employer provides Workers' Compensation Board coverage for this group of employees.

**[20]** Installers are supervised by June Botkin, and Ken and Kim Kowalchuk. They are required to keep time sheets like other employees. They are paid on an hourly, as opposed to a piece rate, system. Installers' pay rates are, on average, higher than shop employees'. Shop employees earn from $7 to $19 per hour, while installers earn from $14 to $18 per hour.

**[21]** Shop employees are required to work on-site, away from the plant, on various occasions. They deliver product to the site. They may assist installers with part of the work removing old cabinetry, installing drawers, doors, hardware, countertops, backsplashes, and performing caulking, cleaning, repairs and touch-ups. According to Mr. Kowalchuk, most employees at the plant have spent time on-site. The Union did not disagree with the assertion that shop employees perform some work on-site, but it maintained that the work was of a different nature and quantity than installers.

**[22]** The evidence indicated that Mr. McLaren, one of the employees in dispute, performs work as an installer.

## C. Employees hired on heels of organizing campaign

**[23]** In LRB File No 042-02, the Employer admitted in a statement of agreed facts filed with the Board that it terminated the employment of six employees on March 15, 2002 and that the activity of the Union in relation to its organizing drive was, if not the primary reason, at least a relevant consideration in the termination of the employees' employment. After receiving legal advice, the Employer reinstated each of the six employees and paid them for any lost wages. This action was taken on April 1, 2002 before the Board heard the unfair labour practice. The Board found that the Employer violated ss. 11(1)(a), (e), (g) and (o) of the *Act* and issued an order requiring the Employer to refrain from such violations and to post the reasons for decision and order in the workplace.

**[24]** The Union led evidence that the reasons and Orders were not posted as required by the Board's Order. Mr. Kowalchuk testified that he gave instructions to his staff to post the Order and Reasons. He was not present in the workplace during the period of required posting and did not have actual knowledge as to whether or not the posting requirements were met. On the other hand, the Union's witness, Mr. Curtis Mazenc, acknowledged that in summer time, coffee and lunch breaks are often taken out of doors and not in the coffee room where notices would be posted.

**[25]** In relation to the hiring of six additional employees on March 18th, Mr. Kowalchuk testified at this hearing that productivity had dropped significantly by March 15th and the Employer was forced to hire new employees to deal with what appeared to him to be a slow-down of production. An advertisement was placed in the Leader-Post on March 16th. The resumes of the four employees who are in question on this application show that one had experience as a labourer and cook; one as a sales associate in retail clothing; one was a carpenter; one was a shipper/receiver and labourer; one had experience installing low voltage security devices. At the same time, the Employer had three employees who were then working part-time. Mr. Kowalchuk explained that the three part-time employees did not have the ability to perform the work needed. Counsel for the Union asked if it was reasonable to expect that a retail sales clerk would be any better qualified than existing employees to perform the work in question. Mr. Kowalchuk indicated that the Employer was assessing the ability to train the employee in question, not their current readiness to perform the work.

**[26]** Only one of this group of employees remains on the job (Mr. Solie), the rest having quit for a number of reasons.

## Argument

### (1) Breadth of Bargaining Unit

#### (a) Union's Argument

**[27]** The Union argues that a plant unit is normal in this industry. It points to certifications at R. L. Cushing and Moose Jaw Sash and Door Ltd. as examples of similar bargaining units where office staff members are excluded from the bargaining units. In this case, the Union argues that the cleaning person is more closely connected with the office staff and ought to be excluded with the office staff.

**[28]** In relation to the installers, the Union points out that they are paid differently, own their own tools and vehicles, function more independently and have more flexibility in their work arrangements than shop employees. Counsel argued that the Union, by seeking to exclude installers, is not attempting to "tailor" the bargaining unit to match its support, but is basing its bargaining unit description on its historical experiences in the industry where it traditionally represents shop employees.

**[29]** In relation to the issue of intermingling between plant workers and installers, the Union argued that the evidence does not support such a claim. The plant workers do make deliveries, remove old cabinets and install knobs, doors and clean already installed cabinets. Installers, on the other hand, do not perform plant work although they may spend time in the plant in relation to their installation work. The core of the work performed by installers is journeyman carpentry work.

**[30]** The Union argued that there is no evidence that the proposed bargaining unit will lead to difficulties in collective bargaining. It noted that the Employer already accommodates different arrangements for different staff without difficulty.

**[31]** On this issue, the Union relied on *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; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Brown Industries (1976) Ltd. et al.,* [1995] 2nd Quarter Sask. Labour Rep. 71, LRB File No. 010-95 & 012-95; *United Food and Commercial Workers, Local 1400 v. Peak Manufacturing Inc.,* [1996] Sask. L.R.B.R. 234, LRB File No. 011-96; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Custom Built Ag. Industries Ltd.,* [1998] Sask. L.R.B.R. 662, LRB File No. 112-98.

**(b) Employer's Argument**

**[32]** The Employer argued that the proposed unit is under inclusive and should not be certified. The Employer referred to Board policy of supporting large bargaining units and to the rules that may justify a diversion from that policy, as were set out by the Board in *Graphic Communications International Union v. Sterling Newspapers Group,* [1998] Sask. L.R.B.R. 770, LRB File No. 174-98.

**[33]** The Employer argued that the policy permitting less than an all employee unit does not apply to the present case, as there is no discrete boundary separating the plant employees from other employees. It also noted the intermingling of staff, particularly the intermingling of plant staff and installers, both in the plant and on-site. The Employer argued that the work performed by installers is of the same nature as the work performed in the plant, i.e. the fabrication of cabinets. All employees, except for one, are paid on an hourly basis and have their work assignments and hours of work determined by the Employer. No employee works on a piece rate or commissioned system, unlike salesmen considered in *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.

**[34]** The Employer argued that there was no reason why the Union could not have extended its organizing efforts to include the office staff and installers. In its view, there are no labour relations reasons for departing from an all employee bargaining unit.

**(2) Employees hired on the heels of the organizing drive**

**(a) Union's Argument:**

**[35]** With respect to the four employees who were hired on the heels of the organizing drive, the Union argued that they should be excluded from the statement of employment as they were hired as a consequence of the Employer's unfair labour practice. The Union argued that in such circumstances, the Board should exercise a discretion to exclude the new hires to prevent the Employer from manipulating the statement of employment by firing known union supporters and hiring new employees at the time of a certification drive. The Union questioned the bona fides of the Employer's recruitment process, noting that the employees who were hired on March 18th lacked experience or qualifications to perform the work in question. The Union concluded that the Employer hired these employees for the purpose of affecting the Union's support in the bargaining unit.

**[36]** The Union referred to *Custom Aggregates v. Cement Workers,* [1978] OLRB Rep. Mar. 21 and *Betteridge v. Canadian Union of Public Employees, Local 3097,* [1988] Fall Sask. Labour Rep. 75, LRB File No. 083-88, in support of its arguments that stacking a statement of employment with recent hires constitutes a violation of *Act* and may result in the disenfranchisement of such employees.

**[37]** The Union also referred to *Canadian Union of Public Employees, Local 3287 v. University of Saskatchewan,* [1989] Summer Sask. Labour Rep. 37, LRB File No. 063-88 to demonstrate the point that the Board has a discretion to alter the normal rules pertaining to statements of employment when circumstances warrant.

**(b) Employer's Argument**

**[38]** The Employer argued that the normal rules should apply. If the employees have "a reasonably tangible employment relationship with the employer," they should be included in the bargaining unit. The Employer argued that the three employees who are no longer in the plant worked for a reasonable period of time prior to quitting their employment, and they demonstrated a significant connection to the work place.

**[39]** The Employer argued that the primary reason for the termination of the six employees during the organizing campaign was the production slowdown; however, it did acknowledge that anti-union animus was also a factor. The Employer pointed out that it acted quickly to reinstate the employees and to rectify the harm done by its decision to terminate the employees in question.

## Analysis

### (1) Breadth of the Bargaining Unit

**[40]** In plant settings, although the Board does prefer large and inclusive bargaining units, bargaining units comprised of production workers have been held to be viable units: see *Prairie Micro-Tech Inc., supra,* and *Brown Industries (1976) Ltd., supra.*

**[41]** In relation to office clerical staff, the work performed is based on a different set of skills; the employees report to different supervisors; there is no significant intermingling with the production staff; and the proposed bargaining unit is not lacking in bargaining strength. The Union is one that typically represents shop, rather than office, workers. In our view, excluding office employees from the proposed bargaining unit does not render the bargaining unit inappropriate for the purposes of collective bargaining.

**[42]** In addition to the office staff, the Union also proposes to exclude the design staff and the computer systems employee. In our view, these positions are more identified in their interests with the office staff. They work with different skill sets than the production staff; they take direction from the owners, as opposed to the production manager; other than Mr. Donsberger, they have minimal contact with production workers.

**[43]** Although it would be possible to consider Mr. Donsberger's interests as fitting more closely with the production workers (as was done in the *Brown Industries* case, *supra,* with a similar position), his primary responsibility is to ensure the practicality of designs, to program the computer cuts, and to make sure the computerized equipment is working properly. This work is different in nature from the production employees. Mr. Donsberger works primarily in the office area and he takes direction from the owners, not from the production manager. Overall, we view his work as having more in common with the office, design and computer systems employees, than with the production employees and he can be excluded from the bargaining unit.

**[44]** The janitor or cleaning person is also one that could be assigned either to the production unit or the office unit. In this case, the evidence indicates that she cleans the office, staff-rooms, bathrooms and show rooms. She also replaces the receptionist, on occasion. There is little connection between her work and the production workers. For instance, the evidence does not suggest that she works cleaning the production area or works side-by-side with production crews on a regular basis. In our view, this position has more in common with office employees and can be excluded from the proposed bargaining unit without creating undue fragmentation or industrial instability.

**[45]** The exclusion of installers raises a more difficult issue. Installers work primarily as finishing carpenters - installing and finishing the cabinets on-site. They possess a more skills than those required of most production workers, which is reflected in their average pay. There is some intermingling of installers with production workers, both in the plant and on-site. Production workers assist installers in locating the products and tools that they need on the job site and they assist with some of the more minor installation tasks. However, there is a clear division between production workers and installers. As one Union witness stated, he would not have a clue how to go about actually installing a cabinet, although he can assist with minor aspects of the installation job. Installers perform work of a skilled nature in the carpentry trade unlike production workers who possess general skills or specific production skills linked to the use of computerized saws and drills.

**[46]** Installers have a tradesman-like working relationship with the Employer. Some of the features of this relationship include the contract approach to their pay. The Employer does not make deductions for income tax or Canada Pension Plan. Installers are required to use some of their own tools for work and they are required to use their own vehicles to move from site to site. These steps are taken to give some tax advantages to installers, presumably by claiming status as sub-contractors, as opposed to employees. On the other hand, they are paid on an hourly basis and are required to keep track of their time in the same way as the production workers. Like tradesmen in other settings, installers are not reassigned to work on other jobs when they are not engaged in on-site installation. Production workers are moved around the plant if they are not busy and are not sent home when their work is completed.

**[47]** None of these features would make it impossible for the Union to represent installers in the proposed bargaining unit. At the same time, however, there is a distinct skill boundary around installers and distinct terms and conditions of their employment that does not render it inappropriate to exclude them from collective bargaining. The proposed bargaining unit can function in a labour relations sense without the inclusion of installers. We can draw a parallel between installers in this case and the truck drivers considered in *Brown Industries (1976) Ltd., supra.* Both groups of employees worked primarily away from the plant and on terms and conditions different from the plant production workers.

**[48]** There may be some concern that the installers may be left out of a collective bargaining regime as a tag-end group, unable to form an effective bargaining unit of their own. This may be a concern with employees who do not possess specialized skills or qualifications that give them some economic clout on their own outside of a larger bargaining structure. In this case, the type of work performed by installers requires carpentry skills. A small bargaining unit of carpenters would not be lacking in bargaining strength simply due to the skilled nature of their work.

**[49]** For these reasons, we find that the bargaining unit proposed by the Union is an appropriate unit.

(2) **Employees hired on the heels of the organizing campaign**

**[50]** The Board generally requires the Employer to list on the statement of employment all employees who were employed on the date the application for certification was filed with the Board. The purpose of the strict cut-off date was set out in *Health Sciences Association of Saskatchewan v. Royal University Hospital et al.,* [1993] 3rd Quarter Sask. Labour Rep. 128, LRB File No. 210-90 as follows at 129:

> *The general requirement that an employee must be employed on the date the application is filed, in order to be eligible to vote in a representation vote, was developed both for a reason and with the general or typical application in mind. The reasons for selecting the date of the filing of the application as the basis for the voters' list is that experience has shown the Board that it is advisable to use a date that is as early as possible in the representation process, as this minimizes any opportunity for the Employer to influence the outcome of the vote by tampering with the employee complement, or even to be perceived as having done so. The later the date in the process, the more likely it is that every hiring or layoff will be perceived as manipulation and the ensuing litigation would greatly add to the expense and the complexity of the representation issue. Secondly, if the applicant's organizing of the*

> *employees must stop on the date of filing, then logic suggests and fairness to the applicant requires, that the calculation of whether it has a majority must also be based upon the employee complement as it existed on that date, regardless of when the calculation is actually done and what changes to the work force occur during the interval. On a typical application, the interval between the date when the application is filed and the date the vote is conducted is a matter of weeks or perhaps a few months during which the constituency does not change dramatically.*
>
> *These general policies are helpful and as the historical record of this Board illustrates most cases fall well within the factual parameters which were used to develop the criteria. Consequently, the Board's general policy serves the overwhelming majority of cases and enjoys general support from the labour relations community. However, as the Board's decision in Little-Borland and University of Saskatchewan indicate, we recognize that one policy is not sufficient to deal with every conceivable fact situation. When the facts of a case are entirely different from those to which the Board's general policy was developed to apply, the Board must be prepared to consider whether modifications are required.*
>
> *In this case, the interval of two and one-half years between the date the application was filed and the date of the vote and the fact that nearly one-half of the employees have been replaced by new employees, taken together with the complete absence of any suggestion that any of these new employees are anything but legitimate, bona fide members of the bargaining unit makes application of the Board's general policy inappropriate.* [emphasis added]

**[51]** The Union in this case is asking the Board to disenfranchise employees who were hired on the heels of the organizing drive to replace workers who, the Employer admits, were terminated for union activity. The Union argues, in essence, that the hiring of these employees was not for bona fide business reasons. We agree with this assessment. Through the illegal means of the firing of certain employees and the hiring of new employees, the Employer attempted to manipulate the employee complement.

**[52]** We acknowledge that the Employer acted quickly to restore the fired employees to their jobs and it did not object to their inclusion on the statement of employment. At the same time, however, it is arguing that four of the recently hired employees should remain on the statement of employment as they demonstrated some reasonable connection to the workplace.

**[53]** In our view, that is an untenable proposition. The Board's rules on the establishment of employee lists are designed to reduce the opportunities for manipulation by the Employer. Once it is established that such manipulation has occurred, the Board must take appropriate action to prevent such conduct from influencing the outcome of a representational test even if this requires a

suspension of the normal rules. In this case, the Board will not include the four employees hired on the heels of the organizing drive on the statement of employment.

## Conclusion

**[54]** The Union has filed evidence of majority support among the employees in the bargaining unit. The Board will grant the following bargaining unit description which lists exclusions that conform to the current titles used by managerial personnel in the plant (President – Ken Kowalchuk, Treasurer – Kim Kowalchuk, Production Manager – June Botkin) and the exclusion of groups of employees – office staff, computer systems staff, janitorial staff, installers and designers (Bernie Blatter and Steve Donsberger). As the bargaining unit applied for is a production, as opposed to an "all employee" unit, it will be described as such in the Order. The Order will describe the bargaining unit as follows:

> *All production employees of Cabtec Manufacturing Inc. in the City of Regina and within a 25 kilometer radius of Regina, except the President, Treasurer and Production Manager, and except those employees who are employed as office staff, computer systems staff, janitorial staff, design staff or installers.*

# JASON MERONIUK, Applicant v. RURAL MUNICIPALITY OF PREECEVILLE NO. 334, Respondent

LRB File Nos. 063-02, 064-02 & 065-02; August 15, 2002
Chairperson, Gwen Gray, Q.C.; Members: Pat Gallagher and Don Bell

For the Applicant: Randy P. Kachur
For the Respondent: Carmen Gattinger

**Unfair labour practice – Burden of proof – Dismissal – Employee engaged in union activity prior to dismissal – Board examines employer's reasons and motivation for dismissal – Board evaluates sufficiency of employer's reasons for dismissal to determine if union activity played any role.**

**Evidence – Onus – Reverse onus – Employer's reasons for dismissal of employee not coherent and credible – Board finds that employer did not have good and sufficient reason for dismissal – Board finds Employer has committed unfair labour practice pursuant to s. 11(1)(e) of The Trade Union Act and orders reinstatement of employee.**

**Unfair labour practice – Dismissal – Board finds employee dismissed for union activity in violation of s. 11(1)(e) of The Trade Union Act – Board orders reinstatement of employee.**

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

## REASONS FOR DECISION

### Background

**[1] Gwen Gray, Q.C., Chairperson:** Mr. Jason Meroniuk (the "Applicant") filed unfair labour practice, reinstatement and monetary loss applications with the Labour Relations Board relating to the termination of his employment as a patrol operator with the Rural Municipality of Preeceville, No. 334 (the "Employer" or the "Rural Municipality"). The Applicant filed the applications on April 24, 2002. The Employer denied the unfair labour practice in its Reply filed on May 3, 2002. The Board heard the applications on July 29, 2002.

**[2]** The parties agreed at the hearing that the question of monetary loss would be left to be decided at a later date, if needed.

[3] The Employer agreed that the threshold requirements of s. 11(1)(e) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") had been met by the application and reply. It did not put the Applicant to further proof of these pre-requisites and accepted that it was required to establish good and sufficient reasons for the termination of the Applicant's employment.

## Facts

[4] The Applicant started working as a patrol operator with the Employer in June 1997. He works with five other employees, three of whom (including the Applicant) work year round for the Employer. He is the second most senior equipment operator. The Applicant has no disciplinary record. He did admit to causing two accidents with his grader, neither of which resulted in discipline or traffic charges.

[5] In January of each year, the council of the Rural Municipality meets to decide the wages to be paid to employees of the Rural Municipality. In January 2002, the Applicant, along with his winter colleagues, Mr. Jaques and Mr. Nagy, met with council to discuss their wages. They told council that they wanted their winter hours of work guarantee changed from 100 hours to 130 hours for the months of January to March. This was the only change the employees were seeking.

[6] Council of the Rural Municipality decided at the January meeting to increase the guaranteed hours to 115 hours. It also agreed to increase the mileage payment by $.05/per kilometer. The administrator informed the employees of these changes by council through contact with one of the three equipment operators.

[7] The equipment operators were very disappointed with council's decision. They decided to meet with a representative of the International Union of Operating Engineers (the "Union"), a union with some experience in organizing municipal equipment operators. This meeting was held at the Applicant's home in Sturgis in February before the next scheduled council meeting. All five employees were invited to the meeting but one had to leave before the Union representative arrived. The Union representative talked to the employees about the benefits of joining the Union and shared copies of a draft collective agreement with them. Mr. Meroniuk testified that two employees were prepared to sign union cards at the meeting; one was "on the fence" while another was opposed to joining a union. The employees made no decision at that time.

**[8]** Shortly after, Mr. Ted Wardle, the employees' working foreman, called a meeting of employees at his house. Mr. Wardle had attended the meeting with the union representative and had been part of the union discussion. At this meeting, Mr. Wardle suggested that they give the council of the Rural Municipality another opportunity to discuss the wage issue. He proposed that he attend the meeting as spokesperson for employees and see what could be done. The employees agreed to this proposal.

**[9]** Mr. Wardle spoke with council members Ebel, Sawka and Mitchell about the threatened union drive and the employees' complaints.

**[10]** He then contacted the council and asked for a place on the February meeting agenda. At the meeting attended by all the employees, Mr. Wardle placed a four-point proposal to members of council. The proposal was as follows:

> 1. *For the winter months (Dec. 1 to March 31) the patrol operators want pay for a minimum of 130 hours. (non-negotiable) Retroactive to Jan. 1, 2002;*
>
> 2. *Mileage to be increased to .35 cents per km.*
>
> 3. *A wage increase of $1.00 per hour.*
>
> 4. *A long-term disability health and dental plan (level 3) – R.M. to pay or an increase of wages to cover the cost of the insurance.*

**[11]** Reeve Earl Pottle was upset with the use of the term "non-negotiable" in the employees' first demand and he felt they had a gun to council's head. He did not believe that the employees would join a trade union because he knew three of them personally and did not think they would take this step. He did not know about the Applicant.

**[12]** During the meeting, one council member asked the employees what would happen if they did not agree to the proposal to move guaranteed hours to 130 hours. Mr. Wardle, speaking on behalf of the employees, answered that they would then be dealing with someone else. He meant that the employees would join the Union and commence negotiations through the Union with council.

**[13]** After council met with the employee delegation at its February meeting, it voted to change its guarantee of winter hours to 130 hours, as requested by the employees.

**[14]** The next resolution reported in the minutes of the meeting records the following motion:

> *53/02/02 Ebel: That as the municipality no longer requires three patrol operators to carry out the road maintenance in the municipality that one patrol operator position be terminated and therefore patrol operator Jason Meroniuk be let go and that he be provided with payment in lieu of notice (4 weeks).*

**[15]** In justifying the reduction of patrol operators from three to two, Mr. Ebel testified that he had thought about the matter all of January. He thought it was possible to reduce the number of patrol operators due to the new state of the art snow removal equipment that was now available to the employees. Winter roadwork was reduced in time by approximately 1/3 and hence, now could be done by two workers in the time that it used to take three workers. Mr. Ebel testified that he was concerned with a number of cost increases facing the Rural Municipality, including increased costs of gravel, hospitals, and the like. He viewed his role as trying to keep the tax mill rate as low as possible; the elimination of one operator position would result in savings to the Employer.

**[16]** The Rural Municipality had owned the faster snow removal technology for ten years or more. The last speed plough was bought in 2001.

**[17]** No mention was made to employees who attended the February meeting that if they were given an increase in their guaranteed hours, one patrol operator might be laid off.

**[18]** Mr. Ebel said that council chose the Applicant as the operator to be laid off because he had two accidents and had been the subject of more than one complaint from a ratepayer. Mr. Ebel feels that the new system is working well and he has received no complaints from ratepayers.

**[19]** Lynn Larson, the administrator of the Rural Municipality, gave evidence relating to the February council meeting. She testified that council was faced with rising costs in the area of policing, regional waste management projects, and the gravel contract. It was carrying a deficit from 2001 that needed to be recovered. In addition, in February, the Rural Municipality was unaware of the amount of grants it would receive from the provincial government. Ms. Larson testified that there was a discussion of these costs at the February meeting. At that time, Mr. Ebel made his motion to reduce the number of patrol operators. Ms. Larson stated that the reduction of workers

was proposed as a cost cutting measure. She explained that council was unaware of some of the cost issues at the January meeting, when it normally set the wage rates.

**[20]** Prior to deciding which employee would be laid off, Ms. Larson checked with the Labour Standards Branch, Saskatchewan Labour, to determine if there was any requirement that employees be laid off in order of seniority. She was told that there was no such requirement outside of a union setting.

**[21]** When she conveyed this information to council, council decided to terminate the employment of the Applicant, who was not the most junior patrol operator. Ms. Larson prepared the notice of termination and presented it to the Applicant the next day. The letter stated in part, as follows:

> *This letter is written to advise you that council has made the decision to eliminate one patrol operator position for the municipality as they feel two patrol operators can manage the road maintenance therefore your employment by the municipality has been terminated as of today's date.*

**[22]** Ms. Larson explained that council considered the Applicant's accident record when it was deciding to terminate his employment rather than the employment of another operator.

**[23]** Ms. Larson was aware prior to the February council meeting that the employees had been discussing joining a union. She had received this information from Reeve Pottle. She confirmed that the Rural Municipality still owns three graders. The Applicant's grader was not sold. She also confirmed that Mr. Meroniuk had no disciplinary record.

**[24]** Mr. Ernie Sawka also testified for the Rural Municipality. Mr. Sawka is a member of council and attended both the January and February meetings. Mr. Sawka acknowledged that he was aware that the employees were meeting with a union representative. Mr. Wardle, foreman, told Mr. Sawka this information and explained as well that he did not want to be a member of the Union. Mr. Sawka testified that it would not matter to him if they did join a union but he was convinced at the time that they would not be successful because they were too well paid.

**[25]** Mr. Sawka justified the elimination of one patrol operator position on the basis of fiscal restraint and he justified the selection of the Applicant based on his attitude to manual labour and his method of servicing his grader.

**[26]** Mr. Earl Pottle, Reeve of the Rural Municipality, testified that one operator position was eliminated due to the increased costs in gravel, policing, the waste management project and hospital project of which council was not aware in January when it set the wage rates for 2002.

**[27]** At the same time, council had a surplus equal to or greater than its assessment and normally set its budget in April, after it had received information from the Government on its annual grants.

**[28]** Reeve Pottle testified that some council members were not satisfied with the Applicant's work and that is why he was selected for lay off.

**[29]** Mr. Wardle testified that he thought the selection of the Applicant was wrong. If council needed to lay off one employee, they should have chosen Mr. Nagy who was junior to the Applicant and not as skilled an operator. Council did not consult Mr. Wardle regarding the termination of the Applicant's employment.

**Employer's Argument**

**[30]** The Employer argued that it established good and sufficient reason for the termination of the Applicant's employment. Council was concerned in February with rising costs in the three areas of policing, gravel and waste management and made a decision to reduce costs by reducing the number of patrol operators. In doing so, council considered the Applicant's accident record and work attitude. Council believed that the employees were only using a threat of union as a bargaining chip and it did not believe that the employees would join a union.

**Applicant's Argument**

**[31]** The Applicant argued that the three reasons given for his termination do not hold water. First, the economic reasons relied on by council were suspect, given the normal pattern of setting the budget in April each year after all the information was available. There was no urgency to this decision.

**[32]** Second, the increase in productivity with the new snow removal equipment stretched credibility. The equipment was already in place and the third grader has not been sold. The council "lucked" out this year with road grading because of the dry conditions.

**[33]** Finally, the reasons given for selecting the Applicant lack credibility. He had no disciplinary record. The foreman was not contacted to provide information to council on the relative merits of selecting the Applicant over one of the two other operators and some of the reasons given were petty. The Applicant asked the Board to take into consideration the coincidence of timing between the discussions with the Union, the demands made of council, including the threat of unionization, and the resulting immediate termination of the Applicant's employment.

## Relevant Statutory Provisions

**[34]** Section 11(1)(e) of the *Act* states 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

**[35]** In this case, there is no dispute that the employees of the Rural Municipality were engaged in union activity at or around the time council decided to terminate the Applicant's employment. Council members were aware that employees had met or were meeting with a union representative. They were also told at the council meeting in February that if their demands were not met, the employees would join a union.

**[36]** In these circumstances, the Employer faces the difficult task of establishing that its reasons for terminating an employee were unrelated to the union activity and were for "good and sufficient" reasons. The Board is not concerned with the question of whether the Employer had "just cause" for terminating the employment of an employee, but we will scrutinize the manner of selecting the employee and the justifications put forth to determine if there are credible and coherent reasons for the dismissal: see *International Union of Operating Engineers, Hoisting, Portable & Stationary v. Points North Services Ltd. and Points North Construction Ltd.,* [1995] 4th Quarter Sask. Labour Rep. 115, LRB File Nos. 216-95, 217-95 & 218-95.

**[37]** In addition, the Employer must provide some explanation for the coincidence of timing of the trade union activity and the termination: see *The Newspaper Guild v. The Leader-Post,* [1994] 1st Quarter Sask. Labour Rep. 242, LRB File Nos. 251-93, 252-93 & 253-93.

**[38]** In the present case, the manner of selecting the Applicant for layoff lacks credibility. The Applicant was not the junior employee, his supervisor, Mr. Wardle, did not have any input into the selection of the Applicant and no objective assessment was made of the Applicant's work compared to the work of the more junior employee.

**[39]** Members of council appear to have considered factors that may relate to the Applicant's support for the Union. Reeve Pottle testified that he was aware from his personal knowledge of the other three employees that they would not support the union. This evidence suggests to the Board that perhaps the Applicant was gauged to be the most likely instigator of the union talk and selected for that reason. In any event, the Employer had not met the threshold test in this regard, that the Applicant was selected for layoff based on good and sufficient reasons that are unrelated to any union activity.

**[40]** We also find that the reasons provided by the Employer relating to the decision to reduce the number of operators from three positions to two positions strain credibility. The equipment that gave rise to productivity savings had been in place for some time. There did not appear to be any urgency to the decision to remove one operator. No consultation was held between council and the foreman, Mr. Wardle, to obtain his views of the proposed change. In all, the coincidence of the union activity and the decision to reduce the number of positions raises the suspicion that the termination of the Applicant's employment was related to his union activity and was not for good and sufficient other reasons.

**[41]** For these reasons, we direct that the Applicant be reinstated forthwith to his position as a patrol operator without loss of seniority as if the Applicant continued to be employed from the date of his termination on February 15, 2002. He will have his wages and benefits restored in full and shall be made whole for all monetary loss suffered as a result of his termination, taking into account the monies he has already received and any other income earned during the period from February 15, 2002 and the date of his reinstatement. If the parties are unable to agree to the amount that is owing to the Applicant, either party may refer the matter back to the Board for determination.

# INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 529, Applicant v. SUN ELECTRIC (1975) LTD., ALLIANCE ENERGY LIMITED and MANCON HOLDINGS LTD., Respondents

LRB File No. 216-01; August 21, 2002
Chairperson, Gwen Gray, Q.C.; Members: Brenda Cuthbert and Gerry Caudle

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

**Practice and procedure – Production of documents – Production ordered if information arguably relevant – Board orders production of executive and membership meeting minutes touching on arguably relevant matters – Board orders production of relevant annual audited financial statements if applicant intends to argue financial duress as reason for not pursuing earlier claim – Board orders production of documents otherwise subject to claim of solicitor-client privilege if party intends to put legal advice in issue or waive privilege at hearing.**

**Practice and procedure – Production of documents – Responsibility for determining relevancy of minutes rests with officer(s) charged with giving testimony with respect to party's case – Departure from ruling in *United Brotherhood of Carpenters and Joiners of America, Local 1985 et al. v. Graham Construction and Engineering Ltd.*, [2002] Sask. L.R.B.R. 143, LRB File Nos. 014-98 & 227-00.**

***The Construction Industry Labour Relations Act, 1992* ss. 18 and 18.1(c)**

## REASONS FOR DECISION

### Background

**[1] Gwen Gray, Q.C., Chairperson:** The parties asked for assistance in determining the scope of document and information disclosure and production required under s. 18.1(c) of *The Construction Industry Labour Relations Act 1992,* S.S. 1992, c. C-29.11 (as amended, S.S. 2000, C-69).

**[2]** The parties agreed to a process for pre-hearing disclosure and production of documents. They also agreed to a protocol for dealing with the confidentiality of the information contained in the documents. Both parties prepared statements of documents which list the documents which they have in their possession. The statements also identify which documents the parties object to

producing and the reason for the objection. In addition, counsel for the Union wrote to the Respondents on May 13, 2002 seeking production of certain categories of documents.

**[3]** These reasons will address the basic rules that guide the disclosure and production of documents and information under s. 18.1 and will apply the rules to the present application.

**[4]** The parties agreed to set aside a further half day of hearings on October 18, 2002 at 9:30 a.m. to deal with any remaining document production issues.

## Analysis and Decision

**[5]** The production of documents in this instance is governed by s. 18.1(c) of *The Construction Industry Labour Relations Act, 1992* (the "*CILRA, 1992*") as amended, which provides as follows:

> *18.1 In relation to any proceeding brought pursuant to section 18, the board may:*
>
> . . .
>
> *(c) at any stage of a proceeding, compel any person to provide information or produce records and things that may be relevant to a matter before the board, after providing the parties an opportunity to make representations;*

**[6]** This provision empowers the Board to order both disclosure ("provide information") and production ("produce records and things") of documents in the pre-hearing and hearing stages of a related employer application brought pursuant to s. 18 of the *CILRA*. This amendment to the *CILRA* significantly expands the disclosure and production powers of the Board which otherwise is limited to issuing subpoenas *duces tecum* requiring persons to appear at the Board and to produce certain documents: see *International Brotherhood of Electrical Workers, Local 529 v. Pyramid Corporation,* [2001] Sask. L.R.B.R. c.-19 (Sask. Q.B.), aff'd. [2002] Sask. L.R.B.R. c.-1 (Sask. C.A.), in which the Court set aside a Board Order that required a party to disclose and produce relevant documents in the course of hearing an application.

**[7]** The power contained in s. 18.1(c), requiring parties to provide information that is relevant to the application, also permits the Board to order the disclosure of information in a general sense, whether or not it is contained in an existing document. In the context of a s. 18 application, the Board may now make the type of order made by the Ontario Board in *United Brotherhood of Retail,*

*Food, Industrial and Service Trades International Union v. 935772 Ontario Ltd. (cob Royal Taxi),* [1998] O.L.R.D. No. 3844 (Oct. 28, 1998), which reads as follows:

> *1. An Order that each of the Respondents produce to the Applicant and to the Board a list of the following:*
>
> *(a) premises owned, leased or occupied;*
> *(b) equipment owned, leased or used;*
> *(c) payroll records since inception;*
> *(d) a copy of all business cards;*
> *(e) name of solicitor;*
> *(f) customer list;*
> *(g) phone and facsimile numbers used;*
> *(h) all signs indicating associated existence;*
> *(i) all shared equipment, personnel and employees;*
> *(j) all policies and procedures concerning service provision, bookkeeping and accounting procedures, and all policies and procedures concerning labour relations or human resources management under which the Respondents operate.*

**[8]** In exercising the powers contained in s. 18.1, the Board will be governed by the rules that normally apply to determine the admissibility of such information or documents at a hearing. A useful summary of these factors was set out by the Canada Industrial Relations Board in *Air Canada Pilots Association v. Air Canada et al.,* [1999] C.I.R.B.D. No. 3 at para. [28] as follows:

> *1. Requests for production are not automatic and must be assessed in each case;*
>
> *2. The information requested must be arguably relevant to the issue to be decided;*
>
> *3. The request must be sufficiently particularized so that the person on whom it is served can readily determine the nature of the request, the documents sought, the relevant time-frame and the content;*
>
> *4. The production must not be in the nature of a fishing expedition; that is, the production must assist a complainant in uncovering something to support its existing case;*
>
> *5. The applicant must demonstrate a probative nexus between its positions in the dispute and the material being requested;*
>
> *6. The prejudicial aspect of introducing the evidence must not outweigh the probative value of the evidence itself, regardless of any possible "confidential" aspect of the document.*

**[9]** While other considerations may arise that ought to be taken into account, we find that the list provided is an excellent starting point for assessing requests for discovery and production of information and documents under s. 18.1.

**[10]** We will first assess the Applicant's request for disclosure and production of documents set out in its May 13, 2002 letter to the Respondents.

**[11]** At the hearing, counsel for the Respondents indicated that the Respondents do not object generally to the matters requested in Mr. Plaxton's May 13, 2002 letter to the solicitors for the Respondents, with two main exceptions that we will set out below.

**[12]** However, the Applicant is concerned that the statement as to documents prepared by the Respondents is unresponsive to the Applicant's demand for production.

**[13]** The Respondents indicated that they did list all of the documents that are requested by the Applicant with the exception of employee lists, which they assumed would be left for the discussion of the remedial issues, which the parties have agreed to set aside for a further hearing, if needed.

**[14]** We find that the employee list requested in point 5 of Mr. Plaxton's letter is arguably relevant to the Applicant's case and ought to be provided at this stage of the hearing. The Respondents are directed to provide the Applicant with employee lists.

**[15]** The two areas of exception pertain to documents subject to a claim of solicitor-client privilege (Schedule II to the statement as to documents); and documents in Schedule III to the statement as to documents, which the Respondents object to producing on the grounds that they are not relevant to the issue at hand.

**[16]** In regard to documents covered by solicitor-client privilege, the Board has addressed the production of such documents in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Pepsi Canada Ltd.,* [1997] Sask. L.R.B.R. 734, at 739, as follows:

> *In its ruling at the hearing of this matter, the Board stated that it respects the claim for solicitor-client privilege and views it as a substantive matter, not simply a procedural*

*or evidentiary rule. The nature of the rule and its rationale is set out in the Lac La Ronge Indian Band case, supra, as follows at 261:*

> *It is well established that confidential communications, whether oral or written, passing between a solicitor and client, for the purpose of seeking or giving legal advice, are privileged from disclosure or production in legal proceedings. The rationale for the privilege is the public interest in protecting the right of confidential access to professional legal advice. While originally regarded as a rule of evidence, the privilege is now recognized not only as a substantive rule of law, but as a fundamental civil and legal right. Confidential communications between a solicitor and client, made for the purpose of giving or obtaining legal advice, are permanently protected from disclosure.*

*It is not the desire of the Board to hinder the role of legal counsel in providing legal advice to clients in relation to labour relations issues. A difficulty, however, arises when legal counsel play a key role in the development of the Employer's or Union's strategy in negotiations. Legal counsel are not insulated from the obligations contained in The Trade Union Act. When they are engaged in a negotiating role on behalf of one party with another party, their conduct in that role will be measured against the same standards that are set by the Act as apply to all other negotiators. For instance, they are not permitted to engage in conduct that constitutes bargaining in bad faith.*

*This Board, however, will not extend its scrutiny of the conduct of legal counsel to advice provided by legal counsel unless the advice is put into issue by the client in the proceedings, or unless the privilege is waived by the client either explicitly or implicitly. In this regard, the Board generally will accept the claim for solicitor-client privilege without going behind it to determine the constituent elements: (1) that legal advice was sought; and (2) that it was intended to be confidential. We are confident that a claim to such privilege is not made lightly by counsel appearing before the Board.*

*However, where such a claim is made, the party making the claim cannot be selective about the evidence to which it applies, especially when that evidence relates to a key area of dispute. A similar view was expressed in the St. Marie case, supra, where Grotsky J. quotes from Wigmore on Evidence (McNaughton Rev. 1961), vol. 8, pp. 635-636, as follows (127 Sask. R. 81, at 91):*

> *What constitutes a waiver by implication?*
>
> *Judicial decision gives no clear answer to this question. In deciding it, regard must be had to the double elements that are predicated in every waiver, i.e., not only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness*

> *requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or disclose, but after a certain point his election must remain final . . .*
>
> (emphasis added)

**[17]** In this case, each party must decide if it intends to put the legal advice in issue or waive the solicitor-client privilege in the course of the hearing. If so, then the documents related to the claim of privilege are subject to disclosure and production. This would occur where the party states that it relies on legal advice in deciding its course of action. Having put the advice in issue, the other party is entitled to question the witness on the advice given and to have produced any documents pertaining to the advice. We do not know from the materials filed if the legal advice will be put in issue at the hearing or if the privilege will be waived. As a result, there will be no order requiring disclosure and production of these documents but a general direction that they be disclosed and produced if the party in question intends to put the legal advice in issue or intends to waive the privilege in the course of the hearing. The matter is left in the hands of each party at this stage of the hearing.

**[18]** The second issue relating to the Applicant's request for documents pertains to documents generated or coming into existence in the period from 1983 to 1992, during which *The Construction Industry Labour Relations Act, 1979 (the "CILRA, 1979")* was repealed (which are listed in Schedule III of the Respondents' statement as to documents). Counsel for the Respondents argued that there was no law restricting the creation of spin-off corporations during this period of time and, on this theory, the activities of the Respondents in this period cannot be considered as establishing a related employer status.

**[19]** The Applicant argued that the Respondents' argument on the effect of the repeal of the *CILRA, 1979* is wrong. The Applicant believes that it is possible to argue that the corporations became "related employers" in the 1980s and remain so today. The *CILRA, 1992* no longer contains a grandfathering clause as a result of the amendments made in 2000. As such, it is not important when the companies became "related employers" as long as they remain "related employers" at the time the application was made.

**[20]** At this stage of the hearing, the Board will not decide which interpretation is correct. Our task is to determine if the information requested by the Applicant is arguably relevant to the issues in

dispute. In our view, they do meet this requirement as they set out various agreements and corporate arrangements that came into existence during the period in question that arguably pertain to the issue of whether the corporations are related corporations. The Respondents will be required to produce all such documents contained in Schedule III of its statements as to documents.

**[21]** In relation to the disclosure and production of documents and information, we find that the requests made by the Applicant in its letter of May 13, 2002 as contained in paragraphs numbered (1) to (9) meet the tests set out above, subject to our remarks on solicitor-client privilege, and are to be disclosed and produced by the Respondents to the Applicant in the manner set out in the agreement reached between the parties.

**[22]** In relation to the documents and information required by the Respondents from the Applicant, the Respondents request that, in addition to the documents that the Applicant agrees to disclose and produce, it also produce:

> *(1) Monthly newsletters for the IBEW for the relevant time period;*
>
> *(2) Minutes of Executive and Membership meetings for the IBEW for the relevant time period;*
>
> *(3) Financial records for the Union for the relevant time period unless the Union will stipulate in these proceedings that the Union's failure to enforce any rights it alleges it possessed to represent the Employees in question (which is not admitted) was not caused by lack of necessary finances to either enforce those rights or to retain counsel for advice as to enforcement of rights.*

**[23]** The Respondents argue that these documents are relevant to the defence of abandonment of bargaining rights by the Applicant. The Respondents require the documents in order to effectively cross-examine the Applicant's witnesses on why the Applicant did not pursue its claims against the Respondents earlier. It wants to see the minutes to determine how the Applicant viewed the Respondents and how it dealt with its members who were employees of the Respondents during the period in question. The financial records are requested to enable the Respondents to effectively cross-examine the Applicant's witnesses on questions pertaining to the abandonment defence.

**[24]** Counsel pointed out that similar documents were required to be produced by applicants in a similar application involving *United Brotherhood of Carpenters and Joiners of America, Local 1985 et al. v. Graham Construction and Engineering Ltd.*, [2002] Sask. L.R.B.R. 143, LRB File Nos. 014-98 &

227-00. In that case, Vice-Chairperson Matkowski ordered the production of "relevant membership minutes" and allowed the Applicants to block out irrelevant portions of such minutes. In relation to the financial records, the Applicants in that case agreed that they would not rely on economic duress as a defence to the defence of abandonment and, as a result, the Board ordered the Respondents to return the financial documents to the Applicants. The Board, in that instance, did order the production of Executive Board minutes to the Respondents.

**[25]** The Applicant, in this instance, argues that the prejudice to the Applicant caused by the wholesale disclosure of its financial records and its executive and membership meeting minutes to the Respondents outweighs any disadvantage caused by the lack of such disclosure to the Respondents. It points out that these documents are the heart and soul of the Union and are generally not disclosed to any employer. In relation to the financial records, the Applicants argued that the request was a ridiculous waste of time and was not remotely relevant to the issues in dispute. Counsel argued that the Respondents did not meet the prerequisite tests for raising the defence of abandonment, which tests were set out by the Board in *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. On this theory, the Applicant argued that it had no case to meet on the abandonment issue as the pleadings did not disclose that the Respondents met the requirements set out in *Mudjatik.*

**[26]** In response, counsel for the Respondents argued that *Mudjatik* was wrongly decided and that abandonment was a good defence to the Applicant's claim in this instance. Counsel also argued that the Union minutes, if they were going to be vetted, had to be vetted by counsel for the Union as he was the one in a position to best decide if the subject matter of a minute was arguably relevant to an issue in dispute on this application.

**[27]** Counsel for the Applicants argued that the Respondents' counsel has not read every document in the possession of his clients that possibly relate to the matters in dispute and neither should he be expected to exercise that degree of supervision over the disclosure and production of relevant documents.

**[28]** As the Applicant has no objection to the disclosure and production of the Union's newsletters during the period in question, we will order their disclosure and production.

**[29]** In relation to the membership and executive minutes, we do not agree with the ruling made by Vice-Chairperson Matkowski in the *Graham Construction and Engineering Ltd.* case, *supra,* that required wholesale production of such minutes unless counsel for the Applicants personally scrutinized the minutes for a determination of their relevancy. It would seem to this Board that responsibility for such a determination rests with the officer(s) of the Applicant charged with giving testimony with respect to the Applicant's case. The officer should review the executive and membership meeting minutes to determine what portions of them are arguably relevant to the issues in dispute, which include the issues raised in the application and any defences raised by the Respondents. Particularly, the officers of the Applicant should disclose and produce any minutes in which any of the Respondents are discussed during the period in question and any minutes in which the employees of the Respondents are discussed. Counsel for the Applicants will perform the same role in relation to such disclosure as does counsel for the Respondents – advising his client as to the issues that are raised on the application and the replies, the types of information that must be disclosed and produced, and answering his client's questions in relation to this obligation. The obligation, however, rests with the officers, not with counsel.

**[30]** In general, an order requiring the wholesale disclosure of board minutes, whether of a corporation or a union, is considered to be highly prejudicial to the interests of the corporate body. In the *Air Canada* case, *supra,* the Canada Industrial Relations Board dealt with such a request and concluded at para. 29 as follows:

> *In evaluating the competing interests, the Board will be inspired by the principles set out above. It will be particularly mindful of the prejudice that may be caused by the ordering of the wholesale production of sensitive business records and weigh the probative value of that production against the labour relations interests in disposing of the case. Even if the business records are to be admitted on a confidential basis, the applicant still has the onus of establishing a prima facie case that the material has some bearing on the case it seeks to put forward and that its value outweighs the prejudice to the respondent. Absent this probative value, these documents will not be ordered disclosed.*

**[31]** And, at para. 37 the Board concluded:

> *Finally, with respect to undue prejudice, Air Canada argued that the information concerning matters of executive compensation, severance arrangements, stock options, pension matters and internal dealings with trade unions is not relevant to these proceedings. The Board agrees that these issues are of no concern to ALPA and do not forward its case.*

**[32]** In the same fashion, membership and executive minutes of union meetings contain similar internal discussions and decisions, the disclosure of which would be highly prejudicial to the union and its members with little or no probative value in relation to the issues in dispute in the particular case.

**[33]** For these reasons, we order the disclosure and production of only those minutes of membership and executive meetings touching on matters that are arguably relevant in these proceedings.

**[34]** In relation to the Applicant's financial records, the same balancing of interests will apply. The Respondents argue that the Applicant abandoned its representative rights in the 1980s when it did not pursue litigation against the purported successor or related employer to Sun Electric (1975) Ltd. The Applicant argues that the Respondents have not pleaded the necessary prerequisites of abandonment and, as a result, it is not required to counter this defence.

**[35]** In our view, the Applicant must disclose and produce any information and documents related to the abandonment issue that are arguably relevant. This may or may not include the financial records of the Union. The Board is not aware that the Applicant is claiming financial duress as a reason for not pursuing an earlier claim against the Respondents, but to the extent that it does, it must disclose and produce the relevant annual audited financial statements. We do not agree that background information need be disclosed as there is sufficient information provided in the annual financial report to enable the Respondents to cross-examine the Applicant's officers without unduly lengthening this hearing or unduly prejudicing the interests of the Applicant.

**[36]** For the reasons stated, an Order will issue on the following terms:

1. The Respondents shall disclose and produce to the Applicant the information and documents requested by the Applicant in its solicitor's May 13, 2002 letter to the solicitor for the Respondents;

2. The Applicant and the Respondents shall disclose and produce to each other all documents that otherwise would be subject to a claim of solicitor-client privilege if they intend to put the legal advice in issue in these proceedings or if they intend to waive the privilege in the course of the hearing;

3. The Respondents shall produce to the Applicant all documents listed in Schedule III of its statements as to documents;

4. The Applicant shall disclose and produce to the Respondents the Applicant's monthly newsletters during the relevant period;

5. The Applicant shall disclose and produce to the Respondents those portions of its executive and membership meetings that are arguably relevant to the matters in dispute;

6. The Applicant shall disclose and produce to the Respondent relevant annual audited financial statements if the Applicant intends to rely on evidence of financial duress in response to the Respondents' claim that it abandoned or otherwise lost its rights to represent employees of the Respondents through inactivity.

7. The Applicant and the Respondents shall produce to each other all of the remaining documents that they have identified in their statements as to documents that they have not objected to produce.

# THE BOARD OF EDUCATION OF THE SOURIS MOOSE MOUNTAIN SCHOOL DIVISION NO. 122, Applicant v. CANADIAN UNION OF PUBLIC EMPLOYEES, Respondent

LRB File No. 046-02; August 22, 2002
Vice-Chairperson, Walter Matkowski; Members: Leo Lancaster and Pat Gallagher

For the Applicant: LaVonne Black
For the Respondent: Harold Johnson

**Bargaining unit – Amendment – Employer applies to merge three bargaining units previously certified by Board – Amended unit to reflect amalgamation of two employers – Union agrees to merge two bargaining units – Board reviews policy with respect to preference for larger, more inclusive bargaining units and concludes that merger of three units necessary and appropriate – Amended certification order issued accordingly.**

**Bargaining unit – Appropriate bargaining unit – Board policy – Board reviews policy of preferring larger, more inclusive bargaining units – Board grants application for amendment of existing Board orders and issues amended certification order.**

***The Trade Union Act*, ss. 5(i), 5(j) and 37(2)**

## REASONS FOR DECISION

### Background

**[1] Walter Matkowski, Vice-Chairperson:** The Board of Education of the Souris Moose Mountain School Division No. 122 of Saskatchewan (the "Employer") brought an application pursuant to sections 5(i), (j), (m) and 37(2) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") seeking an Order amending an existing Order of the Board dated April 4, 2001 (LRB File No. 050-01) so as to create one bargaining unit where three now exist.

**[2]** At present, there are three certification Orders issued by the Board that apply to the Canadian Union of Public Employees ("CUPE" or the "Union") and this Employer or its predecessor. In LRB File No. 031-89, CUPE Local 3357 was certified to represent all bus drivers employed by the Board of Education of the Oxbow School Division No. 51 of Saskatchewan. In LRB File No. 191-96, CUPE Local 3951 was certified to represent all school caretakers employed by the Board of Education of the Oxbow School Division No. 51 of Saskatchewan.

**[3]** In 1997 the Oxbow School Division and the Arcola School Division merged into the present Employer. In LRB File No. 050-01, CUPE Local 4432 was certified to represent all school secretaries, teacher associates, care aides, library aides and student service workers employed by the Employer in the new merged school division.

**[4]** CUPE Locals 3951 and 4432 have agreed to merge into one CUPE local. At the hearing, the parties agreed to describe the merged bargaining unit as follows: Caretakers employed at Carievale, Gainsborough, Carnduff Elementary and High, Storthoaks, Alida, Oxbow Elementary and Prairie Heights, and Glen McGuire and Alameda Schools and all school secretaries, teacher associates, care aides, library aides, cooks, library technicians, and student service workers employed by the Board of Education of the Souris Moose Mountain School Division No. 122 of Saskatchewan. The Union did not agree to include the bus drivers in CUPE Local 3357 in the amended bargaining unit.

## Facts

**[5]** Arthur Keating, the director of education for the Employer, and William Wells, an employee relations consultant with the Saskatchewan School Trustees Association, testified on behalf of the Employer. Gordon Cole, the president of CUPE Local 3357, testified on behalf of the Union. There was no real disagreement about the facts of the case.

**[6]** Following the amalgamation of the Oxbow and Arcola school divisions in 1997, the bus drivers in Local 3357 continued on with business as usual. The drivers had negotiated six contracts with the Oxbow School Division and subsequently negotiated a contract with the successor Employer, Souris Moose Mountain School Division, which expires on December 31, 2002. The parties met three times for a total of 12 hours during this latter set of negotiations.

**[7]** The bus drivers have never been on strike and have not had any significant disputes with their employer. The bus drivers do not intermingle with the bus drivers from the old Arcola School Division because the Employer contracts out that work. The bus drivers continue to have minimal contact with other members of the proposed merged bargaining unit and continue to report to the same supervisor. The bus drivers are still paid per day as well as per kilometer and per student pickup. There was no evidence of any significant change with regard to the bus drivers since the school division amalgamation in 1997. There was no evidence of any form of conflict for the Employer or the various Union locals as a result of the amalgamation of the school divisions.

**[8]** The Employer testified that it would prefer to enter into one contract with an amended bargaining unit to ensure consistency. In other words, it wanted to be able to treat all its employees the same. The Employer presented no practical evidence of any difficulties that it encountered as a result of having a number of CUPE bargaining units, but gave the example of what could happen if one local's contract had a clause providing four days compassionate leave while another local's contract provided five days compassionate leave. It was the Employer's testimony that such inconsistencies could lead to administrators making mistakes and difficult employee relations for the Employer.

**[9]** Mr. Keating testified that the Applicant has a number of employees who will not be included in the proposed bargaining unit. These include contractors (36-38, mainly bus drivers), maintenance crew workers (6), central office personnel (6), native liaison workers and the bus supervisor.

**[10]** Mr. Keating also asserted that a merged large bargaining unit would permit employees to move between classifications. He said that the Employer had one employee who was both a bus driver and a caretaker and that in rural Saskatchewan, it was difficult to hire people. One large bargaining unit would assist the Employer in that regard.

**[11]** Finally, Mr. Keating testified that one large bargaining unit would create both administrative and economic efficiencies. For example, the Employer would not have two separate rounds of bargaining with two different CUPE locals.

**[12]** Mr. Wells testified that there are CUPE locals in other school divisions that have one local including bus drivers, and that these CUPE locals outnumber the CUPE locals that have a separate bus driver locals.

**[13]** Mr. Cole testified on behalf of the bus drivers and asserted that the bus drivers have nothing in common with other CUPE staff. Mr. Cole said that the 30-35 bus drivers would have no clout in an amended local of approximately 120 employees. The bus drivers also did not want to get into a situation in which they had to "horse trade" with other groups in the amended CUPE bargaining unit. In other words, if the bus drivers wanted a clause in the collective agreement, they did not want to have to approach the caretakers to obtain their support in return for the bus drivers supporting a caretaker proposal.

## Relevant Statutory Provision

**[14]** The relevant statutory provision is as follows:

> *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:*
>
> ...
>
> *(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;*

### Applicant's Argument

**[15]** The Applicant argued that the amendment was necessary and advisable and in keeping with the Board's stated goal of having larger, more inclusive bargaining units.

### Union's Argument

**[16]** The Union acknowledged the Board's stated goal of having larger more inclusive bargaining units but argued that it was neither necessary nor advisable to force the amalgamation of the bus drivers into a larger unit and that the bus drivers presently formed an appropriate unit. The Union argued that there has not been any significant change in circumstances with regard to the bus drivers to justify the amalgamation.

## Analysis

**[17]** The Board agrees with counsel for the Applicant, that the Board favours the creation of larger, more inclusive bargaining units. Where possible, the Board's policy has been to establish all employee units. In the decision *Board of Education of the Saskatchewan Rivers School Division No. 119 of Saskatchewan v. Canadian Union of Public Employees, Local 4195*, [1998] Sask. L.R.B.R 478, LRB File Nos. 303-97 & 364-97, the Board states at page 487:

> *Before dealing with the main issue raised on this application, the Board wishes to congratulate both parties for the efforts made in successfully merging the various certification Orders and collective agreements affecting the employees in question. The Board's policy has been to prefer large "all employee" bargaining units. The history of the certification Orders and collective agreements affecting the employees with this new Employer demonstrates the need for a more rational approach to collective bargaining in the school divisions. Hopefully, the bargaining unit rationalization will accompany future amalgamation of school divisions. The Board*

*is aware of the enormous efforts that have been made by the Union, its members and the Employer in attempting to bring the many bargaining units and collective agreements into one comprehensive structure. The parties are to be commended for their efforts.*

**[18]** This Board accepts the direction set out by the Board in *Saskatchewan Rivers School Division, supra*, and finds that there has been an evolution of the bargaining structure with this Employer. For example, the evidence confirms that the two school divisions were amalgamated in 1997. Thereafter, in 2001, a bargaining unit was formed which, for the first time, contained members from both old school divisions. Now, in 2002, the Employer has requested the formation of one CUPE local to deal with all unionized employees, with the new local created in 2001 and one of the old locals agreeing to this merger into one local. This evolution is precisely what the Board contemplated in *Saskatchewan Rivers School Division, supra.*

**[19]** It is agreed that in the case at hand, the Applicant is not proposing a true all employee unit, as the bus drivers and caretakers from the old Arcola School Division are not included in the new proposed bargaining unit. However the result of the evolution will be the creation of one local with a vast majority of the employees comprising that unit. The Board finds that the above mentioned evolution amounts to material change so that the bargaining unit assigned to the bus drivers local is no longer appropriate and that the proposed amalgamated unit is more appropriate (see: *Canadian Union of Public Employees, Local 4532 v. FirstBus Canada Ltd.*, [2002] Sask. L.R.B.R 261, LRB File No. 067-02).

**[20]** Therefore, this Board concludes that it is necessary and appropriate, pursuant to s. 37 (2) of the *Act,* to amend the Order of the Board dated April 4, 2001 as follows:

*Bus drivers, excepting the Transportation Supervisor, employed at Carievale, Gainsborough, Carnduff Elementary and High, Storthoaks, Alida, Oxbow Elementary and Prairie Heights, and Alameda Schools, caretakers employed at Carievale, Gainsborough, Carnduff Elementary and High, Storthoaks, Alida, Oxbow Elementary and Prairie Heights, and Glen McGuire and Alameda Schools and all school secretaries, teacher associates, care aides, library aides, cooks, library technicians, and student service workers employed by the Board of Education of the Souris Moose Mountain S. D. No. 122 of Saskatchewan, are an appropriate unit for the purpose of bargaining collectively.*

# SASKATCHEWAN ASSOCIATION OF HEALTH ORGANIZATIONS, Applicant v. HEALTH SCIENCES ASSOCIATION OF SASKATCHEWAN, Respondent

LRB File Nos. 081-02 & 137-02; September 5, 2002
Chairperson, Gwen Gray, Q.C.; Members: Patricia Gallagher and Leo Lancaster

For the Applicant: Brian Kenny and Jason Mohrbutter
For the Respondent: Neil McLeod, Q.C.

**Remedy – Interim order – Criteria – Balancing of labour relations harm – Employer seeks interim order prohibiting union from engaging in strike action until determination of unfair labour practice application - If employer allegation of bad faith bargaining found to have merit, then union conduct, including strike, would be tainted by failure to bargain in good faith – Potential labour relations harm from permitting strike to proceed prior to determination of unfair labour practice application greater than harm potentially occasioned by slight delay in commencing strike action – Board grants application.**

**Remedy – Interim order – Unfair labour practice application – Board finds arguable case on main application – On balance of labour relations harm, Board grants interim order prohibiting strike action until main application is determined.**

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

## INTERIM APPLICATION

### Background

**[1] Gwen Gray, Q.C., Chairperson:** Saskatchewan Association of Health Organizations ("SAHO") is the representative employers' organization charged with bargaining collectively with Health Sciences Association of Saskatchewan ("HSAS") in relation to health support practitioners in each regional health authority.

[2] SAHO and HSAS have been engaged in collective bargaining since March 13, 2001. On February 21, 2002 the bargaining committees reached a memorandum of settlement ("MOS"). Article 2 of the MOS states: "HSAS Representatives will recommend complete acceptance of all terms of this Memorandum of Settlement to their principals, provided that the current employer initiatives to address market issues affecting employee retention have demonstrated satisfactory results."

[3] It is common ground that the executive council of the Union, which is a body separate from the bargaining committee, decided to recommend to the membership of HSAS that it reject the MOS. HSAS held a ratification vote among its members and the MOS was rejected. Subsequently, HSAS held a successful strike vote and served strike notice on SAHO on September 4, 2002, prior to the commencement of this hearing.

[4] SAHO and HSAS disagree on whether HSAS failed to fulfill its agreement to recommend the MOS to its membership. SAHO argues that it met the condition attached to the agreement to recommend ratification when it presented to HSAS the Provincial Market Supplement Committee's report respecting two classifications, respiratory therapists and pharmacists. HSAS takes the position that the condition was not met, as SAHO was unwilling to put forward any monetary proposals with respect to the market supplement until HSAS ratified the MOS. It argues that it did not find the results of the Provincial Market Supplement Committee to be satisfactory and, as such, was entitled to recommend that the membership reject the MOS. It also argues that the bargaining committee was only required to recommend ratification to its principals and that SAHO ought to have understood that this referred to the executive council of HSAS, not to the membership. Under HSAS's Constitution, the executive council is the body that recommends acceptance or rejection of bargaining offers to the membership.

[5] The dispute came to the Board as of an unfair labour practice application (LRB File No. 081-02) in which SAHO complained that HSAS failed to bargain in good faith contrary to s. 11(2)(c) of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the "*Act*"), by failing to recommend acceptance of the MOS to its members when they voted on ratification of the MOS. In its original application, SAHO requested that the Board restrain HSAS from further communications with its members aimed at encouraging its members to reject to MOS. This application was filed on May 8, 2002. The ratification vote was scheduled to be completed by May 20, 2002.

[6] In its application, SAHO also complained that HSAS refused to enter into discussions to negotiate market supplements for the two classifications of employees which were the subject of the Provincial Market Supplement Committee's report.

[7] SAHO filed a second unfair labour practice application on July 25, 2002 (LRB File No. 137-02). In this application, SAHO alleges that HSAS conducted a ratification vote and recommended

rejection of the MOS, which did result in the rejection by the membership of the MOS, and that subsequently, HSAS put forward a new package of bargaining proposals to SAHO touching on matters that had not been raised in the first round of bargaining and matters that had been agreed to in the first round of bargaining. SAHO alleges that HSAS's bargaining conduct subsequent to the ratification vote constitutes a breach of s. 11(2)(c) of the *Act*.

**[8]** At the same time, SAHO expanded the remedial relief sought in the first unfair labour practice application by including a request that the Board impose the terms of the MOS as a remedy for the unfair labour practice, or alternatively, that the Board direct HSAS to conduct a second ratification vote on certain terms.

**[9]** HSAS also filed an unfair labour practice against SAHO on July 25, 2002 in which it alleges that SAHO has bargained in bad faith in relation to the negotiations that took place at the time the second SAHO unfair labour practice was filed with the Board.

**[10]** On July 26, 2002 HSAS sought and was granted an adjournment of the hearing of LRB File No. 081-02 from July 30 and 31, 2002 to a date to be set by the Board. The Board also ordered the consolidation of the three unfair labour practice applications listed above. The hearing dates for all applications are currently set for September 16, 17 and 18, 2002.

**[11]** SAHO filed its interim application on August 29, 2002 seeking an interim order prohibiting HSAS and its officers, directors, employees, agents, representatives and members from declaring, counselling, taking part in or persuading any employee to take part in any form of strike action against their employers until the Board has heard and determined SAHO's unfair labour practice applications.

**Decision of the Board**

**[12]** The Board has decided that an interim order will issue to restrain HSAS and its members from engaging in strike activity until the Board hears and determines SAHO's unfair labour practice applications.

**[13]** In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Raider Industries Inc.,* [2001] Sask. L.R.B.R. 924, LRB File Nos. 259-01, 260-01 & 261-01, the Board set out the test for interim relief in the following terms:

> *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.*

**[14]** The Board is not required on an application for interim relief to speculate on the strength or weakness of the applications filed, but must assess if the allegations contained in the application give rise to a possible breach of the *Act.* SAHO's applications clearly meet that requirement. In past decisions, the Board has found a party's failure to ratify the terms of a MOS may constitute a breach of the duty to bargain in good faith: see *Canadian Union of Public Employees v. Potashville School Division No. 80,* [2000] Sask. L.R.B.R. 231, LRB File No. 206-98. The allegations contained in SAHO's first application, although not identical, are similar in nature. The Canada Industrial Relations Board considered a situation similar to the present application in *Nav Canada v. Public Service Alliance of Canada* (1999), 53 C.L.R.B.R. (2d) 1, in which it found that the union had bargained in bad faith through the method it employed to ratify the proposed collective agreement and ordered the union to conduct a new ratification vote according to certain directions.

**[15]** The second part of the test for determining if interim relief is available requires the Board to assess and balance the labour relations harm arising from a decision to grant or not grant interim relief.

**[16]** As indicated, SAHO's complaint is that HSAS reneged on its promise to recommend acceptance of the MOS to its members on the ratification vote. It seeks a variety of remedies including the taking of a new ratification vote presumably with instructions to HSAS that it recommend acceptance of the MOS.

**[17]** If SAHO is correct in its assertion that HSAS engaged in bad faith bargaining by failing to recommend acceptance of the MOS, then SAHO has lost an opportunity to have the membership of HSAS consider the MOS with a positive recommendation from its bargaining committee prior to the commencement of HSAS's strike. SAHO believes that it concluded collective bargaining with HSAS, subject to a fair ratification vote taken among HSAS's members. If HSAS is allowed to strike

prior to the determination by the Board of SAHO's applications, SAHO will be unable to benefit from the provisions of the *Act* that permit it to have the Board determine if HSAS has met the obligations set forth in s. 11(2)(c) to bargain in good faith.

**[18]** In its arguments, SAHO also relied on s. 11(2)(b) of the *Act* which prohibits a trade union from engaging in strike activity when an application is pending before the Board. Section 11(3) states that a matter is pending before the Board "on and after the day on which it is first considered by the board at a formally constituted meeting until the day on which the decision of the board is made." While we are not required in this instance to determine if the current applications are applications "pending," we do think that the principals underlying s. 11(2)(b) are fundamental to the working of the Board and the system of labour relations adopted in the *Act*. Section 11(2)(b) and its counterpart in s. 11(1)(j) are intended to prevent one party from "attempting to subvert the access of the other party to the Labour Relations Board by raising the stakes when an application is being brought here" (quoting from *Saskatchewan Joint Board, Retail Wholesale and Department Store Union, Local 454 v. Westfair Foods Ltd.,* [1993] 1st Quarter Sask. Labour Rep. 57, LRB File No. 007-93, at 59). In the present application, the Board processes would be rendered meaningless if a strike were permitted to occur on the heels of a ratification vote that may have been conducted in violation of the *Act*.

**[19]** On the other hand, if SAHO is wrong in its assertion that HSAS engaged in bad faith bargaining, then HSAS's right to engage in lawful strike activity is delayed by the Board processes. The bargaining process is also necessarily delayed. The labour relations harm to HSAS resulting from such a delay may be significant in terms of its ability to organize an effective strike. Overall, however, strike action would only be delayed, not destroyed, by the issuing of an interim order.

**[20]** On balance, we find that the labour relations harm that may result from not granting the interim order is greater than the harm that would be suffered if the order is granted. The main applications can be heard and determined in a relatively short period of time. Given the length of time that the parties have engaged in collective bargaining, a short further delay in collective bargaining to permit the Board to hear and determine the unfair labour practice will not pose an unreasonable burden on HSAS.

[21] Counsel for HSAS argued that there was no relationship or an insufficient relationship between the relief sought on the interim application and the relief sought in the main applications. We agree that the relief requested in an interim order must find its basis in the allegations and subject matter set forth in the main application. However, in our view, the relief requested on the present interim application does meet this requirement. The strike vote came about as a result of the alleged failure of HSAS to recommend acceptance of the MOS. It is a consequence of the alleged breach of the *Act* and is subject to the general Board powers contained in s. 5(e) of the *Act,* which permits the Board to make orders:

> *5(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;*
>
> (emphasis added)

[22] Counsel for HSAS also argued that the parties have embarked on another round of bargaining and that the issues now facing them are different from the issues that existed in May 2002 when SAHO first filed its unfair labour practice application. This may be the case to some extent, but it is also clear that the dispute between HSAS and SAHO over the February MOS is preventing the parties from engaging in effective bargaining. SAHO is obviously reluctant to accept that the MOS is not the final deal, subject to what it considers to be a fair or proper ratification process. HSAS is obviously frustrated by SAHO's unwillingness to move from its position. It would seem to the Board that it is important for both parties to have the applications heard and determined by the Board to settle the disagreement and to permit the parties to move forward in their collective bargaining.

[23] HSAS also referred the Board to its decision in *Grain Services Union, Local 1450 v. Bear Hills Pork Producers Ltd. Partnership,* [2000] Sask. L.R.B.R. 223, LRB File No. 079-00 in which the Board refused to issue an interim order restraining the employer from continuing a lock-out of employees in circumstances where the union alleged that the employer was bargaining in bad faith

by pushing an alleged illegal bargaining proposal to impasse. In that instance, the Board found at paras. 23 to 25 as follows:

> *[23] In our view, however, the granting of an interim Order to restrain the Employer from engaging in lock-out activity in relation to its bargaining position that may or may not be illegal, does not move the parties along in achieving a first collective agreement. They remain free to engage in strike and lock-out activity related to other aspects of the bargaining dispute.*
>
> *[24] In addition, the Board is reluctant to throw itself into a bargaining dispute of this nature through the mechanism of an interim Order when the dispute originated with a strike notice. The Union's concern with the lawfulness of the Employer's bargaining position could be brought to the Board in the form of an unfair labour practice at any time, and, in this case, certainly before strike activity commenced. There is no apparent urgency in the Union's conduct of its own case. In addition, a final Order is required to enable the parties to engage in serious bargaining on the hours of work dispute. An interim Order does not resolve the central issue that is in dispute and does not further bargaining on the issue in question.*
>
> *[25] If it is found on a final hearing, that the Employer's offer was unlawful and that it caused an unnecessary delay in achieving a collective agreement or unnecessarily prolonged the labour dispute, the Board can address the resulting harm in a monetary award.*

In the present case, the unfair labour practice application is not an isolated complaint about one or more of HSAS's bargaining proposals; rather, it touches on the entire process of ratification. If HSAS is found to have bargained in bad faith through its failure to recommend ratification of the MOS, then all of its conduct, including any strike activity, may be tainted by the failure to bargain in good faith. The failure could not be easily remedied through a direction to bargain in good faith and a monetary order as was the case in *Bear Hills Pork Producers Ltd. Partnership, supra.*

**[24]** We will issue an interim Order prohibiting HSAS, its officers, employees and members from engaging in strike activity until the Board hears and determines the applications contained in LRB File Nos. 081-02 and 137-02.

**[25]** In addition, we will permit HSAS to elect to move the hearing of the applications from September 16 to 18, 2002 to September 9 to 11, 2002. HSAS will notify the Board within 24 hours of receiving this Order of its election. This election is granted to prevent unnecessary delay in the hearing and determination of these matters.

**[26]** The Board wishes to make it clear that these Reasons are not intended in any way to provide an assessment of the merits of SAHO's unfair labour practice applications, its conduct in bargaining, or HSAS's conduct in bargaining. All of these issues remain to be determined after hearing evidence and argument from the parties at the hearing of the main application. We confine our comments in these Reasons to determining if an interim order should be granted.

# UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1400, Applicant v. HIGHLINE MANUFACTURING INC., Respondent

LRB File No. 122-02; September 13, 2002
Chairperson: Gwen Gray, Q.C.; Members: Gerry Caudle and Brenda Cuthbert

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

**Bargaining unit – Appropriate bargaining unit – All-employee unit – Union seeks to exclude team leaders from bargaining unit – Board finds team leader and production worker functions too intertwined to create separate bargaining units – Board orders vote.**

**Bargaining unit – Appropriate bargaining unit – Community of interest – Union seeks to exclude team leaders from bargaining unit – Board finds team leader and production worker functions too intertwined to create separate bargaining units – Board orders vote.**

**Vote – Certification – Union seeks to exclude team leaders from bargaining unit – Board finds team leader and production worker functions too intertwined to create separate bargaining units – Board orders vote.**

**The Trade Union Act**, *ss. 2(a), 2(f) and 6*

## REASONS FOR DECISION

### Background

**[1]** **Gwen Gray, Q.C., Chairperson:** The United Food and Commercial Workers Union, Local 1400 (the "Union") applied to be certified for an all employee bargaining unit except managers and team leaders at Highline Manufacturing Inc. (the "Employer"). The employer manufactures agricultural machinery in Vonda, Saskatchewan. The Employer sought to include team leaders in the bargaining unit.

**[2]** The Board heard this application in Saskatoon on July 30, 2002. The Union called three witnesses to testify with respect to the duties and functions of team leaders. None of the Union's witnesses actually perform the work in question and only one witness was a plant employee. The Employer stated that it did not intend to call a team leader to testify when the hearing resumed.

**[3]** As a result, the Board directed that the Board's investigating officer attend at the plant to conduct interviews with team leaders and any other employees that she deemed necessary. The investigating officer's report was filed with the Board and with the parties on August 9, 2002. The Board advised both parties that the findings of the investigating officer would be binding unless the parties called evidence to contradict her findings.

**[4]** The hearing resumed in Saskatoon on August 12, 2002. At that time, the Employer called Gisele Malyk, executive assistant to the president, as a witness. Ms. Malyk is responsible for human resources management at the Employer's workplace. During cross-examination, she acknowledged that she had conducted a meeting with all team leaders prior to their interviews with the Board's investigating officer. Ms. Malyk explained that she was concerned given the evidence put forth by the Union at the first day of hearings that team leaders did not understand their role at the plant. She provided them with a questionnaire to complete and then reviewed the proper answers to the questions with them. Although Ms. Malyk expressed her concern that the Employer not be seen to be interfering in the process of the selection of a union, she did not seek advice from the Board with respect to her decision to interview team leaders prior to the investigating officer's visit.

**[5]** Despite all attempts by the Board to ensure that it obtained accurate information concerning the role and function of team leaders, the Board was frustrated both by the failure of the Union and Employer to call team leaders as witnesses, and the interference by Ms. Malyk in the investigating officer's investigation. As a result, less than satisfactory evidence was presented to the Board on the team leader position. We have assessed the duties and functions of team leaders primarily from the report filed by the investigating officer. The evidence presented by the Union's witnesses was largely second hand; Ms. Malyk's evidence of was more direct and useful, albeit somewhat coloured by her decision to meet with team leaders to discuss their functions prior to their interviews with the investigating officer.

**[6]** Due to time constraints, the Board issued an Order directing a vote among employees in the bargaining unit including team leaders, prior to issuing these Reasons. These Reasons set out the Board's decision on why team leaders were included in the bargaining unit.

## Facts

**[7]** The manufacturing plant at Vonda is organized into various lines of work, each of which is assigned a team leader. In total, there are five team leaders – two welding team leaders, one fabrication team leader, one night team leader and one assembly team leader.

**[8]** Team leaders are recruited from the existing staff. They report to the production manager who is responsible overall for production goals. Team leaders receive training on completing performance evaluations and they are also trained in "people skills." They are required to complete performance appraisals on their fellow workers. The production manager uses the appraisals to address work related issues and to determine wage progressions. The production manager determines the action that is to be taken as a result of the performance appraisal and the team leaders communicate the decisions to individual workers.

**[9]** Team leaders assign work among the employees on their team, taking into account each employee's skills. They organize the work by ensuring that the materials are in place. They also assist employees by demonstrating how best to perform the work and by checking the quality of their work. Team leaders interact frequently with the production manager to obtain instructions.

**[10]** Team leaders perform hands-on work in the bargaining unit. They work along side other workers as time permits. They are paid higher hourly wages than production workers due to their team leadership roles.

**[11]** Team leaders have a minor role to play in discipline. They write up "green notes" documenting both negative and positive employee conduct. These notes are provided to the production manager to use as he sees fit. Team leaders may also provide opinions to the production manager and they may bring concerns to him regarding matters such as workplace safety. Otherwise, the executive assistant, in conjunction with the production manager, makes decisions concerning hiring, discipline and discharge of production employees. The Employer has adopted a policy of progressive discipline that requires the employee to first receive a written warning concerning unacceptable performance. The investigating officer searched the files of various employees and confirmed that the production manager signed such warnings.

**[12]** Team leaders are not responsible for scheduling the hours of work or approving overtime, vacations or leaves of absences. The production manager performs these tasks. Team leaders meet regularly with the production manager, but not with other members of management.

**[13]** Mr. Eyre, the organizing representative of the Union, testified that in other manufacturing plants the Union has found the team leaders to be conduits to management. According to Mr. Eyre, such employees tend to view their role as management and they tend to weaken the strength of the bargaining unit. Mr. Eyre pointed to one previous certification effort where team leaders posed a problem for the Union in achieving an effective first collective agreement. Mr. Eyre testified that other production employees are reluctant to talk at Union meetings where team leaders are in attendance as they are afraid that their comments will be taken back to management. Mr. Eyre concluded that the production workers view team leaders as bosses and want them excluded from collective bargaining.

## Argument

**[14]** The Union argued that team leaders ought to be excluded from the bargaining unit because they have a labour relations conflict with members of the bargaining unit. The Union did not argue that team leaders are managerial employees; rather, it argued that they are middle management – entitled to union representation, but not to inclusion in the main bargaining unit. The Union referred the Board to *Saskatchewan Government Employees' Union v. Saskatchewan Liquor and Gaming Authority,* [1997] Sask. L.R.B.R. 836, LRB File No. 037-95.

**[15]** The Union also argued that it is not obligated to seek certification of the "most" appropriate unit and that its application represented "an" appropriate bargaining unit. The Union argued that team leaders would be able to form their own union, separate from the main bargaining unit.

**[16]** The Employer argued that the Union was proposing to exclude team leaders on the theory that team leaders are the eyes and ears of management on the shop floor, a test that has not been accepted by the Board for the exclusion of supervisory employees in the past. The Employer disputes that team leaders are middle managers or supervisors whose labour relations functions place them in a conflict of interest with the members of the bargaining unit. The Employer referred the Board to its decision in *United Food and Commercial Workers, Local 1400 v. Peak Manufacturing*

*Inc.,* [1996] Sask. L.R.B.R. 234, LRB File No. 011-96, where the Board included working team leaders in the larger bargaining unit.

## Analysis

**[17]** Although the evidence was less than satisfactory in this case, due to the failure of either party to call any team leaders as witnesses and the Employer's interference with the team leaders prior to the investigation by the Board officer, we find that the team leaders are employees who should be included in this bargaining unit.

**[18]** In simple terms, the matter was addressed by the Board in *Peak Manufacturing Inc., supra,* and more recently in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Custom Built Ag. Industries Ltd. (Trail Tech),* [1998] Sask. L.R.B.R. 662, LRB File No. 112-98, in which the Board included team leaders in the bargaining units in question. In *Peak Manufacturing Inc., supra,* the Board concluded at 241:

> *We have concluded that the proposed bargaining unit would not be an appropriate one. It is clear that the duties of the lead hands are entangled with those of the other employees on their respective teams in a way which makes it impossible to separate them. The lead hands spend a significant part of their working time on the tools as other employees do, and the responsibilities which distinguish them still involve working closely with those other employees. There seems to us no rational way to sever the determination of their employment and conditions of employment from those of the other members of their teams, and any attempt to draw a line between the two groups would be artificial.*

**[19]** In the present case, the same problems exist as did in *Peak Manufacturing Inc., supra.* The functions of the team leaders and production workers are too intertwined to separate into two bargaining units. There may be some labour relations issues that give rise to conflict between the team leaders and production workers but we are not convinced that they are sufficient to remove team leaders from the bargaining unit. Team leaders have very little effective control over the working lives of the production workers. For instance, they do not schedule work, approve leaves of absence or perform first level disciplinary functions that would lead the Board to exclude them from the bargaining unit on the theory that team leaders are middle managers.

**[20]** As a result, the Board finds that team leaders ought to be included in the proposed bargaining unit and an Order was issued requiring that a vote be taken among employees in the bargaining unit, including the team leaders.

# SASKATCHEWAN ASSOCIATION OF HEALTH ORGANIZATIONS, Applicant v. HEALTH SCIENCES ASSOCIATION OF SASKATCHEWAN, Respondent

LRB File Nos. 081-02 & 137-02; September 17, 2002
Chairperson: Gwen Gray, Q.C.; Members: Patricia Gallagher and Leo Lancaster

For the Applicant: Brian Kenny
For the Respondent: Neil McLeod, Q.C.

**Unfair labour practice – Duty to bargain in good faith – Parties arrive at memorandum of settlement which, with conditions, union undertakes to recommend to principals for ratification – Employer alleges that union's failure to recommend ratification constitutes bad faith bargaining – Board finds that employer did not meet conditions under which union would make positive recommendation – Board dismisses application.**

**Unfair labour practice – Duty to bargain in good faith – Employer alleges bad faith bargaining in union's bringing new issues to bargaining and revisiting previously agreed issues after rejection of memorandum of settlement by membership – Board finds that addition of two minor clauses to new bargaining package consistent with union's obligation to reassess bargaining position after rejection vote – Board dismisses application.**

***The Trade Union Act*, ss. 5(d) and 11(2)(c)**

## REASONS FOR DECISION

### Background

**[1] Gwen Gray, Q.C., Chairperson:** Saskatchewan Association of Health Organizations ("SAHO") and Health Sciences Association of Saskatchewan ("HSAS") have been engaged in collective bargaining for the renewal of their collective agreement since February 2001. The parties reached a memorandum of settlement ("MOS") on February 21, 2002. HSAS's executive committee refused to recommend that its membership ratify the MOS and the membership voted to reject the proposed settlement. SAHO filed its first unfair labour practice application on May 8, 2002 claiming that HSAS had bargained in bad faith by failing to recommend acceptance of the MOS to its members. In its reply, HSAS denied that it had failed to bargain in good faith and raised two defences: (1) that the bargaining committee had fulfilled its undertaking to recommend acceptance to its principals, being the executive council of HSAS; and (2) that a condition of recommending acceptance was not met by SAHO.

**[2]** Subsequently, HSAS made further proposals to SAHO. SAHO filed a further unfair labour practice application in relation to these proposals and seeks an order that finds HSAS guilty of bargaining in bad faith by raising issues that had not been the subject of bargaining prior to the rejection of the MOS and by making new proposals on matters that had already been settled. HSAS defends against this unfair labour practice application by relying on its members' rejection of the MOS and by asserting a right, on such rejection, to raise new issues and to re-open issues that had been the subject of the MOS.

**[3]** SAHO seeks orders finding that HSAS violated s. 11(2)(c) of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the "*Act*") and it also asks the Board to impose the MOS as the collective agreement or, alternatively, to require HSAS to conduct a new ratification vote among its members with a recommendation for acceptance.

**[4]** On September 4, 2002, prior to the Board hearing these applications, HSAS also conducted a successful strike vote among its members and served strike notice on the regional health authorities covered by the bargaining. SAHO asked the Board to restrain the commencement of the strike on an interim basis pending the determination of these applications. The Board issued a restraining Order on September 5, 2002.

**[5]** These reasons address the issues of whether HSAS bargained in bad faith by failing to recommend acceptance of the terms of the MOS and whether, subsequently, HSAS bargained in bad faith by raising new issues or re-opening issues that had already been agreed to in the MOS.

## Facts

**[6]** SAHO, as the representative employers' organization in the health sector, and HSAS, a union of professional health employees, have a long history of successful collective bargaining. In its 30 years history, HSAS has never engaged in a strike.

**[7]** Recently, HSAS's membership increased significantly as a result of the restructuring of labour relations in the healthcare sector: see *The Health Labour Relations Re-organization Act, R.S.S. 1978, c. H-0.03* and *Regulations.* HSAS now bargains on behalf of 30 classifications in a province-wide bargaining unit. Since re-organization, the parties successfully negotiated one collective agreement for the period that came to an end on March 31, 2001.

**[8]** As stated above, SAHO and HSAS began talks for the renewal of their collective agreement in February 2001. The parties agreed to an interest-based method of bargaining and were assisted by a facilitator. Greg Deren, senior labour relations officer, led HSAS's negotiating team, while Jeff Waselenchuk, human resources director, led SAHO's negotiating team. It was obvious to the Board through hearing the testimony of both spokespersons that they conducted negotiations with a great deal of professionalism and integrity. Both spokespersons worked diligently with their committees to achieve the MOS on February 21, 2002.

**[9]** Before we outline the problems that arose subsequent to the signing of the MOS, we will describe the key issues in the dispute and describe the general flow of the bargaining process.

**[10]** One of HSAS's main bargaining goals was to address the increasing wage gaps between its members and similar classifications of professionals in other provinces, which gaps are causing serious recruitment and retention issues in various HSAS classifications. Mr. Deren noted that this issue was the most difficult part of collective bargaining. At the bargaining table, HSAS identified the issue as one of serious concern both for the union and for health sector employers. The parties discussed the size of the wage gaps between Saskatchewan HSAS occupations and those in other provinces and brought information and data to flesh out the extent of the problem. HSAS intensified its pressure concerning the recruitment and retention problem both at the table and in public, through a media campaign and a political lobbying strategy. It also organized conferences among HSAS members to identify specific recruitment and retention issues.

**[11]** Mr. Deren noted that SAHO and the employers it represents were not insensitive to the recruitment and retention issue. He observed that line managers in the field were telling SAHO that they were experiencing recruitment and retention problems with a number of HSAS classification. Pressure to resolve the problem was coming from both sides.

**[12]** In the course of bargaining, SAHO informed HSAS candidly, in Mr. Deren's words, that it was constrained in its ability to address the recruitment and retention issue at the bargaining table because of the economic mandate imposed by government that required it to settle the agreement on the pattern of 3%-3%-3%. SAHO felt that it had little room to move within the economic mandate in order to address market wage gaps ranging from 15% to 20%.

**[13]** HSAS continued to attempt to have the recruitment and retention issues addressed at the bargaining table and through its public campaign. SAHO undertook a survey of its members in late August 2001. The data generated from the survey indicated that there were double-digit shortages in six occupational classifications and that these could be reduced by a pay increase that would have the effect of decreasing the wage gap between Saskatchewan and other labour markets. The shortages were clearly identified for both parties through this survey.

**[14]** In mid-to-late November 2001, SAHO began to discuss with HSAS and other health care unions a plan known as the Market Supplement Program ("MSP"). Under the proposed program, a management committee would investigate various health care occupations to determine if they require market supplements. At the bargaining table, SAHO explained that it could not write the program into the collective agreement as it would then need to be costed as an item within the economic mandate of 3%-3%-3%. As a result, SAHO took the position that the MSP had to be external to the collective bargaining process.

**[15]** Mr. Deren noted that discussion around the concept of the MSP was frequent and intense at the bargaining table. HSAS, he observed, had the normal reluctance of any union faced with a proposal to remove wage discussions from collective bargaining. HSAS was also concerned about SAHO's ability to address market supplement issues in a timely fashion.

**[16]** On December 11, 2001, SAHO sent a letter to HSAS stating that the health districts had endorsed the MSP. The letter provided the names of persons who would form the MSP Review Committee, all of whom were employer representatives. It invited HSAS to participate in the process by identifying difficult-to-fill classifications and assisting in data collection. It also suggested that HSAS would be invited to present information to the committee along with health districts. SAHO noted in its letter that eight occupational groups would be dealt with initially by the Committee early in the new year. Seven of the eight occupations fell within HSAS's bargaining unit.

**[17]** SAHO also attached a document entitled "Provincial Market Supplement Program Framework" and the terms of reference for the MSP Review Committee. The guiding principles established for the MSP were set out as follows:

*Guiding Principles:*

*1. The Market Supplement Program is designed to address specific pay related skill shortages by use of a temporary market supplement to attract and/or retain qualified employees. This will only be done when it is required to improve the ability of the employer to retain or recruit employees with the required skills to deliver appropriate health services.*

*2. The Program will ensure that temporary salary adjustments respond to valid labour market conditions to address recruitment/retention pressures.*

*3. The integrity of the Joint Job Evaluation Plan shall be maintained.*

*4. The integrity of the provincial collective bargaining system for negotiating province-wide agreements for wages and working conditions shall also be maintained.*

*5. The Program shall be ongoing and separate and apart from collective bargaining.*

*6. The Program shall be responsive and timely to address health service delivery.*

*7. Unless otherwise agreed to by SAHO and Saskatchewan Health, all adjustments will be funded through existing funding allocations.*

**[18]** The MSP Review Committee's terms of reference included the following description of the Committee's decision-making tasks:

*Decision Making:*

*In order to be a decision of the MSRC, decisions will require the consensus of those members in attendance.*

*The MSRC recognizes the critical need for responsiveness and timely decision-making and, given full information, will strictly adhere to program timelines for decision-making.*

*The MSRC will analyze all market supplement review requests, taking into consideration all the labour market review criteria as a whole, and render all decisions with regard to the approval or denial of the payment of a temporary market supplement and recommendations regarding appropriate supplement levels.*

*The MSCR will decide on the relativity and adequacy of labour market review information received in support of a Market Supplement Consideration Request. The MSCR will determine and request any additional information or explanation required for their decision-making.*

*The MSRC shall provide a written report of all their decisions.*

(emphasis added)

**[19]** Mr. Deren testified that, to arrive at the February 21, 2001 MOS, HSAS's bargaining committee had to accept SAHO's position that the only avenue for providing some relief to its members was through the MSP. He stated that the bargaining committee was willing to participate in the MSP process and do what it could to make sure the needs of HSAS members were fairly placed before the MSP Review Committee. Mr. Deren described HSAS's desire to maximize the likelihood of success of the MSP process. In a letter dated December 19, 2002 to the SAHO official in charge of the MSP program, Mr. Deren informed SAHO that "[a]lthough it is something about which we have many reservations, the Market Supplement Program is one we hope will work to meet urgent needs of our members."

**[20]** HSAS was the only healthcare union to sign on to the MSP process. Other health care unions dismissed it as contrary to the principles of collective bargaining that require the negotiation of rates of pay between employers and unions.

**[21]** The HSAS bargaining committee was also not without reservations and it informed SAHO that it needed to see some real results from the MSP process before it would commit the MOS to the ratification process. In particular, HSAS wanted to see two reports – one dealing with respiratory therapists and one dealing with pharmacists – prior to proceeding further with the ratification process.

**[22]** The first two clauses of the February 21, 2002 MOS read as follows:

> *1. The parties agree to the terms of this Memorandum of Settlement, which constitutes full and final settlement of terms of the collective agreement for the period April 1, 2001 to March 31, 2004 as negotiated by the parties.*
>
> *2. SAHO representatives will support and recommend complete acceptance of all the terms of this Memorandum of Settlement to their principals. HSAS representatives will support and recommend complete acceptance of all terms of this Memorandum of Settlement to their principals, provided that the current employer initiatives to address market issues affecting employee retention have demonstrated satisfactory results. The ratification process involving the said collective agreement shall take no longer than ninety (90) days.*
>
> (emphasis added)

**[23]** Both parties agree that "current employer initiatives" referred to in clause 2 of the MOS means the MSP. They also agree that "satisfactory results" refers to the production by the MSP Review Committee of two reports – one dealing with respiratory therapists and one with pharmacists. From here, the parties differ greatly in their interpretation of the proviso contained in clause 2.

**[24]** Mr. Deren expected that SAHO would provide HSAS copies of the two reports shortly after the signing of the MOS. He expected that the reports would set out information of the nature that was, in fact, contained in them, and that they would also include the Committee's recommendation for appropriate supplement levels. Mr. Deren arrived at this understanding from the terms of reference for the MSP Review Committee, which indicated that the reports would contain recommendations for appropriate supplement levels, and from his informal channels within the health care community and SAHO. He expected that the Committee would recommend levels of market supplements in the 15% range for the classifications in question as he had heard in mid-December that 15% was the figure being discussed within the MSP Review Committee.

**[25]** According to Mr. Waselenchuk, all that was required by SAHO to satisfy the proviso contained in clause 2 of the MOS was to provide two reports from the MSP Review Committee to HSAS. He had advised HSAS that he could not make a commitment that the reports would be positive or favourable. The wording of the MOS was carefully crafted, in his view, not to require anything more than the production of the two reports.

**[26]** In fact, after the signing of the MOS, Mr. Waselenchuk faced hard questions from his superior, Mr. McKillop, vice-president of human resources. Mr. McKillop was concerned that the reference to the MSP breached the condition that the MSP process be separate from collective bargaining. He was concerned that it might sweep the MSP into the economic mandate. Mr. McKillop testified that he wanted clarification of the proviso both from his own negotiator and from HSAS to satisfy himself that all they were dealing with was the production of the two reports to HSAS. Mr. McKillop understood from Mr. Waselenchuk that HSAS wanted to have some kind of proof that the MSP was "real." In his mind, this meant a timely report from the MSP Review Committee that dealt with the two occupations of respiratory therapists and pharmacists. This was contrasted in Mr. McKillop's mind with past commitments made by health districts and SAHO that had not produced results for HSAS.

**[27]** Mr. Waselenchuk sought reassurance from Mr. Deren about the meaning of the proviso in clause 2 on February 22, 2002. He took some solace from a telephone conversation he had with Mr. Deren in which he understood Mr. Deren to be expressing regret that a newspaper report on the tentative settlement did not reflect what Mr. Deren had intended to convey about the recruitment and retention issues. Mr. Waselenchuk also took comfort from a letter he received from Mr. Deren on the same day which he interpreted as meaning that all SAHO had to do to meet the requirements of the proviso was physically produce the two reports. Mr. Deren's letter read in part as follows:

> *Most importantly, I understand from our last telephone conversation that there is concern about our proviso in the Memorandum of Settlement concerning the market supplement program, and our notion as to "satisfactory results". I hope the following clarifies and confirms our position.*
>
> *From the beginning, we had as a major issue at the table the need to address large wage gaps contributing to shortages in the groups we represent. We tentatively withdrew this issue from the table only in consideration of the expectation that the employer process that has been developed over the last few months would address it. In order to be sufficiently confident that this was a valid and effective process that we could so inform our executive council and membership, we have held for some time now that we would have to see how the Committee dealt with shortages among Respiratory Therapists and Pharmacists. That has never changed. Most recently, I had advised you and other SAHO officials that we would want a report on that committee's deliberations by March 6, at which time we would be presenting the Tentative Collective Agreement to Council. I know that the committee is committed under its Terms of Reference to issue such a report, and that with respect to Respiratory Therapists, it would likely be ready by about now for other reasons. We would have expected to have the report with respect to Pharmacists ready by that time too, but would be prepared to have interim communication as to the state of progress to that point.*
>
> *Of course, we would hope that the news is that these two professions would be receiving significant supplements, and that would help a lot in getting member votes for ratification. We have, however, always avoided drawing any more specific parameters than that I describe above in the knowledge that this market supplement process was separate from collective bargaining.*
>
> (emphasis added)

**[28]** Mr. Deren's testimony placed a slightly different interpretation on the conversation and the letter. According to Mr. Deren, he contacted Mr. Waselenchuk by telephone on February 22, 2002, the day after concluding the MOS, to give him heads up on a newspaper article in which Mr. Deren was quoted as saying:

> *Unless HSAS gets proof of SAHO's plan to increase wages, it's unlikely a deal will be reached.*

And,

> *All I can say for sure is that the executive council is unlikely to recommend ratification of the agreement unless there's some clear evidence the employer will work to address the problem.*

**[29]** Mr. Deren testified that he did not retreat from these comments in his conversation with Mr. Waselenchuk but he did tell Mr. Waselenchuk that he had also spoken to the reporter in question about the many positive aspects of the MOS and she had not chosen to report on those comments.

**[30]** Later in the same day, Mr. Deren recalled that Mr. Waselenchuk phoned him back and advised Mr. Deren that he was facing some tough questions from Mr. McKillop, vice-president of human resources for SAHO, about the proviso. Mr. Deren recalled that Mr. Waselenchuk told him that he (Mr. Waselenchuk) had been questioned about whether he had violated the conditions of the mandate by referring to the MSP in the MOS; that, according to Mr. Waselenchuk, the MSP had to be disguised in the agreement, not included, because of the economic mandate. In addition, he asked Mr. Deren for a letter giving his superiors comfort on the issue that the MSP was not a monetary issue in the bargaining. Mr. Deren described the underlined portion of his letter set out above as his diplomatic effort not to draw more specific parameters around the MSP than "it has to work."

**[31]** Mr. Deren was expecting to receive the report on respiratory therapists from SAHO within days of February 21, 2002. He knew that the report on pharmacists would be delayed because the MSP Review Committee had a change of heart with respect to the need for a supplement for this group and the report had to be re-done.

**[32]** Mr. Deren reported that he was nervous about the respiratory therapist report and he set up a meeting with Mr. McKillop at the end of February to discuss the matter. Mr. Deren impressed upon Mr. McKillop the importance of getting the report on respiratory therapists as soon as possible.

**[33]** Mr. Deren and a member of his bargaining committee met with Mr. McKillop approximately one week later to again impress on him the importance of getting the report from the MSP Review Committee and to express their concern and need to have the report to provide to their members.

**[34]** On March 6, 2002, SAHO delivered a copy of the MSP Review Committee's report on respiratory therapists to HSAS. Mr. Deren received the report the evening before he had to attend at the executive council meeting of HSAS to present the tentative collective agreement. The report did not contain any recommendation on the level of market supplement that should be made available to respiratory therapists. It simply recommended that "a temporary market supplement be negotiated for the position of respiratory therapist." In the attached covering letter, Mr. McKillop informed Mr. Deren that:

> *Negotiations with respect to implementing the market supplement will be conducted between HSAS and SAHO once the successful ratification of the HSAS Collective Agreement has been completed. Please note that the negotiations of a market supplement rate for Respiratory Therapists will depend on the availability of resources and will be prospective in nature.*

**[35]** Mr. Deren was extremely disappointed with the report and covering letter. Nevertheless, he went ahead with his presentation to HSAS's executive council. The executive council was not satisfied with the report because it did not contain a recommended level of market supplement and it was also disappointed that SAHO had not provided it with the report on pharmacists. HSAS's bargaining committee had previously told the president, Stan Dimnik, that the two reports would be available to review at the March 6, 2002 meeting.

**[36]** According to Mr. Dimnik, the executive council was shocked when it reviewed the MSP Review Committee report on respiratory therapists and found there were no monetary recommendations contained in the report. The rest of the report, according to Mr. Dimnik, merely confirmed what HSAS already knew – i.e. that there were serious shortages of respiratory therapists. Mr. Dimnik thought that the bargaining committee was being somewhat "pollyannaish" by recommending the MOS to the executive council when they had not received the second report and had no indication of the recommended supplements. HSAS was facing a 90-day time frame to conduct a ratification vote and on Mr. Dimnik's calculations, there was not much time left to get the information required from SAHO. As a result, the executive council directed Mr. Deren to go back to SAHO and find out why it had not produced the second report and why no monetary recommendation was included in the respiratory therapists report. The executive council did not vote to accept or reject the MOS at the March 6 and 7, 2002 meetings.

**[37]** Mr. Deren telephoned Mr. McKillop on March 7, 2002 to inform him that HSAS wanted to see the second report and signed dollar figures for both occupational groups within 30 days. He repeated this message in a letter to Mr. McKillop on March 25, 2002.

**[38]** According to Mr. Deren, Mr. McKillop advised that the pharmacists report would be delivered to HSAS within 30 days but no financial information would be provided by SAHO to HSAS in relation to the amount of recommended supplements. Mr. McKillop explained that he was unable to provide the figures because it would constitute an unfair labour practice. According to Mr. Deren, Mr. McKillop indicated that the terms of reference for the MSP Review Committee, particularly the provision that required the Committee to recommend a supplement amount, was in error and should be changed.

**[39]** In his testimony, Mr. McKillop explained that providing a monetary figure with the MSP Review Committee reports would not be consistent with the economic mandate. The next step in his view was to contact HSAS to negotiate a rate; this practice in his mind was consistent with past practices whereby certain health care unions negotiated top-ups for certain classifications with local district health boards following the signing of their provincial collective agreements.

**[40]** Mr. Dimnik explained that HSAS was reluctant to move ahead without seeing a dollar figure on the market supplements because once it ratified and signed the agreement, HSAS would not be able to strike or to refer the dispute to a binding dispute resolution process.

**[41]** The executive committee of HSAS met on March 26, 2002 to discuss the matter further. According to Mr. Dimnik, the executive committee decided that SAHO was forcing it to reject the tentative agreement. Mr. Dimnik, as President, decided to make one more attempt to convince SAHO to change its mind. He and members of the executive committee telephoned Mr. McKillop and asked if SAHO would agree to refer the wage supplements to binding arbitration if the parties were unable to agree on the amount of supplement to be paid. Mr. McKillop considered the request and contacted HSAS on April 3, 2002 to reject the proposal.

**[42]** Mr. McKillop testified that he rejected binding arbitration over the rates for the MSP because it was inconsistent with the position that the MSP was not part of the collective bargaining process. On cross-examination, he testified that it was SAHO's intention to negotiate mid-term rates

under the MSP and he hoped that agreement could be reached on rates, but if the parties did not agree to a rate, SAHO could go ahead and impose one.

**[43]** Mr. Dimnik stated that, at this point, HSAS felt that it had no choice but to recommend rejection of the MOS as they had no dollar figures attached to the MSP reports and no binding process to resolve any disputes over market supplements.

**[44]** Mr. McKillop also proposed in his April 3, 2002 telephone call that the parties meet to discuss the market supplements for respiratory therapists and pharmacists, but not other classifications.

**[45]** During this period of time, SAHO was also negotiating with the Saskatchewan Union of Nurses ("SUN"). Mr. Dimnik testified that, prior to the signing of the SUN-SAHO tentative agreement, he was given "heads up" by SUN that something interesting was going to happen at its table. Shortly after receiving this "heads up" from SUN, Mr. Dimnik received Mr. McKillop's phone call rejecting binding arbitration and suggesting the parties meet to discuss the rates for respiratory therapists and pharmacists. At that point, Mr. Dimnik was suspicious of Mr. McKillop's motives and concluded that SAHO was trying to get HSAS to agree to temporary adjustment rates before the news of the SUN-SAHO deal broke. Mr. Dimnik told Mr. McKillop he would wait a week to see what interesting things were developing elsewhere and he instructed the negotiating committee not to meet with SAHO to discuss the market supplements unless the seven original groups and two added groups (psychologists and dental therapists) were included in the discussion.

**[46]** The executive council of HSAS met on April 16, 2002 and passed a resolution to recommend rejection of the MOS. By this time, SUN had arrived at a tentative settlement with SAHO that contained a 20% increase for all nurses to bring them more in line with nurses in other jurisdictions. In HSAS's view, the SUN-SAHO deal represented the negotiation of permanent market supplements using funds that had been earmarked for other programs, such as pay equity and joint job evaluation. HSAS viewed the SUN-SAHO deal as changing the ground rules on the joint job evaluation plan and the pay equity plan that had not been discussed or made available to HSAS to address its recruitment and retention issues.

**[47]** On April 17, 2002, Tim Slattery, executive Director of HSAS, telephoned Mr. McKillop to seek an extension of time for conducting the ratification vote. Mr. McKillop did not recall if Mr. Slattery then advised him that the executive council had voted to recommend rejection of the MOS. Mr. McKillop responded to the request by seeking clarification of reports that HSAS was about to recommend rejection of the MOS. Mr. Dimnik responded on April 23, 2002 advising Mr. McKillop that the HSAS bargaining committee strongly recommended acceptance of the MOS to the executive council on March 6, 2002 and asserted that this recommendation met the terms of the MOS that the committee recommend the MOS to "their principals." His letter of April 23, 2002 read in part as follows:

> *On March 6, 2002, the HSAS Bargaining Committee updated the HSAS executive council at which point they strongly recommended acceptance of the tentative agreement. Executive Council directed the Bargaining Committee to secure from SAHO evidence that the "employer initiatives" had "demonstrated satisfactory results" and, having received advice that SAHO was unwilling to participate in adopting a dispute resolution mechanism, Executive Council passed a motion strongly recommending rejection of the tentative agreement.*

**[48]** As noted, Mr. Dimnik took the position in this letter that the term "principals" referred to the executive council of HSAS, not the membership of HSAS. Under the constitution of HSAS, only the executive council has the right to make recommendations to accept or reject a tentative settlement to its members. The bargaining committee reports its work to the executive council with its own recommendation; but the recommendation that goes out to members on a ratification vote must be made by the executive council. The specific wording of the constitution reads as follows:

> *4.6 – Ratification of Collective Agreement*
>
> *The Executive Council shall have the sole responsibility for recommending acceptance or rejection of the terms of any Collective Agreement negotiated by the Negotiating Committee, to the members of the Collective Bargaining Unit. . . .*

**[49]** Mr. Waselenchuk and Mr. McKillop testified that HSAS negotiators never advised SAHO that the HSAS bargaining committee did not have authority to recommend ratification of the MOS to the members of HSAS. SAHO was aware that the bargaining committee had to present the MOS to the executive council, but SAHO was not aware that the term "principals" in the eyes of the HSAS bargaining committee meant the HSAS executive council.

**[50]** Mr. Deren agreed that he never explicitly informed SAHO that he could only recommend acceptance to the executive council of HSAS and that it was that body that would make the final decision on the recommendation to members. Mr. Deren assumed that SAHO understood this from the numerous references he and other bargaining committee members made at the table about the need to sell the deal to the executive council. Mr. Deren was certain that SAHO understood that he needed the two reports to take to the executive council meeting and that it would be at that meeting that HSAS decided if the proviso contained in paragraph 2 of the MOS was satisfied.

**[51]** HSAS prepared extensive materials for its members to consider prior to voting on the tentative agreement. It then conducted meetings in each health district to explain the MOS and the reasons why executive council was proposing that the members reject it. Members voted by mail-in ballots were counted on May 20, 2002 and the results were 78% vote in favour of rejection with 50% of the membership casting ballots.

**[52]** In its ratification vote materials, HSAS made it clear to its members that it did not reject the entire MOS. In the Q & A portion of its materials, HSAS stated:

> *What happens if HSAS members vote to reject the Tentative Agreement?*
>
> *If HSAS members vote to reject the Tentative Agreement a new HSAS Bargaining Team will be going back to the bargaining table to negotiate a more satisfactory wage increase (note: Executive Council is not recommending rejection of the body of the Tentative Agreement). However, prior to commencing negotiations the membership will be surveyed to determine what the members' wishes are with respect to monetary proposals. At this point members may wish to express views on wage increases beyond those covered by MSP Program.*

**[53]** On May 8, 2002 SAHO filed its first unfair labour practice application seeking an order from the Board directing HSAS to stop asking its members to reject the MOS.

**[54]** On June 21, 2002 SAHO called a meeting with HSAS which was attended by SAHO's senior labour relations staff (McKillop, Waselenchuk and Schmeichel) and the new bargaining team for HSAS with Mr. Slattery as chief spokesperson. HSAS informed SAHO that it was conducting a bargaining issues survey among its members and was unable to discuss the collective agreement issues until the survey was completed. HSAS proposed a further meeting on June 26, 2002.

**[55]** At the June 26, 2002 meeting, the Union tabled a new bargaining package, the primary thrust of which was to increase the rates of pay in the same or similar manner as occurred in the SUN-SAHO agreement (top rate of $30/hr for Baccalaureate). Other issues raised included a family responsibility leave provision, similar to that in the recently concluded SUN-SAHO agreement, and a body armour clause requiring health sector employers to provide body armour to EMS employees. All other proposals related to monetary issues.

**[56]** SAHO complained in its second unfair labour practice that HSAS was seeking to bargain collectively with respect to issues that were already concluded in the terms of the MOS. In evidence, Mr. Waselenchuk pointed to the family responsibility and body armour clauses that had not been on the table or had been settled by the MOS.

**[57]** At the time of meeting with HSAS, however, SAHO did not raise any objection to the tabled proposals, nor did it indicate to HSAS that it was unwilling to bargain with respect to the matters tabled on June 26, 2002. SAHO did raise concerns about its ability to cost the package given the number of new proposals and it suggested at this stage that the parties consider asking Saskatchewan Labour to appoint a conciliator.

**[58]** The parties met again on June 27, 2002 to discuss further dates and the involvement of a conciliator. HSAS advised SAHO that it would agree to the appointment of a conciliator.

**[59]** A meeting was held in early July 2002 to discuss technical issues pertaining to the costing of HSAS's new proposals.

**[60]** On July 24, 2002 the parties held their last bargaining session during which HSAS asked SAHO to commit to the $30/hour top rate for all Baccalaureates. SAHO said that it could not do so. SAHO did think that some classifications might come out higher and some lower than the $30/hour top rate depending on the outcomes of the Joint Job Evaluation process and the MSP.

**[61]** At this point, HSAS broke off talks and returned to its membership for a strike vote, which was successful, and SAHO filed its second unfair labour practice application.

## Discussion and Analysis

**[62]** The Board finds that HSAS did not commit an unfair labour practice by failing to recommend acceptance of the MOS to its membership. Our reasoning is based primarily on our assessment of the facts that we have found in relation to the meaning of the proviso in clause 2 of the MOS that "HSAS representatives will support and recommend complete acceptance of all terms of this Memorandum of Settlement to their principals, provided that the current employer initiatives to address market issues affecting employee retention have demonstrated satisfactory results." (emphasis added)

**[63]** It is our view of the evidence that the parties agreed to make HSAS's positive recommendation to ratify the MOS contingent on SAHO producing the two reports covering respiratory therapists and pharmacists from the MSP Review Committee and on HSAS finding that these reports met the test of "demonstrat[ing] satisfactory results."

**[64]** In its evidence, SAHO put forth the view that all it was required to do was to produce the two reports. In some sense, Mr. Deren for HSAS did not disagree with SAHO's characterization of the way in which the proviso would be satisfied, but he did have a considerably different view of what would be contained in the reports. In his mind, the reports had to contain recommendations about the supplement levels that would be provided to the occupations in question and the recommendations had to be within a reasonable range. Without this information, he would have a difficult time selling the MOS to his members as they would have no way to assess the seriousness of SAHO in responding to the well-documented and mutually identified recruitment and retention problem.

**[65]** Mr. Deren expected the reports to contain information about the amount of recommended supplements because (1) the terms of reference for the MSP Review Committee required the Committee to "render ... recommendations regarding appropriate supplement levels"; and (2) his informal discussions with SAHO led him to believe supplement amounts were being discussed by the Committee. Nothing in the evidence presented suggests that SAHO revised the task assigned to the MSP Review Committee. In the context of this round of collective bargaining, in which HSAS was being asked to trust a wage setting scheme that is outside of the normal collective bargaining process, we do not think it is unreasonable for HSAS to rely on SAHO's own description of what would be contained in the two reports as a basis for determining, on a very elementary level, if the reports did in fact demonstrate "satisfactory results."

**[66]** The contingency giving rise to HSAS's obligation to recommend the MOS to its membership was clearly not met on this level as the reports did not contain any recommendations regarding appropriate supplement levels. This leaves aside a broader issue of whether the phrase "demonstrate satisfactory results" means something more than receiving the reports in the form promised. In our view, the words are not ambiguous or confusing. They simply mean that HSAS had to be satisfied with the results of the two reports. In this case, had the reports contained all of the information that the terms of reference for the MSP Review Committee required, we would find that the clear words of the proviso would still allow HSAS an opportunity to evaluate the results to determine if they were "satisfactory" to its membership.

**[67]** In argument, SAHO took the position that Mr. Deren's telephone call and letter of February 22, 2002 to Mr. Waselenchuk provided SAHO with the assurance that all that was required was that SAHO produce the two reports. We do not interpret Mr. Deren's phone call and letter in the same light. When he spoke of "avoiding drawing any more specific parameters than that I described above in the knowledge that this market supplement process was separate from collective bargaining," he was using rather vague and diplomatic language to say that the money associated with the MSP was not part of the current bargain. However, the sentence immediately prior to the one above quoted gives a strong indication to SAHO that Mr. Deren expected the reports to contain recommendation on supplement levels, as he states: "we would hope that the news is that these two professions would be receiving significant supplements, and that would help a lot in getting member votes for ratification." As well, his quoted comments in the newspaper article confirm his understanding at the time that SAHO would include recommendations for supplement levels in the MSP Review Committee's reports. Overall, the content of the phone call and the letter from Mr. Deren to Mr. Waselenchuk do not support the view that HSAS simply wanted two reports, regardless of what was contained in them.

**[68]** SAHO also suggested in argument that the recommendation contained in the reports that a temporary market supplement be negotiated for the positions in question met the requirements of the terms of reference and the general requirements of the *Act*. SAHO noted that HSAS took the position that market supplements would be subject to collective bargaining once the MSP Review Committee made its reports. SAHO noted as well that HSAS had not made any recommendation of its own regarding the level of supplements.

**[69]** We agree that the evidence demonstrated (and the *Act* requires) that SAHO and HSAS would negotiate with respect to the level of supplements paid to the various occupations under the MSP process. However, this bargaining was going to take place mid-term when HSAS was stripped of its bargaining power to conduct a strike. In this context, the absence of recommended rates in the MSP Review Committee reports was not a minor omission. Such information would demonstrate to HSAS and its members the manner in which SAHO was proposing to calculate market supplements and would presumably set out the market conditions that were causing the recruitment and retention problems, i.e. the wages that are paid in competing labour markets. This empirical work could then inform the bargaining between SAHO and HSAS, if any was needed, to set the market supplements for each occupation. As counsel for HSAS described SAHO's position, it was asking HSAS to buy a pig-in-a-poke. SAHO needed to generate some numbers to show that HSAS, by giving up the right to bargain market supplements during the open period with access to all of the economic weapons available, was likely to achieve similar results through the MSP process.

**[70]** SAHO noted that HSAS refused in April 2002 to negotiate with SAHO regarding the market supplements for the two classifications. The suggestion is that the offer to negotiate the market supplement rates for the two positions cured the defect in the two reports. In our view, the offer came too late in the process and did not have the effect of curing the defect in the two reports.

**[71]** Initially, when SAHO delivered the first report on respiratory therapists, its cover letter made it clear that negotiations on rates would commence after the ratification of the MOS. When HSAS's executive council asked SAHO to provide the MSP Review Committee's recommendation on market supplements, it was rebuffed (Deren's telephone call to McKillop on March 7, 2002 and his March 25, 2002 letter). HSAS made a further attempt to resolve the matter on March 26, 2002 when it proposed a binding process for setting supplement levels as a method of moving the issue of the MOS along. SAHO rejected this proposal. Mr. McKillop thought that the proposal was inconsistent with the MSP program not being part of the collective bargaining process. By the time SAHO suggested that the parties engage in discussion relating to the market supplements for respiratory therapists and pharmacists, Mr. Dimnik had concluded that the reports were not satisfactory and they were faced with the need to recommend rejection of the MOS to their members. HSAS was also aware around the same time that the SUN-SAHO agreement was pending and the results may have some bearing on where HSAS would go in bargaining further with SAHO.

**[72]** At that stage, the proviso having not been fulfilled by the delivery of the two reports, HSAS was entitled to recommend rejection of the MOS to its membership. The contingency for making a positive recommendation was not met and HSAS was free, in a collective bargaining sense, to respond accordingly.

**[73]** Since we have found on a factual basis that the proviso contained in clause 2 of the MOS was not met, we do not need to address the issue of the bargaining committee's mandate. We would say for the future benefit of the parties that it is helpful and in keeping with the general duty to negotiate in good faith for parties to inform each other of their reporting structures and any limits on their ability to sign a tentative settlement. In this case, HSAS's bargaining committee understood the word "principal" to refer to its executive council. In most collective bargaining situations, the word "principal" would refer to union members. In this case, it may have been appropriate for HSAS to agree to recommend ratification to its executive council or to at least inform SAHO that it required the approval of the executive council before it could agree to make a positive recommendation.

**[74]** We suspect that SAHO had some institutional knowledge of HSAS's constitutional provisions; however, the players at the bargaining table change frequently and it is important that limitations of the type imposed on the bargaining committee in this instance, i.e. that it could not make a recommendation to accept the MOS to the membership of HSAS, be made known to the other bargaining team at the outset of collective bargaining. In any event the issue does not require determination in this instance as we have found that neither the bargaining committee or the executive council of HSAS were obligated to make a positive recommendation to its membership.

**[75]** Finally, we will address the issues raised in relation to the bargaining that went on after HSAS rejected the MOS. SAHO alleges that HSAS has bargained in bad faith because it has added items that were not previously raised in bargaining and has raised issues around matters that were already the subject of agreement in the MOS. HSAS takes the position that once the MOS is rejected, the parties can raise any issues and bargaining starts afresh.

**[76]** The Board has said in the past that collective bargaining is an art, not a science. It is difficult to list black and white rules that apply to all collective bargaining situations. In some instances, the raising of new issues once bargaining has apparently concluded is an example of bad faith bargaining; in other instances it is not an unfair labour practice. In *Local 527, Office and*

*Professional Employees International Union v. Board of Education for the City of Hamilton*, [1993] O.L.R.B.R. April 308, Chairperson MacDowell described the equivocal nature of the rules at para. 61 as follows:

> *There are quite a few OLRB cases which deal with the issue of "resiling" from positions agreed upon before, but they do not provide an unequivocal answer. Sometimes a party has been able to withdraw from its previous position, and sometimes it has not, depending upon the reasons for the purported change of heart, and whether the Board could conclude that the earlier position was a sham, or the later one a device to avoid entering into a collective agreement. A change of position occasioned by the interplay of bargaining power or changing economic circumstances will not, in itself, be unlawful.*

**[77]** In *Ladner Private Hospital Ltd. et al. v. Hospital Employees' Union, Local No. 180* (1977), Dec., No. 19/77, the British Columbia Labour Relations Board examined the issue of resiling from a bargaining position and noted that there is no automatic rule that would make such conduct an unfair labour practice. In particular, it noted that, in the case of a rejected tentative settlement, the general proposition cannot be applied "without alteration to such circumstances."

**[78]** Frequently, a party which resiles from a previous offer does so in an attempt to thwart the collective bargaining process and this conduct is taken to demonstrate that the party has no intention to conclude a collective agreement. Often such conduct is part of a pattern of events that, looked at as a whole, demonstrates surface bargaining - see, for instance, *Service Employees' International Union, Local 336 v. Royal Canadian Legion, Branch No. 56,* [1990] 1st Quarter Sask. Labour Rep. 99, LRB File No. 192-89. We have reviewed the cases cited by SAHO in relation to this argument and find that they fall within this category of cases, that is, the resiling conduct was part and parcel of a pattern of behaviour that demonstrated an unwillingness to conclude a collective agreement.

**[79]** In the present case, SAHO pointed out that HSAS told its members that it was satisfied with the body of the MOS and that if the MOS was not ratified the only issues to be renegotiated pertained to wages. HSAS then went on to file a new bargaining proposal which raised at least two issues that fell within the categories of (1) not having been raised in round one, and/or (2) raised and settled in round one.

**[80]** HSAS takes the position that it was entitled to come back to the bargaining table with new proposals based on its membership's directions. It surveyed the members following the ratification vote and formed its proposal package to meet their needs.

**[81]** In our view, HSAS's addition of two rather minor clauses to the new bargaining package (family responsibility leave and body armour) does not demonstrate that HSAS is refusing or failing to bargain toward the conclusion of a collective agreement. This is not a case of HSAS adding new issues or attempting to renegotiate issues that have been settled or not earlier addressed at a late stage in bargaining, but prior to a ratification vote. In this case, the MOS was rejected by the membership demonstrating that the members did not accept the terms that were negotiated. When bargaining resumes after a rejection vote, the union must reassess its bargaining package and, in most cases, will elect a new bargaining committee to attempt to negotiate a collective agreement that will respond to members' aspirations. HSAS may be taking slight advantage of developments in other collective agreements since the signing of the MOS, but an attempt to "pattern bargain" in this industry is not unusual. We do not find that the addition of the two minor proposals constitutes bargaining in bad faith in the context of the resumption of negotiations following the rejection vote.

**[82]** As a result, the unfair labour practice applications are dismissed. At the hearing, HSAS undertook not to commence strike activity until 24 hours after this decision has been issued. SAHO asked the Board to make an Order requiring HSAS to serve a further 48 hour strike notice on SAHO and the regional health authorities. However, as we have found that HSAS did not bargain in bad faith and is not in breach of s. 11(2)(c) of the *Act,* the original strike notice cannot be struck down as part of an unlawful bargaining scheme. The Board has no statutory authority outside of the unfair labour practice provisions to require HSAS to serve a new strike notice.

# INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 2038, Applicant v. PRAIRIE CONTROL SERVICES LTD., Respondent

LRB File No. 087-02; September 26, 2002
Vice-Chairperson, James Seibel; Members: Clare Gitzel and Donna Ottenson

For the Applicant: Angela Zborosky
For the Respondent: Eileen Libby

**Appropriate bargaining unit – Construction industry – Board finds no compelling reason to depart from standard bargaining unit description.**

**Certification – Statement of employment – Electrical trade division unit does not include restricted journeyman electricians or their helpers – Board removes individuals so described from statement of employment.**

**Construction industry – Appropriate bargaining unit – Statement of employment – Individuals who are restricted journeyman electricians and their helpers not included in electrical trade division – Board removes individuals from statement of employment.**

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

## REASONS FOR DECISION

### Background and Evidence

**[1] James Seibel, Vice-Chairperson:** The International Brotherhood of Electrical Workers, Local 2038 (the "Union") filed an application pursuant to sections 5(a), (b) and (c) of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the *"Act"),* to be certified as bargaining agent for the standard bargaining unit of employees in the electrical trade, as follows:

> *Journeyman electricians, electrical apprentices, electrical workers and electrical foremen employed by Prairie Control Services Ltd. in Saskatchewan south of the 51st parallel.*

**[2]** Prairie Control Services Ltd. (the "Employer") is engaged in the installation (both new construction and retrofit), repair and maintenance of commercial, institutional and industrial environmental and lighting control systems.

**[3]** The issues in dispute on this application are the composition of the statement of employment for the purposes of determining the level of support for the application and the appropriateness of the

standard bargaining unit. The Employer has employees who are certified as full journeyman electricians or are indentured electrical apprentices under apprenticeship and trade certification legislation, and also has employees who are not certified in the trade under apprenticeship and trade certification legislation and who perform only "extra low voltage"[1] electrical work pursuant to "restricted" licenses issued under electrical licensing legislation.

**[4]** The context of the application, which involves a compulsory apprenticeship trade in the construction industry, is important. These contextual facts are drawn mainly from the testimony of Stan Shearer, the Union's business manager, and Alfred Pellerin, one of the Employer's principals, and also from the legislation relevant to the construction industry, trade certification and apprenticeship, and electrical trade licensing.

**The Standard Bargaining Unit**

**[5]** The term "construction industry" is defined in s. 2(e) of *The Construction Industry Labour Relations Act, 1992*, S.S. 1992, c. C-29.11 (the "*CILRA, 1992*"), as follows:

> *2 In this Act:*
>
> *(e) "construction industry":*
>
> *(i) means the industry in which the activities of constructing, erecting, reconstructing, altering, remodelling, repairing, revamping, renovating, maintaining, decorating or demolishing of any building, structure, road, sewer, water main, pipeline, tunnel, shaft, bridge, wharf, pier, canal, dam or any other work or any part of a work are undertaken; and*
>
> *(ii) includes all activities undertaken with respect to all machinery, plant, fixtures, facilities, equipment, systems and processes contained in or used in connection with a work mentioned in subclause (i);*

The purpose of the legislation, that is, to implement sectoral bargaining, is enunciated in s. 4:

[1] I.e., less than 30 volts. See in more detail the industry usage of the term, *infra*.

> *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.*

**[6]** Pursuant to ss. 9 and 9.1 of the *CILRA, 1992,* the Minister of Labour has designated certain appropriate trade divisions in the construction industry, each comprising the unionized employers in the trade, and designating a representative employers' organization to act as the exclusive agent to bargain collectively on behalf of all unionized employers in the trade division. Certain unions, or locals of unions, have established the right to bargain collectively on behalf of the unionized employees of unionized employers in a trade division. 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, the Board established the standard bargaining units – colloquially referred to as "Newbery" units – for each trade division, in accordance with the similar 1979 legislation, *The Construction Industry Labour Relations Act*, S.S. 1979, c. C-29.1[2] (the "*CILRA, 1979*").

**[7]** The electrical trade is one of the designated trade divisions. A joint council of IBEW, Local 2038 and IBEW, Local 529, affiliates of the Saskatchewan Building Trades Council, has established the right to bargain collectively on behalf of the unionized employees of the unionized employers in the electrical trade division, respectively south and north of the 51st parallel. Other IBEW locals represent workers in the trade outside the construction industry, such as public utility workers. IBEW Local Nos. 2038 and 529 each operate a hiring hall dispatching members according to the rules in the provincial collective agreement for the electrical trade division in the construction industry (the "provincial electrical agreement")[3].

**[8]** The standard Newbery bargaining unit in the electrical trade division of the construction industry originally included only "journeyman electricians, electrician apprentices, and electrician foremen." Shortly afterwards, in *The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local No. 179* v. *ICS Western Construction Ltd.,* [1980] May Sask. Labour Rep. 62, LRB File No. 135-79, the standard bargaining unit was amended to add "electrical workers" to reflect the practice in the trade following the introduction of changes to trade certification in 1976 that designated each of the electrical and

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[2] Repealed by S.S. 1983-84, c. 2.
[3] The present agreement is for the term from May 1, 2001 to April 30, 2003.

plumbing trades as a "compulsory apprenticeship trade." The Board stated in *ICS Western, supra,* at 63 as follows:

> *The Board has also found it necessary to change the unit description with respect to the electrical trade. The unit had been defined as follows: all journeymen electricians, electrician apprentices, and electrician foremen. The terms used are defined in legislation and in practice and are well understood in the industry. However, it was found that there are other employees engaged in electrical work who do not fall within these definitions. These may be employees with "grandfather rights" under apprenticeship regulations or who have not yet become apprenticed as required by law. They are persons who are permitted to work without a journeymen's license under Sections 14(4) and (6) of The Electrical Inspection and Licensing Act, R.S.S. 1978, Chapter E-7, as well as persons who have traditionally been included in electrician's union certifications pursuant to a long series of jurisdictional decisions and agreements. In order to be sure that these persons are included it was deemed necessary to add the classification "electrical workers" to the electricians certification order. . .*

**[9]** Therefore, the classification of "electrical workers" in the standard electrical trade division bargaining unit description includes persons who are not qualified journeypersons or registered apprentices, but who are: (1) persons not required to hold a journeymen's license to work in the trade who were "grandfathered" under apprenticeship and trade certification legislation; (2) persons working in the trade with the intention of shortly becoming an indentured apprentice; and, (3) persons traditionally included in electricians' union certifications in the construction industry.

**The Electrical Trade – Certification and Licensing**

**[10]** Since December 1, 1976, the electrical trade has been designated as a "compulsory apprenticeship trade." The other construction trades (e.g., carpenter, ironworker, insulator, etc., to name but a few) are "voluntary apprenticeship trades."

**[11]** With respect to the compulsory nature of the electrical trade, to be eligible to become licensed to perform the full range of the work of the electrical trade, a person must complete a prescribed course of technical study, training and apprenticeship, and successfully complete qualifying examinations, leading to certification as a journeyman.[4] One may not work in the electrical trade unless one: (1) holds a full journeyman electrician certificate issued pursuant to that *Act* by the Saskatchewan Apprenticeship and Trade Certification Commission ("the Trade

[4] See, *The Apprenticeship and Trade Certification Act, 1999*, S.S. 1999, c. A-22.1, s. 19(1), and The Apprenticeship and Trade Certification Regulations, R.S., c. A-22.1, Reg. 1, s. 67(3).

Certification Commission"); (2) has a contract of apprenticeship in the trade registered with the Trade Certification Commission; (3) holds a special permit to work in the trade (e.g., is "grandfathered" as described, *supra*);[5] or, (4) intends shortly to become indentured as an apprentice in the trade.[6] Certification may be inter-provincial.

**[12]** Journeyman electricians and electrical contractors are licensed pursuant to *The Electrical Licensing Act*, S.S. 1988-89, c. E-7.2, under the aegis of Saskatchewan Municipal Affairs, Culture and Housing, Protection and Emergency Services Branch, Electrical Licensing and Inspection (the "Electrical Licensing Branch") to do "work of electrical installation."[7] SaskPower administers the system of permits and inspection mandated by *The Electrical Inspection Act, 1993*, S.S. 1993, c. E-6.3.

**[13]** In the electrical trade, systems and components that operate at less than 30 volts are designated as "extra low voltage." Systems and components that operate in the range of 30 volts to less than 700 volts (including common residential 110-volt and 220-volt systems) are designated as "low voltage." Systems that operate at more than 700 volts are designated as "high voltage." For ease of reference, and because high voltage electrical work is not at issue in this case, we shall use the terms "extra low voltage" and "higher voltage" to refer, respectively, to less than and greater than 30 volts.

**[14]** Journeyman electricians and electrical apprentices working under a journeyman are trained and certified pursuant to *The Apprenticeship and Trade Certification Act, 1999*, and licensed under *The Electrical Licensing Act*, to perform the work of electrical installation involving any voltage, including extra low-voltage work. Persons who are not journeymen certified by, or apprentices registered with, the Trade Certification Commission may nonetheless be licensed as "restricted journeypersons" under *The Electrical Licensing Act* to perform work only on extra low voltage systems, so long as they are employed by a contractor that is itself licensed to install extra low voltage electrical systems.

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[5] See, s. 38 of the *Act*, and s. 12(3) of the Regulations.

[6] A person intending to become indentured may work in the trade for a period of not more than the lesser of six months' full-time employment or one-half the number of hours in a prescribed apprenticeship year, i.e., 900 hours.

[7] *The Electrical Licensing Act*, s. 2(s), defines "work of electrical installation" as "the installation of any electrical equipment, in or on any land, building or premises, from the point where electrical power or energy is delivered to the point where the power or energy can be used, and includes the maintenance, connection, alteration, extension and repair of electrical installations." The terms "electrical equipment" and "electrical installation" are also defined by the statute and include "connected wiring."

**[15]** *The Electrical Licensing Act* provides for the licensing of both contractors and journeypersons performing higher voltage electrical work and/or restricted electrical work as outlined above. Only electrical tradespersons qualified and licensed to perform higher voltage electrical work may work on such higher voltage systems and components (e.g., ordinary lighting and wiring, fans, pumps, starters, etc.) and at the interfaces between a building's higher voltage system and components and extra low voltage controls system and components (e.g., environmental sensors and controls and extra low voltage lighting).

**[16]** Persons wishing to work in electrical installation as a bonded contractor or employer must also obtain a license. An unrestricted contractor's license authorizes the holder to engage in an unrestricted scope of electrical work. A restricted contractor's license authorizes the holder to engage in a limited range of electrical work in one of eight (8) categories: extra low voltage; instrumentation; power lineman; x-ray and dental; lightning rod; oilfield pipeline equipment; industrial; and, install/repair signs. Only contractors holding an unrestricted electrical license may do the work of electrical installation involving any voltage through personnel certified and registered under apprenticeship and trade certification legislation who in turn hold an unrestricted license. However, duly licensed contractors may also perform extra low voltage electrical work utilizing either such fully certified and licensed tradespersons and/or persons holding only a "restricted journeyperson" license with an extra low voltage designation.

**[17]** The difference between a journeyman electrician qualified under *The Apprenticeship and Trade Certification Act, 1999* and licensed as an "unrestricted journeyman" and a person not so certified, but licensed as a "restricted journeyman," was described as follows in the September 2001 "Report of the Committee to Review Restricted Electrical Licences"[8]:

> *The Electrical Licensing Act is administered by the Department of Municipal Affairs and Housing and requires anyone who performs electrical installations to be licensed as either an unrestricted journeyman or a restricted journeyman. The term "journeyman" is defined differently and hence has a different meaning in The Electrical Licensing Act than it does in The Apprenticeship and Trade Certification Act. The two types of licences are as follows:*

[8] The Committee was created in response to concerns raised by members of the electrical trade regarding the regulatory regime governing the broadly defined electrical industry and was mandated to develop a fair and balanced assessment of existing policies and procedures. The Committee's voluntary membership was comprised of representatives of several government departments, SaskPower, the Electrical Contractors Association of Saskatchewan, IBEW, and certain restricted license contractors.

> • *An unrestricted licence authorizes the holder to engage in an unrestricted scope of electrical work and is issued only for journeyman electricians as defined in The Apprenticeship and Trade Certification Act; and,*
>
> • *A restricted licence authorizes the holder to engage in a limited range of electrical work and does not require formal certification as a journeyman electrician as defined in The Apprenticeship and Trade Certification Act.*

**[18]** Section 22(1) of *The Electrical Licensing Act* provides that the department may issue a restricted journeyman's license to an individual who "satisfies the director that he is competent to perform the work of electrical installation with respect to which he has applied for a license."

**[19]** The Committee Report describes the requirements in practice for the extra low voltage restricted journeyman license as being within the discretion of the director of electrical licensing as follows:

> *The Director of Licensing requires some combination of two years of experience and related community college electronics courses or manufacturer-specific training, as well as a letter from the employer stating that the employee is competent to perform work within the scope of the licence.*

**[20]** Pursuant to ss. 22(2) and 11(3)(b)(iii) of *The Electrical Licensing Act*, the holder of a restricted journeyman's license may not do any work of electrical installation except as specified in the license at the risk of having the license suspended.

**[21]** The Employer in the present case is engaged in the installation and maintenance of indoor industrial, institutional and commercial environmental and lighting control systems. Most new systems of this type operate at less than 30 volts and therefore are designated as extra low voltage. There is a fair amount of retrofit work to convert from older pneumatic, mechanical and higher voltage controls and systems to the extra low voltage computerized systems. However, such systems are tied into the building's ordinary higher voltage electrical system after the current has been transformed down. The Employer is licensed as both an unrestricted electrical contractor and a restricted extra low voltage electrical contractor. The former license has no restrictions and provides that the employer "is authorized to engage in the business of a Full Electrical Contractor...." The latter license provides that it "is authorized to engage in the business of a Restricted Electrical

Contractor..." and "allows the holder to do the installation, repair, alteration and maintenance of equipment pertaining to communications and extra low voltage installations." The Employer must hold both types of license because it employs restricted journeymen as well as unrestricted journeymen and apprentices to work to do the work on its contracts, which may include extra low voltage and/or higher voltage work.

**The Statement of Employment and Unit Appropriateness Issues**

**[22]** The composition of the statement of employment and the bargaining unit description were the issues at the hearing. In its application filed on May 10, 2002, the Union estimated there were four (4) employees in the proposed bargaining unit on that date: Trent Taylor, Kevin Kosar, Ryan Boers and Jeff Owens. However, the statement of employment filed by the Employer on May 21, 2002 listed eight (8) persons purported to be within the description of the proposed unit in the following classifications:

1. *Bob McLeod, Journeyman Electrician*
2. *Daren Kosar, Journeyman Electrician*
3. *Kevin Kosar, Journeyman Electrician*
4. *Brad Kress, Journeyman Electrician*
5. *Trent Taylor, Journeyman Electrician*
6. *Ryan Boers, Apprentice*
7. *Jeff Owens, Helper*
8. *Ryan Bardoczi, Helper*

**[23]** The hearing was originally scheduled for May 31, 2002 but was adjourned by request and consent of the parties to June 13, 2002. The Employer did not file a reply until June 12, 2002. In the reply, the Employer denied that the proposed bargaining unit was an appropriate unit, stating, in part, as follows, at para 4:

> *(a) All employees of the employer perform functions which are electrical work or incidental to electrical work;*
>
> *(b) In the alternative, all employees perform functions related to low voltage electrical work and in the event that such work is not deemed to be "electrical work" within the scope of the proposed bargaining unit, the appropriate unit in the circumstances is an all employee unit.*

**[24]** That is, the Employer alleged that all of the employees listed on the statement of employment perform "electrical work," whether of a restricted extra low-voltage nature and/or of a higher voltage,

and should be considered for the purposes of determining the level of support for the application. In the alternative, the Employer said that the appropriate bargaining unit is a unit of all employees engaged in electrical work of any type, and not just those qualified under apprenticeship and trade certification legislation to perform the entire range of electrical work.

**[25]** The representative employers' organization, CLR Construction Labour Relations Association of Saskatchewan Inc., and the Saskatchewan Provincial Building and Construction Trades Council were provided with notice of the application, but did not reply or appear at the hearing.

**[26]** The electrical trade status of the persons listed on the statement of employment as at May 22, 2002, according to the Apprenticeship and Trade Certification Commission, and their licensing status under *The Electrical Licensing Act*, is as follows:

| Name | Trade Certification | Licence |
|---|---|---|
| Bob McLeod | (9) | Full Journeyman |
| Daren Kosar | Not Registered | Restricted Journeyman |
| Kevin Kosar | Journeyperson | Full Journeyman |
| Trent Taylor | Journeyperson | Full Journeyman |
| Brad Kress | Not Registered | Restricted Journeyman |
| Ryan Boers | Registered Apprentice | None |
| Jeff Owens | Not Registered | None |
| Ryan Bardoczi | Not Registered | None |

**Trent Taylor**

**[27]** Trent Taylor, a certified and licensed unrestricted journeyman electrician, has worked for the Employer for approximately 18 months. For the last six months he has been engaged primarily in the retrofit upgrade and installation of digital electrical controls and devices at the provincial legislature. He testified that the majority of his work on the project consists of running and bending conduit, pulling wiring, mounting transformers and devices and tying the extra low voltage components and systems into the regular electrical system. However, he does not program computers or calibrate the extra low voltage systems and devices when they are commissioned. In the last six to twelve months he has been engaged in similar work as well as some new construction and repair/replacement of higher voltage pumps, motors and related controls.

[9] The Commission did not specifically advise as to Mr. McLeod's certification status, but responded that it required his birth date or social insurance number, perhaps because there is more than one "Bob McLeod" in its registry. Evidence adduced at the hearing otherwise established that he is a certificated journeyman electrician.

**[28]** Mr. Taylor said that only a certificated journeyman or apprentice could install higher voltage equipment and work at the connection interface with the extra low voltage system. He perceived himself, along with Kevin Kosar, Ryan Boers and Jeff Owens, to be the Employer's "electricians" engaged in construction. They run conduit and wiring, install transformers, mount devices, and make connections between systems. In contrast, Daren Kosar and one Chad Pellerin are engaged in system programming, while Brad Kress, Daren Kosar and Bob McLeod are engaged primarily in answering service calls and ongoing maintenance after the construction and installation of the extra low voltage system is completed. He said that maintenance consists primarily of changing filters and replacing faulty valves and sensors.

**[29]** Mr. Taylor said that while he did not know Mr. McLeod's electrical trade status, he had not seen him perform any electrical installation work or carry a tool belt. In his view, Mr. McLeod is the Employer's service manager, spending most of his time in the office, dressed in casual clothes, directing Brad Kress and Daren Kosar with respect to service and maintenance calls.

**[30]** Mr. Taylor testified that Daren Kosar's work at construction jobsites is primarily restricted to computer programming of the systems after installation, although he infrequently assists with pulling wire and "terminating" extra low voltage devices, but not with bending conduit. Brad Kress assisted him with construction for a short time on one jobsite. He also had not observed Ryan Bardoczi to be engaged in electrical installation or construction, but rather, said that he spent most of his time in the shop, in casual clothes, doing something involving computers and taking his instructions from Chad Pellerin or the Employer's principal, Fred Pellerin.

**[31]** Mr. Taylor testified that Jeff Owens has worked with him in electrical installation and construction, although he said he primarily works with Kevin Kosar doing the same kind of work as Mr. Kosar. He said that Mr. Owens has expressed to him the desire to apprentice in the electrical trade.

**[32]** On cross-examination, Mr. Taylor admitted that one did not have to be an unrestricted journeyman electrician to run conduit or pull wiring, but said that he had been educated in the proper way to perform these tasks, as well as bending pipe, as part of his formal electrician training and, as such, offered the opinion that it was "electrical work." He admitted that connecting extra low voltage devices and running extra low voltage cable "free-air" (for example, across a suspended ceiling as

opposed to through conduit) may be within the scope of a restricted license, but was nonetheless electrical work.

**Jeff Owens**

**[33]** At the time of the hearing, Jeff Owens had worked for the Employer for just over three months. He testified that for the first two months he assisted Kevin Kosar on a new construction project at the new television and film sound stage running and bending conduit, pulling wiring and mounting devices, which he termed "apprentice stuff." He then spent a few days with Kevin Kosar servicing pneumatic controls at a customer site and cleaning up at the shop, before spending three weeks working nights on the project at the legislature with Trent Taylor. Most recently he has been assisting Kevin Kosar on another new construction project.

**[34]** Mr. Owens stated that while he does not have electrical apprenticeship status he has inquired of the Union about the procedure and has picked up the necessary application forms although he has not yet submitted them. He has taken the safety course required by the Union. He said he intends to become a journeyman electrician someday, and claimed that when he was hired by the Employer, Mr. Pellerin indicated that he might sponsor his apprenticeship at some future time.

**[35]** Mr. Owens said that to his knowledge Ryan Bardoczi worked in the office developing computer graphics of installed systems. During his time on the sound stage project he said he observed Brad Kress doing general labour and that he was not proficient at bending conduit. He said that while he had observed Daren Kosar mounting some devices, he seemed mostly to be engaged in programming the extra low voltage system; he had never observed him to run pipe or pull wiring.

**Ryan Boers**

**[36]** Ryan Boers, a registered third-year electrical apprentice, has been employed by Prairie Controls for about three years. He submitted his apprenticeship application when he had been with the Employer for about nine months, shortly after another apprentice had left the employ of the company. The hours he spent doing extra low voltage electrical work counted towards his apprenticeship requirement.

**[37]** Referring to Bob McLeod as the "service manager," Mr. Boers said he observed him doing invoicing and directing "the service people," which he said included Daren Kosar, Brad Kress and Chad Pellerin. He has never seen Mr. McLeod on a construction site except to drop off materials, although he

said he believed that he was a journeyman electrician. Mr. Boers said that the only time he has been directed in his work by Mr. McLeod is when he has done some service work for a few weeks a year when construction is slow. He said he has only seen Ryan Bardoczi at a desk in the office working on a computer, but not at a construction site. He has infrequently observed Daren Kosar and Brad Kress to run conduit and pull wiring.

**Stan Shearer**

**[38]** Stan Shearer is the business manager of IBEW, Local 2038. He was also a member of the Committee to Review Restricted Electrical Licenses. Local 2038 represents journeyman electricians, electrical apprentices and people "working into apprenticeship" primarily engaged in electrical construction south of the 51st parallel, and runs a hiring hall and dispatch system. Mr. Shearer testified that all of the local union members are certified journeymen, registered apprentices, and those who are shortly intending to apprentice or are grandfathered "electrical workers" and that the scope of the provincial electrical agreement includes all such persons. Some of its members are also certified in another trade, such as welding or instrument mechanic. The Union has no members who hold only a restricted journeyman electrical license and the scope of the provincial electrical agreement does not include these workers, nor is there a wage grid for such a classification. He said that while some certificated journeyman electricians may perform control and system programming and calibration, particularly if they also have an instrument mechanic ticket, the Union does not consider such work to be "electrical work" in the extra low voltage area.

**[39]** In describing the apprenticeship system in the electrical trade, Mr. Shearer referred to the scope of the term "electrical workers" as including those persons who were grandfathered (i.e., exempted from apprenticeship) when apprenticeship in the trade was made compulsory and those intending to apprentice in the trade (see "Standard Bargaining Unit," *supra*). As a compulsory trade, an apprentice must work directly under a journeyman on a one-to-one basis for 7200 hours, complete four educational periods of nine weeks each and obtain a score of at least 70 per cent on the journeyman examination in order to obtain a journeyman certificate.[10] Mr. Shearer stated that a person working for a unionized contractor who desires to become apprenticed might be indentured either by the contractor or the Union under one of the contractor's journeymen. He confirmed that Jeff Owens had sought his advice with respect to the apprenticeship procedure.

[10] See, s. 67 of The Apprenticeship and Trade Certification Regulations, f.n. 4, *supra.*

**[40]** Mr. Shearer referred to the fact that the Union has had certification orders for the standard electricians' bargaining unit for Honeywell Limited since 1984, and Apperley Electric since 1995, companies that he said also install extra low voltage controls systems, and that the bargaining units do not include any employees that are restricted journeymen. He pointed out that electrical contractors that have been organized by the Union have all kinds of employees that perform duties ancillary to actual electrical construction work that are not part of the standard electricians' bargaining unit, including, for example, estimators, labourers, truck drivers and other tradespersons.

**[41]** Mr. Shearer noted that, unlike unrestricted certificated journeyman electricians, a restricted journeyman does not necessarily have any formal training in the electrical trade at all.

**Alfred Pellerin**

**[42]** Alfred Pellerin is the Employer's principal. Kevin Kosar is his son-in-law. The Employer was created in 1984 and is engaged in the construction, installation, service and maintenance of environmental and lighting control systems in commercial, industrial and institutional buildings. He said the company has had a restricted contractor's license for approximately twelve years and a full unrestricted contractor's license for approximately two years. Prior to acquiring an unrestricted license, the company engaged a subcontractor to do any electrical work on its jobs that required an unrestricted journeyman.

**[43]** Mr. Pellerin stated that while individual employees on the statement of employment may spend much of their time engaged in either construction or service, no one employee does so exclusively. For example, he said that each of Trent Taylor, Ryan Boers, Daren Kosar, Jeff Owens, Kevin Kosar, and Brad Kress have been engaged to some degree in construction/installation on the job at the legislature, including running and bending conduit, pulling wire, or mounting and terminating devices.

**[44]** Mr. Pellerin confirmed that on construction/installation only the certified journeymen, Trent Taylor and Kevin Kosar, and Ryan Boers and Jeff Owens working under the supervision of either of them, perform the electrical work over 30 volts, and had spent most of their time in the last three to six months doing construction work. He also confirmed that Daren Kosar, Kevin Kosar and Brad Kress know the most about systems service, but that Trent Taylor, Ryan Boers and Jeff Owens are learning. Daren Kosar and Chad Pellerin (one of his sons and a shareholder in the company) work together doing

most of the programming and servicing of controls systems and design engineering. Daren Kosar and Brad Kress have spent the majority of their time in the last few months performing systems service.

**[45]** With respect to Bob McLeod, Mr. Pellerin said that while his title is "service manager," he has no management duties but supervises service dispatch and provides quotes for service. Mr. Pellerin said that Mr. McLeod, who is a certificated journeyman electrician, sometimes does emergency – but not scheduled – electrical service work including, for example, servicing or replacing pump motors, pressure switches and air conditioning systems that are of a voltage that requires an unrestricted journeyman to do the work. However, he only spends perhaps 5 or 10 per cent of his time "on the tools."

**[46]** With respect to Jeff Owens, Mr. Pellerin denied that he indicated to him that the company would indenture him as an apprentice, but confirmed that he spends most of his time working under Trent Taylor or Kevin Kosar on construction. He confirmed that while Daren Kosar spends some of his time as part of the construction/installation crew, particularly in the finishing stage – for example, on the legislature job – he then switches to the "commissioning crew," which programs the system and brings it into operation. He confirmed that Ryan Bardoczi spends most of his time assisting another of his sons, Jeremy Pellerin, doing systems graphics and on jobsites when a system is commissioned and brought into operation.

**Kevin Kosar**

**[47]** Kevin Kosar has been a journeyman electrician with the Employer for approximately seven years. He testified that on a typical construction job he spends perhaps only five per cent of his time doing electrical work that requires his unrestricted electrician's license as opposed to that which could be done by a restricted extra low voltage journeyman. He said that all the persons listed on the statement of employment have worked with him at one time or another and that everyone helps each other do whatever is required to get the job done. In listing their names, however, he did not mention Ryan Bardoczi.

**[48]** Mr. Kosar confirmed that generally only he and Trent Taylor, and Ryan Boers or Jeff Owens under their supervision, perform higher voltage electrical work; however, on occasion it has been done by Daren Kosar or Brad Kress under his supervision. He confirmed that Ryan Boers is

indentured to him as an apprentice and spends approximately 75 per cent of his time on construction/installation.

### Daren Kosar

**[49]** Daren Kosar has been with the Employer since approximately 1987. He has a post-secondary certificate in electronics engineering technology and has had an extra low voltage restricted journeyman license for about 10 years. He has taken specific programming training with a particular manufacturer. He testified that he does everything from construction to service to programming to systems design, and that although he is restricted by his license to doing only extra low voltage electrical work, he infrequently also does some simple higher voltage work.

## Argument

**[50]** Ms. Zborosky, counsel for the Union, argued that the standard electrical trade bargaining unit is an appropriate unit. Historically, the Union has not represented restricted electrical licensees and has no present interest in doing so. There is no hiring hall for restricted licensees, because to be so licensed requires the written statement by such a prospective licensee's present employer that the prospective licensee is qualified to do the work that the employer requires them to do, whether it be extra low voltage, signage, etc. That is, a restricted licensee's qualifications and license are specific to that employer's work and equipment.

**[51]** Counsel pointed out that the standard electrician's bargaining unit in the construction industry has defined classifications. She argued that just because certain of the Employer's employees who are not journeyman electricians or electrical apprentices might perform electrician's work, though not licensed to do so, it does not make them "electrical workers." Counsel argued that the definition of "electrical worker" should not be expanded to include such persons and that they should not be included on the statement of employment for the purposes of determining the level of support for the application. Citing the decision of the Board in *International Brotherhood of Electrical Workers, Local 529 v. Guest Industrial Contractors Ltd.*, [1999] Sask. L.R.B.R. 673, LRB File No. 169-98, Ms. Zborosky stated that there was likewise no reason to expand the classifications in the standard bargaining unit to include "restricted journeypersons."

**[52]** Citing the decisions of the Board in *International Union of Operating Engineers, Hoisting, Portable and Stationary, Local 870 v. K.A.C.R., A Joint Venture*, [1983] September Sask. Labour

Rep. 37, LRB File No. 106-83, and *United Brotherhood of Carpenters and Joiners of America (Millwrights Union, Local 1021) v. Daycon Mechanical Systems Ltd.*, [1999] Sask. L.R.B.R. 127, LRB File No. 338-97, Ms. Zborosky asserted that it is a long-standing policy of the Board not to deviate from craft certification in the construction industry except in exceptional circumstances, and to adhere to this policy even more rigorously in the case of the compulsory trades. Counsel argued that there are no exceptional circumstances in the present case to warrant a deviation from the policy.

**[53]** Ms. Zborosky pointed out that ss. 15 and 16 of *The Electrical Licensing Act* contain separate provisions for unrestricted journeyman electricians and for restricted journeymen respecting the electrical installation work that they may properly perform and who may perform same under their supervision. She also pointed out that the Saskatchewan Provincial Electrical Agreement applies only to unrestricted journeymen, indentured apprentices and other employees working under a journeyman, and contains no mention or provisions respecting restricted journeymen or their helpers. That is, the construction industry has not recognized the latter as a construction trade.

**[54]** Ms. Zborosky referred to the criteria generally applied by the Board in determining whether an employee should be considered as being engaged in a particular trade for the purposes of determining the level of support for the application. The cases she referred to included: *K.A.C.R., supra*; *Daycon, supra*; *Construction and General Workers Union, Local 890 v. Work Force Construction Ltd.*, [1988] Fall Sask. Labour Rep. 39, LRB File No. 206-87; *Operative Plasterers and Cement Masons, Local 442 v. Vector Construction Ltd.*, [1992] 2nd Quarter Sask. Labour Rep. 82, LRB File No. 307-91; *Sheet Metal Workers' International Association, Local 296 v. Suer & Pollon Mechanical Partnership*, [1998] Sask. L.R.B.R. 723, LRB File No. 157-98.

**[55]** Ms. Zborosky contended that applying such criteria, only Trent Taylor, Kevin Kosar, Jeff Owens and Ryan Boers are within the classifications in the standard electricians' bargaining unit. Ryan Boers is apprenticed to Kevin Kosar; Jeff Owens intends to become indentured as an apprentice. Because legislation restricts each full journeyman to supervising only one apprentice or other worker doing electrical work, and because the evidence showed that Mr. Boers and Mr. Owens spend the majority of their time doing construction/installation electrical work under the supervision of either of Mr. Kosar or Mr. Taylor, that group of four persons constitutes the members of the proposed bargaining unit – they are the only employees who can legally perform the entire range of

"work of electrical installation" as defined by the legislation (see counsel's comments respecting Bob McLeod, *infra*).

**[56]** With respect to Bob McLeod, counsel asserted that although he has a journeyman electrician certificate and license, he does next to no actual electrical work as part of his regular duties, and then only in the nature of emergency service as opposed to construction or installation. With respect to Daren Kosar and Brad Kress, counsel contended that there was confusion among the Employer's witnesses about the focus of their work; that is, whether it is primarily construction or, in the case of Mr. Kosar, service and programming, and in the case of Mr. Kress, service. In any event, as restricted journeymen, while they are licensed to engage in performing work of electrical installation of a limited kind, there was never any intention to include their ilk within the classifications of either "journeyman electrician" or "electrical worker" in the standard bargaining unit description. Finally, with respect to Ryan Bardoczi, counsel asserted there was no evidence that he performs any work of electrical installation.

**[57]** Ms. Libby, counsel for the Employer, filed a brief of her argument that we have reviewed. Counsel asserted that the real issue in the present case is whether employees of the Employer who perform electrical work of any kind, or work incidental to such work, should be included within the proposed bargaining unit description. Counsel asserted, in the alternative, that if the primary work done by the employees listed on the statement of employment was not "electrical work" in construction, and the standard bargaining unit description did not include all of them, then the standard craft unit is not appropriate in the circumstances.

**[58]** Ms. Libby pointed out that *The Electrical Licensing Act* allows employers to perform electrical work (in the construction industry or otherwise) by utilizing licensed unrestricted or restricted journeymen (as the nature of the work requires) so long as the employer has the necessary contractor's license. Counsel said that the definitions of "electrical installation," "electrical equipment" and "work of electrical installation" in *The Electrical Licensing Act* are broad enough to encompass the work done by all of employees listed on the statement of employment, with the exception of Ryan Bardoczi who, Ms. Libby conceded, was not primarily engaged in performing electrical work and should come off the statement. Counsel indicated that the Union's distinction based solely on the voltage of the work performed was not reasonable.

**[59]** Ms. Libby referred to the decision of the Board in *International Association of Heat and Frost Insulators and Asbestos Workers v. Alberta Insulation Supply and Services Ltd.*, [1999] Sask. L.R.B.R. 91, LRB File No. 368-97, in which the Union sought to include "insulator helpers" on the statement of employment for the purposes of determining the representation issue. The employer originally excluded the employees from the statement of employment on the basis that they performed labourers' work. The Board held that the standard *Newbery* insulator trade bargaining unit classification of "insulators" was broad enough to include helpers who performed work that is incidental to the trade.

**[60]** Counsel also referred to the decision of the Board in *International Union of Painters and Allied Trades, Local 739 v. L.C.M. Sandblasting and Painting Ltd.*, [2001] Sask. L.R.B.R. 854, LRB File No. 152-01, in which the Board approved a non-standard bargaining unit description for the painter trade by including sandblasters.

**[61]** Finally, counsel asserted that if the employees in question are not included in the bargaining unit, they have nowhere to go for union representation.

## Statutory Provisions

**[62]** Relevant sections 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;*
>
> *(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;*

## Analysis and Decision

**[63]** In the present case, the Union has applied to be certified as bargaining agent for the standard bargaining unit for electricians working in the construction industry. While the Board has a broad discretion to determine the appropriate unit of employees for the purpose of bargaining collectively under s. 5(a) of the *Act*, it has established standard bargaining units for the construction industry. These units are drawn on craft lines because of the historical and statutory evolution of the employment relationship and the organization of labour in the construction industry. The *CILRA, 1992* provides for province-wide collective bargaining between all unionized employers in a trade division and an established construction craft union. Addressing the issue in relation to the former *Construction Industry Labour Relations Act*, S.S. 1979, c. C-29.1[11], in *K.A.C.R., supra*, the Board stated as follows at 42:

> *. . . 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.*

**[64]** While the Board has remained open to the consideration of special circumstances that might cause it to conclude that traditional craft unit representation, or the standard craft bargaining unit, is not appropriate in a particular case, because of the historical and statutory imperatives referred to above, deviation from craft representation or the standard bargaining unit is rare.

**[65]** The Employer's main objection to the application in this case is based on the issue of the appropriateness of the standard bargaining unit description in the circumstances of the case. The Employer asserts that either: (a) the standard bargaining unit classification of "electrical worker" ought to be interpreted as being broad enough to include, essentially, "restricted extra low voltage journeyman licensees" and "electrical helpers;" or, (b) the Board ought to deviate from the standard craft bargaining unit description and specifically include such classifications. The Employer also mounts an argument that in the event the Union's application is successful, the persons in such excluded classifications will be without representation. We shall deal with each of these assertions in turn.

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[11] See, f.n. 3, *supra*.

**[66]** As mentioned earlier in these reasons, the electrician trade has a special status as a "compulsory apprenticeship trade" whereby its general practitioners are required by one piece of legislation – *The Apprenticeship and Trade Certification Act, 1999, supra* – to have certain formal education and training, and to be certified as qualified in the trade, and by another piece of legislation – *The Electrical Licensing Act, supra* – to be "licensed" to perform "the work of electrical installation." It is not outrageous to surmise that mandatory certification and licensing is required for reasons related to public safety.

**[67]** The standard electricians' bargaining unit description as set out in *ICS Western, supra*, as disclosed in the reasons given in that case, is meant to reflect the situation created by the legislation which made the electrician trade a compulsory apprenticeship trade, but permitted some persons who were not certified journeymen or apprentices — those with "grandfather rights" under apprenticeship legislation, and those shortly intending to become indentured apprentices — to perform such work. In *International Brotherhood of Electrical Workers, Local 529, v. Alron Electric Ltd.*, [1980] October Sask. Labour Rep. 34, LRB File No. 130-80, the labourers' union complained that the addition of the job classification "electrical workers" to the standard electrical trade unit description, which was intended to cover such grandfathered persons, would create jurisdictional problems between the electricians and the labourers. The Board took pains to clarify that this addition to the electricians' unit description would not be interpreted by the Board as intruding upon the jurisdiction of any other union. The Board stated at 34:

> *As stated in the ICS case the unit description was not intended to add to the jurisdiction of the electricians and was not intended to infringe upon the jurisdiction of any other union but to preserve the status quo. The Board will not construe it in any other manner. If the use of the term "electrical workers" in the IBEW certification is abused so as to infringe upon the jurisdiction of the labourers Union, the proper forum for settlement of the dispute is the impartial jurisdictional disputes board for the construction industry. This Board is not the proper forum for such disputes. This was more fully discussed in [Newbery], the decision by which the Board gave its reasons for fixing units to be applied for in the construction industry.*

**[68]** Since that time, the Board has not expanded the interpretation of the term "electrical worker" to include any persons other than those that it was originally intended to include as described in *ICS Western, supra*. We are not inclined to do so in the present case. The standard unit description, and specifically the term "electrical worker" therein, has a scope commonly understood by all engaged in

working in the trade and in the construction industry in general, and it would not serve any good purpose to expand upon or change the meaning of the term in the present case.

**[69]** However, there remains the issue as to whether the standard unit description for the electrical trade should be changed or deviated from in the present case, to include restricted journeyman electricians and/or their helpers.

**[70]** There is no doubt that in the present case, persons other than journeymen, apprentices and others, respectively certified, registered or recognized under apprenticeship and trade certification legislation to work in the electrical trade, are performing "work of electrical installation" as defined by *The Electrical Licensing Act, supra*, and/or are engaged in "construction" as defined by the *CILRA, 1992* as it relates to the electrical trade. But extra low voltage electrical construction work (or the work in any of the restricted electrical license categories referred to earlier in these reasons) by itself is not a recognized construction trade, and we have not been asked to determine whether it should be. Rather, extra low voltage electrical work is part of what certified journeyman electricians and electrical apprentices are formally trained to do and what they and "electrical workers" routinely do as part of their work in construction in the trade, although others who hold the appropriate restricted license may also perform such work.

**[71]** Restricted journeyman electricians and their helpers were not included in the standard electrical craft bargaining unit established by *Newbery, supra*, and *ICS Western, supra*. Why they were not included is not known, but it was not because the concept of restricted licensing did not exist: statutory provisions respecting the licensing of restricted journeymen, in substantially the same form as in the present *Electrical Licensing Act*, were first enacted in 1935,[12] and respecting the licensing of restricted contractors, in 1940.[13] While restricted licensees may consider it unfortunate that they are not part of the electrical trade recognized in the construction industry, it is not necessarily up to the designated bargaining agent for the electrical trade division to represent them within its union organization when it has not historically done so, is not constituted to do so, and does not desire to do so.

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[12] See, *The Electrical Inspection and Licensing Act, 1935*, S.S. 1934-35, c. 64, s. 21.
[13] See, *The Electrical Inspection and Licensing Act, 1949*, S.S. 1949, c. 261, s. 14.

**[72]** The Board has previously declined to include persons in the bargaining unit for compulsory apprenticeship trades in the construction industry who are not certified, registered or otherwise recognized pursuant to apprenticeship and trade certification legislation to work in the trade, where the trade union designated to represent workers in the trade in the construction industry has not historically represented, and does not wish to represent, such persons. In *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada v. Comfort Mechanical Ltd.*, [1998] Sask. L.R.B.R. 422, L.R.B. File No. 082-98, in considering an application for certification of a plumbing contractor by the designated bargaining agent for the plumbing trade – also a compulsory apprenticeship trade – the Board removed the name of an employee from the statement of employment described as "helper" or "utility worker" who was not registered under trade certification legislation as an apprentice or journeyman. The Board stated at 426:

> *With respect to Ms. Carlson, the evidence indicates that at the time of the hearing she was not registered as an apprentice or journeyman in the plumbing and pipefitting trades, both of which are compulsory trades, that is, persons performing such work must be registered under the appropriate legislation as an apprentice or journeyman. The Board finds that Ms. Carlson performed work that is normally performed by a helper or utility worker. These positions do not fall within the scope of the Union's certification. Ms. Carlson's name will also be removed from the statement of employment.*

**[73]** Similarly, in *Guest Industrial, supra*, the Board refused to interpret the term "electrical workers" to include journeyman or apprentice instrument mechanics or deviate from the standard electricians' bargaining unit to include persons holding journeyman certification or apprentice registration only as an instrument mechanic (some of the electricians in the bargaining unit were also certified in the instrument mechanic trade), despite the fact that the work of the two trades was often complementary and that, in practice, the instrument mechanics frequently performed "work of electrical installation."

**[74]** These cases may be contrasted with the situations regarding voluntary apprenticeship trades, referred to by counsel for the Employer, in *Alberta Insulation, supra*, where the Board included "helpers" in the insulator trade, and *L.C.M. Sandblasting and Painting, supra*, where the Board deviated from the standard bargaining unit for the painting trade by including sandblasters. It is instructive to note that in the latter case the Board considered it very relevant that sandblasting and painting preparation work were part of the technical school training program for the painter trade and

had been included in the painter craft through the negotiation of scope in the provincial agreement for the painting trade division. This was consistent with the intention expressed in *Newbery, supra*, where the Board observed, at 39:

> *The Board does not intend, by this policy [of assigning standard bargaining unit descriptions] to interfere in any way with collective bargaining. It has always been the policy of the Board that, notwithstanding the scope of a certification order, the parties are free, by negotiation, to change the scope of those covered by the collective bargaining process.*

**[75]** The major reason for the difference in the consideration of bargaining units for compulsory and voluntary apprenticeship trades is, of course, that in the compulsory trades "helpers" are not allowed to perform any of the work that is exclusively that which may only be performed by persons recognized as qualified under apprenticeship and trade certification legislation. Accordingly, in the present case, if in fact, as was adduced in evidence, employees of the Employer who are not qualified to do so are performing "work of electrical installation" outside the scope of a restricted journeyman extra low voltage electrical license (if they hold one), it does not induce the Board, for obvious reasons, to include them in the bargaining unit description for the electrical trade division of the construction industry.

**[76]** Counsel for the Employer asserted that, in the event the application is granted, if the restricted licensees and their helpers are not included in the bargaining unit, they will be deprived of union representation. We have concluded, however, that the assertion is not well founded. There was evidence that at least one other bargaining agent represents employees in a company engaged in extra low voltage systems installation; there are also likely other unions that would be interested in doing so. Indeed, at some point in the future, the applicant Union might seek to represent such persons and bargain the scope of the collective agreement to include such persons.

**[77]** We are of the opinion that the proposed standard electricians' construction industry bargaining unit is an appropriate unit for the purpose of bargaining collectively in the present case. We do not reject necessarily the notion that a bargaining unit that includes restricted electrical licensees is not also an appropriate unit, but there are no compelling reasons in the present case to depart from the standard unit description.

**[78]** It now falls to be determined who should be on the statement of employment for the purpose of determining the level of support for the application. Only those persons who come within the scope of the classifications in the standard unit will be included.

**[79]** There was really no issue between the parties that Trent Taylor and Kevin Kosar, both certified and licensed journeyman electricians, and Ryan Boers, a registered third-year electrical apprentice, should be listed on the statement of employment. The evidence disclosed that all three employees spend the great majority of their time performing electrical construction work, whether of extra low voltage or higher voltage. Their names shall remain on the statement of employment.

**[80]** At the conclusion of her argument, counsel on behalf of the Employer admitted that Ryan Bardoczi, listed on the statement of employment as a "helper," was not within the standard unit description. The evidence was clear that his work was not work of electrical installation or electrical construction. His name will be removed from the statement of employment.

**[81]** That leaves to be determined the status of Bob McLeod, Daren Kosar, Brad Kress and Jeff Owens. These employees are not certified journeymen or registered apprentices under apprenticeship and trade certification legislation. It is, therefore, only as an "electrical worker," as we have interpreted that term, that any of them could be included in the scope of the proposed unit. There is no evidence that any of them is a grandfathered "electrical worker" as a result of making the electrical trade a compulsory apprenticeship trade in 1976, so none of them is included on that basis.

**[82]** However, there was evidence that Mr. Owens expressed to several persons in the workplace that he intended to become indentured as an electrical apprentice. He has not only obtained the forms necessary to apply to become indentured, but has inquired of the Union about the indenture process and has taken the Union's safety course. On the job, he spends the great majority of his time performing electrical construction work directly under the supervision of the unrestricted journeymen, Trent Taylor and Kevin Kosar. For these reasons, we accept that Mr. Owens intends shortly to become indentured in the trade and is an "electrical worker." His name shall remain on the statement of employment.

**[83]** By contrast, no attempt was made to establish that either Daren Kosar or Brad Kress intends to become indentured as an apprentice in the trade. As described above, the fact that either or both of Mr. Kosar or Mr. Kress perform a significant amount of "work of electrical installation" within the scope of

their respective restricted journeyman electrical licenses, or infrequently perform such work outside the scope of their licenses, or assist the full journeymen electricians as helpers, does not bring them within the scope of "electrical worker." Their names shall be removed from the statement of employment.

**[84]** The Board accepts that Bob McLeod is a certified and licensed journeyman electrician. He is the Employer's service manager and assigns and directs the employees with respect to service, repair and maintenance of electrical equipment and systems. The evidence did not establish that he ought to be excluded from the bargaining unit on the basis that he is not an "employee" within the meaning of s. 2(f)(i) of *The Trade Union Act*. Rather, the Union's objection to his inclusion was that he did not perform electrical work in the nature of "construction." The evidence disclosed that Mr. McLeod rarely works "on the tools," and when he does so, it is only on an emergency basis and in relation only to service, repair or maintenance.

**[85]** However, the fact that Mr. McLeod's work on the tools is infrequent is not determinative of the issue of his status within the proposed bargaining unit. The Union represents persons who may not work on the tools at all, i.e., foremen and general foremen. Art. 4.01 (b) of the provincial electrical agreement provides that, "Foremen may, but shall not be required to, work with the tools." This is not to say that we consider Mr. McLeod to be a "foreman" under the agreement (we have not been asked, nor do we purport, to answer such question), but we mean merely to point out that the Union does not consider work on the tools to be a necessary requirement for representation.

**[86]** Nor is it a determinative fact that Mr. McLeod's work on the tools is in relation to service, repair and maintenance, rather than the more traditional construction work that is the primary focus of the work performed by Trent Taylor, Kevin Kosar, Ryan Boers and Jeff Owens. In *Sheet Metal Workers' International Association, Local 296 v. Atlas Industries Ltd.*, [1998] Sask. L.R.B.R. 51, LRB File No. 011-97 (quashed in part on judicial review at [1999] Sask. L.R.B.R. c-1 (Q.B.), reversed on appeal at [1999] Sask. L.R.B.R. c-63 (C.A.), application for leave to appeal to the Supreme Court of Canada dismissed April 20, 2000), the Board confirmed, first, that an employer engaged in both construction and non-construction work is included in the scope of the *CILRA, 1992*, even if the primary focus of its work is outside the construction industry; and, second, that installation and maintenance work are within the scope of the term "construction industry" in the *Act*. The Board stated, at 61:

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

**[87]** The Board required the Employer, a large portion of whose work was fabrication in its shop of sheet metal equipment and systems for installation by customers or its own personnel, to apply the terms of the provincial sheet metal agreement in the construction industry to all of its employees that came within the sheet metal worker standard craft unit.

**[88]** For these reasons, therefore, in the present case, we are of the opinion that Mr. McLeod is within the proposed unit description. His name shall remain on the statement of employment.

**[89]** The composition of the statement of employment for the purposes of determining the level of support for the application is as follows:

Bob McLeod
Kevin Kosar
Trent Taylor
Ryan Boers
Jeff Owens

**[90]** As the Union has filed evidence that a majority of the employees in the proposed unit support the application, an Order will issue in the usual form designating the Union as the certified bargaining agent for the standard electricians' craft bargaining unit in the construction industry, and ordering the Employer to bargain collectively.

**[91]** Mr. Gitzel dissents from these Reasons for Decision. A written dissent will be forwarded to the parties in due course.

# CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 2128, Applicant v. BOARD OF EDUCATION OF THE BIGGAR SCHOOL DIVISION NO. 50, SASKATCHEWAN SCHOOL TRUSTEES ASSOCIATION and SASKATCHEWAN SCHOOL TRUSTEES ASSOCIATION EMPLOYEE BENEFITS PLANS, Respondents

LRB File No. 068-02; September 30, 2002
Chairperson, Gwen Gray, Q.C.; Members: Bruce McDonald and Clare Gitzel

For the Applicant: Harold Johnson
For the Respondent: LaVonne Black

**Unfair labour practice – Strike – Denial of benefits – Employer sends letter to striking employees saying long term disability coverage to be discontinued during strike – Plan director negotiates continuation of coverage with carrier – Board finds letter in violation of ss. 11(1)(l) and 47 of *The Trade Union Act* and issues declaratory order to that effect – No remedial order issued as no benefits actually denied.**

**Unfair labour practice – Strike – Denial of benefits – Board finds that benefit plan documents, which require cessation of benefits for striking employees, do not conform with requirements of ss. 47 and 11(1)(l) of *The Trade Union Act* – Board issues declaratory order to that effect – No remedial order issued as no benefits actually denied.**

***The Trade Union Act*, ss. 5(d), 11(1)(l) and 47**

## REASONS FOR DECISION

### Background

**[1]** **Gwen Gray, Q.C., Chairperson:** Canadian Union of Public Employees, Local 2128 (the "Union") filed an unfair labour practice application in which it alleged that the Board of Education of the Biggar School Division No. 50 (the "Employer") threatened to deny or did deny health, medical or disability benefits to striking employees contrary to s.11(1)(l) of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the *"Act"*).

**[2]** Section 11(1)(l) provides:

> *11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:*
>
> *(l) to deny or threaten to deny to any employee:*

> *(i) by reason of the employee ceasing to work as the result of a lock-out or while taking part in a stoppage of work due to a labour-management dispute where such lock-out or stoppage of work has been enforced by the employer or called in accordance with this Act by the trade union representing the employee, as the case may be; or*
>
> *(ii) by reason of the employee exercising any right conferred by this Act;*
>
> *any pension rights or benefits, health rights or benefits or medical rights or benefits that the employee enjoyed prior to such cessation of work or to his exercising any such right;*

**[3]** Section 47 of the *Act* provides for the continuation of some benefit plans during a strike in the following terms:

> *47(1) In this section, "benefit plan" means a medical, dental, disability or life insurance plan or other similar plan.*
>
> *(2) During a strike or lock-out, the trade union representing striking or locked-out employees in a bargaining unit may tender payments to the employer or to a person who was, before the strike or lock-out, obliged to receive the payment:*
>
> *(a) in amounts sufficient to continue the employees' membership in a benefit plan; and*
>
> *(b) on or before the regular due dates of those payments.*
>
> *(3) The employer or other person mentioned in subsection (2) shall accept any payment tendered by the trade union in accordance with subsection (2).*
>
> *(4) No person shall cancel or threaten to cancel an employee's membership in benefit plans, including coverage under insurance plans, if the trade union tenders payment in accordance with subsection (2).*
>
> *(5) On the request of the trade union, the employer shall provide the trade union with any information required to enable the trade union to make the payments mentioned in subsection (1).*

**[4]** The Employer denied the allegation in its reply.

## Facts

**[5]** The parties placed various letters and documents before the Board by agreement. The Union relied on this evidence in support of its application. The Employer called Karen Smith, director of Employee Benefit Plans for the Saskatchewan School Trustees Association ("SSTA"), as its witness. The collective agreement provides for life insurance, accidental death and dismemberment, long term disability, dental care and employee assistance from the SSTA Group Benefit Plans. SSTA, in turn, contracts the plans to various insurance companies.

**[6]** On January 30, 2002, the Union wrote to the Employer requesting information from the Employer relating to the benefit plans costs pertaining to each employee in the bargaining unit. The Union requested this information so it could make benefit payments on behalf of employees who were about to participate in a strike.

**[7]** The Employer responded to the request on January 31, 2002, setting forth the names of employees in the bargaining unit along with the costs pertaining to their benefit coverage. The Employer requested that the Union make its benefit payments to the Employer on or before the seventh day of each month.

**[8]** On April 2, 2002, the Employer sent a revised schedule of payments to the Union. The first schedule was incorrect as it only recorded the employees' share of the premium costs and did not reflect the Employer's share, which would also need to be paid by the Union during the strike. It included a copy of the premium sheet from its benefit plan provider. The deadline for contributing benefits on behalf of employees was extended to April 15, 2002.

**[9]** The Union paid the sum to the Employer on April 11, 2002.

**[10]** On April 17, 2002, the Employer sent a letter to each member of the Union. The letter reads in part as follows:

> *It has come to our attention that benefit coverage under this plan would be deemed to have ended on March 31, 2002. However, an extension of these benefits has been negotiated on your behalf (excluding Long Term Disability coverage). A letter from Karen Smith, Director of the S.S.T.A. Employee Benefits Plan is enclosed for your information.*

> *Please complete the enclosed "Strike Leave for Benefits Declaration Form" and return to this office by April 25, 2002, so we can meet the April 29, 2002 deadline outlined in the letter from Karen Smith.*

**[11]** This letter was copied to Mr. Bill Robb, national union representative. The letter was sent one day before a Board ordered vote on the last Employer offer.

**[12]** The letter attached from Karen Smith details some of the difficulties encountered by the SSTA Employee Benefits Plan in continuing benefit coverage during the strike. The plan documents contain the following clause:

> *If the employee is absent from work due to temporary layoff or strike, employment shall be deemed to cease as of the date layoff or strike begins for weekly disability income and long-term disability benefits. Employment shall be deemed to continue until the end of the month next following the month in which the layoff or strike began for all other coverages, provided the required premiums are paid to the Insurer.*

**[13]** The benefit plan has been in place for this Employer since March 1, 1986 and the above clause has always been included in the plan documents. Ms. Smith testified that, according to the plan documents, the long term disability benefits would have ceased on February 4, 2002, the first strike day, and the other benefits would have ceased at the end of March 2002.

**[14]** However, upon learning of ss. 47 and 11(1)(l), she approached the three insurers who provide insurance coverage to the SSTA Benefits Plan to negotiate extensions of the insurance coverage. For dental, life, accidental death and dismemberment, the insurers agreed to treat the striking workers as though they were on a leave of absence which enabled them to continue their coverage provided the Union paid all the premiums associated with the insurance. However, it proved more difficult to get the insurer to agree to continue long term disability coverage as the costs of the plan are experience rated by the insurer. The insurer was concerned that coverage for striking workers might prove to be more costly than regular coverage.

**[15]** Ms. Smith sent out the above letter and form to the employees covered by the plan. She testified that she treated the matter in the same way as she would treat a leave of absence, that is, that the individual elects to continue coverage. However, the response to her letter was very poor. Eventually, she was contacted by Mr. Robb who questioned why employees were required to sign

individual strike leave forms and why long term disability coverage was not continued during the strike.

**[16]** As a result of this conversation, Ms. Smith went back to the insurer and convinced them to continue to provide the long term disability insurance on the basis that the Union would pay all premium costs for the duration of the strike. SSTA also dropped the requirement that individual employees complete the strike leave form.

**[17]** The disability insurer agreed to provide continued coverage for a nine month period. Employees under this scheme would be treated as though they were on a leave of absence. Their long term disability claims would be dealt with on the return to work and after completion of the waiting period specified in the plan document. Ms. Smith indicated that if the strike went on past nine months, she would need to return to the insurer to extend the leave period further.

**[18]** No benefits had been denied to the employees to the date of the hearing.

## Argument

**[19]** The Union argued that the Employer's letter of April 17, 2002 violated ss. 11(1)(l) and 47 of the *Act* by threatening to cut off the benefit plans after one year of strike activity and by excluding the long term disability plan from the negotiated extensions of the benefit plans. The Union noted that the letter was sent one day before a Board ordered vote and it was suspicious of the Employer's motives.

**[20]** The Employer argued that its benefit plan was faced with a unique situation that it had not faced before. The plan's director did her best to negotiate extensions to the benefit plans and did, in the long run, accomplish that task.

## Analysis

**[21]** Section 11(1)(l) makes it an unfair labour practice for any person to deny or threaten to deny "any pension rights or benefits, health rights or benefits or medical rights or benefits" that the employees enjoyed prior to engaging in a strike, lock-out or other trade union activity. Section 11(1)(l) has been contained in the *Act* for many years and has been interpreted in at least three decisions of the Board.

**[22]** In *United Steelworkers of America, Local 7552 v. Cominco Ltd.,* [1980] May Sask. Labour Rep. 64, LRB File No. 259-79, the Board found that the employer did not violate s. 11(1)(l) by refusing to allow striking employees to accrue seniority. At 65, the Board found:

> *In the view of the Board, the employer has been guilty of no unfair labour practice because at the end of the strike each of the striking employees had exactly the same seniority as they had when the strike began. Therefore, the employees had the same benefit with respect to seniority at the termination of the strike as they enjoyed prior to the cessation of work and that is all which is required by the employer under the terms of Section 11(1)(l) of The Trade Union Act. To put it another way, there was no loss of any benefit which any employee had prior to the cessation of work. The employer is not required to give additional seniority when an employee is not working and on strike any more than an employer is required to pay employees when they are not at work and on strike.*

**[23]** In *Saskatchewan United Food and Commercial Workers, Local 1400 v. Saskatoon Co-operative Association Limited,* [1985] April Sask. Labour Rep. 29, LRB File Nos. 255-83 & 256-83, the Employer served notice on striking employees that their benefit coverage under income guarantee, group life insurance and dental programs was cancelled on the date employees commenced striking. The Board found that this communication did not violate s. 11(1)(l) of the *Act* for the following reasons (41):

> *The third communication is alleged to have contravened Section 11(1)(l) of The Trade Union Act in that it amounted to a denial of health or medical benefits because of the strike that the employees enjoyed prior to the strike.*
>
> *In United Steelworkers of America, Local 7552 and Cominco Ltd. [supra], the Board held that as long as employees have the same benefits at the end of a strike as they enjoyed prior to the cessation of work the requirements of Section 11(1)(l) have been met. The Board held that an employer is not required to give benefits to an employee who is on strike and not working any more than an employer is required to pay an employee who is not at work and on strike.*
>
> *Although Section 11(1)(l) was amended since the Cominco decision by substituting the works "health rights or benefits or pension rights or benefits" for the words "or any benefit whatever", the amendment did not expand the employer's obligations under the legislation.*
>
> *The terms of the Income Guarantee Plan, Group Life Plan and Dental Plan were incorporated by reference into the collective bargaining agreement negotiated between the parties. It had therefore been agreed by both parties to the strike that benefits under the Income Guarantee Plan and the Group Life Plan would not be payable during a strike. The respondent did not threaten to deny or reduce these benefits, but rather informed the employees what their rights were.*

**[24]** Finally, in *Communication Workers of Canada v. Saskatchewan Telecommunications,* [1988] April Sask. Labour Rep. 35, LRB File No. 067-87, the Board found that the termination of extended sick leave benefits for employees who were on leave at the time of the commencement of a lock-out was not covered by the prohibition contained in s. 11(1)(l) as the employees had not "ceas[ed] to work as a result of the lock-out." At 38, the Board commented as follows:

> *If by enacting subclause (i) of Section 11(1)(l) the legislature intended to ensure that all employees would continue to receive pension rights or benefits, health rights or benefits, and medical rights or benefits during a lock-out, it could have simply said so. It did not. Rather, it specifically prohibited an employer from denying or threatening to deny those rights or benefits to any employee "by reason of the employee ceasing to work as the result of a lock-out or while taking part in a stoppage of work ... called ... by the trade union."*

**[25]** Prior to the addition of s. 47 to the *Act* in 1994, the only protection afforded striking or lock-out employees was the continuation of benefits enjoyed prior to the strike when the employees returned to work. During the strike, coverage offered under the plans could be suspended by the employer or by the terms of the plan documents.

**[26]** Section 47 made a major change to the requirements relating to benefits during a strike or lock-out by providing a mechanism for the continuation of major benefit plans during a strike or lock-out. If the union pays the premium costs associated with the plans to the employer or plan administrator, the plans must continue in place (s. 47(2)). Given the positive requirement that now exists in the *Act* to require the continuation of benefit plan membership and coverage during a strike or lock-out, s. 11(1)(l) must be interpreted to prevent the denial or threatened denial of the continuation of the benefit plans mentioned in s. 47 during a strike or lock-out, not merely a threat to deny or actually deny benefit plan coverage once the strike or lockout comes to an end.

**[27]** In the present case, the plan documents did not conform to ss. 47 or 11(1)(l) of the *Act* as they contemplate the termination of plan benefits during a strike or lock-out. Obviously, the plan documents have not been amended to take into account the introduction of s. 47.

**[28]** The April 17, 2002 letter also violates ss. 11(1)(l) and 47(4) because it states that continued coverage under the long term disability plan has not been extended for striking employees. The plan administrator, however, had another go at the insurer and managed to reach an agreement with the

insurer to extend coverage for nine months. During the period of the strike to the date of the hearing, no benefit coverage was actually lost for the employees in question

**[29]** On these facts, we find that the Employer violated ss. 11(1)(l) and 47 as it did threaten to cancel the striking employees' membership and/or coverage in the long term disability plan in its plan documents and its April 17, 2002 letter to employees.

**[30]** We would add that it was inappropriate for the Employer to deal directly with members of the Union on the issue of continuing benefits during the strike. The information ought to have been shared initially with the Union. Once the details of the coverage were determined, the parties could have agreed on the communication to be sent to employees. In the context of a strike, the Employer and its agents must be sensitive in its communications to employees to avoid the type of incident that occurred in the present case where the April 17, 2002 letter was received by employees on the eve of a Board conducted final offer vote.

**[31]** In future, the parties to the SSTA benefit plans need to address the requirements of s. 47 in the context of their plan documents and address with their insurers their additional needs for coverage during strikes.

**[32]** The Board will issue an Order finding the Employer in violation of ss. 11(1)(l) and 47 of the *Act*. There will be no remedial Order issued as the plan administrator managed to obtain the coverage required by the *Act* and employees were not actually denied benefits.

**HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES UNION, LOCAL 41, Applicant v. CAVALIER ENTERPRISES LTD. operating as the SHERATON CAVALIER, Respondent**

LRB File No. 123-02; September 30, 2002
Vice-Chairperson, Walter Matkowski; Members: Maurice Werezak and Leo Lancaster

For the Applicant: Brian Christoph
For the Respondent: Kevin Wilson

**Bargaining unit – Appropriate bargaining unit – Board finds under-inclusive bargaining unit inappropriate – Housekeeping and laundry employees do not possess discrete skills to justify separate certification – Board finds proposed bargaining unit would lack bargaining strength – Board dismisses application.**

**Certification – Bargaining unit – Appropriate bargaining unit – Board finds under-inclusive bargaining unit inappropriate – Housekeeping and laundry employees do not possess discrete skills to justify separate certification – Board finds proposed bargaining unit would lack bargaining strength – Board dismisses application.**

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

## REASONS FOR DECISION

### Background

**[1]** **Walter Matkowski, Vice-Chairperson:** Hotel Employees and Restaurant Employees Union, Local 41 (the "Union") applied to be certified for a bargaining unit comprising the housekeeping and laundry department workers at Cavalier Enterprises Ltd., a Saskatoon Hotel operating as the Sheraton Cavalier (the "Employer"). The Employer opposed the application on the basis that the unit applied for was not an appropriate bargaining unit.

**[2]** In 1981, the Board issued a certification Order to Local 767 of the Union covering maintenance employees employed by the Employer.

### Facts

**[3]** The Union rested its case on its material filed before the Board. The Employer called one witness, John Bevis, general manager of the Employer. Following is a summary of his testimony.

**[4]** On July 29, 2002 the Employer had 248 employees in its employ. The number of employees varies depending on business, but the normal range is between 230 – 270 employees. The present 248 employees work in the following 18 departments:

(1) Accounting – 3
(2) Catering – 54
(3) Majestic Grille – 25
(4) Carvers – 13
(5) Front Office – 19
(6) Majestic Express – 10
(7) Housekeeping – 33
(8) Kitchen – 31
(9) Laundry – 3
(10) Lounge – 10
(11) Maintenance – 14
(12) Management – 5
(13) Mini Bar – 2
(14) Oasis – 8
(15) Parkade – 2
(16) Hamptons – 1
(17) Sales – 5
(18) Guest Services – 10

**[5]** Two other managers report to Mr. Bevis. The room sales manager is responsible for the front office, housekeeping, laundry, oasis, mini bar, parkade and guest services departments while the food and beverage manager is responsible for the remaining departments.

**[6]** The laundry department consists of three employees who look after the sheets, towels, etc. while the housekeeping department consists of thirty three employees who are responsible for cleaning guest rooms, both during and at the conclusion of guest stays. The housekeeping department has a high level of staff turnover and its workforce is transient. New housekeeping staff require less than one day of training prior to commencing duties on their own. Mr. Bevis testified that in the event of a strike, the housekeeping staff could be easily replaced.

**[7]** Housekeeping staff regularly deal with the maintenance department, the front office and, to a lesser extent, with the mini bar staff. Most employees work between 7:00 a.m. and 4:00 p.m.

**[8]** The Employer encourages its employees to train to work in other departments. As a result, part-time employees regularly pick up extra hours by transferring from their department to another. This is a common practice among housekeeping employees.

**[9]** During the last round of collective bargaining, the Union asked the Employer to expand the maintenance department's bargaining unit to have the Employer voluntarily recognize an "all employee" bargaining unit. The Employer rejected this request.

**[10]** Mr. Bevis testified that two small collective bargaining units at the hotel would lead to operational problems. These problems would result from administering different sets of benefits, spending more time negotiating, dealing with two separate collective agreements and possibly dealing with multiple strike situations.

## Analysis

**[11]** The Union argued that the proposed bargaining unit was an appropriate unit while the Employer argued that it was not. The Union and Employer also disagreed over whether the housekeeping supervisor position should be included in the Union's proposed collective bargaining unit. Given the Board's decision on the appropriateness of the proposed bargaining unit, this issue need not be addressed.

**[12]** In this case, we are dealing with a proposed under-inclusive bargaining unit which would comprise approximately 15% of the Employer's employees.

**[13]** The Board, in the decision *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, carefully considered how the Board has historically dealt with proposed under-inclusive bargaining units. At p. 780, the Board summarized 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.*

**[14]** The Board then applied these five factors to the facts of its case and further stated at p. 780:

> *Overall, the Board is satisfied in this application that the press room employees are a sufficiently skilled and discrete craft group to justify their separate certification. There is no evidence that the press room employees are regularly interchanged with employees in other departments. They obviously have a sufficient ability to bring the work of the newspaper to a halt and possess sufficient bargaining power to render them a viable collective bargaining unit. In addition, there is recent history establishing the difficulty of organizing on a more inclusive basis and a past history of lack of success in organizing in this sector in Saskatchewan. Finally, there is no existing bargaining unit that would be more suitable for the employees in question. For these reasons, and the reasons stated above, although the unit proposed is not the most appropriate bargaining unit, the Board is convinced that the proposed unit is, nevertheless, appropriate for collective bargaining.*

**[15]** This Board accepts the factors to be considered in regard to whether an under-inclusive bargaining unit will be certified, as set out in *Sterling Newspapers*, *supra*, and will apply them to the facts of this case.

**[16]** Housekeeping and laundry staff do not possess a discrete skill set that sets them apart from other employees in the hotel. There is little training required to perform the work. Housekeeping and laundry staff are encouraged to and do work in other departments of the hotel, which demonstrates some level of intermingling of housekeeping and laundry staff with other hotel employees. In the event of a strike, housekeeping and laundry staff could easily be replaced by the Employer. Thus, a separate bargaining unit for these employees would lack bargaining strength as a withdrawal of their labour would not place much economic pressure on the Employer.

**[17]** In *Sterling Newspapers, supra,* the Board states at pp. 777 and 778:

> *In some situations, however, the Board has refused to certify bargaining units that are composed of fewer employees than the total employee complement in the business. In Hotel Employees and Restaurant Employees International Union, Local 767 v. Courtyard Inns Ltd., [1988] Winter Sask. Labour Rep. 51, LRB File No. 116-88, the Board found that a unit of maintenance employees in a hotel was not an appropriate unit for the following reasons, at 51:*
>
> > *. . . the historical pattern of organization of large hotels in Saskatchewan like the Regina Inn indicates that bargaining units significantly larger than the one applied for by the applicant in this case have been considered appropriate. There is no indication that a larger unit would unreasonably inhibit union organization and there is no suggestion that maintenance employees possess a particular community of interest that would make it inappropriate to include*

> *them in a larger unit. The proposed bargaining unit comprises a numerically insignificant number of employees and the Board has serious doubts about its viability for collective bargaining purposes. The maintenance employees in question are not so highly skilled that they would be difficult to replace or that a withdrawal of their services would put much economic pressure on the employer. Finally, if the unit applied for in this case were appropriate, then other units of comparable size would also be appropriate which would lead to piecemeal certifications, a multiplicity of bargaining units and industrial instability.*

**[18]** Since the *Courtyard Inns, supra,* decision referred to by the Board in *Sterling Newspapers, supra*, most certifications in this sector are for "all employee" bargaining units. However, in regard to this hotel, Board records indicate that the Union attempted to organize an all employee unit in 1997 but was unsuccessful. The Board is concerned that, in this hotel, the historical pattern of organizing on an "all employee" basis may, in fact, be inhibiting the organization of the workforce. However, the Union did manage to sign up the housekeeping and laundry departments, which typically are difficult to organize given the high degree of staff turnover. Without additional evidence to demonstrate that the historical pattern of organizing on an "all employee" basis is inhibiting the organizing efforts at this hotel, the Board is reluctant to stray from the policy of encouraging larger, more inclusive bargaining units.

## Conclusion

**[19]** Taking into consideration the factors as set out in *Sterling Newspapers, supra*, and the Board's decision in *Courtyard Inns, supra,* the Board concludes that the proposed under-inclusive bargaining unit is not an appropriate bargaining unit. If this bargaining unit were appropriate, then other units of comparable size such as the fine dining departments of the Hotel would also be appropriate, which would lead to piecemeal certification, a multiplicity of bargaining units and industrial instability. In addition, these small bargaining units would lack the bargaining strength which a larger, all employee unit would possess.

**[20]** As indicated, since *Courtyard Inns, supra,* the Board has, in the majority of cases, granted certification Orders based on "all employee" bargaining units in the hotel industry, except for historical carve outs. Although we are concerned about the difficulty the Union has experienced in attempting to certify an "all employee" unit in this hotel, we do not have a sufficient evidentiary basis

to conclude that the policy of preferring larger, more inclusive bargaining units in this industry is preventing the Union from achieving success in its organizing efforts.

**[21]** In this case, we are not dealing with a situation in which the Union is attempting to organize an "all employee" unit in a previously unorganized industry comprised of part-time and casual employees who are traditionally considered difficult to organize. In these instances, the Board has held that an "all employee" unit may not be a reasonable requirement if it is likely to prevent organization at all. (see: *Hotel Employees & Restaurant Employees Union, Local 767 v. Regina Exhibition Association Ltd.*, [1986] Oct. Sask. Labour Rep. 43, LRB File No. 015-86, at p.45).

**[22]** For all of the foregoing reasons, the Union's application is dismissed.

# INTERNATIONAL UNION OF OPERATING ENGINEERS HOISTING AND PORTABLE AND STATIONARY, LOCAL 870, Applicant v. RURAL MUNICIPALITY OF MEOTA NO. 468, Respondent

LRB File Nos. 094-02, 095-02 & 096-02; October 1, 2002
Vice-Chairperson, Walter Matkowski; Members: Duane Siemens and Marshall Hamilton

For the Applicant: Gary L. Bainbridge
For the Respondent: John Beckman, Q.C.

**Unfair labour practice – Burden of proof – Dismissal – Employee engaged in union activity prior to dismissal – Board examines employer's reasons and motivation for dismissal – Board evaluates sufficiency of employer's reasons for dismissal to determine if union activity played any role.**

**Evidence – Onus – Reverse onus – Employer's reasons for dismissal of employee not coherent and credible – Board finds that employer did not have good and sufficient reason for dismissal – Board finds Employer has committed unfair labour practice pursuant to s. 11(1)(e) of *The Trade Union Act* and orders reinstatement of employee.**

**Unfair labour practice – Dismissal – Board finds employee dismissed for union activity in violation of s. 11(1)(e) of *The Trade Union Act* – Board orders reinstatement of employee.**

***The Trade Union Act*, s. 11(1)(e)**

## REASONS FOR DECISION

### Background

**[1] Walter Matkowski, Vice-Chairperson:** On May 22, 2002, the International Union of Operating Engineers Hoisting and Portable and Stationary, Local 870 (the "Union") filed unfair labour practice, reinstatement and monetary loss applications relating to the termination of Mr. John MacDonald's employment with the Rural Municipality of Meota No. 468 (the "Employer" or the "R.M."). The Union alleged that the Employer had committed unfair labour practices in violation of ss. 11(1)(a) and 11(1)(e) of *The Trade Union Act, R.S.S.* 1978, c.T-17 (the "*Act*"). The Employer denied the allegations in its reply. The Board heard the applications on September 4, 2002.

## Facts

**[2]** In *International Union Of Operating Engineers Hoisting & Portable & Stationary, Local 870 v. Rural Municipality Of Meota No. 468*, [2002] Sask. L.R.B.R. 285, LRB File No. 091-02; the Board certified a bargaining unit of employees in the R.M. of Meota. The proposed bargaining unit described by the Union included Mr. MacDonald's position. In the Reasons for Decision in the case, the Board noted that the certification application was filed on May 8, 2002, that the Employer received a copy of the Union's application from the Board on May 13, 2002 and that the Employer sent a reply and statement of employment to the Board by fax on May 16, 2002.

**[3]** Mr. MacDonald was the Union's sole witness. He is a retired Saskatoon police officer who attained the rank of staff sergeant. He was President of the Saskatoon Police Association from 1995-1998. Following his retirement in 2000, he moved to Meota. In 2001, Mr. MacDonald responded to a newspaper advertisement in which the Employer sought applications for a "maintenance person." The ad said "welding and mechanical skills would be an asset." Mr. MacDonald was interviewed for and received the position. Mr. MacDonald told the Employer at the interview that he did not have extensive welding and mechanical skills.

**[4]** Mr. MacDonald started working for the Employer on March 30, 2001. His duties were those listed in the ad to which he had responded, being grass cutting, sign maintenance and other duties. Mr. MacDonald testified that 2001 was a "good year." He worked 1224 hours from March 30 to November 1, was not disciplined in any way and was invited by the Employer to submit an application for the position of maintenance person for the 2002 season. The Employer gave him a Christmas turkey in appreciation of his work and in January 2002, called him to work on a bridge project.

**[5]** Early in 2002, Mr. MacDonald responded to advertisements for two positions with the Employer, the maintenance person position and an operator position. Mr. MacDonald was interviewed and was the successful candidate for the maintenance person position. The Employer told Mr. MacDonald that he would be on probation for a three-month period.

**[6]** Mr. MacDonald started work on April 25, 2002. On May 10, 2002, he signed a Union card. On May 17, 2002, Mr. Iverson, a councillor with the R.M., asked Mr. MacDonald why he wanted to be part of the Union. Mr. MacDonald answered that it was for better hours of work, better pay,

safety reasons and because the Employer was not listening to the men. The discussion ended with Mr. Iverson saying he was happy with the work the men were doing and wondering why they wanted a Union.

**[7]** At the end of his workday on May 21, 2002, Mr. MacDonald was asked to meet Councillor Tait at the shop. At this meeting, Mr. Tait informed Mr. MacDonald that council had decided to terminate his employment "because he wasn't mechanically inclined enough." Mr. Tait also told him that the Employer would be replacing him with another maintenance person. Mr. MacDonald testified that Mr. Tait had trouble looking him in the eye and that he told Mr. Tait that "I wasn't even there when the Union first came," and that "this is B.S. and you know it."

**[8]** Mr. MacDonald clipped out an advertisement from a local paper in late May 2002, in which the Employer sought a maintenance person. The ad was identical to the ads to which Mr. MacDonald had replied. It read in part "This is a seasonal position with responsibilities to include grass cutting, sign maintenance and other duties. Welding and mechanical skills would be an asset."

**[9]** Mr. MacDonald testified that in 2001, he had twice tipped over the Bushhog, a grass-cutting machine. Both times, Mr. MacDonald reported the accident to his immediate supervisor. In response to the Employer's allegation that he failed to take another employee with him to a job on a beaver dam, he testified that he was instructed to take someone with him when he did the work and he did, though the person was not an employee of the R.M.

**[10]** Mr. Tait, Mr. Fennig, the reeve of the R.M., and Mr. Lamb, a businessman who services certain types of machinery, testified for the Employer. Mr. Lamb confirmed that his company had assembled the Bushhog incorrectly and that it was repaired on warranty.

**[11]** Mr. Tait and Mr. Fennig did not challenge Mr. MacDonald's testimony that the Employer had never disciplined him prior to his dismissal. He had not been warned that he could lose his employment as a result of not being mechanically inclined enough. They testified that in 2001, the grass was not being cut to their standards. Mr. Tait said that he had complained to Mr. MacDonald about how he had been cutting the grass, but later learned that it was the Bushhog itself that was responsible. The Bushhog was repaired under warranty at no cost to the Employer and Mr. Tait apologized to Mr. MacDonald for complaining about the grass cutting.

**[12]** When Mr. Fennig and Mr. Tait later found out that Mr. MacDonald had tipped over the Bushhog twice in 2001, they told him to be more careful but did not discipline him.

**[13]** Minutes from a May 1, 2002 council meeting read in part as follows:

> *That it be documented that Mike Doom and Alan Doom were both informed that their work was not satisfactory, roads that should have been patrolled have not been done this year and that they should be putting in longer hours, or working every day to get caught up. It was noted that Mike is not performing as a foreman should and it was noted that Alan is not working daily and is still on three-month probation. It also be noted that John MacDonald's performance shows a lack of knowledge for mechanical equipment. A meeting with the Foreman will be held Tuesday, May 14, at the R.M. shop. A decision as to Mike's ability as foreman and Alan and John's employment will be made this month. Carried.*

**[14]** Minutes from a May 17, 2002 Council meeting read in part as follows:

> *That we give John MacDonald one week's notice. His position will be terminated effective May 24, 2002, due to lack of knowledge of equipment, that he took someone other than an employee of the RM on a Sunday to open a Beaver Dam. Carried.*

**[15]** Mr. Fennig testified that as of May 1, 2002, council was not aware of any Union activity. He stated that Mr. MacDonald's union activities had absolutely nothing to do with his discharge, which was based solely on his poor work performance, including Mr. MacDonald taking someone who was not an employee of the R.M. to work on the beaver dam.

**[16]** In cross examination, Mr. Fennig conceded that he may have been aware of the Union prior to council's decision to fire Mr. MacDonald, but he said that he had been told not to talk to anyone about the Union. He did not say who told him not to talk to anyone about the Union or whether the gag order, so to speak, applied to all council members.

## Relevant Statutory Provision

**[17]** Section 11(1)(e) of the *Act* reads as follows:

> *11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:*

> *(e) to discriminate in regard to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including discharge or suspension or threat of discharge or suspension of an employee, with a view to encouraging or discouraging membership in or activity in or for or selection of a labour organization or participation of any kind in a proceeding under this Act, and if an employer or an employer's agent discharges or suspends an employee from his employment and it is shown to the satisfaction of the board that employees of the employer or any of them had exercised or were exercising or attempting to exercise a right under this Act, there shall be a presumption in favour of the employee that he was discharged or suspended contrary to this Act, and the burden of proof that the employee was discharged or suspended for good and sufficient reason shall be upon the employer; but nothing in this Act precludes an employer from making an agreement with a trade union to require as a condition of employment membership in or maintenance of membership in the trade union or the selection of employees by or with the advice of a trade union or any other condition in regard to employment, if the trade union has been designated or selected by a majority of employees in any such unit as their representative for the purpose of bargaining collectively.*

### Applicant's Argument

**[18]** Counsel for the Union argued that the Employer had not satisfied the burden of proof which s. 11(1)(e) of the *Act* places upon it to show that the Employer had not discharged Mr. MacDonald as a result of Union activities and for good and sufficient reasons.

### Employer's Argument

**[19]** Counsel for the Employer argued that Mr. MacDonald was discharged for good and sufficient reasons, which had nothing to do with his or any type of Union activity.

## Analysis

**[20]** Both counsel agreed that the Employer's motivation is the central issue in regard to Mr. MacDonald's dismissal and that there is a presumption in favour of Mr. MacDonald that he was dismissed contrary to s.11(1)(e) of the *Act.* In this case, the evidence clearly establishes that employees were engaged in union activity when the Employer decided to terminate Mr. MacDonald's employment, and that the Employer was aware of the Union activity. Thus, the Employer had to establish that its reasons for terminating Mr. MacDonald's employment were unrelated to union activity and were for "good and sufficient reasons."

**[21]** The Applicant's case is compelling. Mr. MacDonald worked one season with the Employer and received no warnings or discipline. The only complaint made against him was about how the grass was being cut and the Employer eventually learned that a defective machine was in fact responsible.

**[22]** Mr. MacDonald was encouraged to apply for the 2002 season, did apply, and was again given the maintenance person position, limited mechanical skills and all. The Employer called Mr. MacDonald to work on a project in January 2002. The Employer complained that it was not aware until well after the fact that Mr. MacDonald had tipped the Bushhog over twice in 2001. However, the evidence confirms that Mr. MacDonald reported the incidents to his supervisor.

**[23]** Mr. MacDonald testified that on May 17, 2002 one of the councilors of the R.M. specifically asked him why he wanted a Union. This conversation took place one day after the Employer had replied to the Union's application for certification.

**[24]** The Employer did not provide any credible explanation for the coincidence of timing of the trade union activity and the termination of Mr. MacDonald's employment: see: *The Newspaper Guild v. Leader-Post*, (1994) 1st Quarter Sask. Labour Rep. 242, LRB File Nos. 251-93, 252-93 & 253-93. Counsel for the Employer pointed to the May 1, 2002 council minutes to suggest that the Employer was evaluating Mr. MacDonald's continued employment prior to the Union's presence at the workplace. However, the minutes reflect a concern with three employees, and the Employer was not able to provide this Board with credible and coherent reasons for choosing to dismiss Mr. MacDonald.

**[25]** Counsel for the Employer argued that Mr. MacDonald's failure to take another employee with him when he was working on the beaver dam project constitutes a credible and coherent reason for the Employer's decision to terminate his employment. The Board accepts Mr. MacDonald's evidence that he was advised only to ensure that "someone" was with him when he undertook the beaver dam project. The Board was impressed with Mr. MacDonald's manner of giving evidence and has no hesitation in concluding that Mr. MacDonald, as a former staff sergeant and a 31 year veteran of the police force, would have followed any lawful directive given to him by an employer.

**[26]** The Board finds that the Employer's allegations that Mr. MacDonald was fired because he was not mechanically inclined or because he was not knowledgeable about the equipment lack credibility. Mr. MacDonald performed his job duties for more than one season with no discipline, warning or

suggestion of training being necessary made by his employer. For his Employer to state now that Mr. MacDonald was fired for his lack of knowledge defies logic.

**[27]** The Board concludes, given the presumption in favour of Mr. MacDonald as dictated by the *Act*, that the Employer has not satisfied the onus under s. 11(1)(e) of the *Act* to prove that Mr. MacDonald was dismissed for good and sufficient reasons that are unrelated to any Union activity.

**[28]** The Board finds the Employer guilty of an unfair labour practice in violation of s. 11(1)(e) of the *Act* and will issue an Order accordingly.

**[29]** The Order will also require the Employer to reinstate Mr. MacDonald to his position as maintenance person immediately, with seniority to be calculated as if Mr. MacDonald had continued to be employed from the date of his termination on May 21, 2002. He will have his wages and benefits restored in full and shall be made whole for all monetary loss suffered as a result of his termination. If the parties are unable to agree to the amount that is owing to Mr. MacDonald, either party may refer the matter back to the Board for determination.

**UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1400, Applicant v. 610539 SASKATCHEWAN LIMITED, o/a the HERITAGE INN, SASKATOON, Respondent**

LRB File No. 161-02; October 3, 2002
Vice-Chairperson, James Seibel; Members: Gerry Caudle and Brenda Cuthbert

For the Applicant: Rod Gillies
For the Respondent: Kevin Wilson

**Certification – Appropriate bargaining unit – Managerial exclusion – Whether position of housekeeping supervisor should be excluded – Board concludes that position should not be excluded and certifies unit accordingly.**

**Employee – Managerial exclusion – Employer seeks to exclude housekeeping supervisor from bargaining unit – Housekeeping supervisor has no authority to impose formal discipline and participation in disciplinary process consultative only – Board concludes that housekeeping 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(f)(i), 5(a), 5(b) and 5(c).**

## REASONS FOR DECISION

### Background

**[1] James Seibel, Vice-Chairperson:** United Food and Commercial Workers Union, Local 1400 (the "Union"), applied to be certified for a bargaining unit of all the employees of 610539 Saskatchewan Limited, operating as the Heritage Inn, Saskatoon (the "Employer"), with the exception of the general manager, office/front desk manager, restaurant manager, bar manager, banquet manager, chef, housekeeping manager, maintenance manager, sales staff, and anyone above the rank of manager. Prior to the hearing, the parties agreed that the administration assistant should also be excluded and the assistant kitchen manager should be in scope of the proposed bargaining unit. The parties also agreed that two names, Raillan Cochrane and Dixie Camber, should be removed from the statement of employment. There are otherwise 45 persons listed on the statement of employment.

**[2]** The only issue at the hearing of the application on September 25, 2002 was whether the position of housekeeping supervisor should also be excluded – that is, whether the incumbent in the position, Diane Wolfe, is an "employee" within the meaning of s. 2(f) of *The Trade Union Act*, R.S.S.

1978, c. T-17 (the *"Act"*). This issue had no bearing on whether the Union enjoyed majority support for the application.

## Evidence

**[3]** Diane Wolfe, the incumbent in the housekeeping supervisor position, testified under subpoena by the Union. Ms. Wolfe has been with the Employer since October 1996, and in her present position since January 2000. During her testimony, the position was variously called "housekeeping supervisor," "assistant housekeeper" and "assistant housekeeping manager." For consistency, these Reasons shall refer to the position as "housekeeping supervisor."

**[4]** Ms. Wolfe described the structure of the housekeeping department, which carries out the room cleaning and laundry functions. There are 14 employees on staff, all of whom work day shift only. The department is headed by the executive housekeeper or housekeeping manager, Gloria Arcand, to whom Ms. Wolfe reports. Ms. Arcand, who has a chronic medical condition, works four days per week, Monday, Tuesday, Thursday and Friday. She does not do housekeeping or laundry work, but prepares the monthly schedule and, depending on the daily occupancy of the hotel, adjusts the staff complement and employees' hours of work for the day. The staff clean certain rooms on a rotation so that they are not always doing the same rooms, but Ms. Arcand may change the assignments. Ms. Arcand administers the departmental budget and attends the monthly meeting of department heads. She has the authority to, and actually does, hire, fire and discipline departmental employees, as well as complete annual employee performance reviews and new employee probation period assessments. She also authorizes employee vacation and other leave. Ms. Arcand orders cleaning supplies and room amenities. She conducts the weekly housekeeping staff meeting.

**[5]** Ms. Wolfe works full time from Wednesday to Sunday. Her main job functions are room inspection, assessing the quality and thoroughness of the work in each room, encouraging and attempting to help each housekeeper to attain the mandated production rate of so many rooms per hour. Daily production statistics are posted the following day. Ms. Wolfe also cleans rooms or works in the laundry once or twice a week, when the hotel occupancy is lower and her inspection duties are lighter. She is a resource to help the housekeeping staff solve problems as they arise.

**[6]** On Ms. Arcand's days off, Ms. Wolfe performs all of Ms. Arcand's administrative functions, except that she can only impose discipline, allow overtime or authorize vacation or leaves of absence

after consulting with Ms. Arcand by telephone or with the hotel general manager. She also performed such duties full-time for approximately three months, from early March to mid-May 2002, when Ms. Arcand was off sick. However, she does not attend department head meetings, even in Ms. Arcand's absence, nor does she receive the meeting minutes or memos from management to the department heads. Ms. Wolfe may add items to the weekly staff meeting agenda and runs the meeting in Ms. Arcand's absence.

**[7]** There are three "day supervisors" – Maureen Firman, Rhonda Gauthier and Billie-Ray Isfeld – who ordinarily clean rooms or work in the laundry, but who also inspect rooms in Ms. Wolfe's absence. They report to Ms. Wolfe or in her absence, to Ms. Arcand. There are nine other housekeepers who clean rooms or work in the laundry exclusively, and who have no supervisory or administrative responsibilities. They report to Ms. Wolfe or in her absence, to the acting supervisor. Ms. Wolfe or the supervisors train the new housekeepers. Ms. Wolfe trains the supervisors.

**[8]** Other than during the period when Ms. Arcand was on extended leave, Ms. Wolfe has not hired or fired any employees. Even during that period, she did so only after consulting Ms. Arcand by telephone and obtaining her advice and direction. However, she has interviewed several prospective employees, or performed the reference checks, and has made recommendations to Ms. Arcand as to whether individuals should be hired. Ms. Arcand routinely solicits her opinion in this regard. Similarly, in her room inspection role, Ms. Wolfe directly observes the daily performance of the housekeeping staff. She has the authority to direct staff to re-do or properly complete a cleaning job. She routinely urges slow employees to increase their productivity and provides verbal warnings regarding quality of work, non-attendance and late attendance at work. She does not have the authority to issue a written reprimand except on the direction, or with the agreement, of Ms. Arcand or the hotel manager. If there is a continuing problem with the quality of an employee's work, Ms. Wolfe raises it with Ms. Arcand who decides on a course of action. Although Ms. Arcand has the ultimate authority, Ms. Wolfe's opinions are respected. Ms. Arcand either issues written warnings herself or directs Ms. Wolfe as to what the warning should say.

**[9]** Near the end of employees' 90-day probationary period, Ms. Wolfe and Ms. Arcand discuss the performance of each potential permanent employee. Because Ms. Wolfe is in a direct position to know how the candidate has performed, Ms. Arcand respects her opinion. The same goes for the annual performance reviews.

**[10]** A locked file drawer in the office contains personnel records, budget information and minutes of department head meetings. Ms. Arcand and Ms. Wolfe have the only keys. Ms. Wolfe testified that she used her key to access employee records in Ms. Arcand's absence, but had not used it to access management minutes or communications.

**[11]** In cross-examination, when asked whether she would terminate an employee for theft from a guest room, Ms. Wolfe said she would not, but would check first with Ms. Arcand or the hotel manager. However, she did agree that she is "management's eyes and ears on the floor," at least as concerns performance issues. When asked whether she nonetheless had influence as to whether an employee would be fired, she responded "in some ways." She agreed that she could affect the number of hours that an employee would be assigned to work.

**[12]** Ms. Wolfe is paid a monthly salary. She takes time off in lieu of any overtime. The balance of the housekeeping staff is paid hourly. During the time of Ms. Arcand's extended absence, neither Ms. Wolfe's job title or remuneration was changed.

**[13]** In reference to a job description for "Housekeeping Manager/Supervisor" dated April 15, 2002, Ms. Wolfe said that she had not seen it before, although she had been given job descriptions for the housekeepers and laundry. However, she testified that she had performed many of the listed functions.

**[14]** The Employer did not call any evidence.

## Argument

**[15]** Referring to the decisions of the Board in *Hotel Employees and Restaurant Employees Union, Local 206 v. Spartan Holdings Ltd.*, [2000] Sask. L.R.B.R. 490, LRB File No. 155-00, and *Canadian Union of Public Employees, Local 1902-10 v. Regina's Market Square Early Learning Centre Inc.*, [1996] Sask. L.R.B.R. 744, LRB File No. 152-96, Mr. Gillies, counsel for the Union, argued that Ms. Wolfe was an employee within the meaning of s. 2(f) of the *Act*, and that the housekeeping supervisor position she occupies is properly in scope of the proposed bargaining unit.

**[16]** In *Spartan Holdings*, *supra*, the Board found that the duties of the shift co-ordinators in a fast food restaurant were supervisory rather than managerial, that the incumbents were "employees" within

the meaning of the *Act*, and that the position was in scope of the proposed bargaining unit. Mr. Gillies asserted that Ms. Wolfe's duties as housekeeping supervisor were similar to those of the shift co-ordinators, as described in the case report, at 491-92:

> *[4] Shift co-ordinators work on various shifts throughout the day starting at 8 a.m. They work without the assistance of crew members for the slower parts of the day. Crew members are scheduled to work over the lunch hour and supper rush periods. A night shift provides drive through service to customers until 3 or 4 a.m. and performs various cleaning and maintenance functions. During most shifts, the store manager or one of his assistant managers are also on duty.*
>
> *[5] The main functions of the shift co-ordinators include: reading shift report book from previous shift; ensuring that food is prepared for the upcoming lunch or supper rush; performing temperature checks on the grills; running the floor during the rush periods; assisting as needed at various work stations; making bank deposits and closing the computer at the end of the day; assigning cleaning duties to crew members; supervising the work of the crew members; issuing verbal and written reprimands and praise to crew members; completing performance evaluation forms on staff members; and attending monthly management meetings.*
>
> *[6] Currently, one shift co-ordinator is responsible for the scheduling of employees. This work is normally performed by an assistant manager, who is away from the Albert Street location attending to the opening of another restaurant for the Employer.*
>
> *[7] Shift co-ordinators are responsible for minor discipline of employees, such as sending employees home when they arrive at work without the proper uniform. As part of their supervisory functions, shift co-ordinators are required to speak to employees about work performance issues. If correction is needed, they can issue written reprimands. Any further corrective action is decided by the restaurant manager or assistant managers. Shift co-ordinators do not hire, fire or suspend employees. They have a limited supervisory role in relation to crew members.*
>
> *[8] Shift co-ordinators and assistant managers are required to complete performance evaluations on crew members. These evaluations are reviewed with the employee and forwarded to the restaurant manager who decides if the employee will receive a wage increase. Shift co-ordinators have no direct input into the salary determination.*
>
> *[9] Shift co-ordinators attend monthly management meetings where various matters are discussed, such as upcoming promotions, overall sales results, and the like. They are also assigned responsibility for representing the Employer on the Occupational Health and Safety Committee. They report problems to the restaurant manager through the use of the shift report book that is not accessible to crew members. They wear uniforms similar to the uniforms worn by senior management and different from the crew members' uniforms.*

> *[10] Crew members perceive shift co-ordinators to be junior management. Shift co-ordinators are the direct supervisor of crew members and the first line of authority for resolving employee problems.*

**[17]** Mr. Gillies pointed out that in *Regina's Market Square, supra*, the Board stated, at 746, that there is no single comprehensive test which can be used to separate those who fall on the employee side of the line from those who are classified as belonging to management, and confirmed the observation of the Board in *City of Regina v. Canadian Union of Public Employees, Local 21, and Regina Civic Middle Management Association*, [1995] 3rd Quarter Sask. Labour Rep. 153, LRB File No. 268-94, at 158, that:

> *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.*

**[18]** Counsel argued that Ms. Wolfe's normal duties (that is, as opposed to when Ms. Arcand was on extended leave) did not include the usual hallmarks of managerial authority, being the independent exercise of the functions of hiring, firing and discipline, and/or regularly acting in a confidential capacity with respect to the employer's industrial relations. Counsel pointed out that as part of the regular duties of her position, Ms. Wolfe worked with the housekeepers cleaning rooms and in the laundry, and that her agreement in cross-examination with the suggestion by counsel for the Employer that she was "the eyes and ears of management" was related to her room inspection function and was no different from the position of the day supervisors regularly acting in her absence. That is, it did not allow any significant independent decision-making in terms of discipline that would create an insoluble conflict with her co-workers.

**[19]** Mr. Wilson, counsel for the Employer, filed a written brief that we have reviewed. Citing the decisions of the British Columbia Labour Relations Board in *Canadian Union of Public Employees, Local 23 v. The Corporation of the District of Burnaby*, [1974] 1 CLRBR 1, and of the Ontario Labour Relations Board in *International Brotherhood of Electrical Workers v. Caledon Hydro-Electric Commission*, [1979] 3 CLRBR 495, counsel asserted that the crux of the decision is whether, in the case

of "first line" managerial employees, the individual in question can fundamentally affect the economic lives of their fellow employees such that they would be in conflict of interest with them.

**[20]** Mr. Wilson referred to the decisions of the Board in *Regina District Health Board v. Canadian Union of Public Employees, Local 176*, [1994] 1st Quarter Sask. Labour Rep. LRB File No. 263-93, and *Saskatchewan Insurance, Office and Professional Employees' Union, Local 397 v. Saskatchewan Health-Care Association*, [1993] 1st Quarter Sask. Labour Rep. 137, LRB File No. 049-92. He pointed out that the fact that one's decisions may be countermanded by persons higher up the hierarchy does not necessarily transform one into an employee. A consideration must be whether an employee makes recommendations that are routinely acted upon which regularly and significantly have a detrimental effect on the employment of fellow employees.

**[21]** Mr. Wilson also argued that Ms. Wolfe ought to be excluded as she has access to confidential employer information regarding budgets, costs and personnel in the department and matters related to industrial relations. He said that it is an accepted proposition that the work necessary to deal with labour relations matters may significantly increase after unionization. As Ms. Arcand works only part time, he said, she will require additional assistance with such matters. Counsel argued that if Ms. Wolfe is in the bargaining unit she would be in an uncomfortable and untenable position that will inevitably lead to conflict with the housekeeping department employees.

## Statutory Provisions

**[22]** Relevant provisions of the *Act* include s. 2(f)(i), 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;*

## Analysis and Decision

**[23]** We have determined that Ms. Wolfe is an "employee" within the meaning of the *Act*, and that the position of housekeeping supervisor is within the scope of the bargaining unit.

**[24]** With respect to the issue as to whether she should be excluded on the basis of what is commonly called the "managerial exclusion" in s. 2(f)(i)(A) of the *Act*, the provision requires that the person's primary responsibility is to actually exercise authority and perform functions of a managerial character. In *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, LRB File Nos. 037-95 & 349-96, the Board approached the issue of a person's status as an "employee" or a "manager" by examining whether the person's job functions and responsibilities have the potential to place the person in a conflict of interest with members of the bargaining unit. The Board identified the primary types of responsibilities that serve to distinguish managerial status as including such authority as the power to discipline and discharge and to influence labour relations, while secondary considerations include the authority to hire, promote and demote.

**[25]** In *Professional Institute of the Public Service of Canada v. Executive Branch of the Government of Saskatchewan and Saskatchewan Government Employees' Union*, [1997] Sask. L.R.B.R. 530, LRB File No. 018-97, the Board observed, at 547-48, that the definition of "employee" in s. 2(f) of the *Act* signals a direction to make exclusions on as narrow a basis as possible, and that incidental or occasional performance of managerial or confidential tasks is generally not sufficient to warrant exclusion from the bargaining unit, but that the nature and degree of such occasional tasks might, in a particular case, make exclusion appropriate:

> *This Board has interpreted this definition as a direction to make exclusions on as narrow a basis as possible. It is not sufficient that someone who would otherwise fall within the definition of employee perform incidentally or occasionally tasks which are of a managerial or confidential nature. The provision requires that, in order for a*

> *person to be excluded, the functions which are the basis of the exclusion must be the major focus of the position.*
>
> *This does not mean that the Board has not been confronted with the questions of degree which were addressed by the Canada Board in some of the cases referred to above. The rationale which has often been articulated as the impetus for the exclusion of persons performing managerial or confidential functions is, as we have seen, the possibility of an insoluble conflict of interest between the responsibilities of these persons in carrying out their duties, and their inclusion for purposes of representation with a group of employees whose terms and conditions of employment may be materially affected by their performance of those duties. Sensitivity to such potential conflict has led the Board, on occasion, to exclude positions on the basis that certain key responsibilities inevitably pose the risk of conflict, even if they may not in themselves occupy the preponderant amount of working time of the incumbents.*
>
> (emphasis added)

**[26]** In the present case, the evidence disclosed that Ms. Wolfe does not exercise any of the primary or secondary functions of a manager identified in *Saskatchewan Liquor and Gaming Authority*, *supra*, even incidentally or occasionally. Even when she was essentially backfilling for Ms. Arcand when Ms. Arcand was on extended leave, Ms. Wolfe was in frequent contact with her by telephone to seek instructions related to any of such functions, or alternately, sought direction from the hotel manager. While Ms. Arcand most often asks for Ms. Wolfe's input in matters of hiring, firing and discipline, it is because Ms. Wolfe is in a position to observe, as a working supervisor, the performance of the housekeeping staff. Her evidence tended to indicate that her room inspection function is one of quality control rather than enforcement and discipline. Our impression of her testimony in this regard is that it is not so much that she makes "recommendations" to Ms. Arcand, but that she relates her observations to Ms. Arcand, who then makes the decisions.

**[27]** Ms. Wolfe did not express any confidence whatsoever that she could make managerial decisions on her own, and while her perception is not necessarily determinative of the issue, it is important, and no attempt was made on the part of the Employer to contradict her impression.

**[28]** The job description for the Housekeeping Manager/Supervisor that was put to Ms. Wolfe in cross-examination is not helpful. It appears to be the job description for Ms. Arcand's description. Even it makes no mention of any authority to exercise any of the functions of discipline, firing, hiring, promotion or demotion. Other than Ms. Wolfe's assigning hours or adjusting the daily schedule on the days when Ms. Arcand is absent, decisions made in the course of Ms. Wolfe's duties have no real effect

on the employees' terms and conditions of work. It would probably not be a surprise to the housekeeping employees to learn that if their work is slow or shoddy, they are not likely to pull as many hours on the schedule as someone else.

**[29]** It was suggested that Ms. Wolfe would be in conflict with bargaining unit members whom she supervises if she is not excluded from the unit. A similar argument was made in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Remai Investments Corporation, operating as Imperial 400 Motel (Swift Current)*, [1997] Sask. L.R.B.R. 335, LRB File Nos. 014-97 & 019-97, where the issue was whether the positions of housekeeping supervisor and restaurant supervisor in a motel should be excluded from the bargaining unit. In determining that they ought not to be excluded, the Board observed as follows, at 348-49:

> *It is natural that a senior manager would rely on the direct supervisors of employees to provide insight into the daily performance of those employees, or to correct or admonish them in connection with the carrying out of specific duties. We have concluded that the disciplinary authority of the supervisors was limited to this kind of minor corrective discipline.*
>
> . . .
>
> *Ms. McDowell testified that she might feel uncomfortable taking part in union activities alongside employees who were subject to her supervision. There can be no doubt that the position of an in-scope supervisor can be unpleasant on occasion. Such a supervisor may be the focus of any dissatisfaction senior management have with employee performance, and of the disenchantment of employees with their work assignment, their fellow employees or their terms and conditions of employment. In the City of Regina v. Canadian Union of Public Employees decision, supra, the Board addressed this issue, in the following terms, at 151:*
>
> > *It is our view that there is nothing about the functions carried out by the persons in these positions which creates a conflict between the interest of their Employer and the interest of their bargaining unit colleagues of a kind which would justify removing the positions from the bargaining unit. Two of them said that they felt their status as members of the bargaining unit had created problems for the performance of their duties. Our assessment of this evidence is that such "problems" did not go beyond the awkwardness and discomfort which is experienced by many persons who must direct or admonish their fellow employees. Such tension is not sufficient to qualify as a conflict of interest of the sort which would justify the exclusion of a position on managerial grounds. In order to justify the exclusion, the position must be subject to competing loyalties which render it impossible for an incumbent to bring them into balance.*
> >
> > (emphasis added)

**[30]** In our view, Ms. Wolfe is in no different position than line supervisors or working forepersons in other workplaces who assign work, supervise a crew, provide minor admonishment, and identify problems to their superiors for action, but who are included in the bargaining unit. Situations may arise where her position as a member of the bargaining unit might be inconvenient or undesirable from the point of view of either the Employer or the Union, or in which she feels uncomfortable, but this is not of a kind or of a degree that would constitute an untenable labour relations conflict, particularly given that it is Ms. Arcand who wields the real discretionary decision making authority.

**[31]** With respect to what is commonly called the "confidential exclusion" in s. 2(f)(i)(B) of the *Act*, it is clear to us that Ms. Wolfe does not regularly act in a confidential capacity with respect to the industrial relations of the Employer, nor does the evidence support a contention that she will likely do so in the event the application for certification is granted. The Employer offered no evidence that she would be involved in collective bargaining or developing labour relations strategy for the Employer, or that she would receive or be involved in adjusting grievances, or that she would assume clerical or administrative duties relating to these, as was the case in *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.

**[32]** The fact that Ms. Wolfe has access to confidential budget information or personnel records is of no great moment. In scope clerical and administrative employees regularly have access to such information in many workplaces; it is simply part of their job duties to keep the information confidential. The crux of the confidentiality exclusion is that of acting in a confidential capacity in relation to the employer's industrial relations, not in relation to its business or employee records in general. To the extent that the Employer may want to restrict her access to other material in the file drawer to which she has a key, the Employer can simply move it.

**[33]** For the reasons outlined, we are of the opinion that Ms. Wolfe is an "employee" within the meaning of the *Act*, and that the position of housekeeping supervisor is in the scope of the proposed bargaining unit. As the Union has filed evidence that a majority of the employees in the proposed bargaining unit support the application, a certification Order will issue in the usual form.

**[34]** Board member Cuthbert dissents from these Reasons for Decision. A written dissent will be forwarded to the parties in due course.

# CITY OF SASKATOON, Applicant v. CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 47, and SASKATOON CIVIC MIDDLE MANAGEMENT ASSOCIATION, Respondents

LRB File No. 254-01; October 10, 2002
Vice-Chairperson, James Seibel; Members: Gerry Caudle and Don Bell

For the Applicant: Jim Cowan
For CUPE, Local 47: Phil Miller and Harold Johnson
For SCMMA: Tom Milroy

**Bargaining unit – Appropriate bargaining unit – Board policy – When faced with multiple bargaining units Board will take restrictive approach to defining scope of smaller specialized unit.**

**Bargaining unit – Appropriate bargaining unit – Board policy – Middle management unit – Middle management unit must be confined to positions in conflict or potential conflict through exercise of supervisory duties with membership in general unit.**

**Bargaining unit – Appropriate bargaining unit – Community of interest – Industrial relations characteristics of position are of overarching significance.**

**Bargaining unit – Appropriate bargaining unit – Community of interest – Cross-connection control program coordinator exercises no regular supervision with respect to members of general unit – Job functions of cross-connection control program coordinator not incompatible with membership in general unit – Cross-connection control program coordinator position therefore assigned to general unit.**

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

## REASONS FOR DECISION

### Background

**[1] James Seibel, Vice-Chairperson:** The Canadian Union of Public Employees, Local 47 ("CUPE 47"), and Saskatoon Civic Middle Management Association ("SCMMA") are each designated as the bargaining agent for certain units of employees of the City of Saskatoon ("the City"). The City applied for a provisional determination on the bargaining unit assignment of the newly created position of cross-connection control program co-ordinator, in the water and wastewater treatment branch of the City's utility services department, and for amendments to the certification Orders as may be necessary.

## Evidence

**[2]** Mark Keller, manager of the City's water and wastewater treatment branch ("the Branch") since January, 2002, testified for the City. Mr. Keller, a professional engineer, has been employed by the City since 1984 in positions of increasing responsibility, all relating to water and wastewater treatment. He testified about the history, structure and activities of the Branch and about the anticipated duties of the new position of cross-connection control program co-ordinator ("cross-connection co-ordinator").

**[3]** In 2001, the City restructured the utility services department by amalgamating the water treatment and meters branch with the wastewater treatment and lifts branch into a single branch. As a result of the restructuring, Mr. Keller moved from his position of manager of the water treatment and meters branch, which was eliminated along with that of the manager of the wastewater treatment and lifts branch, to manager of the entire amalgamated Branch.

**[4]** Mr. Keller testified that one result of his expended management area was that he is "spread thinner" and has to delegate some of his former direct responsibilities to subordinate managers. For example, he has off-loaded direct management of the meter shop to the meters superintendent. Other managers experienced similar expansions of duties and authority. For example, where there was formerly an operations manager for each of the branches, there is now a single such position for the entire Branch.

**[5]** At about the same time as the branch amalgamation, City council gave budgetary approval for the new cross-connection co-ordinator position. A "cross-connection" is an unprotected connection to a drinking water system that has the potential to be contaminated by backflow from another source. Mr. Keller described the history of the control of such cross-connections, which was valuable to our understanding of the science and mechanics of the issue, but which we do not intend to outline in detail in these Reasons. Since the early 1980s there has been increasing pressure on municipalities, through both national plumbing codes and provincial regulation, to increase diligence with respect to the issue. In 1996, the City became a member of the Western Canada Water and Wastewater Cross-Connection Control Committee, a body charged with the responsibility to establish guidelines for control program administration including hazard level assessment, testing procedures, approved prevention devices, and accrediting and certifying test personnel. The same year, the City amended its waterworks bylaw to

include a section on backflow prevention that detailed the specifications and testing of approved devices.

**[6]** The City perceived the need for the new cross-connection co-ordinator position to implement and enforce the backflow prevention provisions of the bylaw. Mr. Keller said that he requires someone to manage the program. He referred to the duties of the cross-connection co-ordinator and to the formal job description.

**[7]** The position of cross-connection co-ordinator will report to Mr. Keller. It is an expanding position, that is, initially the incumbent will develop a cross-connection control program including the development of a user database, and a hazard assessment and classification of each user. Then, starting with the highest risk class, the cross-connection co-ordinator will implement an information and education program of cross-connection risk and liability issues and bylaw requirements. The cross-connection co-ordinator will define a three-year work plan and in the future, hire and direct the activity of a planned cross-connection inspector position. After inspections are made, users will be informed of the protective measures that must be taken. The co-ordinator will oversee evaluation of the effectiveness of the measures and compliance with the bylaw.

**[8]** Mr. Keller stated that all of the "section managers", those persons on the second tier below him – operations manager, systems analyst, maintenance engineers (2), meters superintendent and cross-connection co-ordinator – work as a team. He anticipated that the cross-connection co-ordinator's typical work week would include the same responsibilities as the other section managers, that is, to provide a weekly report of work done and work planned for the following week, to attend weekly meetings of the section managers where the position will share confidential reports of cross-connection "incidents," and to attend to employment issues, such as staffing levels and discipline concerns.

**[9]** Duties that are more specific to the position include: developing the cross-connection control program; preparing and presenting media-like educational presentations to interest groups such as mechanical contractors; directing a cross-connection control inspector who will do the on-site inspections and evaluate the effectiveness of the measures taken; ensuring compliance with the bylaw and assessing the need for changes; serving on the Western Canada Cross-Connection Control Committee, and heading up a local committee including representatives of the building standards

branch, plumbing inspectors and others; preparing for the section budget. The cross-connection co-ordinator will be integral to co-ordinating the team responding to cross-connection incidents.

**[10]** Mr. Keller said that the cross-connection co-ordinator will also supervise the meter shop each Friday and at other times when the meters superintendent is absent. This requires the cross-connection co-ordinator to supervise and discipline the installer and dispatch staff. Mr. Keller estimated that these duties would occupy up to 40 per cent of the cross-connection co-ordinator's work.

**[11]** Mr. Keller confirmed that there are approximately 150 SCMMA members across the City's work force and 100 CUPE 47 members among the personnel in the Branch. To his knowledge no CUPE 47 member meets the educational requirements for the new position – a two-year post-secondary diploma in civil engineering technology. Although it is expected that the position will supervise the cross-connection control inspector, the position description makes no reference to supervisory responsibilities because at the time it was drafted, the budget did not provide for subordinate positions. According to Mr. Keller, there is now a budget provision for a cross-connection control inspector reporting to the position.

**[12]** Mr. Keller said that the position has not been formally classified for grade and salary, pending the decision by the Board, but that informally it has been graded at level 6 using the City's standard procedure and criteria – the same level as the meters superintendent. In the second tier section manager personnel, Mr. Keller said that the operations manager was out of scope of any bargaining unit, and that the other positions on the tier were in SCMMA.

**[13]** Mr. Keller acknowledged that certain CUPE 47 positions on the third tier of personnel, such as the biosolids supervisor and the buildings and grounds supervisor, supervise many employees. Prior to the amalgamation of the branches, those supervisors reported directly to the manager of the wastewater treatment and lifts branch, but now report to the second tier operations manager and the water treatment plant maintenance engineer, respectively. He also acknowledged that the chief meter tester, a CUPE 47 position, formerly backfilled for the meters superintendent in his absence. However, Mr. Keller assumed coverage of the position himself in 1998 because the chief meter tester could not perform the disciplinary function of the superintendent position. Since the branch amalgamation, however, he no longer has time to perform this additional task.

**[14]** Mr. Keller described the difference between supervisors in scope of CUPE 47 and the cross-connection co-ordinator. The CUPE 47 supervisors are similar to working foremen. They provide day-to-day direction to fellow workers but they do not impose any discipline. The cross-connection co-ordinator will perform different work than the cross-connection inspector and will be required to exercise disciplinary authority over the inspector.

**[15]** Mr. Keller acknowledged that job descriptions for positions in scope of SCMMA at the superintendent level generally expressly require that they assess staffing needs, hire, lay off, recall and supervise staff, evaluate work and impose discipline.

**[16]** Wayne Wallace has been a clerk at the wastewater treatment plant for over 20 years and is a CUPE 47 member. He described his duties in relation to the formulation and day-to-day monitoring of the plant's annual budget of approximately $4.75 million, including his discussions with, and liaison activity between, the operations manager and the supervisors.

**[17]** Lorne Peters has been the biosolids foreman at the City's wastewater disposal facility since 1996 and previously worked in the water lab for about 25 years. He has been with the City and a member of CUPE 47 for some 30 years. He has a two-year diploma in water science technology.

**[18]** Depending on the season, Mr. Peters supervises a staff of between 3 and 15 employees. His duties include planning shifts and scheduling employees, and developing and implementing an equipment maintenance schedule. Until a year ago, when the plant began to do certain work in house, he and the plant manager oversaw the tendering process for certain contract work; he supervised the contractors working on site. Now, the plant manager does the tendering.

**[19]** Although 20 to 30 per cent of Mr. Peters' work is the same as the staff he supervises, he supervises and monitors all aspects of the City's biosolids program, including compliance with environmental guidelines, determining the acceptability of disposal sites after assessing tests and reports, negotiating disposal agreements with landowners and adjusting complaints. He assists the branch manager with budgeting and planning of the program. He prepares reports for approval by the branch manager for submission to the City and the provincial environment department. He administers a budget of approximately $700,000.

**[20]** Mr. Peters said that, while he had interviewed job applicants a couple of times a few years ago, the City's human resources department hires casual and temporary staff for the seasonal buildup. However, he determines when seasonal employees' work will end.

**[21]** Mr. Peters attends weekly meetings of section foremen and the plant manager to assist in co-ordinating Branch activities, but staffing and personnel issues are not discussed. In his opinion, he does not have the authority to discipline his staff, and takes any concerns to his superiors.

**[22]** Mr. Peters testified that he is aware that in the past, members of CUPE 47 have filled in for superintendents during their absence, but acknowledged that he has no knowledge of the situation in the meters shop.

## Argument

**[23]** Mr. Milroy, on behalf of SCMMA, argued that the vast majority of SCMMA positions are in pay grades 6 through 8, including the meters superintendent position, and perform many of the same duties that the cross-connection co-ordinator will perform. Given the qualifications for the co-ordinator position, he said it is unlikely that any member of CUPE 47 could fill it.

**[24]** Mr. Milroy contended that the cross-connection co-ordinator position is an extension of the branch manager's office. He asserted that the duties of the position are such that it ought properly to be in scope of SCMMA.

**[25]** Mr. Miller, on behalf of CUPE 47, pointed out that, unlike the descriptions for SCMMA jobs that were referred to in testimony, the job description for the cross-connection co-ordinator makes no reference to disciplinary authority. He contended that the description was more like that of a foreman in scope of CUPE 47 than that of a superintendent in scope of SCMMA. He asserted that the position's budgetary responsibilities described in Mr. Keller's evidence do not differ significantly from Mr. Peters'. In arguing that the position should be in scope of CUPE 47, Mr. Miller referred to the decisions of the Board in *Saskatoon Civic Middle Management Association v. City of Saskatoon and Canadian Union of Public Employees, Local 59*, [1998] Sask. L.R.B.R. 341, LRB File Nos. 354-97 & 010-98, and *City of Saskatoon v. Canadian Union of Public Employees, Local 59, Saskatoon Civic Middle Management Association and Amalgamated Transit Union, Local 615*, [1998] Sask. L.R.B.R. 335, LRB File No. 244-97.

## Statutory Provisions

**[26]** Relevant provisions of the *Act* include the following:

> *5 The board may make orders:*
>
> *(m) subject to section 5.2, determining for the purposes of this Act whether any person is or may become an employee;*
>
> . . .
>
> *5.2(1) On an application pursuant to clause 5(m), the board may make a provisional determination before the person who is the subject of the application is actually performing the duties of the position in question.*
>
> *(2) A provisional determination made pursuant to subsection (1) becomes a final determination after the expiry of one year from the day on which the provisional determination is made unless, before that period expires, the employer or the trade union applies to the board for a variation of the determination.*

## Analysis and Decision

**[27]** The certification Order designating SCMMA as bargaining agent for a so-called "middle management" unit comprising "all administrative, supervisory and professional staff" in 14 City departments was issued by the Board on January 9, 1997 in LRB File No. 098-96. The Board appointed an agent to review all of the positions and to make recommendations to the Board as to which bargaining unit each might most appropriately be placed in or whether it should remain out-of-scope. With the help of the Board agent, the parties ultimately arrived at an agreement. The new SCMMA bargaining unit comprised approximately 150 employees who hitherto had not been represented by any union and were members of the City's out-of-scope Exempt Staff Association. The SCMMA certification Order excludes, among others, City employees who are members of bargaining units represented by various other unions, including CUPE 47.

**[28]** 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 considered for the first time a proposed amendment to the SCMMA certification Order to include 10 newly created positions. The Board stated that its approach to determining the scope of middle management bargaining units was restrictive, confining membership to positions that would be in a conflict of interest in a labour relations sense with members of the more general bargaining unit, and to

positions excluded from the general bargaining unit for some historical reason. The Board stated, at 321:

> *. . . the Board has defined the middle management unit in a restrictive fashion by confining its membership to those positions who, if they were included in a large industrial unit, would be placed in a conflict of interest situation between their obligations to perform supervisory and first rung management functions in relation to those employees and their membership in the larger unit. The Board has also allowed positions to be included in middle management units which have some peculiar historical reason for being excluded from the industrial bargaining unit. However, these positions are not permitted to be used as a springboard for organizing other positions that otherwise would be included in the larger industrial unit.*

**[29]** In that case, the Board also stated that the professional or other status required by a position was not a determining factor as to where it ought properly to be assigned. At 332, the Board observed:

> *In relation to defining the community of interest that must be shared by persons assigned to the middle management unit, the Board will focus on the labour relations aspects of their positions. The professional or other status required by the position will not be considered a determining factor, unless the position is one that for historical reasons was included in the middle management unit, or excluded from the industrial unit.*

**[30]** The decision was soon followed by a *City of Saskatoon, supra* (LRB File No. 244-97), another application to amend the SCMMA certification Order to include a new position. The Board reiterated its restrictive approach, usefully summarizing the principles enunciated in *City of Saskatoon, supra* (LRB File No. 232-97), at 339, as follows:

> *This is the second occasion on which the Board has been asked to comment on the scope of the middle management unit at the City. In City of Saskatoon v. Canadian Union of Public Employees, Local 59 and Saskatoon Civic Middle Management Association, [1998] Sask. L.R.B.R. 321, LRB File No. 232-97, the Board set out its approach in determining the boundaries of the middle management unit along the following general principles:*
>
> > *1. In a multi-bargaining unit setting, the Board is primarily concerned with ensuring that the multiplicity of bargaining units does not result in industrial instability;*
> >
> > *2. The Board historically favours larger, industrial units over smaller specialized bargaining units as being the best vehicles for promoting industrial stability;*

> *3. When faced with multiple bargaining units, the Board will take a restrictive approach to defining the scope of the smaller, more specialized unit;*
>
> *4. Middle management units will be confined, in general, to those employees who, if they were included in the large industrial unit, would be placed in a conflict of interest situation between their obligations to perform supervisory and low level managerial functions and their membership in the larger unit;*
>
> *5. The Board may allow for exceptions to the conflict of interest test where there are peculiar historical reasons for excluding persons from the larger unit, but these exceptions will not be permitted to form a spring board for organizing positions that otherwise would be assigned to the larger unit.*

**[31]** In *City of Saskatoon, supra* (LRB File No. 232-97), the positions in question were not yet filled. The Board provisionally assigned certain of the positions to SCMMA and others to CUPE 59. The Board's comments in relation to the differences in responsibility between the positions is instructive. The Board stated, at 332:

> *In the present application, the Board holds that the superintendent of boards and agencies, the superintendent of program facilities, manager project services and manager maintenance support fall within the middle management unit, at least on a provisional basis. The job descriptions for the positions contain first line managerial functions which include "performance management and disciplinary action." It would be difficult for such employees to be placed in the CUPE unit without giving rise to a conflict of interest between their job functions and their membership in the Union. They are also unlike the working supervisors in CUPE in that they are expected to impose minor discipline on staff and have input into major disciplinary decisions up to and including discharge. Overall, their job functions are incompatible with their membership in CUPE and they will be assigned as a result to SCMMA.*
>
> (emphasis added)

And, at 333:

> *In relation to the project officer and technical officer positions, the Board finds that their job responsibilities are significantly different than the superintendent and managerial positions. The project officers and technical officers do not supervise CUPE staff. They may provide technical expertise to the workforce but they are not directly or indirectly responsible for overseeing the performance of other employees. As a result, the Board will assign the positions to CUPE.*

> *In its evidence and argument, SCMMA took the position that the technical officer and project officer were "near" managers, that is, that they are an integral part of the management team because they provide expert advice to the management structures in the branch. SCMMA also views some of its bargaining unit as containing a number of similar members who are highly skilled but not directly involved in the management of employees who fall within the CUPE bargaining unit. SCMMA argued with respect to the project and technical officers that they in effect were similar to other positions in SCMMA which do not perform managerial functions.*
>
> *In our view, the evidence with respect to the "near" managers was unsatisfactory. If there are positions currently within SCMMA which have no role in managing the work of other employees, they will be treated by the Board in future applications as anomalies. They will not be deleted in their ranks from SCMMA, there having been some historical reason for being included in SCMMA and excluded from CUPE. However, these ranks will not be expanded by the Board.*
>
> (emphasis added)

**[32]** Not long afterwards, in *City of Saskatoon, supra* (LRB File Nos. 354-97 & 010-98), the Board confirmed that in the middle management context, the industrial relations authority of a position is of overarching significance in determining its assignment, stating, at 349-50:

> *The determination of the composition of middle management units requires a focused approach to allow more accurate and efficient decisions as in the case of managerial exclusions. The Board has determined that, in fostering industrial peace and stability, the essence for assignment to the middle management unit must be confined to those positions which would be in conflict or potential conflict in the exercise of their supervisory and junior management duties in relation to their membership in the general unit. It should be recognized that there may be exceptions to the strict application of this criterion for historical or other good and sufficient reasons but it is the industrial relations characteristics of the position in relation to community of interest which are of overarching significance.*

**[33]** In this case, the evidence establishes that positions within the scope of SCMMA generally expressly provide for the exercise of certain managerial functions such as supervising supervisors, evaluating performance, initiating minor disciplinary action and providing input into decisions on major discipline. Such positions include operations superintendent, public works branch; waste collection engineer, environmental compliance branch; and maintenance engineer, water and wastewater treatment branch. They may be contrasted with the biosolids foreman position held by Mr. Peters, the job description for which makes no mention of performance evaluation responsibility or disciplinary authority.

**[34]** The position description for the cross-connection co-ordinator makes no mention of any performance evaluation, supervisory responsibility or disciplinary authority. It does refer to the responsibility to "perform the duties of the Meter Shop Superintendent, as required." But those duties are a minor part of the job of cross-connection co-ordinator. It is difficult to understand Mr. Keller's testimony that backfilling for the meters superintendent one day a week and during vacation will constitute 40 per cent of the work of the cross-connection co-ordinator. There was no evidence of the frequency or extent of the exercise of disciplinary authority that is customarily required. Presumably, matters beyond incidents requiring minor admonitory action are not common or we would have heard some detailed evidence about them.

**[35]** Mr. Keller stated that the position would supervise the new position of cross-connection control inspector. However, the job description makes no reference to this responsibility, and the evidence on the anticipated scope of the responsibility was vague.

**[36]** The fact that there may not presently be any members of CUPE 47 who are qualified to apply for the position is of little or no relevance. It is a new position requiring a new and different skill set, but there are other positions in CUPE 47, such as that of biosolids foreman Peters, which require the same level of education, a two-year post-secondary diploma. Indeed, there was no evidence that there are any members of SCMMA who presently would be qualified to apply.

**[37]** We find that the position of cross-connection control program co-ordinator as presently configured will not exercise functions that will give rise to a labour relations conflict with members of CUPE 47. However, because neither it nor the inspector position has been filled, we will issue an Order provisionally assigning it to CUPE 47. The Order will become final after one year unless an application is made to vary the Order.

# UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (MILLWRIGHTS UNION, LOCAL 1021), Applicant v. PROCON MINERS INC., Respondent

LRB File No. 147-02; October 17, 2002
Vice-Chairperson, Walter Matkowski; Members: Gerry Caudle and Brenda Cuthbert

For the Applicant: Kerry M. Westcott
For the Respondent: Larry F. Seiferling, Q.C.

**Certification – Statement of employment – Board discusses factors to be considered in determining which individuals properly included on statement of employment.**

**Construction industry – Appropriate bargaining unit – Statement of employment – When trade not a compulsory trade, individuals performing work primarily within craft jurisdiction of applicant properly on statement of employment.**

**Certification – Practice and procedure – Board rules that applications shall be considered filed only on days that Board offices are open to public.**

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

## REASONS FOR DECISION

### Background

**[1]** **Walter Matkowski, Vice-Chairperson:** United Brotherhood of Carpenters and Joiners of America (Millwrights Union, Local 1021) (the "Union") applied to be certified as the bargaining agent for a unit of employees at Procon Mining and Tunneling Ltd. (the "Employer") comprising "all millwrights, millwright apprentices and millwright foremen." The Union's application says that there are approximately seven employees in the proposed unit.

**[2]** The Employer's reply identified its correct legal name as Procon Miners Inc. and listed ten employees in the bargaining unit, including a foreman, who were assigned to complete millwright work as at August 6, 2002.

**[3]** The parties disagreed on two issues: the number of employees in the proposed bargaining unit and the date on which the application was filed. Counsel for the Union argued that the Board should

consider August 2, 2002 as the date of filing. On that date, the Saskatchewan Labour Relation Board offices were closed, as were a majority of Government of Saskatchewan offices. However, a Department of Labour employee was in the office in Saskatoon that day and accepted and date stamped the application. When the Board reopened on August 6, 2002, the Board Registrar re-stamped the Applicant's materials as received by the Board on August 6, 2002 and crossed out the August 2, 2002 stamp.

**[4]** At the beginning of the hearing the Board advised counsel for the Applicant that its initial reaction, subject to hearing argument, was to consider August 6, 2002 as the application's filing date. Based on this information and given that two employees had been laid off on August 2, 2002, the Union took the position at the hearing that there were two employees in the proposed bargaining unit.

## Facts

**[5]** Clarence George, business manager for the Union, and two apprentice millwrights, Rudy Beaulieu and Christopher Beaulieu, testified for the Union, while Jon Braaten, a division manager, testified for the Employer. Mr. George testified that the millwright trade is not a compulsory trade in Saskatchewan. He referred to a millwright as an industrial mechanic who is responsible for the installation and maintenance of equipment. Mr. George said that at a non-union job site the trade lines are unclear in that work may not be done strictly on trade lines. Millwrights often have other skills and he estimated that approximately one third of millwrights could weld or hold a welding ticket.

**[6]** Mr. George testified that certain millwright work can be performed by anyone and apprentices learn millwright work by doing "lesser types of work." In attempting to identify the bargaining unit, he considered two factors: what the workers are doing at a particular time and what their trade status is.

**[7]** Mr. George signed up employees at the work site on August 1, 2002, then filed the application with the Board. He was unaware if there were any journeyman millwrights at the worksite on August 6, 2002, but he was aware there were two apprentice millwrights. He said that at some job sites, an apprentice does not have to work with a journeyman and that at a non-union job site, a contractor can assign work to whomever he chooses.

**[8]** The Employer was awarded a small, cost plus contract to perform maintenance work during a maintenance shutdown at a Saskatchewan potash mine. The mine owner also had a crew present,

including journeyman millwrights. The work consisted of 80-85% millwright work according to Mr. Braaten, 67% millwright work according to Mr. R. Beaulieu and 25% millwright work according to Mr. C. Beaulieu. Mr. Nick Doyle, a journeyman millwright who had the authority to hire and fire employees, supervised the project. Mr. Doyle signed as superintendent on a time sheet that the Employer filed with the Board. The owner gave Mr. Doyle the day-to-day work assignments and also supervised the crews' work. Mr. Doyle filled out daily time sheets, which required the owner's signature prior to the Employer getting paid. In addition, these timesheets had to list where employees were and what tasks they were performing. The Employer had some of these timesheets present at the hearing and referred to them in his cross-examination of both Mr. R. Beaulieu and Mr. C. Beaulieu.

**[9]** Mr. Braaten and Mr. R. Beaulieu agreed that the nine men on the crew performed similar duties. Mr. Braaten testified that because the work was based on a maintenance shutdown, millwright work levels were high. Mr. R. Beaulieu testified that many of the men did welding at the job site, including Brent Acorn, George Wolverine and Kevin Walters, and that the work consisted of millwright work, welding work and pipework. If a crew was assigned to a job, everyone worked together and did the same things.

**[10]** Mr. C. Beaulieu testified that there was a division of work among the men and that only a few of them did millwright work. The Employer called him directly to come to work, rather than calling the hiring hall, and he was at the job site for only two weeks, while his brother was there for a significantly longer period. Mr. C. Beaulieu is a ticketed welder and the employer payroll records list his occupation as welder. He conceded during cross-examination that other employees were doing millwright work. For example, when questioned about the August 6, 2002 timesheet, he agreed that the work being done on fans was millwright work and that non-millwrights were doing this work.

**[11]** Both Mr. R. Beaulieu and Mr. C. Beaulieu testified that on August 2, 2002 there were four journeyman or apprentice millwrights at the job site and that on August 6, 2002, there were three.

## Relevant Statutory Provision

**[12]** The application must be determined in accordance with ss. 5(a), (b) and (c) of *The Trade Union Act*, R.S.S.1978 c. T-17 (the "*Act*") which read as follows:

*5 The board may make orders:*

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

*(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;*

**Ruling on date of filing**

**[13]** The Board finds that the proper filing date in this instance is August 6, 2002. Although the Union was able to have the application date stamped on a day the Board was not open to the public, the application ought not to have been accepted or date stamped on that day. No special arrangements are permissible under the Board's system of filing applications, especially applications for certification or rescission, both of which are time sensitive. All parties must have equal access to the Board. Since the filing of this application, the Board has taken measures to ensure that future applications are not received and date stamped on days the general offices of the Board are closed to the public.

**Union's Argument**

**[14]** The Union argued that if the Board determined that the filing date was August 6, 2002, there were two employees in the proposed bargaining unit. The Union argued that the foreman or superintendent, a journeyman millwright, should be excluded, leaving two apprentice millwrights in the unit.

**Employer's Argument**

**[15]** The Employer argued that there were ten employees in the bargaining unit doing primarily millwright work, including the foreman or superintendent.

## Analysis

**[16]** In arriving at its decision, the Board is guided by the decision *United Brotherhood of Carpenters and Joiners of America, (Millwrights Union, Local 1021),* v. *Daycon Mechanical Systems Ltd.,* [1999] Sask. L.R.B.R. 127, LRB File No. 338-97. In *Daycon Mechanical, supra*, the Board provides at pp. 134 and 135:

> *The second issue is to determine which of the employees fall within the bargaining unit. In making this determination, the Board will have reference to a number of factors including the following:*
>
> - *status under The Apprenticeship and Trades Qualification Act: see A.V. Concrete Forming Systems Ltd., supra;*
>
> - *work performed by employees for a majority of their time during a relatively representative period prior to the application: see K.A.C.R., supra; Vector Construction Ltd., supra; International Union of Operating Engineers, Hoisting and Portable and Stationary, Local 870 v. Flynn Bros. Construction Inc., [1999] Sask. L.R.B.R. 73, LRB File No. 182-98; and*
>
> - *"helpers" will not be included in bargaining units involving mandatory trades, but may be included in non-mandatory trades: see United Association of Plumbers and Pipefitters of America, Local 179 v. Comfort Mechanical Ltd., [1998] Sask. L.R.B.R. 422, LRB File No. 082-98 and Alberta Insulation Supply and Services Ltd., supra.*

**[17]** This analysis coincides with what Mr. George did when he attended at the work site, namely, inquired as to what work the workers were actually doing and what their trade status was.

**[18]** Mr. Braaten and Mr. R. Beaulieu testified that all the men on the crew were doing primarily millwright work. While the Board would have expected a more distinct division of work based on trade lines, the evidence before the Board in regard to this job site did not support this expectation. The Board accepts the evidence of Mr. Braaten and Mr. R. Beaulieu over that of Mr. C. Beaulieu in regard to the crew doing primarily millwright work. Mr. C. Beaulieu was not at the job site for a very long period of time as compared to his brother. In addition, he agreed during his cross examination that other employees were doing millwright work as set out in the August 6, 2002 timesheet, which supports the testimony of Mr. Braaten and Mr. R. Beaulieu.

**[19]** Based on our assessment of the evidence, we find that there are nine employees in the proposed bargaining unit. Mr. Doyle is excluded from the unit because he has the authority to hire and fire and was identified as a superintendent.

**[20]** The Union has not filed majority support of the employees listed on the statement of employment and has not filed support of 25% of the employees required for the Board to order a vote. Accordingly, the Union's application is dismissed.

# CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 4552, Applicant v. DEER PARK VILLA INC., Respondent

LRB File No. 159-02; October 17, 2002
Vice-Chairperson, Walter Matkowski; Members: Leo Lancaster and Pat Gallagher

For the Applicant: Suzanne Posyniak
For the Respondent: Kevin Wilson

**Certification – Appropriate bargaining unit – Managerial and/or confidential exclusion – Whether positions of home manager and day program co-ordinator/program director should be excluded – Board concludes that positions should not be excluded and certifies unit accordingly.**

**Employee – Managerial exclusion – Employer seeks to exclude home manager and day program co-ordinator/program director from bargaining unit – Home manager has no authority to impose formal discipline and participation in disciplinary process consultative only – Employer proposes to assign comparable duties to day program co-ordinator/program director – Board concludes that positions do not have primary responsibility to exercise managerial authority within the meaning of *The Trade Union Act* and duties of positions do not conflict with inclusion in bargaining unit.**

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

## REASONS FOR DECISION

### Background

**[1]** **Walter Matkowski, Vice-Chairperson:** Canadian Union of Public Employees, Local 4552 (the "Union") applied to be certified for a bargaining unit comprising all employees of Deer Park Villa Inc., in the Town of Ituna (the "Employer"), except the chief executive officer and administrative assistant. The Employer argued that two more positions should be out of scope, namely home managers and the day program co-ordinator/program director. This issue had no bearing on whether the Union enjoyed majority support for the application.

### Facts

**[2]** The Union rested on its material. The Employer called their only witness Lucy Mazden, Chief Executive Officer (the "CEO"). The CEO reports directly to a Board of Directors. The Employer is a non-profit agency that provides residential vocational and developmental services to

adults with disabilities. The Employer has approximately 25 employees providing services to about 23 clients.

**[3]** The Employer operates three group homes that are staffed 24 hours per day and an activity centre that provides vocational training for clients. The number of group homes have increased over the years and the Employer anticipates opening more facilities as the need arises.

**[4]** As the number of facilities increased, Ms. Mazden realized that she could not manage every one. In 1999, the Employer created a home manager position for each group home. Ms. Mazden wanted to delegate responsibility to the home managers and to train them to perform various managerial functions, including disciplining employees if necessary.

**[5]** In June 2001, home managers were authorized to participate in the hiring process in their respective homes.

**[6]** In March 2002, Ms. Mazden assigned home managers the responsibility for annual performance appraisals of staff whom they supervised and for three month probationary evaluations for new employees. In addition, Ms. Mazden asked home managers to participate in budget preparation by forecasting the group homes' household needs.

**[7]** On June 2, 2002, the Board of Directors approved a job description for the home managers' position. The job description does not include responsibility for any level of discipline of staff.

**[8]** On July 2, 2002, the Employer hired a day program co-ordinator. Ms. Mazden testified that this an evolving position that will eventually have the same responsibilities as a home manager.

**[9]** The Employer entered a personnel policy as an exhibit, portions of which read as follows:

> *Article 1.02*
> *Positions and job descriptions are subject to change at the discretion of the CEO ...*
>
> *Article 2.01*
> *Hours of work for employees shall be those designated by the CEO in consultation with the Personnel Committee.*

*Article 4.05*
*When advertising a position, applicants will be asked to submit a resume with references and a letter indicating reason for applying for the job. The references will be verified by the CEO.*

*Article 4.07*
*The CEO with assistance from the Home Managers will conduct the screening and interview process of applicants for other staff positions.*

*Article 8.01*
*Employee performance appraisals shall be made by the CEO in consultation with Group Home Managers.*

*Article 8.05*
*Performance appraisals shall be presented to the employees by the CEO and /or Home Manager.*

*Article 10.03*
*Any employee desiring to take vacation leave shall submit a written request to the CEO no less than ...*

*Article 11.04*
*Personal day without pay – that staff be granted one shift per calendar year with 48 hours notice to the CEO ...*

*Article 12.06*
*Requests for sick leave pertaining to a sick child shall be made in writing to the CEO.*

*Article 13.02*
*Level 1 – Complaints or grievances will be presented to the CEO of Deer Park Villa.*

*Article 14.02*
*The foregoing measures should be applied in sequence. Deer Park Villa Inc. considers the following as the appropriate disciplinary procedure:*
*Step 1 – Verbal warning – delivered by Home Managers or CEO*
*Step 2 – Written warning – delivered by the CEO*
*Step 3 – Meeting with the Personnel Committee, CEO, and employee ...*

*Article 15.01*
*a) Upon recommendation of the CEO, temporary suspension will occur until a meeting can take place ...*

*Article 16.02*
*All employees' personnel records shall be kept confidential. Access to the employee records shall be limited to the CEO, the Personnel Committee, and the Chairperson of the Board.*

*Article 17.02*
*... All transportation expenses for which reimbursement is claimed must be accounted for by receipts which must be submitted to the CEO ...*

*Article 18.01*
*Any employee injured while working must report such injury to the CEO as soon as possible ...*

*Article 34.02*
*An employee shall hold confidential all information gained in the course of his or her employment relating to the residents and the employer's business, and shall not release any such information to any person without the authorization of the CEO.*

**[10]** The Board of Directors approved the personnel policies on April 15, 2002. During Ms. Mazden's cross-examination, it became evident that the Employer's personnel policy regarding the home managers' duties conflicted with her description of those duties. When questioned by the Board, Ms. Mazden acknowledged the inconsistency and said that she intended to meet with the Board of Directors in three days to change the personnel policy. She added that the Board of Directors was aware of the changes that she intended to implement.

**[11]** Earlier in her testimony, Ms. Mazden testified that the Employer would be changing its policies so that home managers could issue written warnings and have a greater role to play in abuse cases, among other things. Presently, the Employer's formal abuse policy says that any staff who observes or becomes aware of abuse must report the occurrence to his/her supervisor (or in their absence, the CEO) who shall in turn inform the CEO. The CEO will contact the police. The CEO conducts the initial review of the allegation and sits on the formal investigation committee.

**[12]** Loriann Hotsko, a group home manager, testified under subpoena from the Union. Her primary duties are looking after her clients medical and dietary needs, their medical appointments and medications. She has no involvement in budget preparation, personnel policies, staffing levels, job descriptions or setting employees' wages. She has some new duties such as issuing verbal warnings and hiring new employees as part of a committee. When hiring new employees she is part of a group, including the CEO, who ask candidates questions that are prepared without her input. After she issues a verbal warning, she contacts the CEO to tell her about it.

## Relevant Statutory Provision

**[13]** Section 2(f)(i) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") 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;*

### Employer's Argument

**[14]** The Employer argued that the home managers and the day program co-ordinator should be excluded from the proposed bargaining unit as managerial exclusions or confidential capacity exclusions.

### Union's Argument

**[15]** The Union argued that the home managers do not actually perform functions that are of a managerial nature and that their primary responsibility is to provide services to their clients.

## Analysis

**[16]** The Employer argued that the day program co-ordinator position was an evolving position that it hoped would mirror the home manager position in the future. If the Board finds that the home

manager position is in scope, the day program co-ordinator position would follow suit. We have determined that the home manager position and the day program co-ordinator are positions that are properly within the scope of the bargaining unit. The Board in the recent decision, *United Food and Commercial Workers Union, Local 1400* v. *610539 Saskatchewan Limited, o/a the Heritage Inn, Saskatoon*, [2002] Sask. L.R.B.R. 460, LRB File No. 161-02, reviewed recent Board decisions about whether a position should be excluded from the bargaining unit based on a "managerial or confidential capacity." In *Heritage Inn, supra*, the Board says at pages 467 and 468:

> *[24] With respect to the issue as to whether she should be excluded on the basis of what is commonly called the "managerial exclusion" in s. 2(f)(i)(A) of the Act, the provision requires that the person's primary responsibility is to actually exercise authority and perform functions of a managerial character. In 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, LRB File Nos. 037-95 & 349-96, the Board approached the issue of a person's status as an "employee" or a "manager" by examining whether the person's job functions and responsibilities have the potential to place the person in a conflict of interest with members of the bargaining unit. The Board identified the primary types of responsibilities that serve to distinguish managerial status as including such authority as the power to discipline and discharge and to influence labour relations, while secondary considerations include the authority to hire, promote and demote.*
>
> *[25] In Professional Institute of the Public Service of Canada v. Executive Branch of the Government of Saskatchewan and Saskatchewan Government Employees' Union, [1997] Sask. L.R.B.R. 530, LRB File No. 018-97, the Board observed, at 547-48, that the definition of "employee" in s. 2(f) of the Act signals a direction to make exclusions on as narrow a basis as possible, and that incidental or occasional performance of managerial or confidential tasks is generally not sufficient to warrant exclusion from the bargaining unit, but that the nature and degree of such occasional tasks might, in a particular case, make exclusion appropriate:*
>
> > *This Board has interpreted this definition as a direction to make exclusions on as narrow a basis as possible. It is not sufficient that someone who would otherwise fall within the definition of employee perform incidentally or occasionally tasks which are of a managerial or confidential nature. The provision requires that, in order for a person to be excluded, the functions which are the basis of the exclusion must be the major focus of the position.*
> >
> > *This does not mean that the Board has not been confronted with the questions of degree which were addressed by the Canada Board in some of the cases referred to above. The rationale which has often been articulated as the impetus for the exclusion of persons performing managerial or confidential functions is, as we have seen,*

> *the possibility of an insoluble conflict of interest between the responsibilities of these persons in carrying out their duties, and their inclusion for purposes of representation with a group of employees whose terms and conditions of employment may be materially affected by their performance of those duties. Sensitivity to such potential conflict has led the Board, on occasion, to exclude positions on the basis that certain key responsibilities inevitably pose the risk of conflict, even if they may not in themselves occupy the preponderant amount of working time of the incumbents.*
> *(emphasis added)*

**[17]** In this case, the home managers have extremely limited managerial functions. The evidence is that the CEO performs the vast majority of the managerial functions. It is true that the home managers now have the authority to issue verbal warnings, but all other discipline is the CEO's and/or the Board of Directors' responsibility. While the CEO does ask for advice from the home managers in regard to hiring and employees' performance, it is because the home managers, who are working managers, are in the best position to observe the performance of staff in the group homes.

**[18]** The only home manager to testify, Ms. Hotsko, clearly stated that her primary duty is to look after the clients at the group homes. She does not have the power to make managerial decisions on her own, except for some limited powers that she had just acquired. Even then, when she verbally disciplines an employee, she notifies the CEO.

**[19]** Kevin Wilson, counsel for the Employer, suggested that home managers would be in conflict with bargaining unit members whom they supervise if they were not excluded from the unit. Mr. Wilson specifically argued that in a client abuse case, a home manager would be reluctant to bring to the CEO's attention any incidents of client abuse if that meant "turning in" another union member. In *Heritage Inn, supra*, the Board comments at pages 469 and 470:

> *[29] It was suggested that Ms. Wolfe would be in conflict with bargaining unit members whom she supervises if she is not excluded from the unit. A similar argument was made in Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Remai Investments Corporation, operating as Imperial 400 Motel (Swift Current), [1997] Sask. L.R.B.R. 335, LRB File Nos. 014-97 & 019-97, where the issue was whether the positions of housekeeping supervisor and restaurant supervisor in a motel should be excluded from the bargaining unit. In determining that they ought not to be excluded, the Board observed as follows, at 348-49:*
>
> > *It is natural that a senior manager would rely on the direct supervisors of employees to provide insight into the daily performance*

*of those employees, or to correct or admonish them in connection with the carrying out of specific duties. We have concluded that the disciplinary authority of the supervisors was limited to this kind of minor corrective discipline.*

. . .

*Ms. McDowell testified that she might feel uncomfortable taking part in union activities alongside employees who were subject to her supervision. There can be no doubt that the position of an in-scope supervisor can be unpleasant on occasion. Such a supervisor may be the focus of any dissatisfaction senior management have with employee performance, and of the disenchantment of employees with their work assignment, their fellow employees or their terms and conditions of employment. In the City of Regina v. Canadian Union of Public Employees decision, supra, the Board addressed this issue, in the following terms, at 151:*

> *It is our view that there is nothing about the functions carried out by the persons in these positions which creates a conflict between the interest of their Employer and the interest of their bargaining unit colleagues of a kind which would justify removing the positions from the bargaining unit. Two of them said that they felt their status as members of the bargaining unit had created problems for the performance of their duties. Our assessment of this evidence is that such "problems" did not go beyond the awkwardness and discomfort which is experienced by many persons who must direct or admonish their fellow employees. Such tension is not sufficient to qualify as a conflict of interest of the sort which would justify the exclusion of a position on managerial grounds. In order to justify the exclusion, the position must be subject to competing loyalties which render it impossible for an incumbent to bring them into balance.*
> *(emphasis added)*

*[30] In our view, Ms. Wolfe is in no different position than line supervisors or working forepersons in other workplaces who assign work, supervise a crew, provide minor admonishment, and identify problems to their superiors for action, but who are included in the bargaining unit. Situations may arise where her position as a member of the bargaining unit might be inconvenient or undesirable from the point of view of either the Employer or the Union, or in which she feels uncomfortable, but this is not of a kind or of a degree that would constitute an untenable labour relations conflict, particularly given that it is Ms. Arcand who wields the real discretionary decision making authority.*

**[20]** We agree with the analysis in *Heritage Inn, supra*, and add that this Board does not accept the argument that because home managers will be part of a Union, they will ignore client abuse by union members. The Union understandably took exception to this hypothesis. The Board has no hesitation in stating that it is confident, especially after hearing the evidence of Ms. Hotsko, that home managers will continue to care for their clients, in whatever manner is best for those clients.

**[21]** In regard to the Employer's "confidential exclusion" argument, pursuant to s. 2(f)(i)(B) of the *Act*, no evidence was presented which suggests that the home managers or the day program co-ordinator act in a confidential capacity with respect to the industrial relations of the Employer (see: *Heritage Inn, supra*, at p. 470).

**[22]** For the reasons outlined, we are of the opinion that the home managers and the day program co-ordinator/program director positions are properly within the scope of the proposed bargaining unit. The union filed evidence that a majority of the employees in the proposed bargaining unit support the application. Accordingly, a certification Order will issue in the usual form.

# CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 2128, Applicant v. BOARD OF EDUCATION OF THE BIGGAR SCHOOL DIVISION NO. 50 OF SASKATCHEWAN, Respondent

LRB File Nos. 069-02 & 070-02; October 18, 2002
Chairperson, Gwen Gray, Q.C.; Members: Clare Gitzel and Bruce McDonald

For the Applicant: Harold Johnson
For the Respondent: LaVonne Black

**Unfair labour practice – Interference – Communication – Direct bargaining – Board finds employer's public dissemination of contents of final offer prior to presenting offer to union constitutes direct challenge of union's statutory bargaining authority – Board finds employer violated of s. 11(1)(c) of *The Trade Union Act* and issues declaratory order.**

**Unfair labour practice – Intimidation – Board finds employer's public dissemination of individual employees' rates of pay has effect of intimidating or coercing employee of average fortitude in exercise of right to strike – Board finds employer violated s. 11(1)(a) of *The Trade Union Act* and issues declaratory order.**

**Unfair labour practice – Interference – Communication – Board finds employer's letter to employees explaining proposals in final offer did not meet standard of fair and accurate explanation – Board finds employer violated s. (11)(1)(a) of *The Trade Union Act* and issues declaratory order.**

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

## REASONS FOR DECISION

### Background

**[1] Gwen Gray, Q.C., Chairperson:** The Canadian Union of Public Employees, Local 2128 (the "Union") alleges in LRB File No. 069-02 that the Board of Education of the Biggar School Division No. 50 (the "Employer") by letter interfered with, restrained, intimidated, threatened or coerced employees in the exercise of a right conferred by *The Trade Union Act,* R.S.S. 1978, c. T-17 (the *"Act"*); failed or refused to bargain collectively with the Union; and, used coercion or intimidation with a view to discouraging activity in or for the Union. The Union relies on ss. 11(1)(a), (c) and (e) of the *Act.* The Employer denies the allegations in its Reply.

**[2]** In LRB File No. 070-02, the Union alleges that the Employer, by a communication, interfered with, restrained, intimidated, threatened or coerced employees in the exercise of rights conferred by the *Act* and failed or refused to bargain collectively with the Union by publishing to the employees and the general public the terms of the Employer's final offer. The Union relied on ss. 11(1)(a), (c) and (e). The Employer denies the allegations in its Reply.

## Facts

**[3]** The parties to this dispute have been engaged in a very difficult round of bargaining that resulted in a strike by the Union. The strike began on February 4, 2002 and was continuing at the time of this hearing in July 2002. The employees covered by the collective bargaining agreement are teacher assistants, school secretaries, library assistants, caretakers and maintenance staff. The parties have engaged in collective bargaining for thirty years without any strikes or lock-outs.

**[4]** Mr. Bill Robb, national representative for the Union, is the Union's chief negotiator. He testified that the Employer placed an advertisement in the local newspaper, which was circulated in the community on March 3, 2002, setting forth its bargaining position on various issues and inviting the public to obtain copies of the Employer's "final offer" from the its offices, along with a list of employees who possess post-secondary qualifications sufficient to entitle them to additional pay under the Employer's proposal. The list included the names and the proposed pay for each qualified employee.

**[5]** According to Mr. Robb, the Union's bargaining committee was surprised to read the advertisement as the Union had not yet seen the Employer's final offer. As well, the Union took issue with the Employer's characterization of the strike and with its omissions. For instance, Mr. Robb noted that the advertisement did not mention that the Union had made offers that were rejected by the Employer. Mr. Robb also complained that the advertisement did not mention the substance of the strike – that the Employer was proposing a total re-write of the collective agreement that had been in existence for 30 years. Mr. Robb characterized the Employer's approach to this round of bargaining as an attempt to treat the Union as though it was a newly certified bargaining unit. The Employer requested concessions in many areas of the agreement.

**[6]** Mr. Robb pointed out the following inaccuracies in the written communication:

(1) The Employer stated that its final offer was based on the current agreement's language and format. The Union claims that all the provisions have been rewritten and basic rights that existed for 30 years were stripped away.

(2) The Employer stated that it had offered to refer the collective bargaining issues to binding arbitration. Mr. Robb testified that this statement was true, but that it omitted to say that binding arbitration is rarely used in this sector or to acknowledge that the Union has the right to bargain freely. Mr. Robb felt that, given the extreme positions taken by the Employer, it was too risky for the Union to accept binding arbitration. Furthermore, he objected to the negative light in which this statement cast the Union.

(3) The Employer stated that it recognized the importance of seniority and its proposals recognize seniority as a factor in appointments, layoff and recalls. And further, it stated that its proposals would not change the way that seniority is earned or lost by employees. Mr. Robb explained that seniority was the key issue in the dispute and that there was an attack on the principles of seniority throughout the Employer's proposals.

(4) The Employer listed a number of provisions that the Union had rejected. According to Mr. Robb, some of these items were merely housekeeping items of no consequence to the overall bargaining; some provisions listed were already agreed to by the Union; some were disagreed with because they did not meet the requirements of labour statutes; some proposed new wording for clauses that had been in existence and worked well for 30 years; some misrepresented the nature of the Employer's proposals (particularly the seniority proposals).

(5) The Employer claimed that seniority would be calculated in the same manner as before. Mr. Robb noted, however, that the Employer's proposal would limit seniority rights to permanent employees, and would not grant seniority rights to temporary employees. He noted that currently, when temporary employees become permanent, their seniority calculation goes back to the beginning of their temporary employment.

(6) The fundamental change in the Employer's proposal was the requirement to consider the interests of the child first when making decisions on lay-off and reclassification. This proposal was viewed by the Union as implying that the employees did not care about the needs of children. In addition the proposal had not been made to the Union prior to the advertisement appearing in the newspaper.

(7) The Employer proposed that job descriptions be current. Mr. Robb noted that the existing collective agreement permits the Employer to prepare job descriptions and present them to the Union. The Employer had not done so and it was difficult for the Union to understand why this point became an issue when the Employer was responsible for preparing up-to-date job descriptions. The Employer proposed that it be permitted to unilaterally adopt new job descriptions, after consultation with the Union. Currently, it is required to negotiate the changes with

the Union. The Employer described this process of negotiation as the Union having a "veto."

(8) The Union claims the Employer misrepresented its bargaining proposal on the cost-sharing of benefit plans.

(9) The Employer claimed that its monetary offer was competitive with other school divisions. Mr. Robb testified as to various settlements in other school divisions to demonstrate that the Employer's offer was less than what had been received in other divisions.

(10) The Employer proposed letters of understanding granting job security to employees who are not currently qualified. The Union claims that the term "qualified" was different wording than had been presented to the Union. Mr. Robb explained that this provision provided little comfort to employees in exchange for them giving up their existing bargaining unit wide seniority on promotions, transfers, demotions and recalls.

(11) There was a vagueness to the Employer proposals to grandfather existing employees who did not meet the newly imposed "qualifications."

(12) The Union disputed the Employer's claim that its offer was fair and competitive.

(13) The Union's bargaining committee had not been provided with a copy of the Employer's final offer before it was made available to the public. In addition, it had not been informed of the employees who would be considered "qualified" and entitled, under the Employer's proposal, to premium pay. These lists were made available to the public and caused discomfort to members of the Union whose salaries were now broadcast throughout the community. Mr. Robb also noted that the list was inaccurate and made such insensitive errors as excluding the president of the local union.

**[7]** Mr. Robb received his copy of the final offer from Mr. Randy Fox, director of education, by fax on March 6, 2002. The Employer anticipated that the final offer would be put to a Board directed vote among the members of the Union although, at that time, no application had been made to the Board seeking such an order.

**[8]** On April 15, 2002, the Employer sent a letter to union members, with a copy to Mr. Robb, containing a "detailed explanation of significant changes the Board of Education is proposing in its final offer." By that time, the Board had ordered a vote be conducted on the final offer and April 18, 2002 was the date set for the vote.

**[9]** Mr. Robb noted that the document was a subjective interpretation of the final offer and did not stick to simply presenting factual information to the striking employees. He gave the following examples:

> (1) Article 1.01 – the Employer's document suggested that the phrase in the existing Article 1.01 "and hereby agrees to negotiate with the Union, or any of its authorized committees, concerning all matters affecting the relationship between the parties, aiming towards a peaceful and amicable settlement of any differences that may arise between them" was "unnecessary and has never been used by the Union."
>
> (2) Article 2.01 – the Union placed a different interpretation on the Employer's proposal to subject the non-discrimination clause to the phrase "subject to any order or approval of the Human Rights Commission." The Union noted that the terms of the affirmative action plan have been negotiated between the Union and the Employer and such appointments are not "discriminatory" by definition. The Union viewed the Employer's proposal as an attempt by the Employer to unilaterally choose positions for affirmative action hiring. The Employer's comments suggested that they were trying to prevent the Union from grieving the hiring of aboriginal employees.
>
> (3) Article 5.07 and 5.08 – The Employer claimed that it was updating the maternity, parental and adoption leave provisions to bring them in line with current law and that, where the existing language was "better than" existing law, the language was retained. The Union noted that the Employer's proposal deleted the phrase "without pay but with retention of seniority for pregnancy" thereby raising some doubt about the accrual of seniority during pregnancy leaves.
>
> (4) Article 6.01 – The Employer explained its proposal by saying it wanted to limit the Union's rights to grieve matters that were outside the terms of the collective agreement, such as mill rates, educational decisions, policies of the Employer. The Union noted that the current wording was broader, but it had not resulted in irresponsible filing of grievances.
>
> (5) Article 8.01 – The Employer indicated in its document that the manner of calculating seniority was not changed in its document. It insisted that the Agreement had only been applied to permanent, as opposed to temporary, employees. It also indicated that the words "promotion" and "demotion" were deleted as there were no positions falling within the scope of these terms. The Union took issue with the claim that seniority is acquired and lost in the same manner as before as the proposed clause restricted seniority rights to permanent employees. The Union also disputed the claim that there were no positions to which employees could be "promoted" or "demoted."
>
> (6) Article 9.02 – The Employer proposed that the Article be revised to clarify that the agreement only applies to "permanent" positions. The Union disputes this interpretation.
>
> (7) Articles 9.02 & 9.03 – The Employer proposed to standardize wording in the posting and promotions clauses by referring to "required qualifications, knowledge,

formal education, skills and abilities." The Union acknowledged that all of these words had been used in the existing 9.02 and 9.03, but the effect of using them as a phrase in Article 9.03 seriously diluted the role of seniority in promotions. Mr. Robb referred to the Employer's explanation as a "thin veil of logic."

(8) Article 9.03 – Appointments – The Board proposed that both the Employer and the Union recognize "the fundamental need to staff schools to meet the needs of children" as a preamble to the appointment clause. Further, the Employer argued that its proposals for the clause as a whole was the "most common approach" found in collective agreements. Mr. Robb disputed the last assertion and suggested that the Employer glossed over the effect of its proposed changes which, in his view, seriously eroded the role of seniority in filling vacancies and new positions. In addition, the Employer did not point out to staff that the proposal only applied to vacancies and new positions and did not apply to "staff changes, transfers, promotions" as described in the existing collective agreement.

(9) Article 10.01 – Recall – The Employer explained that it wanted to standardize the wording used in the promotions, vacancies and recall clauses by using the words "required qualifications, knowledge, formal education, skills and abilities" to replace the current phrase "provided they are qualified to do the work." Mr. Robb complained that the Employer did not define "qualifications." He suggested that the proposal attempted to weaken the seniority provisions and was a "take away."

(10) Article 10.05 – Staff Reassignment or Lay Off – The Employer proposed language that would displace the least senior employee "provided that the particular education or developmental needs of any affected pupil are met to the satisfaction of the Director of Education." The Union protests that the Employer's fear is unjustified as its members have responded positively to the Employer's requests for such accommodations in the past.

(11) Article 13.01 – Sick Leave Defined – The Employer explained its proposal by stating that the language was intended to bring the Article into line with changes to provincial laws. The provision excluded sick leave benefits for accidents covered by *The Automobile Accident Insurance Act*. Mr. Robb explained that this *Act* does not prevent employees from receiving sick leave benefits from their employer. He accused the Employer of providing an inaccurate and misleading reason for proposing the change.

(12) Article 14.03 – Part-time Employees – The Employer suggested that the change in terms for part-time employees was required because of insurance plan eligibility requirements which, it claimed, the Employer and Union cannot change. The Employer noted that insurance companies may cancel insurance if the collective agreement created conditions different from the insurance policy. Mr. Robb testified that the SSTA plans provide benefits for part-time workers who work more than 15 hours in a week. He noted that the Employer added the word "permanent" in front of "part-time" in order to exclude temporary part-time employees from this coverage. He concluded that this proposal violated the requirements of *The Labour Standards Act,* which requires pro-rated benefits for employees who work 15 hours per week or more.

(13) Article 15.01 – Job Descriptions – The Employer commented that "the Board has proposed a revision to this Article to ensure that the employees and the Union have the opportunity to have input into any change to job descriptions." Mr. Robb took issue with the Employer's characterization of the proposed change as the existing clause permitted negotiations over job descriptions. The proposed provision only permitted the Union to comment on proposed job descriptions. In his words, the Union would enjoy far less input than it currently enjoyed.

(14) Article 15.03 – Changes in Positions – The Employer indicated that the wording change proposed for this clause was required by the *Act* and the certification Order. Mr. Robb pointed out that, in fact, the wording change deleted the provision allowing for reclassification of employees when their job duties changed and this provision has nothing to do with the *Act.*

(15) Article 16.03 – Employee Benefits Plan – Mr. Robb alleged that the Employer's comment that "failure to address the recent Revenue Canada ruling would result in the maximum tax implications being imposed on all employees" was misleading.

(16) Article 19.01 – Present Conditions to Continue – The Employer indicated that it proposed a change to ensure that the Article applies to the existing agreement. The Union noted that the wording change had the effect of subverting the entire purpose of the clause as it required the present conditions to be provided for in the Agreement.

(17) Article 19.02 – Continuation of Acquired Rights – The old provision required the renegotiation of the agreement in the event of an amalgamation. The renegotiations could be requested by either party. The Employer's proposal deleted this aspect of the provision. In its explanation, the Employer suggested that the topic was covered by the provisions contained in s. 37 of *The Trade Union Act.* The Union disputed the Employer's interpretation of s. 37 and noted that the question looms large for its members because of the trend toward amalgamation of school divisions.

(18) Article 20.06 – Permanent Part-time Employees – The Union complained that the Employer failed to note that its proposal restricted the assignment of additional hours to "permanent" part-time employees. The Employer also added the phrase "required qualifications, knowledge, formal education, skills and abilities" in place of "qualifications and ability."

(19) Schedule "A" – Salary Grids – The Employer's explanation of its wage offer stated "The Board has offered a sum of money which will be distributed between the enhanced group benefits, the existing grid and the Union's proposal of a 'pay equity' adjustment for School Secretary, Teacher Assistant and Library Assistant classification." The Union complained that the rates actually contained in the final offer did not contain any pay equity adjustments. In addition, the communication contained information on the types of qualifications the Employer would accept under its proposal to pay a premium. The Union had not been provided this information before the publication of the document.

(20) Letters of Understanding #1, 2, 3 – Mr. Robb complained that these letters were newly offered by the Employer and differed from the information provided in the earlier advertisement.

**[10]** The Employer pointed out that at the hearing of the application for final offer vote, it filed a draft letter that it intended to present to employees in the district. It suggested that the Union had prior knowledge of the intended communication and that it was informed of its content prior to the communication being sent to its members. Mr. Robb testified that the content of the April 15, 2002 communication was not entirely identical to the earlier draft letter filed on the application for final offer vote. He noted, for instance, that the earlier version did not contain a listing of the qualifications that would attract premium pay and that no disclosure of the Employer's position on this issue had taken place at the bargaining table.

**[11]** The Employer also noted that the Union had disseminated material throughout the community relating to the strike issues.

**[12]** Mr. Randy Fox, director of education, testified for the Employer. Mr. Fox stated that the Board placed the advertisement in the newspaper to inform the general public of the Employer's final offer and to counter the Union's communications. Mr. Fox noted that the Employer was expecting that an application for final offer vote would be made within days of the advertisement and the Employer felt it necessary to communicate its final offer to members of its public. He testified that the opinions contained in the advertisement were the honestly held views of the Employer. The Employer did not send copies of the final offer to members of the Union but did provide them with copies if Union members requested them. Mr. Fox testified that the Employer considered the personal nature of the information provided in the wage schedule which outlined which employees would be receiving the qualifications premium but the Employer still thought it was important to publish the information to the community as a whole.

**[13]** Mr. Fox also stated that the direct communication to the Union membership was intended to explain the Employer's final offer to employees. The Employer did not intend to negotiate directly with the employees, but only wanted to explain the significant changes it was proposing in the collective agreement so the employees would hear both sides of the arguments. Mr. Fox did not argue that the communication was directed at correcting false or misleading statements made by the Union. He also acknowledged that the phrase "the fundamental need to staff schools to meet the

needs of the children" was not in any proposal that the Employer had presented to the Union in negotiations.

## Relevant Statutory Provisions

**[14]** Section 11(1)(a), (c) and (e) 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;*
> >
> > . . .
> >
> > *(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;*

## Analysis

**[15]** Employer communications during negotiations are permitted under the *Act* provided the communication does not amount to direct bargaining, does not attempt to undermine the Union's status as the employees' exclusive bargaining agent, and does not interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of rights conferred by the *Act*: see *Retail, Wholesale and Department Store Union v. Canadian Linen Supply Limited,* [1991] 1st Quarter Sask. Labour Rep. 63, LRB File No. 029-90 at 67.

### The Advertisement and Related Materials

**[16]** The Employer made the final offer documents, along with the list of employees who qualified for premium pay and their proposed pay rates, available to the public and members of the Union before the final offer was presented to the Union. The Union was unaware of the details of the Employer's proposal offering premium pay for unspecified "qualifications" until it received a copy of the employee list that was handed out along with the final offer.

**[17]** We find that the Employer violated s. 11(1)(c) by making the final offer and the related materials available to the public before it was brought to the bargaining table. There are two objectionable aspects to this conduct. First, it demonstrates a lack of respect for the role of the union. Through the certification process, employees have signaled their desire to be represented in negotiations with the employer exclusively by a union. By making direct appeals to the membership of a union, the employer is directly challenging the statutory role of the union and rendering it less effective as a bargaining agent for employees in the bargaining unit.

**[18]** Second, by engaging in such conduct, the employer does not display an intention to negotiate with the union with a view to concluding a collective agreement. When an employer takes its proposals directly to union members, the employer is skirting its obligation to engage in a rational discussion and debate at the bargaining table. It is also placing the union in an unfair position with respect to its members by not disclosing its entire bargaining position to the union at the bargaining table and, as a result, not providing the union with an opportunity to consider and make an informed response to the employer's proposal.

**[19]** Such conduct has consistently been found to violate the duty to bargain in good faith (s. 11(1)(c)): see, for example, *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Western Grocers, a division of Westfair Foods Ltd.,* [1993] 1st Quarter Sask. Labour Rep. 195, LRB File No. 168-92; *Saskatchewan Government Employees Union v. Saskatchewan Liquor Board,* [1985] May Sask. Labour Rep. 35, LRB File Nos. 443-83 & 485-83.

**[20]** The Employer argued that the lapse was minor as the Union was provided with copies of the final offer shortly after the publication of the advertisement. In our view, this is insufficient to overcome the problem caused by disclosing bargaining positions away from the bargaining table. Collective bargaining is conducted at a bargaining table to permit both parties to engage in rationale discussion and debate about the merits of each other's proposals with the hope that compromises can be reached and a collective agreement concluded. This cannot occur if bargaining takes place in the press or directly with employees and without consideration for the role of the Union.

**[21]** The Employer also argued that it was entitled to inform the public of the status of negotiations, the proposals that it has made to the union and its version of the reasons for any breakdown in the negotiations. We would agree with this submission; however, as noted in many cases, the Employer must be careful not to engage in direct bargaining through its communications: see *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Westfair Foods Limited,* [1995] 2nd Quarter Sask. Labour Rep. 234, LRB File Nos. 246-94 & 291-94.

**[22]** The Union also complained that the information contained in the advertisement did not meet the additional standard for permissible communications – that it must be fair and accurate and not misleading. We find that the content of the advertisement does meet the requirements for permissible communication. The Employer set out its bargaining position in a generally accurate manner and it did not speak in disparaging tones about the Union or its bargaining committee.

**[23]** The Union objects to the slant taken by the Employer in its communication and the accuracy of some of the statements made by the Employer. No doubt the Employer did put forth its position in a light that was irritating to the Union. In any strike or lock-out situation, the bargaining positions of both sides have predictably hardened and this is reflected in their communications and in their assessment of the communications generated by the opposing side. In this case, the Employer placed a slant on its communications that was slightly exaggerated in its overall tone, but not to the point of

constituting a significant misrepresentation of either its position or the Union's. In these circumstances, we would not find that the advertisement breached the requirements of s. 11(1)(a) or (c) based strictly on its contents.

**[24]** A second problem, however, arises from the Employer's decision to release lists of the names of employees who qualified for premium pay under its proposals to members of the public and to the employees. We have already found that this conduct violated s. 11(1)(c) of the *Act* because it amounts to direct bargaining. Section 11(1)(a) also prohibits the Employer from engaging in conduct that interferes with, restrains, intimidates, threatens or coerces an employee in the exercise of a right conferred by the *Act*. The Board will consider a number of factors in assessing whether a communication crosses the line from the dissemination of information to unlawful interference. These factors were summarized by the Board in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Yorkton Credit Union Ltd.*, [1997] Sask. L.R.B.R. 454, LRB File No. 090-96 at 460, as follows:

> *A somewhat similar approach is reflected in the following comment of the Ontario Labour Relations Board in Forintek Canada Corp. v. Public Service Alliance of Canada, [1986] OLRB Rep. 453, at 474:*
>
> > *In assessing whether employer communications during or in relation to collective bargaining go beyond the bounds of permitted speech into the realm of prohibited interference, the Board has considered whether they reflect an attempt to explain the position the employer has taken at the bargaining table or, rather, an attempt to disparage the union or its proposals. The Board looks at the context, content, accuracy and time of employer communications in discerning their purpose and effect. Communications made after good faith bargaining has reached an impasse are less suspect than those made during early stages of bargaining, accurate statements are less suspect than inaccurate ones and, in any event, communications of explanations or positions not first fully aired at the bargaining table are highly suspect.*

**[25]** This strike is taking place in the context of a small rural community where members of the bargaining unit are known to other members of the community. The Employer could not provide a specific justification for publishing the individual proposed salaries of the "qualified" employees, although Mr. Fox testified that the Employer did consider the effect of the release of this information on the individual employee. In our view, the Employer had many alternative methods of providing this information to the public that did not entail the disclosure of individual salaries.

**[26]** It would appear to the Board that the Employer used this communication as a mechanism for applying pressure to the individual employees that would result from the publication of their potential salaries in the small rural community. Perhaps the Employer thought that the information would cause employees to encourage the Union to settle the strike. In our view, in the context of this strike, the Employer's conduct would cause a reasonable employee of average fortitude to feel intimidated or coerced in the exercise of the right to strike. As a result, we find that the Employer's dissemination of materials relating to premium pay constitutes a violation of s. 11(1)(a).

**The April 15, 2002 Letter and Materials**

**[27]** In relation to the April 15, 2002 materials that were disseminated to employees prior to the conduct of the final offer vote, the Union led evidence to support its position that the Employer misrepresented its bargaining position in a significant manner in these materials. The Employer takes the position that in the context of a final offer vote, it is entitled to present its side of the bargaining to employees in an attempt to convince them to vote in favour of the final offer.

**[28]** The Employer's purpose was to provide information to employees about its proposals prior to the employees voting on a final offer vote. In itself, this is not an improper motive. However, as we have stated above, in the course of presenting such evidence, the Employer must ensure that the information is fair and accurate and not misleading: see *International Brotherhood of Electrical Workers, Local 2067 v. Saskatchewan Power Corporation,* [2000] Sask. L.R.B.R. 30, LRB File No. 207-98.

**[29]** We have reviewed the various points raised by the Union in its evidence and find that the Employer did misrepresent its bargaining position in several respects. Without reviewing all of the evidence in detail, we find that the Employer's statements pertaining to the question of seniority for permanent versus temporary employees was inaccurate; that its description of the benefit problem for part-time employees was stated in a manner that did not fairly reflect the problem or explain it in such a manner that a reasonable employee would understand it, without fear that coverage would be lost if the Employer's proposal was not accepted; that the "changes in positions" article inadequately explained the Employer's position and misled employees as to the reason for the change; that the Employer provided an inadequate explanation of the changes it desired with respect to the cost-sharing of benefit plan premiums and left the impression for the reasonable employee of dire, but unexplained, tax consequences. There are other examples that could be stated, but, in general, we

find that the Employer's April 15, 2002 document did not provide a fair and accurate explanation of the Employer's proposals.

**[30]** The Employer argued that in other jurisdictions, a town hall type of debate is permitted between the Employer and Union in the period prior to a Board ordered final offer vote. In this context, it was suggested that the Employer should have more leeway in trying to persuade employees to vote in favour of the final offer. Any misstatements could be corrected by the Union in its internal communications to members.

**[31]** We do not think that any special rules are required regarding Employer communications with employees at the time of a Board ordered final vote. The principles of the *Act* still apply – that is, the Employer must not engage in conduct that takes advantage of the power imbalance between employees and the employer in order to convince employees to vote in favour of the final offer. This does not prevent an Employer from explaining its proposals to employees prior to the vote, provided, as we have indicated, the explanation is fair and accurate and not misleading.

**[32]** The Employer did not meet this standard in its April 15, 2002 materials. As a result, the Board finds that the Employer violated s. 11(1)(a) in disseminating the materials.

## Conclusion

**[33]** The Board finds that the Employer violated s. 11(1)(c) by publishing the advertisement containing the final offer and information pertaining to employees who would qualify for the Employer's proposed premium pay, without bargaining collectively with the Union with respect to the final offer. The Board finds that the Employer violated s. 11(1)(a) by disclosing the names and individual salaries of employees who would qualify for the proposed premium pay to members of the public. The Board finds that the Employer's materials of April 15, 2002, which were sent to employees prior to the Board ordered vote on the Employer's final offer, did not contain fair and accurate explanations of the Employer's proposals and constitute a violation of s. 11(1)(a) of the *Act.*

**[34]** An Order will issue accordingly.

**[35]** The Board noted that both chief negotiators appeared to have lost the ability to discuss bargaining issues in a coherent and rational manner without personal animosity. We would remind the spokespersons of their obligation, both to their constituents and to each other, to keep discussing bargaining issues and to focus on the need to achieve a collective agreement.

# INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 2038, Applicant v. TESCO ELECTRIC LTD., Respondent

LRB File No. 135-02; October 18, 2002
Vice-Chairperson, James Seibel; Members: Mike Carr and Donna Ottenson

For the Applicant: Angela Zborosky
For the Respondent: Larry B. LeBlanc, Q.C.

**Construction Industry – *Construction Industry Labour Relations Act, 1992* – Definition of "construction industry" – Board finds that "construction industry" includes maintaining industrial plant.**

**Appropriate bargaining unit – Construction industry – Board finds no compelling reason to depart from standard craft bargaining unit description.**

**Certification – Statement of employment – Electrical trade division unit does not include individuals not qualified in the trade – Board removes unqualified individuals from statement of employment.**

**Construction industry – Appropriate bargaining unit – Statement of employment – Individuals who are not qualified in the trade not included in electrical trade division – Board removes individuals from statement of employment.**

**Construction industry – Appropriate bargaining unit – Board finds that appropriate bargaining unit for compulsory apprenticeship trade does not include welders or helpers not qualified in the trade.**

*The Trade Union Act*, ss. 5 (a), (b) & (c)
*The Construction Industry Labour Relations Act, 1992*, s. 2(e)

## REASONS FOR DECISION

### Background

**[1] James Seibel, Vice-Chairperson:** The International Brotherhood of Electrical Workers, Local 2038 (the "Union") applied to be certified as the bargaining agent for the "standard" bargaining unit of employees in the construction sector of the electrical trade employed by Tesco Electric Ltd. (the "Employer" or "Tesco") as follows:

> *journeyman electricians, electrical apprentices, electrical workers and electrical foremen employed by Tesco Electric Ltd. in Saskatchewan south of the 51st parallel*

**[2]** The Employer is almost exclusively engaged in the construction, repair and maintenance of equipment and systems pursuant to a contract with IPSCO Inc., a producer of steel and steel pipe in Regina.

**[3]** The parties disagree over the statement of employment for the purposes of determining the level of support for the application and the appropriateness of the standard bargaining unit in this case – that is, whether it should be the standard unit or a unit of all employees. The Employer's position is based, first, on the fact that the Employer's work is primarily maintenance and repair, rather than construction in the conventional sense. Second, while the Employer has employees who are certified as full journeyman electricians or are indentured electrical apprentices under apprenticeship and trade certification legislation, it also has employees who are certified as journeyman, registered as apprentice welders, or are helpers. All of them often work with the electrical personnel. The Employer suggests that a bargaining unit of all employees is the appropriate unit.

**[4]** In its application filed on July 24, 2002, the Union estimated there were seventeen (17) employees in the proposed standard electricians bargaining unit. The Employer filed a statement of employment listing all of its employees, including an administrative office clerk. Following is a list of the names, occupational classification and status with the Saskatchewan Apprenticeship and Trade Certification Commission of each of the thirty-one (31) employees listed by the Employer:

| Name | Classification | Trade Status |
|---|---|---|
| Terry Ellis | Electrical/Mechanical Foreman | Journeyman Electrician |
| Tim Archer | Journeyman Electrician | Journeyman Electrician |
| Bob Hydamacka | Journeyman Electrician | Journeyman Electrician |
| Leo Carteri | Journeyman Electrician | Journeyman Electrician |
| Ryan Moffat | Journeyman Electrician | Journeyman Electrician |
| Ken Novak | Journeyman Electrician | Journeyman Electrician |
| Marlowe Pilsner | Journeyman Electrician | Journeyman Electrician |
| Conrad Saager | Journeyman Electrician | Journeyman Electrician |
| Greg Selinger | Journeyman Electrician | Journeyman Electrician |
| Kevin Wagman | Journeyman Electrician | Journeyman Electrician |
| Bill Wenarchuk | Journeyman Electrician | Journeyman Electrician |
| Dave Wenarchuk | Journeyman Electrician | Journeyman Electrician |
| Chris Oswald | Journeyman Electrician | Journeyman Electrician |
| Alvin Lebruno | Apprentice/Helper | Electrical Apprentice |
| Darcy Mathieson | Apprentice/Helper | Electrical Apprentice |
| Steve Romanow | Apprentice/Helper | Electrical Apprentice |

| Name | Classification | Trade Status |
|---|---|---|
| Dave Donovan | Apprentice/Helper | Electrical Apprentice |
| Jason Sebastian | Apprentice/Helper | Electrical Apprentice |
| Leonard Arnold | Apprentice/Helper | No record |
| Mickey Schauenberg | Apprentice/Helper | Inactive June, 2001[1] |
| Dustin Tessier | Apprentice/Helper | No record[2] |
| Shaun Kerbs | Electrical/Mechanical Worker | Welder |
| Danny Korsherg | Electrical/Mechanical Worker | Welder |
| Mike Oswald | Electrical/Mechanical Worker | Welder |
| Mike Spanier | Electrical/Mechanical Worker | Welder |
| Kris Vancha | Electrical/Mechanical Worker | Welder |
| Trevor Wirth | Electrical/Mechanical Worker | Welder |
| Clayton Romanow | Electrical/Mechanical Worker | No record |
| Brock Sebastian | Electrical/Mechanical Worker | Welder Apprentice |
| Troy Tait | Electrical/Mechanical Worker | Welder Apprentice |
| Sharon Melnick | Administrator | Not applicable |

**[5]** The Union's position is that the employees beginning with "Leonard Arnold" to the end of the list have no status in the electrical trade and are not part of the proposed bargaining unit. The Union also disputes the inclusion of Terry Ellis on the basis that he is a manager, Bob Hydamacka on the basis that he is a contractor to the Employer, and of Greg Selinger on the basis that he does not work for the Employer.

**[6]** The Board heard the application on September 3, 2002.

## Evidence

### Stan Shearer

**[7]** Stan Shearer has been the business manager and financial secretary of the Union for about ten years. A joint council of IBEW Local Nos. 2038 (the Applicant Union) and 529, affiliates of the Saskatchewan Building Trades Council, has established the right to bargain collectively on behalf of the unionized employees in the electrical trade division of the construction industry, respectively south and north of the 51st parallel. Other IBEW locals represent workers in the trade outside the construction industry, such as public utility workers. IBEW Local Nos. 2038 and 529 each operate a

[1] Failed to complete educational requirement.

[2] Applied to become indentured as an electrical apprentice after the application for certification was filed, but before hearing.

hiring hall, dispatching members according to the rules in the provincial collective agreement for the electrical trade division in the construction industry (the "provincial electrical agreement").[3]

**[8]** Mr. Shearer testified that the electrical trade is a compulsory apprenticeship trade pursuant to apprenticeship and trade certification legislation, whereas the welding trade is a voluntary apprenticeship trade. To become licensed to perform the full range of the work of the electrical trade one must have completed a prescribed course of technical study, training and apprenticeship, and successfully complete qualifying examinations leading to certification as a journeyman. Only persons with the following status may work in the electrical trade: those holding a journeyman electrician certificate; those indentured as an apprentice in the trade or intending shortly to become indentured as an apprentice; and those "grandfathered" to work without certification when the trade became a compulsory apprenticeship trade in 1976. Mr. Shearer testified that the Union's membership comprises only persons with such status. According to Mr. Shearer, persons with the latter two types of status – that is, those intending to apprentice or those who are grandfathered – are within the classification of "electrical worker" in the standard bargaining unit description for the trade.

**[9]** Mr. Shearer testified that Tesco's employees perform capital construction and maintenance work at IPSCO. He said that IPSCO has its own maintenance staff of perhaps 150 employees, including electricians and other trades, who are members of a local of the United Steelworkers of America, which also represents production and office employees at the plant. He said there are other contractors working for IPSCO who are unionized by various craft trades.

**[10]** In cross-examination, Mr. Shearer stated that the Union was certified to represent employees of other employers engaged in maintenance work. He reiterated his testimony that the Union does not represent persons who have no status in the electrical trade. He stated that the apparent reference in the scope clause of the provincial electrical agreement to persons other than journeymen or apprentice electricians encompasses only those within the classification of "electrical worker" as explained in his evidence in chief.

[3] The present agreement is for the term from May 1, 2001 to April 30, 2003.

**[11]** Mr. Shearer testified in cross-examination that he believed that Bob Hydamacka worked for another contractor – C & R Electric – rather than the Employer, that submitted remittances on his behalf to the Union's benefit plans.

**[12]** Mr. Shearer said that some years ago the Employer had agreed to obtain workers from the Union's hiring hall. He referred to a letter dated May 13, 1991, received by the Union from the Employer. The letter reads, in part:

> *This will confirm our discussions of the last few days, at which time it was agreed that Tesco Electric Ltd. when requiring additional manpower will contact the Local Union Office and hire I.B.E.W. members, if available, under the terms and conditions agreed to in September, 1990 and updated February, 1991.*

**[13]** Mr. Shearer said that the Employer had not honoured the agreement referred to in the letter for at least five or six years. In cross-examination, he agreed that it referred to a project to expand the pipe mill at IPSCO.

**Ken Novak**

**[14]** Ken Novak has been a journeyman electrician for some forty years. He is also a journeyman welder. He was employed by the Employer at the IPSCO site for about nine years, left to work for other employers for some three years and has worked for the Employer for about the past three years. He testified for the Union. Mr. Novak described himself as a foreman or lead hand supervising the Employer's staff in the rolling mill and motor room area of the IPSCO plant. Mr. Novak used to do both electrical and welding work for the Employer; he now does only electrical work.

**[15]** Mr. Novak supervises five electricians – Tim Archer, Bill Wenarchuk, Steve Romanow, Dave Donovan and Jason Sebastian – and another employee, Mickey Schauenberg, who does the welding for the electricians. Another foreman, Leo Carteri, supervises the Employer's staff in the melt shop area.

**[16]** Mr. Novak testified that he receives work orders from IPSCO and assigns personnel to carry out the work. The work includes new construction, repairs and maintenance. For example, in the last few months he has been installing a programmable logic controls system for the automatic lubrication of equipment, as well as working on preventative maintenance and repair of electric

motors, overhead cranes and other equipment. On a motor change job, the electrician does the electrical disconnect and reconnect, but millwrights "set" the motor. He testified that he also takes orders from IPSCO's maintenance supervisors and that Tesco's employees often work "shoulder-to-shoulder" with IPSCO's maintenance personnel.

**[17]** Mr. Novak described a division of labour in his area between the electricians and the welder. He said that Mickey Schauenberg's work typically includes constructing and installing or removing brackets and hangers for conduit, making backing plates for equipment, and constructing large junction boxes. The electricians, on the other hand, install the conduit, run the cable and install and terminate the equipment. In cross-examination, he agreed that Mr. Schauenberg occasionally helps to pull a difficult cable, or disconnect a small motor if the power is turned off and changes motor brushes "even though he is not supposed to." He said that to avoid conflicts, the work must be coordinated with another contractor's ironworker employees who run piping.

**[18]** Mr. Novak believes that Tesco infrequently performs work for companies other than IPSCO, and he referred to some fabrication at Brandt Industries, and some high-voltage connection work for a contractor at the Science Center. However, he believed the former work was on behalf of IPSCO.

**[19]** Mr. Novak commented on the status of some other employees on the statement of employment. He referred to Terry Ellis as the Employer's "job superintendent or foreman or whatever you want to call him" at IPSCO. Mr. Novak said that while Mr. Ellis spends some time in the office and in the melt shop, he is seldom in Mr. Novak's area, and he usually only sees him in the locker/staff room before the start of the work day or at lunch. He did not know whether Mr. Ellis did any "hands on" electrical work. He thought that Mr. Ellis has hired some employees, but was not aware of whether he had fired anyone. He said that Mr. Ellis conducted the Employer's safety meetings and had occasionally verbally reprimanded both him and other employees for safety contraventions.

**[20]** Mr. Novak testified that Greg Selinger has not worked for the Employer for some one and a half years. He said Mr. Selinger initially worked for the Employer for about a week and then went to work for a heating, ventilation and air conditioning ("HVAC") company owned by the Employer that also had a contract with IPSCO.

**[21]** Mr. Novak testified that he has not seen Leonard Arnold on site for a few months, but that he worked with the welders in the HVAC operation.

**[22]** Dustin Tessier is the son of the Employer's principal, Barry Tessier. Mr. Novak said that Dustin, a university student in his final year of electrical engineering, has worked for him for part of the past two summers. He said that in 2002, he did electrical work, welding, and acted as a "gofer" for a period of about six weeks until a few weeks before this hearing. He said Mr. Tessier also spent some time in the Employer's office doing computer graphics work. While he did not know whether Mr. Tessier was apprenticing in the electrical trade, Mr. Novak said that some of the work he did with him was of a kind that might be credited towards an apprenticeship requirement.

**[23]** According to Mr. Novak, there are six or seven electricians, including himself, among the Union's membership who are also certificated welders. In cross-examination, Mr. Novak said that he thought that there was one member of IBEW who was solely a welder, and not an electrician at all, who he said he had met while working for another employer, but he could not recall his name.

**Leo Carteri**

**[24]** Leo Carteri has been a journeyman electrician for some twenty-five years, employed by Tesco at the IPSCO plant for about the last ten years. He described himself as the lead hand in the melt shop, distributing the work to and supervising some eight employees, including journeyman electricians or electrical apprentices Bob Hydamacka, Ryan Moffat, Marlowe Pilsner, Conrad Saager, Dave Wenarchuk, Chris Oswald and Alvin LeBruno, and also Sean Todd, who started work after this application was filed and about a month prior to the hearing. Mr. Carteri did not know whether Mr. Todd was a registered apprentice. He described the work in the melt shop as "electrical maintenance" with some new construction and projects for modernizing old equipment and systems. For example, he said his staff is presently doing the electrical work to move the high-voltage switching room to other remodeled premises.

**[25]** Mr. Carteri testified that when he needs a welder in his area, he generally calls Danny Korsherg, whom he described as the welders' lead hand. He is not sent the same welder or welders every time, but has had Clayton Romanow, Mike Spanier, Mike Oswald, Shawn Kerbs, Kris Vancha, Trevor Wirth, Troy Tait, and even Mr. Korsherg himself, attend. He said that welders' work in the melt shop includes fabricating equipment stands and brackets and supports for conduit and cable,

among other work. The welders have their own shop. He described the welders' work outside the melt shop as primarily repairing water-cooled panels. The electricians disconnect and reconnect the sensors on the panels.

**[26]** Mr. Carteri testified that Tesco does a very small amount of work at sites other than IPSCO. He said that he himself had worked away from the IPSCO site on perhaps two occasions, one of which was to repair a crane at Superior Hard Chrome.

**[27]** Mr. Carteri commented on the status of some other persons on the statement of employment. He said that Brock Sebastian transports equipment. Darcy Mathiesen is an electrical apprentice who does a lot of computer work related to security and communications, as well as some ordinary electrical work. Kevin Wagman is a journeyman electrician who normally does maintenance and repairs to the yard cranes and locomotives, but occasionally works in the melt shop when Mr. Carteri needs a hand.

**[28]** Mr. Carteri said that Greg Selinger used to work for the Employer's HVAC division, which he did not think was in operation any longer. He said that Mr. Selinger infrequently worked in the melt shop with the electricians, but he had not seen him for about a year and thought he now worked for a different company. Mr. Carteri said Leonard Arnold had been a welder with Tesco, but last saw him some six weeks before the hearing and did not know where he was now. He said that both Mr. Selinger and Mr. Arnold had done some HVAC work in the IPSCO main office and some outlying buildings.

**[29]** Mr. Carteri testified that he reports to Terry Ellis, who gives him the work assignments, although they sometimes come directly from IPSCO personnel. Marlowe Pilsner fills in as lead hand in the melt shop in Mr. Carteri's absence.

**Brian Bakken**

**[30]** Brian Bakken manages the Employer's Regina operation at IPSCO, as well as a new operation at another IPSCO steel mill in Alabama. Because of the time he spends at the new operation, he is in Regina for only three to five days every few months. Mr. Bakken, a journeyman electrician, originally completed his apprenticeship under Tesco's principal, Barry Tessier. He has worked for Tesco in some capacity for some fifteen years. As the company grew, so did his

management role. He is in charge of operations, while Mr. Tessier focuses on accounting and payroll. Mr. Bakken testified that the Employer was incorporated in 1985, and is owned by Barry Tessier, through his holding company, Tescan Holdings, which also partially owns a separate company, Tesco Industries Ltd.

**[31]** Mr. Bakken said that IPSCO is the Employer's primary client, accounting for nearly all of Tesco's work. He said that Tesco has a contract to provide the labour for electrical and mechanical services; the company uses its own tools and equipment. According to Mr. Bakken, though the scope of the work involves some construction, it is primarily maintenance and repair work, such as cleaning transformers, repairing "hot" connections, carbon injection guns, water-cooled panel connections, and crane motors. Mr. Bakken estimated that installing upgraded equipment comprises about 10 per cent of the company's work, while maintenance and repair make up the balance. While the major part of Tesco's work is in the rolling mill/motor room and melt shop areas, it also does work in the yard and outbuildings as required. Mr. Bakken said that the journeyman welders are paid the same as the journeyman electricians. The lead hands are paid the same as the journeymen.

**[32]** Mr. Bakken testified that many of the jobs undertaken by Tesco combine electrical and mechanical work that requires electricians and welders to work together. For example, pulling cable or laying heavy conduit are strenuous jobs often requiring some of the mechanical employees to assist the electricians. Likewise, he said, they work together when changing furnace transformers or replacing heavy motors, which might also involve ironworkers or millwrights from IPSCO's maintenance staff or another contractor. The Employer's welders fabricated the poles for the yard lighting and the electricians wired them. He said that Tesco's employees frequently also do odd jobs that would be considered labourer work.

**[33]** Mr. Bakken described Mr. Ellis's duties as including Tesco's day-to-day liaison with IPSCO personnel. Mr. Ellis receives the work orders and determines, in consultation with the lead hands, who is available, or who will be made available, to do the work. Mr. Ellis is paid hourly and has no authority to hire, fire or suspend, although he can make recommendations, nor is he involved in setting employees' wages. Although Mr. Ellis approves requests for vacation and other time off, Mr. Bakken can override his decisions.

**[34]** Mr. Bakken testified that while Tesco does not actively seek work from other clients, they infrequently seek out Tesco. For example, he said that Superior Hard Chrome, which also does work for IPSCO, sometimes has Tesco fix problems with its cranes. Similarly, Brandt Industries asked Tesco to pre-wire some equipment it fabricated for another of IPSCO's steel mills. To his knowledge, the high-voltage work done by Tesco at the Science Centre was the only work the company has done that was not in some way related to its relationship with IPSCO; Tesco was asked by another contractor to do the work because of its high-voltage experience.

**[35]** Regarding the May 13, 1991 letter referred to by Mr. Shearer, Mr. Bakken testified that it concerned projects at IPSCO for the construction of a new pipe mill and the installation of equipment in a new spiral mill. The Union had lost the vote in a certification application the year before.[4] Tesco was going to work on the new projects for which it required additional personnel, but it did not want them to be considered by the Union as part of its ordinary complement involved in performing the work on its maintenance contract with IPSCO. It agreed with the Union to obtain the additional personnel from the Union's hiring hall on the condition that the Union would not attempt to use them to certify the company. Mr. Bakken denied that the letter had anything to do with the present circumstances, and was related only to the special projects.

**[36]** Mr. Bakken testified that Bob Hydamacka has been with Tesco since the company started up. He works as a lead hand on new construction and project work. Mr. Bakken said that at one time Mr. Hydamacka had a company through which he provided his services, but that he has been a direct employee of Tesco for some time.

**[37]** Mr. Bakken said Mickey Schauenberg originally started with the Employer in 1990 as an apprentice electrician. However, since June 2001, his indentured status has been terminated through a failure to complete certain educational requirements. While he now welds in the motor room area, he occasionally changes the brushes on rotating machinery.

**[38]** Mr. Bakken testified that Dustin Tessier is in electrical engineering at university, and that it is expected that one day he will be a valuable asset for the Employer. He has worked for the

[4] LRB File No. 267-89

Employer for at least a part of each of the past four summers. Mr. Bakken said that Mr. Tessier intends to become a journeyman electrician, had filed his application to apprentice the week before the hearing, and had submitted his hours worked for Tesco for credit towards his apprenticeship requirement.

**[39]** Mr. Bakken testified that Tesco began doing some HVAC work at IPSCO about five years ago. He said that Greg Selinger and Leonard Arnold have been part of Tesco's HVAC division since June 6, 1999 and November 8, 1999 respectively. Mr. Selinger was the electrician for the group. In 1999 Tesco was competing with another contractor for the HVAC work. IPSCO divided the work between Tesco in the rolling mill and the other contractor in the melt shop. After one year, Mr. Bakken said, IPSCO felt that Tesco did not have a big enough HVAC work force and it gave all the HVAC work in the rolling mill and the melt shop to the other contractor, but gave Tesco the HVAC work in the outbuildings. It is in the outbuildings where he says Mr. Selinger and Mr. Arnold now work, and that is why the other employees may not have seen them for some time. However, Mr. Bakken said, in June 2002, he and Barry Tessier, the Employer's principal, along with two other partners, started up Reliable Heating and Cooling ("Reliable"), through which, eventually, it intends to bid on larger HVAC contracts at IPSCO. He said that Tesco provides the labour to Reliable. It is through Reliable that the services of Mr. Selinger and Mr. Arnold are now provided at IPSCO; the invoicing on the IPSCO contract is now through Reliable. If more manpower is required for HVAC work at IPSCO, Tesco provides it to Reliable. Reliable is also doing work for other clients in order to build up a large enough work force to bid on additional work at IPSCO. It has some 10 employees and an office and shop separate from Tesco.

**[40]** Mr. Bakken said that the Reliable employees have the same benefits and health plan as Tesco's employees. Mr. Selinger is paid a little more than a dollar an hour more than the other journeymen because he is certificated in both the electrical and refrigeration trades.

**Barry Tessier**

**[41]** Barry Tessier is the Employer's principal. He testified that the employees of Reliable, including Greg Selinger and Leonard Arnold, were converted to a bi-weekly payroll as of June 17, 2002, while Tesco's employees remained on a weekly payroll. Both payrolls are being run through Tesco in order to realize the cost savings of having as many persons as possible in the Tesco health plan.

## Argument

**[42]** Ms. Zborosky, counsel for the Union, argued that Tesco's employees are engaged in work in the "construction industry" as that term is defined in s. 2(e) of *The Construction Industry Labour Relations Act, 1992*, S.S. 1992, c. C-29.11 (the *"CILRA, 1992"*), and that the appropriate bargaining unit for its electrician employees is thus the standard craft unit for electricians in the construction industry as established by the decisions of the Board 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, and *The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local No. 179* v. *ICS Western Construction Ltd.,* [1980] May Sask. Labour Rep. 62, LRB File No. 135-79. Counsel also relied on the decision of the Board in *Sheet Metal Workers' International Association, Local 296 v. Atlas Industries Ltd.*, [1998] Sask. L.R.B.R. 51, LRB File No. 011-97 (quashed in part on judicial review at [1999] Sask. L.R.B.R. c-1 (Q.B.), restored on appeal at [1999] Sask. L.R.B.R. c-63 (C.A.), application for leave to appeal to the Supreme Court of Canada dismissed April 20, 2000). The applicant Union is the IBEW local that represents electricians in the construction industry in the province south of the 51st parallel.

**[43]** Ms. Zborosky argued that if the Board determines that the proposed craft unit is the appropriate unit, it must then decide who is working in the trade. Counsel referred to the evidence, particularly Mr. Bakken's, that the Employer's electricians do some non-electrical work, and its welding/mechanical employees do some "cold" electrical work and sometimes assist the electricians. She asserted that if one applied the "primary focus of the work" test enunciated by the Board in *International Union of Operating Engineers, Hoisting, Portable and Stationary, Local 870 v. K.A.C.R., A Joint Venture*, [1983] September Sask. Labour Rep. 37, LRB File No. 106-83, the evidence demonstrates that the employees that the Union says ought to be included in the proposed unit spend the majority of their time doing electrical work, and the other employees do not, but rather spend the majority of their time doing welding and labourer work. In this regard, counsel also cited the Board's decisions in *Carpenters Provincial Council of Saskatchewan v. A. V. Concrete Forming Systems Ltd.*, [1983] Nov. Sask. Labour Rep. 35, LRB File No. 107-83, *Construction and General Workers Union, Local 890 v. Work Force Construction Ltd.*, [1988] Fall Sask. Labour Rep. 39, LRB File No. 206-87, and *Operative Plasterers and Cement Masons, Local 442 v. Vector Construction Ltd.*, [1992] 2nd Quarter Sask. Labour Rep. 82, LRB File No. 307-91.

**[44]** Ms. Zborosky referred to the statement by the Board in *Newbery, supra*, at 40, to the effect that helpers and welders working incidental to a recognized construction trade would fall into the definition of that trade's bargaining unit. However, she argued that, unlike most other construction trades, the electrical trade is a compulsory apprenticeship trade and the Union represents only persons qualified to do electrical work under apprenticeship and trade certification and electrical licensing legislation, which does not include helpers and welders, unless the latter are also qualified electricians. As such, she said that a bargaining unit that includes helpers and simple welders with those qualified to do electrical work is not appropriate. Counsel noted that in *International Brotherhood of Electrical Workers, Local 529 v. Guest Industrial Contractors Ltd.*, [1999] Sask. L.R.B.R. 673, LRB File No. 169-98, the Board declined to include instrument mechanics in a bargaining unit with electricians, at least partly because of the compulsory nature of the trade, and in *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada v. Comfort Mechanical Ltd.*, [1998] Sask. L.R.B.R. 422, L.R.B. File No. 082-98, the Board declined to include helpers in a bargaining unit with plumbers, which is also a compulsory apprenticeship trade. In support of this part of her argument, counsel also referred to the decision of the Board in *Sheet Metal Workers' International Association, Local 296 v. Suer & Pollon Mechanical Partnership*, [1998] Sask. L.R.B.R. 723, LRB File No. 157-98.

**[45]** While arguing that all of the employees on the statement of employment from and including Mr. Arnold to the end should be excluded in the consideration of the representation issue, Ms. Zborosky also specifically argued that Terry Ellis, Greg Selinger, Leonard Arnold, Dustin Tessier and Mickey Schauenberg ought not to be considered for the purposes of determining the level of support for the application. She withdrew the Union's objection to Bob Hydamacka.

**[46]** She said that Mr. Ellis should be excluded because he is not an employee within the meaning of s. 2(f)(i) of the *Act*, as he exercises authority of a managerial character. Mr. Arnold should not be included because he is a welder, but in any event, both he and Mr. Selinger were not employed by Tesco at the time the application for certification was filed, but by Reliable, an entity not affected by the Union's application. She asserted that the use of Tesco's payroll by Reliable was solely for the purpose of realizing health plan cost savings, but that the two entities maintained separate accounting and offices. She argued that Dustin Tessier is a summer student and does not have a substantial and tangible connection with the Employer. Also, his application for apprenticeship was filed after the certification application was filed, and he was not called to testify as to his having any intention to

apprentice in the trade prior to the application being made. With respect to Mickey Schauenberg, counsel noted that he no longer has apprenticeship status in the electrical trade and works almost exclusively at welding.

**[47]** Ms. Zborosky referred to the decision in *International Association of Bridge, Structural and Ornamental Iron Workers, Local 771 v. D & M Mechanical Services*, [1995] 1st Quarter Sask. Labour Rep. 197, LRB File No. 237-94, in which the Board certified the applicant union to represent all employees of the employer, "a small firm which perform[ed] maintenance work on a contract basis at the IPSCO plant." The employer's principal had been a member of the applicant union for many years. Ms. Zborosky noted that the Board emphasized the employer's small size. Counsel asserted that the case could be distinguished from the present case because the ironworker trade is not a compulsory apprenticeship trade, and in the present case the application is for a craft unit.

**[48]** Mr. LeBlanc, Q.C., counsel for the Employer, argued that *D & M Mechanical, supra*, is directly on point and ought to be followed by this Board to determine that a craft unit is not appropriate in the circumstances, but rather a unit of all employees is an appropriate unit. Counsel asserted that "only in a narrow, technical sense" could one call the work being done by Tesco "construction." Mr. LeBlanc argued that on the principle of interpretation of *noscitur a sociis* – "it is known from its associates" – the type of work performed by Tesco – i.e., maintenance – should not be considered as being within the definition of "construction" in the *CILRA, 1992*. Under that doctrine, he said, words or phrases that are coupled together take colour from one another, with the meaning of the more general being restricted to a sense analogous to the less general.

**[49]** Mr. LeBlanc also referred to the decision of the Board in *International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, et al. v. Tanar Lloydminster Maintenance Ltd.*, [1992] 1st Quarter Sask. Labour Rep., LRB File Nos. 255-91, 267-91, 274-91 and 303-91, in which the Board considered applications by four construction trades unions – boilermakers, carpenters, plumbers and pipefitters, and labourers – to certify craft bargaining units of the company's employees. The employer was under contract to the owners of the heavy oil upgrader in Lloydminster, which was some 80 per cent completed at the time of application, to complete construction of, commission and subsequently maintain, the facility. The employer consented to the applications by the craft unions. A fifth applicant union – a non-construction craft union, Energy and Chemical Workers – applied for a bargaining unit of all employees. It had argued that craft units

were inappropriate in the maintenance industry. In the decision, then Board Chairperson, R. I. Hornung, Q.C., stated as follows, at 58:

> *Certification along craft lines is confined to the construction sector. If the construction trades wish to represent employees in other sectors of the economy, they must respect and follow the patterns of organization appropriate in those sectors, just as an industrial union would have to respect craft lines if it attempts to represent employees in the construction industry. The Board will only deviate from these patterns of organization if required by special circumstances.*
>
> . . .
>
> *Although the Board clearly prefers single plant maintenance units, in the unique circumstances of this case, the craft units applied for are appropriate for certification.*

**[50]** The "unique circumstances" of the case as cited by the Board included: the fact that the employer had to construct some 20 per cent of the facility before moving into its maintenance role; that it would require skilled tradespersons to do so; that the employer consented to the craft unions' applications; that the certifications related only to the employer as contractor and not to the facility owner; that the four trades were to bargain together through a council; and that the majority of the employees affected supported certification on a craft basis.

**[51]** Mr. LeBlanc opined that it was only reluctantly that the Board certified by craft in the *Tanar Lloydminster Maintenance* case, *supra,* and asserted that all of Tesco's employees should be in a single bargaining unit, as are all of IPSCO's maintenance employees. He noted that the Employer's electricians and welder/mechanical persons often worked side-by-side and both performed duties like pulling cable, erecting scaffolding and sometimes even doing things that ironworkers or labourers would customarily do. He said that nothing prevented the Union from organizing and representing a unit of all of Tesco's employees.

**[52]** Mr. LeBlanc argued that in the present case, in accordance with the dictum of the Board in *Newbery, supra*, with respect to the work of welders and helpers that is incidental to a recognized construction trade, the employees who do not have formal status in the electrical trade should nonetheless be included in the bargaining unit. In support of the argument, counsel cited the decision of the Board in *International Brotherhood of Electrical Workers, Local 529, v. A-Lert Canada Ltd.*, [1996] Sask. L.R.B.R. 156, LRB File No. 294-95. In that case, IBEW had applied to certify the standard electrical craft construction unit. At 159, the Board declined to include welders and their

helpers in the bargaining unit because "there was no evidence on the question of whether the welders' work was incidental to the electrical work to justify the inclusion of welders and their helpers into the electrician bargaining unit." Counsel asserted that in the present case, however, there was evidence that the welders' work was incidental to the electrical work. For example, he said Mr. Schauenberg worked almost exclusively welding for the electricians in the rolling mill/motor room. Similarly, he argued that the other welders should be assigned to the bargaining unit as working incidental to the electrical trade, otherwise, he said, they will "fall between the cracks".

**[53]** Counsel also referred to the decisions of the British Columbia Labour Relations Board in *E & N Railway Co. (1968) Ltd.* (1999), 51 CLRBR (2d) 271, and *Vertex Construction Services* (2000), 58 CLRBR (2d) 161. The former case dealt with concerns about fragmentation and multiple bargaining units when a short-line railway was split off from the CPR and came under provincial jurisdiction. While it was under federal jurisdiction, it had been certified by several railroad unions, and the new employer applied to consolidate the bargaining units. In the latter case, the B.C. Board found that both craft and all-employee units were appropriate in the construction industry in British Columbia.

**[54]** Counsel argued that the Board's decision in *Guest Industrial, supra*, could be distinguished from the present case on the basis that the instrument mechanics that the employer argued should be included in the bargaining unit applied for by the electricians were part of the standard bargaining unit of the plumbing and pipe fitting craft in the construction industry.

**[55]** With respect to Mr. Ellis' status, counsel argued that there was no evidence that he exercised any of the usual managerial authority to hire, fire or discipline, or that there would be any labour relations conflict if he were included in the bargaining unit. Counsel asserted there was evidence of Dustin Tessier's intention to become a journeyman electrician and that he had been doing electrical work. With respect to Greg Selinger and Leonard Arnold, counsel said that they were really employees of Tesco; it supplied the labour to Reliable and maintained a separate payroll so that it would know how much to bill Reliable.

## Statutory Provisions

**[56]** Relevant sections of *The Trade Union Act* include the following:

> *2 In this Act:*
>
> *(f) "employee" means:*
>
> *(i) a person in the employ of an employer except:*
>
> *(A) a person whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character;*
>
> . . .
>
> *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;*

## Analysis and Decision

**[57]** In the present case, the Union has applied to be certified as bargaining agent for the standard bargaining unit for electricians working in the construction industry. While pursuant to *The Trade Union Act* the Board has a broad discretion to determine the appropriate unit of employees for the purpose of bargaining collectively on a certification application, it has established standard bargaining units for the construction industry drawn on craft lines because of the historical and statutory evolution of the employment relationship and the organization of labour in the construction industry.

**[58]** The term "construction industry" is defined in s. 2(e) of *CILRA, 1992*, as follows:

> *2 In this Act:*
>
> *(e) "construction industry":*
>
> *(i) means the industry in which the activities of constructing, erecting, reconstructing, altering, remodelling, repairing, revamping, renovating, maintaining, decorating or demolishing of any building, structure, road, sewer, water main, pipeline, tunnel, shaft, bridge, wharf, pier, canal, dam or any other work or any part of a work are undertaken; and*
>
> *(ii) includes all activities undertaken with respect to all machinery, plant, fixtures, facilities, equipment, systems and processes contained in or used in connection with a work mentioned in subclause (i);*

**[59]** The purpose of the *CILRA, 1992*, that is, to implement sectoral bargaining, is enunciated in s. 4:

> *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.*

**[60]** Pursuant to ss. 9 and 9.1 of the *CILRA, 1992*, the Minister of Labour has designated certain appropriate trade divisions in the construction industry, each comprising the unionized employers in the trade, and designating a representative employers' organization to act as the exclusive agent to bargain collectively on behalf of all unionized employers in the trade division. Certain unions, or locals of unions, have established the right to bargain collectively on behalf of the unionized employees of unionized employers in a trade division.

**[61]** In *Newbery, supra*, the Board established the standard bargaining units – colloquially referred to as "Newbery" units – for each trade division, in accordance with the similar 1979 legislation, *The Construction Industry Labour Relations Act*, S.S. 1979, c. C-29.1[5] (the "*CILRA, 1979*"). In *K.A.C.R., supra*, the Board stated as follows, at 42:

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[5] Repealed by S.S. 1983-84, c. 2.

> *. . . 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.*

**[62]** The standard Newbery bargaining unit in the electrical trade division of the construction industry originally included only "journeyman electricians, electrician apprentices, and electrician foremen." Shortly afterwards, in *ICS Western Construction Ltd., supra*, the Board amended the standard bargaining unit to add "electrical workers" to reflect the practice in the trade following the introduction of changes to trade certification in 1976 that designated each of the electrical and plumbing trades as a "compulsory apprenticeship trade." The Board stated in *ICS Western*, at 63, as follows:

> *The Board has also found it necessary to change the unit description with respect to the electrical trade. The unit had been defined as follows: all journeymen electricians, electrician apprentices, and electrician foremen. The terms used are defined in legislation and in practice and are well understood in the industry. However, it was found that there are other employees engaged in electrical work who do not fall within these definitions. These may be employees with "grandfather rights" under apprenticeship regulations or who have not yet become apprenticed as required by law. They are persons who are permitted to work without a journeymen's license under Sections 14(4) and (6) of The Electrical Inspection and Licensing Act, R.S.S. 1978, Chapter E-7, as well as persons who have traditionally been included in electrician's union certifications pursuant to a long series of jurisdictional decisions and agreements. In order to be sure that these persons are included it was deemed necessary to add the classification "electrical workers" to the electricians certification order . . .*

**[63]** Therefore, the classification of "electrical workers" in the standard electrical trade division bargaining unit description includes not only qualified journeypersons or registered apprentices, but also: (1) persons not required to hold a journeymen's license to work in the trade who are "grandfathered" under apprenticeship and trade certification legislation; (2) persons working in the trade with the intention of shortly becoming an indentured apprentice; and, (3) persons traditionally included in electricians' union certifications in the construction industry.

**[64]** There can be no doubt that maintenance activities are included in the definition of "construction industry," as was observed by the Board in *Construction Labour Relations Association of Saskatchewan Inc. v. Delta Catalytic Industrial Services Ltd.*, [1995] 1st Quarter Sask. Labour Rep. 226, LRB File No. 232-94, at 232:

> *It is clear from this definition [i.e., of "construction industry" in s. 2(e) of the CILRA, 1992] that the maintenance sector of the industry was included within the scope of the provisions of the statute, and that the general regime laid out in the Act was intended to apply to this sector.*

**[65]** In *Atlas Industries, supra*, at 58, the Board described the import of this definition for the maintenance sector, as follows:

> *As stated in s. 4 of the CILRA, its purpose is to implement a system of province-wide bargaining between all unionized employers in a trade division and a trade union. It achieves this goal by requiring unionized construction employers to bargain through a representative employers' organization, the fruits of which bargaining apply to all unionized construction employers and the unionized employees in a trade division. Under the CILRA structure, the stability of the unionized construction sector is enhanced by restricting the use of strikes and lock-outs to the period surrounding the negotiation of the provincial agreement and by standardizing labour costs for all unionized construction employers.*
>
> *In this context, it would appear that the statutory definition of "construction industry" which is contained in s. 2(e) of the CILRA is deliberately broad in its scope in order to ensure that all aspects of the industry benefit from the stabilizing effects of the CILRA. The definition includes construction, renovation, maintenance, decorating and demolishing various structures or works and, "all activities undertaken with respect to all machinery, plant, fixtures, facilities, equipment, systems and processes contained in or used in connection" with these works.*
>
> (emphasis added)

And at 61:

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

**[66]** For these reasons we are not persuaded by the assertion of counsel for the Employer that application of the maxim *noscitur a sociis* leads to an interpretation of s. 2(e) of the *CILRA, 1992* that "maintaining" should be interpreted as meaning something other than its plain and ordinary

meaning. In his argument on this point, counsel was very brief and gave no detailed explanation of how he perceived the principle ought to be applied in the present case.

**[67]** In the context of statutory interpretation, the maxim was described as follows in *R. v. Goulis*, 33 O.R. (2d) 55 (Ont. C.A.):

> *The meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it: Broom, A Selection of Legal Maxims, 10th ed., p. 396. When two or more words that are susceptible of analogous meanings are coupled together they are understood to be used in their cognate sense. They take their colour from each other, the meaning of the more general being restricted to a sense analogous to the less general: see Maxwell on the Interpretation of Statutes, 12th ed. (1969), at p. 289.*

**[68]** In our opinion, application of the maxim in this case does not advance the interpretation of the provision. The words of s. 2(e)(i) of the *CILRA, 1992* that lend colour to each other are: constructing, erecting, reconstructing, altering, remodeling, repairing, revamping, renovating, maintaining, decorating and demolishing. None of these words, which describe a range of activities, seems to us to be "doubtful" or ambiguous. It is not possible to determine which of these functions are the "more general," such that application of the maxim would restrict their meaning to a sense analogous to the less general. Presumably, counsel for the Employer would urge that "maintaining" is more general than, and must be restricted to a sense analogous to, "constructing". We do not agree, and in any event, we do not find the exercise useful or necessary in the present case.

**[69]** The more useful exercise, in our opinion, is to consider the plain and ordinary meaning of the functions and activities listed in s. 2(e) in light of the purpose of the legislation, expressed in s. 4, to implement collective bargaining by trade on a province-wide basis. That is, in our opinion, the legislature intended to bring within the operation of the statute, activities customarily performed by the building trades and carried out by employers for whom sectoral bargaining legislation is appropriate, be it constructing, demolishing, maintaining, etc., buildings, structures, etc. and including all activities undertaken with respect to the machinery, plant, systems etc. contained in or used in connection with those structures or works. In our opinion, this includes maintenance work of the kind under consideration in this case.

**[70]** This approach has been used by the Alberta Labour Relations Board to interpret the activities listed in the definition of "construction" in s. 1(g) of the Alberta *Labour Relations Code*, R.S.A.

2000, c. L-1, which definition specifically excludes "maintenance."[6] In *Construction Workers Union, Local No. 63 v. J. Mason & Sons Inc.*, [1999] Alta. L.R.B.R. 577, the Alberta Board considered the meaning of the various activities comprising "construction," as well as the excluded "maintenance" activity, in order to determine whether the activities of the employer came within the provincial construction industry mandatory bargaining regime. The Alberta Board observed that:

> *When Alberta enacted a statutory definition of construction, the legislature extended beyond that of new construction, the range of employer activities potentially subject to the specialized collective bargaining system. The section 1(g) definition also includes the activities of alteration, decoration, restoration and demolition.*

**[71]** In our opinion, "maintaining" is not the only word in s. 2(e)(i) of the *CILRA, 1992* that extends the definition of "construction industry" beyond the notion of new construction; indeed, nearly all of the other words do so as well. To do as counsel for the Employer urges, and interpret "maintaining" as meaning only maintenance activities that are analogous to "constructing," rather than to consider the term in the broader context of the range of functions carried out by employers and ordinarily performed by the building craft trades, would be counter to the legislature's intention to implement sectoral bargaining in the industry. Had the legislature intended to restrict or exclude maintenance activity, as part of the definition of construction industry, it would either have left it out of the provision, as was done in the analogous Ontario legislation[7], or specifically excluded it, as was done in the Alberta legislation. We prefer to give the word "maintaining," as well as the other activities listed in s. 2(e), their plain and ordinary meaning interpreted in the context of the intent of the legislation as a whole.

**[72]** It is interesting to note that in Alberta, where maintenance activities are specifically excluded from the mandatory regime of construction sector bargaining, the express policy of the Alberta

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[6] The definition provides as follows:

> *1. In this Act,*
> *(g) "construction" includes construction, alteration, decoration, restoration or demolition of buildings, structures, roads, sewers, water or gas mains, pipelines, dams, tunnels, bridges, railways, canals or other works, but does not include*
> *(i) supplying, shipping or otherwise transporting supplies and materials or other products to or delivery at a construction project, or*
> *(ii) maintenance work;*

[7] See, *Labour Relations Act, 1995*, S.O., s. 1(1)

Labour Relations Board is to certify maintenance contractors by craft. The Alberta Board's Information Bulletin #11 provides, in part, as follows:

> *Alberta industry relies on the services of maintenance contractors. These contractors supply labour and expertise to maintain and repair industrial plants. They may perform "long-term, contract" ongoing maintenance work at a plant or major "turn-around" maintenance during a plant shutdown or both.*
>
> . . .
>
> *The Board's policy is to certify maintenance contractors on a craft-by-craft basis for maintenance work. The various eligible trades are the same as those used for the general construction industry.*

**[73]** In any event, it is not necessary to our decision in this case to engage in semantic gymnastics. While "maintaining" may comprise the larger part of the Employer's activities, it is also engaged to some degree in "constructing." In *Atlas Industries Ltd., supra*, the Board confirmed, first, that an employer engaged in both construction and non-construction work is included in the scope of the *CILRA, 1992*, even if the primary focus of its work is outside the construction industry; and, second, that installation and maintenance work are within the scope of the term "construction industry" in the *Act*.

**[74]** The Board has demonstrated a preference for craft bargaining units in the construction industry as being consonant with the intent of the legislation. In *K.A.C.R., supra*, the Board stated as follows at 42:

> *. . . 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.*

**[75]** However, the Board has remained open to considering special circumstances that might cause it to conclude that a bargaining unit comprising all employees of an employer in the construction industry may be appropriate. Because of the historical and statutory imperatives referred to above, deviation from craft representation and the standard bargaining unit is relatively rare. In such situations, it is not that the Board has found that a craft unit is not an appropriate bargaining unit, but rather, that a unit of all employees is also appropriate, and the applicant union seeks to represent such an alternative unit.

**[76]** The Board has allowed bargaining units of all employees in the construction industry when an employer is engaged in maintenance work, as opposed to the traditional notion of "construction" as a new construction project of limited duration. As the Board observed in *Delta Catalytic, supra*, at 228, the work of maintenance companies is typically continuing and repetitive, in contrast to such ordinary construction activity:

> *The maintenance sector has traditionally occupied a unique place in the construction industry. Unlike work on construction projects, which is typically transient and of limited duration, the activities of maintenance companies tend to be ongoing or repeated at the same location. Though larger companies are often the subject of separate certification applications from a number of building trades, the jurisdictional lines based on craft tend to be more relaxed in the case of maintenance than regular construction activities.*
>
> (emphasis added)

**[77]** The employer in *Delta Catalytic* was certified by some thirteen different building trades unions.

**[78]** This observation followed upon that stated by the Board in *D & M Mechanical, supra*, at 198, which had been decided a few weeks earlier. In that case, the Board noted that, in the maintenance area, the building trades have not guarded their trade jurisdictions as jealously as in the area of more traditional construction activity, particularly with respect to smaller employers:

> *The work done by this firm is maintenance work. Though maintenance work has always been associated with the construction industry, and is included within the definition of construction in The Construction Industry Labour Relations Act 1992, the jurisdictional lines drawn between the building trades have always been applied in a somewhat relaxed way to this sector.*
>
> . . .
>
> *In this connection, we would add that we think it appropriate for the bargaining unit to be described in this case as an all-employee unit. Though it is customary for the building trades to seek separate certifications for their members employed by larger maintenance contractors, this is not always the case with smaller firms.*
>
> (emphasis added)

**[79]** We do not agree with the assertion by counsel for the Employer, as noted *supra*, that the Board in *D & M Mechanical* found that a craft unit was not appropriate in the case of small maintenance contractors. Rather, as the emphasized portion of the excerpt demonstrates, the Board found that the building trades have not always sought to organize by craft, and that where there is a

small number of employees, the Board may be inclined to find that a unit of all employees is also an appropriate unit. This interpretation of the case is the only one that makes sense. In neither its Reasons for Decision in *Delta Catalytic* nor *D & M Mechanical* did the Board give any indication as to what it considered to be a "large" maintenance contractor. Indeed, any statement to the effect that an employer with less than a certain number of employees is a "small" maintenance contractor, as opposed to a "large" one, would be entirely arbitrary. The point illustrated by *D & M Mechanical* is that in the maintenance sector of the construction industry, when a trade union seeks to certify an "all employee" unit rather than a craft unit, the Board will consider the size of the work force among other factors in determining whether it is appropriate to deviate from certification by craft. This is not the same as saying that certification by craft is inappropriate in the case of small maintenance contractors.

**[80]** Nor do we agree with the assertion by counsel for the Employer that it was only "with reluctance" that the Board granted certifications by craft unit in *Tanar Lloydminster Maintenance, supra*. Rather, while the Board in that case expressed a preference for single plant maintenance units, it found, at 58, that "special circumstances" existed that supported the appropriateness of certification by craft. Indeed, at 57, the Board had decided that it would not consider the application by the non-construction union for a unit of all employees unless the craft unions' applications were dismissed. And, in any event, it is important to recognize that the case was decided in January 1992, some eight years after the repeal of the *CILRA, 1979*, and before the enactment of the *CILRA, 1992* re-established sectoral bargaining in the province's construction industry. In such circumstances, there was an absence of the statutory imperative for the preference for certification by craft in the construction industry.

**[81]** In view of the construction industry bargaining regime mandated by the *CILRA, 1992* and for the reasons described above, it is our opinion that certification by craft unit is appropriate in the maintenance sector of the industry.

**[82]** It now falls to be determined whether the welders/mechanical workers should be included in the bargaining unit. In *Newbery, supra*, the Board stated as follows, at 40, with respect to welders and helpers working in construction incidental to a recognized building trade:

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

**[83]** And further, with respect to the significance of trade qualification in determining whether an individual falls within the trade unit, the Board stated, also at 40, as follows:

> *. . . in determining whether or not a particular employee falls within one trade unit or a different trade unit the Board has, in the past, and will continue in the future, to consider as a very important factor in making the determination whether or not a person is qualified or does hold a certificate of status under The Apprenticeship and Tradesmen Qualification Act if it applies to the trade in question. In many cases it will be the determining factor.*

**[84]** The electrical trade is among the construction trades that, since December 1, 1976, along with the plumbing and sheet metal trades, have been designated as "compulsory apprenticeship trades."[8] The other trades (e.g., carpenter, ironworker, millwright, insulator to name but a few) are "voluntary apprenticeship trades." As the decision in *ICS Western, supra*, discloses, at the time when *Newbery, supra*, was decided, the Board apparently was not aware that a certain small number of trades had been designated as compulsory apprenticeship trades.

**[85]** The significance of the compulsory nature of the electrical trade is that, pursuant to *The Apprenticeship and Trade Certification Act, 1999*,[9] and The Apprenticeship and Trade Certification Regulations,[10] to be eligible to become licensed to perform the full range of the work of the trade one must have completed a prescribed course of technical study, training and apprenticeship, and pass qualifying examinations, leading to certification as a journeyman. Pursuant to s. 38 of the *Act* and s. 12(3) of the Regulations, one may not work in the electrical trade unless one: (1) holds a full journeyman electrician certificate issued pursuant to that *Act* by the Saskatchewan Apprenticeship

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[8] The refrigeration mechanic trade also was later listed as a compulsory apprenticeship trade on December 1, 1988.

[9] S.S. 1999, c. A-22.1, s. 19(1).

[10] R.S., c. A-22.1, Reg. 1, s. 67(3).

and Trade Certification Commission; (2) has a contract of apprenticeship in the trade registered with the Commission; (3) holds a special permit to work in the trade (e.g., is "grandfathered" as described, *supra*); or, (4) intends shortly to become indentured as an apprentice in the trade.[11] One must also be licensed pursuant to *The Electrical Licensing Act*[12] to do the "work of electrical installation."[13] We do not think it outrageous to surmise that certain trades are designated as compulsory apprenticeship trades for reasons of public safety.

**[86]** It is important to note that the employer in *D & M Mechanical* was engaged in ironwork and millwright work, which are voluntary apprenticeship trades. In that regard, the case may be contrasted with *Comfort Mechanical Ltd.*, *supra*, in which, considering an application for certification of a plumbing contractor by the designated bargaining agent for the plumbing trade – a compulsory apprenticeship trade – the Board removed the name of an employee from the statement of employment who was described as a "helper" or "utility worker" and who was not registered or qualified under trade certification legislation as an apprentice or journeyman. The Board stated, at 426:

> *With respect to Ms. Carlson, the evidence indicates that at the time of the hearing she was not registered as an apprentice or journeyman in the plumbing and pipefitting trades, both of which are compulsory trades, that is, persons performing such work must be registered under the appropriate legislation as an apprentice or journeyman. The Board finds that Ms. Carlson performed work that is normally performed by a helper or utility worker. These positions do not fall within the scope of the Union's certification. Ms. Carlson's name will also be removed from the statement of employment.*

**[87]** Similarly, in *Guest Industrial, supra*, the Board refused to interpret the term "electrical workers" to include journeyman or apprentice instrument mechanics, or deviate from the standard electricians' bargaining unit to include persons holding journeyman certification or apprentice registration only as an instrument mechanic (some of the electricians in the bargaining unit were also

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[11] A person intending to become indentured may work in the trade for a period of not more than the lesser of six months' full-time employment or one-half the number of hours in a prescribed apprenticeship year, i.e., 900 hours.

[12] S.S. 1988-89, c. E-7.2

[13] *The Electrical Licensing Act*, s. 2(s), defines "work of electrical installation" as "the installation of any electrical equipment, in or on any land, building or premises, from the point where electrical power or energy is delivered to the point where the power or energy can be used, and includes the maintenance, connection, alteration, extension and repair of electrical installations".

certified in the instrument mechanic trade), despite the fact that the work of the two trades was often complementary, and that, in practice, the instrument mechanics frequently performed "work of electrical installation."

**[88]** These cases may be contrasted with situations regarding a voluntary apprenticeship trade, such as in *International Association of Heat and Frost Insulators and Asbestos Workers v. Alberta Insulation Supply and Services Ltd.*, [1999] Sask. L.R.B.R. 91, LRB File No. 368-97, where the Board included "insulator helpers" in the bargaining unit description.

**[89]** The major reason for the difference in the consideration of the scope of bargaining units for compulsory and voluntary apprenticeship trades is, of course, that, in the compulsory trades, "welders" and "helpers" are not allowed to perform any of the work that may only be performed by persons recognized as qualified under apprenticeship and trade certification legislation. This led the Board in *United Brotherhood of Carpenters and Joiners of America, (Millwrights Union, Local 1021) v. Daycon Mechanical Systems Ltd.*, [1999] Sask. L.R.B.R. 127, LRB File No. 338-97, in discussing the factors that will be considered to determine which employees fall within a bargaining unit, to state, at 135, as follows:

> *. . . "helpers" will not be included in bargaining units involving mandatory trades, but may be included in non-mandatory trades: see . . . Comfort Mechanical, [supra] and Alberta Insulation [infra].*

**[90]** If the Union were to apply in a particular and appropriate case to include such persons in the bargaining unit, it might be done, but when the bargaining agent has not historically represented, and does not seek to represent, such persons, the Board will not deviate from the standard scope of the craft unit, unless imperative reasons exist. We accept the evidence of Mr. Shearer, the local Union president, that the Union does not allow persons who are not qualified in the trade to hold membership in the Union and that the Union does not dispatch other than such qualified tradespersons from its hiring hall. In the present case, there are no special or compelling circumstances that lead us to conclude that welders and/or helpers or mechanical workers should be included in the bargaining unit with the electricians, a compulsory apprenticeship trade.

**[91]** This still leaves to be determined who should be on the statement of employment for the purposes of assessing the level of support for the application and in the bargaining unit in the event the application is granted.

**[92]** In view of our decision that the standard craft bargaining unit for the electrical trade is an appropriate unit, and that it excludes those who are not qualified to do the work of the trade, all those persons on the statement of employment from and including Leonard Arnold to the end of the list shall be deleted from the list.

**[93]** This includes Dustin Tessier, whose status we find it unnecessary to determine. Because of the level of support filed with the application, whether Mr. Tessier is found to be within the bargaining unit description, as one who shortly intends to become indentured as an apprentice, is irrelevant. He is no longer working for the Employer and has returned to full time attendance at school.

**[94]** We find that at the date of application Greg Selinger was not employed by Tesco, but by Reliable. Accordingly, his name is deleted from the statement of employment.

**[95]** The Union withdrew its objection to Bob Hydamacka and his name shall remain on the statement of employment.

**[96]** We find that Terry Ellis is an employee of Tesco and within the proposed bargaining unit. While his supervisory duties have no doubt increased since Mr. Bakken has assumed responsibility for the operation in Alabama, there was no evidence that he exercised other than minor admonitory authority. In *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, the Board included in the electricians' craft bargaining unit individuals acting as foremen with supervisory functions but without disciplinary functions. The fact that Mr. Ellis does not work "on the tools" is not determinative of the issue of his status within the proposed bargaining unit. The Union represents persons who may not work on the tools at all, i.e., foremen and general foremen. Art. 4.01 (b) of the provincial electrical agreement provides that, "Foremen may, but shall not be required to, work with the tools". This is not to say that we consider Mr. Ellis to be a "foreman" under the agreement (we have not been asked, nor do we purport, to answer such question), but merely to point out that the

Union does not consider work on the tools to be a necessary requirement for its representation. Accordingly, Mr. Ellis shall remain on the statement of employment.

**[97]** Therefore, the composition of the statement of employment for the purposes of determining the level of support for the application is as follows:

| | | |
|---|---|---|
| Terry Ellis | Marlowe Pilsner | Alvin Lebruno |
| Tim Archer | Conrad Saager | Darcy Mathieson |
| Bob Hydamacka | Kevin Wagman | Steve Romanow |
| Leo Carteri | Bill Wenarchuk | Dave Donovan |
| Ryan Moffat | Dave Wenarchuk | Jason Sebastian |
| Ken Novak | Chris Oswald | |

**[98]** As the Union has filed evidence that a majority of the employees in the proposed unit support the application, an Order will issue in the usual form designating the Union as the certified bargaining agent for the standard electricians' craft bargaining unit in the construction industry, and ordering the Employer to bargain collectively.

**[99]** Mike 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 47, Applicant v. CITY OF SASKATOON and SASKATOON CIVIC MIDDLE MANAGEMENT ASSOCIATION, Respondents

LRB File No. 030-02; October 28, 2002
Vice-Chairperson, James Seibel; Members: Brenda Cuthbert and Bruce McDonald

For the Applicant: Sharon Lockwood
For the City of Saskatoon: Jim Cowan
For SCMMA: Tom Milroy

**Bargaining unit – Appropriate bargaining unit – Board policy – When faced with multiple bargaining units Board will take restrictive approach to defining scope of smaller specialized unit.**

**Bargaining unit – Appropriate bargaining unit – Board policy – Middle management unit – Middle management unit must be confined to positions in conflict or potential conflict through exercise of supervisory duties with membership in general unit.**

**Bargaining unit – Appropriate bargaining unit – Community of interest – Industrial relations characteristics of position are of overarching significance.**

**Bargaining unit – Appropriate bargaining unit – Community of interest – Training consultant exercises no regular supervision with respect to members of general unit – Job functions of position not incompatible with membership in general unit – Training consultant position therefore assigned to general unit.**

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

## REASONS FOR DECISION

### Background

**[1] James Seibel, Vice-Chairperson:** The Canadian Union of Public Employees, Local 47 ("CUPE 47"), and Saskatoon Civic Middle Management Association ("SCMMA") are each designated as the bargaining agent for certain units of employees of the City of Saskatoon (the "City"). CUPE 47 applied for a determination on the bargaining unit assignment of the newly created position of training consultant in the Administration Branch of the City's Utility Services Department and for amendments to the certification Orders as may be necessary.

**[2]** Canadian Union of Public Employees, Local 59, which also represents a bargaining unit of civic employees, was given notice of the application, but did not file a reply or attend the hearing.

## Evidence

**[3]** Phil Miller has been the president of CUPE 47 for the past five years. He is employed by the City at its wastewater treatment plant. According to Mr. Miller, the city posted the new position of training consultant on April 25, 2001 and unilaterally assigned the position to the SCMMA bargaining unit. The job description provides as follows:

> *Core Function*
> *This position is responsible for the development, co-ordination and delivery of training programs, including assessing training needs.*
>
> *Scope and Major Responsibilities*
> *1. Develops, maintains and conducts a variety of training sessions, including programs related to certification, work safety, branch operations and business processes.*
> *2. Develops and maintains policies and procedures manuals.*
> *3. Monitors technical and legislated changes in related industries to ensure training requirements are maintained.*
> *4. Assists with the development and maintenance of emergency response plans, contingency plans and the environmental management system.*
> *5. Communicates with educational institutions and certification agencies to co-ordinate internal and external training sessions.*
> *6. Develops, monitors and controls the training budget for branches within the Department.*
> *7. Develops, maintains and conducts training sessions for contractors to ensure adherence to on-site safety requirements.*
> *8. Assists with career development and succession planning. Co-ordinates the departmental MEANS program.*
> *9. Provides public relations support, including preparing and modifying documentation and conducting technical presentations.*
> *10. Develops training schedules and maintains a record of training sessions and participants.*
> *11. Performs other related duties as assigned.*
>
> *Relationship*
> *Reports to the General Manager, Utility Services Department.*
>
> *Qualifications*
> • *University degree in a related field (civil/chemical or environmental engineering, biology, chemistry)*
> • *Four to six years' experience in the field of water and wastewater treatment technology or related industrial operations including one year's experience developing and conducting training programs.*

- *Knowledge of safety practices, procedures, policies, first aid, CPR and WHMIS regulations.*
- *Knowledge of industrial control systems.*
- *Ability to plan, design, co-ordinate and conduct training sessions.*
- *Ability to communicate effectively, both orally and in writing.*
- *Ability to develop and maintain effective working relationships with civic employees, external agencies, contractors and the public.*
- *Ability to utilize computers as a routine tool in plant operations.*
- *Skill in the operation of a microcomputer with various word-processing, database and spreadsheet software.*

**[4]** Mr. Miller said that the position was not filled until September 4, 2001. The successful applicant and present incumbent, Tracy Helmink, was an equipment utility worker at the wastewater treatment plant and a member of CUPE 47 prior to obtaining the position. Between October 2001 and the filing of this application in March, 2002, Mr. Miller said he met with the City's human resources manager, Jim Cowan, the president of SCMMA, Tom Milroy, and the general manager of the Utilities Services Department, Randy Munch, to discuss the assignment of the position to SCMMA, but the matter was not resolved. He said that he also discussed the issue with the other civic unions and none of them had any objection to its being in scope of CUPE 47.

**[5]** Shortly after the present application was filed, CUPE 47 wrote to Ms. Helmink to advise her of the date set for the Board hearing, and later also advised her that if the Board placed the position in scope of CUPE 47, it would not object to her remaining in the position without it being re-posted.

**[6]** Mr. Miller testified that the training consultant works out of an office at the City's wastewater treatment plant. He pointed out that neither the position description nor the job posting for the training consultant make mention of those major functions ordinarily considered to be managerial, that is, the ability to hire, discipline and fire employees, but he admitted that the position has certain responsibilities related to budgeting. In that regard, however, he testified that the budget process at the wastewater treatment plant involves the plant manager and the section managers meeting with the budget clerk, a member of CUPE 47, to discuss their budgetary needs and priorities; the budget clerk develops the budget in consultation with them and it is submitted to the general manager of the Utilities Services Department for approval.

**[7]** Mr. Miller testified that in the past, members of CUPE 47 have performed training duties in addition to their regular duties. He offered his opinion that there are no duties involved in the training

consultant position that are likely to place it in conflict with the members of CUPE 47 and that it has a community of interest with that bargaining unit.

**[8]** Mr. Miller referred to several postings for certain positions in scope of CUPE 47, where the incumbents have certain responsibility in relation to budget development or administration, including: clerk, Administration Branch, Environmental Services Department; biosolids foreman, Wastewater Treatment Branch; mechanical maintenance foreman, Water Treatment Branch; and building and grounds foreman, Wastewater Treatment Branch. He compared these to positions in the Water Treatment Branch that are either in scope of SCMMA or not in scope of any union – manager of Water and Wastewater Treatment, maintenance engineer, and operations manager. These latter positions recruit, evaluate and discipline CUPE 47 members. In cross-examination, however, Mr. Miller admitted that no positions in scope of CUPE 47 report directly to the general manager.

**[9]** Mr. Miller testified that several CUPE 47 members applied for the training consultant position and that at least one, other than Ms. Helmink, had the educational qualifications. According to Mr. Miller, there are other training positions within the City, including the central records trainer in the Police Service (reporting to the assistant manager); the training and promotions co-ordinator in the Finance Branch (reporting to the City Treasurer); the training co-ordinator, Vehicle and Equipment Services (reporting to the manager); and the trainer in the Facilities Branch of the Infrastructure Services Department, that are within the scope of CUPE 859 and which have no responsibility for recruitment or discipline. In cross-examination, Mr. Miller agreed that none of these positions requires a university degree, and that there are other City training positions that are within the scope of SCMMA.

**[10]** Andrew Hawrysh is a member of CUPE 47 and has been employed as a millwright at the wastewater treatment plant for approximately 18 years. He testified that since the early to mid-1990s to September 2001, when Ms. Helmink was hired as the training consultant, he intermittently co-ordinated training of many kinds for the City, including first aid, CPR, harassment, cross-cultural, intervention training and other safety-related subjects, as well as in regard to many kinds of vehicles and equipment including air brakes, skid-steer loaders, boom trucks, aerial devices and rigging. Mr. Hawrysh described his duties, which he performed part time mainly during lunch hours and coffee breaks, as the overall co-ordination of the training programs, including arranging for the course provider, informing the employees for whom certain programs were mandatory, keeping records of completion and tracking

the expiry of time-limited certifications. He co-ordinated training sessions for contractors on on-site safety, partially prepared a bomb threat procedure and assisted with water treatment plant Y2K contingency plans. He also provided annual statistical reports regarding training to the plant manager and identified emerging issues that might require training for input into the budget planning process.

**[11]** Mr. Hawrysh testified that he in fact once presented a "Training the Trainer" course in SCUBA and WHMIS to a group that included Ms. Helmink, after which she did some training at the water treatment plant. He said that some others in scope of CUPE 47 also trained in equipment lock out procedures and confined space entry. After Ms. Helmink began in her new position, Mr. Hawrysh helped her out for several weeks until she got herself oriented.

**[12]** Mr. Hawrysh, who himself has a university undergraduate degree, was of the opinion that the training duties he performed did not require a university degree, and certainly not a degree in engineering. He felt that a degree in education might be helpful. However, he agreed that the experience qualifications for the position were appropriate. Mr. Hawrysh acknowledged that he had applied for the position but was not successful.

**[13]** Howard Pilot has been employed with the City since 1978, and has been a utility operator at the water treatment plant since 1991. Mr. Pilot testified that at the request of Water and Wastewater Treatment Branch manager, Mark Keller, he agreed to assist the superintendent, Gerald Woodridge, with developing and implementing a new water treatment operator's certification program, developing computer training programs for preventative maintenance, and procedures for cleaning the plant chlorine room. The impetus for developing these programs was new government regulations requiring operator certification by 2005. The duties were to be in addition to his regular duties, so after discussions between management and CUPE 47, Mr. Pilot received a substantial wage increase.

**[14]** He performed the additional duties for a seven month period ending in May 2001. Mr. Pilot said that he arranged for the required certification sessions, and formed and sat on a committee to liaise with the provincial environment department. He also communicated with outside agencies such as the Meewasin Valley Authority, SIAST and the universities. He did some preliminary budget work on cost projections of certain products used in the plant and for the replacement of the intercom system. He prepared and staffed a display for an energy expo at the University of Saskatchewan. He even trained his own supervisor on some of the computer programs.

**[15]** While performing these duties, Mr. Pilot shared an office with Mr. Woodridge. He said that although he was also to work on the "boil water order" and contingency planning, his additional duties were terminated and he returned to his old job before he could do so.

**[16]** Mr. Pilot, who himself has a degree in education, offered his opinion that because of the substantial experience requirement for the training consultant position, he could not understand why it would require a university degree. He also applied for the position and was interviewed, but after he heard nothing for several months he indicated he was no longer interested.

**[17]** Lloyd Aldorfer is employed by the City as a truck driver and relief trainer in the infrastructure services department. He is a member of CUPE 859. He relieves the full trainer on courses in 1A and 3A license classifications and forklift operation. He conducts practical training and examination preparation. He expects to assist in the development of course material. While he has mainly trained members of CUPE 859, he has also trained some from the City's CUPE 47, CUPE 59 and IBEW bargaining units, as well as out-of-scope staff. Most of the forklift operators are not in his bargaining unit. Mr. Aldorfer said that he only experienced a minor problem on one occasion with a member of his own bargaining unit. He anticipates providing some training to fire department employees on jack brakes.

**[18]** Mr. Aldorfer and the full time trainer both report to the department's training co-ordinator, a member of SCMMA.

**[19]** Randy Munch is the general manager of the City's Utility Services Department. He has been with the City for some 35 years. Mr. Munch testified that the department was formed in 1999, by the amalgamation of the former Environmental Services Department, transit and electrical operations. There are approximately 500 employees in the department. Its branches include water and wastewater treatment, the electrical utility, transit operations, biosolids waste management, and department administration. He testified that it was intended that the new training consultant position would help him manage the department's training needs.

**[20]** Prior to the reorganization, Mr. Munch said that it had been determined that there was not enough work for a full time trainer in the water and wastewater treatment branches, but after the amalgamation the scope of the training demands increased. After the Walkerton, Ontario contaminated

water incident, there was increasing pressure to provide water treatment operator certification in the short term, after which the training consultant could work on assessing and prioritizing the other branches' training needs. Accordingly, while the position would mainly see to the training of CUPE 47 members (who hold the bulk of the positions in water and wastewater treatment), it will then move to training in the department's other four branches. One fifth of the payroll costs for the position are charged to each branch in the 2002 budget.

**[21]** Mr. Munch said that he was not involved in making the decision to place the position in scope of SCMMA, but was of the opinion that because it directly reported to him, the placement was appropriate. The water treatment operations manager handled recruitment and hiring for the position because of the urgency to develop the water treatment operator certification program. The position itself is in the department's administration branch, but because of a shortage of office space, it is located in a part of an office in the water treatment plant.

**[22]** Tracy Helmink has been employed by the City for approximately ten years, working in positions in scope of CUPE 47 until obtaining the training consultant position. She has a degree in education and physical education and did some post-graduate work in biosolids handling.

**[23]** Ms. Helmink testified that before she accepted the position she approached Mr. Miller and asked for a "reversion clause" so that she could return to her old job if necessary. She said the CUPE 47 executive refused.

**[24]** Ms. Helmink confirmed that while the water treatment operator certification procedure has been her foremost responsibility, she expects its demands to decrease over the next 12 to 18 months allowing her to increasingly attend to the training demands of other branches. She said that she expects that eventually she will split her time between the branches as follows: water and waste water, 40 percent; transit, 30 percent; solid waste and environmental compliance, 25 per cent; and electrical, 5 per cent. She said that at the same time as she has arranged for the operators to take their certification training and examinations, she has been taking the examinations herself.

**[25]** Ms. Helmink keeps the training records, updates the employees' training files, tracks the necessity for recertification, stays current on industry requirements and standards, updates the safety manual and co-ordinates applications for the training programs. She also administers the City's

Municipal Educational Assistance and Needs Program ("MEANS"), a program meant to help permanent employees avail themselves of educational opportunities that would be beneficial to their present position or one they aspire to achieve. The program is open to all civic employees, both union and non-union. Ms. Helmink does not determine who may access the program funds, but merely keeps track of the program's budget.

**[26]** Ms. Helmink offered the opinion that her position is analogous to that of the training co-ordinator in Vehicle and Equipment Services, occupied by a Mr. Booth, except that he primarily co-ordinates heavy equipment training.

**[27]** Ms. Helmink said that she did not think that there was any present likelihood of her being in conflict with members of CUPE 47, but that it might arise in the future. She confirmed that she does not supervise or manage other employees, nor does she have the authority to impose discipline for failure to attend or complete training.

## Argument

**[28]** Ms. Lockwood, on behalf of CUPE 47, argued that the training consultant position is properly in the scope of CUPE 47 rather than SCMMA. She pointed out that CUPE 47 members performed the duties of the position, albeit on a part time basis, before the position was created. She pointed out the similarities in the job descriptions between the training co-ordinator and other positions with the City that are in scope of CUPE 859 – the fact that it does not exercise hiring or disciplinary functions and has no labour relations confidentiality aspect. The position has a greater community of interest with CUPE 47 than with SCMMA, which positions generally include such duties and authority.

**[29]** Ms. Lockwood argued that because the position involved training members of other bargaining units, and even out-of-scope personnel, the issue of conflict with other CUPE 47 members was misleading. She asserted that the evidence did not establish that there was a likelihood of conflict between the position and other members of CUPE 47. The training consultant is in no position to adversely affect the terms and conditions of employment of co-workers.

**[30]** In support of her argument, Ms. Lockwood referred to the following decisions of the Board: *Saskatoon Professional Fire Fighters Union, International Association of Fire Fighters, Local 80 v. Saskatoon Civic Middle Management Association and City of Saskatoon*, [2002] Sask. L.R.B.R. 213,

LRB File Nos. 295-00 & 296-00; *City of Saskatoon v. Canadian Union of Public Employees, Local 59, Saskatoon Civic Middle Management Association and Amalgamated Transit Union, Local 615*, [1998] Sask. L.R.B.R. 335, LRB File No. 244-97; *Saskatoon Civic Middle Management Association v. City of Saskatoon and Canadian Union of Public Employees, Local 59*, [1998] Sask. L.R.B.R. 341, LRB File Nos. 354-97 & 010-98; *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.

**[31]** Mr. Milroy, on behalf of SCMMA, argued that the training consultant position was properly in scope of SCMMA. He said that there are five factors that dictate that the position should be in scope of SCMMA. First, the duties of the position are similar to those of the training co-ordinator in Vehicle and Equipment Services, which was originally placed in the SCMMA bargaining unit by agreement in 1997. Second, although the other civic unions have currently responded that they have no problem with the position being in scope of CUPE 47, he queried what will happen if they object in the future. Third, because the position attends to the training needs of multiple bargaining units, a significant proportion of which are in CUPE 47, it should properly be in SCMMA to prevent any possibility of conflict of interest. Fourth, Mr. Milroy questioned why CUPE 47 waited for so long after the position was posted and identified as a SCMMA position to take issue with its assignment and make the present application. He argued that the delay in application, particularly after the successful applicant has been working in the job, ought to militate against the success of the present application. Fifth, Mr. Milroy also asserted that the specialized knowledge and skill set required for the position also dictated that it be placed within SCMMA.

**[32]** Mr. Cowan, representing the City, made no submission in argument.

## Statutory Provisions

**[33]** Relevant provisions of the *Act* include the following:

> *5 The board may make orders:*
>
> *(m) subject to section 5.2, determining for the purposes of this Act whether any person is or may become an employee;*
>
> . . .

*5.2(1) On an application pursuant to clause 5(m), the board may make a provisional determination before the person who is the subject of the application is actually performing the duties of the position in question.*

*(2) A provisional determination made pursuant to subsection (1) becomes a final determination after the expiry of one year from the day on which the provisional determination is made unless, before that period expires, the employer or the trade union applies to the board for a variation of the determination.*

## Analysis and Decision

**[34]** The Board issued the certification Order designating SCMMA as bargaining agent for a so-called "middle management" unit comprising "all administrative, supervisory and professional staff" in 14 City departments on January 9, 1997 in LRB File No. 098-96. The Board appointed an agent to review all of the positions and to make recommendations to the Board as to which bargaining unit each might most appropriately be placed in or whether it should remain out-of-scope. With the help of the Board agent, the parties ultimately arrived at an agreement. The new SCMMA bargaining unit comprised approximately 150 employees who hitherto had not been represented by any union and were members of the City's out-of-scope Exempt Staff Association. The SCMMA certification Order excludes, among others, City employees who are members of bargaining units represented by various other civic unions, including CUPE 47.

**[35]** In *City of Saskatoon, supra*, LRB File No. 232-97, the Board considered for the first time a proposed amendment to the SCMMA certification Order to include 10 newly created positions. The Board stated that its approach to determining the scope of middle management bargaining units was restrictive, confining membership to positions that would be in a conflict of interest in a labour relations sense with members of the more general bargaining unit, and to positions excluded from the general bargaining unit for some historical reason. The Board stated, at 321:

*. . . the Board has defined the middle management unit in a restrictive fashion by confining its membership to those positions who, if they were included in a large industrial unit, would be placed in a conflict of interest situation between their obligations to perform supervisory and first rung management functions in relation to those employees and their membership in the larger unit. The Board has also allowed positions to be included in middle management units which have some peculiar historical reason for being excluded from the industrial bargaining unit. However, these positions are not permitted to be used as a springboard for organizing other positions that otherwise would be included in the larger industrial unit.*

**[36]** In that case, the Board also stated that the professional or other status required by a position was not a determining factor as to where it ought properly to be assigned. At 332, the Board observed:

> *In relation to defining the community of interest that must be shared by persons assigned to the middle management unit, the Board will focus on the labour relations aspects of their positions. The professional or other status required by the position will not be considered a determining factor, unless the position is one that for historical reasons was included in the middle management unit, or excluded from the industrial unit.*

**[37]** The decision was soon followed by a *City of Saskatoon, supra* (LRB File No. 244-97), another application to amend the SCMMA certification Order to include a new position of accountant in the transit department. The Board reiterated its restrictive approach, usefully summarizing the principles enunciated in *City of Saskatoon, supra* (LRB File No. 232-97), at 339, as follows:

> *This is the second occasion on which the Board has been asked to comment on the scope of the middle management unit at the City. In City of Saskatoon v. Canadian Union of Public Employees, Local 59 and Saskatoon Civic Middle Management Association, [1998] Sask. L.R.B.R. 321, LRB File No. 232-97, the Board set out its approach in determining the boundaries of the middle management unit along the following general principles:*
>
> > *1. In a multi-bargaining unit setting, the Board is primarily concerned with ensuring that the multiplicity of bargaining units does not result in industrial instability;*
> >
> > *2. The Board historically favours larger, industrial units over smaller specialized bargaining units as being the best vehicles for promoting industrial stability;*
> >
> > *3. When faced with multiple bargaining units, the Board will take a restrictive approach to defining the scope of the smaller, more specialized unit;*
> >
> > *4. Middle management units will be confined, in general, to those employees who, if they were included in the large industrial unit, would be placed in a conflict of interest situation between their obligations to perform supervisory and low level managerial functions and their membership in the larger unit;*
> >
> > *5. The Board may allow for exceptions to the conflict of interest test where there are peculiar historical reasons for excluding persons from the larger unit, but these exceptions will not be permitted to form a spring board for organizing positions that otherwise would be assigned to the larger unit.*

**[38]** In that case, the Board also reiterated that professional status is not necessarily determinative of the placement of a position, observing, at 399, that:

> *In the present case, the position of accountant in the transportation department will be assigned to ATU. The position does not exercise supervisory or low level managerial authority. It is similar in conditions of work, qualifications and work duties to positions which are currently placed into the CUPE all employee unit, as opposed to SCMMA. Professional accounting positions that have been assigned to SCMMA include supervisory functions over CUPE or other employees. The professional status is not sufficient to remove the position from the larger unit on the test of conflict of interest.*

**[39]** In *City of Saskatoon, supra*, (LRB File No. 232-97) the positions in question were not yet filled. The Board provisionally assigned certain of the positions to SCMMA and others to CUPE 59. The Board's comments in relation to the differences in responsibility between the positions is instructive. The Board stated, at 332:

> *In the present application, the Board holds that the superintendent of boards and agencies, the superintendent of program facilities, manager project services and manager maintenance support fall within the middle management unit, at least on a provisional basis. The job descriptions for the positions contain first line managerial functions which include "performance management and disciplinary action." It would be difficult for such employees to be placed in the CUPE unit without giving rise to a conflict of interest between their job functions and their membership in the Union. They are also unlike the working supervisors in CUPE in that they are expected to impose minor discipline on staff and have input into major disciplinary decisions up to and including discharge. Overall, their job functions are incompatible with their membership in CUPE and they will be assigned as a result to SCMMA.*
>
> (emphasis added)

And, at 333:

> *In relation to the project officer and technical officer positions, the Board finds that their job responsibilities are significantly different than the superintendent and managerial positions. The project officers and technical officers do not supervise CUPE staff. They may provide technical expertise to the workforce but they are not directly or indirectly responsible for overseeing the performance of other employees. As a result, the Board will assign the positions to CUPE.*
>
> *In its evidence and argument, SCMMA took the position that the technical officer and project officer were "near" managers, that is, that they are an integral part of the management team because they provide expert advice to the management structures in the branch. SCMMA also views some of its bargaining unit as containing a number of similar members who are highly skilled but not directly involved in the management of employees who fall within the CUPE bargaining unit. SCMMA argued with respect to*

> *the project and technical officers that they in effect were similar to other positions in SCMMA which do not perform managerial functions.*
>
> *In our view, the evidence with respect to the "near" managers was unsatisfactory. If there are positions currently within SCMMA which have no role in managing the work of other employees, they will be treated by the Board in future applications as anomalies. They will not be deleted in their ranks from SCMMA, there having been some historical reason for being included in SCMMA and excluded from CUPE. However, these ranks will not be expanded by the Board.*
>
> (emphasis added)

**[40]** Not long afterwards, in *City of Saskatoon, supra* (LRB File Nos. 354-97 & 010-98), the Board confirmed that, in the middle management context, the industrial relations authority of a position is of overarching significance in determining its assignment, stating, at 349-50:

> *The determination of the composition of middle management units requires a focused approach to allow more accurate and efficient decisions as in the case of managerial exclusions. The Board has determined that, in fostering industrial peace and stability, the essence for assignment to the middle management unit must be confined to those positions which would be in conflict or potential conflict in the exercise of their supervisory and junior management duties in relation to their membership in the general unit. It should be recognized that there may be exceptions to the strict application of this criterion for historical or other good and sufficient reasons but it is the industrial relations characteristics of the position in relation to community of interest which are of overarching significance.*

**[41]** In the present case, the evidence established that positions within the scope of SCMMA generally expressly provide for the exercise of certain lower level managerial functions such as supervising supervisors, evaluating performances, initiating minor disciplinary action and providing input into decisions of major discipline. They may be contrasted with the training positions in scope of CUPE 859 referred to in the evidence of Mr. Miller, above, the job descriptions for which make no mention of such responsibilities.

**[42]** Ms. Helmink gave straightforward uncompromising evidence that she does not supervise anyone and does not exercise even minor admonitory authority over any employees. In the circumstances, there is no evidence of the likelihood now or in the future of a labour relations conflict with the members of CUPE 47 if she is included in that bargaining unit. After the flurry of work regarding the training and certification of the initial group of water treatment operators – members of CUPE 47 – is completed, Ms. Helmink estimates that the largest part of her work will still be in relation

to the members of that bargaining unit. The other civic unions, with the exception of SCMMA, have no objection to her being in scope of CUPE 47. In the circumstances, her greatest community of interest lies with the members of CUPE 47.

**[43]** In the present case, there is no evidence of any peculiar historical reason for placing the position in scope of SCMMA. While that may have been the rationale for the parties' agreement to place the vehicle and equipment training co-ordinator position in SCMMA in 1997, there is no evidence to that effect, nor any evidence as to why the same rationale should apply to the position presently in issue. As the Board stated in *City of Saskatoon, supra* (LRB File No. 232-97), the Board will not allow such historical anomalies to act as a springboard for organizing positions that would otherwise be assigned to the industrial unit.

**[44]** We find that the position of training consultant, Utilities Services Department, is properly within the scope of CUPE 47 and an Order will issue accordingly.

# CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1660 and THE BOARD OF EDUCATION OF THE BATTLEFORDS SCHOOL DIVISION NO. 118, Co-Applicants

LRB File No. 022-02; October 31, 2002
Vice-Chairperson, James Seibel; Members: Brenda Cuthbert and Duane Siemens

For the Applicant CUPE, Local 1660: Andy Iwanchuk
For the Applicant Battlefords School Division: Richard Buettner and Ray Kopera

**Bargaining unit – Appropriate bargaining unit – Board rules that community school coordinators and community liaison workers are within scope of existing bargaining unit.**

**Reference of dispute – Bargaining unit – Whether positions of community liaison workers and community school coordinators are within scope of existing bargaining unit – Board determines that positions have no job functions to warrant their exclusion from bargaining unit on basis of managerial authority or confidential capacity – Board rules that positions are employees within meaning of s. 2(f)(i) of *The Trade Union Act.***

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

## REASONS FOR DECISION

### Background

**[1]** **James Seibel, Vice-Chairperson:** The Canadian Union of Public Employees, Local 1660 (the "Union"), is the bargaining agent for a unit of employees of the Board of Education of the Battlefords School Division No. 118 (the "Employer"). The parties applied under s. 24 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") to refer a dispute to the Board to determine whether community school co-ordinators ("co-ordinator") and community liaison workers ("liaison worker") are employees within the meaning of s. 2(f) of the *Act* and are within the scope of the Union's bargaining unit and, if necessary, to amend the certification Order dated June 10, 1997 accordingly.

**[2]** The parties also applied to amend the certification Order to reflect the scope clause in the current collective bargaining agreement with the term January 1, 2001 to December 31, 2003.

## Evidence

**[3]** Katherine McHarg has been the Employer's supervisor of special services for five years. She described the provincial community schools program (the "Program"), referring to a publication of Saskatchewan Education entitled "Building Communities of Hope – Best practices for Meeting the Learning Needs of At-Risk and Indian and Metis Students."

**[4]** The Program, which has been active in Regina, Saskatoon and Prince Albert for some 20 years, is founded on a tradition of community education and community development. Its goal is to create schools that build relationships between community members, organizations and families; that take into account students' cultural and socio-economic conditions; that improve educational opportunities and programs; and that strengthen the communities in which the schools are located. A community school council, comprising parent, community, staff and student representatives, as well as the school principal and the community school co-ordinator, leads the development and implementation, and subsequent co-ordination and evaluation, of the particular community school plan.

**[5]** In 2001, Saskatchewan Education expanded the existing community school program in the school district from kindergarten through grade 8, to kindergarten through grade 12. The Employer increased the number of co-ordinator positions that would work with the principals of certain schools and the community council to set up the expanded programming. There are three co-ordinator positions, two in the public elementary system at McKittrick and Connaught Schools, and one at North Battleford Comprehensive High School. The first co-ordinator was hired in 1996 and the other two in September 2001.

**[6]** Ms. McHarg referred to the co-ordinator position description, but said that actual duties may differ from school to school depending on local conditions. The position description provides, in part, as follows:

> *Reports to:*
> *Directly:* *Principal*
> *Indirectly:* *Superintendent*
>
> *Responsible for Community Schools*

*Required Education, Knowledge, Qualifications and Experience:*

- *Possess a Grade 12 diploma . . .*
- *Minimum of two years of post-secondary training in Social Work or equivalent post-secondary education in a related area . . .*
- *Supervisory training or experience would be an asset.*

*Required Skills and Abilities:*

- *Ability to maintain strict confidentiality in school division operations.*
- *Ability to work as a team player. . . .*

*Supervision of Other Staff:*

*This position supervises the Teacher Associates (Community School) assigned to the school, and the Nutrition Worker where applicable.*

*Duties and Responsibilities:*

*5. In the area of Community School Planning and Implementation:*

- *Work with the principal, teachers, parents and community members as a team in implementing and co-ordinating all aspects of the Community School Program. This Community School Program includes: parent and community involvement, integrated services and community development as well as the Community School Plan and process for ongoing renewal.*
- *Assist in developing a positive caring and supportive culture and climate in the school.*

*6. In the area of Parent Involvement and Community Partnerships:*

- *Develop an effective Community School Council that reflects its community, and work with the Council to develop leadership skills and the capacity among members to become meaningfully involved in educational and community affairs.*
- *Encourage community and parent involvement and develop the capacity among parents and other members of the community to participate effectively in all aspects of the Community School.*
- *Develop, co-ordinate and/or deliver adult learning opportunities such as family literacy programs, parenting education, Adult Basic Education, pre-employment, and self-help courses.*

*7. In the area of Integrated Services:*

- *Work with the Community School Council to identify the needs of the students and the community, and organize effective responses to these needs.*
- *Identify and establish partnerships with human service providers and other community agencies to develop and co-ordinate integrated education, health, social, justice and recreation services and programs for students and their families.*

*8. In the area of Community Development:*

- *Initiate and participate in activities to identify community issues and undertake activities to address them.*
- *Co-ordinate the involvement of the Teacher Associates (Community School) in community activities.*

*9. In the area of Extension Activities:*

- *In concert with school-based administration, develop a positive, caring and supportive culture and climate in the community school.*
- *Interpret and promote the Community School Program to the community and facilitate communication between parents, community and the school through such communication vehicles as public speaking, engagements, workshops and newsletters.*

*Judgment, Independence and Client Contact:*

- *Confidentiality*

*At no time should a School Liaison Worker discuss, in public, information pertaining to a student. A School Liaison Worker is expected to respect the confidential nature of the position by avoiding discussion about any topics that are not formally communicated to the public by the administration of the school or school division. Breaching confidentiality is a serious violation of acceptable conduct.*

- *Independence*

*A School Liaison Worker is expected to work independently.*

- *Working Jointly with Other Staff on Common Assignments or Tasks*

*This position involves working jointly with the human services providers, educational assistants, teachers, and school-based administration on a daily basis.*

**[7]** The co-ordinators work the full calendar year. Summer duties include supervising a summer program and preparing grant submissions. They report to the school principals and Ms. McHarg, and take turns supervising the four community school teacher associates and the nutrition worker. The co-ordinators schedule the teacher associates and determine their daily duties, which include visiting students' homes and working with social services, justice and mental health agencies, and cultural leaders and elders, among others, to help students from leaving, or to assist them in returning to and staying in, school. Sometimes the co-ordinator accompanies the teacher associates on their visits and works with them.

**[8]** The principals hire the teacher associates, although the co-ordinators and community school councils may provide input into the decision. A co-ordinator sat in one disciplinary hearing for a teacher associate, but a resolution of the matter was achieved by mediation between the particular school principal and the Union. Ms. McHarg agreed that a co-ordinator cannot independently impose discipline, but may provide relevant information.

**[9]** Diane Pooyak has been employed as a co-ordinator since August 2001. She spends much of her time planning, scheduling and supervising the work of two teacher associates at Connaught School.

They report to her daily. Sometimes she schedules the associates to work at evening functions. She approves the associates' time off.

**[10]** Ms. Pooyak herself makes home visits to what she termed "difficult families" that the teacher associates are not able to handle, sometimes accompanied by the associate. Part of her duties is to encourage parents to participate in planning the community school program.

**[11]** Ms. Pooyak testified that if she has a performance problem with a teacher associate, she first speaks to the associate and then, if necessary, she refers the matter to the principal. In fact, the disciplinary matter referred to by Ms. McHarg in her evidence arose as a result of Ms. Pooyak referring a matter to the principal. While she has been present at disciplinary meetings, she herself has not disciplined anyone. Furthermore, while she expects to evaluate teacher associates' performance, she has not yet done so.

**[12]** Heather Leask has been employed as a liaison worker since January 2002. She has a diploma in criminology and presently is working on a degree in social work.

**[13]** Ms. Leask is assigned to five schools, four in the public system and one in the separate system. Her duties include: obtaining referrals of students from the teachers and principal; dealing with student attendance issues; establishing homework schedules; making home visits; and acting as liaison between the school, home, social services and mental health services. She said that she has performed nearly every duty described in the liaison worker position description, which reads, in part, as follows:

> *Reports to:*
> *Directly: Principal*
>
> *General Description:*
> *School Liaison Workers provide assistance to students, their parent/guardians and school staff where students are experiencing social, emotional or behavioral problems. As well, the School Liaison Worker provides enhanced Aboriginal cultural perspectives, awareness and guidance to students, families and school staff.*
>
> *Required Education, Knowledge, Qualifications and Experience:*
> • *Post-secondary training in Social Work, Human Justice or equivalent post-secondary education in a related area . . .*
>
> *Required Skills and Abilities:*
> • *Ability to maintain strict confidentiality in school division operations. . . .*

*Supervision of Other Staff:*
*This position does not involve the supervision of other staff.*

*Duties and Responsibilities:*
*5. In the area of Liaison Worker:*

- *Provide case co-ordination for students who are experiencing social, emotional and/or behavioural problems.*
- *Promote effective integration of community and school-based services to assist students and their families.*
- *Provide counselling to students and their families, if qualified to do so.*
- *Initiate referrals of students and their families to other human service agencies.*
- *Assist other human service agencies in planning and implementing services to students and their families.*
- *Assist in the development and/or implement preventative programs and activities for individuals and groups.*
- *Make home visits on a regular basis.*
- *Assist with attendance and truancy issues.*
- *Maintain records of individual cases. These case records will be accurate, concise and outline the action taken by the School Liaison Worker.*

*6. In the area of Cultural Awareness:*

- *Provide enhanced Aboriginal cultural perspectives, awareness and guidance to students, families and school staff.*
- *Enhance linkages to the Aboriginal community.*
- *Increase the involvement of Aboriginal peoples in the education of their children.*

*Judgment, Independence and Client Contact:*

- *Confidentiality*

*At no time should a School Liaison Worker discuss, in public, information pertaining to a student. A School Liaison Worker is expected to respect the confidential nature of the position by avoiding discussion about any topics that are not formally communicated to the public by the administration of the school or school division. Breaching confidentiality is a serious violation of acceptable conduct.*

- *Independence*

*A School Liaison Worker is expected to work independently.*

- *Working Jointly with Other Staff on Common Assignments or Tasks*

*This position involves working jointly with the human services providers, educational assistants, teachers, and school-based administration on a daily basis.*

**[14]** Ms. Leask often works in the evening making home visits and attending meetings of, and arranging facilitators for, a parenting group. She does not supervise any other staff. She is expected to maintain the confidentiality of the students and the work of other agencies. She reports to the school principal and to Ms. McHarg. The liaison worker is not on the community school council.

## Argument

**[15]** Mr. Iwanchuk, representing the Union, argued that there was nothing in the evidence to suggest that either of the disputed positions should be placed out of scope of the bargaining unit. In particular, he said, the fact that the liaison workers require flexible work hours to allow for some evening work can be dealt with in collective bargaining. He pointed out that provincial social workers are unionized.

**[16]** Mr. Iwanchuk argued that neither the co-ordinator nor the liaison worker has any disciplinary responsibility or authority – they must refer such issues to their superiors. The co-ordinators' supervisory role with respect to teacher associates is one of scheduling and co-ordination. Referring to the decision of 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, Mr. Iwanchuk asserted that the authority to give minor admonishment to others in the bargaining unit is not sufficient to justify exclusion.

**[17]** Mr. Buettner, on behalf of the Employer, argued that both positions should be placed out of scope. He said that the incumbents must act independently and with more autonomy and flexibility than teachers. The new designation of the Comprehensive High School as a community school means that the co-ordinator position is evolving. He asserted that their day-to day work involves making final decisions on all kinds of matters. He pointed out that the Employer's central office secretaries, computer technicians and transportation clerks are out of scope.

## Statutory Provisions

**[18]** 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;*
>
> . . .
>
> *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.*

## Analysis and Decision

**[19]** We are asked to determine whether either or both of the positions of community school co-ordinator and community liaison worker should be placed out of scope of the bargaining unit represented by the Union. The basis for the exclusion of persons from the bargaining unit is that they are not "employees" within the meaning of the *Act* or their inclusion would mean that the unit is not appropriate for the purposes of collective bargaining.

**[20]** In deciding whether individuals ought to be excluded on the basis that they exercise managerial authority, the central determination is whether they have, or would be likely to have, a conflict of interest in a labour relations sense with other members of the bargaining unit. The Board expressed this rationale in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Remai Investments Corporation,* [1997] Sask. L.R.B.R. 335, at 337-38, as follows:

> *The roots of the rationale lie in the right guaranteed under the Act for employees to join together to bring their collective power to bear on the determination of their terms and conditions of employment. In the hierarchy of an organization, there are inevitably persons whose role in selecting, directing and evaluating the workforce has a significant impact on those terms and conditions of employment. Legislatures and labour relations boards have concluded that in the construction of collective bargaining relationships, the placing of such persons among the group of employees whose terms and conditions of employment are subject to collective bargaining would create a conflict of interest between their responsibility as a representative of*

*the employer to assist in determining the shape and future of the employee group, and their interest as a member of that group in the exercise of collective influence.*

**[21]** In *City of Regina, supra*, the Board summarized the issue as follows, at 158:

*At the heart of the decision the Board must make is the question whether in any particular case the duties which are attached to a position are of a kind and extent which would create an insoluble conflict between the responsibility which someone performing managerial functions owes to an employer, and the interests of that person and his or her colleagues as members of a bargaining unit. Because such a conflict is in many cases a matter of degree, it is impossible to state any one test which can be used to determine whether a particular person falls on one side of the line or the other.*

**[22]** In *Canadian Union of Public Employees, Local 4283 v. Duck Mountain Ambulance Care Ltd.*, [1999] Sask. L.R.B.R. 697, LRB File No. 096-99, the Board reviewed the principles and jurisprudence relating to the issue, observing as follows, at 708-10:

*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.*

*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:*

*a) The extent of the power to hire new employees;*

*b) The extent of the power to discipline;*

*c) The extent of the power to promote and demote;*

*d) The extent of the authority to administer personnel policies (and the collective agreement and grievances, if applicable);*

*e) The extent of the authority to evaluate employee performance;*

*f) 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.*

> *g) The nature and extent of the discretion to affect, and responsibility for, the overall performance of the work area or department.*

*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.*

*As stated by the Board in Grain Services Union (ILWU Canadian Area) v. AgPro Grain Inc., [1995] 1st Quarter Sask. Labour Rep. 243, LRB File No. 257-94, at 246:*

> *It is often difficult to distinguish those configurations of these clues which indicate that a person has true managerial authority from those in which such authority is so attenuated or insignificant as not to justify exclusion from the bargaining unit. The Board must be cautious about accepting titles or vague attributions of managerial authority as a basis for depriving employees of the opportunity to have their interests represented by a trade union.*

*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 focused 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.*

**[23]** In the present case, neither the co-ordinator nor the liaison worker exercises job functions that warrant their exclusion from the bargaining unit on the ground of the exercise of "managerial authority." The supervision that the co-ordinators exercise in relation to the teacher associates includes, at most, the authority to give minor admonishment – any true disciplinary situation is referred to the school principal. The liaison worker does not supervise anyone. Neither position is likely to be in a labour relations conflict with other members of the bargaining unit.

**[24]** With respect to exclusion on the "confidentiality" ground, clearly this type of exclusion only pertains to acting in a confidential capacity with respect to an employer's industrial relations. There is no evidence that either position has such responsibility. Many in-scope employees must maintain confidentiality of employer, business, personnel and customer information and records as a term and condition of employment, the breach of which may draw serious disciplinary action – that type of confidential responsibility is not generally of the kind that warrants exclusion from the bargaining unit.

**[25]** Finally, there was no evidence adduced or argument advanced that either position does not have a sufficient community of interest with the members of the bargaining unit such that it would be inappropriate to include them in the unit.

**[26]** For these reasons, we find that the positions of community school co-ordinator and community liaison worker are within the scope of the bargaining unit represented by the Union. An Order will issue amending the certification Order in the manner otherwise requested by the parties.

# DORA PINEDA and JOSE PINEDA, Applicants v. INTERNATIONAL UNION OF OPERATING ENGINEERS HOISTING AND PORTABLE AND STATIONARY, LOCAL 870, Respondent

LRB File Nos. 199-01 & 200-01; October 31, 2002
Vice-Chairperson, James Seibel; Members: Clare Gitzel and Duane Siemens

For the Applicants: Dora Pineda and Jose Pineda
For the Respondent: Gary Bainbridge

**Unfair labour practice – Union – Intimidation – Board finds no coercion or intimidation in union's organizing tactics – Board dismisses applications.**

***The Trade Union Act*, ss. 5(d) and 11(2)(a)**

## REASONS FOR DECISION

### Background

**[1] James Seibel, Vice-Chairperson:** The Applicants, Dora Pineda and Jose Pineda (the "Pinedas"), are husband and wife. The Pinedas and one of their daughters are employed by Marquis Facilities Corporation, the cleaning contractor at the Midtown Plaza in Saskatoon. Dora Pineda is a supervisor. In early June 2001, International Union of Operating Engineers Hoisting and Portable and Stationary, Local 870 (the "Union") was engaged in an organizing drive of the employees of Marquis Facilities Corporation. The Pinedas each filed an application alleging that the Union had committed an unfair labour practice in violation of s. 11(2)(a) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") as the result of an incident on June 6, 2001 and subsequent related events. The two applications were consolidated for hearing.

**[2]** Section 11(2)(a) of the *Act* 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;*

## Evidence

**[3]** Dora Pineda testified that Union organizer Jim Chisholm came to the Pineda residence at about 6:15 a.m. on June 6, 2001. One of the Pineda's daughters who was already up answered the door and then woke Dora and her husband. Dora Pineda said that her daughter told them there was a man at that door and that it was an emergency. She and her husband both went to the door to find Mr. Chisholm, whom she recognized because he had been at the workplace in connection with a personal relationship he had with one of her co-workers. Mr. Chisholm explained that the Pinedas and their daughter, Sobeyda, were the last employees he was seeking to have sign cards in support of the Union, and that they had to sign that day for the Board to count their cards. Dora Pineda told him that she did not understand what he was talking about and Mr. Chisholm proceeded to explain the benefits of Union membership.

**[4]** According to Dora Pineda, Mr. Chisholm told her that if she did not sign a card and the Union got in, she could lose her position as food court supervisor. She also testified that he said that if the present employees did not sign they might be fired, or words to that effect. She asked him if she could sign afterwards and he said that she could not. She said that his words frightened her, and she told him she did not want anything to do with the matter and refused to sign. Dora Pineda said that neither she nor her husband asked Mr. Chisholm to leave, that there were no raised voices and that Mr. Chisholm was polite. She estimated that the exchange lasted approximately fifteen minutes, but also said that it could have been somewhat longer.

**[5]** Dora Pineda said that Mr. Chisholm approached her at work the next day and told her that he had tape-recorded the conversation the day before and was in fact recording their present conversation, pointing to the portfolio he was carrying. According to Ms. Pineda, Mr. Chisholm said he did so to protect himself from allegations of intimidation. She said that she thought that he was trying to intimidate her.

**[6]** In reply to a question by Board member Siemens, Dora Pineda stated that she and her husband were El Salvadorian immigrants for whom English was a second language.

**[7]** Jose Pineda works as a janitor at the Midtown Plaza. He went to the door with his wife on the morning of June 6, 2002. After listening to Mr. Chisholm outline the purported benefits of joining the Union, he said he excused himself and left for 30 to 40 minutes. When he returned, Mr. Chisholm was still at the door speaking to his wife. Mr. Pineda said that he asked Mr. Chisholm some questions about unions, and when he told him he was not interested in signing a card, Mr. Chisholm told him that he – that is, Mr. Chisholm – could sign his name to a card anyway. Mr. Pineda testified that when he told Mr. Chisholm he would sign if the Union came in, Mr. Chisholm said it then would be too late, and that this day was the last day to sign. Mr. Pineda indicated that he thought that Mr. Chisholm was wrong about that.

**[8]** Mr. Pineda estimated that Mr. Chisholm was at the door for approximately one and a half hours. Neither Mr. Pineda nor his wife ever asked Mr. Chisholm to leave.

**[9]** Mr. Pineda testified that Mr. Chisholm approached him at work a few days later and, showing Mr. Pineda a small tape recorder, said that he had recorded everything at their home on the morning a few days before.

**[10]** Brenda Desnomie is the account manager for Marquis Facilities, and Dora Pineda's supervisor. She testified for the Pinedas. Most of her evidence was hearsay, regarding a conversation she had with Dora Pineda on the morning of June 6, 2001. During that conversation, Ms. Desnomie advised her that she did not think that it was true that Ms. Pineda could lose her job if she did not sign in support of the Union if the Union got in. Later that morning, Mr. Chisholm came to see Ms. Desnomie and told her that he was filing an application for certification of Marquis Facilities.

**[11]** Jim Chisholm has been a member of the Union for over twenty years and started as an organizer in late May 2001, after a two-day training course. Marquis Facilities was his first organizing campaign, but he had assisted in other campaigns. He became interested in organizing Marquis Facilities because of a personal relationship he had with one of the employees.

**[12]** Mr. Chisholm stated that the Pinedas were among the last employees he approached because he was concerned that they were close to certain members of management, and Dora might end up being out of scope. He said he went to their home early in the morning because they worked at the Midtown at different times and also had second jobs, and he knew that their daughter had an early morning paper route. He waited outside in his car until about 6:30 a.m., when he saw the Pineda's daughter enter the house, before he went to the door. When the Pineda's daughter answered, he said he told her that he wanted to speak to her mother and father about a "very important matter" and he denied that he used the word "emergency."

**[13]** When Dora and Jose Pineda came to the door, Mr. Chisholm introduced himself and explained why he was there. He gave them some information and pamphlets about the purpose and benefit of the Union. He showed them Union support cards, explained the difference between such cards and Union membership documents and asked them if they would sign. Mr. Chisholm testified that when Jose Pineda asked him if he could lose his job, he explained that only they, the Union and the Labour Relations Board would know that they had signed in support of the Union, but not the employer. He said he further indicated that to be counted, the cards had to be signed before the application went to the Board. He said he explained to the Pinedas that if the Union was certified, they would be included in the bargaining unit even if they did not sign, but that Dora Pineda might not be in the bargaining unit because of her position as a supervisor. He said he asked some questions about her job duties and authority in order to better ascertain whether she might be out of scope. Mr. Chisholm denied that he made any mention about other persons taking their jobs if they did not sign.

**[14]** Mr. Chisholm confirmed that Jose Pineda indicated that he did not want to sign, but said that he would do so if the Union came in. Mr. Chisholm said that he took some time to attempt to persuade Mr. Pineda that it would be preferable to sign a support card then and there. Mr. Chisholm adamantly denied that he indicated to Mr. Pineda that if he chose not to sign a card Mr. Chisholm could put his name on one anyway. Mr. Chisholm also confirmed that Mr. Pineda left for a period at some point during the discussion.

**[15]** Mr. Chisholm testified that he left when it became clear that he was not going to be able to persuade either of the Pinedas to sign cards – he was never asked to leave. To him it did not appear that either of them was upset about his visit. He said that the union organizing training he had just completed a few days before had emphasized that coercion was not to be practiced.

**[16]** In cross-examination by each of Dora Pineda and Jose Pineda, Mr. Chisholm denied that he told Mr. Pineda that he had taped their conversation, or that he had taped it at all. Mr. Chisholm confirmed that he did sometimes carry a tape recorder to record the witnessing of signatures to a statement of employment, and to record details related to an organizing drive, such as who is an employee, in case there are later problems with an employer regarding the statement. Mr. Chisholm testified that it was not usual to attend at the homes of prospective supporters at such an early hour, but he wanted to speak to the Pinedas outside of their work hours, which was difficult because of their multiple jobs. He said that he wanted to file the application as soon as possible so it was somewhat urgent that he speak with them.

## Argument

**[17]** Dora Pineda, on her own behalf, asserted that in bothering her at such an early hour on June 6, 2002, Mr. Chisholm had disturbed her privacy. She said that she was also disturbed that it seemed that he had been spying on them in that he knew that their daughter delivered early morning papers. She indicated that she felt uncomfortable about her safety and that of her family.

**[18]** Jose Pineda, on his own behalf, said that he felt that Mr. Chisholm had breached his right to privacy, especially by apparently spying on his daughter. He said that if the Board did find that an unfair labour practice had been committed, he would like an apology from Mr. Chisholm.

**[19]** Mr. Bainbridge, counsel for the Union, argued that the evidence did not support the allegation of this relatively rare unfair labour practice, referring to the decision of the British Columbia Labour Relations Board in *Richmond Elevator Maintenance Ltd.*, [2000] B.C.L.R.B.D. No. 173 (April 17, 2000), and those of the Ontario Labour Relations Board in *Mike's Painting and Decorating Ltd.*, [1991] OLRB Rep. January 67, and *United Cement, Lime, Gypsum and Allied Workers International Union*, [1983] OLRB Rep. December 2125.

**[20]** In *Richmond Elevator Maintenance, supra*, certain employees who objected to the appropriateness of the union's organizing tactics filed unfair labour practice applications against the union. One employee complained that the union's organizer had visited his home on two occasions, once at 9 p.m. Another complained that a union organizer had visited him at home at 6:30 p.m. and had telephoned him several times between 9 p.m. and 11 p.m. Another complained that a union organizer had contacted him more than 20 times. Confirming that the test of intimidation or coercion is an

objective one, the B.C. Board held that while the union's approaches may have been frequent, aggressive and annoying, they were not, nor reasonably would have been, intimidating or coercive.

**[21]** As to the matter of the alleged statements by Mr. Chisholm regarding the recording of the conversation with the Pinedas, Mr. Bainbridge argued, first, that it was not established that it had been recorded, and second, that the statements were made some days after the conversation and were not material to what occurred on the prior date.

## Analysis and Decision

**[22]** We must determine whether Mr. Chisholm's conduct interfered with, restrained, intimidated, threatened or coerced either or both of Dora Pineda or Jose Pineda with a view to encouraging membership in or activity in or for the Union.

**[23]** The test as to whether conduct is coercive or intimidating is an objective test. In *Insurance Corporation of British Columbia v. Office and Professional Employees' International Union, Local 378*, [1998] B.C.L.R.B.D. B71, the B.C. Board stated as follows:

> *Coercion involves a type of unfairly forceful pressure which expressly or implicitly involves a threat of adverse consequences to the individual if s/he fails to do what a union representative wants them to do, or an unreasonable promise of beneficial consequences if s/he does what is requested.*
>
> *A threat may be implied, unspoken, or assumed. Words or actions which may seem innocuous on their face may constitute a threat to certain employees . . . A misrepresentation may cross the line from being merely a persuasive statement, to constituting coercion or intimidation. This occurs when the misrepresentation is so outrageous or inflammatory that it places undue or excessive pressure upon the employee . . .*

**[24]** In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Custom Built Ag. Industries*, [1998] Sask. L.R.B.R. 662, LRB File No. 112-98, at 697, the Board observed that:

> *We agree that the "no harm, no foul" principle should not be adopted as a matter of policy, because it is unnecessary. The real inquiry is essentially objective: whether a reasonable person would perceive the statement as coercive or intimidating such that it affects his or her free choice.*

**[25]** Therefore, while whether the alleged coercion or intimidation has the desired effect is not determinative of the issue, clearly each of the applicants resisted Mr. Chisholm's entreaties and declined to sign a card. There is no suggestion that Mr. Chisholm was other than polite and spoke with a moderate tone without suggestion of irritation or ill-humour. He was never asked to leave. There was a significant discrepancy between the testimony of Dora Pineda and Jose Pineda as to how long Mr. Chisholm was actually there – approximately 15 minutes versus approximately 90 minutes. By Mr. Pineda's admission, he was not present for the bulk of Mr. Chisholm's visit.

**[26]** There was conflicting evidence over whether Mr. Chisholm spoke of the Pinedas losing their jobs if they did not sign support cards. Mr. Chisholm had just completed the Union's organizing training course a few days before. We accept his evidence that the Union does not counsel or countenance such tactics and that he did not in fact make statements to that effect. However, neither do we say that the Pinedas are not telling the truth on this point. Rather, we believe it is likely that they were mistaken as to the meaning of his comments with respect to the usefulness of their signing before the application for certification was filed, and with respect to whether Dora Pineda would be included in the bargaining unit if the Union was certified.

**[27]** In the present case, while Mr. Chisholm's conduct may have seemed aggressive, annoying, insensitive and somewhat perplexing to the Pinedas, applying an objective test, we cannot say that it was coercive or intimidating, even if it was, over all, ill-advised.

**[28]** Each of the applications is dismissed.

**[29]** Mr. Gitzel dissents from these Reasons for Decision. A written dissent will be forwarded to the parties in due course.

# RANDY D. J. GIBSON, Applicant v. COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL 650 and FANTASTIC CLEANING INC., Respondents

LRB File No. 089-02; November 4, 2002
Vice-Chairperson, Walter Matkowski; Members: Marshall Hamilton and Maurice Werezak

For the Applicant: Randy Gibson
For the Respondent: Angela Zborosky

**Duty of fair representation – Scope of duty – Union adequately investigated circumstances surrounding applicant's dismissal – Union considered likelihood of success at arbitration and possibility that the applicant would still not be able to return to work – Union did not breach duty of fair representation – Board dismisses application.**

**Duty of fair representation – Scope of duty – Board finds union did not violate duty in entering into settlement agreement without consent, but with knowledge, of grievor – Union has carriage of grievance and therefore, provided union considers relevant factors in thoughtful and reasonable manner, has authority to enter into settlement agreements.**

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

## REASONS FOR DECISION

### Background

**[1]** **Walter Matkowski, Vice-Chairperson:** Randy Gibson (the "Applicant") filed an unfair labour practice application alleging that the Communications, Energy and Paperworkers Union of Canada, Local 650 (the "Union") violated s. 25.1 of *The Trade Union Act, R.S.S.1978,* c.T-17 (the "*Act*") by failing to represent him fairly and reasonably following the termination of his employment at Fantastic Cleaning Inc. (the "Employer") on February 10, 2002. This matter was heard in Regina on August 30, 2002.

### Facts

**[2]** The Applicant testified on his own behalf while David Durning, a National Representative with the Union, and Brian Berscht, a member of the Union's negotiating committee, testified for the Union.

**[3]** The Applicant started working as a cleaner for the Employer on November 10, 2001. The Employer's only cleaning contract is with Casino Regina. In January 2002, the Employer offered the Applicant a position as a supervisor, which he turned down.

**[4]** Mr. Gibson became active in the Union and joined the Union's negotiating committee on February 9, 2002. His supervisors learned of his union activity on this date. During his employment, he was not subject to any reprimands or discipline.

**[5]** Mr. Gibson was terminated from his employment on February 10, 2002. Chris Melenchuk, a supervisor, notified him of the termination. Mr. Melenchuk did not advise Mr. Gibson that he was entitled to Union representation at the termination meeting. Mr. Melenchuk told Mr. Gibson that he was fired because he had not finished his work on his previous shift.

**[6]** Mr. Gibson asked Mr. Melenchuk to put the reasons for dismissal in writing. Mr. Melenchuk signed a document that reads as follows: "Chris Melenchuk terminated Randy Gibson Sunday Feb. 10/02 start of shift. Randy has been terminated due to job performance. Written at 3:30 a.m." The Applicant asked Mr. Melenchuk to expand on the words "job performance," but Mr. Melenchuk would not.

**[7]** The Applicant met with Mr. Durning and Mr. Berscht who filed a grievance on February 14, 2002 seeking the Applicant's reinstatement. The Union also filed unfair labour practice, reinstatement and monetary loss applications with the Labour Relations Board on February 15, 2002, alleging that the Applicant was dismissed as a result of his Union activity.

**[8]** Mr. Durning sent a letter on February 14, 2002 to Dawn Andrews, the Employer's General Manager, which reads in part:

> *Our complaint is that there has been ongoing harassment of past and present local union officers and bargaining committee members and that the recent termination of Randy Gibson was as a result of his union involvement, all of which are violations of The Trade Union Act. The union will also be seeking Randy's reinstatement through the grievance process.*

**[9]** Mr. Durning testified that two previous Union bargaining committee members had informed him that they had been harassed at the workplace because of their union activities. According to Mr. Durning, the two former bargaining committee members quit their employment and were not prepared to take their complaints further. Mr. Berscht, a current member of the Union's bargaining committee testified that he too had been harassed as a result of his union activities.

**[10]** Mr. Durning was confident that Mr. Gibson's termination would be overturned, either by the Labour Relations Board or by an arbitration board. He thought that a grievance was likely to succeed because Mr. Gibson had no prior disciplinary record and had not been offered Union representation at the termination meeting.

**[11]** The Employer wrote the Union on February 16, 2002 setting out in more detail why it fired Mr. Gibson. The Employer claimed, as well, that Mr. Gibson was not entitled to be represented at the termination meeting because he was a probationary employee.

**[12]** At the third step of the grievance process, the Union and the Employer reached an agreement to settle the grievance. The terms of the agreement are set out in a letter from Ms. Andrews to Mr. Berscht dated April 16, 2002, and in a letter from the Union to the Applicant dated April 23, 2002, which read respectively as follows:

> *RE: Randy Gibson Grievance – Step 3*
>
> *Dear Mr. Berscht,*
>
> *To follow up our discussion on Monday 15 April 2002. I made a proposal to the Union and the Union made a counter proposal to resolve the grievance.*
>
> *The Union proposed the following:*
>
> 1. *Randy must take an Anger Management course – Union will cover cost*
> 2. *Four weeks monetary loss @ 30 hours per week x $7.65*
> 3. *Reinstatement with no probation at rate of pay when dismissed*
> 4. *Unfair Labour Practice will be withdrawn*
>
> *The Union also stated that Randy will be told this is a take it or leave it offer. If any of the above are refused by Randy, the Union has agreed that the grievance will be dropped.*
>
> *I only have one thing to add to this proposal. If there are any incidents where Randy's temper is in question, there will be serious consequences.*

*If you have any questions, please call me at 949-1510.*

*Regards,*

*Dawn Andrews*
*General Manager*
*Fantastic Cleaning*

. . .

*Dear Randy:*

*Further to the telephone conversation between you, Brian Bersht and myself yesterday, this is to inform you of the status of your grievance and the proposed settlement.*

*On April 15, Brian and I met with Dawn Andrews to discuss your grievance at the third step. This offer was put forward as a final offer from the employer to settle your grievance. The position taken by the employer was that if this was not accepted and the union chose to take the matter to arbitration, they would proceed with securing statements from various Fantastic Cleaning and Casino Regina employees attesting to issues they have had with your behaviour during the course of your employment and that they would pursue the action of having you barred from Casino property.*

*Brian and I have discussed this proposed settlement and agree it is in your best interests and the best interests of the local to accept this settlement, which is as follows:*

1. *Randy must take an Anger Management course – Union will cover cost*
2. *Four weeks monetary loss @ 30 hours per week x $7.65*
3. *Reinstatement with no probation at rate of pay when dismissed*
4. *Unfair Labour Practice will be withdrawn*

*(The anger management course referred to consists of approximately 5 two hour sessions held in the evening.)*

*Fantastic Cleaning has agreed to extend the time limit at this stage of the grievance procedure in order that you may have more time to consider the offer. We will need to convey our response to them by Friday, May 3, 2002 at the latest.*

*Please call me if you have questions about this.*

*David Durning*
*National Representative*

**[13]** Mr. Durning still believed that the Union had a good case if the matter proceeded to arbitration. However, reports of two events caused him some concern. Dawn Andrews told Mr. Durning that on March 1, 2002 the Applicant went to the Employer's office to pick up his final pay cheque and to return two items, including his uniform. As Ms. Andrews described the incident, there was a confrontation between the Applicant and the receptionist over the uniform. The Applicant allegedly used some profane language and somehow, the receptionist stumbled. Mr. Durning subsequently asked the receptionist about the incident but she said she would not talk about it.

**[14]** Ms. Andrews also alleged that the Applicant had an altercation with a security guard employed by Casino Regina and made a racist comment to the guard. Ms. Andrews would not give Mr. Durning details about the incident, but said if the incident was investigated and the allegation confirmed, that the Applicant could be banned from Casino Regina. Mr. Gibson acknowledged to Mr. Durning that he and a "black security guard exchanged words," but he assured Mr. Durning that the incident was a minor one and that he did not make any racist comments. Mr. Gibson also denied that he had an altercation with the receptionist on March 1, 2002.

**[15]** Mr. Durning testified that the Employer was first certified in February 1999, and that the Employer representatives were not used to dealing with a Union. The parties were just starting negotiating on a new collective agreement, their second, and progress was slow.

**[16]** Before the Employer and Union reached their agreement to settle the grievance, Mr. Durning kept Mr. Gibson informed about what was happening during Mr. Durning's settlement meetings with the Employer and in regard to Mr. Durning's concerns about the Union running Mr. Gibson's grievance. Mr. Gibson was made aware that the Union local did not have a lot of money, that the Union was entering into difficult contract negotiations, and that Mr. Durning was concerned that Casino Regina could bar Mr. Gibson from the premises as a result of the alleged incident with the security guard.

**[17]** Mr. Durning testified that he and Mr. Berscht considered a number of factors before making the tentative deal with the Employer. These included the cost of an arbitration, the uncertainty of an arbitrator's decision, their opinion that a negotiated settlement is accepted more readily at the workplace than a decision imposed by a third party, the possibility that the Applicant would be banned from Casino Regina, making a successful result from an arbitrator irrelevant, and that the parties were

commencing difficult contract negotiations. Mr. Durning and Mr. Berscht balanced these factors against the certainty of immediate reinstatement and partial monetary compensation that were available under the terms of the proposed settlement agreement.

**[18]** The Applicant rejected the terms of the agreement between the Union and the Employer. At the hearing the Applicant stated that he may have been flexible on the back pay issue but he was not prepared to go to an anger management course. The Applicant was aware that if he did not accept the proposed settlement, the Union would withdraw his grievance. The Union wrote the Applicant on May 5, 2002, confirming the Applicant's rejection of the settlement and confirming that the Union would be withdrawing the grievance, which it did shortly thereafter. The Applicant then filed this duty of fair representation application.

## Relevant Statutory Provision

**[19]** Section 25.1 of the *Act* reads as follows:

> *25.1 Every employee has the right to be fairly represented in grievance or rights arbitration proceedings under a collective bargaining agreement by the trade union certified to represent his bargaining unit in a manner that is not arbitrary, discriminatory or in bad faith.*

### Applicant's Argument

**[20]** The Applicant argued that the Union had failed him in regard to his grievance with the Employer and that the Union was obligated to stand up for him.

### Union's Argument

**[21]** Counsel for the Union argued that there was no evidence that the Union had acted in an arbitrary or discriminatory manner, that it had acted in good faith at all times and that there was no evidence of bad faith in regard to the Applicant or the handling of his file.

## Analysis

**[22]** The Board summarized its general approach to applications alleging a violation of s. 25.1 of the *Act* in *Laurence Berry v. Saskatchewan Government Employees' Union*, [1993] 4th Quarter Sask. Labour Rep. 65, LRB File No. 134-93 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.*

**[23]** The first issue this Board must decide is whether the Union could enter into a settlement with the Employer without the Applicant's consent. As set out in *Berry, supra*, the right to take a grievance to arbitration is reserved to the Union. In *Cheston v. Saskatchewan Retail, Wholesale and Department Store Union and Sherwood Co-operative Association Limited*, [1998] Sask. L.R.B.R. 36 at p. 45, the Board confirms the Union's authority to settle a grievance. We find that the Union was entitled to enter into the settlement agreement with the Employer, without the Applicant's consent or agreement as to the terms of the agreement.

**[24]** The Board must also determine whether the Union acted in an unreasonable or arbitrary manner, disregarding the Applicant's interests or treating them in a manner that could be considered perfunctory. There was no evidence that the Union acted in bad faith or in a discriminatory manner. Neither did the Union act in a manner that could be described as perfunctory, unreasonable or lacking in thoughtfulness. In deciding not to proceed to arbitration and to enter into a settlement agreement with the Employer, the Union conducted a thorough analysis of the many factors that were before it. With this analysis as a basis, the Union entered into a settlement agreement with the Employer, securing the Applicant's immediate reinstatement, partial compensation and status as a permanent employee.

**[25]** While Mr. Durning did not place much weight on the Employer's post termination allegations, he was concerned about the Casino Regina barring the Applicant from its premises because of the alleged altercation with the security guard. If this were to occur, Mr. Durning believed that the Applicant's reinstatement by an arbitration board would be irrelevant as the Employer's only contract was with the Casino Regina. Mr. Durning did attempt to investigate the two incidents in question. He talked to the Employer's receptionist and asked the Applicant to comment on the incidents. The Applicant's confirmation that he had a minor disagreement with a black security guard caused Mr. Durning a significant level of concern. Taking all these factors into account, Mr. Durning decided to enter into the settlement agreement with the Employer. There was nothing in this decision that can be described as unreasonable or lacking in thoughtfulness.

**[26]** The Board questioned counsel for the Union extensively about the "take it or leave it" aspect of the settlement into which the Union entered. The Board certainly has reservations about the appropriateness of this type of agreement. However, the Union entered into this agreement with the Employer in good faith, thinking that it had obtained a good settlement for the Applicant. The Applicant was immediately reinstated as a permanent, non-probationary employee, who would be receiving approximately half of his back pay. The "take it or leave it" settlement was negotiated with the Employer following the usual give and take that occurs in a "without prejudice" settlement meeting. It is not appropriate in these circumstances for the Board to second guess the Union's decision to enter into a settlement with the Employer on the terms which it did.

**[27]** It is the Board's opinion that the Union did not violate s. 25.1 of the *Act*. The Union considered a number of issues, as set out earlier in this decision, before deciding to enter into a settlement agreement with the Employer. In deciding not to proceed to arbitration, the Union took a reasonable view of the situation and made a thoughtful decision based on all the facts it could obtain.

**[28]** The Applicant also alleged that the Union did not act in a timely manner in proceeding with his grievance. The evidence confirmed that this was not the case.

**[29]** For the foregoing reasons, the application is dismissed.

**INTERNATIONAL UNION OF OPERATING ENGINEERS HOISTING AND PORTABLE AND STATIONARY, LOCAL 870, Applicant v. 665864 ALBERTA INC., 763804 ALBERTA LTD., 771791 ALBERTA LTD., 772205 ALBERTA LTD., and 778793 ALBERTA LTD. cob as FOCUS CONSTRUCTION MANAGEMENT, Respondent and LARRY LOVE, Intervenor**

LRB File No. 180-02; November 14, 2002
Chairperson, Gwen Gray, Q.C.; Members: Bruce McDonald and Clare Gitzel

For the Applicant: Neil McLeod, Q.C.
For the Respondent: Ted Koskie

**Certification – Improper organizing tactics – Employer's reply alleges union misinformed employee and used coercion and intimidation in organizing drive – Counsel for employer agrees that reply should be struck as made as a result of employer interference.**

**Certification – Board policy – Board reiterates requirement that employer remain neutral during union organizing campaign.**

**Certification – Practice and procedure – Intervenor status – Board grants employee intervenor status at hearing even though employee's reply struck as being made as a result of employer influence – Board concludes that employee's testimony not reliable due to employer influence in facilitating testimony.**

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

## REASONS FOR DECISION

### Background

**[1] Gwen Gray, Q.C., Chairperson:** On September 23, 2002, the International Union of Operating Engineers, Local 870 (the "Union") applied to be certified for its normal craft bargaining unit at Focus Construction Management (the "Employer"). The Union claimed that there were three employees in the bargaining unit and indicated that it had filed majority support among the employees in the bargaining unit.

**[2]** On October 10, 2002, the Employer filed its reply and statement of employment. Focus Construction Management is the name used by a consortium of companies, being 665864 Alberta Inc., 763804 Alberta Ltd., 771791 Alberta Ltd., 772205 Alberta Ltd., and 778793 Alberta Ltd., all of Edmonton, Alberta. In the statement of employment, it claimed that there was one crane operator on

site on the date the application for certification was filed and one labourer/equipment operator. Mr. Larry Love was named in the latter category.

**[3]** In its reply, the Employer claimed that the Union was deliberately misleading and inaccurate when it approached Larry Love. The Employer claimed that Mr. Love told the Union that he was not interested in being represented by the Union in Saskatchewan but that he intended to work in Alberta later and would be interested in joining the Union there. The Employer also claimed that the Union told Mr. Love that he would need to work 300 hours after signing a union card before he could be considered a member and therefore, suggested that he sign a union card now and get put on the board for work. The Employer claimed that the Union informed Mr. Love that signing a card in Saskatchewan would not affect him or change his status in Saskatchewan. The Employer further claimed that Mr. Love did not understand that signing a union card was an expression of support for certification and asserted that Mr. Love would not have signed a card in support of the Union had he been so informed. The Employer claimed that Mr. Love would like to be granted intervenor status at the hearing.

**[4]** The Employer also claimed in its reply that several individuals had approached it and advised that an organizer for the Union had used intimidation, threats and coercion against Focus employees before, during and after the organizing campaign.

**[5]** The Employer made other claims that were not pursued at the hearing.

**[6]** Mr. Larry Love also filed a reply. Mr. Koskie, counsel for the Employer, prepared this reply and filed it with the Board. Mr. Koskie represented to the Board that he did not act as counsel for Mr. Love, but he acknowledged that he interviewed Mr. Love on the telephone, that he prepared Mr. Love's reply and attended on Mr. Love in his office to swear the reply.

## Facts

**[7]** The issues on the central portion of this application relate to the composition of the statement of employment. The Union argued that Mr. Cook and Mr. Love were both employed as operating engineers. The Employer agreed that both worked as operating engineers; however, it took the position that since Mr. Cook resigned on October 5, 2002, he should not be counted as an employee.

The Employer abandoned other claims it had made in its reply. It did maintain, however, that Mr. Love's support should not be counted because of improper Union organizing tactics.

**[8]** At the outset of the hearing, the Union asked leave to cross-examine Mr. Love on his reply to determine if it was 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. If so, the Union would ask the Board to disregard Mr. Love's reply.

**[9]** Mr. Love was cross-examined on his reply. He testified that he was granted leave from his work to attend Mr. Koskie's office to sign his reply. He did not pay for his transportation or hotel costs for attending the Board hearing, nor did he pay any legal fees to Mr. Koskie. Mr. Brian Parsons, project manager for the Employer, arranged for Mr. Love to meet with Mr. Koskie, and encouraged and facilitated his attendance at the lawyer's office and at the Board hearing.

**[10]** The Union cross-examined Mr. Love on the allegations made in his reply and it was clear that he did not understand all of those allegations. He did testify that he felt that Mr. Doug Cook, a co-worker, tricked him into signing a union card. When he found out that the Union was trying to obtain certification, Mr. Love told Mr. Parsons about his role in the sign-up. He indicated that Mr. Cook had told him that his job would not be affected if he signed a union card. He explained that he had wanted to be on the Union's out-of-work list in Alberta and was told that by signing a card in Saskatchewan, he could join the Union in Alberta. Mr. Parsons told Mr. Love that the Employer does not want to be certified by the Union. He claimed that the Employer is already dealing with another union, namely the Canadian Iron, Steel and Industrial Workers' Union ("CISIWU").

**[11]** Mr. Love indicated that Mr. Koskie told him that he – meaning Mr. Koskie – was not acting as his counsel.

**[12]** Mr. Love does not recall seeing the notice of certification from the Labour Relations Board posted at his workplace.

**[13]** At the end of the cross-examination of Mr. Love, Mr. Koskie for the Employer agreed that the reply he filed on behalf of Mr. Love should be struck under s. 9 of the *Act* as being an application

made in whole or in part on the advice of, or as a result of influence of the employer or employer's agent.

**[14]** The Union rested on the material it filed with its application.

**[15]** Despite the Board's ruling that it would disregard Mr. Love's reply as being improperly influenced by the Employer, the Board permitted Mr. Love to present evidence as an ordinary employee who had complaints about the Union's organizing campaign. The Board normally allows employees who attend a certification hearing to give evidence regarding their allegations of unfair organizing tactics without first filing a reply or notice of intervention.

**[16]** Mr. Love asserted that his co-worker, Mr. Cook, tricked him into signing a union card. He indicated that he roomed with Mr. Cook and met with two union organizers briefly in his room to sign a union card. According to Mr. Love, Mr. Cook explained to Mr. Love that if he signed a card, it would not affect Mr. Love's employment in Saskatchewan and he would be able to put his name on the Union's out-of-work board in Edmonton in order to gain other work in Alberta. Mr. Cook claims that he did not understand that his card would be used to certify his Employer in Saskatchewan. Mr. Love testified that he was told that he had to work 300 hours before he would be considered as eligible to be a union member and that the Union would get back to him when he had the required number of hours. He said that he did not consider himself to be a union member at the time of signing the membership card.

**[17]** Mr. Love denied that he had been threatened or coerced into signing a union card. He did state, however, that his co-worker, Mr. Cook, got angry at him and his fellow workers in the bar the day before Mr. Cook resigned his position. He explained that Mr. Cook was angry that he was paying dues to CISIWU. According to Mr. Love, Mr. Cook wanted the Union in to get back his dues from CISIWU.

**[18]** Mr. Love acknowledged that he had not read the membership card that he signed. Mr. Love indicated that he had spoken with members of the Employer's management team on his worksite prior to signing the Union card and they had indicated to him that they did not think it would hurt him to sign a card. While Mr. Love did not explain this in detail, we understood that he meant that

the Employer's representatives did not object to Mr. Love attempting to get on the Union's out-of-work list in Edmonton.

**[19]** Mr. Love said that the Union's organizers had not misled him about the effect of him signing the Union card. He also agreed that he signed it voluntarily. He also asserted that he did not understand the effect of signing the card as a result of the information he was provided by Mr. Cook. Mr. Love indicated, however, that he thought the Union was there to get Mr. Cook's dues back from CISIWU.

**[20]** Mr. Love acknowledged that one of the Union's organizers attended at the workplace when the statement of employment was signed and that he did not take this opportunity to explain to the Union organizer that he did not want his card used to certify the Employer.

**[21]** At the conclusion of Mr. Love's testimony, Mr. Koskie withdrew the allegations made in the Employer's reply against the Union in relation to intimidation, threats and coercion by the Union in relation to the garnering of its support.

## Argument

**[22]** In the end result, the Employer argued that the evidence indicated that Mr. Love had not understood what he had signed when he signed a support card in favour of the Union. Counsel argued that Mr. Love would not have signed the card if he had understood that it would be used in a certification application against the Employer. As a result, he asked the Board not to rely on the cards filed and to dismiss the application. Counsel also asked the Board not to consider Mr. Cook an employee because he resigned his employment shortly after the Union filed the application for certification.

**[23]** The Union argued that the Board should grant the application because the evidence demonstrates only that Mr. Love did not understand what he signed. There was no evidence of improper conduct on the part of the Union. The only suggestion was that Mr. Cook told Mr. Love that his job would not be affected in Saskatchewan. Mr. Cook was a rank and file member and not a representative of the Union. In addition, Mr. Love had an opportunity to discuss the matter with the

Union representatives when he signed the support card and again when he signed the statement of employment.

## Analysis

**[24]** In previous certification applications, the Board has indicated that it will not require employees to testify as to their decision to join or not join a trade union. Most frequently, this issue arises when an employer is convinced that a union has engaged in improper organizing tactics and the employer decides to take up the cause for the employees by having them testify as to the sign-up campaign. In *Sheet Metal Workers' International Association, Local 296 v. KD Mechanical Ltd.*, [1995] 4th Quarter Sask. Labour Rep. 127, the Board described the difficulties that arise when the employer takes on such a cause and stated at 129:

> *As indicated in these decisions, employees have a right to come before the Board to raise issue of improper organizing on the part of a union. An employer, however, treads on dangerous ground when it takes up the cause of the employees. Once the employer becomes an active participant in the discussion of why or how employees signed union cards, it is difficult, if not impossible, to determine if the employees are expressing their true wishes. Employers must maintain a "hands off" response to employee complaints of improper organizing in order to avoid the appearance that they had interfered with the exercise of the employees' rights to join a trade union. If employees raise such issues with employers, employers are encouraged to refer the employees to the Board.*

**[25]** This decision was reinforced in a later decision of the Board in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Custom Built Ag. Industries Ltd.*, [1998] Sask. L.R.B.R. 497 at 503, where the Board ruled as follows:

> *In the present case, the Employer, not the employees themselves, has raised the issue of impropriety in the organizing drive; and it is the Employer, not any employee or group of employees, that requests a vote on the issue of support for the Union.*
>
> *Section 3 of the Act provides as follows:*
>
> > *3 Employees have the right to organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing; and the trade union designated or selected for the purpose of bargaining collectively by the majority of the employees in a unit appropriate for that purpose shall be the exclusive representative of all employees in that unit for the purpose of bargaining collectively.*

> *It is the right of the employees to make the determinations referred to in s. 3. If there has been illegality on the part of the Union in securing their "support" it is not for the Employer to take up their cause. It matters not that the Employer takes the position that it does not represent the employees alleged to be the victims of an allegedly improper organizing campaign, because for all practical purposes and consequences that is exactly what the Employer is doing. As when an Employer is approached by an employee who seeks advice or support for a proposed application to rescind a certification order, the Employer should refuse to be involved on behalf of the employee; likewise where an employee has a complaint about his or her bargaining agent, the Employer ought not to become involved on their behalf. The employees may seek information from the Board about their concerns and/or may seek independent advice about their rights and the remedies available.*
>
> . . .
>
> *To expose individual employees to a tug-of-war between the Employer and the Union in the guise of alleged "protection" of the employees by the Employer when they have not independently chosen to put the matter in issue is not conducive to the free exercise of the rights of employees under the Act.*
>
> *No employee or group of employees has requested that a vote be held on the basis that the evidence of support is suspect. None of the employees who requested to withdraw their membership and support evidence has pursued that issue further despite having notice of these proceedings.*

**[26]** When the Board established its policy on quick certification applications, it specifically addressed the problem of employee allegations of improper organizing by requiring employers to post notice of the pending application in the workplace. The notice in this case read as follows:

> *TAKE NOTICE that an application has been filed with the Saskatchewan Labour Relations Board by the International Union of Operating Engineers Hoisting and Portable and Stationary, Local 870, seeking to obtain an order for certification of "All operating engineers and operating engineers foremen employed by Focus Construction Management in the Province of Saskatchewan."*
>
> *If a hearing is required on the application, it will be heard by the Labour Relations Board on Wednesday, October 9, 2002 at 9:30 a.m. at the Labour Relations Board Hearing Room, 10th Floor, Sturdy Stone Building, 122 3rd Avenue North, Saskatoon, SK. If you wish to attend the hearing, contact the Board Registrar to confirm that the hearing will be proceeding at this time.*
>
> *The Trade Union Act grants certain rights and provides certain protections to employees. More information can be obtained about The Trade Union Act and the procedures for certification at the Board's website: www.sasklabourrelationsboard.com*

*Board Registrar*
*Saskatchewan Labour Relations Board*
*1600 – 1920 Broad Street*
*REGINA, SK S4P 3V7*

*Fax: (306) 787-2664*
*Phone: (306) 787-2406*

*DIRECTIONS TO EMPLOYER FOR POSTING*

*Please post this notice in a location in each work site where employees are able to read the notice.*

**[27]** The purpose of the notice is to provide employees with access to information about their rights under the Act through the Board's website and telephone contacts with the Board.

**[28]** As indicated in the *Custom Built Ag. Industries* decision, *supra*, when the Employer takes up the employee's case on improper union organizing, the Board is unable to determine whether the employee has a legitimate complaint about the manner in which the Union garnered support or whether the employee has simply concocted an explanation for the employer's benefit to prevent the employer from taking retaliatory measures against him or her. This dilemma arises from the power imbalance between the Employer and employee. In this case, Mr. Love was particularly vulnerable, as it would be known from the number of employees in the operating engineer trade that he had signed a card in favour of the Union.

**[29]** As a result of the employer's aggressive intervention supposedly on behalf of Mr. Love, we are left with a situation of having to dismiss Mr. Love's reply under s. 9 as it was influenced by the Employer through Mr. Parsons and its counsel, Mr. Koskie. It was highly improper for counsel for the Employer to interview Mr. Love with respect to his allegations of improper organizing and even more questionable to extend such assistance to the point of preparing and filing a reply for Mr. Love and doing so in his capacity as counsel for the Employer. Mr. Koskie pleaded ignorance and suggested that he was simply attempting to place Mr. Love's story before the Board.

**[30]** The Board cannot state strongly enough that the Employer must remain neutral in any organizing campaign; it is not entitled to ask employees if they support the union; and it is not entitled to take up the cause of employees who allege that a union has conducted an improper sign-up campaign.

When an employee who claims that the Union engaged in improper organizing confronts an employer, the employer should inform the employee to contact the Board with the concerns.

**[31]** Despite our ruling that struck down Mr. Love's reply under s. 9, we did permit Mr. Love to raise evidence and argument with respect to improper organizing as we would with any employee who appears before the Board on a certification application.

**[32]** The evidence of Mr. Love, if believed, only established that he did not understand the purpose of signing the support card for the Union. There was no evidence of any misconduct on the part of the Union's organizers. In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Western Automotive Rebuilders Ltd. et al.,* [1993] 1st Quarter Sask. Labour Rep. 156, LRB File Nos. 239-92 and 263-92, the Board set down the test for nullifying support evidence in these circumstances as follows at 162:

> *In our view, for us to nullify the evidence of support provided by any signature, it would have to be established that the obtaining of that signature was so contaminated by lack of information, misunderstanding or improper conduct that it could not be regarded as a genuine signature at all. Whether or not Mr. Dudra was entitled to lay down conditions which must be satisfied before he would give his signature, we are convinced that he understood fully what it was he was signing and what the consequences of that would be. We thus find that his membership card bore his genuine signature and should not be regarded as a nullity.*

**[33]** In the present case, Mr. Love knew that he was signing up with the Union. He intended to join the Union as he wanted to be placed on its out-of-work list in Alberta. He knew, as well, that Mr. Cook did not want CISIWU to collect dues from him. CISIWU was collecting dues from employees for reasons that were not explained to the Board in evidence, although the Employer's reply suggests that CISIWU had a national voluntary agreement with the Employer. This claim was not pursued in the hearing nor did CISIWU attend the hearing to press its claim to represent the employees in question.

**[34]** Mr. Love told the Board that he understood that he would not be affected in his current job as a result of his support for the Union. In the context of craft unions, we understand such a representation to mean that if the Union was successful in organizing the Employer, it would not subject Mr. Love's employment to the normal hiring hall rules, that is, that he would be allowed to continue in his employment without regard to those rules.

**[35]** The Board finds it difficult to believe Mr. Love's interpretation of Mr. Cook's representations and the events surrounding the signing of his card in support of the Union. Mr. Love is sufficiently informed about the Union to know that he wants to be placed on the Union's out-of-work board in Edmonton, but claims not to understand that he was signing a support card to enable the Union to represent him in collective bargaining with his current employer. He knows that Mr. Cook wants the Union to get back his dues from CISIWU but does not explain how he thinks that would happen. The matter is further complicated by the role the Employer took in taking up Mr. Love's cause.

**[36]** Overall, we are of the view that Mr. Love's support card was signed on a voluntary basis and that it was not contaminated by "lack of information, misunderstanding or improper conduct that it could not be regarded as a genuine signature at all" as required in the *Western Automotive Rebuilders Ltd.* case, *supra*. Mr. Love was a vulnerable employee acting with knowledge of the Employer's desire not to have the Union certified in Saskatchewan. His testimony before the Board was highly contaminated by the Employer's role in bringing his concerns to the Board. As a result, the Board will not nullify his support card based on the evidence presented.

**[37]** Finally, the Employer urged the Board to remove Mr. Cook's name from the statement of employment as he resigned shortly after the application for certification was filed. The Board has stated in many cases its policy of determining evidence of support on the date the application for certification is filed. This date is even more sacrosanct in the construction industry where employees move frequently among employers. The Board has not been presented with any unusual circumstances or reasons in this case to depart from the normal practice of determining support among those employees who were employed on the date the application for certification was filed.

**[38]** As the Union has filed evidence of majority support, a certification order will be issued.

# STEVEN HUBER and GLEN STEVENSON, Applicants v. REINHARDT PLUMBING, HEATING & AIR CONDITIONING LTD. and SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 296, Respondents

LRB File No. 195-02; November 14, 2002
Chairperson, Gwen Gray, Q.C.; Members: Patricia Gallagher and Don Bell

For the Applicant: Steven Huber and Glen Stevenson
For the Respondent Union: Gunnar Passmore

**Decertification – Employer influence – Board concludes that application improperly influenced by employer's anti-union conduct – Board dismisses application.**

**Decertification – Discretion of Board – Board has authority, pursuant to s. 9 of *The Trade Union Act,* to dismiss applications made as result of employer influence – Board finds that employer's disregard of collective agreement provisions pertaining to dues remittance, wage rates and benefit plans constitutes improper influence – Board dismisses application.**

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

## REASONS FOR DECISION

### Background

**[1] Gwen Gray, Q.C., Chairperson:** On October 15, 2002, Mr. Steven Huber and Mr. Glen Stevenson, employees of Reinhardt Plumbing, Heating & Air Conditioning Ltd. (the "Employer") applied to the Board for an order rescinding the certification Order issued to Sheet Metal Workers' International Association, Local 296 (the "Union") on February 27, 2001.

**[2]** The Union filed a reply claiming that the applicants are not members of the Union and have no status to apply for rescission.

**[3]** The Employer filed a statement of employment but did not appear at the hearing.

## Facts

**[4]** At the hearing of the application, it was established that both Mr. Huber and Mr. Stevenson had been members of the Union but that their memberships were suspended for non-payment of dues. Since the Employer was certified, it has not abided by the terms of the collective agreement in relation to the payment of union dues, payment of wages or benefit plans. The employees acknowledge that the Employer has basically ignored the Union and the collective agreement and feels that it is not subject to either the certification Order or the collective agreement. Mr. Huber claims that the Union did not notify him of his suspension for non-payment of dues, but he also acknowledges that the Employer has not deducted his dues. The Union indicates that it has met with the Employer to assist it in understanding its obligations under the collective agreement to no avail.

## Analysis

**[5]** The issue on this application is whether the Board should dismiss the application for rescission in circumstances where the Employer has ignored the certification Order and the collective agreement.

**[6]** The Board examined this question in *Flaman v. Western Automatic Sprinklers (1983) Ltd. et al.,* [1989] Spring Sask. Labour Rep. 45, LRB File No. 045-88. In that case, the employer hired employees without regard to the hiring hall provisions contained in the collective agreement. The union took various steps under the terms of the collective agreement to enforce its terms but the employer continued to disregard the terms of the collective agreement. In this environment, the Board held that employees hired "off the street" in violation of the union security provisions could not participate in a representation vote. In addition, the Board found that the employer's conduct in not abiding by the terms of the collective agreement led the Board to infer that the employer improperly influenced or interfered with employees who brought the application for rescission. In essence, the employer's anti-union conduct, which rendered the unionization efforts meaningless, tainted the employees' support for the union.

**[7]** In the present case, the employees who applied to the Board for rescission of the Union's certification order are not members of the Union as required in the collective agreement. The Employer has not remitted their membership dues to the Union, nor has it complied with any of the terms of the collective agreement including the wage rates, benefit plan remittances and the like. The

Employer has made it clear by this conduct that it does not want its employees to participate in the Union or to enjoy the benefits of the collective agreement.

**[8]** Section 9 of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the "*Act*") permits the Board "to dismiss any application made to it by an employee or employees where it is satisfied that the application is made in whole or in part on the advice of, or as a result of influence of or interference or intimidation by, the employer or employer's agent." In this situation, the Board finds that the application is improperly influenced by the Employer's anti-union conduct.

**[9]** As a result, the application for rescission of the Union's certification Order 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 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., PCL CONSTRUCTION MANAGEMENT INC., PCL INDUSTRIAL CONSTRUCTORS INC., PCL-MAXAM, A JOINT VENTURE, MAXAM CONTRACTING LTD., GREENRIDGE HOLDINGS LTD., WORKFORCE CONSTRUCTION LTD. OPERATING AS WORKFORCE CONSTRUCTION OR QUADRA CONSTRUCTION, PAYCOM CONSULTING SERVICES LTD., MAXAM DEVELOPMENTS LTD., QUADRA CONSTRUCTION AND CORAM CONSTRUCTION LTD., Respondents**

LRB File No. 192-01; November 21, 2002
Vice-Chairperson, Walter Matkowski; Members: Clare Gitzel and Gerry Caudle

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| For the Applicant: | Drew S. Plaxton and Rod Gillies |
| For PCL Construction Holdings Ltd. et al.: | F. Albert X. Lavergne |
| For PCL Construction Management Inc.: | Hugh McPhail, Q.C. |
| For PCL Industrial Constructors Inc.: | Larry F. Seiferling, Q.C. and Scott Wickenden |
| For Maxam Contracting Ltd. et al.: | Bruce Wirth |
| For the Attorney General for Saskatchewan: | Thomson Irvine |

**Practice and procedure – Application – Respondents argue that application should be dismissed as being devoid of material fact and incapable of supporting unfair labour practice ruling – Board confirms earlier Board panel distinction between conduct and status complaints – Board determines that complaints in application are status complaints requiring assertion of fact supported by evidence to be led at hearing – Board declines to dismiss application.**

**Practice and procedure – Application – Respondents argue that application should be dismissed as being devoid of material fact and incapable of supporting unfair labour practice ruling – Board determines that particulars ordered from applicant by Executive Officer and by previous Board panel are sufficient to enable respondents to reply to application – Board declines to dismiss application.**

**Practice and procedure – Jurisdiction – Respondents ask Board to deal as preliminary matter with question of its jurisdiction to determine constitutionality of *The Construction Industry Labour Relations Act, 1992* – Question of constitutionality dependent on Board's conclusion regarding whether respondents unionized employers – Board declines to deal with question as preliminary matter.**

## REASONS FOR DECISION

### Background

**[1]** **Walter Matkowski, Vice-Chairperson:** United Brotherhood of Carpenters and Joiners of America, Local 1985 (the "Union") filed an application on September 19, 2001 claiming that 23 respondents are successor corporations of Poole Construction Company Limited, PCL Industrial Construction Ltd. and PCL Industrial Constructors Inc., and are related or common employers. A history of the proceedings before the Board is set out in a decision of the Board dated February 11, 2002 (*United Brotherhood of Carpenters and Joiners of America, Local 1985 v. PCL Construction Holdings Ltd., et al.* [2002] Sask. L.R.B.R. 120, LRB File No. 192-01). A number of the Respondents asked the Board's Executive Officer to strike the Union's application for its confusing allegations and lack of material facts. The Board's Executive Officer, in a written decision dated December 6, 2001, refused to strike the Union's application but did order the Union to provide further particulars. A number of the Respondents appealed the Executive Officer's decision to a full panel of the Board.

**[2]** In its February 11, 2002 decision on the appeal, the Board thoroughly reviewed whether more particulars should be ordered by the Board and did in fact order that the Union provide more particulars. This second set of particulars has been provided by the Union to the various respondents. In its decision, the previous Board panel states at page 135:

> *The Board has carefully reviewed the requests for particulars made by the various respondents and the materials filed by them in relation to their request for particulars and their applications to review the decision of the Executive Officer. We find that the majority of the requests for particulars are not required, as they do not pertain to the essential elements of the claims made by the Union under the various statutory provisions, which we have set out above. Many of the requests also pertain to matters of evidence, not fact, and are not required to be provided for in the application.*

**[3]** PCL Industrial Constructors Inc. applied for judicial review of the Board's decision. In a judgment dated April 23, 2002 (*PCL Industrial Constructors Inc. et al., U.B.C.J.A., Local 1985 and the Saskatchewan Labour Relations Board,* [2002] Sask. L.R.B.R. c-3), Smith J. states at c-20:

> *... The Board is entitled to control its procedures and to prevent abuse of those procedures. In this case, however, although both the Executive Officer, in his decision of December 6, 2001, and the Board panel in the impugned decision of*

> *February 11, 2002, make a point of stating that the Union's original application was "mostly" sufficient, ... in fact both ordered the union to provide further particulars to all of the respondents. In particular, in relation to what the panel described as "conduct complaints" (as opposed to "status complaints"), both the Executive Officer and the Board panel found that the union application was defective in failing to identify what conduct was complained of, when it occurred, who was involved, where it occurred and how the conduct constitutes a breach of the Act.*

**[4]** Following the judgment of Smith J., the parties returned before the Board and agreed on a number of procedural issues. However, the parties could not agree on the following two issues.

> 1. Should the Board treat as a preliminary matter the issue of whether it has the jurisdiction to apply the Charter and whether it has the jurisdiction to determine the constitutionality of the provisions of the *Construction Industry Labour Relations Act, 1992*?
>
> 2. Should the Board dismiss the unfair labour practice application against various respondents on the basis that the application is entirely devoid of material facts and incapable of supporting an unfair labour practice ruling?

**Should the Board treat as a preliminary matter the issue of whether it has the jurisdiction to apply the Charter and whether it has the jurisdiction to determine the constitutionality of the provisions of the *Construction Industry Labour Relations Act, 1992*?**

**[5]** Counsel for various Respondents argued that the Board should deal with the constitutionality and charter issues as preliminary matters. Mr. Lavergne, counsel for PCL Construction Holdings Ltd. et al., provides in his brief of law as follows:

> *The Construction Industry Labour Relations Act, as amended ("CILRA"), violates the Respondents' rights under the Canadian Charter of Rights and Freedoms ("Charter"). If the Respondents are named unionized employers, Section 9.1 of the CILRA and the Schedule to it, require the Respondents to belong to one representative employers' organization, The Construction Labour Relations Association of Saskatchewan for the trade divisions of Bricklayers, Tilesetters, Carpenters, Cement Masons, Plasterers, Electrical, Elevator Constructors, Insulators, Ironworkers, Labourers, Millwrights...*
>
> (emphasis added)

**[6]** With respect, the constitutionality issue and the charter arguments are not preliminary issues. The Board need not address these issues if the Board finds that the Respondents are not unionized employers. The issues before the Board are both numerous and complex. The Board is not inclined

to delve into issues before it is required to do so. As such, the constitutionality and charter issues will only be dealt with following the Board's initial ruling, if necessary.

**Should the Board dismiss the unfair labour practice application against various Respondents on the basis that the application is entirely devoid of material facts and incapable of supporting an unfair labour practice ruling?**

**[7]** Counsel for both PCL Industrial Constructors Inc. and the Maxam Group argued that the application against their respective clients should be struck on the basis that the applications are devoid of material facts. The Board's distinction in its February 11, 2002 ruling between conduct complaints and status complaints remains an important distinction for understanding the Union's application. Conduct complaints require the who, what, when and where and how the conduct constitutes a breach of the *Act*. The Applicant can raise status complaints by making a bare assertion of fact. If the alleged status is in issue, evidence will have to be provided to the Board at the hearing to prove elements that constitute the status in question.

**[8]** In its February 11, 2002 ruling, the earlier Board panel ruled that this evidence of status does not have to be described in the application. The decision of Smith J. does not challenge the Board's ruling on this point. This Board concurs with the distinction between conduct complaints and status complaints as set out in the Board's February 11, 2002 decision. Therefore, this Board rules that the Union's application should not be struck on the basis that the application is entirely devoid of material facts and incapable of supporting an unfair labour practice ruling. The Board, upon reviewing the two sets of particulars ordered by the Board's Executive Officer and the February 11, 2002 Board, finds that the Respondents, including PCL Industrial Constructors Inc., do have sufficient particulars so as to enable them to properly file a reply to allegations against them.

**[9]** Finally, Mr. Lavergne argued that the applications against corporations not conducting business in Saskatchewan should be dismissed. In his supplemental brief of law he suggests "the activities must take place and effect construction work within the Province of Saskatchewan." Without having heard any evidence in regard to the Union's numerous allegations, the Board cannot entertain this request and accordingly dismisses this argument as premature.

**[10]** The Board brings to the parties' attention the Queen's Bench decision *Pyramid Electric and International Brotherhood of Electrical Workers* [1999] Sask. L.R.B.R. c-93. In this decision, which was affirmed by the Saskatchewan Court of Appeal (*International Brotherhood of Electrical Workers v. Pyramid Electric*, [2000] Sask. L.R.B.R. c-1), Dawson J. states at c-114:

> *Without examination of the relevant facts and documentation the Board will be unable to perform its function. Pyramid may have entered into arrangements and contracts with Sparrow or its trustee, which arrangements or contracts occurred outside the territorial jurisdiction of Saskatchewan, but which nevertheless govern the employees, contracts or assets of Sparrow in Saskatchewan. The mere fact that such arrangements, if they exist, took place between Pyramid and Sparrow outside Saskatchewan or the mere fact that Pyramid alleges they do not apply to Sparrow is not determinative. The Board must determine whether such arrangements, if they exist, are sufficient to classify Pyramid as the successor to Sparrow in Saskatchewan in accordance with the legislation and the parameters outlined in Lester, supra.*

# SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant v. SASKATCHEWAN GAMING CORPORATION – CASINO MOOSE JAW, Respondent and PUBLIC SERVICE ALLIANCE OF CANADA, Intervenor

LRB File No. 187-02; November 25, 2002
Chairperson, Gwen Gray, Q.C.; Members: Leo Lancaster and Gloria Cymbalisty

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| For the Applicant: | Larry Kowalchuk |
| For the Respondent: | Larry LeBlanc, Q.C. |
| For the Intervenor: | Rick Engel |

**Certification – Practice and procedure – Intervenor status – Union requests intervenor status on certification application filed by another union three days earlier – First union submits majority support evidence – Second union submits support evidence of more than 25%, but less than 50%, of employees – Second union asks Board to order vote – Board exercises discretion pursuant to s. 6(1) of *The Trade Union Act* to order vote.**

**Practice and procedure – Application – Board rules that revocations of support will be considered only if original, signed form submitted to Board or union prior to date application is filed.**

**Vote – Competing unions – First union submits majority support evidence – Second union submits support evidence of more than 25%, but less than 50%, of employees – Second union asks Board to order vote – Board exercises discretion pursuant to s. 6(1) of *The Trade Union Act* to order vote – Board offers first union option of quick vote with results to be sealed until Board deals with first union's allegations of employer interference or influence in collection of second union's support.**

***The Trade Union Act*, ss. 5(b), 6 and 10.**

## REASONS FOR DECISION

### Facts

**[1] Gwen Gray, Q.C., Chairperson:** The Saskatchewan Joint Board, Retail, Wholesale and Department Store Union ("RWSDU") filed a certification application for all employees at Casino Moose Jaw. The application was filed with support evidence on September 27, 2002. Prior to filing its application, RWDSU had filed revocation cards in which employees of Casino Moose Jaw revoked their support for the Public Service Alliance of Canada.

**[2]** The Public Service Alliance of Canada ("PSAC") filed a reply seeking intervenor status in the application. Its reply was filed on October 1, 2002 and it was accompanied by support evidence garnered among employees of Casino Moose Jaw. Some of the support evidence was signed after the filing of the application for certification by RWDSU. PSAC seeks a vote among employees of Casino Moose Jaw. PSAC also filed with its intervention revocation cards in which employees of Casino Moose Jaw revoked their support for RWDSU.

**[3]** The main issue on this application is whether the Board should order a vote between RWDSU and PSAC or simply issue an order in favour of RWDSU if we find that RWDSU has filed majority support. The parties agreed that the Board would address this issue initially. If the Board concludes that a vote should be ordered in these circumstances, RWDSU requested that the hearing be reconvened to hear evidence pertaining to alleged employer interference in the gathering of PSAC's support evidence. RWDSU was directed to provide particulars of its allegations of employer interference to PSAC and the Employer by Friday, October 25, 2002.

## Argument

**[4]** RWDSU asked the Board to issue a certification order without a vote on the basis of the support evidence it filed with its application.

**[5]** PSAC argued that it is entitled to request a vote as it filed evidence of support from 25% or more of the employees in the proposed bargaining unit. PSAC noted that *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") is completely silent on the topic of when the Board will order a vote to determine which of two competing unions will be certified as a bargaining agent for employees in a newly certified enterprise. The *Act* used to specify that a vote was required where a competing union filed 25% support evidence in s. 6. PSAC argued that the Board has adopted a new rule that requires a vote where the competing union files evidence of support in excess of 25% and where the applying union has not filed "overwhelming" evidence of support. Counsel for PSAC argued that the normal rules for ordering certification on the filing of simple majority support are in place to suppress employer interference in organizing campaigns, not to suppress employee choice when more than one union seeks to represent the same group of employees.

**[6]** In response, RWDSU pointed out that the Board should not consider any revocation of employee support filed after the date of the filing of RWDSU's application and that PSAC's support evidence ought to be garnered and filed with the Board prior to the filing of the certification by RWDSU. In addition, RWDSU argued that s. 6 of the *Act* gives the Board discretion as to whether it will order a vote; it is not required to do so when the applicant has filed proof of majority support. RWDSU urged the Board to order a vote only in circumstances where both unions claim to represent a majority of employees in the proposed bargaining unit, or neither union claim to represent a majority of employees. In the case where one union has filed proof of majority support and the intervening union has filed support evidence from less than 50% of the employees in the proposed unit, no vote should be ordered. The reasons for granting certification without a vote in these circumstances is to prevent on-going campaigning and the possibility of unfair labour practices under s. 11(2) of the *Act* by the intervening union. Counsel argued that employees who signed cards supporting both unions had demonstrated that they are content with either union and their support for the applicant should not be discounted by the fact that they also signed support cards for the intervenor.

## Analysis

**[7]** Section 5(b) of the *Act* gives the Board its statutory authority to determine which trade union represents employees in a bargaining unit as follows:

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

**[8]** In making such determinations, the Board may order that a vote be conducted among employees in the appropriate bargaining unit. Section 6 sets out this power as follows:

> *6(1) In determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, in addition to the exercise of any powers conferred upon it by section 18, the board may, in its discretion, subject to subsection (2), direct*

*a vote to be taken by secret ballot of all employees eligible to vote to determine the question.*

*(2) Where a trade union:*

*(a) applies for an order of the board determining it to represent the majority of employees in an appropriate unit for which there is an existing order of the board determining another trade union to represent the majority of employees in the unit; and*

*(b) shows that 25% or more of the employees in the appropriate unit have within six months preceding the date of the application indicated that the applicant trade union is their choice as representative for the purpose of collective bargaining*

*the board shall, subject to clause 5(k), direct a vote to be taken by secret ballot of all employees eligible to vote, but the board may, in its discretion, refuse to direct the vote where the board:*

*(c) is satisfied that another trade union represents a clear majority of the employees in the appropriate unit; or*

*(d) has, within six months preceding the date of the application, upon application of the same trade union, directed a vote of employees in the same appropriate unit.*

**[9]** The Board also has discretion with respect to the evidence that it will accept on a representational question. Section 10 provides as follows:

*10 Where an application is made to the board for an order under clause 5(a) or (b), the board may, in its absolute discretion, reject any evidence or information tendered or submitted to it concerning any fact, event, matter or thing transpiring, or occurring after the date on which such application is filed with the board in accordance with the regulations of the board.*

**[10]** In applications for certification and rescission, the Board does not consider support evidence or revocations of support garnered after the date the applications are filed: see *Construction and General Workers Union, Local 180 v. Gunner Industries Ltd.,* [1997] Sask. L.R.B.R. 318, LRB File No. 333-96 where the Board explained the policy as follows:

*In keeping with this provision [s.10], the Board has consistently refused to consider evidence of support or of revocation of support which originates after the date the application is filed. In Hotel Employees & Restaurant Employees Union v. Chi Chi's Restaurant Enterprises Ltd., [1986] June Sask. Labour Rep. 31, LRB File No. 035-86, the Board summarized this well-entrenched policy in these terms, at 34:*

> *The Board has always required an applicant for certification to establish majority support as of the date on which the application is filed, and only if there is a cloud over the union's organizing campaign in the form of coercion, undue influence, or misrepresentation, will the Board order a vote by secret ballot rather than rely on support cards. That policy facilitates the employees' choice of collective bargaining, renders pointless the imposition of sanctions on the employees once the application has been filed, and protects as much as possible the future relationship between the union and employer from the acrimony that often arises during a pre-vote contest between the union and anti-union forces. In this case there are no reasons why the Board should depart from its normal practice by ordering a vote.*

*In a more recent decision in Retail Wholesale Canada, a Division of the United Steelworkers of America v. United Cabs Ltd., [1996] Sask. L.R.B.R. 337, LRB File No. 115-95, the Board explained the basis of the policy as follows, at 366:*

> *The evidence which was presented was of persons who had signed a Union card and later changed their minds. It is common enough in any democratic system for persons to alter their views about important issues, and they are perfectly entitled to do that. It is also true in any democratic system that there must be some criteria for determining what the majority do support in relation to particular decisions, and establishing fixed points at which opinion will be assessed. Elections are held to elect members to legislatures, for example: though voters may decide the day after an election that they no longer support the candidate they voted for, a parliamentary system could not function if such changes of opinion were allowed to alter the outcome of the election.*
>
> *In the case of applications filed with this Board related to questions of trade union representation, it is necessary to develop a coherent picture of whether there is majority support for a trade union at a particular time. The time which has been accepted consistently by the Board as critical for this purpose is the date on which an application was filed. The question of majority support will be determined as of that date, whether or not individuals might later wish to withdraw their support for the trade union or add their support.*

*We have concluded that there is no reason in this case to depart from our established practice of limiting our assessment of the evidence of support to the date of the*

*application, and to disregard any intimations of a change of heart or disaffection on the part of employees which arises after that date.*

**[11]** We must determine if the revocation evidence needs to be signed and filed with the Board prior to the date the first application for certification is filed. RWDSU took the position that PSAC was required to file the revocations prior to or at the same time as the application for certification was filed by RWDSU. The cases cited above do not make it clear if the revocation evidence simply needs to be signed before the date the application for certification is made or whether it must be both signed and filed with the Board or with the applicant Union before or at the time the application for certification is made.

**[12]** In *United Food and Commercial Workers Local 1400 v. Remai Investment Corporation et al.*, [1995] 1st Quarter Sask. Labour Rep. 289, LRB File Nos. 171-94 & 177-94, the Union was provided with revocation cards from several employees prior to the date it filed the application for certification with the Board. Despite receiving the revocation cards, the Union filed the support cards signed by these employees with its application as it was of the opinion that the employees withdrew their support for the Union due to undue pressure from the employer. The original revocation cards were filed with the Board after the certification application had been filed. At 291, the Board dealt with the effect of the revocation cards as follows:

*The Union submitted that the revocation letters can have no affect on the question of majority support for its certification application because they were filed with the Board two days after July 11, 1994, which was the date upon which the certification application was filed. The Union relied upon Section 10 of the Act. . .*

*This section is the basis of the Board's long-standing and rigid policy of refusing to have regard to support cards or revocations that occur after the date upon which an application for certification or decertification is filed. This policy is based on the simple requirement in any system where a majority must be determined, that there be a point in time when the calculation of majority support can be made.*

*Section 10 and the Board's policy would apply if, after the Union had filed its application for certification, an employee changed his or her mind and indicated to the Board or the Union that he or she wished to withdraw his or her support card. Evidence of such a fact would be rejected on the authority of Section 10 because the event of revocation occurred after the date on which the application for certification was filed. However, in the present case, the decision by the five employees to withdraw their support for the Union, the creation of the revocation letters, their delivery to the Union and their mailing to the Board, all occurred prior to the date when the Union filed its application for certification. The letters of revocation received by the Board*

> *on July 13, 1994, are therefore effective, subject to the following qualification, as they were admittedly created and describe an event that occurred prior to the date on which the application for certification was filed. Section 10 is therefore inapplicable to these letters.*
>
> (emphasis added)

**[13]** It may be concluded from this case that the Board has accepted revocations that were filed with the Board after the certification application was filed, provided the revocation documents were created, signed, delivered to the Union and mailed to the Board prior to the date the Union filed its application for certification. We conclude from the facts described in the *Remai Investment Corporation* case, *supra,* that the "event of revocation," as the Board used that term, meant more than the simple signing of a letter of revocation. Clearly, there must be some act that draws the revocation of support to the attention of the Union and/or the Board in a timely fashion in the context of s. 10 in order to prevent the kind of mischief that is anticipated by s. 10.

**[14]** In our view, revocations must be signed and presented in their original form either to the Union or to the Board prior to the date the application for certification is filed with the Board. In keeping with its policy of not disclosing the names of employees who support or do not support a union's organizing campaign, the Board does not reveal the name of the employees who seek revocation of their support for the union, although the applicant union should be made aware that the Board has received revocation cards.

**[15]** In this case, PSAC filed revocations relating to some employees' support of RWDSU subsequent to the date the application for certification was filed by RWDSU. Although the cards may have been signed prior to the date the application for certification was filed by RWDSU, there is no evidence that RWDSU was provided with copies of the revocation cards prior to the filing of the application. In this case, applying the logic of *Remai Investment Corporation, supra,* we find that the event of revocation did not occur prior to the filing of the application for certification and the revocations of support for RWDSU are therefore ineffective.

**[16]** In addition, as indicated in the cases referred to above, the Board has been clear that it will consider only those support cards signed on or before the date of the filing of the first certification application in deciding whether a vote is required to determine which of two or more unions have the support of a majority of employees in the bargaining unit. RWDSU argued that this evidence must not simply be signed before the date of filing but also must be filed on or before the filing of the first application for certification. Indeed, in *Health Sciences Association of Saskatchewan v. Regina District*

*Health Board,* [1995] 3rd Quarter Sask. Labour Rep. 131, LRB File No. 025-95 & 118-95, the Board appears to have adopted this approach when it stated at 133 as follows:

> *The procedures adopted by the Board are in general marked by considerable flexibility, which assists us to accommodate the peculiar circumstances of particular cases and the needs of the parties to the applications which are brought before us. One exception to this is our adherence to a policy of considering evidence of support for a certification application as of the date of the application. Though it has sometimes been urged upon us to show more flexibility in the application of this policy, we have reiterated firmly on a number of occasions our position that, if evidence of support for a certification application, – or of withdrawal of support or of support for some other trade union – is to be considered by the Board, it must be in the hands of the Board in its original form by the date on which the application is filed with the Board. The Board reiterated this point recently in a decision in Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Brown Industries (1976) Ltd., LRB File No. 010-95 and 012-95.*
>
> (emphasis added)

**[17]** However, the Board went on to note the exception that arises when a second union files a counter-application for certification. At 134, the Board commented on this exception as follows:

> *In Remai Investment Corporation decision [supra], the Board alluded to the exception to this policy which has been made where the support proffered by the rival trade union was acquired prior to the filing of the first certification application. In International Union of Operating Engineers v. Penn-Co Construction Ltd. and Construction Workers Association, LRB File No. 187-89, the Board made the following comment:*
>
> > *In the situations where an application for certification by one union is received and a subsequent intervention and request for certification by another is filed, the Board has consistently taken the position that:*
> >
> > > *Only evidence of support gathered prior to the filing of the first application for certification will be considered . . . in determining an intervening union's status to request and participate in a representation vote. Construction Workers Association (CLAC), Local 151 – and – Salem Industries Canada Limited, LRB File No. 033-86, (June 1986), p. 5.*
> >
> > *In the present case, CLAC has filed sufficient apparent support of the employees by a majority of one vote. It is clear that the support garnered for CLAC was done prior to the date of the certification application filed by the applicant and accordingly therefore meets the test set forth above.*

> *In our opinion, Regulation 17 reflects this exception, and is not meant to be applied in a way which departs from the general requirement of the Board that any evidence which is to be considered must be in existence prior to the date an application is filed. In a circumstance where two trade unions are vying for support at the same time, the regulations allow a trade union to present evidence of support which was in existence prior to the date of the application, to be considered along with whatever evidence is filed by the applicant.*
>
> *In this case, the Saskatchewan Union of Nurses [the intervening union] did not claim that this evidence has existed prior to the filing of the application; indeed, they stated candidly that their efforts to obtain the support of employees had not commenced until after the application was filed. In these circumstances, we must reject the evidence.*
>
> (emphasis added)

**[18]** Regulation 17 provides as follows:

> *17(1) When an application for certification is made, any trade union claiming to represent any of the employees in the unit of employees in respect of which the application is made, may intervene by giving notice in writing to the board within 12 days after the date on which the application was received in the office of the board or within 10 days after the date on which a copy of the application was forwarded to such trade union by the secretary of the board, whichever is the later.*
>
> *(2) The notice of intervention shall be in Form 10 and shall be verified by statutory declaration.*
> *(3) The notice of intervention may contain a counter-petition for certification.*
> *(4) The intervening trade union shall comply with regulation 5(3).*

**[19]** The rationale for confining evidence of support on the intervening union's counter-petition for certification to those cards signed on or before the date the main application for certification is filed with the Board was set out in the *Salem Industries Canada Limited* case, *supra,* as follows:

> *Whenever the Board has received an application for bargaining rights by one union and a subsequent intervention and request for certification by another union, it has consistently accepted only evidence of support gathered prior to the date on which the first application for certification is filed and rejected evidence of support obtained subsequently . . . The Board has considered the date of the first application for certification to be the best date for determining majority support because it renders pointless subsequent employer tactics intended to turn employees against the union and establishing a terminal date for the cessation of campaigning between two competing unions. Once an application is filed, further attempts to obtain support, withdrawals of support or transfers of support to an emerging employee association or to an intervening union serve no purpose. It would be chaotic if the filing of an*

> *application for certification simply served as a signal for all those seeking employee support to begin campaigning in earnest.*

**[20]** From a consideration of the above cases and regulations, the Board concludes that the support evidence garnered by PSAC prior to date of the filing of RWDSU's application for certification may be considered by the Board even though it was not filed with the Board prior to the date that RWDSU filed its application. It is sufficient so long as it was filed at the time of the intervention and counter-petition for certification. Support cards signed in favour of PSAC after the date of the filing of the application by RWDSU will not be considered as evidence of support for PSAC.

**[21]** In summary, then, support evidence for RWDSU consists of all the support card evidence filed by RWDSU with its application. None of the revocation cards filed by PSAC in relation to RWDSU's support are accepted as they were filed after the date that RWDSU filed its application for certification and there is no evidence that the revocation cards were presented to RWDSU prior to the date that it filed its application. The support evidence for PSAC will be comprised of the support cards filed by PSAC with its intervention, less those support cards for which RWDSU filed revocations of support prior to the date of PSAC's application, and less those support cards signed subsequent to the date that RWDSU filed its application for certification.

**[22]** Applying these rules to the support evidence filed with the Board, RWDSU has filed support from more than 50% of the employees in the bargaining unit, while PSAC has filed support from more than 25% but less than 50% of the employees. Several employees indicated support for both unions. At the hearing, we incorrectly advised the parties that the overlapping support reduced RWDSU's support to below 50%. This calculation was based on incorrect assumptions about the revocation evidence filed by PSAC and we regret leaving the impression with RWDSU that its support fell below the 50% mark if the double membership cards were not counted.

**[23]** RWDSU encouraged the Board to consider the overlapping support evidence as an indication that the employees in question were indicating a desire to have "a" union, but without concern for "which" union. In our view, the overlapping support evidence is ambiguous and cannot be assigned any particular meaning. However, we note that with respect to RWDSU's support, applying ordinary principles established in the *United Cabs Ltd.* case, *supra,* the Board does not consider evidence of

employees' change of mind occurring after the application for certification is filed. As such, RWDSU's support is unaffected by the double card issue. We note also that a majority of employees in the proposed bargaining unit support having a union.

**[24]** The Board must decide in these circumstances whether a vote is required. In *Public Service Alliance of Canada v. Casino Regina – Saskatchewan Gaming Corporation et al.,* [1996] Sask. L.R.B.R. 454, LRB File No. 068-96, after reviewing arguments similar to the ones made on this application, the Board concluded as follows at 458-9:

> *On the one hand, since a vote is typically held only when the applicant trade union has failed to file evidence of majority support, it would seem rather draconian to require that a second union present evidence of majority support in order to be allowed to take part in a vote. On the other hand, we share the concern of counsel for P.S.A.C. that, in the absence of any standard for the Board to use in exercising our discretion, we would leave the field open for opportunistic attempts by trade unions to exploit the organizing efforts of others, or for intervention by small groups of employees who are disgruntled or who are acting at the behest of an employer.*
>
> . . .
>
> *It is not necessary, in our view, to make a categorical finding that the twenty-five per cent figure for support which was supported by counsel for P.S.A.C. should be institutionalized in our procedures, although we must say that our first impression is that this figure makes as much sense as any. Our review of the evidence of support for representation by C.U.P.E. which was filed with the Board relating to the period up to the date of the filing of this application falls short of that level by a significant margin, and we have concluded that there is no basis for altering our practice of requiring the presentation of sufficient support by the time an application is filed.*

**[25]** In *Energy and Chemical Workers' Union v. Remai Investment Corporation et al.,* [1992] 2nd Quarter Sask. Labour Rep.97, LRB File Nos. 027-92 & 028-92, the Board at 103 indicated that a vote would be ordered between competing unions unless "one of the unions has overwhelming support compared to the other union." This ruling was based on comments made by the Board in *Penn-Co Construction Ltd.*, [1990] Summer Sask. Labour Rep. 39, LRB File No. 187-89, where the Board held that it would order a vote unless one union could show overwhelming proof of support. In the *Penn-Co* case, *supra,* the applicant union filed less than 50% support while the intervening union filed support from 3 out of 5 employees, a majority of one employee. The Board's ruling in that case may also be considered from the point of view of the first-in rule, that is, that the first application filed with the Board must be considered prior to the intervening application. In the *Penn-Co* case,

*supra,* the applicant filed without majority support – a circumstance that normally would lead to a vote.

**[26]** Aside from the *Penn-Co* case, *supra,* there are no decisions in which the Board has faced the situation present in this case – that is, where the applicant has filed evidence of majority support and the intervenor has filed evidence of support which is greater than 25% but less than 50%. Under earlier versions of the *Act,* the Board was required to conduct a vote among employees in a bargaining unit when a trade union filed for certification with 25% or more support. This rule applied to all certification applications, including counter-petitions for certification filed by intervening unions. In the present *Act*, s. 6(1) leaves the matter entirely to the discretion of the Board in the case of certifications of new bargaining units, while s. 6(2) retains the 25% rule in raid situations.

**[27]** It is possible to argue that the repeal of the old provisions in 1983 must be given some meaning and the 25% rule is no longer the only factor that will determine if a vote should be ordered in either a certification application or in a competing certification situation. The applicant in this case argued that the Board should only exercise its discretion to order a vote in a competing certification situation where (1) both unions applied with majority support, or (2) neither union filed with majority support.

**[28]** The Board does not agree with the applicant's position. In our view, the Board's discretion to order a vote ought to take into account the degree of support filed by the applicant and the intervening union. If the applicant union files with overwhelming or "clear" support, then there is no logical reason for conducting a vote as the applicant has demonstrated the wishes of the employees in clear terms.

**[29]** On the other hand, if the intervening union files evidence of significant support to the extent that, if the application were received as a primary, as opposed to an intervening, application, the Board would direct a vote, then the Board should order a vote to ensure that the wishes of the employees are clearly determined.

**[30]** We agree with the Board in the *Casino–Regina* decision, *supra,* that the figure of 25% makes as much sense as any other figure in determining when the intervening union's application has

entered the area of "significant" support. In part, s. 6(2) of the *Act* gives some clue as to the level of support that the Legislature has deemed sufficient to cause the Board to conduct a vote in a raid situation where one union is attempting to oust another union's certification order by setting the level of support evidence required at 25%.

**[31]** In a competing certification situation, it is possible to argue that the running shoes approach is the best, that is, that the first application to be filed with majority support should win, without any vote. There is a certain attractiveness to this approach as it avoids the divisiveness of a vote. It also reduces the opportunities for employer influence or interference.

**[32]** On the other hand, competing certification applications are rare and most frequently arise in situations where employees have some trade union experience or background, as was the case in this instance. A vote in these circumstances will clear the air and settle the representation question through a fair process. Employer influence or interference can be avoided by taking a quick vote.

**[33]** In the present case, we find that, given the level of support for the applicant and the intervening union, a vote is in order.

**[34]** Normally, at this point, the Board would order a vote between RWDSU and PSAC without including in the ballot a non-union option, which is permitted under the principles set out by the Saskatchewan Court of Queen's Bench in *Plante v. Oil, Chemical and Atomic Workers International Union* (1978), 92 D.L.R. (3d) 352 (Sask. Q.B.) in circumstances where a majority of employees have indicated their support for a union in the workplace.

**[35]** However, there is a remaining issue relating to allegations of Employer interference. At the hearing of this matter, RWDSU indicated that it was prepared to call evidence related to its allegations that the Employer influenced or interfered with the selection of bargaining agents. PSAC, however, was not prepared to proceed to deal with the allegations at that time. As a result, the Board decided that it would rule first on the issue of whether a vote was required in these circumstances and, if so, it would convene a second hearing to hear and determine the allegations of employer influence or interference. The Board suggested that any vote would be delayed pending our determination of the allegations made by RWDSU with respect to employer influence or interference in the collection of PSAC's support evidence.

**[36]** In retrospect, however, given the allegations of Employer interference, the Board is of the view that it would be prudent to order a quick vote among employees in the bargaining unit. The ballots will not be counted until after the Board has heard and determined the remaining issues. If, as a result of the further hearing, the Board decides that PSAC's support was tainted by employer influence or interference, one remedial option may be to grant RWDSU's certification without a vote. In that case, the ballots will be destroyed without counting. On the other hand, if the evidence does not result in the removal of PSAC from the representational contest, then the ballots will be counted and the representation issue settled without a lengthy period of campaigning.

**[37]** The proposal for a quick vote was not explored at the hearing. As a result, the Board directs the Board Registrar to determine if the applicant agrees to the quick vote process. If so, the vote will commence within 7 days of the date of the Order and the ballots will remain sealed until the hearing is concluded. If the applicant does not agree to the quick vote process, the Registrar will set further hearing dates in order to conclude the hearing.

**[38]** Ms. Cymbalisty dissents from these reasons and would hold that a certification order should issue to the Applicant without a vote.

# COMMUNICATIONS ENERGY AND PAPERWORKERS UNION, Applicant v. GOVERNMENT OF SASKATCHEWAN, SASKATCHEWAN ENVIRONMENT, SASKATCHEWAN WATERSHED AUTHORITY, SASKATCHEWAN WATER CORPORATION, SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION and SASKATCHEWAN WETLAND CONSERVATION CORPORATION, Respondents

LRB File No. 141-02; November 29, 2002
Chairperson, Gwen Gray, Q.C.; Members: Gloria Cymbalisty and Don Bell

For the Applicant: Angela Zborosky
For the Respondent Union: Rick Engel

**Successorship – Intermingling – Parties agree that employees of new treasury board crown corporation sufficiently intermingled to warrant creation of single bargaining unit.**

**Successorship – Certification – Respondent union represents small number of employees in newly created treasury board crown corporation and unrepresented employees are less than 25% of total – Board designates applicant union that represented majority of employees prior to creation of new treasury board crown corporation as bargaining agent for all employees of new entity.**

**Successorship – Collective agreement – Board directs that collective agreement covering employees of respondent union to remain in force until transitional matters negotiated by parties.**

***The Trade Union Act*, s. 37**

## REASONS FOR DECISION

### Facts

**[1] Gwen Gray, Q.C., Chairperson:** This application is filed under the successor rights provisions contained in s. 37 of *The Trade Union Act,* R.S.S. 1978, c. T-17. The application results from the creation of a new treasury board crown corporation, known as the Saskatchewan Watershed Authority (the "Authority"). It is taking over part of the functions and work previously performed by Saskatchewan Water Corporation, Saskatchewan Wetland Conservation Corporation and Saskatchewan Environment, a department within executive government.

**[2]** The Applicant, Communication Energy and Paperworkers Union ("CEP"), represents employees formerly employed by Saskatchewan Water Corporation. In the merged bargaining unit, CEP represents 105 employees.

**[3]** The other certified union is Saskatchewan Government and General Employees' Union ("SGEU"). SGEU represents the former employees of Saskatchewan Environment. There are 12 employees in this bargaining unit.

**[4]** In addition, some employees were not represented by any union. These employees were employed by the Saskatchewan Wetland Conservation Corporation. There are 17 employees who fall within this category in the proposed bargaining unit.

**[5]** The parties filed an agreed statement of facts and agreed upon legal issues wherein they agreed to the following:

> (1) The Authority is a successor employer to Saskatchewan Water Corporation, Saskatchewan Wetland Conservation Corporation and Saskatchewan Environment;
>
> (2) There is sufficient intermingling among employees to warrant the creation of one bargaining unit;
>
> (3) All the employees of the Authority should belong in one bargaining unit.

**[6]** In the interests of labour peace, SGEU has agreed that CEP should be designated the successor union. SGEU, however, has asked the Board to delay issuing a final order of certification for CEP until SGEU has an opportunity to negotiate a letter of understanding relating to the transfer of its members out of the main public service bargaining unit. CEP has agreed to this process and will participate in the negotiating meetings with SGEU. SGEU proposes that it be granted one month to complete the negotiations. If agreement is not reached within that time, SGEU will refer the matters back to the Board for determination under s. 37. At the request of the Board, the parties submitted a draft interim order setting forth the bargaining unit description for the proposed unit.

**[7]** SGEU does not oppose the issuing of an interim certification Order to CEP covering the remaining employees in the Authority.

**[8]** The parties all agree that seniority recognition will be given to all employees in the merged bargaining units, including employees formerly employed by Saskatchewan Wetland Conservation Corporation. Notice of this hearing was given to such employees by the Applicant.

**[9]** In addition to the matters addressed in the agreement reached between CEP and SGEU, CEP also addressed the issue of whether a vote was required in the merged unit given the inclusion in the bargaining unit of employees who formerly were not represented by either union. Counsel for CEP argued that the requirement for a vote under s. 37 is not mandatory in a situation where a certified union represents a significant majority of employees in the merged bargaining unit.

## Analysis

**[10]** The Board finds that Saskatchewan Watershed Authority is a successor employer to part of the business of Saskatchewan Water Corporation, Saskatchewan Wetland Conservation Corporation and Saskatchewan Environment within the meaning of s. 37(1) of the *Act.*

**[11]** The bargaining unit set forth in the draft order is an appropriate bargaining unit on an interim basis. The final order will not exclude those employees who transferred from Saskatchewan Environment to the Authority.

**[12]** On the question of whether a vote should be conducted, the Board finds that CEP should be designated as the bargaining agent for employees in the interim and final orders. CEP represents the vast majority of employees in the proposed bargaining unit. SGEU concedes its lack of support. The non-union segment is less than 25%, which is the rough standard used by the Board for determining if a vote ought to be conducted in an intermingling situation: see *Estevan Coal Corporation et al. v. United Mine Workers of America, Local 7606 and United Steelworkers of America, Local 9279,* [1998] Sask. L.R.B.R. 709, LRB File No. 186-98.

**[13]** The Board makes the following additional directions under s. 37:

> (1) The collective agreement currently in effect between CEP and Saskatchewan Water Corporation shall be applied to employees in the bargaining unit at the Authority and to the Authority, except to those employees temporarily excluded by the interim Order who shall continue to be governed by the collective agreement between SGEU and the Government of Saskatchewan;

(2) All employees who fall within the bargaining unit shall be granted seniority under the terms of the collective agreement currently in effect between CEP and Saskatchewan Water Corporation, taking into account their service with the predecessor employers;

(3) The Authority and CEP shall negotiate transitional issues; and

(4) The Authority and SGEU shall negotiate transitional issues.

**[14]** SGEU and the Authority are directed to advise the Board within 30 days of the issuing of the interim Order as to whether they have reached agreement with respect to the transitional issues, and if not, what issues remain outstanding for determination by this Board.

# UNIVERSITY OF SASKATCHEWAN, UNIVERSITY EMPLOYEES' UNION CUPE LOCAL 1975 and ADMINISTRATIVE AND SUPERVISORY PERSONNEL ASSOCIATION, Co-Applicants

LRB File No. 019-02; December 3, 2002
Vice-Chairperson, Walter Matkowski; Members: Maurice Werezak and Clare Gitzel

| | |
|---|---|
| For the University of Saskatchewan: | Neil Gabrielson, Q.C. |
| For the Canadian Union of Public Employees, Local 1975: | Jim Holmes |
| For the Administrative and Supervisory Personnel Association: | Gary Bainbridge |

**Bargaining unit – Practice and procedure – Board reviews criteria for determining bargaining unit assignment of positions in multiple bargaining unit setting.**

**Employee – Status – New position – Board reviews criteria for determining bargaining unit assignment of positions in multiple bargaining unit setting.**

**Reference of dispute – Bargaining unit – Parties ask Board to determine bargaining unit assignment of architectural technologist position.**

***The Trade Union Act*, ss. 5(m) and 24**

## REASONS FOR DECISION

### Background

**[1] Walter Matkowski, Vice-Chairperson:** The University of Saskatchewan (the "Employer"), the University Employees' Union CUPE Local 1975 ("CUPE") and the Administrative and Supervisory Personnel Association ("ASPA") referred a dispute to the Board pursuant to ss. 24 and 5(m) of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the *"Act")* to determine the appropriate bargaining unit for the position of architectural technologist, Facilities Management Division.

**[2]** In 1999 the parties agreed that the architectural technologist position should be in the ASPA bargaining unit. Subsequent to this agreement, CUPE filed a grievance alleging that the Employer had assured the Union that if draftspersons applied for and filled the new architectural technologist positions, the draftsperson positions, which are CUPE positions, would be back-filled. Draftspersons did fill some of the architectural technologist positions but the Employer did not immediately fill the

vacant draftsperson positions. The Employer and CUPE agreed, as a resolution to the grievance, that they would ask the Board to determine into which bargaining unit the architectural technologist position should fall. The Board heard the matter in Saskatoon on October 7, 2002.

## Facts

**[3]** Bruno Konecsni, director of employee relations, human resources, and Colin Tennent, director of architectural and engineering services, testified for the Employer, while Glenn Ross, past president of the local union, testified for CUPE.

**[4]** In the early 1990s, the Employer needed draftspersons to enter approximately 40,000 to 50,000 blueprints on a new computer system called CAD. The Employer hired as many as eight CUPE draftspersons to perform this task. Once the majority of blueprints were entered, fewer draftspersons were needed. By 1999, three full time draftsperson positions remained. At approximately this time, there was an unprecedented building phase at the University, and the Employer determined that its electrical engineers, mechanical engineers and architects needed technical support. The Employer created three new positions, an architectural technologist, an electrical technologist and a mechanical technologist. The Employer gave the job descriptions for these new positions to CUPE in June 1999. In a memorandum to the Employer dated July 8, 1999, CUPE confirmed that the three new positions could be assigned to the ASPA bargaining unit.

**[5]** The Employer determined that it needed four full time architectural technologists and hired five people for the positions in approximately October 1999. Two individuals job shared one position. Three of the five individuals had been draftspersons. Their positions were not immediately backfilled.

**[6]** Mr. Konecsni testified that he reviewed the architectural technologist position and determined that it should fall in the ASPA bargaining unit. He considered the nature of the work as well as where the duties came from. He said that the technologists were to provide assistance to engineers and architects, including some designing and some project management. Architects and engineers are in the ASPA bargaining unit.

**[7]** Mr. Konecsni considered draftspersons to be primarily engaged in storage and retrieval of infrastructure information. When he compared the architectural technologist's duties to those of other positions, he found them similar to duties performed by mechanical engineering technologists, civil engineering technologists and electrical engineering technologists, all of which are ASPA positions.

**[8]** Mr. Konecsni agreed that the draftspersons probably obtained skills on the job that helped them as architectural technologists.

**[9]** Mr. Tennent, an architect, testified that demand for traditional drafting services was waning at the University in approximately 1998 and would increase again in approximately 2003, when the new projects would have to be entered into the CAD system. He testified that an architectural technologist takes on a good deal of the project management and some design work.

**[10]** Mr. Tennent testified that the draftspersons were successful candidates for the architectural technologist positions because of their familiarity with the CAD system. In addition, the draftspersons had experience working with both engineers and architects.

**[11]** Mr. Tennent indicated that the draftsperson positions were not all being replaced because the Employer had limited resources, which it was allocating as best it could. Three draftsperson positions, or positions much like a draftsperson, had been created subsequent to October 1999. The first was actually a draftsperson II position. The second was a technician III position, which does work similar to a draftsperson. The third was a technician III position, recently posted, which had a site visit component to it, but was to deal with identifying asbestos in buildings at the University. All three of these positions were CUPE positions.

**[12]** Mr. Ross testified that he received various job postings in June 1999, including the one for an architectural technologist. He acknowledged that he reviewed the posting with other CUPE officials and that CUPE decided to allow the position to fall into ASPA's bargaining unit. He further acknowledged that the job postings were accurate, in that he did not have a complaint that the architectural technologists were now doing different types of work. Rather his concern was that CUPE not lose any positions. In his view, this had occurred despite the Employer's assurance to him

that draftsperson positions would be backfilled if draftspersons were appointed to the new architectural technologist positions.

## Relevant Statutory Provisions

**[13]** The relevant statutory provisions are as follows:

> *5 The board may make orders:*
>
> *(m) subject to section 5.2, determining for the purposes of this Act whether any person is or may become an employee;*
>
> . . .
>
> *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.*

### Employer and ASPA Argument

**[14]** Both the Employer and ASPA argued that the evidence demonstrated that the positions were properly ASPA positions and that CUPE's complaint about the Employer's assurances was irrelevant to this hearing. The Employer further argued that the draftsperson positions were eventually backfilled, though counsel acknowledged that the technician III position dealing with asbestos was certainly not identical to a draftsperson position.

### CUPE's Argument

**[15]** CUPE argued that the architectural technologist position was properly a CUPE position, in that the work for the position came from the draftsperson position.

## Analysis

**[16]** The factors for the Board to consider in determining which bargaining unit the architectural technologist position falls into are set out in the decision *Canadian Union of Public Employees v. University of Saskatchewan et al.*, [2000] Sask. L.R.B.R. 83, LRB File No. 218-98. The present

Board looked at "whether the duties and responsibilities of the new position could be traced back to either of the bargaining units" and "the similarities between the new position and ones currently assigned to each bargaining unit" to determine the assignment of the disputed position. The evidence before the Board confirmed that the nature and essence of the position's duties are more like those of architectural and engineering duties than of draftsperson duties.

**[17]** The evidence before the Board also confirmed that the duties of the architectural technologist position were similar to those of electrical and mechanical technologists, both ASPA positions. The Board is therefore of the opinion that the architectural technologist position is an ASPA bargaining unit position.

**[18]** CUPE agreed, after reviewing the architectural technologist job posting in 1999, that the position was properly an ASPA position. CUPE's July 8, 1999 memorandum to the Employer does not say that CUPE's agreement that the architectural technologist position go to ASPA is contingent on a draftsperson position being backfilled.

**[19]** In any case, the parties have only asked this Board to determine into which bargaining unit the architectural technologist position falls. We find that the position is an ASPA bargaining unit position.

# CANADIAN UNION OF PUBLIC EMPLOYEES, Applicant v. SASKATCHEWAN ASSOCIATION OF HEALTH ORGANIZATIONS, Respondent

LRB File No. 057-02; December 4, 2002
Chairperson, Gwen Gray, Q.C.; Members: Brenda Cuthbert and Maurice Werezak

For the Applicant: Lois Lamon
For the Respondent: Leah Schatz

**Remedy – Unfair labour practice – Collective bargaining – Board finds that employer's unilateral implementation of process to determine provincial market supplements constitutes failure to bargain in good faith – Board directs employer to bargain collectively with union with respect to implementation of process.**

**Unfair labour practice application – Duty to bargain in good faith — Board finds that employer's unilateral implementation of process to determine provincial market supplements constitutes failure to bargain in good faith – Board finds employer in violation of s. 11(1)(c) of *The Trade Union Act* – Board directs employer to negotiate with union with respect to implementation of process.**

**Unfair labour practice application – Duty to bargain in good faith – Exclusive bargaining authority – Board finds that union's role as exclusive bargaining agent for its members undermined by employer soliciting proposals directly from members – Board finds employer violated s. 11(1)(c) of *The Trade Union Act* – Board directs employer to negotiate only with exclusive bargaining agent with respect to implementation of market supplements process.**

***The Trade Union Act*, ss. 2(b), 2(d), 3, 5(d), 5(e) and 11(1)(c)**

## REASONS FOR DECISION

### Facts

**[1] Gwen Gray, Q.C., Chairperson:** The Canadian Union of Public Employees ("CUPE") represents health services providers in several health districts and has entered into provincial collective agreements with the Saskatchewan Association of Health Organizations ("SAHO"). SAHO is the representative employers' association for health sector employers designated pursuant to s. 12 of The Health Labour Relations Reorganization (Commissioner) Regulations, R.R.S. c. H-0.03 Reg. 1 (the "Dorsey Regulations"). The last provincial agreement was executed by the parties on October 24, 2001

after a six day strike and a difficult ratification process. It has an effective period from April 1, 2001 to March 31, 2004.

**[2]** On October 2, 2001, prior to the signing of the provincial agreement, CUPE Local 3967, the union local for health service provider employees in the Regina Health District ("RHD"), entered into a letter of understanding ("LOU") with the RHD Board to provide market supplements to employees within diagnostic services classifications. Each classification was granted a general wage increase of 3% as provided for in the terms of the agreement reached between SAHO and CUPE, an additional adjustment in their pay grades, and an additional temporary market supplement of 4%. Around the same time, a CUPE local representing employees in the East Central Health District negotiated market supplements for its medical laboratory technologists and diagnostic imaging technologists. The locally negotiated agreements purported to vary the terms of the provincially negotiated agreement.

**[3]** On September 28, 2001, prior to signing the LOU by Local 3967 and RHD, Mr. John Welden, chief negotiator for CUPE at the CUPE-SAHO bargaining table, wrote to his counterpart at SAHO, Ms. Laura Scott, to encourage SAHO to "sit down and talk to [CUPE] about a provincial process" for addressing market supplements for positions affected by severe recruitment and retention issues. CUPE was keenly aware from its members of the pressures that were building in the technology professions as a result of recruitment and retention difficulties. According to CUPE, members reported being stretched to their limits by the workload and overtime requirements created by the shortage of certain technologists.

**[4]** Under previous collective agreements, local negotiations similar to the negotiations between CUPE Local 3967 and the RHD took place under the auspices of the existing classification plan. Employees could request reclassification of their positions by referring the request to a joint union-management committee. If the parties did not reach agreement on the proper classification for a position, the matter could be resolved through arbitration. This process was used to set new rates when the duties of a classification changed. For instance, when the scope of practice increased for operating room technicians, they successfully applied for a reclassification to the joint union-management committee.

**[5]** However, there was some give and take in this process. Following the approval of increased pay rates for the operating room technicians, licensed practical nurses ("LPN") also applied for

reclassification as they were similarly affected by the expansion of their scope of duties. Mr. Welden testified that, at this time, the RHD indicated that it could not afford to pay an increased rate for the LPN classification. In the end result, the parties reached an agreement to set the LPN rate at pay grade 12 retroactive to the date of the LPN application to the joint union-management committee.

**[6]** In the second last round of provincial bargaining, the parties agreed to suspend the operation of the reclassification provisions as a result of their agreement to enter into a joint job evaluation process, which entailed a system-wide review of health sector occupations. All of the health sector unions are participating in the joint job evaluation process. Pending the implementation of the results of the joint job evaluation process, the parties agreed that "[t]here shall be no new classifications created or reclassifications accepted until such time as the Maintenance Program has been established by the Joint Job Evaluation Committee."

**[7]** In the history of bargaining between these parties then, the collective agreement permitted local negotiation of pay rates in the context of reclassification reviews. However, when special wage rates were agreed to in one health district, other health districts were pressured to follow suit in order to prevent recruitment and retention problems in their districts. Although the Dorsey Regulations required SAHO and CUPE to negotiate one provincial agreement, the wages paid to various occupations within the health services provider group varied across the province causing competitive pressures among those districts for the highly skilled occupations within this bargaining unit.

**[8]** Mr. Dave McKillop, vice-president of human resources for SAHO, testified that this issue came to the boiling point in September 2001 when the East Central Health District offered market supplements to the technologist classifications and the RHD followed with its offer of market supplements for diagnostic imaging technologists. According to Mr. McKillop, this placed the ratification of the CUPE agreement in jeopardy because of the pressures from other occupational classifications, notably the medical laboratory technologists, for similar market supplements.

**[9]** After the LOU was signed with respect to the diagnostic imaging technologists in the RHD, medical laboratory technologists in the same bargaining unit sought similar or better market supplement increases. By this time, however, SAHO exerted its authority as the representative employers' organization as designated under s. 12 of the Dorsey Regulations to preclude the RHD from negotiating any further market supplements with CUPE.

**[10]** As a result of the competitive pressures caused by the locally negotiated increases, other district health boards pressured SAHO to come up with a provincial mechanism for determining market supplements for occupations experiencing recruitment and retention issues, and to put an end to the process of locally negotiated market supplements.

**[11]** Mr. Welden testified that CUPE was not opposed to the notion of developing a provincial process for negotiating market supplements for the hard to fill occupations. He encouraged SAHO to discuss the matter with CUPE in late September, 2001, as noted above. The urgency of the matter was reinforced in a letter to Ms. Scott from Mr. Welden on October 5, 2001, which reads in part as follows:

> *This situation is becoming critical. It is our wish to deal with this issue on a provincial basis versus a crisis management basis, local by local. Therefore, I am attaching for your information, the Letter of Understanding that was signed in Regina and request that immediately SAHO and CUPE sit down and provincially negotiate a comprehensive package that will address the recruitment and retention issues faced in all the technological classifications until such time as the joint job evaluation and subsequent processes are completed.*

**[12]** The parties met on October 23, 2001 to discuss CUPE's proposal. Mr. Welden now admits the meeting was a bit of a set up on his part. SAHO thought the meeting was to address the recruitment and retention concerns for diagnostic imaging members across the province and it attended with the manager of diagnostic imaging at the RHD and the director of human resources of the RHD. However, CUPE arranged for representatives of all of the unions in the provider sector to attend. It was an ambush of sorts and did not produce the results that CUPE wanted to see, that is, a joint union-management process to address the on-going recruitment and retention problems.

**[13]** SAHO responded to CUPE's proposal on October 24, 2001 by informing CUPE that all health districts would implement the LOU rates of pay for diagnostic imaging technologists that had been negotiated between the RHD and CUPE. On the issue of the medical laboratory technologists, SAHO took the position that their rates would be dealt with under the terms of the joint job evaluation process and under the terms of a provincial market supplement program that SAHO was in the process of developing.

**[14]** SAHO's response did not satisfy the laboratory technologists and they engaged in an illegal work stoppage on October 25, 2001 to make their demands known. The work stoppage was resolved

with a back-to-work agreement between CUPE and SAHO that did not address the underlying causes of the work stoppage.

**[15]** In the meantime, SAHO began developing a provincial market supplement program. Mr. McKillop explained that he met with all of the members of SAHO during the previous year and they expressed to him their desire to have a provincial mechanism for setting market supplement rates. They did not favour a continuation of the ad hoc, district based market supplements.

**[16]** In late October and November 2001, Mr. McKillop worked with the health care employers to establish a framework for establishing a market supplement process. On December 11, 2001, Mr. McKillop wrote to each health care union and advised them that all health districts had endorsed the "provincial market supplement program." Mr. McKillop also explained that a provincial market supplement review committee ("MSP Committee") would be established to undertake the implementation of the program. The MSP Committee comprised members of management in various health districts. SAHO did not propose any union participation on the MSP Committee. Mr. McKillop noted that the MSP Committee would initially look at eight classifications, two of which fell within CUPE's bargaining structure (medical laboratory technologists and cytology technologists). He attached the provincial market supplement program framework and the terms of reference for the MSP Committee to his letter. In the framework document, the guiding principles were stated as follows:

> *Guiding Principles:*
>
> *1. The Market Supplement Program is designed to address specific pay related skill shortages by use of a temporary market supplement to attract and/or retain qualified employees. This will only be done when it is required to improve the ability of the employer to retain or recruit employees with the required skills to deliver appropriate health services.*
> *2. The Program will ensure that temporary salary adjustments respond to valid labour market conditions to address recruitment/retention pressures.*
> *3. The integrity of the Joint Job Evaluation Plan shall be maintained.*
> *4. The integrity of the provincial collective bargaining system for negotiating province-wide agreements for wages and working conditions shall also be maintained.*
> *5. The Program shall be ongoing and separate and apart from collective bargaining.*
> *6. The Program shall be responsive and timely to address health service delivery.*
> *7. Unless otherwise agreed to by SAHO and Saskatchewan Health, all adjustments will be funded through existing funding allocations.*

**[17]** The terms of reference document described the decision-making responsibilities of the MSP Committee in part as follows:

> *The MSRC will analyze all market supplement review requests, taking into consideration all the labour market review criteria as a whole, and render all decisions with regard to the approval or denial of the payment of a temporary market supplement and recommendations regarding appropriate supplement levels.*

**[18]** Mr. McKillop explained that SAHO envisaged CUPE and other health care unions working with district health boards to jointly provide information on various classifications to the MSP Committee to enable it to make reasonable decisions on the need for market supplements. The program also envisaged the unions bringing forward their own requests for review in situations where there was disagreement at a local level between the health districts and the union over the need for market supplements.

**[19]** Mr. McKillop said that SAHO anticipated that it would engage in negotiations with the appropriate trade unions concerning the size of any market supplement that was approved by the MSP Committee. However, no reference was made in the framework documents to such negotiations. The framework document described the role of the health care unions as follows:

> *Unions will be encouraged to participate in the process by identifying classifications that may be eligible for a market supplement and may jointly compile labour market criteria data and submit such information with an employer. If a union and an employer are not in agreement that a market supplement is necessary, the union may compile labour market criteria and submit a request on its own.*

**[20]** On February 21, 2002, Mr. Welden wrote to Mr. McKillop expressing CUPE's response to the provincial market supplement program in the following terms:

> *In response to your letter of December 11, 2001, the Unions have reviewed the process outlined in your proposed Provincial Market Supplement Program and find your process to be totally unacceptable.*
>
> *Your proposal was obviously prepared without giving any consideration to the most important aspect of the Joint Provincial Market Supplement Committee proposal put forward by the Unions in our meeting on October 23, 2001. Despite the fact that you were clearly told by all of the Unions in attendance at that meeting, and again in a letter from us dated October 25, 2001, that the Union are not about to agree to any process to deal with base rates and supplement market adjustments which is not developed jointly.*

*Although you appear to recognize the importance of union participation in your letter, you are not prepared to consider the Unions as an equal partner in your process. It is not enough for you to say that the Districts and the Unions will be encouraged to jointly present information to the Provincial Market Supplement Review Committee. Rather the Unions have to be a part of whatever decision is made by the Committee. We have seen the success of joint committees.*

*From the perspective of the Unions, any adjustments made to the negotiated salary rates of any positions constituted collective bargaining and to say that this process will function outside of collective bargaining is not appropriate.*

*Please indicate by March 4, 2002 if your organization is prepared to commit to the joint development of a market supplement program.*

**[21]** On March 8, 2002, SAHO provided CUPE with the MSP Committee's report on cytology technologist I and medical laboratory technologist I classifications, positions within its bargaining units. The covering letter from Mr. McKillop stated, in part:

*In recommending that a market supplement be provided to the Cytology Technologist I classification, it should be noted that the market supplement will be supplemental pay added to an employee's base salary. The employee's pay grade and step will remain the same. The determination regarding continuing or discontinuing the market supplement will be made annually by the Provincial Market Supplement Committee.*

*Although the Provincial Market Supplement Review Committee is not recommending that a market supplement be provided to the Medical Laboratory Technologist I classification at this time, it will allow for additional information to be submitted by each of the unions (CUPE, SEIU and SGEU) representing Medical Laboratory Technologists I. The additional submissions are invited as there may be a perception that you were not provided an opportunity to furnish information to the committee.*

*Negotiation with respect to implementing a market supplement for the Cytology Technologist I classification will be conducted between SAHO and each of the bargaining agents. Please note that the negotiations of a market supplement rate for Cytology Technologists will depend on the availability of resources and will be prospective in nature.*

**[22]** The report of the MSP Committee did not contain any recommendation pertaining to the amount of the market supplement that would be offered to cytology technologists.

**[23]** Following the issuing of the MSP Committee's report, Mr. McKillop wrote CUPE seeking submissions from CUPE on the needs of the medical laboratory technologists. In addition, SAHO asked CUPE to enter into negotiations to establish market supplements for cytology technologists with

CUPE. Mr. Welden acknowledged that CUPE locals may have participated in presenting information to the MSP Committee through its participation in the joint union-management committee at the health district level. Mr. Welden also attended one negotiating meeting between SAHO and Service Employees' International Union that dealt with the cytology technologist market supplement. The meeting did not resolve the issue of the market supplement and it remained outstanding at the time of this hearing. Otherwise, CUPE took the position that it would not participate in the market supplement process unless SAHO would agree to work out the terms of the program with CUPE.

**[24]** Mr. McKillop explained in his evidence that SAHO took a unilateral approach to the development of the MSP Committee and the framework document because the normal collective bargaining process could not address the difficult retention and recruitment issues. He explained that there are a number of different incentives that can be used to address recruitment and retention issues, not all of which are matters that require collective bargaining. In addition, Mr. McKillop noted that the three year structure of collective bargaining did not provide the necessary flexibility to deal with market supplement issues.

## Analysis

**[25]** In this application, we must decide if SAHO violated s. 11(1)(c) of the *Act* by unilaterally implementing the provincial market supplement program. CUPE takes the position that SAHO has implemented a term or condition of employment without bargaining collectively with it, while SAHO argues that it requested and encouraged CUPE's input into the MSP committee on a number of occasions and that CUPE's actions in failing to agree to the bargaining dates for setting the cytology market supplement rates has resulted in a delay in the "bargaining process."

**[26]** Section 5(c) of *The Trade Union Act* is the statutory source of the Employer's obligation to bargain collectively with a trade union when it is certified to represent employees in a bargaining unit. In this case, the obligation rests with SAHO as it was appointed the representative employers' organization ("REO") for health sector employers in s. 12 of the Dorsey Regulations.

**[27]** A provincial structure is also imposed on the collective bargaining through s. 13(1) of the Dorsey Regulations, which stipulates as follows:

*13(1) Where a trade union represents health sector employees in more than one appropriate unit prescribed by section 3 or 5, the representative employers' association and the trade union shall negotiate one collective bargaining agreement that applies to all those appropriate units.*

(emphasis added)

**[28]** "Collective bargaining" is defined in the *Act* in s. 2(b) as:

*2(b) "bargaining collectively" means negotiating in good faith with a view to the conclusion of a collective bargaining agreement, or a renewal or revision of a bargaining agreement, the embodiment in writing or writings of the terms of agreement arrived at in negotiations or required to be inserted in a collective bargaining agreement by this Act, the execution by or on behalf of the parties of such agreement, and the negotiating from time to time for the settlement of disputes and grievances of employees covered by the agreement or represented by a trade union representing the majority of employees in an appropriate unit;*

**[29]** A "collective bargaining agreement" is defined in s. 2(d) of the *Act* as follows:

*2(d) "collective bargaining agreement" means an agreement in writing or writings between an employer and a trade union setting forth the terms and conditions of employment or containing provisions in regard to rates of pay, hours of work or other working conditions of employees;*

(emphasis added)

**[30]** Section 3 of the *Act* bestows a statutory role on the certified trade union by providing that:

*3 . . . [T]he 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.*

(emphasis added)

**[31]** This Board and other labour relations boards and courts have interpreted the duty to bargain in good faith as imposing two key obligations on an employer: (1) an obligation to recognize the union as the exclusive representative of the employees in the bargaining unit for the purpose of "bargaining collectively;" and (2) an obligation to make every reasonable effort to conclude a collective agreement: see *Energy and Chemical Workers Union, Local 649 v. Saskatchewan Power Corporation,* Winter Sask. Labour Rep. 64, LRB File No. 022-88; *Devilbiss (Canada) Ltd.,* (1976), 2 C.L.R.B.R. 101; *Royal Oak Mines Inc. v. Canada (Labour Relations Board) et al.,* [1996] 1 S.C.R. 369.

**[32]** This case involves the first aspect of the duty – that is, the obligation to recognize the trade union as the exclusive representative of the employees in the bargaining units concerned. In general terms, once a certification order is issued, the employer must address the certified union with its proposals and concerns related to the terms and conditions of employment of its employees. As the Supreme Court stated in one of its earlier decisions on the Wagner model of collective bargaining statutes:

> *. . . [T]here is no room left for private negotiation between employer and employee. Certainly to the extent of the matters covered by the collective agreement, freedom of contract between master and individual servant is abrogated. The collective agreement tells the employer on what terms he must in the future conduct his master and servant relations . . .*
>
> *Syndicat Catholique des Employes de Magasins de Quebec, Inc. v. Compagnie Paquet Ltee. (1959), 18 D.L.R. (2d) 346 at 353-4 (S.C.C.)*

**[33]** The exclusivity principle was reinforced by the Supreme Court's later decision in *McGavin Toastmaster Ltd. v. Ainscough* (1975), 54 D.L.R. (3d) 1 where the Court ruled at 6 as follows:

> *The reality is, and has been for many years now throughout Canada, that individual relationships as between employer and employee have meaning only at the hiring stage and even then there are qualifications which arise by reason of union security clauses in collective agreements. The common law as it applies to individual employment contracts is no longer relevant to employer-employee relations governed by a collective agreement which, as the one involved here, deals with discharge, termination of employment, severance pay and a host of other matters that have been negotiated between union and company as the principal parties thereto.*

**[34]** In Saskatchewan, these decisions have helped to shape the Board's approach to cases involving the role of the trade union in collective bargaining. For instance, in *International Woodworkers of America, Local 1-184 v. Moose Jaw Sash and Door (1963) Ltd.,* [1980] May Sask. Labour Rep. 69, LRB File No. 312-79, the employer offered to pay employees who abandoned a strike rates in excess of those contained in the collective agreement under negotiation. The Board relied on the exclusivity principle at 70 to find the employer in violation of s. 11(1)(c):

> *As stated previously, the employer, by telling each employee who gave evidence that he would be paid a wage rate in excess of that called for under the collective agreement and by in fact paying that pay rate is dealing with the employee when the certification order of the Board makes the union the exclusive representative of the employees with respect to wages and working conditions. This constitutes a refusal*

> *to bargain collectively with the union, an unfair labour practice under section 11(1)(c) of The Trade Union Act. The Board finds support for its decision in Regina v. Davidson Rubber Co. Inc., 69 C.L.L.C. para. 14,190 and Le Syndicat Catholique des Employes de Magasins de Quebec, Inc. v. La Compagnie Paquet Ltee., 59 C.L.L.C. para. 15409. In the latter case the Supreme Court held that freedom of individual contract was abrogated when a union is certified and that there is no room left for private negotiation between employer and employee.*

**[35]** Similarly, in *Saskatchewan Insurance Office and Professional Employees' Union, Local 397 v. Saskatchewan Government Insurance,* [1987] Mar. Sask. Labour Rep. 48, LRB File No. 125-86, where the employer entered into contracts with temporary employees to avoid the costs of the union agreement, the Board applied the exclusivity principle to find the employer in breach of s. 11(1)(c). The Board summarized the general law relating to the negotiation of individual contracts as follows:

> *It is well settled that a certification order abrogates an employer's freedom to negotiate individual contracts of employment with employees in the appropriate bargaining unit described therein (see Le Syndicat Catholique des Employes de Magasins de Quebec, Inc. v. La Compagnie Paquet Ltee., 59 C.L.L.C. para. 15,409). A certified employer who bargains directly with individual employees with respect to the terms and conditions of their employment commits an unfair labour practice under section 11(1)(c) of The Trade Union Act (see, for example, Saskatchewan Liquor Board et al., Sask. Labour Rep. August, 1984, Vol. 35, No. 8, p. 40).*

**[36]** In the *Saskatchewan Liquor Board* decision, referred to in *the Saskatchewan Government Insurance* case, *supra*, the Board found that negotiations between the employer and the employees, without sanction from the union, constituted a failure to bargain in good faith. In that instance, the Board explained the rationale for its decision in the following terms at 43-44:

> *The negotiations may have taken place on November 22, 1983 because those taking part in them misconceived the fundamental nature of an employer's duty to bargain collectively with a trade union. So long as it remains certified to represent employees in an appropriate unit, a trade union is their exclusive bargaining agent and it is not open to some or all of the employees to bargain directly with the employer. Under The Trade Union Act an employer makes his collective bargaining agreement with the union, and not with the employees. . . .*
>
> *To hold otherwise would be to permit effective decertification of the union without reference to The Trade Union Act. Similarly, if a bare majority of employees in a larger bargaining unit prefer to eliminate the union as their bargaining agent and to negotiate directly with their employer, they are not free to do so without first applying to the Board to decertify the union in accordance with s. 5(k) of the Act. To hold otherwise would be to destroy the certified union's basic right under section 3 of the Act to be the exclusive representative for all employees in the unit, and to ignore the*

*employer's duty to deal with employees through the union rather than with the union through the employees.*

**[37]** Similar rulings were made in *Saskatoon City Police Association v. Saskatoon Board of Police Commissioners*, [1993] 4th Quarter, Sask. Labour Rep. 158, LRB File No. 240-93, where the employer established an early retirement incentive program and offered it to eligible members without negotiating the program with the association. The Board found at 167 that the unilateral implementation of the incentive program constituted a violation of s. 11(1)(c) for the following reasons:

*It is also relevant that in this case the parties have addressed the "pension plan and related matters" in Article 16 of the collective agreement, suggesting that they wished to include within the scope of terms and conditions considered in bargaining between them the issue of the terms on which departure from the workforce through retirement would occur. It is not clear from the wording of this provision what sanctions would ensue upon a finding that it had been violated; its existence does, however, serve to underline and to reinforce the obligation of the Employer to engage in bargaining concerning terms and conditions related to these issues.*

*As the British Columbia Board pointed out in the Westar case, supra, the fact that the offer made by the Employer might be attractive to the group of employees for whom it is meant does not make it any the less a threat to the bargaining strength of the Union. The offer by the Employer of a benefit which has not been obtained through the efforts of the Union weakens the status of the Union as a representative of employees in a way which may be equally as damaging as the infliction of a penalty which the Union is powerless to prevent. This Board made this point in a decision in Energy and Chemical Workers Union v. Saskatchewan Power Corporation, LRB File No. 022-88.*

*We accept that the Employer has important statutory responsibilities, and that the difficulties of carrying out those duties at a time when the civic authorities to which the Police Service is accountable has imposed financial constraints are serious. Witnesses for the Employer gave evidence to show that, once they decided that an ERIP would be a useful measure, they were under severe time constraints because the funds which were earmarked for the program must be returned to the City of Saskatoon if they are not expended before December 31, 1993; this evidence was credible, and we must accept it.*

*These factors do not, however, create an exemption for the Employer from fulfilling obligations, which are imposed by The Trade Union Act. Many employers experience financial exigencies, and many might say that they would find it more efficient or more satisfying to address those exigencies without subjecting them for their solution to the complex process of collective bargaining. In our view, neither financial pressures nor responsibilities to the public can be relied on to justify a departure from those rights and obligations set out in The Trade Union Act.*

*Whether the ERIP would run into heavy weather in collective bargaining, or whether the Union would be receptive, is a matter of speculation. It is possible that the*

> *Employer would be unable to convince the Union that the ERIP offers a unique opportunity, that it would serve the interests of both parties, or that the funds would not be available for any other purpose dearer to the heart of the Union. We feel, nonetheless, that an employer is not entitled to resort to unilateral implementation of a good idea at the cost of weakening the effectiveness of collective bargaining.*

**[38]** In the *Energy and Chemical Workers Union v. Saskatchewan Power Corporation, supra*, relied on in the *Saskatoon Board of Police Commissioners* case, *supra,* the employer offered employees a bonus payment while the union and the employer were engaged in collective bargaining. The Board found that the payment of the bonus constituted an unfair labour practice under s. 11(1)(c) and, relying on the Ontario Labour Relations Board's decision in *Devilbiss (Canada) Ltd., supra,* commented as follows:

> *The Ontario Labour Relations Board described the duty to negotiate in good faith in Devilbiss (Canada) Ltd. 1976, 2 CLRBR 101 at p. 114:*
>
> > *Hence it is our belief that the duty . . . has at least two principle functions. The duty reinforces the obligation of an employer to recognize the bargaining agent and, beyond this somewhat primitive though important purpose, it can be said that the duty is intended to foster rational, informed discussion thereby minimizing the potential for unnecessary industrial conflict.*
>
> *The Ontario Board went on to comment that tactics designed to undermine the status of the union during negotiations do not satisfy the requirement of negotiating in good faith and making every reasonable effort to reach a collective bargaining agreement.*
>
> *The facts in Devilbiss Canada Ltd. were strikingly similar to the present case. An employer had unilaterally and substantially improved wages in the midst of negotiations for a renewed collective bargaining agreement without consulting the union. At p. 115-6 the board said:*
>
> > *When an employer, while negotiating with a trade union, implements new conditions of employment that have not been first proposed to the trade union, the inference logically arises that the tactic is designed to undermine the status of the trade union amounting to a suggestion that beneficial terms and conditions of employment do not require the presence of the bargaining agent . . . Professor Cox . . . commented on the problem in the following manner:*
> >
> > *Unilateral action yields to much the same analysis. When taken during negotiations or upon subjects on which the union wishes to bargain it weakens the union by showing the employees that it is useless to try to negotiate. If the employer unilaterally raises wages or makes some other concession, his conduct effectively tells the employees that without collective bargaining they can secure advantages as great or possibly greater than those the union can*

> *secure. Unilateral changes made while the employees' representative is seeking to bargain also interfere with the normal course of negotiations by weakening the union's bargaining position. Consequently, proof that an employer changed wage rates or other terms of employment in the midst of contract negotiations ordinarily gives rise to the inference that he had no intention of coming to an agreement; . . .*
>
> *In this case, for over 13 months SPC resolutely refused to agree to any wage increase and then, suddenly and without consultation, paid every employee $1000 (or a pro-rated amount) for a job well done. By doing so SPC repudiated the union as exclusive bargaining representative of all employees in the bargaining unit and at the same time demonstrated in the clearest way that it had not been making every reasonable effort to reach a collective bargaining agreement at the negotiating table. If there was bonus money available to be paid directly to the employees, then there was bonus money available to be placed on the bargaining table and it was SPC's duty to do so.*
>
> *In the Board's opinion, SPC's conduct therefore amounted to a violation of the duty to negotiate in good faith, and the board finds that it committed an unfair labour practice within the meaning of section 11(1)(c) of The Trade Union Act.*

**[39]** In a similar vein, the Board has found that an employer violates s. 11(1)(c) when it involves union members in the formulation of its bargaining proposals. For instance, in *Canadian Union of Public Employees, Local 1594 v. Regina Public Library*, [2001] Sask. L.R.B.R. 834, LRB File No. 096-01, the employer asked a workplace committee to recommend the creation of a new casual category of staff to resolve a call-in problem. The committee comprised out-of-scope and in-scope employees. At 840, the Board held:

> *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.*

**[40]** In the present case, SAHO created the MSP Committee process for the purpose of arriving at rates of pay for certain classifications of employees that were different than the rates of pay established for those classifications in the recently negotiated collective agreement. In doing so, it encouraged CUPE locals and members to join with their employers in providing information to the MSP Committee for the purpose of encouraging SAHO to offer market supplement payments to various occupations. SAHO suggested, as well, that CUPE could initiate requests for market supplement reviews before the MSP Committee. Although the wording of the framework documents suggested that the MSP Committee would recommend wage supplements, in fact, the reports did not

recommend any specific dollar amounts. Rather, the MSP Committee referred the wage setting aspect of the task to SAHO and CUPE to settle through mid-term collective bargaining.

**[41]** It may be possible to characterize the provincial market supplement program as a device developed by SAHO to determine, among its employer-members, which classifications would benefit from negotiated market supplements. In this sense, the market supplement program could be compared to the normal information gathering process that, no doubt, takes place among employer-members of SAHO before SAHO enters into negotiations for the renewal of its collective agreements.

**[42]** However, SAHO also envisaged the MSP process as requiring the participation of union locals and their members, working with local district boards, to formulate the information packages that may persuade the MSP Committee to recommend market supplements for the occupations in question.

**[43]** If we operate on the theory or understanding that the MSP Committee was only a mechanism for formulating employer proposals for mid-term bargaining, then SAHO violated s. 11(1)(c) of the *Act* by encouraging union members to participate in the formulation of these proposals. This follows from the Board's decision in the *Regina Public Library* case, *supra,* where the Board found that similar conduct violated s. 11(1)(c) because it undermined the union's role as the exclusive bargaining agent.

**[44]** Employer-initiated consultations with union locals or members cause difficulties in the formal bargaining relationship because employers may be viewed as encouraging employees to support bargaining positions that may be contradictory to the goals of the union. Employees who are in a minority position in the union may seek strategic alliances with the employer through such consultations in order to pressure the union into accepting their bargaining goals. Overall, the union, which has a responsibility to all of its members, is placed in a situation where it may be required to disavow the results of the consultation process and face an employer in bargaining who, as a result of its consultation process, believes that it understands the needs of the union members better than the union. In the end result, the union's role as the exclusive representative of the employees is weakened and its ability to represent its members compromised by the employers' actions of seeking member or local input into the formulation of the employers' bargaining proposals. In the present

case, CUPE may find it difficult or impossible to take a bargaining position with SAHO that disavows the results of the MSP Committee particularly where the process is offering wage increases to segments of its membership.

**[45]** On the other hand, the Board does not think that the MSP process would violate s. 11(1)(c) if SAHO used the process solely for the purpose of generating a consensus among its members as to the mid-term bargaining proposals the members want to pursue with respect to market supplements. SAHO would then be in a position to approach CUPE with respect to its desire to negotiate market supplements for the occupations in question. CUPE could then decide if it wished to engage in such mid-term bargaining, and if so, on what terms or conditions. The development of bargaining proposals on this issue would be confined internally to both organizations – SAHO, for the employers, and CUPE, for the union members. The parties may end up agreeing to the process established by SAHO or to a modified process, but, in either event, it would be a negotiated, as opposed to unilaterally imposed, process.

**[46]** In this case, however, we find that the provincial market supplement process was not solely a mechanism for determining a mid-term bargaining position. Rather, SAHO intended the process to result in amendments to the wage schedule in the collective agreement. Although the MSP Committee did not recommend specific wage supplements, it identified which occupations were considered deserving of market supplements.

**[47]** The MSP Committee recommendations set up positive and negative expectations among CUPE's members. Some would expect that they would receive market supplements as a result of the reports issued by the MSP committee, while others would be disappointed by being excluded from the recommendations. CUPE was left in a position of having to explain to those members who stood to gain from the process why the union was unwilling to engage in the employer-driven process. CUPE would also be left trying to push forward the claims of other occupational groups who were excluded from consideration by the MSP committee without any agreement or process in place for dealing with such requests.

**[48]** The cases cited above make clear that wages cannot be altered without agreement and consent of the union even if the alterations result in pay increases for union members.

**[49]** Was the unilateral implementation of the MSP cured by SAHO's offer to CUPE to sit down to negotiate market supplements for those classifications deemed deserving of such increases by the provincial market supplement committee? SAHO did not obtain CUPE's agreement before it embarked on the MSP process. As stated in the *Saskatoon Board of Police Commissioners* case, *supra,* no matter how difficult the negotiations, the employers' representative and the union have an obligation to engage in constructive negotiations of such matters and they must do so in the context and in accordance with the principles of the *Act,* particularly s. 11(1)(c). We find in this instance that SAHO failed to meet these requirements by acting unilaterally in establishing the provincial market supplement process and committee.

**[50]** For these reasons, the Board finds that SAHO failed to bargain in good faith with CUPE by unilaterally implementing the provincial market supplement program without negotiating the same with CUPE; by asking and encouraging CUPE locals and members to participate in providing information and proposals to the provincial market supplement committee; and by issuing the report of the provincial market supplement committee recommending wage supplements for certain occupations in CUPE's bargaining units without negotiating with CUPE.

**[51]** An Order will issue finding SAHO in violation of s. 11(1)(c) by unilaterally establishing the provincial market supplement program and committee and directing SAHO to negotiate with CUPE with respect to the establishment of a provincial market supplement program.

**SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant v. SASKATCHEWAN GAMING CORPORATION – CASINO MOOSE JAW, Respondent and PUBLIC SERVICE ALLIANCE OF CANADA, SASKATCHEWAN FEDERATION OF LABOUR and CANADIAN LABOUR CONGRESS, Intervenors**

LRB File No. 187-02; December 12, 2002
Chairperson, Gwen Gray, Q.C.; Members: Don Bell and Gloria Cymbalisty

| | |
|---|---|
| For the Applicant: | Larry Kowalchuk |
| For the Respondent: | Brian Kenny |
| For the Intervenor Public Service Alliance of Canada: | Rick Engel |
| For the Intervenor Saskatchewan Federation of Labour: | Larry Hubich |
| For the Intervenor Canadian Labour Congress: | Rick Byrne |

**Reconsideration – Criteria – Board reviews criteria for granting reconsideration application – Board grants reconsideration application on grounds that Board's misstatement of evidence in original hearing constituted breach of natural justice.**

**Reconsideration – Natural justice – Board grants reconsideration application on grounds that Board's misstatement of evidence in original hearing constituted breach of natural justice.**

**Reconsideration – Policy – Board confirms original decision on basis that it did not constitute significant policy shift regarding Board's view of support card evidence.**

## REASONS FOR DECISION
### Reconsideration Hearing

### Background

**[1] Gwen Gray, Q.C., Chairperson:** The Applicant, Saskatchewan Joint Board, Retail, Wholesale and Department Store Union ("RWDSU"), applied for reconsideration of the Board's November 25, 2002 decision on a certification application brought by RWDSU for a bargaining unit of employees at Casino Moose Jaw. In the decision, the Board exercised its discretion, pursuant to s. 6(1) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), to direct that a vote be conducted among employees at Casino Moose Jaw to determine which trade union represents a majority of the employees. Both RWDSU and the intervening union, Public Service Alliance of Canada ("PSAC"), applied for certification. RWDSU filed its application with majority support cards on September 27,

2002 and PSAC filed its intervention with support cards in excess of 25% on October 1, 2002 and requested that a vote be conducted.

**[2]** At the hearing of the reconsideration application on December 6, 2002, the Saskatchewan Federation of Labour ("SFL") and the Canadian Labour Congress – Prairie Region ("CLC") applied to intervene in the application on the grounds that significant policy issues relating to the card support method of determining majority support were at issue and that the Board's November 25, 2002 decision represented a major policy shift. The SFL, supported by the CLC Prairie Region, asked to make representations relating to the legal issues in the matter.

**[3]** The Board determined that it would hear from the SFL and CLC on the legal issues only, although the Board noted that the protagonists in this dispute are both affiliates of the SFL and CLC and, in that sense, neither the SFL or the CLC could argue that they were making representations on behalf of all of their affiliates. Both intervenors advised the Board that they would be taking the same position on this issue no matter which affiliate was affected by the Board's earlier decision.

**Grounds for Reconsideration**

**[4]** RWDSU argued that the Board should reconsider its November 25, 2002 decision on the grounds of a failure of natural justice in the earlier hearing. In particular, it argued that the Board made an incorrect statement at the hearing concerning RWDSU's support evidence. The misstatement took RWDSU by surprise as it understood that it had filed support evidence from a majority of the employees in the bargaining unit.

**[5]** At the hearing, the Board Chairperson indicated if support cards that had been signed by employees in support of both RWDSU and PSAC were excluded from the calculation of support, RWDSU's support would fall below the 50% mark. This calculation was based on certain assumptions made with respect to revocation cards filed by PSAC which assumptions the Board rejected in its November 25, 2002 decision, reported at [2002] Sask. L.R.B.R. 601, LRB File No. 187-02. At paragraph 22 of that decision, the Board, after having considered the evidence, concluded as follows:

> *. . . Several employees indicated support for both unions. At the hearing, we incorrectly advised the parties that the overlapping support reduced RWDSU's support*

> *to below 50%. This calculation was based on incorrect assumptions about the revocation evidence filed by PSAC and we regret leaving the impression with RWDSU that its support fell below the 50% mark if the double membership cards were not counted.*

**[6]** At the reconsideration hearing, RWDSU argued that this misstatement at the original hearing changed the focus of its arguments and made it difficult to know the case against it. It argued that the misstatement amounted to a breach of natural justice and rendered the former hearing a nullity. As such, it asked that the application be reconsidered by this panel as though this were a new hearing.

**[7]** RWDSU also argued that the policy decision made by the Board in its November 25, 2002 decision was a significant departure from the support card system of determining majority support and ought to be reconsidered on that ground as well.

**[8]** PSAC argued that no reconsideration of the November 25, 2002 Reasons was necessary as the misstatement of facts by the Board at the hearing was corrected in the Reasons in favour of RWDSU. It argued that RWDSU was not prejudiced by the misstatement and the matter was fully argued in the original hearing.

**[9]** PSAC also argued that the Board's November 25, 2002 Reasons did not represent a major change in Board policy pertaining to support card evidence. Rather, it argued that the Board was following its earlier decisions.

**Board's Decision on the Reconsideration Application**

**[10]** The Board has adopted six general criteria for determining when it will entertain an application for reconsideration. These criteria were adopted from the British Columbia Industrial Relations Council's decision in *Overwaitea Foods v. United Food and Commercial Workers,* No. C86/90 and include:

> *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.*

See *Remai Investment Corporation, operating as Imperial 400 Motel v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union et al.*, [1993] 3rd Quarter Sask. Labour Rep. 103, LRB File No. 132-93.

**[11]** In this case, RWDSU relies primarily on criterion 5 above, as well as 6 and 2.

**[12]** As we expressed in the November 25, 2002 Reasons for Decision, the Board regrets that it incorrectly summarized the support evidence at the original hearing. In this sense, we agree with counsel for RWDSU that the focus of the hearing changed for RWDSU, from one where it thought it had filed evidence of majority support to one where there was a possibility that its support was less than 50%. We agree that this misstatement of the evidence was serious and amounts to a breach of natural justice in the sense that RWDSU was not permitted to argue the initial case based on a fair understanding of the evidence. The Board ought to have posed its questions in a hypothetical sense to flesh out the issues that required determination, such as how to treat the revocation cards filed by PSAC and the overlapping support cards. Unfortunately, the Chairperson left the impression that the support card issues had been determined in a manner that reduced RWDSU's support below 50%.

**[13]** Although the error was corrected in the Reasons, we do accept that the original hearing proceeded on an assumption that was unfair to RWDSU. A reconsideration of the application is therefore granted in the overall interests of fairness.

## Arguments on the Merits of the Application

### Arguments of RWDSU

**[14]** RWDSU argued that it was entitled to rest on the materials filed by it in its application, including its support card evidence. It argued that the application should be treated as an uncontested application as: (1) the bargaining unit description is agreed to by all parties; (2) the statement of employment has been agreed to by all parties; (3) RWDSU has filed evidence of majority support through its support card evidence; and (4) PSAC has not challenged the legitimacy of RWDSU's support card evidence. RWDSU argued that in these circumstances, where it has complied with the Regulations and Board Practice Directives in filing its application for certification, the Board should issue a certification order without a hearing.

**[15]** RWDSU argued that the focus of the *Act* is on the garnering of majority support through the support card system. It noted that Form 1 of the Regulations asks the applicant union "Do you want a vote if you do not have a majority of cards signed?" RWDSU argued that the corollary is that no vote is required when evidence of majority card support is filed.

**[16]** RWDSU pointed out that s. 3 of the *Act* should guide the Board's interpretation of its discretion under s. 6(1) to order a vote. Section 3 states:

> *3 Employees have the right to organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing; and the trade union designated or selected for the purpose of bargaining collectively by the majority of 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.*
>
> (emphasis added)

**[17]** Counsel for RWDSU argued that "designated" refers to a Board Order made pursuant to s. 5(b) of the *Act*, while the word "selected" refers to the support card evidence obtained by the applicant in the course of filing its application. Counsel for RWDSU noted that various provisions of the *Act* give status to a union when it has signed up a majority of the employees in a bargaining unit and before it has been designated by the Board as the exclusive representative of employees in the bargaining unit: see ss. 11(1)(e) and 11(2)(a). Some sections of the *Act* refer only to the union that represents a majority of employees and do not use the words "designated or selected."

**[18]** RWDSU argued that, in this sense, a union is "selected" to be the exclusive representative of employees in a bargaining unit when it has obtained majority card support. Once the union has been "selected" and has filed its application for certification in order to be designated the exclusive bargaining representative by Board order, the union's status as representing a majority of the employees in the bargaining unit cannot be challenged.

**[19]** RWDSU argued that the legislative purpose that can be deduced from these provisions is that the support card system is the primary method of determining majority support under s. 5(b) which simply requires the Board to determine "what trade union, if any, represents a majority of employees in an appropriate bargaining unit . . .". Counsel also referred the Board to ss. 10.1 and 10.2 as supporting the use of support card evidence as the primary method of making the s. 5(b) determination of majority support.

**[20]** On this analysis, then, RWDSU argued that once it filed evidence of majority support, the Board is obligated to issue a certification order as the evidence establishes the choice of the employees in question.

**[21]** In relation to Regulation 17, which permits a second union to intervene in an application for certification when it claims to represent employees in the proposed bargaining unit, RWDSU argued that the purpose of Regulation 17 is to establish a method for the intervening union to challenge the support evidence filed by the first union, that is, to challenge whether the first union has legitimate majority support, for instance, by challenging the appropriateness of the proposed bargaining unit, by challenging the manner in which the first trade union obtained its support evidence, or by claiming to represent a majority of employees in the proposed unit itself.

**[22]** RWDSU argued that the majority card system is the most efficient and accurate method of determining majority support. The majority established under the support card sign up is 50% plus one among all of the employees in the bargaining unit. This is contrasted with the support required on a vote, which is set in s. 8 of the *Act* as 50% plus one with a quorum of 50% plus one of the eligible voters.

**[23]** RWDSU put forward the view that s. 6(1) of the *Act*, which gives the Board discretion to order a vote on a certification application, is only available to the Board when there are legitimate

reasons for rejecting the support card evidence filed by the applicant union. This would include allegations of improper card sign-up such as occurred in *Saskatchewan Government Employees' Union v. Saskatchewan Institute of Applied Science and Technology Faculty Association and the Saskatchewan Institute of Applied Science and Technology,* [1988] May Sask. Labour Rep. 42, LRB File No. 001-88 and 002-88, where the applicant trade union filed cards that did not describe or name the employer, leaving the Board with some doubt as to how the cards had been obtained. In this sense, RWDSU takes the position that s. 6(1) discretion is fettered by s. 3 of the *Act* and the legislation's preference for support card system of determining majority support.

**Arguments of PSAC**

**[24]** PSAC argued that the Board's practice in this factual situation is clear. When two unions are competing for certification and both file card support in excess of 25%, the Board will exercise its discretion under s. 6(1) to order a vote. Counsel argued that this is not an attack on the support card system of determining majority support, but is a recognized exception to the general rule that majority support will be determined by the support card evidence filed with an application for certification.

**[25]** PSAC directed the Board to the following cases:

> (1) *Oil, Chemical & Atomic Workers International Union v. Potash Corporation of Saskatchewan Mining Limited, Rocanville Division and United Steelworkers of America,* [unreported] LRB File No. 138-78. In that case, the pre-1983 provision required that the Board direct a vote to be taken in a bargaining unit when a trade union filed support card evidence in excess of 25%. In a competing certification environment, this requirement ensured that a vote would be conducted in a situation such as the one facing the Board presently, i.e. where one union filed card support evidence in excess of 50% and the second intervening union filed card support evidence in excess of 25% but less than 50%. The Board held that although the Applicant has filed proof of support of a majority of the employees, it felt that it must direct a vote because of the provisions of Section 6(3) . . . which the Board considers to be mandatory because of the use of the words "the board, . . . shall direct a vote to be taken by secret ballot of all employees eligible to vote;"
>
> (2) *Construction Workers Association Local 151 v. Salem Industries Canada Limited and Construction and General Workers Union, Local 180,* [1986] June Sask. Labour Rep. 69, LRB File Nos. 033-86 & 044-86. This case arose under the amended 1983 *Act* which removed the mandatory vote upon the filing of 25% support evidence. In this case, the Board rejected the application of the intervening union because: (1) its evidence of support consisted of statutory declarations of union membership, which did not comply with the Board's rules on the form of

support required, and (2) the support cards filed were garnered after the filing of the first application for certification;

(3) *Saskatchewan Institute of Applied Science and Technology, supra,* in which the Board applied s. 6(1) and ordered a vote between two competing unions where one union filed support card evidence in excess of 50% and the intervening union filed support card evidence in excess of 25%;

(4) *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, in which the Board ordered a vote under s. 6(1) where the applicant trade union filed less than 50% support and the intervening union filed evidence of majority support. The Board concluded that "contrasted against that, however, is the Board's equally consistently position, that, given its discretion in Section 6(1), it will order a vote in these circumstances unless one union can show overwhelming proof of support;"

(5) *Energy and Chemical Workers' Union v. Remai Investment Corporation and Saskatchewan Joint Board, Retail, Wholesale and Department Store Union,* [1992] 2nd Quarter Sask. Labour Rep. 97, LRB File Nos. 027-92 & 028-92, in which the Board indicated that it would direct a vote be conducted between two competing unions in the following circumstances:

> (a) where the union establishes that its ability to organize the employees was frustrated or prevented by the employer; or
>
> (b) if the intervening union has the support of at least 25% of the employees in the proposed bargaining unit and its support was garnered prior to the date on which the first union applied for certification.

The Board commented that "even then the decision to direct a vote is discretionary and the Board has indicated that it may not order a vote between two unions if one of the unions has overwhelming support compared to the other union." In this instance, the Board refused on both grounds to order a vote;

(6) *Health Sciences Association of Saskatchewan v. Regina District Health Board,* [1995] 3rd Quarter Sask. Labour Rep. 37, LRB File Nos. 025-95 & 118-95, in which the Board articulated the view that there is an exception to the general rule that a union's application for certification will be considered without reference to subsequent applications when the subsequent application is supported by support card evidence garnered prior to the filing of the first application. The Board found that Regulation 17 supported its finding;

(7) *Public Service Alliance of Canada v. Casino Regina-Saskatchewan Gaming Corporation and Canadian Union of Public Employees,* [1996] Sask. L.R.B.R. 454, LRB File No. 068-96, in which the Board refused to order a vote when the intervening union filed evidence of support of less than 25% of the employees in the proposed bargaining unit. The Board in this instance did not institutionalize the 25% figure but remarked that "this figure makes as much sense as any."

**[26]** PSAC argued that in Saskatchewan, there are two methods for applying for certification. The first method is to file an application for certification accompanied by support cards from a majority of employees in the bargaining unit; the second method is to file an application for certification with support card evidence from less than 50% of the employees in the bargaining unit and request that a vote be conducted. In the case of two competing unions, PSAC noted that the Board in the *Casino Regina* case, *supra,* remarked that it would be draconian to require the intervening union to file evidence of majority support as a vote is granted in ordinary circumstances when an applicant trade union files evidence of support from less than 50% of the employees in the bargaining unit. By adopting the vote rule in situations where there are competing unions, each with support evidence in excess of 25%, the Board is reconciling the two methods of obtaining a certification order.

**[27]** PSAC also noted that the 25% threshold was used in the health sector to determine which unions would be included on ballots in the reorganized health districts. Counsel also argued that the rule has been used to determine if a vote should be held in an intermingling situation.

**[28]** In support of its arguments, PSAC also referred the Board to a decision of the British Columbia Labour Relations Board in *A. & R. Metal Industries Ltd. and CAW v. CLAC,* [1996] B.C.L.R.B. Dec. No. B240/96, where CAW made arguments similar to the arguments made in this case by RWDSU – that is, that the Board should issue a certification order to the union with majority card support. The B.C. Board explained its position at paras. 18, 19 and 20 as follows:

> *The Board has distinguished the ordering of a "run-off" representation vote in competing certification applications from representation votes in an application for certification filed by one trade union. The reason that the Board must order a representation vote where there are two (or more) competing certification applications is that as soon as the second application for certification is received, the first application is equivocal. There is nothing ambiguous in a case where one trade union applies for certification, meets all the requirements under the Code and the Rules, and the Board is satisfied there is the requisite support for automatic certification; thus, the application will be granted. However, a competing application will raise a bona fide doubt about the true wishes of the employees.*
>
> *When the Board is faced with applications from two (or more) different trade unions within 10 days of the receipt of the first application, how is the Board to know and decide without a doubt which trade union has the majority support of the employees each union purports to represent? The CAW says where one trade union has more than 55% support and another less than that, the Board can nevertheless determine the majority wishes of the employees. The CAW submits that a first trade union*

*applicant with the support to meet the requirements for automatic certification is representative of the majority of the employees. However, that may not necessarily be true.*

*If more than one application is filed with the Board for the same unit of employees, there might be reasons why the applicant trade union that has the most support and meets the requirements for automatic certification, is not truly representative of the majority of the employees in the unit applied for. Where there are competing certification applications, it is apparent there has been campaigning by more than one union and employees could have signed membership cards with both trade unions. Thus, the membership evidence cannot necessarily be relied on as representative of the actual support even if a first applicant trade union might have had 55% support or more at the time of application for certification. In addition, the employees could be confused or have changed their minds about supporting the first trade union but did not know about the revocation procedures required by the Board. Furthermore, one of the trade unions could be more sophisticated, diligent and efficient in marshalling support for its certification application and in timing the filing of its application, but events subsequent to the application being filed point to diminished support.*

**[29]** Counsel for PSAC pointed out that s. 3 of the *Act* makes the designated trade union the "exclusive representative" of employees in the bargaining unit. The notion of "exclusivity" therefore requires a determination by employees of their support for one trade union. Where there is evidence of overlapping support, the support evidence is equivocal. PSAC noted that the safeguards that exist to prevent abuse of the certification process include the requirement that the intervening union file support from a threshold greater than 25% of the employees in the proposed bargaining unit, and that the Board may refuse the vote if the support garnered by the first applicant is substantial.

**[30]** PSAC also referred to p. 7-76 of Adams, Canadian Labour Law, 2nd ed., (Aurora: Canada Law Book Inc., 2002) where the learned author states: "Another common situation where a board will always order a vote is when one union is seeking to displace another. The atmosphere of confusion generated by two competing unions renders membership evidence equivocal, hence, the secret ballot is demanded as a test of employee wishes."

**SFL and CLC**

**[31]** These intervenors argued that the support card system must be accepted in all circumstances as the most acceptable method of determining employee support, whether there are competing applications for certification or not. The intervenors took the position that the Board's discretion to

order a vote under s. 6(1) of the *Act* is limited to cases where there is some reason to doubt that the applicant trade union enjoys majority support. The doubt in this case was removed by the Board's November 25, 2002 decision.

**[32]** The intervenors drew a parallel between this case and the case of rescission applications where the Board requires evidence of support from a majority of the employees in a bargaining unit for the applicant seeking a rescission order before it will order a vote.

**[33]** The intervenors also argued that majority support means simply 50% plus one employee and no inquiry needs to be made as to whether the applicant trade union enjoys a substantial majority.

### Reply by RWDSU

**[34]** RWDSU replied to PSAC's argument by making the following points: (1) the *SIAST* case, *supra,* indicated that a vote was required because there was a problem with the support card evidence filed by the applicant union, the implication being that if there was no problem with the evidence, an order would have issued; (2) the *Penn-Co* case, *supra,* was a situation where the applicant's majority was put into question by the intervening union who filed cards from more employees and claimed that there were more employees in the bargaining unit; (3) the *Remai* case, *supra*, again involved an attempt by the intervening union to attack the bona fides of the majority claimed by the applicant trade union; (4) in the present case, PSAC has not cast any doubt on RWDSU's majority sign-up; and (5) the rule encouraged by PSAC would require unions to file evidence of support from 76% of employees in a bargaining unit before it could be assured that it would obtain an automatic certification.

## Analysis and Decision

**[35]** Both sides of this debate raise compelling arguments. RWDSU argues that if support card evidence from 50% plus one employee in a bargaining unit is good enough on ordinary certification applications, there is no need for the Board to order a vote simply because another union claims to represent less than 50% of the employees in the same bargaining unit.

**[36]** We agree with RWDSU (as does PSAC) that the support card system is the primary method adopted by *The Trade Union Act* and this Board to determine if a trade union should be certified to

represent employees in a bargaining unit. This method, however, is not the only method of obtaining certification, as PSAC pointed out. It is also possible for a trade union to apply to the Board for certification with less than 50% support. In this situation, the trade union would ask the Board to order a vote. If the Board determined to exercise its discretion pursuant to s. 6(1), a secret ballot vote would be ordered among the employees in the proposed bargaining unit.

**[37]** In the present case, RWDSU's application, standing alone, would not require a vote as it has filed evidence in excess of the 50% plus one threshold. However, PSAC's application, if it were a stand-alone application, would require a vote as the level of support filed by PSAC is in excess of 25% - an informal threshold that the Board has applied in similar circumstances to determine if a vote will be held.

**[38]** In the competing certification situation, the two methods of obtaining certification clash. The Board has resolved this issue in the past by directing that a vote be conducted to determine which trade union a majority of the employees in the proposed bargaining unit support. Up until 1983, such a vote was rendered mandatory by the wording of s. 6(3) of the *Act.* The mandatory wording was removed in 1983 thereby leaving the Board with a simple discretion – it may order a vote, but it is not required to do so.

**[39]** Why would the Board order a vote in the case of competing certifications? The primary reason is as stated above – both unions have established a threshold entitlement to have their respective applications considered by the Board had they been stand alone applications. As the Board expressed in the *Casino Regina* case, *supra*, it would be draconian to require the intervening union to file evidence of majority support under Regulation 17 if such support is not required in ordinary circumstances to obtain a vote on a certification order. We also agree with the suggestion in the *Casino Regina* case that there must be some threshold of support filed by the intervening union, and that the 25% figure, which has been used by the Board since the inception of the *Act* in 1945, makes sense. It is not a rigid rule, however, and if the Board judges the support filed by the first trade union as being overwhelming, then no vote would be required.

**[40]** There is also the problem caused by employees who sign support cards for both unions as indicated in the British Columbia decision of *A. & R. Metal Industries Ltd., supra.* The evidence in this sense is equivocal and as we expressed in our earlier reasons is ambiguous in its effect. The

Board is required to determine under s. 5(b) "what trade union, if any, represents a majority of employees in an appropriate unit of employees." In order for the Board to make a determination, employees must indicate in some clear fashion which trade union they are selecting. This issue does not arise when there is only one union engaged in an organizing campaign.

**[41]** Is the Board departing radically from its previous positions in determining that a vote should be conducted in this case? We think not. As indicated, from 1945 to 1983, the Board was required to order a vote in a fact situation similar to the present one. From 1983 onward, the Board has ordered a vote in the *S.I.A.S.T.* and *Penn-Co* cases, *supra,* both with similar fact situations to this case. In addition, in other cases where no votes were ordered, the Board accepted that votes would be required where the intervening union filed sufficient support evidence. There are no previous cases in which the Board rejects the approach we are taking in this case.

**[42]** Will the decision lead to labour relations instability? Again, we think not. The exercise of the Board's discretion to order a vote in a case of competing certification applications has not, as far as we are aware, led to opportunistic organizing. There are several safeguards protecting unions from such practices. First, the evidence garnered by an intervening union must be garnered before the initial application for certification is filed with the Board. Second, the support filed by the intervening union must come from a significant portion of the workforce – it cannot be trifling in numbers. Third, the support must be filed with the Board in a timely fashion. We would not expect that this decision will result in a flood of competing certification applications.

**[43]** Does the decision to require a vote in the situation of competing certification applications undermine the representational status of a trade union prior to certification? We do not think so. The representational status that exists for a union claiming to represent a majority of employees in a bargaining unit will remain in effect. The Board, however, must confirm the claim of representational status once an application for certification is filed. In an ordinary certification application, a trade union may claim to represent a majority of employees in a bargaining unit and it may exercise certain representational rights based on its claim. Nevertheless, the Board still scrutinizes the support evidence filed to determine if, in fact, the applicant union represents a majority of those employees. The Board can order a vote as part of its method of scrutinizing the support, although, as we have stated on many occasions, votes are not routinely required and the

support card system is the primary method of determining representational issues. One exception, however, is the situation of competing certification applications.

**[44]** Why would the Board order a vote when the support card system requires evidence of support from 50% plus one employees in the entire bargaining unit as opposed to a majority of a majority (50% plus one of those voting where those voting must include a majority of those eligible to vote)? The degree of support required in order to obtain automatic certification is significantly higher than the minimum that is required on a vote. A vote could determine the representational question by sampling a much smaller pool of the employees in question. The hazard of the vote system is the right to refuse to vote, which is a good reason for relying on majority support card evidence in the majority of applications. However, in contested applications between competing unions, the risk of obtaining the views of a smaller portion of employees is outweighed, in our view, by the opportunity provided to employees to clearly indicate which of the two (or more) unions they would select to represent them in collective bargaining. It overcomes the duplicate card problem and puts responsibility for selecting a bargaining agent clearly in the hands of the employees who chose to vote. This assumes, of course, a fair opportunity for all employees to vote, which the Board attempts to do by including all parties in a discussion of voting times and locations.

**[45]** In the end result, we are not persuaded to accept the arguments of RWDSU. We confirm the November 25, 2002 decision and direct that a vote be conducted to determine which of the two trade unions represents a majority of the employees in the proposed bargaining unit. This direction is subject to the hearing of the allegations of employer influence/interference in the garnering of support for PSAC which will be heard by a panel of this Board on Monday, December 16, 2002.

**[46]** Gloria Cymbalisty, Board Member, dissents from these Reasons for Decision. A written dissent will be forwarded to the parties in due course.

# HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES UNION, LOCAL 41, Applicant v. B.J. JUGGS NEIGHBOURHOOD PUB, Respondent

LRB File No. 226-02; December 17, 2002
Vice-Chairperson, James Seibel; Members: Mike Wainwright and Bruce McDonald

For the Applicant: Garry Whalen
For the Respondent: No one appearing

**Certification – Practice and procedure – Application for certification declared and filed by individual who is member of employer's management and organizer for union – Board concerned that voluntary nature of purported support for application tainted as consequence – Board dismisses application.**

***The Trade Union Act*, ss. 3 and 5(b)**

## REASONS FOR DECISION

**[1]** **James Seibel, Vice-Chairperson:** On November 12, 2002, Hotel Employees and Restaurant Employees Union, Local 41 (the "Union") filed an application for certification as the bargaining agent for all employees of B.J. Juggs Neighbourhood Pub (the "Employer"), except the accountant, bar manager and those persons acting in a management capacity. The Employer's premises are located at the King George Hotel at 157 – 2nd Avenue North in Saskatoon. The Board Registrar served the application by registered mail addressed to the Employer at that location. Canada Post confirmed delivery on November 18, 2002. The Employer did not file a reply to the application nor a statement of employment. No representative of the Employer attended at the hearing of the application on December 11, 2002.

**[2]** The application estimated that there are nine employees in the proposed bargaining unit. The Union filed purported evidence of support from a majority of the employees in the proposed bargaining unit with the application.

**[3]** At the hearing, 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. Brian Christoph, a self-described organizer with the Union, declared the application. However, Mr. Whalen,

representing the Union at the hearing, confirmed that Mr. Christoph had been and was still a member of the Employer's management.

**[4]** In these circumstances – that is, Mr. Christoph being a member of the Employer's management and the organizer and declarant of the certification application on behalf of the Union that he also represents – the Board cannot accept the purported evidence of support for the application as indicative of the true wishes of employees in accordance with the exercise of their rights under s. 3 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"). The Board is concerned about the voluntary nature of the purported support for the application. The employees who signed a card in support of the application may have been influenced to do so by the fact that a manager of their Employer was requesting that they do so or was in charge of the organizing drive, and, therefore, would have knowledge of who does and who does not support the application and the Union.

**[5]** Accordingly, the application is dismissed.

# BEN SCHAEFFER, Applicant v. SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION and LORAAS DISPOSAL SERVICES LTD., Respondents

LRB File No. 196-02; December 18, 2002
Vice-Chairperson, James Seibel; Members: Leo Lancaster and Pat Gallagher

For the Applicant: Larry Seiferling, Q.C.
For the Union: Larry Kowalchuk
For the Employer: Noel Sandomirsky, Q.C.

**Decertification – Employer influence – Board finds that, although employer did not explicitly promote making of rescission application, employer's conduct had effect of influencing applicant to make application – To grant vote on decertification application in climate created by employer could constitute denial of employees' rights under *The Trade Union Act* to bargain collectively through the union they have chosen – Board dismisses application.**

**Decertification – Discretion of Board – To grant vote on decertification application in climate created by employer could constitute denial of employees' rights under *The Trade Union Act* to bargain collectively through the union they have chosen – Board dismisses application.**

***The Trade Union Act*, ss. 3, 5(k), and 9.**

## REASONS FOR DECISION

### Background

**[1] James Seibel, Vice-Chairperson:** The Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Union") was designated as the bargaining agent for a unit of employees at Loraas Disposal Services Ltd. (the "Employer") by a certification Order dated March 25, 1997. On October 16, 2002, Ben Schaeffer (the "Applicant") filed the present application during the "open period" on behalf of himself and other employees seeking rescission of the certification Order, pursuant to s. 5(k) of *The Trade Union Act*, R.S.S. 1978, c. T-17 ("the *Act*"). The Union replied that the application was made as a result of influence by the Employer and that the Board ought to dismiss the application pursuant to s. 9 of the *Act*. The Employer denied that there had been such interference. The application was heard on November 7, 2002.

## Evidence

**[2]** The Applicant has been employed with the Employer as a driver for some 25 years. The present application is the fifth attempt to obtain rescission of the certification Order. The Applicant has been involved in all of the attempts as either an applicant or an assistant to the applicant.

**[3]** The Applicant testified that he had no contact or communication with representatives of the Employer regarding the making of the present application. He made the present application because he does not want the Union to represent him with respect to his employment with the Employer. He argued that it does not look after the needs of all the employees, but just, as he put it, the needs of "the chosen few." He said that he has held these views pretty much since the Union came into the workplace in 1997. He requested that a vote be conducted among the members of the bargaining unit as to whether they support the Union.

**[4]** The Applicant alleged that the Union does not provide him with information about Union meetings and has neglected to respond to certain inquiries for information or explanation made by him or in concert with others. In this regard, the Applicant referred to four specific matters: (1) the recent removal from the Employer's trucks of a satellite tracking system ("GPS"); (2) the alleged failure of the Union to advise employees about Union meetings and keep them informed about Union matters; (3) the lack of a response by the Union to his position and that of some of the other drivers with respect to the potential reinstatement of driver Kevin Wood; and, (4) the lack of a response from the Union regarding applications for membership made in August 2002 by several of the "grandfathered"[1] employees.

**[5]** With respect to the removal of the GPS on October 3, 2002, when the Applicant asked one of the Employer's mechanics to why this was done, the mechanic said that the manager had ordered it to be done and that he could not speak about it. The Applicant assumed that the Union was responsible and thought the Board had ordered the Employer to remove the system. He concluded this despite the fact that the issue of the Employer's unilateral installation of the system, which had been the subject of an application to the Board for the declaration of an unfair labour practice in 2000 (see [2001] Sask. L.R.B.R. 814, LRB File No. 143-00), had been resolved between the Union and the Employer many months before. Union representative Brian Haughey had replied on January 11, 2002, to an inquiry by employee Monty Shillingford, who had written to him on behalf of a group of employees including the Applicant, to complain about the prospect of the removal of the system and to request a meeting with Mr. Haughey. In his letter, Mr. Haughey stated, in part, as follows:

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[1] I.e., employees not required to join the Union at the time of certification in 1997.

> *In this case, we are not opposed to the use of the GPS for dispatching calls to drivers but we do have a concern when it is used to supervise certain union supporters. In the Company's rectification proposal to the Labour Relations Board,*[2] *it recognizes our concern and states that the GPS will be used for management of the fleet, effective dispatching and responsible customer service. It further states that it will not be used for the purpose of discipline.*
>
> *So, I'm not sure if based on the above you still desire a meeting. Please call me ... if you require anything further.*

**[6]** The Applicant testified that he had no problem with the Union's position regarding the GPS. He did not seek to speak further to Mr. Haughey about the matter until he and three other employees sent a letter to the Union dated October 16, 2002 – the same date the present application was filed – to complain about the removal of the GPS system and other matters. The Applicant was unable to explain why he thought the Union was responsible for the removal of the system. He said that he has learned that the Board did not order its removal. The Applicant stated that the removal of the GPS system is one of the reasons why he wants to decertify the Union, and a short time later said that it had nothing to do with the application for decertification. He was unable to say why he did not express his concern about the system's removal to the shop steward, Dale Laturnas. He denied that he, or the others who signed the October 16, 2002 letter, blamed the Union for its removal. The Applicant also stated that he did not feel that the employees were being properly represented by the Union with respect to the issue.

**[7]** The Applicant agreed that the concept of a third-party bargaining agent for the employees was a good idea instead of bargaining one-on-one, but that he did not want the Union as bargaining agent. He expressed the belief that if the Union was decertified and the Employer refused to deal with the employees as a group they could file a "grievance" with the Board. He agreed that he and those who assisted him to make the present application had not considered the possible consequences for the employees in the event of decertification. Nor did he discuss such matters with other employees when he approached them to obtain their support for the present application.

**[8]** With respect to his complaint that the Union had failed to keep him informed about Union meetings and other matters of interest, the Applicant testified that there have been no notices of Union meetings posted in the workplace, and that he has not been advised of, or invited to, a meeting in the past year. His only personal contact with Union representatives in the past year was in a meeting on February 27, 2002 of the drivers and shop personnel with Mr. Haughey, and in casual contact on the job with the shop stewards, fellow employees Dale Laturnas and Henry Franke. The Applicant said that he has not attended a Union meeting since 1997, that he has not asked Mr. Haughey or either shop steward

[2] In LRB File No. 143-00.

when meetings were held or to provide him with personal notice of meetings, that he has not otherwise tried to find out when meetings were held and that he has never encouraged anyone else to attend nor asked anyone what has occurred at a meeting. He said he knows when the Union holds its regular monthly meeting. He also said that he and others had once formally requested that the Union hold a meeting that he had no intention of attending in order to set the Union up to look unresponsive to employees' concerns if it refused the request.[3]

**[9]** The Applicant testified that he and others keep filing for rescission year after year because, "If we stop, they will think we are satisfied" and he does not want the Union to represent them. He said that although he has opposed the Union from the start, when it was first certified he got on the Union's bargaining committee. When asked whether he did so in good faith or so he could "destroy the Union," the Applicant replied that he acted in good faith "at the beginning."

**[10]** The Applicant's third complaint is that he and the eight other drivers do not support the Union's attempt to secure the reinstatement of fellow driver Kevin Wood. This complaint refers to an outstanding matter before the Board, LRB File No. 143-00[4], in which the Board, in an Order dated November 5, 2001, found the Employer guilty of several unfair labour practices, including one related to the improper demotion and layoff of Mr. Wood. The Board also ordered the Employer to file a rectification plan in respect of the violations to be considered by the Board at a hearing regarding a remedial order. An amended rectification plan was filed with the Board by the Employer on April 8, 2002. The remedial hearing has not been completed. The drivers sent a letter to Mr. Haughey dated March 11, 2002, regarding Mr. Wood's possible reinstatement that reads as follows:

> *On February 27, 2002 the drivers and shop personnel met with you. One of the items discussed was the possible return of Kevin Wood. We want to voice our concern that Kevin may be reinstated as a driver at Loraas Disposal.*
>
> *It was Kevin's choice to resign his position and as with any resignation it should stand. When an employee resigns from a company and then decides he wants to be re-hired he has to apply for a position with that company like everyone else. Why should the rules be different for Kevin Wood?*
>
> *If you total the professional driving years of all of the drivers currently at Loraas Disposal it adds up to 156 years. Drivers with this kind of experience know what it takes to be a safe and efficient driver and we know within a short period of time if a new driver will be successful. Kevin received training in excess of any other employee in the history of Loraas Disposal and still struggles on a daily basis to do the job. There are people who are suited to this type of work. Kevin is not.*

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[3] LRB File Nos. 031-99 to 034-99; [1999] Sask. L.R.B.R. 456, at 457-61.
[4] [2001] Sask. L.R.B.R. 814. See, summary, *infra*.

*The drivers at Loraas Disposal want to be able to continue to enjoy the benefits of working piecework. We do not want to revert back to an hourly wage. If the Labour Relations Board and RWDSU force Loraas Disposal to rehire substandard employees who are incapable of working piecework it will cause us to lose the benefits of piecework. This is not the direction that we want to take.*

*There is a question that "the membership" would like to have answered. Is Kevin Wood still part of the membership and if so, is he still paying dues?*

*If the Union and the Company are ever going to be able to work together, there needs to be one set of rules that everyone must follow. Isn't that what the contract is supposed to represent?*

**[11]** According to the Applicant, the drivers' group has not received a reply to the letter. The Applicant testified that the position of the nine drivers with respect to Mr. Wood is also that of the Employer's principal, Carman Loraas.

**[12]** The Applicant's fourth complaint is that he has not heard whether the Union has accepted applications for membership submitted by grandfathered employees. He testified that, although he and the others have not changed their minds about attempting to decertify the Union, in the event that such application is not successful, they want to "protect themselves." He said the applications were given to the shop steward, Dale Laturnas, sometime in 2002, but he has heard nothing about it since. The Applicant made no further inquiries of Mr. Laturnas or Mr. Haughey. He and three other employees sent a letter to the Union dated October 16, 2002 – the same date the present application was filed with the Board – asking for information about the status of the membership applications, and that further reads as follows:

*As you are also aware, our current contract will soon expire and we anticipate that negotiations will soon begin with management on terms for a new contract. We would like to call a general meeting in preparation for this, and have an election for representatives to sit on a bargaining committee that would negotiate with management. Our preference is to be proactive when it comes to the bargaining process, and we feel that the sooner we start the sooner we will reach a settlement agreeable to both sides. As soon as possible, the union should consult with employees in order to find some common issues that can be raised at the general meeting. ...*

*Regarding shop stewards, we believe that we need to have elections again before we start to negotiate. Can you please inform us as to when and how the stewards are to be elected.*

**[13]** The Applicant testified that he knew that the Employer's principal, Carman Loraas, does not want the Union, would be pleased if it were gone, and has stated several times that he might close the business because of the Union's presence.

**[14]** The Applicant also said that he was not billed by his counsel for the previous decertification application in 2001, not even for expenses, but that he thought he might have to pay something this time, although he did not know how much or at what rate.

**[15]** Henry Franke testified for the Union. He has been employed by Loraas for approximately eight years, except for about one and a half years when he was unlawfully terminated following the Employer's closure of its vacuum truck division in 1997 shortly after the Union was certified. He has testified on behalf of the Union at every hearing before the Board with respect to unfair labour practice applications filed against the Employer, the application for first contract assistance, and the previous decertification applications. The Board summarizes his history with and treatment by the Employer in several decisions. He is presently employed as a driver, a position he secured by Order of the Board in 1998, certain matters in relation to which are still outstanding before the Board.[5]

**[16]** Mr. Franke testified that approximately three years ago he heard Carman Loraas state that he would have his revenge on anyone who has supported or helped to organize the Union. He said that no one who has openly supported the Union, but himself and Dale Laturnas, is still employed with the company.

**[17]** Mr. Franke said that while Mr. Loraas speaks to him much less often than in the past, not a week goes by that, in his opinion, he is not "picked on" as a Union supporter or belittled in some way by Mr. Loraas. As a recent example, he said that Mr. Loraas noticed a black scrape on his truck bumper and accused Mr. Franke of hitting another vehicle. Despite Mr. Franke's protestation that he was not responsible, Mr. Loraas made him stand beside the truck in front of other employees while he took pictures of Mr. Franke. Mr. Franke said that Mr. Loraas has never taken such action with any other employee, and that Mr. Loraas said nothing when he learned that another employee had made the mark when he rolled a tire into the bumper.

**[18]** According to Mr. Franke, the Employer provides him with a less well-equipped truck than more junior employees. He has the only truck without a tarp roller, which means that it takes him several minutes longer to complete each call, and which affects him financially when working on a piece-rate

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[5] See, summary regarding LRB File No. 143-00, *infra*.

basis. He said that a truck with a tarp roller remains unused in the yard. Although he is more senior than some other drivers, he is still sometimes assigned to drive the septic truck and clean portable toilets, the least desirable job in the workplace, while someone junior drives his roll-off truck; this is a practice that the Board decried in earlier decisions. He said that he is often sent home early, purportedly for "lack of work," while more junior employees continue working. He said he is not allowed to make out-of-town calls, while more junior drivers are, which affects him financially. He said that he is the only driver that is not given two consecutive days off, despite his requests. His days off are Thursday and Sunday. Also, some time ago, his start time was made one hour later meaning that he now earns one hour less each workday.

**[19]** When asked why he has not filed grievances about such alleged treatment, Mr. Franke replied that his job and its content is still the subject of the outstanding remedial application before the Board in LRB File No. 143-00. He claimed that the employees are too frightened to grieve because of what might happen to them.

**[20]** Mr. Franke testified that Mr. Loraas has told him that his testimony at previous Board proceedings was improper and that he was not happy about it, and that Mr. Loraas has made it clear that if the Union is decertified he will terminate him. From conversations he has had with Mr. Loraas, he believes "he would do anything to get rid of the Union."

**[21]** Mr. Franke said that he is not the only Union supporter that Mr. Loraas has belittled or treated unfairly – he made Kevin Wood wash containers for a year and a half despite a Board Order that he be reinstated to a driver position.

**[22]** Counsel for the Employer called no evidence.

## Statutory Provisions

**[23]** Relevant provisions of the *Act* include the following:

> *3 Employees have the right to organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing; and the trade union designated or selected for the purpose of bargaining collectively by the majority of the employees in a unit appropriate for that purpose shall be the exclusive representative of all employees in that unit for the purpose of bargaining collectively.*

> *5 The board may make orders:*
>
> *(k) rescinding or amending an order or decision of the board made under clause (a), (b) or (c) where:*
>
> . . .
>
> *(ii) there is no agreement and an application is made to the board to rescind or amend the order or decision during a period of not less than 30 days or more than 60 days before the anniversary date of the order to be rescinded or amended;*
>
> *notwithstanding a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;*
>
> . . .
>
> *9 The board may reject or dismiss any application made to it by an employee or employees where it is satisfied that the application is made in whole or in part on the advice of, or as a result of influence of or interference or intimidation by, the employer or employer's agent.*

## Argument

**[24]** Mr. Seiferling, counsel for the Applicant, asserted that this is a straightforward application for rescission as an exercise of employee rights under s. 3 of the *Act* and that there is no evidence of Employer interference within the meaning of s. 9 in the making of the application. Counsel argued that the Board has taken the position that, because the Employer has been "bad" in the past, the Applicant, and others who support decertification, have lost their right to "get the Union out." He argued that the history of the Employer's actions should not affect this application; the dispute of five years ago between Carman Loraas and the Union should not affect the present application.

**[25]** With respect to Mr. Franke's complaints, counsel asked why he did not file grievances; the collective agreement and not this application for decertification should be the method for resolving his differences with the Employer.

**[26]** Counsel asserted that the Union has failed to respond to employees' concerns as expressed in the letters referred to in the evidence, and there was little wonder that certain employees want to decertify the Union given that lack of response. He asked why the Union did not specifically invite the Applicant to a meeting.

**[27]** Counsel said that the Board could fashion an Order allowing a vote on the application that would clear up any misunderstandings or concerns that might bear on the issue of a true reflection of employees' wishes. For example, the Board could delay the vote until the Union and the Employer have resolved any "unfinished business," specifically the outstanding remedial matters in LRB File No. 143-00.[6] A secret ballot vote, he said, would remove any concerns about influence or intimidation in the garnering of the support filed with the application.

**[28]** Counsel asserted that there is no right to automatic certification or decertification in cases where the employer or union, as the case may be, has committed an unfair labour practice but for which evidence of majority support would have been obtained. Because the Board may only order a vote pursuant to ss. 10.1 and 10.2, respectively, of the *Act,* in the present case, the Board should allow a secret ballot vote as being remedial of the Employer's bad behaviour.

**[29]** In support of his arguments, counsel referred to the following decisions of the Board, which we have reviewed: *Leuschen v. Service Employees International Union, Local 333 and Lutheran Sunset Home of Saskatoon*, [2002] Sask. L.R.B.R. 248, LRB File No. 029-02; *Walters v. United Steelworkers of America and Xpotential Products Inc.*, [2002] Sask. L.R.B.R. 65, LRB File No. 214-01; *Wilson v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, [1990] Fall Sask. Labour Rep. 97, LRB File No. 088-90; *Leavitt v. United Food and Commercial Workers and Confederation Flag Inn (1989) Ltd.*, [1990] Summer Sask. Labour Rep. 61, LRB File No. 225-89; *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 & 275-85; *Gabriel v. Saskatchewan Science Centre and United Food and Commercial Workers, Local 1400*, [1997] Sask. L.R.B.R. 232, LRB File No. 345-96.

**[30]** Mr. Kowalchuk, counsel for the Union, asserted that there was evidence of influence by the Employer in the making of the present application. Pursuant to s. 9 of the *Act*, he argued, the Board has the discretion to dismiss the application if it is satisfied that the application was made in any part as a result of the Employer's influence. Counsel pointed to decisions of the Board dismissing previous applications for decertification with respect to the Employer in which the Board found that the workplace atmosphere created by the Employer was a corrupting influence within the meaning of s. 9, prompting dismissal of the application. Counsel argued that the Employer's strong anti-union opinion and desires, and particularly those of Carman Loraas, are well known in the workplace and have not changed.

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[6] [2001] Sask. L.R.B.R. 814. See, summary, *infra*.

**[31]** With respect to the assertion by counsel for the Applicant that Mr. Franke ought to have filed grievances regarding his complaints if they were serious, Mr. Kowalchuk pointed out that in a previous application for rescission, the Applicant had criticized the Union because he thought that the frequent filing of unfair labour practice applications by the Union had a deleterious effect on the relationship with the Employer[7], and that he was now asserting that the Union ought to be more aggressive in pursuing complaints against the Employer. Counsel argued that it is not possible for the employees to freely and openly exercise their s. 3 rights in the workplace in the face of the Employer's aggressive anti-union stance.

**[32]** With respect to the Applicant's assertions that the Union does not inform him about Union meetings and has not replied to certain employees' concerns including his own, Mr. Kowalchuk argued that the Applicant is aware of the Union's regular monthly meeting and is not interested in attending them anyway, and that Mr. Haughey replied in January, 2002 to inquiries regarding the GPS.

**[33]** Mr. Sandomirsky, Q.C., counsel for the Employer, asserted that the Employer's position with respect to the present application has been to remain neutral. He argued that on the balance of probabilities there is no evidence to draw the conclusion that the application was made in violation of s. 9 of the *Act*; that is, while conduct constituting influence may be covert, there must be evidence nonetheless. The incidents related by Mr. Franke may have intimidated him but there is no evidence that they influenced the Applicant to make the present application. Counsel argued that while the Employer may have expressed anti-union sentiments three or four years ago, and the Board then found there to be "a poisoned atmosphere," there is no evidence of the Employer's present state of mind. In any event, counsel said, the Employer's conduct should not result in the punishment of the employees seeking rescission of the certification Order in the present case.

## Analysis and Decision

**[34]** In all the circumstances of the present case, we have determined that the application should be dismissed for the reasons that follow. To fully understand the import of the evidence in the present case, it is necessary to put it in to context. It is useful to summarize the events in the relationship between Loraas and the Union and the previous proceedings before the Board, as demonstrative of the history of discriminatory treatment by the Employer and its principal, Carman Loraas, of persons it and he deem to be supporters of the Union, which treatment persists. The description of the parties' relationship that follows is from reported decisions of the Board as indicated.

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[7] See, [1998] Sask. L.R.B.R. 573, LRB File No. 019-98, at 580.

**[35]** The Union was certified on March 25, 1997 (LRB File No. 008-97). Notice to bargain was served on the Employer on April 28, 1997. Bargaining commenced on June 2, 1997. The Union obtained a strike mandate on June 12, 1997. The Employer closed its vacuum truck division and terminated the employment of the seven employees who worked as vacuum truck drivers, and two in the office, on June 14, 1997. The terminated drivers included Henry Franke, Kevin Wood and Steve Mayer. The Employer had not disclosed its intention to close the vacuum truck division during prior bargaining. On June 23, 1997 and July 7, 1997, the Union filed applications for reinstatement and monetary loss in respect of the nine employees (LRB File Nos. 208-97, 209-97, 211-97, 212-97, 214-97, 215-97, 217-97, 218-97, 220-97, 221-97, 223-97, 224-97, 226-97, 227-97 & 234-97 to 237-97).

**[36]** On July 4, 1997 the Union filed two unfair labour practice applications, LRB File Nos. 238-97 and 239-97, alleging that by reason of the closure of the vacuum truck division and the associated dismissal of employees among others, the Employer and its principal, Carman Loraas, had violated the *Act* by committing certain unfair labour practices. At that time, the Union also filed an application seeking interim or injunctive relief. On July 15, 1997, the Board issued an interim Order ordering, among other things, the dismissed employees be reinstated and that the Employer bargain collectively with the Union with respect to the employees and for a first collective agreement. The reasons for decision are reported at [1997] Sask. L.R.B.R. 517 ("*Loraas (Interim)*"). In granting interim relief, at 527-28, the Board referred to the chilling effect of the Employer's alleged actions as follows:

> *In the present situation, the Employer's actions can have a chilling effect on the individual employees' support for, and confidence in, the Union, as was attested to by Ms. James. In these circumstances, union members might conclude that signing a union card has made matters worse and they may question their judgment in signing a union card. They must also question the ability of the Union and the law in general to protect their statutory right to join the union of their own choosing.*
>
> *We find that the loss of a bargaining opportunity with respect to the lay-offs and the erosion of confidence in the Union represents irreparable labour relations harm that cannot be readily fixed at a later date.*
>
> *. . . This is a case where the Board cannot recreate the status quo because of the Employer's actions.*

**[37]** Despite this Order, the Employer did not then reinstate the dismissed employees. On January 5, 1998, the Board issued its Reasons for Decision and Order (reported at [1998] Sask. L.R.B.R. 1; quashed in part [1998] Sask. L.R.B.R. c-15 (Q.B.); reversed on appeal [1998] Sask. L.R.B.R. c-73 (C.A.)) ("*Loraas (No. 1)*") with respect to the unfair labour practice applications filed by the Union. The Board found that the Employer and Carman Loraas had committed unfair labour practices in

violation of ss. 11(1)(c), (e), (m) and 43 of the *Act*. The Board further ordered the Employer to file a rectification plan with respect to the violations. The Board's findings and observations included the following:

(a) With respect to the failure to bargain in good faith, at 17:

> *Loraas created a difficult climate for first agreement collective bargaining by failing to disclose its decision to sell the vacuum trucks and by suggesting that its basis for failing to disclose the decision was related to culpable conduct on the part of its long standing employees. The Union and its members are rightly suspicious of Loraas' motives, given that the sale came on the heels of the Union's strike vote.*

And specifically with respect to the Employer's allegation of such "culpable conduct":

> *. . . it became abundantly clear that Loraas' claim was exaggerated beyond reasonable belief. There is no basis for the claim and it was an unfortunate attack on the integrity of the employees of Loraas who had served Loraas faithfully for many years.*

(b) With respect to the unlawful termination of employees, at 19:

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

**[38]** Finding that the rationale for the lay-offs was "discriminatory" and related to union activity, the Board stated, at 20:

> *. . . the Board is of the view that Loraas's evidence is less than convincing with respect to the manner of selecting employees for lay-off. . . . Although the lay-offs flowed from the decision to close the vacuum truck division, the selection of employees who would be laid off was reached at a time when Loraas was aware of the union activity. In this sense, there is a nexus between the union activity and Loraas's decision to select certain employees for lay-off.*
>
> *. . . Loraas selected certain employees for lay-off but its rationale for deciding which employees would be laid-off and which would be retained was not convincing. Loraas kept a junior and apparently less experienced and qualified driver on staff; it also retained two junior and less experienced office staff.*

**[39]** A hearing on the remedial portion of the unfair labour practice applications determined in *Loraas (No. 1), supra*, was held on May 8, 1998. The decision of the Board, dated August 6, 1998, is reported at [1998] Sask. L.R.B.R. 556 ("*Loraas (No. 2)*"). In summary, that decision directed that each of the laid-off employees, including Mr. Franke and Mr. Wood, could exercise bumping rights based on seniority. Those employees who returned to work were entitled to recover full monetary loss; those who elected not to return were entitled to receive severance. The Board observed, at 569, that the Employer's conduct would lead the employees to conclude that it intended to defeat the Union:

> *As we indicated in our initial reasons, the Employer created a difficult climate for first agreement collective bargaining. . . . Whether or not it was motivated by anti-union animus, its conduct in not disclosing the sale undermined the Union's bargaining position and its support among the employees who, no doubt, would draw the conclusion from the coincidence of the sale with the recent unionization that the Employer would go to some lengths to defeat the unionization effort.*

**[40]** On August 25, 1998, the Union gave notice that three of the terminated employees – Mr. Franke, Mr. Wood and Mr. Mayer – sought reinstatement. The remaining terminated employees sought severance.

**[41]** On February 9, 1998, Ben Schaeffer and a fellow employee, Larry Lang, filed the first application for rescission of the certification Order (LRB File No. 019-98). The application was heard on May 6 and June 4, 1998. The rescission application was dismissed with Reasons dated September 1, 1998 reported at [1998] Sask. L.R.B.R. 573 ("*Loraas (No. 3)*"). The Board's observations and findings included the following:

> (a) That one of Mr. Schaeffer's alleged reasons for making the application was that he viewed the Union's actions in filing the unfair labour practice applications against the Employer (i.e., *Loraas (No. 1), supra*) as an impediment to a constructive relationship. The Board observed, at 580, that:
>
> > . . . [Mr. Schaeffer] *thought that the unfair labour practice applications brought by the Union against Loraas had had a deleterious effect on the relationship between Loraas and the employees and . . . that he did not think the Union should have filed them. . . . [I]t had hurt the ability of the Union to obtain a collective agreement.*
>
> (b) That Mr. Schaeffer made the application, at least in part, because, if it succeeded, the reinstated vacuum truck drivers (including Mr. Franke and Mr. Wood)

would not be back at work – in his words, "we don't want them working there, because they support what we don't support" (p. 580);

(c) That Mr. Schaeffer believed that the anti-union views of Carman Loraas were well-known to the employees, that Mr. Loraas would try to get rid of the Union, and that he would know that Mr. Schaeffer supported decertification "because [Mr. Loraas] knows [him]" (p. 581);

(d) That the Employer's conduct had led to a perception among employees that the Union was not an effective bargaining agent, and that Mr. Schaeffer himself was either a victim of that perception or was wilfully blind to the conduct. At 585, the Board stated that the termination of the nine employees

> *. . . had a corrosive effect on the perception of the Union as an effective agent to obtain and maintain fair terms and conditions of employment and on its actual ability to bargain a first agreement.*

And, at 588, the Board stated as follows:

> *. . . Loraas's unlawful conduct and unfair labour practices have created a perception among some employees at least that the Union is ineffective in its ability to bargain with Loraas and represent the rights of the employees in the unit. The expressed perception of Mr. Lang and the Applicant in this case that the Union was not forthcoming and open with respect to the status and progress (or lack thereof) of negotiations demonstrates either a lack of understanding of, or an unwillingness to acknowledge, the effect of Loraas's conduct on the bargaining relationship and the perceived status of the Union.*

(e) That the Employer's conduct had so seriously polluted the workplace that a vote on the rescission application would not reflect the true wishes of employees, and that there was a concern for an "apprehension of betrayal" among the employees. The Board held, at 592-94:

> *Loraas's conduct in the present case, however, is more serious and of a nature that has created an atmosphere of extreme insecurity among the employees and has driven a wedge between the employees who were unlawfully terminated and those who remain. Regardless of whether this was Loraas's intention, it is the clear result. The labour relations harm identified by the Board in its ruling last July apparently had not been remedied by the time this application was filed.*
>
> *The failure of negotiations to progress towards a first contract lies squarely upon Loraas. A critical result of its conduct and unfair labour practices has been to erode confidence in the Union among the*

*employees in the unit and to create a climate of frustration, tension and insecurity. The Board finds that this is what has motivated the present application for rescission. Had bargaining progressed in a fair and reasonable manner on all issues, including the consequences of the sale of the vacuum truck division, the atmosphere in the workplace and the relationship between the Union and Loraas and the perception of the status and effectiveness of the Union would in all likelihood be much different.*

*The Board is satisfied that the application in the present case was made in whole or in part as a result of the influence of Loraas within the meaning of s. 9 of the Act. The definition of "influence" according to Webster's Dictionary includes the following:*

> *The act or power of producing an effect without apparent exertion of force or direct exercise of command; the power or capacity of causing an effect in indirect or intangible ways.*

*Accordingly, influence, as that term is used in s. 9 of the Act, may be exercised or received unknowingly or without consciousness or deliberation. It may emanate vaporously from the employer like a miasma or cloud rather than be exercised directly. This is not a new concept. Indeed, some 35 years ago the Board addressed such a situation in Diehl v. Army & Navy Department Store and Retail, Wholesale and Department Store Union, AFL-CIO/CLC, [1955-1964] 2 Sask. L.R.B.D. 48 (upheld on judicial review at [1955-1964] 2 Sask. L.R.B.D. 213) as follows, at 51:*

> *From all this and more it was made apparent that the store was more preoccupied with a desire to get rid of the union than with the promotion of industrial peace through collective bargaining in good faith, which is the primary purpose and objective of The Trade Union Act. Accordingly, though admittedly there is no direct evidence on the point, the sum total of the facts and circumstances of the case lead the majority members of the Board to the firm conclusion that this application to rid the store of the union is in fact the direct result of the influence by conduct exerted by the employer upon its employees and that as such it should not be granted.*
>
> *As an alternative to rescission, counsel for both the applicant and the employer asked that a vote be ordered to determine the extent of union support among the employees. It is the firm opinion of the majority members of the Board that the true wishes of the employees cannot be determined by a vote at this*

> *time having regard to the prevailing atmosphere in the store and until such time as the confusion and fears of the employees have been dispelled by the employer's willingness to negotiate a collective bargaining agreement in good faith.*
>
> *It is felt that in view of what has transpired in this store the parties have had neither the necessary climate nor the time to conclude the desired agreement.*
>
> . . .
>
> *Although not an issue raised directly by counsel, in these circumstances the evidence has also given the Board cause to be concerned about the "apprehension of betrayal" among the employees which, briefly stated, is a state of affairs where the relationship between Mr. Lang and Mr. Schaeffer and Loraas would cause employees to support the application out of fear that if they did not, it would be made known to management. More likely than not this would explain why Mr. Lang and Mr. Schaeffer have filed evidence of majority support for the rescission and the Union was able to file evidence of majority support for the Union shortly thereafter.*
>
> *The Board has a grave concern that in all the circumstances a vote on the present application would not accurately reflect the true wishes of the employees who are frustrated or confused or frightened, or all of the above, by what has occurred over the past year. To order a vote would be to subject them to what will surely be an intense campaign for their support by both sides. In the present climate, which has been created by Loraas, to grant this application or order a vote in the circumstances of this case could constitute a denial of the employees' rights under s. 3 of the Act to bargain collectively through the Union they have chosen before there has been the fair opportunity to do so through no fault of the Union.*
>
> (emphasis added)

**[42]** On November 1, 1998, the Union applied for further directions with respect to the Board's remedial Order regarding the unfair labour practices in *Loraas (No. 2), supra*, as the parties were unable to agree on its implementation. The Board heard further evidence and argument on the matter in December, 1998.

**[43]** Mr. Franke, Mr. Wood and Mr. Mayer returned to work on November 9, 1998.

**[44]** On January 25, 1999, each of Mr. Schaeffer, the aforementioned Mr. Lang, R. Sydney Glas and Maureen Wollbaum filed applications to rescind the certification Order (LRB File Nos. 031-99 to 034-99). The following day, the Union filed an application pursuant to s. 26.5 of the *Act* requesting the assistance of the Board to achieve a first collective agreement (LRB File No. 037-99). In Reasons for Decision dated March 31, 1999, reported at [1999] Sask. L.R.B.R. 123, the Board determined that the applications would be heard in the order in which they were filed; that is, the applications for rescission would be heard before the application for first contract assistance.

**[45]** The hearing of the rescission applications concluded on May 6, 1999.

**[46]** On June 9, 1999, in LRB File No. 037-99, the Board appointed a Board agent to provide assistance to the parties with respect to bargaining a first contract and to report back to the Board.

**[47]** In Reasons for Decision dated June 10, 1999, reported at [1999] Sask. L.R.B.R. 205 ("*Loraas (No. 4)*"), the Board provided further directions on the implementation of the remedial Order and appointed an agent to facilitate resolution of the calculation of monetary amounts. The observations and findings of the Board included the following:

> (a) that each of Mr. Franke, Mr. Wood and Mr. Mayer returned to work on November 9, 1998 (pp. 213-14);
>
> (b) that the Employer unilaterally and wrongfully altered the seniority date of Kevin Wood to his detriment (p. 209);
>
> (c) that each of Mr. Franke, Mr. Wood and Mr. Mayer were to be reinstated to driver positions, given the Employer's acknowledgement that all three were qualified to drive the front-end and roll-off trucks (p. 214);
>
> (d) that although the Employer purported to reinstate Mr. Franke to a position as roll-off and front-end truck driver, he was primarily assigned to clean portable toilets and other garbage containers. Mr. Wood was similarly put to work cleaning portable toilets and garbage containers. Mr. Mayer was put to work on a one-ton truck loading, delivering and unloading portable toilets (pp. 214-15);
>
> (e) that more junior employees were operating roll-off and front-end trucks (p. 215);
>
> (f) the Board concluded that the Employer had not even attempted to comply with the remedial Order and that the Employer's actions were intended to be punitive. It further ordered the Employer to put the reinstated employees to work in driver positions selected by them based on their seniority within seven days of their selection. The Board stated at 215:

> *[36] In our view, at the time of the hearing, the Employer had not made a genuine effort to comply with any reasonable interpretation of the Board's Order in regard to the reinstatement of Mr. Franke, Mr. Wood or Mr. Mayer. One could view the Employer's actions in assigning Mr. Franke and Mr. Wood to the toilet cleaning brigade as punitive in nature. Clearly, their seniority entitles them to bump employees who are operating roll-off and front-end trucks.*
>
> *[37] 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.*
>
> (emphasis added)

(g) the Board further specified the formulae by which the monetary loss of each of Mr. Franke, Mr. Wood and Mr. Mayer should be calculated (pp. 215-18).

**[48]** The Board subsequently approved the Board agent's calculations regarding severance and monetary loss in Reasons for Decision dated February 11, 2000, reported at [2000] Sask. L.R.B.R. 78, and ordered the implementation of the bumping schedule for the return of Mr. Franke and Mr. Wood to driver positions.

**[49]** Meanwhile, another panel of the Board had dismissed the rescission applications in LRB File Nos. 031-99 to 034-99 with Reasons for Decision dated September 15, 1999, reported at [1999] Sask. L.R.B.R. 456 (*"Loraas (No. 5)"*). The Board's observations and findings included the following:

(a) that the Applicant, Mr. Glas, had requested the Union to change the date of a meeting "as a test of loyalty just to see if it would be done although ... he had no intention of attending;" that he believed that if the decertification application was successful, at least some of the employees who were reinstated by the Board would likely lose their jobs; that he objected to the Union's "waste of taxpayers' money" because of the many proceedings before the Board; he believed that Carman Loraas was not happy about the Union and that he was entitled to know who supported the Union and who did not (p. 458);

(b) that the Applicant, Ms. Wollbaum, believed that Carman Loraas did not want anything to do with the Union and that otherwise she would not then have been at the

Board; that she and her co-applicants had requested the Union to change a meeting date "as a test of good faith" even though they had no intention of attending (p. 459); that there was a rumour in the workplace that there would not be any pay increase as long as the Union remained and that if the Union was decertified there likely would be one (p. 460);

(c) that the Applicant, Ben Schaeffer, expressed concern about the closure of the workplace if the Union remained; that there had been no real changes in the circumstances in the workplace since the previous decertification application; that he blamed the Union for the lack of a wage increase and he believed that if the Union was decertified the employees would receive one (p. 460);

(d) that one of the Applicants, Mr. Lang, felt there had been no change in the circumstances in the workplace since the previous decertification application (p. 461);

(e) after hearing evidence, *inter alia*, at 461-63: that upon being returned to work, each of Mr. Franke, Mr. Wood and Mr. Mayer were set to work for many months cleaning shop floors, garbage bins and portable toilets, while more junior employees drove truck, had not received any compensation for monetary loss by the date of the hearing, and felt humiliated by their treatment; that Kevin Wood felt that he was treated differently by management than the group of employees who were overtly anti-union; that Mr. Franke felt certain that he would be terminated if the Union was decertified; that Carman Loraas had told Mr. Mayer point blank that he did not like him, had accused Mr. Wood of lying and stealing from him, and had called Mr. Franke derogatory names on a number of occasions, the Board determined that there had been no change in the atmosphere in the workplace since the first application for rescission, stating, at 468-69, as follows:

> *[49] 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.*
>
> *[50] Loraas' cynical treatment of Messrs. Mayer, Wood and Franke is distasteful and, if not specifically or consciously intended to foster division among 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.*
>
> (emphasis added)

**[50]** On January 28, 2000, the Board received some 20 individual applications for rescission of the certification Order by a majority of employees in the workplace, (including an application by Mr. Schaeffer, but not by five of the employees including Mr. Franke, Mr. Wood or Mr. Mayer). All the applications were assigned LRB File No. 034-00 and were heard together on August 8, 2000. In

applications were assigned LRB File No. 034-00 and were heard together on August 8, 2000. In Reasons for Decision dated December 19, 2000, reported at [2000] Sask. L.R.B.R. 776, application for judicial review dismissed [2000] Sask. L.R.B.R. c-47 (Q.B.) ("*Loraas (No. 6)*"), the Board dismissed the applications on the basis that the procedure used – i.e., filing multiple individual applications which disclosed to the Employer the names of the employees who purported to support rescission – violated the right of employees to freely choose whether to support the Union in confidence and not in a manner that could result in their being fearful of retaliation from the Employer or the Union. The Board stated, at 783, that,

> [The filing of multiple individual applications for rescission] *also identifies those employees who do not support the application and places employees in the rather vulnerable position of knowing that if they do not sign an application for rescission, the Employer will know that they support the Union. The method of gathering support for the applications filed, that is, by having employees publicly declare their support for the rescission application, places undue pressure on employees to support the application for fear of employer reprisal.*
>
> . . .
>
> *. . . [T]he Board is not confident that the applications filed in the present case are a true reflection of the wishes of the employees given the manner in which support was garnered through the public filing of individual applications for rescission.*

**[51]** The Board also accepted, at 782, that "the Union established . . . that [the Employer] gives wage increases without negotiating with the Union."

**[52]** After meeting with the parties over an extended period of time, the Board agent appointed to assist in achieving a first contract filed his report with the Board on February 1, 2000. As the parties did not accept all the recommendations in the report, a further hearing was held on February 8, and May 11 and 12, 2000, regarding the first contract application in LRB File No. 037-99. In Reasons for Decision dated November 16, 2000, reported at [2000] Sask. L.R.B.R. 663 ("*Loraas (No.7)*"), the Board imposed the terms of the first collective agreement that remained in dispute, and imposed a term for the agreement from December 1, 2000 to November 30, 2002. At 681, the Board noted that while the first contract proceedings were pending the Employer had unilaterally increased the wage rates of three employees without negotiating the changes with the Union.

**[53]** On May 8, 2000, the Union filed an application with the Board in LRB File No. 143-00 alleging that the Employer and Carman Loraas had committed numerous unfair labour practices based on events that occurred before the imposition of a first collective agreement, some of which were dealt

L.R.B.R. 814 ("*Loraas (No. 8)*"), the Board found the Employer guilty of several violations of the *Act*. The Board's observations and findings included the following:

(a) the Board found that the Employer failed to bargain with the Union in good faith in violation of s. 11(1)(c) of the *Act* by negotiating directly with employees with respect to wage increases, unilaterally implementing a new route system for drivers and installing surveillance cameras in the workplace and satellite tracking devices on the trucks (p. 828);

(b) the Board found that the Employer unilaterally changed terms and conditions of employment in violation of s. 11(1)(m) of the *Act* by installing the surveillance system and changing work schedules and uniform requirements (p. 829);

(c) the Board found that the Employer had failed to comply with the Board's earlier Orders regarding the procedure for reinstatement of Kevin Wood to a driver position. The Board stated, at 831, as follows:

> *[67] The Board 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.*
>
> . . .
>
> *[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.*
>
> (emphasis added)

(d) the Board found that the Employer and Carman Loraas failed to bargain collectively with the Union and interfered with Mr. Franke's s. 3 rights under the *Act* in violation of ss. 11(1)(a) and (c). During an altercation on April 26, 2000, Mr. Loraas swore at Mr. Franke and challenged him to a fight when trying to convince him to

move from an hourly wage pay system to a piece rate system. The Board stated, at 833, as follows:

> *[74] The Employer was forewarned of its obligations 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.*
>
> (emphasis added)

**[54]** The Board ordered the Employer to file a plan for rectifying the violations within 10 days. The Employer filed a rectification plan, and later filed an amended plan on May 8, 2002. There has not yet been the further hearing with respect to the plan.

**[55]** On October 5, 2001, the Applicant and Mr. Glas filed another application for rescission of the certification Order (LRB File No. 209-01). The Board heard the application on October 31, 2001. The Board dismissed the application on the grounds of employer influence pursuant to s. 9 of the *Act* with Reasons for Decision dated December 19, 2001, reported at [2001] Sask. L.R.B.R. 935 ("*Loraas (No. 9)*"). The Board heard evidence of the Employer's differential treatment and ridicule of Mr. Franke, which the Board described as follows, at 936-37:

> *[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 does not get preferential trips to locations outside Regina.*

**[56]** On the basis of such evidence the Board found as follows, at 941:

*[17] The Board imposed a first collective agreement on the parties . . . The duration of the first agreement was for two years commencing December 1, 2000. The Board expressed 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] [Carman] 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.*

(emphasis added)

**[57]** Therefore, the fundamental basis for the Board's decision in the rescission application decided approximately one year ago (i.e., *Loraas (No. 9)*) that the application was influenced by the Employer and ought to be dismissed, were:

(a) that the Board's findings on the first and second rescission applications (i.e., *Loraas (No. 3)* and *Loraas (No. 5)*, both *supra*) which were decided in 1998 and 1999, respectively, continued to apply in 2001; and,

(b) that there was evidence of further conduct by Carman Loraas that continued to have an influential, interfering and intimidating effect in the workplace.

**[58]** As outlined earlier in these Reasons, the Board's findings in the *Loraas (No. 3)* and *Loraas (No. 5)* rescission applications included, very briefly, the following:

(a) the corrosive effect of the Employer's unlawful conduct on the perception of the employees of the effectiveness of the Union as a bargaining agent, the creation of a climate of frustration, tension and extreme insecurity among the employees and the driving of a wedge between those who supported the Union and those who did not;

(b) the Employer's poisoning of the workplace atmosphere such as to create concern of an "apprehension of betrayal" among the employees;

(c) the humiliating, derisive and cynical treatment of known Union supporters, including Mr. Franke and Mr. Wood, by Carman Loraas has an influential, interfering and intimidating effect in the workplace.

**[59]** In the present case we have heard uncontradicted evidence of further differential, humiliating and demeaning treatment of Mr. Franke by Mr. Loraas in the past year, including the following:

(a) accusing Mr. Franke in front of his co-workers of damaging his truck and making him stand beside it while pictures were taken, when in fact another employee later admitted to causing the damage;

(b) providing Mr. Franke a less well-equipped truck than junior employees which affects his earnings on the piece rate basis to which the Employer was adamant he convert;

(c) sending Mr. Franke home before the completion of his shift while more junior employees continue working, which affects his earnings;

(d) restricting Mr. Franke's assignment to out-of-town calls while more junior employees are assigned such calls, which affects his earnings;

(e) continuing to assign Mr. Franke intermittently to clean portable toilets and drive the septic truck, while more junior employees continue to drive front-end or roll off trucks;

(f) Mr. Franke is the only driver who does not receive two consecutive days off;

(g) shortening Mr. Franke's work day by one hour, for which no reasons were advanced by the Employer; and,

(h) Mr. Franke's evidence that Mr. Loraas has made it clear that if the Union is decertified his employment will be terminated.

**[60]** In addition there is the outstanding remedial portion of the unfair labour practices in *Loraas (No. 8)*, *supra*, which includes findings by the Board, *inter alia*, that:

(a) in several instances the Employer unlawfully made unilateral changes to terms and conditions of employment;

(b) the Employer failed to comply with the Board's Order regarding the procedure for the reinstatement of Kevin Wood despite having been advised twice by the Board in previous decisions as to his proper seniority date;

(c) the Employer improperly demoted and laid off Kevin Wood contrary to earlier Board rulings; and,

(d) Carman Loraas unlawfully interfered with and intimidated Henry Franke in the exercise of his rights under the *Act*, by engaging him in an argument over changes to the terms and conditions of his employment and attempting to engage him in a fight.

**[61]** Based on the evidence in the present case, we find we have a view similar to that expressed by the Board in the last rescission application that the poisoned atmosphere in the workplace persists in part because of the actions of Mr. Loraas and the Employer.

**[62]** The argument by counsel for the Applicant that because this is the fifth time that an application for rescission has been filed and heard it is, in his words, "an abomination" and an unlawful denial by the Board of the exercise of the s. 3 rights of the Applicant and his supporters if it is not granted, simply does not prevail. The adage "time may heal all wounds" assumes that the proper treatment is applied and the wounds are not continually torn open. In the present case, the passage of time has had little apparent effect on the conduct of the Employer and Mr. Loraas who continue to create new wounds as well as exacerbate old ones caused by previous unlawful acts.

**[63]** Items (b) and (c) immediately above are related to the Board's remedial Order in *Loraas (No. 2)*, *supra*, decided in 1998; that is, the Employer has yet to comply fully with the remedial measures ordered by the Board regarding the unfair labour practices of 1997 described in *Loraas (No. 1)*, *supra*, and has committed further unfair labour practices as outlined in *Loraas (No. 8)*, *supra*, as a result of its intransigence and that of Carman Loraas in so complying. Similarly, the assignment in the past year of Mr. Franke to toilet washing and portable toilet transport duties while more junior employees continue to drive front end and roll off trucks is an apparent failure to comply with the same orders of the Board of several years ago that he be reinstated as a driver.

**[64]** Similarly, the argument by counsel for the Employer that there is no evidence that any recent conduct of the Employer influenced the Applicant to make the application, even if it is found that it intimidated Mr. Franke, is untenable and not persuasive. Counsel is quite right that there is no evidence that the Employer expressly and directly verbally instructed or otherwise directly encouraged the Applicant to make the present application. However, as pointed out in previous Reasons for Decision on rescission applications regarding this Employer, its actions, and those of its principal, Carman Loraas, have created such a corrosive atmosphere of insecurity and tension in the workplace that, until it

is remedied, the fair exercise of a vote on a rescission application is an impossibility. To say that the intimidation and discriminatory and humiliating treatment of the two most well-known supporters of the Union in the workplace – Mr. Franke and Mr. Wood – would not influence the Applicant or others to make and support the present application and lead the Board to be concerned about the apprehension of betrayal among the employees, is to deny reality.

**[65]** There is a long history of often offensive and sometimes egregious conduct by the Employer and Mr. Loraas. They have failed to fully implement Board directions regarding the reinstatement and treatment of Mr. Franke and Mr. Wood (Mr. Mayer was laid off at some point and refused a later notice of recall) imposed by the Board some four years ago and reiterated in a later decision, as outlined above. These led a different panel of the Board to conclude one year ago that the conditions in the workplace that were found to exist in 1998 and 1999 still existed because of the Employer's conduct. The Employer has continued for some years and to the present time to send the message that it wants the Union gone and that known supporters of the Union will be subjected to humiliation, ridicule and differential adverse treatment in work assignments. Given that, it does not need to expressly instruct an employee that holds sentiments like those of the Applicant to influence him that making the application would be a good thing, and that things might go well for those who support a successful decertification application and will not go well for those who do not. Indeed, Mr. Franke must have a constitution of steel. There are few employees who have such fortitude as his to insist on their formal right to remain at work in the face of such egregious conduct by their boss as we have heard described.

**[66]** The argument that, if Mr. Franke's complaints are legitimate and serious, grievances or unfair labour practices should have been filed, confuses the nature of the improper conduct referred to in s. 9 of the *Act* with breaches of the collective agreement or the unfair labour practice provisions of the *Act*. It is not necessary that conduct constituting improper influence, etc. within the meaning of s. 9 be in the nature of such breaches. And, there may be many reasons why a union does not grieve or file unfair labour practice applications. One of those was alluded to in the present hearing: that is, to do so may lead some employees to develop the view that the union or certain employees are combative or antagonistic. There may be other reasons as well, including the desire to shield an employee from a vindictive employer.

**[67]** In *Dresher v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Water Group Canada Ltd., et al.*, [1993] 3rd Quarter Sask. Labour Rep. 131, LRB File No. 033-93, the Board observed as follows, at 142-43:

> *The rational for vesting this discretion* [i.e., under s. 9 of the *Act*] *in the Board was the recognition by the legislature that the employee's right to bargain collectively would be without substance if an employer was allowed to make work life so miserable for employees who chose to bargain collectively that they file for decertification at the first opportunity. It would say to employers that if they are prepared to be ruthless and miserable enough, although they may not be able to stop certification, they can probably force a decertification application to be filed within 10 months. All they have to do is shut the door in the face of the union, make sure no progress is made towards a first agreement, retaliate against identifiable union supporters, tamper with wages and other terms and conditions of employment, bypass the union by dealing directly with the employees and above all, make it clear that things will never get back to normal until the employees "fix it." Never waver, and if the pressure is great enough, the employees will get rid of the union all on their own. That is not the scheme of the Act.*
>
> *When faced with an employer of this variety, a union may well find itself in difficulty whether it resists the employer's conduct or whether it does not. If it resists and files unfair labour practices it risks being labeled as confrontational, litigious and even petty and vindictive. This risk exists whether the Union wins or loses the unfair labour practices. If the union does nothing in order to avoid being perceived as litigious or militant, it appears ineffectual against the employer and this further undermines employee support and confidence in the union and their willingness to align themselves with the union when sides must finally be chosen.*
>
> *This is not the way the legislature intended collective bargaining to work and a choice between collectively bargaining that doesn't work because of the employer's non-co-operation or no collective bargaining at all is not the choice that the legislature intended employees to have to make when a decertification application is filed. When the Board is satisfied that this is the choice that the employer has managed to place before the employees, the Board will disregard any expression by the employees of a desire to give up their right to bargain collectively. For the Board to do otherwise and fall into line by directing a vote would amount to complicity in the employer's subversion of the law.*

**[68]** It is not necessary that direct overt evidence of influence or interference be demonstrated. In *United Food and Commercial Workers, Local 1400 v F.W. Woolworth Co. Limited,* [1994] 1st Quarter Sask. Labour Rep. 169, LRB File Nos. 148-93, 151-93, 192-93, 193-93 & 194-93, the Board stated, at 203:

> *However, the Union's ability or inability to prove the Employer's direct participation with the applicant is not determinative of the Section 9 issue. It is also necessary for the Board to determine if the disposition towards collective bargaining of the employees who supported the decertification application was influenced by the Employer's unlawful or improper conduct. Aside from or in addition to any specific unfair labour practice, this also requires an evaluation of the climate which the Employer created and whether it is intentionally designed to foster a decertification application or encourage support for one. This is especially important when the decertification application is brought during the first open period following a*

> *certification, which was unlawfully opposed by the Employer and where the Union was subsequently prevented from providing any useful service to the employees because of the obstruction and non-cooperation of the Employer.*

**[69]** Notwithstanding that this is not a situation where there has never been a collective agreement, the first "agreement" was imposed, and the Board's comments in both *WaterGroup* and *F.W. Woolworth, supra,* are apposite – the present Employer is to date the kind of employer described by the Board in those cases. The Employer's conduct in the past as found by the Board in each case, coupled with the more recent conduct outlined above, leads unavoidably to the inference that the present application was made, at least in part, as a result of influence, interference or intimidation by the Employer or its agent, Mr. Loraas. In the circumstances, not least because compliance with Board Orders is still incomplete, and the remedial portion of the unfair labour practices in *Loraas (No. 8)* has not yet been dealt with, a vote on the application cannot cure the prevailing polluted atmosphere in the workplace which dates back to the events of 1997 and the import of the messages telegraphed by the more recent conduct of Mr. Loraas.

**[70]** In *WaterGroup, supra,* the Board expressed its task as follows, at 13-14:

> *The difficult task for the Board is to put both sides of this case together and then determine whether a vote on the representation issue, in the conditions and atmosphere in which these employees work, would be an exercise of employee prerogative as is their right by s. 3 of the Act, or whether it would be using the prestige of the secret ballot and democratic process to whitewash the very process of influence and coercion that the Act is supposed to protect employees from.*
>
> (emphasis added)

**[71]** To dismiss the present application is not to deny the Applicant and the purported supporters of the application the exercise of rights under s. 3 of the *Act.* Nor is it to treat them as immature, naive or incapable of making their own choices. Rather it is to insure that s. 3 rights are respected and not made a mockery of by an employer that wages a sustained campaign against the Union as lawful bargaining agent for all of the employees including its overt supporters. The broad goal of s. 3 is to foster economic democracy and human dignity in the workplace through collective bargaining. It does not matter if it is the fifth consecutive attempt to decertify the Union or the fiftieth attempt. If an employer's conduct continues to influence the ability of the employees to exercise their s. 3 rights in an environment free of the apprehension of betrayal, the application must be dismissed.

**[72]** For the reasons set out above, the application is dismissed.

**SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 333, Applicant v. LUTHERAN SUNSET HOME CORP. at LUTHERAN RIVERSIDE TERRACE, Respondent**

LRB File No. 184-02; December 23, 2002
Vice-Chairperson, James Seibel; Members: Don Bell and Maurice Werezak

For the Applicant: Bill Hulme
For the Respondent: Larry Seiferling, Q.C.

**Certification – Appropriate bargaining unit – Managerial exclusion – Whether position of hostess/server supervisor should be excluded – Board concludes that position should not be excluded and certifies unit accordingly.**

**Employee – Managerial exclusion – Employer seeks to exclude hostess/server supervisor from bargaining unit – Board concludes that position 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 – Board issues certification order that includes position.**

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

## REASONS FOR DECISION

### Background

**[1] James Seibel, Vice-Chairperson:** On September 23, 2002, Service Employees International Union, Local 333 (the "Union"), filed an application to be certified as the bargaining agent for all employees of Lutheran Sunset Home Corp. at Lutheran Riverside Terrace in Saskatoon (the "Employer"), except office and clerical staff, supervisors, persons above the rank of supervisor and personal care workers. In its application, the Union estimated there were 29 employees in the proposed bargaining unit. The statement of employment filed by the employer listed the names of 32 employees in the proposed unit. In its reply, the Employer stated as well that one Lori Wells, hostess/server supervisor, was a manager and therefore out of scope of the proposed unit.

**[2]** The matter came before a panel of the Board for hearing on October 10, 2002. The parties joined issue with respect to the employment status of Ms. Wells and three other persons listed on the statement of employment as "home support workers." The Board ordered that the Board's Investigating Officer conduct an investigation with respect to the employment status of the four persons in dispute.

The investigating officer provided her report to the Board on November 1, 2002 (the "IO Report"). The parties each provided their replies to the IO Report to the Board on November 6, 2002.

**[3]** The matter came on again for hearing before the Board on November 25, 2002. The only issue then remaining between the parties was Lori Wells' status; the Union accepted that the other three persons whose status was originally in issue were properly within the scope of the proposed unit.

## Evidence

**[4]** At the hearing, the parties agreed to the facts as found by the investigating officer in her Report as concerns the status of Ms. Wells, except that Mr. Hulme, on behalf of the Union, disagreed that the facts in paragraphs 20 through 23 of the IO report are accurate; his comments in that regard are outlined below. Neither party sought to adduce any other evidence.

**[5]** The relevant portions of the IO Report are as follows:

> *General*
>
> *[5] The Terrace consists of a 155-unit apartment complex and a 24-bed intermediate care facility (the "ICF"). The former is "enriched seniors' housing." A monthly fee covers residents' rent of an unfurnished, self-contained apartment unit (one or two bedroom), 25 evening meals in a communal dining room, transportation to medical appointments and weekly laundry (bed and bathroom linens) and housekeeping service. Each floor has a small laundry room in which residents do personal laundry and ironing. The services of a home support worker are available for an additional fee. There are a number of common use areas available to residents: an interdenominational chapel that doubles as a games room, lounges, TV room, etc. Other services, such as massage therapy, hairdressing and foot care, are available on site for a fee. Residents must prepare breakfast in their apartment; lunch is available in the dining room for a fee.*
>
> *[6] The ICF is part of the same building as the apartment complex. A locked door separates the two; access from the ICF to the complex is through this door, which unlocks with a keypad combination. The units in the ICF are combination bedroom/sitting room.*
>
> *[7] Wage rates for the various classifications of employees at the Terrace are as follows:*
>
> *Servers:* *$7.00/hour plus 4% after 6 months and then 4% annually to a maximum of four steps*

| | |
|---|---|
| *Dishwasher:* | *$7.50/hour plus 4% as above* |
| *Housekeeping, laundry, drivers and first responders:* | *$8.00/hour plus 4% as above* |
| *Cooks:* | *$10.00/hour plus 4% as above* |
| *Home support workers:* | *$8.43 – 9.14 – 9.41 – 9.65 (movement through this grid is first, after six months, then annually)* |
| *Personal care workers:* | *$8.43 – 9.14 – 9.41 – 9.60 (movement as above)* |

*Kelly Peevers, manager of Riverside Terrace, said that the wage increases are not automatic; they are contingent on positive performance evaluations and on budget capacity.*

. . .

*Lori Wells*

*[18] Ms. Wells has been employed as a hostess with the Employer since February 2001. Before that, she worked in the same position for the owner of the company to whom the Employer contracted food services. She says that the former manager of the Terrace, Wayne Dahlgren, hired her at $10.00/hour with the understanding that she would be in charge of the servers. She was paid this rate until the end of April 2001 when, apparently coincident with Michele McKeown being appointed Director of Food Services (in addition to her position as Director of Housekeeping and Laundry Services), Ms. Wells' wage was reduced to $8.50/hour. Her wage was increased to $9.00/hour in April 2002 and remains at that rate (see copies of wage statements at Tab 6). Mr. Peevers says that the Employer has evaluated Ms. Wells' job, along with others, and considers $9.00/hour to be the appropriate starting wage for her position.*

*[19] Ms. Wells says that the job description for her position (see Tab 7) is generally accurate. She schedules a staff of about 13 servers to cover the dining room every day from 4:30 p.m. to 7:30 p.m. She schedules someone to cover her shift (11:00 a.m. to 7:30 p.m.) and to wash dishes on the weekends. She tries to complete schedules at least one week in advance. As most of the servers are students, she tries to accommodate their personal schedules.*

*[20] Ms. Wells says that when new servers are to be hired, her supervisor, Ms. McKeown, places the advertisement in the paper and names herself as the contact person in the ad. Ms. McKeown reviews the applications and selects ones to pass on to Ms. Wells. Ms. Wells sets up the interviews and will conduct them on her own sometimes and with Ms. McKeown other times. She says that the decision about whom to hire is generally hers. Since February 2001, she has hired about six servers. She says that about six months ago, she removed a server named Lea Jensen from the schedule because Ms. Jensen was never available to work; she told Ms. Jensen that she was doing that. Ms. Wells says that Ms. McKeown has told her that, if someone is not doing the job properly, she should not schedule that person for shifts. Ms. Wells says she would clear any discipline with Ms. McKeown. She views herself more as a head*

*waitress than a supervisor and estimates that she spends about 80% of her time doing hands on work.*

*Michele McKeown, Director of Housekeeping and Food Services [includes laundry]*

*[21] Ms. McKeown started working for the Employer on August 15, 2000, when the facility first opened. She was director of housekeeping and laundry until early in 2001, when responsibility for food services was added to her assignment. She currently earns $16.90/hour. There are about 29 employees in the departments for which she is responsible, including cooks, dishwashers, servers, housekeepers (including laundry) and first responders (individuals in the latter classification work as housekeepers, but are on the schedule between 8:00 a.m. and 10:00 p.m. to respond to emergencies in the complex).*

*[22] While Ms. McKeown has overall responsibility for all these employees, she says that Ms. Wells is primarily responsible for the servers. Ms. Wells conducts most of the interviews and decides who will be hired. Ms. McKeown says she has disagreed with some of Ms. Wells' hiring decisions but has not overridden them. She encourages servers to deal with Ms. Wells if they have problems; she recently told a server named Rhonda to work out her concern with Ms. Wells and to come back to her (Ms. McKeown) only if no resolution was possible.*

*[23] Ms. McKeown says that she recently fired a server during Ms. Wells' absence and that Ms. Wells fired a server named Lea Jensen. Ms. McKeown conducted a performance review with Ms. Wells in February during which she told Ms. Wells that Ms. Wells needed to be stricter with the serving staff, that they walk all over her. Ms. McKeown signs all the payroll documents from her departments that require a supervisor's signature.*

*[24] Ms. McKeown says that she probably has more of a relationship with the ICF staff than any other employee in the apartment complex. She is materials manager for the whole facility, including the ICF, and will also frequently check with the personal care workers about the quality of the meals sent over from the apartment complex. She believes that she spends more time doing hands on work than supervising; she helps out as necessary in all the areas for which she is responsible. She has the authority to hire, fire and discipline employees in all the departments for which she is responsible and has performed all those functions.*

*Trina Hodgson, Tenant Services Co-ordinator*

*[25] Ms. Hodgson has been employed at the Terrace as tenant services coordinator since August 2000. Her current rate of pay is $15.59/hour. She addresses concerns that residents and/or their families have, sets guidelines for priority of residents' transportation and supervises and schedules four home support workers and two drivers. Ms. Hodgson has the authority to hire, fire and discipline employees in these classifications, though she has not fired anyone. She said that the home support workers do not work in the ICF at all. The drivers transport apartment residents to appointments or events as scheduled by office staff and monitored by Ms. Hodgson. As noted earlier, Ms. Hipkin (ICF Coordinator) will*

*very occasionally book that service for ICF residents. When the drivers are not driving residents, they perform minor maintenance functions, primarily in the apartment complex and occasionally in the ICF.*

**[6]** The job description referred to by Ms. Wells in paragraph 19, above, provides, in part, as follows:

*HOSTESS:*
*Shift: 11:00 a.m. – 7:30 p.m.*
*One half-hour (1/2) unpaid lunch break.*
*Two (2) fifteen (15) minute paid coffee breaks.*

*Duties:*
[There follows a list of numerous hands-on server-type duties]

*Responsible for serving staff:*
- *Interview for new servers*
- *Hire*
- *Terminate*
- *Find replacement staff when necessary*
- *Talk to servers if there are any problems*
- *Make up the schedules*
- *Fill out payroll*
- *Phone in any payroll changes*
- *Make up a cleaning and duties list for servers*
- *Organize staff into sections every night*
- *Advise servers of the special needs of residents, celiac diet, anti-reflux diet, etc.*

*Make sure dairy is stocked and record items to be ordered*
*Order from Vitality – coffee and juices*

[There follows a list of several miscellaneous duties]

**[7]** The organization chart for the facility shows only that food service staff as a whole report to the director of housekeeping and food services; there is no separate reporting box for the hostess position on the reporting line between the food service staff and the director boxes.

## Argument

**[8]** Mr. Hulme, on behalf of the Union, filed a brief that we have reviewed. He argued that Ms. Wells is in scope of the proposed bargaining unit. He submitted that paragraphs 20 through 23 of the IO Report were inaccurate or otherwise incomplete for the following reasons:

*1. There is an inconsistency between the information provided by Ms. Wells and that provided by Ms. McKeown: Ms. Wells admits to having removed a server – Lea Jensen – from the schedule on the basis of lack of availability and would clear any discipline with Ms. McKeown, while Ms. McKeown stated that Ms. Wells fired Ms. Jensen;*

*2. The IO report makes no reference to any information from the servers as to whether they view Ms. Wells, Ms. McKeown or both as a representative of management with authority to impose discipline, hire fire, promote and demote.*

**[9]** Mr. Hulme also made the following observations and comments regarding the contents of the IO Report:

*1. In paragraph 20, Ms. Wells "views herself more as a head waitress than a supervisor and estimates that she spends about 80% of her time doing hands on work", and, in paragraph 19, does all the scheduling for some 13 servers. Mr. Hulme submitted that, in the circumstances, she would have little time to perform other functions;*

*2. That Ms. Wells's present wage rate is more in line with that of in-scope staff than management personnel. He also asserted that the fact that her wage was cut from $10.00 per hour to $8.50 per hour when Ms. McKeown was hired as director is telling as to her present status.*

**[10]** Mr. Hulme argued that Ms. Wells is an "employee" within the meaning of s. 2(f)(i) of *The Trade Union Act* (the "*Act*") and does not fall within either of the exceptions commonly referred to as the managerial and confidential exclusions. Her primary responsibilities are the hands-on work performed by the food services servers and could be considered a "senior server" in that she performs lead-hand-type duties such as directing the servers, training staff, assigning work, approving leaves and scheduling staff. She does not act in a confidential capacity with respect to the Employer's labour relations. In support of his argument, Mr. Hulme referred to the decisions of the Board in *Regina District Health Board v. Canadian Union of Public Employees*, [2001] Sask. L.R.B.R. 466, LRB File No. 054-00, and *International Union of Operating Engineers, Local 870 v. Rural Municipality of Estevan No. 5*, [2002] Sask. L.R.B.R. 94, LRB File No. 006-02.

**[11]** Mr. Hulme asserted that Ms. Wells' duties do not place her in a position where there is the real potential of conflict in a labour relations sense with other members of the proposed bargaining unit. Mr. Hulme referred to the decisions of the Board in *Saskatchewan Indian Federated College Inc. v.*

*University of Regina Faculty Association*, [2001] Sask. L.R.B.R. 634, LRB File No. 046-01, and [2001] Sask. L.R.B.R. 657, LRB File No. 049-01.

**[12]** Mr. Hulme argued that to include Ms. Wells in the proposed unit would be in accordance with the Board's general policy to provide employees in the workplace with as wide an access as possible to the benefits of collective bargaining: see, *Canadian Union of Public Employees, Local 4449 v. Glencairn Childcare Co-operative*, [2001] Sask. L.R.B.R. 510, LRB File No. 092-01.

**[13]** Mr. Seiferling, Q.C., counsel for the Employer, argued that only paragraphs 18 through 24 of the IO Report and the job description are relevant to this inquiry. He submitted that the relevant consideration is not the wage rate of the position but the duties that are performed. Referring to the decision of the Board in *Westfair Foods Limited v. United Food and Commercial Workers International Union*, [1981] Feb Sask. Labour Rep. 66, LRB File No. 085-80, Mr. Seiferling argued that another relevant consideration is whether the incumbent has the authority to discipline and terminate employees and not whether the incumbent performs hands on work similar to the employees. He asserted that Ms. Wells had the authority to hire and fire and had exercised that authority. For example, he said, the decision "to remove Lea Jensen from the schedule" is, in essence, a termination.

**[14]** With respect to the potential for a conflict of interest, Mr. Seiferling questioned the result if a decision by Ms. Wells were grieved and she held a position as a local union officer. Counsel also asserted that the authorities relied on by the Union support the Employer's position in that they support the principles enunciated in the *Westfair* case, *supra*, or they were distinguishable on their facts.

## Statutory Provisions

**[15]** 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;*

## Analysis and Decision

**[16]** We must determine whether Ms. Wells in the position of hostess is excluded from the proposed bargaining unit. The Employer asserts that Ms. Wells is excluded under s. 2(f)(i)(A) because her "primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character." The Union counters that that authority and those functions are not her primary responsibility, if at all. The onus is on the Employer to establish on the balance of probabilities that Ms. Wells is not an "employee" within the meaning of the *Act*.

**[17]** The proportion of work time spent performing managerial functions is not determinative of the issue – even persons with undisputed independent authority to discipline and terminate employees may rarely be called upon to exercise such authority. Position descriptions often bear limited similarity to the way the job is actually performed. Indeed, such descriptions often contain duties and responsibilities that, on the face of the description, the incumbent may independently exercise, but which in practice may only be exercised with the approval of, or made as a recommendation to, a superior. In the end, it is the real performance of the job that is important.

**[18]** In the present case, Ms. Wells has undeniably exercised an authority to hire server staff – some 6 persons over approximately the past year and a half. She makes the servers' schedule and directs them in their duties while generally working alongside them performing the same duties.

**[19]** The evidence provided by Ms. Wells is that she does not consider herself to have independent authority to impose discipline, let alone terminate an employee. At paragraph 20 of the IO Report, Ms. Wells relates that while Ms. McKeown advised her to remove anyone from the schedule that "is not doing the job properly," she "would clear any discipline with Ms. McKeown." The evidence regarding the situation of removing Ms. Jensen from the schedule is, at best, ambiguous. There is no indication that the action was taken as a disciplinary measure, but rather because Ms. Jensen was not sufficiently available to work to warrant including her in the regular making of the schedule. We do not consider the incident to be a case of the exercise of an authority to terminate employees.

**[20]** Another matter to be considered is that of Ms. Wells' wage rate and the circumstances of how it came to be. The evidence is that she was originally hired at $10.00 per hour in February, 2001. In April 2001, her wage was reduced to $8.50 per hour at the same time Ms. McKeown was hired as director of food and laundry services. No reason was advanced for this action, and while it could be a mere coincidence, it could also be because Ms. Wells was demoted or at least that the responsibilities expected of her were reduced.

**[21]** While it is not an immutable rule, wage rates in a work place generally reflect the relative responsibilities of the jobs in the workplace. Skilled, technical, professional and managerial staff are usually paid somewhat to a lot more than unskilled or experienced labour. Lead hands without managerial responsibility are generally paid a modest amount more than those they supervise. Ms. Wells's present wage is $9.00 per hour, while that of Ms. McKeown is $16.90 per hour – in excess of some 80 per cent more. In contrast, Ms. Wells's wage rate is less than that for an in-scope starting cook, barely more than that of a server with about 4 years service and about the same as a dishwasher with similar service.

**[22]** The present case bears some similarity to the fact situation in the recent decision of the Board in *United Food and Commercial Workers, Local 1400 v. 610539 Saskatchewan Limited, o/a Heritage Inn, Saskatoon*, [2002] Sask. L.R.B.R. 460, LRB File No. 161-02. In that case, the issue was whether the position of hotel housekeeping supervisor was within the scope of the proposed bargaining unit or was excluded as managerial. The main job duty of the incumbent in that case was to inspect the rooms cleaned by the three day supervisor housekeepers and eleven housekeepers, but she also performed some hands on room-cleaning work, prepared the schedule, directed the housekeeping staff and provided verbal warnings regarding quality of work. She could affect the number of hours that a

housekeeper worked through the scheduling function. However, she could not issue a written reprimand, or impose anything more serious, except on the direction, or with the approval, of the housekeeping manager or the hotel manager. Similarly, although she conducted some hiring interviews, performed reference checks and made recommendations to the housekeeping manager on candidates for hiring, she did not independently make decisions on hiring.

**[23]** In determining that the disputed position in *Heritage Inn, supra,* was within the scope of the bargaining unit, the Board confirmed the earlier observation of the Board in *City of Regina v. Canadian Union of Public Employees, Local 21, and Regina Civic Middle Management Association*, [1995] 3rd Quarter Sask. Labour Rep. 153, LRB File No. 268-94, at 158, that:

> *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.*

**[24]** The Board also confirmed, in *Heritage Inn, supra,* at 467, its long standing interpretation of the definition of "employee" in s. 2(f) of the *Act* as signaling a direction to make exclusions on as narrow a basis as is possible, and that incidental or occasional performance of managerial tasks is generally not sufficient to warrant exclusion from the bargaining unit, but that the nature and degree of such occasional tasks might, in a particular case, make exclusion appropriate.

**[25]** In *Professional Institute of the Public Service of Canada v. Executive Branch of the Government of Saskatchewan and Saskatchewan Government Employees' Union*, [1997] Sask. L.R.B.R. 530, LRB File No. 018-97, the Board observed, at 547-48:

> *This Board has interpreted this definition as a direction to make exclusions on as narrow a basis as possible. It is not sufficient that someone who would otherwise fall within the definition of employee perform incidentally or occasionally tasks which are of a managerial or confidential nature. The provision requires that, in order for a person to be excluded, the functions which are the basis of the exclusion must be the major focus of the position.*
>
> *This does not mean that the Board has not been confronted with the questions of degree which were addressed by the Canada Board in some of the cases referred to above. The rationale which has often been articulated as the impetus for the exclusion*

> *of persons performing managerial or confidential functions is, as we have seen, the possibility of an insoluble conflict of interest between the responsibilities of these persons in carrying out their duties, and their inclusion for purposes of representation with a group of employees whose terms and conditions of employment may be materially affected by their performance of those duties. Sensitivity to such potential conflict has led the Board, on occasion, to exclude positions on the basis that certain key responsibilities inevitably pose the risk of conflict, even if they may not in themselves occupy the preponderant amount of working time of the incumbents.*
>
> (emphasis added)

**[26]** In *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, LRB File Nos. 037-95 & 349-96 ("the *SLGA* case"), in examining whether a person's job functions and responsibilities have the potential to place the person in a conflict of interest with members of the bargaining unit, the Board identified the primary types of responsibilities that serve to distinguish managerial status as including the authority to discipline and discharge and to influence labour relations, while secondary considerations include the authority to hire, promote and demote.

**[27]** In the present case, while Ms. Wells infrequently exercises the secondary managerial function of hiring, there is no evidence, or at least no unambiguous evidence, that she performs any of the primary managerial functions identified in the *SLGA* case, *supra*. There is little evidence that, other than preparing the schedule, the decisions that Ms. Wells makes in carrying out her job have any real effect on the employees' terms and conditions of work.

**[28]** The fact that Ms. Wells spends much more time with the servers observing their performance, supervising them and providing them with direction than does Ms. McKeown, does not place her in a position of probable insoluble labour relations conflict if she is in the bargaining unit. Such an argument was advanced by the employer in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Remai Investments Corporation, operating as Imperial 400 Motel (Swift Current)*, [1997] Sask. L.R.B.R. 335, LRB File Nos. 014-97 & 019-97, where the issue was whether the positions of housekeeping supervisor and restaurant supervisor in a motel should be excluded from the bargaining unit. In determining that they ought not to be excluded, the Board observed as follows, at 348-49:

*It is natural that a senior manager would rely on the direct supervisors of employees to provide insight into the daily performance of those employees, or to correct or admonish them in connection with the carrying out of specific duties. We have concluded that the disciplinary authority of the supervisors was limited to this kind of minor corrective discipline.*

. . .

*Ms. McDowell testified that she might feel uncomfortable taking part in union activities alongside employees who were subject to her supervision. There can be no doubt that the position of an in-scope supervisor can be unpleasant on occasion. Such a supervisor may be the focus of any dissatisfaction senior management have with employee performance, and of the disenchantment of employees with their work assignment, their fellow employees or their terms and conditions of employment. In the City of Regina v. Canadian Union of Public Employees decision, supra, the Board addressed this issue, in the following terms, at 151:*

> *It is our view that there is nothing about the functions carried out by the persons in these positions which creates a conflict between the interest of their Employer and the interest of their bargaining unit colleagues of a kind which would justify removing the positions from the bargaining unit. Two of them said that they felt their status as members of the bargaining unit had created problems for the performance of their duties. Our assessment of this evidence is that such "problems" did not go beyond the awkwardness and discomfort which is experienced by many persons who must direct or admonish their fellow employees. Such tension is not sufficient to qualify as a conflict of interest of the sort which would justify the exclusion of a position on managerial grounds. In order to justify the exclusion, the position must be subject to competing loyalties which render it impossible for an incumbent to bring them into balance.*
>
> (emphasis added)

**[29]** And, in *Heritage Inn, supra*, the Board observed, at 470, as follows:

*[30] In our view, Ms. Wolfe is in no different position than line supervisors or working forepersons in other workplaces who assign work, supervise a crew, provide minor admonishment, and identify problems to their superiors for action, but who are included in the bargaining unit. Situations may arise where her position as a member of the bargaining unit might be inconvenient or undesirable from the point of view of either the Employer or the Union, or in which she feels uncomfortable, but this is not of a kind or of a degree that would constitute an untenable labour relations conflict, particularly given that it is Ms. Arcand* [the housekeeping manager] *who wields the real discretionary decision making authority.*

**[30]** In the present case, we are of the opinion that the Employer has not met the onus to establish on a balance of probabilities that Ms. Wells should not be included in the bargaining unit as a managerial exclusion. Accordingly, the position of hostess/server supervisor is within the scope of the proposed bargaining unit, and Ms. Wells' status can be considered on the issue of the evidence of support for the application.

**[31]** As the Union has filed evidence of support for the application of more than 50 per cent of the employees in the proposed bargaining unit, the application for certification is granted. The Order will issue in the usual form.

# INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 529, Applicant v. SUN ELECTRIC (1975) LTD., ALLIANCE ENERGY LIMITED and MANCON HOLDINGS LTD, Respondents

LRB File No. 216-01; December 23, 2002
Chairperson, Gwen Gray, Q.C.; Members: Brenda Cuthbert and Gerry Caudle

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

**Practice and procedure – Production of documents – Panel of Board reviews documents the production of which remains at issue between parties – Board orders production of certain additional documents.**

***The Construction Industry Labour Relations Act, 1992* ss. 18 and 18.1 (b) and (c)**

## REASONS FOR DECISION

**[1]** **Gwen Gray, Q.C., Chairperson:** On August 21, 2002 the Board ordered the Respondents to disclose and produce to the Applicant the information and documents requested by the Applicant in its solicitor's May 13, 2002 letter to the solicitor for the Respondents. A number of issues arose as a result of the Order and the parties attended at the Board on November 27, 2002 to address the additional issues.

**[2]** In order to address the issues raised at the November 27, 2002 hearing, the Board decided to conduct its own review of various documents. The Board conducted its document review on December 10 and 11, 2002 in Saskatoon at the offices of the solicitors for the Applicant and the Respondents.

**[3]** These reasons set out the issues in dispute between the Applicant and Respondents with respect to each of the items listed in the May 13, 2002 letter (in bold) and the Board's ruling.

**All and any documents relating to any sale, lease, transfer or disposition of a business or part thereof from any of the respondents to any of the other respondents, whether said transactions occurred within the province of Saskatchewan or otherwise.**

**[4]** The Applicant complained that the Respondents eliminated all references to financial information from the documents provided. Counsel for the Applicant provided the Board with copies of various agreements with the deletions.

**[5]** The Respondents argued that the financial information contained in the documents in question did not relate to any issues in dispute in the application, that is, the alleged successorship, the related employer question or the issue of abandonment.

**[6]** The Board reviewed the original of the documents in question at the office of the solicitor for the Respondents. The Board's review of the documents listed in Schedule One to the Respondents' Statement as to Documents establishes as follows:

> (1) Documents #3, #4 – The assets transferred from one Respondent to the other were done at the book value and UCC of the assets at the time of the sale. The Board does not require further disclosure of the amounts;
>
> (2) Documents #5, #6 – The Resolutions reflect a transfer of shares at the value set out in Documents #3 and #4 and do not require disclosure;
>
> (3) Documents #10 and #11 – The Board directs the Respondents to provide the entire agreements to the Applicants as the values stated in the agreements are relevant to the proceedings;
>
> (4) Document #21 – The Board finds that the values are consistent with the values expressed in Documents #3 and #4 and do not need to be disclosed;
>
> (5) Document #22 – The financial information is not relevant to the proceedings and does not require disclosure;
>
> (6) Documents #23, #24, #25 – A number of documents from the minute books of the respondent corporations were not produced to the Applicant. The Board has reviewed the same and determined that (a) information pertaining to work performed by the corporations has been disclosed in Documents #1 and #2; (b) the remaining information is not relevant to the issues in dispute;
>
> (7) Document #40 – the values assigned in this document are reflected in Documents #3 and #4 and reflect a book value and UCC of the assets in question. No disclosure of the actual dollar amount is required.

**All documents in relation to all acquisitions from any respondent in relation to any assets including without restricting the generality of the foregoing, tools, vehicles, other equipment, land, buildings and leases for same, telephone numbers, fax numbers and other communication vehicles.**

**[7]** The Applicant argued that this information was provided without details of the financial arrangements. The Respondents argued that the financial information was not relevant. The Board has reviewed the documents as set out above under the first heading and our rulings are repeated with respect to this clause of the Order.

**All documents in relation to any agreements concerning the transfer or disposition, direct or indirect from any respondent to another of goodwill, customer lists, accounts receivable, contracts of any variety, or inventory, whether in Saskatchewan or otherwise.**

**[8]** The Applicant complained that no documents had been produced under this heading and the Respondents provided no explanation with respect to the non-production. The Respondents did not advise the Board of its position on this class of documents.

**[9]** The items listed in this heading are dealt with in various documents provided by the Respondents to the Applicant (for instance, #3, #4, #5 to #21). The Applicant must assume from the Respondents' reply that there are no further documents related to these issues. If, at the hearing, it is established that other documents do exist, then the Respondents will be required to produce them.

**All documents in relation to incorporation, corporate registration, directors, officers, shareholders, key management and personnel, and including annual returns and minute books for each corporation in the province of Saskatchewan from 1975 to present.**

**[10]** The Applicant argued that the Respondents had provided copies of the minute books with certain materials removed. The Applicant also complained that the Respondents had not provided the Applicant with information on key personnel.

**[11]** The Respondents argued that the materials removed related to financial information that is not relevant to the issues in dispute. The Respondents argued that information on key personnel is contained in the minute books through the lists of directors and shareholders and nothing more is required.

**[12]** We have ruled on the issue of the missing documents from the Minute Books above.

**[13]** In relation to the request for disclosure of key management and personnel, the Respondents must provide the Applicant with such lists for the period under consideration in the application for each Respondent. Key management and personnel includes all employees, officers and shareholders employed as superintendents and those positions above superintendents.

**Employee lists for head office personnel in any jurisdiction and office personnel and construction workers in the province of Saskatchewan from 1975 to present.**

**[14]** The Applicant complained that the Respondents failed to produce any lists of employees.

**[15]** The Respondents argued that the remedial issues were not being dealt with at this stage of the hearing and no disclosure was required with respect to the remedial issues as a result of the agreement reached between the parties earlier. The employee lists relate only to the issue of remedy. It would be prejudicial to require production of the lists as the Applicant may use them to discipline members who have worked for the Respondents on a non-union basis. The Respondents argued that employee lists were not central to the issue of common control and direction that is the key issue on the related employer aspect of the application.

**[16]** The Board notes the requirement to provide employee lists as set out in paragraph (5) was made in its earlier order. At the November 27, 2002 hearing, the Respondents attempted to re-argue the earlier procedural ruling. There must be some finality to Board rulings, particularly on procedural matters.

**[17]** We note on this point that the issue of the composition of the workforces of all Respondents was raised in the replies filed by the Respondents when they asserted in their replies (using SUN Electric's reply as the example):

> *SUN Electric (1975) operates separately and independently from the Respondents, Mancon and Alliance. Sun Electric (1975), inter alia, maintains its own work force, bank account, Canada Customs and Revenue Agency Business Number, Canada Customs and Revenue Agency source deduction account for payroll, GST account, Saskatchewan Workers' Compensation Board account and Saskatchewan Finance revenue account, separate and apart from Mancon and Alliance.*
>
> (emphasis added)

In this light, one can assume that the information is broadly relevant to the issue of related employer status.

**[18]** The issue concerning the possible use of the information by the Applicant to discipline its members is covered by the agreement reached by the Applicant and the Respondents – that is, the information will be used solely for the purposes of this hearing.

**[19]** The Respondents are instructed to provide the information requested to the Applicant.

**All documents in relation to the lease of capital assets to or from any other respondent.**
**All documents in relation to joint ventures or contracts with any other respondents.**

**[20]** The Applicant complained that the documents produced under these headings had all financial information deleted. In addition, counsel for the Applicant noted that there was no on-going information provided under these headings, that is, all the information pertained to the early transactions between the Respondents in the 1980s.

**[21]** Counsel for the Respondents advised that all information under these headings had been provided. The economic information was withheld for the reasons stated above – that is, it was not broadly relevant to the issues under consideration.

**[22]** We have ruled on the financial disclosure above. The Applicant must assume that disclosure has been complete. Examination of witnesses may be required to explain the documents produced and to fill in the perceived gaps.

**All documents in relation to the provision to or receipt of services from any other respondent, including, without limitation, accounting, bookkeeping, financial reporting, payroll, personnel or human resources, administration, supervision, inventory or purchasing, computing, quality control, occupational health and safety, management or project management, labour or employment, labour relations, engineering and design, estimating or tendering, communications, public relations, recruiting, training, consulting, advice, legal, tax, reporting, acquisition of bonds or letters of credit, provision of office facilities or personnel or other services within the last five years.**

**[23]** Counsel for the Applicant complained that there was scant material produced under this heading and such information had all financial details deleted.

**[24]** Counsel for the Respondents advised that all materials were produced and the financial information was deleted because it was not broadly relevant to the issues in dispute.

**[25]** The deletion of financial information was dealt with above.

**[26]** The disclosure requested under this heading has been posed with a five year time frame. We find that there are documents that are relevant to this issue listed in Schedule III to the Statement as to Documents. The Board ordered production of documents in Schedule III to the Respondents' Statement as to Documents in the August 21, 2002 Order.

**All corporate and inter-office memoranda as well as correspondence to and from any of the respondents or third parties concerning corporate organization, reorganization management or structure and trade unions, collective bargaining, certifications or collective bargaining agreements.**

**[27]** The Applicant complained that no information was received under this heading.

**[28]** The Respondents advised that there are no documents in this heading other than documents that are subject to solicitor-client privilege that the Respondents have decided not to waive.

**[29]** Again, the Applicant must assume that there are no documents under this heading. No further ruling will be made.

**[30]** In addition to these issues, the Respondents raised the following issues:

**Review of the minutes of the Union's executive and membership meetings.**

**[31]** Counsel for the Respondents seeks more information from the minutes. He proposed that the minutes be reviewed by him and his clients, subject to the agreement on the use of the materials. Counsel wants information arising from the minutes on matters pertaining to enabling agreements entered into between the Applicant and other employers. In his view, this information relates to the issue of the abandonment by the union of its bargaining rights against Alliance.

**[32]** In addition, the Respondents want additional documents arising from the review of the Applicant's minutes, in particular, those relating to charges made against employees working for Alliance/Mancon/SUN during the period in question, the relevant constitutions, and the results of the

charges. Counsel for the Respondents argued that this information is broadly relevant to the issue of abandonment.

**[33]** The Respondents also sought information from the Applicant relating to its attempts to organize Alliance. Again, counsel argued that the information was broadly relevant to the issue of abandonment.

**[34]** The Respondents also sought a copy of a letter sent by the Applicant to Government listing the unionized contractors in its trade division for the purposes of the Crown Tendering Agreement and copies of any letters in which it described or dealt with Alliance as a "union" contractor.

**[35]** The Applicant argued that the enabling agreements with other employers are not broadly relevant to any of the issues in this hearing. He also argued that the abandonment issues are defined and limited by the *Mudjatik Thyssen* case.

**[36]** The Board reviewed the minutes and flagged pages that require further disclosure to the Respondents. The Applicant is ordered to produce the flagged pages to the Respondents along with an indication of the date of the meeting minute, if such is not apparent on the page itself. If the particular page has already been produced, no additional production need be made. This production includes references to various project agreements and to "enabling" or "enabling agreements." Further production of documents under this heading is not required as they are not broadly relevant to the issue of abandonment. For instance, the Respondents have knowledge of whether the Applicant offered it an enabling agreement or any other special arrangements.

**[37]** The issue of internal union charges against members of the Applicant are internal union matters and no further disclosure is required arising from the production of minutes referring to the charges. No further production is required by the Board related to this issue.

**[38]** On the issue of "salting," the Applicant has provided the Respondents with minutes reflecting its attempts to organize the Respondent, Alliance, by providing the Respondents with copies of minutes reflecting such attempts.

**[39]** The Applicant is directed to provide a copy of any letter during the relevant period wherein it listed to Government the contractors with whom it holds bargaining rights and with whom it conducts collective bargaining. It is also directed to provide copies of any correspondence to a third party where it described Alliance Energy Limited as a unionized contractor.

**[40]** These Reasons shall constitute the Board's further order in this matter. Production shall be made as soon as possible. The Board Registrar is directed to forward scheduling information forms to both counsel in order to set further hearing dates.

# JODY ANN HEEDS, Applicant v. CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1975 and COUNTRY CLASSIC FASHIONS LTD. (TREATS CAFÉ, LOWER LEVEL PLACE RIEL), Respondents

LRB File No. 224-02; December 23, 2002
Chairperson, Gwen Gray, Q.C. Members: Bruce McDonald and Michael Wainwright

| | |
|---|---|
| The Applicant: | Jody Ann Heeds |
| For the Respondent Employer: | No one appearing |
| For the Respondent Union: | Harold Johnson |

**Decertification – Discretion of Board – Determination of successorship application currently filed with Board will determine whether imposed collective agreement applies to current employees – Employees entitled to know their status with respect to collective agreement prior to voting on rescission application – Board defers decision on rescission application until successorship application heard and determined.**

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

## REASONS FOR DECISION

### Background

**[1] Gwen Gray, Q.C., Chairperson:** On November 12, 2002, Jody Ann Heeds (the "Applicant") brought an application for rescission of the certification Order dated November 24, 1997 and issued to the Canadian Union of Public Employees, Local 1975 (the "Union") for all employees of Treats at its locations at the University of Saskatchewan in Saskatoon with certain exceptions. The application affects only Treats Café Lower Level at Place Riel, which location has undergone an apparent change in ownership from a corporation known as Four Star Management Ltd. ("Four Star") to Country Classic Fashions Ltd. ("Country Classic"). The former corporation, whose principal owner is Mr. Ron Cummings, maintains ownership of part of Treats in the Upper Level of Place Riel. Country Classic is owned by Ms. Debbie Mitchell.

**[2]** The Applicant originally filed her application with the Board on October 21, 2002, which was within the 30-60 days before the anniversary of the certification Order issued to the Union. As a result of a Board imposed first collective agreement on Treats (discussed below), the Board advised the Applicant that her application needed to be filed in the 30 – 60 day period prior to the anniversary of the effective date of that agreement, being January 1, 2000. The second filing date of November

12, 2002, conforms to that open period. The support evidence accompanying the application was collected in the six month period prior to the date of application.

**[3]** The Union has two applications outstanding in relation to Treats (both locations). In LRB File No. 220-98, the Union applied for and obtained an Order imposing a first collective agreement on Treats. The application was filed with the Board on November 3, 1998. Initially, the Board directed the parties to engage in conciliation. These efforts failed, and on April 28, 2000, the Board ordered that it would impose a collective agreement. Hearings with respect to the imposition of a first collective agreement took place on June 23, 2000. The Board issued its Reasons for Decision imposing a first collective agreement on September 18, 2001. On November 29, 2001, the Union sought clarification of the Reasons. The Union described its reasons for the requested clarification as follows:

> *The Collective Agreement provides for a retroactive wage increase to January 1, 2000 and January 1, 2001. Part of the business was sold on or about April 14, 2002 to Debbie Mitchell. Although Ms. Mitchell has not yet signed the Collective Agreement, we understand that she does not dispute her responsibility after April 14, 2001. However, she does not feel she is responsible for payments prior to April 14, 2001. She has also told us that there is an agreement between her and Mr. Cummings which establishes his responsibility for any wages owing prior to April 14, 2001. We have not seen this document nor do we know Mr. Cummings' position on this matter.*
>
> *It would appear that the assignment of responsibility for retroactive pay should be quite straight forward, but we think it is one that should be addressed by the Board so this Collective Agreement can be finally resolved.*

**[4]** A further hearing was conducted on February 25, 2002 with Reasons for Decision confirming the original Order issued on April 24, 2002. Four Star applied for judicial review of the Board's decision and this application was dismissed by the Court of Queen's Bench on December 12, 2002, a few days after the Board heard this application for rescission.

**[5]** The Union has also filed an application for successorship (LRB File No. 235-02). It claims that Country Classic is the successor to Four Star and is bound by the certification Order and collective agreement with respect to the operation of Treats Café Lower Level at Place Riel. The Union filed this application on November 22, 2002; the Board has not yet heard the application.

**[6]** This is the third application for rescission that employees at Treats have filed. The Board dismissed the first two applications under s. 9 of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the "*Act*"). In the last application, the Board found that both employers had improperly influenced or interfered with the application by failing to implement the terms of the imposed first collective agreement: see *Smith v. Canadian Union of Public Employees, Local 1975 et al.,* [2002] Sask. L.R.B.R. 1, LRB File No. 256-01.

**[7]** Country Classic did not appear at the hearing of the rescission application.

## Facts

**[8]** The Applicant is a regular part-time employee at Treats Café Lower Level Place Riel. She has worked at Treats since Ms. Mitchell took over the Café from Mr. Cummings in April 2001. She did not work under Mr. Cummings' management.

**[9]** The Applicant explained to the Board that employees in the Treats Café Lower Level Place Riel do not feel the need for a union. They feel caught in a conflict between the Union, the new employer and the old employer. The Applicant advised the Board that she had not discussed the application with her current employer or manager and was not influenced in any way by her in the bringing of this application.

**[10]** The Applicant acknowledged that the current employer does not pay her in accordance with the terms of the collective agreement imposed by the Board. She is paid $7.00 per hour while the agreement would require her to be paid $7.25 per hour.

**[11]** The Applicant criticized the Union's lack of contact with employees at Treats and suggested that it had not held union meetings, deducted union dues, elected shop stewards or the like. She was unaware of the location of the Union's bulletin board, its offices on campus, its regular meeting times and the like.

**[12]** Mr. Moran, staff representative for the Union, testified that he took over the servicing of the Union in September 2002 from Mr. Holmes. Mr. Moran met with two employees of Treats Café in September to discuss sick leave issues. At the meeting, he described the complicated legal issues

arising from the imposition of the collective agreement on Treats Café, and the intervening sale of part of the business to Country Classic, to the employees.

**[13]** Mr. Moran reported that he had been advised by Mr. Sharman, the Union's president, that Ms. Mitchell did not want to discuss labour relations matters directly with the Union but directed him instead to her solicitor, Mr. Beckman. Mr. Moran wrote to Mr. Beckman on October 1, 2002 requesting that Ms. Mitchell apply the collective agreement to employees retroactive to April 14, 2001, the alleged date of sale from Four Star to Country Classic. He also requested dates for collective bargaining with the Employer. Mr. Moran advised Mr. Beckman that if the retroactive wages were not paid back to April 14, 2001 by October 8, 2002, the Union would refer the matter to the Board.

**[14]** Mr. Beckman responded to Mr. Moran's letter by indicating that Country Classic agreed that it was bound by the certification Order but disputing that it was bound by the collective agreement. Mr. Beckman explained that his client takes this position because the Board had not imposed a collective agreement on Treats prior to April 14, 2001. He did indicate that he would seek dates for collective bargaining.

**[15]** As a result of Mr. Beckman's letter, Mr. Moran filed the application for successorship. The Union disagrees with Mr. Beckman's suggestion that the collective agreement does not apply to Treats Café and it is not interested in bargaining with the starting premise that no agreement currently applies to the employees in question.

**[16]** In October 2001, Mr. Holmes, then the staff representative for the Union, wrote to Ms. Mitchell outlining the terms of the collective agreement; noting that wage increases in excess of the collective agreement had been offered to certain employees; requesting information on those wage rates; seeking hours of work in order to calculate retroactive pay; and notifying Ms. Mitchell that new employees must join the Union and dues are required to be deducted effective January 1, 2000.

**[17]** Mr. Holmes had written Ms. Mitchell as well in May 2001. Her solicitor, Mr. Harradence, responded in June 2001 that "Ms. Mitchell takes that position that she was not told that there was a Union at the particular Treats franchise which she is in the process of purchasing. I would appreciate

it if you would provide me with some substantiation that there is in fact a collective bargaining agreement which covers the employees of this Treats franchise."

**[18]** Mr. Holmes provided Mr. Harradence with a copy of the certification order, a copy of the union security request, a copy of the Board's decisions on the first collective agreement application and the Board's decision on the first rescission application (LRB File No. 258-99). Mr. Holmes advised Mr. Harradence that the application for first collective agreement was still pending before the Board.

**[19]** Mr. Moran explained that the Union did not require the payment of union dues from employees of Treats Café until the first collective agreement was implemented. Mr. Moran disputed the Applicant's complaints that employees were unaware of the Union. He noted that this is the third attempt by employees to rescind the certification Order. In addition, employees have approached the Union for assistance but the Union has been left in a difficult position as a result of the on-going dispute over the implementation of the first collective agreement.

## Analysis and Decision

**[20]** The Union applied for first collective agreement assistance prior to Ms. Mitchell's company's purchase of Treats Café Lower Level at Place Riel. The issue of whether the collective agreement that was imposed by the Board applies to this owner is a matter that will be determined by the Board in the application for successorship brought by the Union in LRB File No. 235-02. We note that Ms. Mitchell's company acknowledges successorship but the issue of the application of the collective agreement is in dispute.

**[21]** It would seem to this Board that the successorship issues must be resolved before the Board can fairly determine the present application. In the previous rescission application, the Board found that the employers' failure to implement the imposed collective agreement amounted to interference or influence and it exercised its discretion under s. 9 to dismiss the rescission application.

**[22]** Although the process of obtaining a collective agreement has been a lengthy one for the employees in question, the Union is not responsible for the delays or for the complications that have arisen. The Union made Ms. Mitchell aware of the legal processes that were on going at the time of

the sale. It also attempted to have the various matters resolved by referring the issues to the Board in LRB File No. 220-98. Country Classic was notified of the hearing but did not participate in it: see Reasons for Decision, [2002] Sask. L.R.B.R. 229.

**[23]** In our view, the employees are entitled to know if the imposed collective agreement applies to them prior to considering whether they will vote to rescind the Union's certification. If the agreement does apply to them, they are also entitled to experience the benefits of the agreement. For these reasons, the Board will defer a decision on this application pending a hearing and determination of the successorship application.