Labour Relations Board
Saskatchewan

CINEPLEX GALAXY LIMITED PARTNERSHIP, Applicant v. INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES AND CANADA, LOCAL 295, Respondent

LRB File No. 132-05; April 27, 2006
Chairperson, Angela Zborosky; Members: Mike Wainwright and Pat Gallagher

For the Applicant: Larry Page

Collective agreement – Abandonment – Board may apply doctrine of abandonment even though not prescribed by statute – Two principles apply to Board's application of doctrine – First, employees must be employed during period of alleged abandonment – Second, doctrine can only be raised as shield not as sword – Doctrine cannot be used as basis for application for rescission by employer – Board dismisses application for rescission.

Decertification – Employer's application – Board discusses important policy reasons behind Board's choice to deny applications for rescission made by employers – Board dismisses employer's application for rescission.

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

REASONS FOR DECISION

Background:

[1] By Order of the Board dated August 23, 1985, the International Alliance of Theatrical Stage Employees of the United States and Canada, Local 295 (the "Union") was designated as the certified bargaining agent for a unit of employees, including all motion picture machine operators (also referred to as "projectionists") of Cineplex Odeon Corporation south of the 51st parallel in Saskatchewan. Cineplex Galaxy Limited Partnership (the "Applicant" or the "Employer") became a successor employer to Cineplex Odeon Corporation in approximately November 2003. The Employer operates movie theaters across Canada, including in Saskatchewan.

[2] In the present application, the Employer seeks to rescind the Order designating the Union as the bargaining agent for the projectionists employed by the

Employer in the geographical region described in the Order. The Employer claims it is entitled to such an order on the basis that the Union has abandoned its representation of the bargaining unit by reason of an agreement between the Employer and the Union that there would be no further collective agreements entered into between them and that no further bargaining unit employees would be employed by the Employer in the future. The Employer also claims that this agreement was ratified unanimously by all of the employees in the bargaining unit and that there have been no further employees employed in the unit since the subject employees were terminated pursuant to the agreement between the Employer and the Union. The reason for the parties entering into this agreement was because technological advancements in the film industry have resulted in the job of projectionist becoming redundant.

[3] The Union received notice of the application, however, it did not file a formal reply to the application. The Employer did not file a statement of employment, claiming in its application that it no longer employed any projectionists belonging in the unit of employees certified by the Union. No evidence of support of the employees, typical with rescission applications, was filed with the application.

[4] The application was filed on July 25, 2005, which is the date upon which the Board received the application in its offices in Regina. In the application, the Employer indicated that the final collective agreement entered into between the parties had duration of May 1, 2002 through April 30, 2004. The Employer took the position that it had properly filed the application within the open period mandated by s. 5 (k) (ii) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") by filing the application within 30 to 60 days prior to the anniversary of the date of the certification Order.

Evidence:

[5] Daniel Seguin, vice president of the Employer's Québec and Western operations, testified on behalf of the Employer. Mr. Seguin testified that he is responsible for labour relations and was involved in negotiating an agreement with the Union that gave rise to the Employer making the application for rescission. Mr. Seguin testified concerning the changes to the projectionist's job as technology has advanced in the film industry. Prior to ten years ago, the projectionist's work was very complicated and involved the threading of reels of film and the operation of projection equipment.

There were no automated features involved. The projectionist was required to have electrical qualifications and to participate in the provincial government's training and licensing program. With the technological advances that have been made in the industry, movie theaters, including those operated by the Employer, no longer require a projectionist to operate the equipment. In recent years, the daily work of a projectionist has been very limited. At the commencement of the film, the projectionist would spend approximately 1 to 2 minutes threading the film and pressing a button to turn the film on. The projectionist would then sit in the booth waiting until the film ended at which time the projectionist would shut the equipment off. Recent collective agreements entered into between the Employer and the Union have recognized the changes to the projectionist's job. Such changes included a substantial reduction in the projectionist's wage rate and no expansion in the number of hours during which the Employer was required to employ a projectionist, that is, the expansion of hours of operation of the theaters to approximately 80 per week did not result in the projectionists being assigned to work more than the 40 hours per week required by the collective agreement. For the remaining 40 hours per week of operation, the Employer has an usher, who works in the lobby of the theater, thread the projector, start the film and then return to the lobby to perform other duties. The usher would then return at the end of the film to shut off the projector. Alternative technology employed in some theaters utilizes a cashier in the lobby of the theater who presses a button to start the movie after an usher has previously threaded it.

[6] Mr. Seguin described a further more recent technological advancement that is expected to gain widespread use in the next five to ten years. Reel to reel film is being replaced by a digital format. This change will eliminate the transportation of film to theaters and the threading of film in projectors. The movies may be downloaded and stored on the hard drive of a computer and would be programmed to be shown through a digital projector without the need for personnel to start or stop the movie.

[7] Mr. Seguin testified concerning negotiations the Employer held with the Union in early June 2004. The Union agreed with the Employer that, as a result of changes in technology, the Employer no longer required projectionists. The collective agreement, which had a current expiry date of April 30, 2004 was extended until these negotiations were completed, but it was not renewed. The parties' negotiations resulted

in the execution of a memorandum of agreement, executed on June 22, 2004, which states in its entirety as follows:

> ***RECITALS***
>
> *A. The union is certified for a bargaining unit of Projectionists in certain theaters operated by the Employer in the Province of Saskatchewan (the "Bargaining Unit"); and*
>
> *B. The Union and the Employer wish to make an agreement to compensate the employees in the Bargaining Unit for the loss of their employment;*
>
> *C. The Union agrees to cooperate with the Employer on an application to the Saskatchewan Labour Relations Board for rescission of the Union's certification for the Bargaining Unit.*
>
> ***NOW THEREFORE** the union and the employer agree as follows:*
>
> 1. *The only employees in the Bargaining Unit at the time of the execution hereof are Dennis Flichel, Trevor Ewen, Shaun Flichel and J. Hal Priestly. There shall be no future additions to this list of employees in the Bargaining Unit.*
>
> 2. *The employment of all of the employees in the Bargaining Unit will be terminated effective 12:00 midnight on the date that this Memorandum of Agreement is ratified by the members of the Union.*
>
> 3. *The Union hereby withdraws all grievances outstanding against the Employer and shall file no further grievances against the Employer. Within two weeks following the ratification of this Memorandum of Agreement by the members of the Union, the Employer shall pay to the Union the sum of $31,000.00 in the full and final settlement of any and all grievances or claims under the Saskatchewan Trade Union Act and/or the Collective Agreement between the Employer and the Union.* [A handwritten notation adds: "such amounts to be paid as noted in paragraph 7"]
>
> 4. *Effective the date of ratification of this Memorandum of Agreement by the members of the Union, the Employer ceases forever to be the employer of employees in the Bargaining Unit.*
>
> 5. *The Union agrees to cooperate with the Employer on an application for rescission of the certification dated August 23, 1985 granted to the Union by the Saskatchewan Labour Relations Board. The Union agrees that such cooperation will involve, at the opinion of the Employer, at joint application by the Union and the Employer to the Saskatchewan Labour Relations Board for rescission of the certification, or consent by the Union to an application by the*

Employer for rescission of the certification. In order to comply with any time requirements for filing of the application for rescission at the Saskatchewan Labour Relations Board, the Union agrees to take any actions required to obtain the rescission of the certification without delay at the request of the Employer.

6. *The Union shall not object to that said application by the Employer and shall not take any step, make any statement, or do anything to oppose, reverse, overturn, amend, appeal, judicially review, or quash the issuance by the Board of an order rescinding the certification of the Union.*

7. *Within two weeks following the ratification of this Memorandum of Agreement by the members of the Union, which ratification vote shall be held no later than June 10, 2004, the Employer shall pay to each employee named in paragraph 1 who first signs a Waiver and Release in the form attached the sum of $4000.00 for a Dennis Flichel and $4000.00 for Trevor Ewan and $15,000 for Shaun Flichel and $8,000.00 for J. Hal Priestly, less statutory deductions.*

8. *Payment of the amount set out herein shall be deemed to include any and all termination pay and severance pay required by the Labour Standards Act, to be a better benefit than that set out in that Act and to be a settlement of all claims to termination pay under that Act. All severance payments made pursuant to this paragraph are subject to normal statutory deductions.*

9. *The parties agree to recommend the ratification of this Memorandum of Agreement to their respective principals.*

[8] A representative of the Employer, a representative of the Union and Shaun Flichel, an employee of the Employer who was at the time working the greatest number of hours as a projectionist for the Employer, executed the above memorandum of agreement. Mr. Seguin testified that, pursuant to the agreement between the Employer and the Union, the employees ratified the memorandum of agreement on June 22, 2004. The employees also signed the required waiver and release on July 5 and 6, 2004 and were paid their respective severance pay, pursuant to the memorandum of agreement. In the Employer's view, the employees ceased to be employees on July 5 and 6, 2004 when they executed their respective waivers.

[9] Mr. Seguin testified that the four employees referenced above all worked at the theater operated by the Employer in the Southland Mall location in Regina, Saskatchewan. He further testified that the Employer recently opened another theater in

Regina and has operated another theater in Moose Jaw, Saskatchewan since 2002, however, when those theaters opened, the Union did not exercise its jurisdiction under the certification Order to assign projectionists to work in those operations.

[10] Mr. Seguin also testified that the Employer has sold its theaters from time to time. The Employer anticipates that any prospective theater operator would operate the theater in the same manner that the Employer does, that is, by not utilizing projectionists to operate the films but rather by utilizing ushers or cashiers. The Employer believes that, if the certification Order remains in place, prospective purchasers would view the outstanding certification Order as a problem in that the Union might, at some future point in time, assert its rights under the certification Order. The end result, says the Employer, is a devaluation of its business and a problem that might prevent a possible future sale.

[11] Mr. Seguin also stated that the Employer has entered into similar agreements with the unions representing projectionists in other provinces. The British Columbia Labour Relations Board issued an order revoking the certification order held by the union representing projectionists. Mr. Seguin also indicated that it was the Employer's intention to file applications similar to the one here under consideration in both Manitoba and Alberta during the proper time period for such applications to be filed. The only other provinces in which the Employer operates are Québec and Ontario. Factual circumstances similar to that in Saskatchewan exist in those provinces and the Employer intends to attempt to negotiate agreements with the unions in those provinces similar to the one it negotiated with the Union in Saskatchewan.

[12] At the hearing, the Employer also filed documents titled "Support for Application for Rescission of Certification" signed by each of the four employees terminated as a result of the Union and Employer entering into the memorandum of agreement. Each document indicates that the individual is an employee of the Employer and member of the Union and states: "I support the application by the Union and the Employer to the Saskatchewan Labour Relations Board for rescission of the said Order of the Saskatchewan Labour Relations Board made by the Board on August 23, 1985." Three of the subject employees signed the document on July 20, 2004 and one employee signed the document on July 21, 2004. Counsel for the Employer indicated at the hearing that these documents were not being relied upon as typical support evidence

for the rescission application but as evidence of the employees' consent to the application by the Employer.

Arguments:

[13] At the outset of the hearing, Board raised with the Employer the issue of whether the application was properly filed within the open period mandated by s. 5(k) of the *Act.* The Applicant argued that the governing provision was s. 5(k)(ii), suggesting that the collective agreement between the parties had expired upon the signing of the memorandum of agreement and that therefore the relevant open period was the 30 to 60 day window prior to the anniversary date of the certification Order. The Board also pointed out to the Applicant that the application was received by the Board in its offices on Monday, July 25, 2005, which appears to be only 29 days prior to the anniversary date of the certification Order. Counsel for the Applicant took the position that, because the open period expired on a Sunday, by operation of s. 32 of the *Regulations* to the *Act*, the Board should consider the application to have been filed within the open period. Section 32 essentially states that, where the time for doing any act or taking any proceedings expires on a Sunday or another day on which the Board offices are closed, such that the act or proceeding cannot be done or taken on that day, the act or proceeding will be held to have been properly done or taken if the act or proceeding is done or taken on the next day that the Board offices are open. While the Board has significant reservations concerning the applicability of s. 5(k)(ii) (i.e. whether parties can, by agreement, terminate a collective agreement) and the operation of s. 32 of the *Regulations* (to extend the open period during which an application for rescission may be filed), for the reasons that follow, it is not necessary for the Board to decide those questions on this application.

[14] The Employer seeks rescission of the certification Order on the bases that the Union has abandoned its representation of the bargaining unit and has no further interest in representing the unit, that continuing changes in technology have made the job of the projectionist redundant and that, if the certification Order is not rescinded, the Employer will suffer hardship.

[15] The Employer takes the position that both the Union and the four employees who were in the bargaining unit at the time the agreement was made are in favour of the agreement between the Employer and the Union to end the collective bargaining relationship. The Employer submits that the Union has recognized that, through advances in technology, projectionists are no longer required in theaters and therefore the parties agreed, through the memorandum of agreement referred to above, that the collective agreement would expire on June 22, 2004, that there would be no further collective agreements entered into by the parties and that no further employees in the bargaining unit would ever be employed by the Employer. In the memorandum of agreement, the Union agreed to abandon its representation of the bargaining unit and not to supply projectionists to or assert jurisdiction over any of the Employer's theaters in Saskatchewan. In return, severance pay was paid to employees who remained in the bargaining unit at the time the agreement was entered into. The agreement also called for the cooperation of the Union in the making of the rescission application. The four employees in the bargaining unit, whose employment ceased on July 5 and 6, 2004, ratified the memorandum of agreement. As evidence of the employees' support for this application, the Employer pointed to the documents signed by the employees that were filed at the hearing.

[16] The Employer argues that, due to current and anticipated technological changes, theaters no longer require projectionists now or in the future. The Employer argues that the cost of employing projectionists seriously affects the profitability of a theater and that the certification Order, although dormant, is a hardship for the Employer, because any potential purchaser would be concerned about the certification Order should the Employer offer the theater for sale. The Employer anticipates that a potential purchaser would be concerned that the Union would assert its jurisdiction and require the purchaser to employ projectionists. In the Employer's view, if it is not able to have the certification Order rescinded, its business will be devalued a whole and a possible sale could be prevented.

[17] The Employer acknowledged that the Board has in the past denied applications for rescission made by employers (see: *Hugh Brown v. United Food and Commercial Workers, Local 1400 and Group 5 Security Corp*., [1998] Sask. L.R.B.R. 735, LRB File No. 161-98) but that, in one case, where the employer stated that it would

not engage in construction in the future, the Board, in dismissing the application for rescission, relied in part on the fact that the dormant order did not cause hardship to the employer (see: *Prince Albert Comprehensive High School Board v. United Brotherhood of Carpenters and Joiners of America*, [1981] Sept. Sask. Labour Rep. 51, LRB File No. 144-88). The Employer relied on the cases of *Olynyck Construction Ltd.,* LRB File No. 025-68 and *Cameron Electric Co. Ltd.,* LRB File No. 037-72 (written reasons not provided in either application) as support for the proposition that the Board has allowed employers to apply for rescission, pursuant to. 5(k)(i) of the *Act.* The Employer distinguished the decision in *Brown* from this application in that, in *Brown*, the application by the employer was not made with the consent of the union (the union had not abandoned its certification order) and because the employer had failed to provide evidence that there would never be employees in the bargaining unit in the future or that the employer would not resume business in the future. The Employer distinguished the *Prince Albert Comprehensive High School Board* case, *supra,* on the basis that it involved a certification order in the construction industry, where it is common for an employer to have breaks in its operations where employees who would fall within the bargaining unit were not employed. In addition, in the *Prince Albert Comprehensive High School Board* case, there was no evidence of any inconvenience or hardship to the employer if the certification order was not rescinded.

[18] In support of the Employer's argument that the Union has abandoned its bargaining rights and that the abandonment entitles the Employer to rescission of the certification Order, the Employer referred to the case of *International Union of Operating Engineers, Hoisting and Portable and Stationary, Local 870* v. *Wappel Concrete and Construction Ltd.*, [1984] Apr. Sask. Labour Rep. 33, LRB File No. 302-83, where the Board permitted an employer to rely on abandonment to render a certification order void. In that case, the union had been inactive for over 20 years and, because of the union's inactivity in failing to carry out its duty to bargain collectively for the employees it represented without a satisfactory explanation for this failure, the Board concluded that the union no longer represented employees in the bargaining unit; it had effectively abandoned its bargaining rights. The Employer also relied on the Board's decision in *VicWest Steel Inc.* v. *Sheet Metal Workers International Association, Local 296*, [1988] Feb. Sask. Labour Rep. 55, LRB File No. 072-87, a case which was not decided on the basis of abandonment, where the Board commented that "it may be that when a union

abandons its bargaining rights, the affected employer should be entitled to apply for and receive an order rescinding the stale certification."

[19] In its argument, the Employer also referred to *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, which establishes the principles upon which an employer may apply for rescission of a certification order in circumstances where the union has abandoned its representation rights. While the employer's argument was not accepted by the Board in the *Mudjatik Thyssen* case, the Board set out the test for abandonment in the construction industry. The Employer argued that the test enunciated in *Mudjatik Thyssen* should be restricted in its application to employers in the construction industry. The Employer argued that, in non-construction cases, the appropriate test to be applied is whether the trade union, because of inactivity or another reason, no longer represents employees in the bargaining unit. The Employer argued that, in this case, it matters not that there has not been a lengthy period of inactivity by the Union, because there are no projectionists currently employed by the Employer and the Union has expressed an intention not to assert its jurisdiction over the Employer or bargain collectively on behalf of the employees in the bargaining unit.

[20] The Employer also referred the Board to its decision in *United Brotherhood of Carpenters and Joiners of America, Local 1985 et al. v. Graham Construction and Engineering Ltd.*, [2003] Sask. L.R.B.R. 471, LRB File Nos. 014-98 & 227-00 where the Board set out a slightly modified test from the test set out in *Mudjatik Thyssen*, *supra*, and concluded that, because the unions had not challenged the employer's belief that it was non-union for 13 years, they had abandoned their certifications.

[21] The Employer also referred to decisions from other jurisdictions, including Alberta, British Columbia and the federal jurisdiction. In *International Brotherhood of Electrical Workers, Local Union 424 and International Brotherhood of Electrical Workers, Local Union 254 v. Siemens Building Technologies Inc*. and *Brown and Marshall Electric Limited v. International Brotherhood of Electrical Workers, Local Union 424,* [2004] A.L.R.B.D. No. 26, Board Files GE-03180, GE-03637, RV-00762 and GE-03798, the Alberta Labour Relations Board considered the doctrine of abandonment under its

general power of reconsideration and cancelled a certification order where it was necessary to do so in order to preserve the integrity of the representative relationship between the trade union and its employees. In the Alberta Labour Relations Board's view, where a trade union stops actively representing employees for an extended period of time, it undermines its representative character to the point where the character eventually vanishes. In *PCL Constructors Northern Inc. v. United Brotherhood of Carpenters and Joiners of America, Local 1325*, [2005] C.I.R.B.D. No. 1, CIRB Decision No. 306, Board File 24643-C, the Canada Industrial Relations Board recognized the concept of abandonment and found that it could use its discretionary powers to alter, vary or rescind a certification order due to abandonment as part of its supervisory role over certification orders. The Employer argued that these cases establish that, where abandonment has occurred, it is permissible for an employer to apply through the reconsideration process for the certification order to be rescinded, even where the subject legislation contains powers of revocation that do not specifically allow an employer to make such an application. The Employer argued that s. 5(k) of the *Act* does not prevent an employer from applying for rescission of a certification order in circumstances of abandonment.

[22] The Employer also referred to *LOF Glass of Canada Ltd. c.o.b. VANFAX v. I.B.P.A.T. Glaziers, Architectural Metal Mechanics and Glassworkers Union, Local 1527,* BCLRB No. B498/94 (Leave for Reconsideration of B304/94), Case No. 20141, a decision of the British Columbia Labour Relations Board, and urged the Board to apply the principle outlined in that case where the British Columbia Labour Relations Board canceled a certification order because the employer had proven that it had ceased to be the employer of the employees in the unit and had indicated that it would not operate the same or a similar business in the province in the future.

Relevant Statutory Provisions:

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

> *5 The board may make orders:*
>
> *(k) rescinding or amending an order or decision of the board made under clause (a), (b) or (c) where:*

> *(i) there is a collective bargaining agreement in existence and an application is made to the board to rescind or amend the order or decision during a period of not less than 30 days or more than 60 days before the anniversary of the effective date of the agreement; or*
>
> *(ii) there is no agreement and an application is made to the board to rescind or amend the order or decision during a period of not less than 30 days or more than 60 days before the anniversary date of the order to be rescinded or amended;*
>
> *notwithstanding that a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court.*

Analysis and Decision:

[24] The issue before us is whether an employer may bring a rescission application before the Board in circumstances where a union has agreed not to continue to bargain collectively on behalf of its members or assert jurisdiction over the employer. The Employer suggests that, by virtue of the agreement entered into between it and the Union, the Union has abandoned its representative rights, thereby entitling the Employer to succeed with this rescission application.

[25] The Board has had occasion to consider the doctrine of abandonment and to apply it in limited circumstances, although the doctrine is not supported by any statutory authority. It is considered an equitable remedy and it is typically one that is claimed by an employer when faced with an application by a union which attempts to assert the union's rights vis a vis the employer's employees. It is necessary to consider a detailed history of the Board's application of the doctrine of abandonment in order to determine whether it is available in the circumstances before us.

[26] The early decisions of the Board referred to by the Applicant, *Olynyck Construction* and *Cameron Electric*, both *supra*, were rendered without written reasons and are therefore not helpful to our analysis. *Wappel Concrete and Construction Ltd.*,

supra, is the first decision in which the Board considered the doctrine of abandonment and provided written reasons. This case involved an unfair labour practice application filed by the union claiming that the employer failed to comply with the union security provisions of the *Act*. The employer responded by claiming that the union abandoned its bargaining unit. The Board concluded that the union had abandoned its bargaining rights through inactivtity where a certification order was issued in 1959, a collective agreement commencing January 1, 1960 was negotiated and the union did not negotiate a renewal agreement, deal with employee grievances or take any other action relating to its bargaining rights thereafter until 1983, when it served a union security request on the employer. In essence, the Board gauged the union's inactivity by its failure to negotiate a renewal collective agreement; its failure to administer the grievance and arbitration provisions; the fact that terms and conditions of employment were changed by the employer without objection by the union; and the fact that there was no explanation given by the union regarding its failure to assert its rights over this extended time period.

[27] In *Wappel Concrete and Construction Ltd.*, *supra*, the Board made the following comment at the outset of its examination of the principle of abandonment at 34:

> *The fundamental question raised by this application is whether the union is abandoning its bargaining rights through inactivity. Although the principle of abandonment has been recognized and applied in some other jurisdictions for many years (most notably in Ontario), the question of whether it exists in Saskatchewan, in the absence of any specific provision in The Trade Union Act, has not yet been decided.*

[28] The Board went on to describe the underpinnings of the doctrine of abandonment at 36 and 37:

> *Underlying the doctrine of abandonment is the concern that a trade union, because of its inactivity, no longer represents employees in the bargaining unit. Under The Trade Union Act, once this Board determines that a union represents a majority of the employees in an appropriate unit it requires an employer to bargain collectively with the trade union. The union becomes the exclusive bargaining agent for the employees in the unit for which it is certified, and the employee can no longer bargain directly with the employer.*
>
> *. . .*

> *If a union seeks and acquires the right to act as exclusive bargaining agent for employees and then for an unreasonably long time ignores its responsibility to bargain in good faith for them it should lose its right to do so. Accordingly, any union that fails to actively carry out its duty to bargain collectively for the employees it represents, without a satisfactory explanation for its failure, will be found as a fact by this Board to have abandoned its bargaining rights.*

[29] *Morin* v. *Aim Electric Ltd. and International Brotherhood of Electrical Workers, Local 529*, [1985] Feb. Sask. Labour Rep. 27, LRB File No. 331-84, involved an application for rescission brought by an employee in the bargaining unit. In that case, the Board relied upon its decision in *Wappel Concrete and Construction Ltd.*, *supra*, and on the doctrine of abandonment when it found that one local of the union had abandoned a portion of its bargaining unit – the employees of that portion of the bargaining unit were represented by another local of the same union on the basis of a voluntary recognition agreement between the employer and the second local. The certified local of the union had mistakenly believed its jurisdiction did not cover the employees who were members of the local of the union with the voluntary recognition arrangement. Unfortunately, the facts of this case are unique and it does not contain a useful analysis of the doctrine of abandonment, as the issue of abandonment was discussed in the context of determining which employees should be on the voters list.

[30] While the principles in *Wappel Concrete and Construction Ltd., supra,* appear to continue to apply in a non-industrial setting, subject to further discussion below, the Board has taken a different approach to the application of the doctrine of abandonment in the construction industry.

[31] The Board has consistently recognized the special nature of the construction industry, particularly as it relates to employer attempts to avoid or rescind certification orders. In *VicWest Steel*, *supra*, the employer filed an application for rescission in circumstances where it had no employees in the bargaining unit during the time of the alleged abandonment and was subcontracting the work previously performed by members of the bargaining unit. The employer made the claim on the basis that the union had not negotiated with it for approximately two years and because it wished to

sell its equipment, tools and inventory used by these employees, unencumbered by the certification order and free from the successorship provisions of the *Act*. The Board made the following comments at 55:

> *The Board commented on the unique nature of the construction industry in Prince Albert Comprehensive High School Board, [1981] Sept. Sask. Labour Rep. 51, a case in which an employer high school board applied to rescind a certification order covering a craft unit of carpenters on the ground that it had not employed any such carpenters for some five and one-half years and did not anticipate employing any in the immediate future. The Board stated:*
>
> > *This application raises the issue of whether or not an employer is entitled to have a certification order rescinded when there are no employees in the unit. The question must be answered in the negative. In the construction industry, to permit the decertification at the instance of an employer where there are no employees in a unit would require unions to apply for certification for each employer for each new construction project if an employer chose to decertify at the conclusion of each project. This would be an impossible task and would, in effect, destroy adequate union representation in the construction industry and disrupt collective bargaining as it exists in the construction industry.*

[32] In the *VicWest Steel* case, *supra*, the Board, relying on the *Prince Albert Comprehensive High School Board* case, refused to allow this construction employer to apply for rescission where there were no employees in the bargaining unit and where it did not appear that there would be any employees in the bargaining unit for the foreseeable future.

[33] In *International Union of Operating Engineers, Local 870* v. *Gunner Industries Ltd.*, [1996] Sask. L.R.B.R. 749, LRB File No. 160-96, the union brought an unfair labour practice application claiming that the employer refused or failed to recognize the union, bargain collectively with the union or respond to grievances filed by the union. The Board refused to accept the employer's abandonment defence on the following basis at 764 and 765:

> *In this case, the Union did contact the Employer and brought succeeding collective agreements to the attention of Mr. Kimery. They made a demand for the enforcement of the union security clause, they presented a notice to bargain, and they ultimately filed a grievance. It is true that these steps were taken at fairly lengthy intervals, and the Union did not seek the assistance of the Board in asserting their claims. At the same time, it must be remembered that the Union was making these efforts during a period when there was considerable confusion in the construction industry, and, in any case, they may not have known that there were employees falling under their jurisdiction at work for much of this time, given the flat denials of Mr. Kimery on this point. These circumstances fall far short of those in which a trade union might reasonably be regarded as having abandoned the bargaining rights granted in a certification Order.*
>
> *There is no doubt, in our view, that the original certification Order imposed upon this Employer an obligation to bargain collectively with the Union, and that this obligation is still in place. We cannot say what the specific implications of the existence of this duty might be, in terms of the application of various provisions of the relevant collective agreements, or in terms of the outcome of possible differences over the scope of the bargaining unit or other issues.*
>
> *What we can say is that it is not an option for the Employer to simply to ignore the obligation. Mr. Kimery made it clear that his preference would be to avoid any dealings with the Union. What ever his preference, the decision is not his to make. Once the employees have chosen to be represented by a trade union, a legal duty rests on their employer to bargaining collectively with the union on all matters concerning their terms and conditions of employment. It should also be noted that the resolution of the representational issue by the granting of a certification Order confers upon the trade union exclusive status as the bargaining representative of the employees, and it is no longer open to an employer to reach agreements with the individual employees concerning their terms and conditions of employment, as Mr. Kimery has apparently done in this case.*

[34] The period of confusion referred to by the Board in *Gunner Industries*, *supra*, was the period following the repeal of *The Construction Industry Labour Relations Act*, S.S. 1979, c. C-29.1 in 1983. Following the repeal of that legislation, there was no statutory bar to the use of spin-offs and there was no final determination of the status of collective agreements negotiated prior to the repeal until 1990 when the Court of Appeal

in *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada* v. *Metal Fabricating and Construction Ltd.* (1990), 84 Sask. R. 195 determined that collective agreements negotiated prior to the repeal continued in force until new agreements were reached under the new system of bargaining.

[35] In *International Brotherhood of Painters and Allied Trades, Local 739* v. *Marchuk Decorating Ltd.*, [1998] Sask. L.R.B.R. 63, LRB File No. 009-97, the union brought an unfair labour application to the Board alleging that the employer was failing to recognize the union as the bargaining agent for its painter employees, that the employer refused to follow the terms of the collective agreement and that the employer refused to bargain collectively with the union with respect to the settlement of grievances. In its defence, the employer, which operated in the construction industry, argued that the union had abandoned its bargaining rights. The Board declined to find that the union had abandoned its rights at 73:

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

[36] In *Marchuk Decorating Ltd., supra*, the Board also found that the employer's assertion of unilateral mistake as a defence was unfounded on the evidence. With respect to the finding of the Board that the employer refused to bargain collectively with respect to the grievance, the Board stated at 75:

> *It is [sic] been the position of the Board in past decisions that a certification Order is valid and binding on an employer unless and until its rescinded by the Board, stayed or quashed on judicial review by the Courts: see Saskatoon Typographical Union, Local 663 v. Armadale Publishers Ltd. (The Star Phoenix), [1978] June Sask. Labour Rep. 46, LRB File No. 013-77. When an employer asserts that a certification Order is no longer valid, it would seem to the Board that the employer has a corresponding obligation to seek an Order from the Board or a reviewing Court to sustain its assertion. Otherwise, it must consider itself*

> *bound by the Order and the consequences that flow from the Order. In this sense, an employer cannot, by unilateral declaration, relieve itself from the obligation to bargain collectively with the trade union. In these circumstances, where Marchuk had not sought an Order to rescind or set aside the Board's Order, the Board finds that the Marchuk has breached its obligation to bargain in good faith by maintaining the position in its reply to the union's grievance that it is not bound by the certification Order.*

[37] While the *Marchuk Decorating Ltd.* case, *supra*, may stand for the proposition that an employer may raise abandonment as a defence to an application by the union asserting its jurisdiction, the Board does not view this case as standing for the proposition that an employer may apply for rescission of a certification order, asserting abandonment as a basis for the application. The comments referred to above were made in the context of a determination of an unfair labour practice application and the Board was not suggesting that such an application would be permitted outside of s. 16 which permits an employer to bring an application to rescind a certification order obtained on the basis of fraud. It must also be noted that the Board's comments above were following an analysis of the applicability of unilateral mistake as a basis to void the certification order, therefore opening the door to a possible argument that a certification order may be rescinded on the basis of unilateral mistake. In its Reasons for Decision, the Board had already dealt with the abandonment defence raised by the employer and denied the same on its merits. Therefore, while abandonment may be a valid defence for an employer to raise, it appears that the risk the employer runs in asserting such a defence is that, if it fails, it is possible that the employer may be found guilty of an unfair labour practice.

[38] In *Mudjatik Thyssen*, *supra*, the Board dealt with the employer's argument of abandonment raised in defence to an application for successorship made by the union. At 342 through 344, the Board noted four factors which an employer needs to overcome to successfully advance the defence of abandonment, as follows:

> *[38]. . . before the principle of abandonment can be applied in the construction industry,* ***the employer must establish that it employed tradespeople within the scope of the union's certification order during the period of the alleged abandonment****. If there is no evidence that such tradespeople were employed by the employer during the alleged abandonment*

period, the principles set out in Prince Albert Comprehensive High School Board, supra and VicWest Steel Inc., supra, would apply.

. . .

[42] Secondly, it would seem to the Board that the employer must also explain how it came to employ tradespeople without reference to the hiring provisions contained in the relevant collective agreement. Once a collective agreement has been entered into between a union and an employer in the construction sector, the employer generally is obligated to obtain his employees from the union's hiring hall. . . ***Where an employer is relying on the defence of abandonment, in our view, it must explain how it came to employ persons who are not members of the union.*** *This may occur, for instance, if the certified union refused to provide members to the employer in response to the employer's request for tradespeople.*

. . .

[44] Third, in the context of the CILRA, 1992, where negotiations and collective bargaining take place on a multi-employer basis through the designation of a representative employers' organization, it would be difficult for an individual employer to abandon bargaining rights where the certified trade union has negotiated or is attempting to negotiate a collective agreement with the representative employers' organization. Under the centralized system of bargaining, collective bargaining takes place at the level of the union and the representative employers' association. A unionized employer may have little direct contact with the certified union under this scheme. However, the on-going collective bargaining between the union and the representative employers' organization is carried out with respect to the unionized employer and the employees covered by the union's certification order. ***An employer's lack of awareness of or involvement in the work of the representative employers' organization is not indicative of "abandonment" by the certified union.***

[45] Lastly, in most situations, employees in the bargaining unit who do not want to be represented further by the certified union have the ability to file to rescind the union's certification order on an annual basis. ***The Board should be reluctant, except in the most extreme cases, to find that a trade union has abandoned its representation certificate without testing the union's support through the vehicle of a rescission application and vote.***

*[**emphasis added**]*

[39] Outside the construction industry, the issue of abandonment has been raised in very few cases. In *Service Employees' Union, Local 336 v. Shaunavon Union Hospital*, [1992] 3rd Quarter Sask. Labour Rep. 77, LRB File No. 021-92, the employer raised the defence of abandonment in response to an assertion by the union that the employer was failing to deduct dues from certain employees' wages. In determining that the union's right to represent this group of employees had not been abandoned, the Board stated at 78 and 79:

> *Counsel for the Union referred us to the decision of this Board in Quill Plains Centennial Lodge, (LRB File No. 063-85) in which the Board made the following observation:*
>
> > *The principle of abandonment applies only when a certified union fails to carry out its duty to bargain collectively for all employees in an appropriate unit, or when it abandoned all those in a smaller group, which in itself constitutes a unit appropriate for the purpose of bargaining collectively.*
>
> *The principle of abandonment was applied by this Board in the Quill Plains case to protect the rights of employees to seek alternative representation when the union, which is nominally their bargaining agent has effectively ceased to address their interests. In that circumstance, it may, as the decision in Quill Plains suggests, be reasonable to allow members of a bargaining unit an opportunity to be represented by another union, or to revisit the question of whether part of a bargaining unit might engage in more effective collective bargaining as an independent unit.*
>
> *In this case, however, to accept the argument put forward by the Employer on this issue would have the effect, not of improving the access to effective representation for the two employees involved, but of removing them from access to collective bargaining altogether.*
>
> *It is therefore are our finding as a Board that these two employees are still members of the bargaining unit, and the right of the Service Employees' Union to represent them has not been abandoned.*

[40] In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. CAA Saskatchewan Emergency Road Service*, [2000] Sask. L.R.B.R. 476, LRB File No. 153-00, a union filed an application for certification of a bargaining unit for which a certification order held by another union already existed. The certified union received

notice of the application and, although it did not participate in the hearing, it indicated that it had never reached a first collective agreement with the employer following a strike that took place in 1979. Although the application was dismissed because it was not filed in the open period, the Board considered the applicant union's argument that the certified union had abandoned its certification order due to 22 years of inactivity. On the issue of abandonment, the Board stated at 478:

> *The Board finds that the application for certification was filed outside the time limits set in s. 5(k)(ii) of the Act and must be dismissed. There may be good grounds for arguing in this case that the Teamsters' Union abandoned its certification Order. In our view, however, the doctrine of abandonment, if it were found, does not relieve the Union from the mandatory provisions contained in s. 5(k)(ii). The doctrine of abandonment simply prevents one party from relying on its strict legal rights in situations where it is clear to the Board that the party in question abandoned its legal right. It does not, in our view, operate to rescind a certification order vis-à-vis third parties. It must be remembered that the principle of "abandonment" is not set out in any statutory provisions contained in the Act, and it cannot be expanded through creative interpretations to overcome mandatory statutory provisions, such as are contained in s. 5(k)(ii).*

[41] Based on our review of the above authorities, it appears clear that the Board can apply the doctrine of abandonment even though it is not prescribed by statute. There are, however, limits concerning how and when the doctrine may be applied. Although it appears that the applicable test for the application of the doctrine of abandonment in the context of construction vs. other workplaces may be different, two principles clearly emerge from the cases which would support the view that abandonment cannot be used as a foundation for a rescission application in any industry and that, in any event, the doctrine of abandonment is not available in the circumstances of this case.

[42] The first principle is that employees must be employed during the period of the alleged abandonment. Whether one examines the test of abandonment used by the Board in construction cases such as *Mudjatik Thyssen*, *supra*, or the more general test used in *Wappel Concrete and Construction Ltd., supra,* it is clear that a prerequisite to a finding of abandonment is a demonstrated period of time of inactivity or neglect by the union in its representation of the employees in the bargaining unit. Even if the

agreement between the Employer and the Union in this case is valid (and the parties can legally terminate their collective agreement, agree to terminate their bargaining relationship and effectively negotiate employees out of the scope of the bargaining unit and exclude their access to collective bargaining), which is questionable, this application is premature in the sense that it amounts to an agreement by the Union to abandon its bargaining unit in the future. The doctrine of abandonment, by its very definition, refers to past action or inaction.

[43] In all of the Board's decisions referred to above regarding abandonment, there exists a requirement that there must be employees in the bargaining unit employed during the period of the alleged abandonment, whether it is explicitly stated or is implied by the facts of the case. For example, in the *Wappel Concrete and Construction Ltd.* case*, supra,* where the defence of abandonment succeeded, the Board found as a fact that the business of the employer had continued for over 23 years, during which time employees belonging to the bargaining unit were employed. In other cases where the defence of abandonment did not succeed, such as *Marchuk Decorating Ltd.*, *supra* (a construction setting) and *CAA Saskatchewan, supra* (an industrial setting) the defence of abandonment failed in part because there were no employees employed in the bargaining unit during the period of abandonment. It was implied by the facts of these cases that it was a requirement that there be employees who properly belonged in the bargaining unit employed during the period of abandonment. The only case where such a requirement is unclear is the *Graham* case, *supra*, which appears to be an aberration and, in any event, is clearly distinguishable on its facts. In that case, the Board did not strictly apply the test in *Mudjatik Thyssen, supra*, in circumstances where the certified employer had never hired or employed any employees at any time, but rather utilized certified and non-certified companies as labour brokers who supplied all the employees necessary for the certified employer's construction projects (an acceptable practice according to an earlier Board decision which in effect left it to the affected unions to enforce collective agreement provisions requiring any subcontracted work to be performed by union members).

[44] The second principle that emerges from the cases and establishes that the doctrine of abandonment cannot be used as the basis for an application for rescission by the employer, is that abandonment is only permitted to be raised as a

defence to an application. Like the doctrine of estoppel, commonly considered in contract law although also the basis of consideration by the Board in *Retail, Wholesale and Department Store Union, Locals 539 and 540 v. Federated Co-operatives Limited, Saskatoon and Sherwood Co-operative Association Limited, Regina,* [1989] Fall Sask. Labour Rep. 60, LRB File No. 256-88, the doctrine of abandonment may only be used as a *shield* and not as a *sword*. In other words, it may only be used as a defence to the assertion of a legal right rather than as the basis for or the foundation of a claim. For example, in many of the cases referred to above, the defence of abandonment was raised by the employer in response to an unfair labour practice application by the union alleging a failure by the employer to recognize the union, comply with union security, bargain collectively or process grievances. It has also been used by employers as a defence to successorship applications made by unions. Even in the *Wappel Concrete and Construction Ltd.* and *Graham Construction* cases, both *supra*, where the employer successfully relied on the doctrine of abandonment, it was accepted by the Board only as a defence to the union's unfair labour practice application allegations that the employer had failed or refused to recognize the union.

[45] This second principle leads to the result that the employer cannot use abandonment as the basis for an application for rescission. In the *Prince Albert Comprehensive High School Board* case and the *VicWest Steel* case, both *supra*, the Board concluded that a rescission application could not be made by the employer on the basis of abandonment. There are important policy reasons behind the Board's choice to deny such applications. In *VicWest Steel, supra*, the Board commented at 60 on the importance of employee wishes in the rescission process as follows:

> *Why, then, shouldn't the contractor to be entitled to decertify the union after a project is done and the tradesmen have left? Because there is a basic contradiction between an employer application for decertification and the fundamental premise of The Trade Union Act.* ***That premise, which is as applicable to contractors in the construction industry as it is to all other employers, is that it is the wishes of the employees, and only the wishes of the employees, that are to be considered in choosing and rejecting a bargaining agent. A certification order issued solely on the basis of the wishes of the employees can only be removed on the basis of the wishes of the employees unless there is some other criterion directed by be Act in a particular situation (as, for example, Section 16***

> ***of the Act which permits an employer application to rescind a certification order obtained by fraud). If there is to be a different set of rules for contractors, they must emanate not from the Board but from the legislature.***
>
> ***[emphasis added]***

[46] In *Vic-West Steel, supra*, the Board concluded:

> *For all of the foregoing reasons, the Board's policy on employer applications for rescissions in the construction industry should and will be consistent with the policy applied to similar applications in every industry and in all Canadian jurisdictions: it will not grant an employer's application for rescission of a certification order where, as here, the employer carries on business through some contractors and simply wishes to rid itself of a collective bargaining agreement and the duty to bargain collectively with the certified trade union. The application is therefore dismissed.*

[47] In the foregoing quote, while it appears that the Board applied the policy in the context of the specific facts of that case, it is also apparent from a full reading of the decision that the Board was following a policy, at that time applied in all industries and in all Canadian jurisdictions, that employer applications for rescission were not permitted.

[48] In *Wappel Concrete and Construction Ltd., supra*, where the doctrine of abandonment was accepted and applied, the Board considered whether it had jurisdiction under ss. 21 and 42 of the *Act* to deal with the application more effectively than through an order under s. 5(c) requiring the union to bargain collectively. While such jurisdiction is doubtful given the decisions of this Board and the Saskatchewan courts through the intervening years, the Board clearly disposed of the application by simply dismissing the union's unfair labour practice application on the basis of the defence of abandonment. The Board concluded at 37:

> *The Board therefore finds that the applicant's bargaining rights were abandoned through inactivity prior to June 13, 1983 when the employer was served with a request to carry out to the provisions of Section 36 (1) of The Trade Union Act. Since the employer was no longer required by or pursuant to the Act to bargain collectively with the trade union when the notice was*

> *served, it was not required to carry out the provisions of Section 36(1) of The Trade Union Act.*

[49] Also in *Wappel Concrete and Construction Ltd., supra*, one of the very few cases in which the defence of abandonment was accepted by the Board, the rationale for the application of the doctrine in that case was in accordance with an important policy objective underlying the *Act* as a whole, that is, to protect employee choice. In considering the appropriateness of making an order under s. 5(c) of the *Act* directing the union to bargain collectively with the employer, the Board commented at 36-37:

> *This Board's remedial powers with respect to a breach of the duty of fair representation are limited to those conferred upon it by or under The Trade Union Act. Section 5 (c) of the Act permits the Board to require a trade union to bargain collectively with an employer. However, in this case many years of inactivity has resulted in a loss of the employee support needed by the union to effectively negotiate with the employer. It has also demonstrated the union's unwillingness to negotiate on the employees behalf, the result is that any order under Section 5(c) of the Act requiring the union to bargain collectively with the employer would be futile. It would do nothing to promote industrial stability through effective collective bargaining or to preserve the basic rights of employees to organize in and to bargain collectively through a trade union of their own choosing. If those rights are to be preserved and if the objects of the Act are to be attained, than some other Order must be made.*

[50] In our view, the fact that the Board has not previously considered an application for rescission made by an employer in industries other than construction, does not change our conclusion that this application must fail in the circumstances of this case. The Applicant has failed to satisfy the two criteria referred to above necessary to invoke the doctrine of abandonment - the two criteria which are common to both the construction and industrial settings – as follows:

> (i) Firstly, the Applicant has been unable to establish that it had employees working during the period of alleged abandonment because the Applicant presented the Board with evidence only of a questionably valid agreement between the Union and the Employer where the Union states its intention not to represent the employees in the bargaining unit in

> the future. Even had the Board been inclined to consider rescission of the certification Order in the circumstances of this case, the Board, in almost all circumstances, directs a vote of the employees in the bargaining unit as a means of testing the employees' wishes on an application for rescission. Such a vote in the circumstances of this case could not be held because the evidence before the Board indicates that the Employer no longer employs any employees in the bargaining unit.
>
> (ii) Secondly, the Employer has attempted to utilize the doctrine of abandonment as a sword and not a shield, in other words, as a basis for founding an application for rescission rather than as a defence to the assertion of bargaining rights by the Union. Although the Employer, in filing documents evidencing the employees' consent to this application, maintained that these documents should not be considered as evidence of support typically filed with a rescission application, in the circumstances of an application for rescission by the employer, there must be a presumption of the applicability of s. 9 of the *Act*, that is, that the support was obtained through employer involvement or influence. Such a conclusion by the Board would result in dismissal of the application. The foregoing excerpts from the *VicWest Steel* case, *supra*, clearly illustrate the Board's policy that applications for rescission by an employer are not permitted in construction or industrial settings because of the importance of employee choice.

[51] The Board has considered the decisions of labour relations boards in other jurisdictions referred to by the Employer in its argument and finds that they are inapplicable in the circumstances of this case. Both the legislation under which the Board operates and the manner in which case law has developed in relation to abandonment are different than those under consideration in other jurisdictions. For example, the Board's power of reconsideration is much more limited than the reconsideration power used by the Alberta Labour Relations Board and has never been used to reconsider a certification order made some years prior to the filing of the reconsideration application.

[52] The suggestion by the Employer that the Board should grant this application for rescission due to the potential for harm to the Employer should the Employer sell the movie theatres which are subject to the Union's jurisdiction, is not an appropriate consideration on this type of application and, even if it were, does not persuade the Board to grant the rescission to the Employer. In our view, the comment made in the *Prince Albert Comprehensive High School Board* case, *supra,* that there was no real inconvenience to the employer as a result of not applying the doctrine of abandonment, was made in *obiter* and not as a basis for rejection of the employer's claim. In *VicWest Steel, supra*, the employer argued in support of its application for rescission that such an order was necessary to permit it to sell its equipment, tools and inventory free of the application of the successorship provisions of the *Act.* This argument did not persuade the Board in that case to allow the employer's rescission application and the Board commented that the issue of whether the successorship provisions would apply to such a sale was not before the Board on that application. That the Employer in this case hypothesized that it might sell its Saskatchewan movie theaters in the future and that such a proposed sale might be in jeopardy or cause a loss of value to the business, is an uncertain possible future event that does not persuade the Board to ignore the decisions it has made over the past three decades concerning the doctrine of abandonment and to make an exception without specific legislative authority. As stated by the Board in the *CAA Saskatchewan* case, *supra* at 478:

> *It must be remembered that the principle of "abandonment" is not set out in any statutory provisions contained in the Act, and it cannot be expanded through creative interpretations to overcome mandatory statutory provisions, such as are contained in s. 5(k)(ii).*

[53] Should the Employer sell any of its Saskatchewan movie theatres in the future, and should the Union thereafter bring a successorship application or attempt to assert jurisdiction over the new employer, the new employer may be in a position to raise either the defence of abandonment based on the inactivity of the Union during that period of time or rely on the doctrine of estoppel based on the agreement between the Employer and the Union and the intervening events.

[54] Although the Board does not have jurisdiction to make a determination concerning the assertion of rights under a collective agreement, we make the following

observations concerning the scope of the bargaining unit. The certification Order held by the Union describes the bargaining unit in terms of "all employees employed by Cineplex Odeon Corporation, in the geographical area within the East and West boundaries of Saskatchewan and South of the 51st parallel 27degrees except: Manager, Assistant Manager, Management Trainees, Ticket Sellers, Door Men, Ushers, Concession Employees and Cleaning Staff." The scope clause in the collective agreement is slightly different in that it refers only to Motion Picture Machine Operators (or "projectionists") employed by the Employer and states that the Employer agrees "to employ only projectionists supplied solely by the Union . . . to perform work as required by the Employer under the provisions of the collective agreement," and to “notify the Union of its requirement for projectionists and the Union . . . shall furnish such projectionists." In addition, article 3.02 of the collective agreement states that it shall not be a violation of the collective agreement for "non bargaining unit employees of the Employer to perform work normally performed by projectionists provided that the time spent performing such work does not constitute a significant portion of such a person's work time." If technology continues to advance in the manner suggested by the Employer and this results in a lack of work for projectionists, it is therefore arguable that if the Employer does not require or employ projectionists, there are no employees in the bargaining unit or work available for bargaining unit employees over which the Union could assert its jurisdiction. In these circumstances, the “dormant” certification Order holds no potential for harm to the Employer.

[55] For the foregoing reasons the application of the Employer is dismissed.

DATED at Regina, Saskatchewan, this **27th** day of **April, 2006.**

LABOUR RELATIONS BOARD

Angela Zborosky
Vice-Chairperson