

**Labour Relations Board  
Saskatchewan**

**UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1400, Applicant v.  
ARCH TRANSCO LTD. and BUFFALO CABS (1976) LTD. operating as REGINA  
CABS, Respondent**

LRB File Nos. 241-04, 242-04 & 243-04; November 24, 2004

Vice-Chairperson, Angela Zborosky; Members: Leo Lancaster and Patricia Gallagher

For the Applicant: Rod Gillies

For the Respondent: Brian Kenny, Q.C.

**Remedy – Interim order – Criteria – Balance of labour relations harm – Evidence established that employer reacted to employee’s improper and arguably illegal activity – Board finds that other employees would have been aware of employee’s activity and employer’s reaction and could not reasonably believe that employer’s reaction was unexpected or suspicious under circumstances – Union has not demonstrated labour relations harm as chilling effect typically caused by termination at height of organizing campaign not present.**

**Remedy – Interim order – Criteria – Balance of labour relations harm – Board considers labour relations harm suffered by employee - Damage suffered by employee strictly monetary – Board has jurisdiction, upon hearing applications proper, to award employee complete, full and effective relief should union prove that employer terminated employee in violation of *The Trade Union Act* – Board dismisses interim application.**

***The Trade Union Act*, ss. 5(f), 5(g), 5.3 and 11(1)(e).**

**REASONS FOR DECISION**

**Background:**

[1] Arch Transco Ltd., operating as Regina Cabs (the “Respondent”), operates a taxi company in Regina, Saskatchewan. In the last week of August, 2004, United Food and Commercial Workers Union, Local 1400 (the “Union”) commenced organizing the cab drivers of the Respondent, through the efforts of Ernest Gibson who drove a cab under the name of Regina Cabs. On September 9, 2004, Mr. Gibson’s use of the radio system was “suspended” following an incident at the Regina airport. The incident giving rise to the suspension, the terms of the suspension and Mr. Gibson’s ability to continue driving a cab are all in dispute. On October 14, 2004, the Union filed

applications pursuant to ss. 5 (d), (e), (f) and (g) and 5.3 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the “*Act*”) alleging that, in suspending Mr. Gibson and never calling him to take another fare, the Respondent had terminated Mr. Gibson’s employment, thereby committing unfair labour practices in violation of ss. 11(1)(a), (e), (f), (g) and (m) of the *Act*, and requesting that Mr. Gibson be reinstated and paid for monetary loss.

**[2]** The Union’s application states that, on September 9, 2004, Mr. Gibson was at the Regina airport, parked in the taxi stand, gathering support for the Union. The application also alleges that the Respondent was aware that Mr. Gibson had union cards signed and that, on approximately September 1 or 2, 2004, the Respondent discussed the loss of certain contracts it had should the drivers sign union cards. The Union sought remedies including the reinstatement of Mr. Gibson and payment of his monetary loss, an order to provide names, addresses and phone numbers of all employees, a prohibition against opposing any efforts of employees to engage in union activity, a prohibition against communication with employees regarding same, and lastly, an order directing the Respondent to post the Board’s order in the workplace.

**[3]** On October 29, 2004, the Union filed an application pursuant to s. 5.3 of the *Act* for interim relief, seeking, *inter alia*, the reinstatement of Mr. Gibson at his former rate of pay, hours of work and terms and conditions of employment, pending the hearing and disposition of the applications proper.

**[4]** The Respondent’s reply to the applications proper alleges, *inter alia*, that Mr. Gibson is not an employee of the Respondent, that Mr. Gibson was not engaged in union activity at the Regina airport on September 9, 2004, that Mr. Gibson was not permitted to continue using the radio system on that day because he was encouraging drivers to violate Regina airport regulations, that Mr. Gibson voluntarily chose to cease driving a cab on September 10, 2004 and that, while the Respondent heard a rumour that Mr. Gibson was interested in joining a union and had communicated the same to other drivers, it had no knowledge of the timeframe of these communications.

**[5]** The Board heard the application for interim relief on November 8, 2004. The applications proper have been scheduled to be heard on February 3 and 4, 2005.

**Evidence:**

[6] In support of the application for interim relief the Union filed an affidavit and a supplementary affidavit of Mr. Gibson, sworn October 14, 2004 and November 8, 2004 respectively. At the hearing the Union also indicated that it wished to rely on the evidence contained in its application and was advised by the Board that it could rely on those portions that were within the personal knowledge of the deponent. Prior to the hearing, the Respondent filed the affidavits of Sandra Archibald, Dave Senavitch, Doug Cross, Tom Molema and Brenda Molema, all sworn November 4, 2004. The following is a review of the affidavit material filed.

Affidavit of Ernest Gibson

[7] In his first affidavit Ernest Gibson deposed that he was employed as a driver with the Respondent and that, after the Respondent became aware that he was involved in an organizing drive with the Union, the Respondent terminated his employment. Mr. Gibson deposed that, on September 9, 2004, he had parked in the taxi stand at the Regina airport and “began speaking with other employees of the employer in an attempt to gather support for the Union.” He deposed that he “was successful in having other employees sign union support cards and the Employer was well aware of this fact” and that he has “never been given any reason for the termination from the employer.” Prior to September 9, 2004, he had not received any formal discipline or any complaints about his work.

Affidavit of Sandra Archibald

[8] Sandra Archibald is the operations manager of the Respondent, Arch Transco Ltd., which carries out the business of a taxi dispatch service under the name Regina Cabs. Buffalo Cabs (1976) Ltd. is a company with businesses not involved with this application. Ms. Archibald described the legal and business structure within and under which Regina Cabs operates. Essentially the operation of the business is governed by a City of Regina bylaw, *The Taxi Bylaw, 1994, No. 9635* (the “bylaw”), as well as certain regulations contained in *The Vehicle Administration Act, S.S. 1986, c.V-2.1*. The bylaw contemplates three possible parties delivering taxicab service, all of which are involved in the business of Regina Cabs. Regina Cabs is considered a taxicab broker (the “Broker”), which involves receiving calls for taxi service and dispatching

taxicabs. The other parties are a taxicab license owner (the “Owner”) who owns the vehicle that may operate as a taxicab and a taxicab driver (the “Driver”) who is licensed to operate the taxicab. In practice, some Owners drive their own vehicles (provided they have the driver’s license to do so) and some rent out one or more of their vehicles to Drivers for a fee on a shift-by-shift basis. Regina Cabs is not in the business of leasing licensed taxicab vehicles nor does it own any licensed taxicab vehicles.

**[9]** Under the bylaw, Brokers are responsible for ensuring “effective, efficient and quality taxi service” which includes addressing complaints from the public, customers, Owners and Drivers. They are responsible for dispatching only those Drivers who have a valid taxicab driver’s license driving a vehicle bearing a valid taxicab owner’s license. Prior to dispatching a Driver, the Broker must ensure that the Driver is appropriately licensed under the bylaw. To obtain a license to be a Driver, one must hold a driver’s license for the appropriate class in Saskatchewan, be covered by liability insurance for the statutory minimums under *The Vehicle Administration Act*, submit to a criminal record check and obtain confirmation of good character from the chief of police.

**[10]** Mr. Gibson, as a Driver, had a lease agreement with Tom Molema, an Owner affiliated with Regina Cabs. Ms. Archibald deposed that Mr. Molema told her that he had a verbal lease agreement with Mr. Gibson whereby Mr. Gibson would lease Mr. Molema’s licensed taxicab vehicle on a shift-by-shift basis for a fee set by Mr. Molema. Regina Cabs would not be involved in any arrangements between Drivers and Owners and would have no control over if and when Mr. Gibson might choose to work or how long he might work, as it does not schedule Mr. Gibson. Essentially, when Mr. Gibson chooses to work he declares this by transmitting over the two-way radio in Mr. Molema’s vehicle, his taxicab drivers license number, his location, and that he is available to be dispatched (called “booking on”). Once “booked on,” Mr. Gibson would enter a queue and be dispatched as trips become available. He is free to choose which zone to work in and whether he wishes to sit in a taxi stand to obtain fares. At any time, Mr. Gibson could also choose to use the vehicle for personal use. Hours of work and any other terms and conditions were part of an arrangement between Mr. Gibson and Mr. Molema.

**[11]** At Regina Cabs, Drivers are required to own or supply through a lease agreement the vehicle, a two-way radio and a taximeter. Drivers supply and pay for

their own gas and, along with Owners, are responsible for the vehicle's maintenance and repairs. Owners often require Drivers to pay their own insurance deductible for at-fault accidents. Drivers also have various obligations under the bylaw including the responsibility to ensure the vehicles are properly licensed.

**[12]** Ms. Archibald stated her opinion that Mr. Gibson is not and never has been an employee of Regina Cabs for the reasons stated above and because he is not paid any compensation by Regina Cabs, nor are any withholdings made for employment insurance premiums, CPP contributions, or workers' compensation premiums. She stated that Regina Cabs' connection with Mr. Gibson arises only pursuant to its regulatory obligations under the bylaw, other statutory obligations and his lease agreement with Mr. Molema. Mr. Molema and Mr. Gibson are solely responsible for the profitability of their business relationship.

**[13]** Ms. Archibald deposed as to her belief, based on information from management and dispatch personnel of Regina Cabs, that during the early morning rush hour of September 9, 2004, when dispatch was communicating with several taxis and handling 60-70 trips per hour, Mr. Gibson had made inappropriate comments that interfered with the dispatcher's ability to dispatch trips. At approximately 8:00 a.m., Mr. Gibson stated over the radio "that the Regina airport was an 'open taxi stand' and he was going to park there." In fact, the taxi stand at the airport is not an open stand (for any taxis) because it is only available to taxis who are affiliated with Capital Cabs, a broker that has a contract with the Regina airport for its taxicab vehicles to park in this reserved area and serve customers exiting the airport. It would be a breach of *The Airport Traffic Regulations*, Regina airport regulations and a Drivers' obligations under the bylaw, for Mr. Gibson or another Regina Cab taxicab to park in this taxi stand. On September 9, 2004 the dispatcher of Regina Cabs knew that this was not an open stand and that parking there by Mr. Gibson or any taxi affiliated with Regina Cabs was prohibited by law. The dispatcher immediately warned Mr. Gibson that that was not an open stand and he could not park in that stand.

**[14]** In her affidavit, Ms. Archibald outlines her further information that, approximately 10 minutes after the dispatcher's warning, Mr. Gibson arrived at the airport and parked in the reserved area, while he continued to make inappropriate

remarks over the radio, encouraging other Drivers to park their taxicabs at this stand, despite being warned by the dispatcher that he was misusing the radio. Regina Cabs “unauthorized Mr. Gibson from using the radio” because of his interference with dispatch and his continued insistence on illegally parking in the reserved area at the airport.

**[15]** Ms. Archibald further deposed as to her information and belief that dispatch then received a call from Capital Cabs reporting that it would be holding Regina Cabs responsible for Mr. Gibson parking there illegally and threatening to have Regina Cabs barred from dropping passengers off at the airport (which Regina Cabs was permitted to do). At this time, Regina Cabs called Mr. Molema to advise him of Mr. Gibson’s actions.

**[16]** Ms. Archibald also deposed as to her information and belief that, soon after Mr. Gibson arrived at the airport and while not authorized to use the radio, Mr. Gibson radioed that he was taking a customer from the airport to the east side of the city. When Mr. Gibson radioed that he was returning to the airport, the dispatcher again told him to “stay off the air.”

**[17]** Ms. Archibald deposed that, in the afternoon of September 9, 2004, she personally received a call from Dennis Sandoff, the airport operations officer of the Regina airport, to discuss what Ms. Archibald described as “the security incident” involving Mr. Gibson earlier that day at the airport. Mr. Sandoff advised Ms. Archibald that Mr. Gibson had refused to leave the reserved area even when the request was made by a constable with airport security. The Regina airport also issued a parking ticket. Mr. Sandoff also described a telephone conversation he had with Mr. Gibson where Mr. Gibson stated his intentions to have his taxi towed away from the area and that he would also cause a further disturbance there, which would require police intervention and an attempt to provoke his arrest by the police. Appended to Ms. Archibald’s affidavit is a copy of the incident report prepared by Mr. Sandoff that documents this occurrence. In that report, Mr. Sandoff described the content of his telephone conversation with Mr. Gibson on the afternoon of September 9, 2004 at p. 2 as follows:

*... he informed that it was his full intentions to be arrested to make media attention to his issue that he believes that Cab Drivers are*

*not receiving a percentage of the fares being collected. He also indicated that he was waiting to get the vehicle towed away and that he wanted the City Police to arrest him and that in fact he had considered using civil disobedience to ensure that took place. He then went on to suggest that he still fully intended on coming out to the Airport and other taxi stand locations to continue his cause and to get arrested for civil disobedience in order to get the attention he was looking for.*

**[18]** Ms. Archibald stated that she reviewed Mr. Gibson's behaviour with her management team and described their primary concerns being (i) his stated intention to cause further disruption at the airport which would involve the police and his arrest; and (ii) his involvement of the public in breaking of airport regulations, all at a time when security was of concern in the days leading up to the anniversary of September 11, 2001.

**[19]** In her affidavit, Ms. Archibald related Mr. Gibson's history as including driving a cab following the consumption of alcohol, threatening a female taxicab driver with violence and verbally threatening pedestrians while driving his cab. On September 9, 2004, Mr. Gibson had interfered with and harassed the dispatcher. Because of these concerns and because they had not yet received the incident report referred to above, the management team required further time to consider whether any further action would be taken in respect of Mr. Gibson. In the meantime they decided that he should not be authorized to use the radio dispatch system until all the circumstances could be reviewed, including the information to be provided in the incident report. Ms. Archibald deposed that, to her knowledge, Mr. Gibson has never indicated that he has abandoned the intention to cause a disturbance using the taxicab. She felt that anyone who let Mr. Gibson drive would be assuming the risks and repercussions associated with his conduct.

**[20]** Ms. Archibald further deposed that Mr. Molema informed her that Mr. Gibson called him to resign his lease with him. Mr. Gibson did not contact Regina Cabs to advise of same. Ms. Archibald was advised by Dave Senavitch that Mr. Gibson contacted dispatch on September 13, 2004 and was advised by Mr. Senavitch that his "book off" ended that day. To the best of Ms. Archibald's knowledge, Mr. Gibson has not since booked on or communicated with Regina Cabs.

Affidavit of Dave Senavitch

**[21]** Dave Senavitch is a dispatcher with Regina Cabs. On September 13, 2004, Mr. Senavitch received a brief telephone call from Mr. Gibson asking when he could drive a taxicab. Mr. Senavitch replied that Mr. Gibson could book on at any time and the telephone call ended. At no time had Mr. Senavitch been advised by any one with Regina Cabs that dispatch services could not be provided to Mr. Gibson.

Affidavit of Brenda Molema

**[22]** Brenda Molema is a cab driver and is the spouse of Tom Molema. Ms. Molema deposed that, on Friday, September 10, 2004 at approximately 4:45 p.m., she received a telephone call from Mr. Gibson during which Mr. Gibson stated that he resigned. Mr. Gibson briefly discussed his intention to stop leasing Mr. Molema's vehicle but she advised Mr. Gibson that he needed to speak to Mr. Molema directly because his taxicab lease agreement was with him and not her. Ms. Molema further deposed that, while she was on the telephone call with Mr. Gibson, Mr. Molema had returned home and therefore she handed the telephone to him to speak to Mr. Gibson.

Affidavit of Tom Molema

**[23]** Mr. Molema owns a taxicab license and leases a second license from Regina Cabs. He owns two vehicles, which he operates as taxicabs, one under his license, and one under the leased license. Both cabs are affiliated with Regina Cabs (pursuant to the bylaw) and he receives dispatch services in return for a fee. Mr. Molema described the booking on procedure used by Drivers in the same manner as described by Ms. Archibald and confirmed that Drivers choose if and when they wish to operate as a taxi service and that, once booked on, Regina Cabs will dispatch the Driver as fares become available for so long as the Driver wishes to remain booked on. He also indicated that, while booked on, Drivers may wait for fares in public places and pick up customers who hail the taxicab. Mr. Molema described his verbal lease agreement with Mr. Gibson whereby Mr. Gibson paid a set fee for each shift he leased and that he paid for his own gas. While leasing the vehicle, Mr. Gibson could book on with Regina Cabs at his discretion.



**[24]** Mr. Molema deposed that, on September 9, 2004 while Mr. Gibson had leased his vehicle and was booked on with Regina Cabs, he received a phone call at home from Lawrence Lavalley, a manager with Regina Cabs. Mr. Lavalley advised him that Mr. Gibson had improperly parked Mr. Molema's taxicab in the taxi stand at the Regina airport reserved for other contracted taxicabs and that Mr. Gibson was encouraging other taxicab drivers to do the same. Mr. Molema was also advised that Mr. Gibson refused to move the taxicab when requested to do so by the airport authorities and that Mr. Gibson had been booked off by Regina Cabs.

**[25]** Mr. Molema deposed that, following this conversation with Mr. Lavalley, he drove to the airport to investigate the situation. While traveling there, he learned that Mr. Gibson had taken a fare from the airport to the east side of the city and would be going to the Leader Post. Mr. Molema met up with Mr. Gibson at the Leader Post where he was waiting to speak with a reporter. Mr. Molema stated that he spoke to Mr. Gibson about the incident at the airport and Mr. Gibson stated his intention to take the reporter back to the airport and park again in the reserved taxi stand area. Mr. Molema took the taxicab home with him, advising Mr. Gibson "there was no sense in going back to the Regina airport because by that time, Mr. Gibson had already been booked off by Regina Cabs for the rest of his September 9<sup>th</sup> shift."

**[26]** Mr. Molema deposed that, at approximately 5:00 p.m. on September 9, 2004, Mr. Lavalley contacted him to advise that Mr. Gibson "was not authorized to drive until Monday, September 13, 2004." Mr. Molema phoned Mr. Gibson and communicated Regina Cabs' decision to him.

**[27]** Mr. Molema deposed that, on September 10, 2004, he met with officials from the Regina airport who advised him, as Owner of the taxicab driven by Mr. Gibson, of the incident and warned that Mr. Gibson must not park in the reserved area again. Mr. Molema was given a letter from the Regina airport (appended to his affidavit) that referenced the incident, the fine that was issued and a warning that should there be a repeat occurrence or the fine was not paid, the vehicle would be removed and stored until the matter was resolved.

**[28]** Mr. Molema further deposed that, on September 10, 2004 at approximately 5:00 p.m., he arrived home to find his spouse, Brenda Molema on the telephone. She handed the phone to him and it was Mr. Gibson who advised him that he was resigning. Mr. Molema understood that to mean that Mr. Gibson was terminating their lease agreement. As such, Mr. Molema made arrangements to meet with Mr. Gibson to obtain the car keys. Mr. Molema took his friend and taxicab driver, Doug Cross to Mr. Gibson's residence. Mr. Molema described the 15-minute meeting as "not heated or confrontational" and involved Mr. Molema confirming that Mr. Gibson wanted to resign the lease of the taxicab and ensuring that Mr. Gibson knew that he was not firing him. Mr. Molema deposed that Mr. Gibson agreed that he was resigning and he handed over the keys to Mr. Molema. Mr. Gibson still owes Mr. Molema several days of lease payments.

#### Affidavit of Doug Cross

**[29]** Doug Cross is a taxicab license lease owner and taxicab driver affiliated with Regina Cabs. Mr. Cross deposed that, as a friend of Mr. Molema's and at his request, he attended a meeting with Mr. Molema at Mr. Gibson's residence on September 10, 2004. At this meeting, which he described as casual, Mr. Gibson advised Mr. Molema that he was quitting driving for Mr. Molema and Mr. Gibson returned the taxicab keys to Mr. Molema.

#### Supplementary Affidavit of Mr. Gibson

**[30]** In his supplementary affidavit filed after receiving the affidavits filed on behalf of the Respondent, Mr. Gibson denied certain allegations made by Ms. Archibald in her affidavit which include his history of improper conduct and that he harassed the dispatcher on September 9, 2004 (outlined in paragraph 19 of these Reasons) and with respect to his alleged inappropriate comments on the radio when he arrived at the airport on September 9, 2004 (outlined in paragraph 14 of these Reasons). He further deposed that, as a result of the "suspension" he received for September 9 – 12, 2004, he was forced to turn the keys back to the Owner of the cab, Tom Molema, because his lease agreement with Mr. Molema "obligated [him] to pay him sixty dollars (\$60.00) for each shift [he] had with his taxi cab and same had to be paid upfront." He deposed that as a result of his suspension he would have had to pay Mr. Molema \$180.00 upfront

before he could use his cab on September 13, 2004. He states “because of this suspension, and the fact that Regina Cabs ‘booked’ me off until September 13, 2004, I had no money to pay the one hundred and eighty dollars (\$180.00).” Lastly he states that the suspension, having resulted in total impecuniosity, necessitates an interim order for monetary loss in addition to the interim order for reinstatement.

**[31]** It should be noted that this represents the extent of Mr. Gibson’s denials of the information contained in the affidavits filed on behalf of the Respondent, which includes the extensive evidence concerning Mr. Gibson’s conduct at the Regina airport on September 9, 2004 and the circumstances of his termination of the lease agreement with Mr. Molema.

**Arguments:**

**[32]** Mr. Gillies, on behalf of the Union, maintained that the evidence established a prima facie case that the Union was involved in an organizing drive commencing the last week of August, 2004, that Mr. Gibson was leading that drive and was involved in obtaining signed support cards from the drivers of Regina Cabs and that the Respondent was aware of these facts. The Union maintained that Mr. Gibson was involved in union activity at the airport on September 9, 2004 and that the Respondent, in suspending Mr. Gibson for six hours on that day and for a further period of three days to September 13, 2004, effectively terminated Mr. Gibson’s employment by a constructive dismissal due to the lack of funds available to Mr. Gibson to continue making his taxicab lease payments to the taxicab owner, Mr. Molema. The Respondent is therefore in violation of ss. 11(1)(a), (e), (f), (g) and (m) of the *Act*.

**[33]** In its interim application, the Union asserted that there was a serious issue to be tried in relation to the question whether the Respondent could establish that Mr. Gibson was terminated for other good and sufficient reason, untainted by any anti-union sentiment. At no time did the Respondent advise Mr. Gibson of the reasons for his termination and he had no disciplinary record. The Union maintained that the balance of convenience and the potential for labour relations harm weighed in favour of reinstating Mr. Gibson and making a payment for his interim loss until such time as the application proper could be heard and determined. The termination of Mr. Gibson caused obvious harm to Mr. Gibson and had the potential to create a chilling effect on

the organizing drive. Finally, the Union asserted that, on the basis of the reasoning in *CAW – Canada v. United Cabs Ltd. et al.*, [2001] Sask. L.R.B.R. 108, LRB File No. 236-00, Mr. Gibson was an employee of the Respondent and entitled to the protection and remedies contained in the *Act*.

**[34]** Mr. Kenny filed a written brief at the hearing and responded on behalf of the Respondent using the two-part test enunciated in *Hotel and Restaurant Employees Union, Local 206 v. Canadian Hotels Income Properties Real Estate Investment Trust #19 Operations Ltd.*, [1999] Sask. L.R.B.R. 190, LRB File No. 131-99. The Respondent maintained that, on a preliminary and tentative assessment of the merits, the Union had not raised a serious or arguable issue to be considered and, as such, its application should be dismissed. It is the position of the Respondent that Mr. Gibson was not an employee of the Respondent within the meaning of the *Act* thereby rendering the application without merit. At best, Mr. Gibson may have an employment relationship with Mr. Molema but there are none of the typical indicators that would suggest that Mr. Gibson and Regina Cabs have an employment relationship. In the alternative, should Mr. Gibson be determined to be an employee protected by the *Act*, the Respondent maintained that it did not dismiss or terminate Mr. Gibson for union activity or otherwise but rather Mr. Gibson voluntarily terminated any employment relationship that existed between him and the Respondent and thus the application is without merit.

**[35]** With respect to the issue of labour relations harm caused by the termination and the failure to order interim reinstatement of Mr. Gibson, the Respondent maintains that the Union cannot show any prejudice that cannot be fairly addressed if it is required to wait for the determination of the applications proper. It is the position of the Respondent that, even apart from the fact that Mr. Gibson was not an employee of the Respondent and had voluntarily terminated any employment relationship that may have existed, the fact that he quit driving a taxicab has nothing to do with his role as a union organizer and supporter and therefore no irreparable harm will be suffered by dismissal of the interim application. In view of the summary nature of the main application, interim applications should not be used to facilitate an organizing drive where irreparable harm has not been established. The Respondent also maintained that reinstatement of Mr. Gibson would cause it irreparable harm in that it suggests that reasonable requests of the Respondent can be met with disruptive and outrageous

conduct as long as a union organizing drive is in place. The respondent also argued that any chilling effect on support for the Union is the result of deliberate conduct by Mr. Gibson who instigated the September 9, 2004 incident leaving the Respondent with little alternative but to withdraw Mr. Gibson's authorization to access dispatch service to investigate further and ensure its regulatory obligations were met, particularly in light of Mr. Gibson's stated intentions to repeat this behaviour and cause further disruption, which is likely to occur even following reinstatement. Such illegal conduct could have serious potential negative effects on the business of the Respondent.

**Statutory Provisions:**

[36] Relevant provisions of the *Act* include the following:

5. *The board may make orders:*

(d) *determining whether an unfair labour practice or a violation of this Act is being or has been engaged in;*

(e) *requiring any person to do any of the following:*

(i) *refrain from violations of this Act or from engaging in any unfair labour practice;*

(ii) *subject to section 5.1, to do any thing for the purpose of rectifying a violation of this Act, the regulations or a decision of the board;*

(f) *requiring an employer to reinstate any employee discharged under circumstances determined by the board to constitute an unfair labour practice, or otherwise in violation of this Act;*

(g) *fixing and determining the monetary loss suffered by any employee, an employer or a trade union as a result of a violation of this Act, the regulations or a decision of the board by one or more persons, and requiring those persons to pay to that employee, employer or trade union the amount of the monetary loss or any portion of the monetary loss that the board considers to be appropriate;*

5.3 *With respect to an application or complaint made pursuant to any provision of this Act or the regulations, the board may, after giving each party to the matter an opportunity to be heard, make an interim order pending the making of a final order or decision.*

...

11(1) *It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:*

(a) *in any manner, including by communication, to interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of any right conferred by this Act;*

...

(e) *to discriminate in regard to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including discharge or suspension or threat of discharge or suspension of an employee, with a view to encouraging or discouraging membership in or activity in or for or selection of a labour organization or participation of any kind in a proceeding under this Act, and if an employer or an employer's agent discharges or suspends an employee from his employment and it is shown to the satisfaction of the board that employees of the employer or any of them had exercised or were exercising or attempting to exercise a right under this Act, there shall be a presumption in favour of the employee that he was discharged or suspended contrary to this Act, and the burden of proof that the employee was discharged or suspended for good and sufficient reason shall be upon the employer; but nothing in this Act precludes an employer from making an agreement with a trade union to require as a condition of employment membership in or maintenance of membership in the trade union or the selection of employees by or with the advice of a trade union or any other condition in regard to employment, if the trade union has been designated or selected by a majority of employees in any such unit as their representative for the purpose of bargaining collectively;*

...

(m) *where no collective bargaining agreement is in force, to unilaterally change rates of pay, hours of work or other conditions of employment of employees in an appropriate unit without bargaining collectively respecting the change*

*with the trade union representing the majority of employees in the appropriate unit;*

### **Analysis and Decision:**

[37] We are of the opinion that the application for interim relief should be dismissed. While it is highly questionable whether, on the evidence filed, the Union has established that there is an arguable case in relation to the question of whether Mr. Gibson was terminated in whole or in part for his union activity, the Board finds that the balance of labour relations harm weighs in favour of the Respondent and not granting an order for interim reinstatement and payment of monetary loss pending the hearing of the applications proper.

[38] There have been numerous decisions over recent years involving applications for interim relief in circumstances where an employee has been terminated while exercising rights under the *Act*. In *Canadian Union of Public Employees v. Del Enterprises*, [2004] Sask. L.R.B.R. ---, LRB File Nos. 087-04 to 092-04 (not yet reported), the Board summarized the principles applicable to such a determination as follows, at paragraphs 20 to 23:

*[20] The test for the granting of interim relief was enunciated by the Board in Regina Inn, supra, [Hotel Employees and Restaurant Employees Union, Local 206 v. Canadian Hotels Income Properties Real Estate Investment Trust #19 Operations Ltd. (o/a Regina Inn), [1999] Sask. L.R.B.R. 190, LRB File No. 131-99], as follows, 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.

[21] **On an application for interim relief we are not charged with determining whether the allegations have been proven, but rather with whether the status quo should be maintained pending the final determination of the main application: an interim order is intended to be preservative rather than remedial.** As the Board observed in Hotel Employees and Restaurant Employees Union, Local 206 v. Chelton Suites Hotel (1998) Ltd., [2000] Sask. L.R.B.R. 434, LRB File Nos. 091-00, 110-00, 125-00, 139-00, 144-00 & 145-00, at 444, **an interim order must be consonant with the preservation and fulfillment of the objectives of the Act as a whole and of the specific provisions alleged to have been violated.** The Board stated at 443:

Any interim order must first and foremost be directed to ensuring the fulfillment of the objectives of the Act pending the final hearing and determination of the issues in dispute. This includes not only the broad objectives of the Act but also the objectives of those specific provisions alleged to have been violated.

[22] Accordingly, and as iterated in Chelton Suites Hotel, *supra*, at 446, each application for interim relief is determined according to its specific facts. Certain types of applications have particular factors that the Board takes into account in assessing the application according to the test. The factors considered are driven by the specific objectives of the particular statutory provisions alleged to have been violated. In applications such as the present one, where it is alleged that employees were terminated for activity in support of the union, or in attempted intimidation of union supporters, **the Board has considered the potential for a negative effect on the status of the union and the potential for loss of support and confidence, as well as the impact on the individual employees terminated. The fragility of the union's status and strength of support, and the vulnerability of its supporters to pressure exerted by the employer prior to certification, is generally accepted and not seriously disputed.**

[23] In Amalgamated Transit Union, Local 1624 v. Trentway-Wagar Inc., [2000] C.I.R.B.D. No. 10 (February 21, 2000), a case similar to the present one in that the union's key organizers were dismissed at the height of the organizing campaign, the Canada



Board approved of an approach to considering applications for interim relief that specifically entailed consideration of the objectives of the statutory provisions in issue. With respect to the discharge of a union organizer, it approved of the following statement by the Ontario Board in Tate Andale Canada Inc., [1993] OLRB Rep. Oct. 1019:

52. *In the instant case, there is not much doubt that the applicant meets the threshold. **Where the union's two key organizers are unexpectedly discharged at the height of the organizing campaign, there is a prima facie case of a breach of the Act, and there is reasonable cause for employees to believe that an unfair labour practice has occurred**; moreover, in cases of this kind, **where the employer bears the legal onus of establishing that it has not contravened the Act, it is hardly surprising that the union requests that the pre-discharge status quo be maintained until the employer meets the statutory onus cast upon it.** If the employer is obliged to establish that its removal of employees from the workplace was not unlawful, there is nothing counter-intuitive about keeping them there until it does so. ...*
53. *In other words, whether or not the employer is ultimately successful on the main application, the sequence of events under review is likely to inhibit the free exercise of employee rights, unless there is some positive and tangible assurance that those statutory rights will be protected. If an outsider regards these discharges as at least suspicious, an employee in the workplace would reasonably fear the consequences of his/her involvement with the union. ... whatever the motive for these discharges may actually have been, there is likely to be an adverse impact in the workplace until the aggrieved employees' rights are resolved through adjudication.*

[emphasis added]

[39] On an application for interim relief, it is not for the Board to weigh evidence to make factual determinations. It is sufficient at this stage that the Board find that the Union raised an arguable case that Mr. Gibson was terminated by the Respondent in whole or in part for union activity.

**[40]** There is some evidence that Mr. Gibson was engaged in union activity through his involvement in an organizing drive at the Respondent's workplace commencing at the end of August, 2004. Few details of the organizing drive were provided except to say that some cards were signed and that Mr. Gibson was attempting to speak to employees at the airport on September 9, 2004. The Respondent acknowledges that it had information that Mr. Gibson was involved in an organizing drive although it was uncertain as to the timing of that activity. In the context of this case the Union must also establish that there is an arguable issue over whether Mr. Gibson is an employee of the Respondent, whether Mr. Gibson was terminated or he resigned, whether his termination was as a result of union activity and whether Mr. Gibson was "constructively dismissed" by reason of the direction to stop him from using the radio system on September 9, 2004. In this case, the evidence filed on behalf of the Union is extremely weak and lacking sufficient detail in response to the Respondent's evidence in relation to all these issues. It must also be noted that there was uncontradicted evidence that Mr. Gibson resigned his relationship/arrangement with Mr. Molema very soon after the Respondent took action to take him off the radio to investigate his behaviour, which occurred prior to any decision with respect to Mr. Gibson's continued eligibility to use the Respondent's dispatch service. In his evidence Mr. Gibson simply states that he was "terminated" but he provides no factual basis in the materials filed to support that assertion. Although Mr. Gibson fails to deny his conduct at the airport as described by the Respondent, as well as the circumstances of the ending of his relationship with Mr. Molema, in argument the Union raised the possibility of a constructive dismissal resulting from Mr. Gibson's suspension from the radio dispatch system.

**[41]** Even though it is not open to the Board to weigh evidence on an interim application, the Board is unable to conclude with reasonable certainty that there is an arguable case or a serious issue to be tried on the applications proper. In light of the Board's conclusion that follows concerning labour relations harm, the Board finds that it is not necessary for the Board to reach a decision on the question of whether there is an arguable case or a serious issue to be tried.

**[42]** While it is possible that with additional evidence the Union might establish at the hearing of the applications proper that Mr. Gibson was an employee of Respondent, that he was terminated (or constructively dismissed) by the Respondent and that termination was motivated in whole or in part by his activity as a union organizer, the labour relations harm of granting the requested interim relief outweighs that of not granting such relief. The Board finds that there is no chilling effect on the employees' perception of their ability to exercise their rights under the *Act* without fear of retribution by the Respondent and the ability of the Union to protect them if they choose to engage in such action. Further, the Board finds that there is no harm to Mr. Gibson that cannot be remedied at the hearing of the applications proper should the Union succeed with its application.

**[43]** In an attempt to balance the labour relations harm in a case such as this, where there is some contradictory evidence that cannot be resolved, the Board will accept the undisputed evidence and reject that evidence that is so lacking in detail or factual foundation that the statements simply cannot be supported. The Respondent suggests that it will suffer irreparable harm if Mr. Gibson is reinstated in that it becomes unable to take action to investigate complaints about the conduct of its licensed drivers, enforce reasonable rules of conduct or directives of dispatch and prevent illegal activity by the drivers it dispatches, simply because individuals are engaged in union activity around the time of their alleged improper conduct. The Board finds that there is compelling and undisputed evidence to establish that Mr. Gibson was engaged in improper and arguably illegal activity that presented the Respondent with a legal problem, that required further investigation and possible further action against Mr. Gibson, as well as damage to its reputation. Mr. Gibson must take responsibility for his actions at the airport. Even if one accepts that Mr. Gibson also spoke to drivers at the airport that day in an attempt to gather support (which is questioned because there should not be any other Regina Cabs drivers present at the taxi stand where Capital Cabs has the exclusive right to service and there was no evidence of same), the Board cannot sanction the use of union activity as a shield for such improper or illegal conduct. Furthermore, there was undisputed evidence that Mr. Gibson intended to continue that improper conduct and even cause it to escalate. In light of this, it could reasonably be expected that should Mr. Gibson be reinstated he will continue to engage in this course of disruptive conduct, which can be more harmful to labour relations than the harm

caused by removing Mr. Gibson from the use of the radio system. Should the Union be successful with the applications proper, this “cooling off” period may actually assist the parties.

**[44]** The Board also finds that, in weighing the potential harm to the Respondent if an order is granted for Mr. Gibson’s interim reinstatement, it is unlikely that employees’ fear of retribution for involvement with the Union outweighs any potential harm to the Respondent. In order to fulfill the objectives of the *Act*, it is necessary to preserve the integrity of interim orders of reinstatement for those circumstances where the employee is exercising his or her rights in a lawful and appropriate manner. On September 9, 2004, other drivers would have heard Mr. Gibson’s comments on the radio system and his encouragement to act in violation of the law or at least the agreement Capital Cabs has with the airport. The drivers would also have heard that dispatch attempted more than once to have Mr. Gibson stop using the dispatch system that day. Mr. Gibson was informed of the nature of the conduct giving rise to the Respondent’s decision to remove his authorization to use the radio system on September 9, 2004 at the time of the occurrence. It is very likely the other drivers had knowledge of Mr. Gibson’s conduct on the day in question and its impropriety and, as such, an order dismissing the interim application is unlikely to cause a potential loss of support for and confidence in the Union.

**[45]** In *Service Employees’ International Union, Local 336 v. Swift Current District Health Board*, [1995] 1<sup>st</sup> Quarter Sask. Labour Rep. No. LRB File No. 011-95, the Board dismissed an application for an interim order in circumstances where a technological change was alleged to have occurred. While the Board concluded that it need not determine on an interim application whether a significant number of employees were affected, “... *the Union must at least allege that to be the case and put forth a reasonable factual basis to support its allegation.*” In this case both the Union and Mr. Gibson failed to put forward information about the possible chilling effect on the organizing drive. As a result of this failure, combined with the likely knowledge of the taxi drivers of Mr. Gibson’s activities on September 9, 2004, one cannot automatically conclude that the Respondent’s conduct threatened or thwarted the employees’ access to collective bargaining or the exercise of rights under the *Act*. In the Board’s view, the sequence of events in this case is not likely to inhibit the free exercise of employee rights

under the *Act*, should the interim application be dismissed. Any possible harm in this regard can be addressed fairly expeditiously as the hearing of the applications proper has been set for February 3 and 4, 2005.

**[46]** The facts of this case distinguish it from other cases where a union organizer was terminated at the height of an organizing campaign. The Respondent's directive to remove Mr. Gibson's authorization to use the radio on September 9, 2004, and the timing of that directive could not reasonably lead the drivers to believe that the suspension was unexpected or suspicious. For the reasons stated above, the "chilling effect" typically caused by a termination at the height of an organizing campaign does not appear to be present in this case.

**[47]** It is also necessary to consider the labour relations harm, if any, suffered by Mr. Gibson. In *Retail, Wholesale and Department Store Union, Local 455 v. Tai Wan Pork Inc.*, [2000] Sask. L.R.B.R. 219, LRB File No. 076-00, the Board determined that the Union was unable to demonstrate labour relations harm given the strength of its relationship with the Employer. The Board finds that, in the present case, labour relations harm to the Union has not been demonstrated in that it is unlikely that there has been a chilling effect on support for the Union for the reasons stated above. There still remains the question of whether Mr. Gibson suffers such harm. In *Tai Wan Pork, supra*, the Board stated at p. 222:

*[11] The Union raises an arguable case in this instance under ss. 44 and 46 of the Act. However, with respect to the labour relations harm, it is our view that this matter can be remedied by a monetary order should the Employer be found to have engaged in unlawful lock-out or to have failed to abide by the terms of s. 46 of the Act. Where the remedy relates solely to a monetary claim, the Board will not issue an interim Order.*

...

*[14] If an interim Order was granted by the Board, the remedial consequences of the main application would be complete, except perhaps for an assessment of some aspects of the monetary claim. This result dissuades the Board from proceeding solely on the basis of affidavit material and brief oral arguments. The issues are more complex both factually and legally and deserve a full hearing before remedial relief of this magnitude is granted.*

**[48]** In the present case, the Board finds that the damage suffered by Mr. Gibson is strictly monetary and the Board has jurisdiction, upon hearing the applications proper, to award him complete, full and effective relief should the Union prove that Mr. Gibson was terminated by the Respondent in violation of the *Act*. The facts are sufficiently complex that a full hearing is needed to fully assess appropriate remedies should the Board find a violation of the *Act*.

**[49]** Even if there was significant labour relations harm experienced by the Union and/or Mr. Gibson, the Board is unable to fashion an order that would be preservative in nature. In *International Brotherhood of Electrical Workers, Local 2067 v. SaskPower*, [1998] Sask. L.R.B.R. 656, LRB File No. 199-98, the Board, in considering whether the union had suffered irreparable harm, determined that the purpose of an interim order is to preserve the status quo which, in cases such as these, involves an order of reinstatement of the employee until the application proper can be heard. In the *SaskPower* case, *supra*, two employees were suspended from work for allegedly disobeying a work related direction. Immediately following this suspension the employer locked out all the employees and the lockout remained in effect at the time of the hearing of the interim application. In dismissing the application the Board stated at p.661:

*In these circumstances, an interim Order could not restore the status quo which existed before the Employer disciplined Mr. Labensky and Mr. Sears because of the intervening general lock-out. The continuing harm to the Union, in terms of any chill of union activity which might be experienced by its members as a result of the discipline of Mr. Sears and Mr. Labensky, is confined to the period prior to the general lock-out and cannot be cured by an interim Order.*

**[50]** In the present case, if the action of the Respondent can be characterized as a suspension of sorts, Mr. Gibson's intervening "resignation" of his arrangement with Mr. Molema prevents the Board from making an order capable of returning the parties to the status quo. An order directed to the Respondent for reinstatement of Mr. Gibson does not restore the status quo because Mr. Gibson has no licensed taxi to drive. Further, or in the alternative, if the uncontradicted evidence of the Respondent that Mr. Gibson has never been refused dispatch services (at least from September 13, 2004) is accepted, an order of the Board to reinstate Mr. Gibson is simply not necessary. Mr.

Gibson cannot claim that his position or interests as they existed prior to his being unauthorized from using the dispatch system on September 9, 2004, (or September 9 to 13, 2004) have been harmed. Further, as a practical consideration, the Board has no ability to order that the Respondent provide Mr. Gibson with a licensed taxi to drive, as there is no evidence the Respondent is in the business of leasing taxis.

**[51]** For these reasons, we have determined that the application for interim relief is dismissed.

**DATED** at Regina, Saskatchewan this **24th** day of **November, 2004**.

**LABOUR RELATIONS BOARD**

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Angela Zborosky, Vice-Chairperson