**Labour Relations Board**
**Saskatchewan**

**INTERNATIONAL UNION OF OPERATING ENGINEERS, HOISTING & PORTABLE & STATIONARY, LOCAL 870 Applicant v. ARROWHEAD STEEL ERECTORS LTD., Respondent**

LRB File No. 013-06; August 15, 2006
Chairperson, James Seibel; Members: Bruce McDonald and Joan White

For the Applicant: Jim Chisholm
For the Respondent: Robert Gumulcak

**Employee – Status – Lay-off – Employer called union hall each weekend it required workers, union dispatched whichever members were eligible for dispatch each time employer called and employer routinely laid workers off after each weekend's work - Union member not employee of employer on Monday following weekend of work as no substantial or tangible continuing employment connection with employer – Board dismisses application for certification.**

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

## REASONS FOR DECISION

**Background and Facts:**

**[1]** On February 6, 2006, International Union of Operating Engineers, Hoisting & Portable & Stationary, Local 870 (the "Union") filed an application with the Board pursuant to ss. 5(a), (b) and (c) of *The Trade Union Act*, R.S.S. 1978, c. T-17, as amended (the "*Act*") seeking to be designated as the certified bargaining agent for employees of Arrowhead Steel Erectors Ltd. (the "Employer") in the standard construction industry operating engineers bargaining unit[1].

**[2]** In its application the Union estimated that there were two employees in the proposed bargaining unit as at the date of the filing of the application and claimed to have the support of a majority of the employees. However, the statement of employment and the reply filed on behalf of the Employer indicated there were no employees in the proposed bargaining unit.

**[3]** The application was adjourned from its original hearing date of February 26, 2006 and was heard by the Board on April 7, 2006.

**Evidence:**

**[4]** Jim Chisholm, on behalf of the Union, stated that the Union relied upon the evidence filed with the application and also sought to cross-examine Robert Gumulcak on the reply and statement of employment that Mr. Gumulcak had declared and filed on behalf of the Employer.

**[5]** Mr. Gumulcak is one of the principals and shareholders of the Employer and its chief operating officer and manager. The Employer had a contract to install certain structures in the Hitachi plant in Saskatoon; because the plant continued to operate, the work could only be done on weekends and then only on certain, not necessarily consecutive, weekends. The Employer would engage qualified overhead crane operators from the Union's hiring hall. It was the Employer's practice to have the operators start work on Friday evening and then to lay them off at the end of the work day on Sunday for one or more weeks, depending on whether or not the work continued the following weekend. Mr. Gumulcak said that employees are issued a record of employment for Employment Insurance purposes indicating the reason for issuance as lay off with no expected date of recall. Three record of employment forms for three different persons were entered in evidence by the Union indicating in each case the first day worked and that the last day worked was the same day or the next day (i.e., that the employee worked for only one or two shifts on a weekend); however, while the forms indicate the reason for issuance as lay-off, two of them indicate that they were not signed by a representative of the Employer (nor presumably given to the employee) for up to 40 days after the last day of work.

**[6]** The Employer had engaged Bill Chomiak to perform some of this work on at least three occasions by dispatch from the Union's hiring hall. Mr. Gumulcak confirmed that Mr. Chomiak was working for the Employer on Saturday, February 4, 2006. Mr. Gumulcak was present at the Hitachi site on that day. One of the record of employment forms entered in evidence by the Union was with respect to a previous

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[1] Viz, "all operating engineers, operating engineer foremen, and operating engineer apprentices". See, *International Union of Operating Engineers,Hoisting & Portable & Stationary, Local 870 v. Coopers Crane Rental Ltd*., [2006] Sask.

engagement of Mr. Chomiak by the Employer: it indicated a first day worked of December 28, 2005, a last day worked of December 29, 2005, and that the record of employment was signed by the Employer on December 30, 2005.

**[7]** Mr. Chomiak testified that he has been a member of the Union for more than 40 years. He said that he was asked by the Union's dispatcher on Thursday, February 2, 2006 to commence work for the Employer on Saturday, February 4, 2006; he said that he was not advised as to the duration of the job, but he confirmed that the previous occasions on which he worked for the Employer at the Hitachi plant were all on weekends only, and that he had been laid off at some point after each occasion before his next engagement. On the last occasion he attended at work at the Hitachi plant on Saturday, February 4, 2006 for an 8-hour shift. He did not work on Sunday, February 5, 2006. He was not provided a verbal or written notice of lay-off that day and did not receive the record of employment from the Employer until Wednesday, February 8, 2006. The record of employment which Mr. Chomiak received from the Employer on Wednesday, February 8, 2006 indicated that the reason for issuing the record of employment was lay-off with no expected date of return.

**Statutory Provisions:**

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

> *5 The board may make orders:*
>
> *(a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit or a subdivision thereof or some other unit;*
>
> *(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;*

**Arguments:**

**[9]** On behalf of the Union, Mr. Chisholm argued that in the circumstances it was apparent that the operators engaged by the Employer, and specifically Mr. Chomiak, were not notified that the employment relationship with the Employer was over until they received a record of employment from the Employer and that there was no evidence to the contrary.

**[10]** On behalf of the Employer, Mr. Gumulcak argued that, because the Hitachi work was only done on weekends – and not every weekend -- the employees were laid off because it was not known when the next weekend would be during which work would continue.

**Analysis and Decision:**

**[11]** The issues we must determine in this case are whether Mr. Chomiak was an employee of the Employer on the date the application for certification was filed with the Board – Monday, February 6, 2006 – and, if so, whether there is evidence of support for the application.

**[12]** Mr. Chomiak worked an 8-hour shift on February 4, 2006. At the end of the workday, he was not told when to return to work but he testified that notice of lay-off was not communicated to him either verbally or in writing at that time. Mr. Gumulcak did not dispute or contradict Mr. Chomiak's evidence on this point. Mr. Chomiak also testified that he did not actually know he was laid off until receiving the record of employment dated February 8, 2006 and that when he was notified of the job by the Union's hiring hall on February 2, 2006, he was not told how long the job would last. However, Mr. Chomiak also testified that he knew that the Employer only worked at Hitachi on weekends, and that on each previous occasion he had been laid off before being dispatched to work again, that is, his actual work time never extended to a subsequent weekend without an intervening period of formal lay off.

**[13]** Whether or not one is an employee within the meaning of the *Act* is essentially an objective determination; while the perception of the individual may be taken into consideration, it is a relatively very minor factor, and is certainly never, without more, determinative of the issue. In any event, in the present case, while Mr. Chomiak testified that he did not know he was laid off until he received the record of employment indicating such, he knew that t was the Employer's custom to lay him off after any weekend's work, and that if he worked for the Employer at Hitachi again, it was after a new dispatch from the Union hall.

**[14]** The issue is whether Mr. Chomaiak had a substantial or tangible employment connection with the Employer on Monday, February 6, 2006, when the application for certification was filed such that he was an employee within the meaning of the Act for the purposes of determining whether there is majority support for the application; that is, whether the employee has a significant continuing interest in the representation question, or whether the employee has ceased to have a substantial connection with the work place: See, *Canadian Union of Public Employees, Local 3077 v. Lakeland Regional Library Board*, [1987] Oct. Sask. Labour Rep. 74, LRB File No. 116-86; *Shopmens' Local Union No. 838 of the International Association of Bridge, Structural and Ornamental Iron Workers v. Metal Fabricating Services Ltd.*, [1990] Spring Sask. Labour Rep.70, LRB File Nos. 166-89, 193-89 to 195-89 and 214-89 to 216-89; *Saskatchewan Government and General Employees' Union v. Rural Municipality of Paddockwood, No. 520*, [1999] Sask. L.R.B.R. 470, LRB File Nos. 059-99 and 087 to 093-99, application for judicial review dismissed [2000] Sask. L.R.B.R. c-30 (Q.B.).

**[15]** In *International Association of Bridge, Structural & Ornamental Iron Workers v. Tamtrac Holdings Ltd.*, [1995] 1st Quarter Sask. Lab. Rep. 194, LRB File No. 254-94, the Board made the following comments:

> *The concept of what constitutes being "employed" as contemplated in this statement is, of necessity, a somewhat elastic one. In many situations, an employee may not be actually at work for a variety of reasons on the date when a certification application is filed, and still be considered an employee for the purposes of deciding whether there is majority support for the application.*

> *In the construction industry, the Board has taken a fairly restrictive view of what constitutes a relationship of employment. Many employees in this sector have employment relationships with a number of employers, and some of these, at least, will be tenuous, casual or fleeting. Counsel for the Employer argued that, to determine whether a trade union enjoys the support of the employees of an employer, the Board has generally considered only those employees who were actually working for the employer on the date of the filing of the application for certification. This is overstating the case somewhat, as the Board has also permitted the inclusion of employees who can demonstrate a substantial connection with the employer in the period surrounding the application.*
>
> *The inclusion of employees who are more tenuously connected to the employer, however, increases the risk that the list of employees can be manipulated so that a practical determination of whether the trade union enjoys majority support becomes less and less feasible.*
>
> *The latter point seems worth underlining in the context of the construction industry. The composition of the workforce of any employer in this sector is typically volatile and changeable. Allowing employers to include on the Statement of Employment the names of a number of employees whose identity might be unknown to the trade union would have the capacity to jeopardize and undermine union attempts to gather support for a certification application.*

See also, *International Union of Operating Engineers, Local 870 v. Little Rock Construction*, [1995] 4th Quarter Sask. Lab. Rep. 102, LRB File No. 190-95.

**[16]** In the present case, Mr. Chomiak knew that the Employer called the Union hall for each weekend that it required workers, and that he was not always dispatched, but that other Union members also worked as they were dispatched. He also knew that the Employer routinely laid off the workers after each weekends' work, and that members were dispatched according to eligibility based on each fresh request by the Employer for members

**[17]** Accordingly, on all of the evidence we find that Mr. Chomiak was not an employee of the Employer on the date the application for certification was filed for the purposes of determining whether there is majority support for the application as he did not have a substantial or tangible continuing employment connection with the Employer.

**[18]** As there were no employees in the proposed bargaining unit on the date the application was filed, the application is dismissed.

**DATED** at Regina, Saskatchewan, this **15th** day of **August, 2006**

**LABOUR RELATIONS BOARD**

James Seibel
Chairperson