Labour Relations Board
Saskatchewan

GRAIN SERVICES UNION (ILWU-CANADA), Applicant v. WARNER TRANSPORTATION SERVICES LIMITED and PRAIRIE VALLEY SCHOOL DIVISION No. 208, Respondents

LRB File Nos. 090-07, 091-07 & 092-07; September 4, 2007
Chairperson, James Seibel; Members: John McCormick and Kendra Cruson

For the Applicant:	Ronni Nordal
For Warner Transportation Services Limited:	Susan Barber
For Prairie Valley School Division No. 209:	James McLellan

Unfair labour practice – Jurisdiction of Board – Board has exclusive jurisdiction to determine who is "employee" or "employer" under *The Trade Union Act* – For the purposes of discrimination in hiring in violation of s. 11(1)(e) of *The Trade Union Act*, it is not necessary that the individual in question be employee of prospective employer.

Remedy – Interim order – Delay – Events alleged to form basis for application occurred less than a month before application for interim relief filed – Board dismisses preliminary objection based on timeliness of application for interim relief.

Remedy – Interim order – Criteria – Board finds arguable case that individual's exercise of rights under *The Trade Union Act* in support of union formed at least part of basis for individual not being hired – Board balances labour relations harm in favour of union due to chilling effect and lack of harm to employer.

***The Trade Union Act*, ss. 2(f), 2(g), 5(d), 5(e), 5(f), 5.3, 11(1)(a), 11(1)(e) and 42.**

REASONS FOR DECISION

Background:

[1] On July 26, 2007, Grain Services Union (ILWU-Canada) (the "Union"), filed applications with the Board alleging that either or both of Warner Transportation Services Limited ("Warner") and Prairie Valley School Division No. 208 had committed unfair labour practices in violation of ss. 11(1)(a), (b) and (e) of *The Trade Union Act*, R.S.S. 1978, c. T-17, as amended (the "*Act*"), by reason of the termination of, or failure to hire, one Glenn Polivka. Each of Warner and Prairie Valley School Division No. 208 filed a reply to the application. Concurrently, the Union applied for an order for interim

relief pursuant to s. 5.3 of the *Act* seeking, *inter alia*, Mr. Polivka's reinstatement or hiring until final hearing and determination of the applications proper. The Board heard the interim application on August 15, 2007.

Background and Evidence:

[2] In support of the application for interim relief, the Union filed the affidavits of Mr. Polivka and Steven Torgerson. In opposition to the application, Warner filed the affidavits of George Gross and Paul Chamberlin and Prairie Valley School Division No. 208 filed the affidavits of Wes Miskiman and Fred LaClaire. We have reviewed all of the affidavit material and the applications and reply in detail. The background facts are not in material dispute. Following is a summary of the evidence adduced.

[3] In May 2004, Regina School Division No. 4 contracted with Qu'Appelle Valley School Division No. 139 for the latter to provide school bus services for the former until June 30, 2006. Effective January 1, 2006, Qu'Appelle Valley School Division No. 139 amalgamated with Aspen Grove School Division to form Prairie Valley School Division No. 208 ("Prairie Valley"). At the request of Regina School Division No. 4, Prairie Valley agreed to continue providing school bus services for an additional year until June 30, 2007, but no longer. Regina School Division No. 4 began a tendering process for the bus driving services for the following school year.

[4] In December 2006, management personnel of Prairie Valley met with its approximately 100 bus drivers to advise them that the school bus contract with Regina School Division No. 4 would not be extended past its expiry date at the end of June 2007 and that they would no longer be employed by Prairie Valley after that date.

[5] At approximately the same time, or shortly after in early 2007, some of the bus drivers approached the Union regarding certain workplace concerns, including the method used by Prairie Valley in assigning charter trip work. The Union started a self-described "low-key" organizing drive among the drivers. One of the drivers, Glenn Polivka, who had been employed by Prairie Valley since 2004, was active in the drive and garnered support for the Union among fellow employees. Both Prairie Valley and Warner became aware of the organizing drive in February 2007.

[6] When it learned that it was the preferred bidder for the bus driving contract with Regina School Division No. 4, Warner arranged to hold a "town hall" type meeting with the Prairie Valley drivers at the bus barns. At the meeting, the drivers were advised that they would all be given the opportunity to apply for jobs with Warner.

[7] In March 2007, Regina School Division No. 4 awarded the contract to Warner to provide the school bus services formerly provided by Prairie Valley. At or about that time representatives of Warner met with the Prairie Valley bus drivers and advised that there would be no changes in the conditions of work and their positions were secure. Between April 11 and 18, 2007 representatives of Warner held a series of small-group meetings with the bus drivers. Mr. Polivka attended a meeting with Mr. Gross, Warner's controller, along with approximately three other drivers. In his affidavit, at paragraphs 13 and 14, Mr. Gross deposed that part of the intent of the meeting was "to generally determine [the drivers'] suitability for employment with Warner." Mr. Polivka deposed that the drivers were asked if they had any concerns. He said he voiced his concerns about Warner's proposed method of assigning charter trip work. According to Mr. Gross, Mr. Polivka was interested in seniority being the only criteria for assigning the work, while Mr. Gross advised Mr. Polivka that Warner was interested in looking at "experience within the driving pool." Mr. Gross also deposed that, during the discussion, Mr. Polivka "dominated or commandeered the meeting on this topic" and "was argumentative, verging on belligerent."

[8] Mr. Gross further deposed as follows at paragraph 21 of his affidavit:

> *Mr. Polivka's conduct and body language at the meeting suggested to me that he was not the kind of employee we were looking for. … He was not receptive to new ideas and he did not strike me as a team player.*

[9] Mr. Gross further deposed that Mr. Chamberlin confirmed that Mr. Polivka had a poor attitude towards Prairie Valley and the way in which charter work was assigned. Mr. Chamberlin provided Mr. Gross with a list of ten drivers whom Mr. Chamberlin considered to have either "a negative attitude or driving issues." In his affidavit, Mr. Chamberlin described Mr. Polivka as a "problem employee."

[10] Mr. Polivka organized a meeting of the drivers at a local café on May 14, 2007 placing notices of the meeting on drivers' car windshields. Both Mr. Gross and Mr. Chamberlin were aware of the meeting. Those bus drivers in attendance at the meeting agreed to take a "wait and see" approach given the change in contractors for the fall. The organizing drive was, therefore, put on hold.

[11] Written notices of lay-off were provided to the bus driver employees dated April 26, 2007. Mr. Chamberlin, transportation manager for Prairie Valley was also provided with a notice of lay-off on that date.

[12] At the end of the school year, on June 28, 2007, the drivers were instructed to meet with Mr. Gross regarding employment for the 2007-08 school year. Mr. Gross advised Mr. Polivka that he would not be hired by Warner and provided him with a letter of the same date that provided, in part, as follows:

> *After completing the review of your application and criteria we used for judging applicants (drivers abstracts, criminal checks, performance on the job/attitude, and being employed till the end of the school year) we have decided not to offer you employment with Warner Transportation Services Limited.*

[13] Mr. Polivka had a clean drivers abstract, no criminal record, had worked until the end of the school year and had no disciplinary or poor performance or attitude record with Prairie Valley. He asked Mr. Gross for an explanation. Mr. Gross essentially reiterated the letter and provided no specifics.

[14] Only a few of the bus drivers – perhaps five in total – received letters indicating that Warner would not hire them. Attitude was a determining factor in all of those cases.

[15] Mr. Gross deposed that, prior to offering employment to the Prairie Valley drivers, he was aware of union activity among the drivers and was made aware of the identity of some who were believed to be involved by Mr. Chamberlin – one of whom could have been Mr. Polivka – but two of those persons were nonetheless offered employment by Warner.

[16] Mr. Chamberlin was hired as Warner's transportation manager.

[17] Warner has since advertised for school bus drivers for the 2007-08 school year.

[18] On July 3, 2007, Prairie Valley issued each former bus driver a Service Canada Record of Employment ("ROE") stating that the reason for issuance was "Code A" - "Shortage of Work/End of contract or season" and further indicating that the individual would not be recalled. In prior years, Prairie Valley issued ROE's that simply indicated "Code A" and the practice was to "lay-off" the drivers over the summer break subject to rehiring for the start of the new school year. The drivers were not required to reapply for their positions, but rather they would receive a call in late August advising them of the date to return to work and the route they would be driving.

Statutory Provisions:

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

> *2 In this Act:*
>
> *(f) "employee" means:*
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> *(i) a person in the employ of an employer except:*
>
> *(A) a person whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character; or*
> *(B) a person who is regularly acting in a confidential capacity with respect to the industrial relations of his or her employer;*
>
> *(i.1) a person engaged by another person to perform services if, in the opinion of the board, the relationship between those persons is such that the terms of the contract between them can be the subject of collective bargaining.*

(ii) ***Repealed****. 1983, c. 81, s.3.*

(iii) any person designated by the board as an employee for the purposes of this Act notwithstanding that for the purpose of determining whether or not the person to whom he provides his services is vicariously liable for his acts or omissions he may be held to be an independent contractor; and includes a person on strike or locked out in a current labour-management dispute who has not secured permanent employment elsewhere, and any person dismissed from his employment whose dismissal is the subject of any proceedings before the board;

(g) "employer" means:

(i) an employer who employs three or more employees;

(ii) an employer who employs less than three employees if at least one of the employees is a member of a trade union that includes among its membership employees of more than one employer;

(iii) in respect of any employees of a contractor who supplies the services of the employees for or on behalf of a principal pursuant to the terms of any contract entered into by the contractor or principal, the contractor or principal as the board may in its discretion determine for the purposes of this Act;

and includes Her Majesty in the right of the Province of Saskatchewan.

. . .

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) to refrain from violations of this Act or from engaging in any unfair labour practice;

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

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

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

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;*
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> *. . .*
>
> *42. The board shall exercise such powers and perform such duties as are conferred or imposed on it by this Act, or as may be incidental to the attainment of the objects of this Act including, without limiting the generality of the foregoing, the making of orders requiring compliance with the provisions of this Act, with any regulations made under this Act or with any decision in respect of any matter before the board.*

Preliminary Objections:

Jurisdiction

[20] Ms. Barber, counsel on behalf of Warner, raised a preliminary issue that the Board does not have jurisdiction in the present case on the grounds that Mr. Polivka is not an "employee" or Warner is not an "employer" within the meaning of the *Act*. This is predicated on the facts that Mr. Polivka ceased to be employed by Prairie Valley on June 30, 2007 and that he has never been in the employ of Warner. For the purposes of the alleged violation of s. 11(1)(e) of the *Act*, Mr. Polivka simply could not have been discharged by Warner for union activity.

[21] In our opinion the objection is without merit. The Board has exclusive jurisdiction to determine whether anyone is an "employee" or "employer" within the meaning of and for the purposes of the *Act*. At the time of the events alleged in the application, Mr. Polivka was an "employee" within the meaning of the *Act* and, likewise, Warner was an "employer", albeit not necessarily Mr. Polivka's employer. The opening words of s. 11(1)(e) refer to discrimination "in regard to hiring" as well as discharge from

employment. For the purposes of discrimination in hiring in violation of s. 11(1)(e) it is not necessary that the individual in question be an employee of the prospective employer alleged to have practiced the discrimination because that would be impossible and would render the provision devoid of meaning.

[22] There have also been instances where a predecessor employer and a successor employer have worked in concert to secure the discharge of the successor's employee. In such cases, both may be guilty of an unfair labour practice and the successor employer may be ordered to reinstate the employee. In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Remai Investments Corporation and 592828 Saskatchewan Ltd.*, [1990] Winter Sask. Labour Rep. 100, LRB File Nos. 053-90, 054-90, 056-90, 057-90 & 058-90, the Board stated as follows at 116:

> *Section 5(f) of the Act permits the Board to require "an employer" to reinstate "any employee" discharged under circumstances determined by the Board to constitute an unfair labour practice. Ordinarily, the employer referred to in Section 5(f) would be the employer who committed the unfair labour practice. However, that need not necessarily be so. This section is wide enough to permit the Board to direct a successor employer to reinstate employees discharged by its predecessor. In circumstances where the successor is responsible or whether the predecessor and successor have worked in concert to bring about the unfair labour practice, such an order is entirely appropriate. The Board's authority to award monetary loss is found in Section 5(g) of the Act. It is worded similarly to section 5(f) and the same reasoning applies.*

[23] The difference between discrimination in hiring and discharge or suspension for union activity under s. 11(1)(e) is that, in the latter case, a rebuttable presumption may arise if it is shown that employees were, or had been, engaged in union activity.

[24] In the present case, Mr. Chamberlin, who was the Prairie Valley driver supervisor until its contract expired and who became the Warner driver supervisor when its contract became effective, advised Mr. Gross, Warner's controller, with respect to the suitability of drivers for employment with Warner. Their discussions included which drivers Mr. Chamberlin believed to be active on behalf of the Union or supporters of the Union, including Mr. Polivka. We do not know whether the panel of the Board that hears

the case proper will find Mr. Chamberlin to be the seamless link between the respondents in respect of the alleged unfair labour practice but the Board has the exclusive jurisdiction to hear the case.

[25] Counsel asserted that the Board has no jurisdiction to reinstate an employee on a discrimination in hiring unfair labour practice application under s. 5(f) of the *Act*. In our opinion, it would be absurd if a violation of s. 11(1)(e) did not have a suitable remedy. Section 5(e) of the *Act* allows the Board to fashion a remedy. It will be up to the panel that hears the case proper to determine the remedy in the event that it finds a violation of the *Act*.

[26] The preliminary objection regarding jurisdiction is dismissed.

Timeliness

[27] Ms. Barber also argued that the application should be dismissed on the basis of timeliness. The events alleged to form the basis of the application occurred up to the end of June or beginning of July 2007. The application was filed on July 26, 2007 not even a month later. Certainly counsel did not allege that there was any prejudice to her client nor is any demonstrated in the materials filed.

[28] The objection on this ground is dismissed.

Arguments:

[29] There were no significant differences between counsel for the parties as to the test applied by the Board on applications for interim relief pursuant to s. 5.3 of the *Act*. In *Hotel Employees and Restaurant Employees Union, Local 206 v. Canadian Hotels Income Properties Real Estate Investment Trust #19 Operations Ltd. (o/a Regina Inn)*, [1999] Sask. L.R.B.R. 190, LRB File No. 131-99 (hereafter, "*Regina Inn*"), the Board described the test as follows, at 194:

> *…(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.*

The Union

[30] Ms. Nordal, counsel on behalf of the Union, asserted that the Union's application for interim relief meets both arms of the test enunciated in *Regina Inn*, *supra*.

[31] Counsel reviewed the facts and pointed out that, at the time that Mr. Polivka was provided with the letter of June 28, 2007 advising him that he would not be hired by Warner, Mr. Gross declined or refused to specify or expand upon the reason or reasons for the decision. The letter simply refers to certain criteria but does not provide any indication of the particular reason why Mr. Polivka was not being hired. It was only in the present proceedings that Mr. Gross and Mr. Chamberlin depose that the reason was Mr. Polivka's poor attitude. There is no evidence that Mr. Polivka was ever warned or disciplined about his attitude or job performance by Mr. Chamberlin or any other manager at any time during his three years' employment with Prairie Valley. Furthermore, during their discussions about the suitability of the Prairie Valley driver employees for employment with Warner, Chamberlin and Gross had discussed which drivers Chamberlin believed were active with or supported the Union including Mr. Polivka. Mr. Chamberlin was the management supervisor of the drivers for Prairie Valley until its contract expired and he assumed the same position with Warner when its contract took effect.

[32] Anticipating an argument on behalf of Warner, Ms. Nordal submitted that it is not relevant whether the Union organizing drive was "on hold" at the time when Mr. Polivka was advised he was not to be hired by Warner – s. 11(1)(e) refers to past or present union activity as the reason for refusing to hire or discharging an employee. Counsel asserted that the Union has satisfied the first arm of the *Regina Inn* test by establishing an arguable case that the respondents, or either of them, acted in violation of that provision. It is apparent that Warner used its hiring procedure to weed out union supporters that it deemed undesirable and it did so with the complicity of Prairie Valley through the actions of Mr. Chamberlin who was intimately involved in Warner's choices in hiring.

[33] With respect to the balance of labour relations harm if interim relief is granted as opposed to if it is denied, Ms. Nordal submitted that the balance favours the Union. Such actions by employers are assumed to have a chilling effect on union activity and the exercise by employees of rights protected by s. 3 the *Act*. Ordinary employees are likely to be intimidated if they see active union organizers treated in the manner outlined. If he is not allowed to work for Warner, Mr. Polivka will have to try to secure other employment. There is no harm to Warner in that Mr. Polivka is an experienced driver on the routes that it has contracted to run, he has a clean SGI drivers' abstract, no criminal record and a clean disciplinary file with Prairie Valley.

[34] Counsel pointed out that the reply materials filed on behalf of Warner do not allege any labour relations harm in the event that Mr. Polivka is reinstated to its employ.

Warner

[35] Ms. Barber, counsel on behalf of Warner, argued that there is no basis for the unfair labour practice allegation. The situation with the Prairie Valley bus drivers at the end of the 2006-07 school year was different than other years where there may have been an expectation of re-hiring in the fall. The drivers were advised in December 2006 that they would cease to be employees of Prairie Valley at the end of the school year. Warner advised them in March 2007 that they could apply to be hired by Warner for the new school year in the fall.

[36] Counsel asserted that the purpose of s. 5.3 of the *Act* is to preserve the status quo, that is, that Mr. Polivka is a discharged employee of Prairie Valley and not an employee of Warner.

[37] Ms. Barber argued that there was no arguable case for the application: there neither is nor was any employment relationship between Mr. Polivka and Warner; the basis on which Warner declined to hire Mr. Polivka was legitimate – i.e., his poor attitude; at the time that Mr. Polivka was discharged by Prairie Valley, the Union's organizing drive was on hold; and, while Warner had reason to believe that Mr. Polivka

was a supporter of the Union, it did not know the degree of his involvement and, in fact, hired two other drivers that it believed were supporters of the Union.

[38] With respect to the balance of labour relations harm, Ms. Barber argued that there could be no chilling effect because there is no organizing drive at present.

Prairie Valley

[39] Mr. McLellan, counsel on behalf of Prairie Valley, argued that all of the school division's bus driver employees were terminated effective June 30, 2007 and were no longer employees. In any event, he submitted, it is unclear which of the respondents, if either, should be charged with satisfying a remedial order. There certainly is no monetary loss because the drivers do not do the work in the summer months.

Analysis and Decision:

[40] The test used by the Board on applications for interim relief pursuant to s. 5.3 of the *Act* is firmly established. In the present case, there is no reason to depart from the test as enunciated in *Regina Inn*, *supra*, and we were not asked to do so by counsel for any of the parties.

[41] Some decisions of the Board where application of the test has resulted in interim reinstatement of the terminated employee pending hearing and determination of the application for final relief include the following: *United Food and Commercial Workers, Local 1400 v. Tropical Inn, operated by Pfeifer Holdings Ltd. and United Enterprises Ltd*., [1998] Sask. L.R.B.R. 218, LRB File Nos. 374-97. 375-97 and 376-97; *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; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Partner Technologies Incorporated*, [2000] Sask. L.R.B.R. 737, LRB File Nos. 290-00, 291-00 & 292-00; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Universal Reel & Recycling Inc*., [2001] Sask. L.R.B.R. 809,

LRB File Nos. 226-01, 227-01 & 228-01; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Northern Steel Industries Ltd.*, [2002] Sask. L.R.B.R. 304, LRB File No. 114-02; *Canadian Union of Public Employees, Local 4617 v. Heinze Institute of Applied Computer Technology Inc*., [2003] Sask. L.R.B.R. 374, LRB File Nos. 122-03, 123-03 & 124-03; *Canadian Union of Public Employees v. Del Enterprises, o/a St. Anne's Christian Centre*, [2004] Sask. L.R.B.R. 228, LRB File Nos. 219-04, 220-04 & 221-04; *United Food and Commercial Workers, Local 1400 v. D & G Taxi Ltd*., [2004] Sask. L.R.B.R. 347, LRB File Nos. 244-04, 245-04 & 246-04.

[42] In our opinion, the Union has met the test in the present case. We are satisfied that the application reflects an arguable case under ss. 11(1) (a) and (e) of the *Act*. We accept for the purposes of the application for interim relief that Mr. Polivka was a key union organizer in the Prairie Valley workplace -- he garnered card support for the Union and, on his own, organized a meeting of drivers, doing all of the advertising of same by placing flyers on car windshields at the workplace. Prairie Valley admitted that it had known of union organizing activity since February 2007 and knew that Mr. Polivka supported the Union. Prairie Valley communicated this knowledge to Warner. Warner admitted that it had been aware of union organizing activity among the drivers of Prairie Valley since February 2007. The fact that Mr. Polivka was a supporter of the Union was part of the discussion between Mr. Chamberlin on behalf of Prairie Valley and Mr. Gross on behalf of Warner in April 2007 when Mr. Gross was determining who would be offered employment when Warner assumed its contract the moment Prairie Valley's contract expired. Mr. Polivka was advised that he would not be hired by Warner before Warner's contract took effect and while he was still an employee of Prairie Valley.

[43] It is passing strange that Mr. Polivka was not advised as to why he was not to be hired until these proceedings were launched. As far as he believed, he had no reason to think that he did not satisfy Warner's criteria -- he had a clean drivers abstract, no criminal record and a clean disciplinary and job performance record, as well as several years' experience. He was not disabused of this belief despite his request for the grounds of non-hiring.

[44] While it is not our function to assess the merits of the Employer's actions as far as determining whether it had just and reasonable cause, we are charged with the

responsibility on this interim application to assess whether there is an arguable case that Warner's actions are not coherent and plausible apart from any suggestion that exercise of rights under the *Act* and support for the Union played a part in the termination. In the present case, we are satisfied that such an arguable case is made out. There is at least an arguable case that Mr. Polivka's exercise of rights under the *Act* in support of the Union formed at least part of the basis for his not being hired. It is not necessary under either of ss. 11(1)(a) or (e) that there be present union activity or exercise of rights under the *Act*; past activity may also be satisfactory under s. 11(1)(e). And, of course, it is also alleged that the employers' activities complained of were performed in intimidation or discouragement of employees in the exercise of rights under the *Act*.

[45] At this point it cannot be determined and we are not charged with determining whether Prairie Valley acted in concert with Warner, but there is an arguable case that it did given the admitted actions of Mr. Chamberlin.

[46] With respect to the balance of labour relations harm, despite the fact that the Union's organizing drive was on hold, there is no evidence that it was dead. The fact that a main union organizer or supporter is among the very few drivers not hired is almost certain to have a chilling effect on the employees' confidence in their ability to exercise rights under the *Act* without fear of discrimination or reprisal. The chilling effect of alleged unlawful termination or discrimination in hiring of an employee known to be active in a union's organizing efforts extends beyond the immediate organizing drive itself because it strikes at the very heart of the overarching object and purpose of the *Act* as expressed in s. 3: that is, the right of employees to engage in activities to select a trade union to represent them in collective bargaining with their employer free of fear or apprehension that the exercise of such rights may jeopardise their continued employment.

[47] Warner did not allege that if Mr. Polivka were reinstated it would have a negative effect on workplace morale or its ability to satisfy its obligations under its bus driving contract with Regina School Division No. 4. Objectively, from the perspective of an ability to perform the work, there is no doubt that Mr. Polivka is qualified – there is no complaint at all about his abilities as a competent and safe driver.

[48] Accordingly, we have determined that Mr. Polivka is to be "reinstated" to employment with Warner, or, alternatively, that Warner shall hire him as a full-time bus driver (as that term is normally applied by Warner), effective on the date that the bulk of its drivers begin their duties for the new school year, until the hearing and disposition of the final application. In the event that that date has passed, then Mr. Polivka shall be reinstated or hired forthwith. His reinstatement or hiring shall be on the same terms and conditions and with the same rights and benefits as enjoyed by the other drivers. In the event that the application proper is not successful then Warner shall not be required to employ Mr. Polivka any longer.

[49] In all of the circumstances, we are of the opinion that an order for interim relief shall issue in the following terms:

(1) **THAT** the Respondent Warner Transportation Services Limited (the "Employer") shall reinstate or hire Glenn Polivka to the position of full-time driver (as that term is normally applied by the Employer) on the same terms and conditions and with all of the rights and benefits enjoyed by other full-time drivers, pending final hearing and decision of the applications or until further order of the Board;

(2) **THAT** the Employer shall effect such reinstatement or hiring of Glenn Polivka effective on the same date as duties commence for the majority of its drivers in respect of the 2007-08 school year; in the event that such date has passed, Mr. Polivka's hiring shall be effected on the next work day following receipt of the Order by the Employer, or such later date as is agreeable to the Union;

(3) **THAT**, within twenty-four (24) hours of the receipt of the Order and the Reasons for Decision, the Employer shall post a copy of the Order and the Reasons for Decision in the workplace in a location where the Order is visible to and may be read by as many employees as possible, such posting to remain until the final determination of the applications;

(4) **THAT** the Order shall remain in effect until such time as the Board disposes of the applications filed under ss. 5(d), (e), (f) and (g) of *The*

Trade Union Act; depending upon whether the final application for reinstatement or hiring of Glenn Polivka is determined in favour of the Union or the Employer, there may be no further obligation to employ Glenn Polivka from that time; and

(5) **THAT** the Board shall remain seized of this matter for the purposes of determining any issues associated with the implementation of the Order.

[50] Board Member Cruson dissents from these Reasons for Decision.

DATED at Regina, Saskatchewan, this **4th** day of **September, 2007**.

LABOUR RELATIONS BOARD

James Seibel, Chairperson