

**Labour Relations Board
Saskatchewan**

INTERNATIONAL UNION OF HEAT AND FROST INSULATORS AND ASBESTOS WORKERS, LOCAL 119, Applicant v. WILF'S OILFIELD SERVICES (1987) LTD., Respondent

LRB File No. 297-04 & 006-05 to 014-05, November 27, 2007
Chairperson, James Seibel; Members: John McCormick and Ken Ahl

For the Applicant: Bettyann Cox
For the Respondent: Sue Barber

Certification – Practice and procedure – Statement of employment – Board examines evidence respecting work being performed by persons in dispute during reasonably representative period of time prior to filing of statement of employment in context of what constitutes work of insulator trade – Board sets composition of statement of employment.

Unfair labour practice – Dismissal for union activity – Lay-off – Employer continued to employ union supporters for work for which they had been hired after learning of their support for union and subsequently had reasonable and plausible explanation for laying them off – No evidence that lay-offs motivated by anti-union animus – Board dismisses unfair labour practice application.

Unfair labour practice – Interrogation – Board finds no evidence that union supporters interrogated by employer – Union supporters volunteered information to employer at meeting – Board also finds no evidence of intimidation or interference by employer – Board dismisses unfair labour practice application.

***The Trade Union Act*, ss. 5(a), 5(b), 5(c), 11(1)(a), 11(1)(e), 11(1)(f), 11(1)(g), 11(1)(o).**

REASONS FOR DECISION

Background:

[1] International Union of Heat and Frost Insulators and Asbestos Workers, Local 119 (the "Union") has applied, pursuant to ss. 5(a), (b) and (c) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), for an order to be designated as the certified bargaining agent of a standard

“Newbery unit” of “all insulators, insulator apprentices and insulator foremen”¹ employed by Wilf’s Oilfield Services (1987) Ltd. (the “Employer”).

[2] The Union has also applied pursuant to ss. 11(1)(a), (e), (f), (g) and (i) of the *Act*, alleging that the Employer committed unfair labour practices by dismissing certain persons from its employment while employees were exercising rights under the *Act*, by interrogating employees about support for the Union and by requiring that employees not join the Union as a condition of employment. The persons alleged to have been unlawfully dismissed were:

- Lyle Currie
- Jared Laing
- Kevin Merritt
- Perry Baconfield

[3] The Employer denied the unfair labour practice allegations.

[4] In its application for certification, the Union estimated there were seven employees in the proposed bargaining unit. In its reply and statement of employment filed on the application, the Employer stated there were 26 employees, seven of whom should be excluded as managerial and ten of whom should be excluded as confidential. At the hearing, the Employer and the Union agreed that seven persons should properly be removed from the statement of employment as follows:

- Brady Olson
- Jim Leland
- Kelly Peace
- Curtis Hammer
- Ryan Deusner
- Todd Moore
- Rick Wells

¹ The standard bargaining unit for the insulators trade division in the construction industry was established by the Board in *Construction and General Workers’ Local Union No. 890 v. International Erectors & Riggers, a Division of Newbery Energy Ltd.*, [1979] Sept. Sask. Labour Rep. 37, LRB File No. 114-79.

[5] The Union alleged that the name of Don Chalk should be removed from the statement of employment although it had originally agreed with the Employer that Mr. Chalk was properly listed. The Union said that there should only be six persons listed on the statement of employment as follows:

- Reg Hominiuk
- Jared Laing
- Kevin Merritt
- Perry Baconfield
- Lyle Currie
- Stephen Reid

[6] Of those, the Employer contended that Reg Hominiuk should not be listed. The Employer took the position that the following 17 persons should be included on the statement of employment:

- Don Chalk
- Stephen Reid
- Lyle Currie
- Jared Laing
- Kevin Merritt
- Perry Baconfield
- Carmen Schindel
- Nathan Schindel
- William Dueck
- Greg Reid
- Paul Skjei
- Gary Nykolaishen
- Halden Lindbjerg
- John Unger
- Rob Adair
- Blair Dyck

- Greg Gillespie

[7] Accordingly, issue was joined as to whether the following 13 persons should be on the statement of employment:

- Reg Hominiuk
- Don Chalk
- Carmen Schindel
- Nathan Schindel
- William Dueck
- Greg Reid
- Paul Skjei
- Gary Nykolaishen
- Halden Lindbjerg
- John Unger
- Rob Adair
- Blair Dyck
- Greg Gillespie

[8] With respect to these 13 persons, the Employer took the position that Mr. Hominiuk quit his employment on December 6, 2004. The Union took the position that Mr. Chalk was an independent contractor and that the other eleven persons were not employees within the description of the bargaining unit.

[9] Both applications were heard together over five days of hearing involving a great deal of testimony and documentary evidence. The parties agreed that the Union would lead its evidence first and would be allowed to call rebuttal evidence should it deem it necessary.

Evidence:

[10] The evidence led on the applications was voluminous. We do not intend to reiterate it in detail.

[11] The Employer is an oilfield servicing contractor operating out of Swift Current, Saskatchewan. It also does a small amount of general construction work. It has been in business since 1960. The present principal and owner, Brent Kern, has been operating the Employer since 1987. At the time material to the present applications, the Employer was engaged in the winterization process required to protect oil well works, compressor stations and related apparatus from low temperatures. The nature of the insulating work involves the insulation of the well site buildings themselves, the application of flexible insulation around individual pipes, valves and flanges, which may later be tightly clad with aluminium (a process called "metalling"), and the construction and installation of what is called "utilidor" insulation of compressors or groups of pipes -- a contraction of "utility corridor," a utilidor is an accessible insulated chamber or corridor constructed of wood, culvert material or pre-fabricated insulated panels.

[12] Mr. Kern is a journeyman carpenter but is capable of doing mechanical insulation, and works on the tools most days. He testified that the Employer's workforce fluctuates depending on activity in the industry and the time of year, September to December being the busiest months for mechanical insulation. During 2004, the period from the summer through to Christmas was a busy time for the Employer. Mr. Kern stated that on December 7, 2004 the Employer had approximately 40 employees but only the ones that did mechanical insulating were on the statement of employment. For example, two labourers he hired in the fall, Tim Steer and Greg Sears were not listed. Because of the number of new wells that had been established, Mr. Kern knew in October that the Employer would be busy with insulating work. Although he has a core of persons he regularly relies on to do such work he thought he would need at least one more.

[13] Mr. Kern placed an ad on the internet through Human Resources Development Canada ManPower Services for two mechanical insulators. He said he received an inquiry from Mr. Hominiuk on October 28, 2004 and spoke with Mr. Hominiuk by phone about the expectations of the job. Mr. Kern said he told Mr. Hominiuk there was probably work until Christmas. Mr. Hominiuk, who did not live in the Swift Current area, advised Mr. Kern that because of personal reasons he would have to get back to him. Mr. Hominiuk called Mr. Kern back about a week later and commenced work on November 8, 2004 as a mechanical insulator.

[14] Around December 1, 2004 Mr Kern told Mr. Hominiuk that the Employer could use a couple more workers for a couple of weeks. On December 2, 2004 Lyle Currie and Perry Baconfield showed up at the Employer's premises and were hired. Kevin Merritt and Jared Laing showed up on December 3, 2004 and were also hired. Mr. Kern said that he told them all that the work was temporary for perhaps a couple of weeks and might be even shorter because there were now four additional people to do the work. All of them, except Mr. Baconfield, worked straight through without a day off until they were laid off on December 16, 2004. Mr. Kern said he could not recall ever talking about the usual business shutdown for ten or twelve days over Christmas probably because he never intended them to be there that long.

[15] Mr. Kern testified that Mr. Hominiuk told him on December 6, 2004 that he was quitting his employment. He said he recalled Mr. Hominiuk stating to the effect of, "That's it, I'm out of here. I'm going to another job." Mr. Kern said he asked Mr. Hominiuk if he could stay a while longer but Mr. Hominiuk told him he had to travel the next day to start a new job in Weyburn the day after that (i.e., December 8, 2004). Mr. Kern accepted the resignation. He said Mr. Hominiuk called him later the same evening to ask if he could "pick up his stuff" – Mr. Kern said he assumed he meant his tools or equipment. Mr. Hominiuk did not indicate that he had reconsidered and wanted to return to work. Mr. Kern said Mr. Hominiuk showed up at the shop about 7 a.m. the next morning. Mr. Kern thought it was just to get his "stuff" at the shop, but Mr. Hominiuk told Mr. Kern he had left it at the worksite at Claymore. Mr. Kern gave Mr. Hominiuk a truck to use to pick up his things and asked him to take Mr. Laing with him and drop him off there to work and Mr. Kern would pick Mr. Laing up later in the day. Mr. Kern said that he did not instruct Mr. Hominiuk to do any work himself that day. Mr. Kern said that, when he got to the Claymore site about 12:30 p.m., neither Mr. Hominiuk nor Mr. Laing were there – he waited for over an hour. Mr. Kern said no work had been done at the site since he was last there the day before. Mr. Hominiuk called Mr. Kern on his cell. Mr. Kern did not say that during their conversation Mr. Hominiuk said anything about "quitting again."

[16] The application for certification was filed on December 7, 2004. Mr. Hominiuk purported to submit a timecard for December 7, 2004. Mr. Kern maintained that Mr. Hominiuk did not do any work on that date or at any time after December 6, 2004. On December 9, 2004, Mr. Hominiuk called Mr. Kern to ask when his final paycheque would be ready and to advise where it

should be sent.

[17] Mr. Kern testified that on December 8, 2004 Gary Nykolaishen called him from the field and said that Mr. Currie, Mr. Laing, and Mr. Merritt wanted to talk to Mr. Kern when they got back to the shop as to whether they would be fired, Mr. Kern said he advised them he had hired them to do a job and that it looked like the work might last another week. He said that they all indicated they understood.

[18] By December 12, 2004 after consulting with Mr. Nykolaishen, Mr. Kern said he thought the work for Mr. Merritt, Mr. Laing and Mr. Currie would last about another four days -- one day to finish the job they were presently on and two to three days to complete another job near Weyburn. Mr. Chalk told Mr. Kern that he estimated that he and Mr. Baconfield would be at a point "in a few days" when Mr. Chalk could complete the work on his own. On December 16, 2004 the Weyburn job was completed and the Tompkins job was at the point where Mr. Chalk could continue on his own. Mr. Merritt, Mr. Currie, Mr. Laing and Mr. Baconfield were told on December 13, 2004 that there was no more work and their last day would be December 16, 2004.

[19] Mr. Hominiuk testified that he had some 20 years' insulating experience as a journeyman insulator and had an asbestos abatement ticket. He responded to an ad for insulators placed by the Employer on the internet through Human Resources Development Canada. Mr. Hominiuk said that, during his telephone interview with Mr. Kern, he was told he could be "kept busy" for most of the winter. He started work for the Employer on November 8, 2004. During his time with the Employer, he mainly worked with Mr. Nykolaishen. Mr. Nykolaishen would do most of the insulating and he would follow up with the metalling. He also worked with Nathan Schindel, who Mr. Hominiuk specifically said did metalling work and Rob Adair, who Mr. Hominiuk specifically said did insulating. Mr. Hominiuk said that as far as he could tell Mr. Chalk and Stephen Reid worked exclusively at insulating work and the number of other employees that did such work would vary from day to day. He observed Paul Skjei making end caps used in the metalling process. When Mr. Kern indicated to Mr. Hominiuk that he could use some more help, Mr. Hominiuk took it upon himself to contact Chuck Rudder, the Union's business manager, who arranged for Mr. Currie, Mr. Merritt, Mr. Laing and Mr. Baconfield to apply for work.

[20] Mr. Hominiuk stated that he mainly worked twelve hour days for the Employer and, for personal reasons, was under increasing stress. He testified that while returning from the jobsite on December 6, 2004 he decided to quit his employment and advised Mr. Kern of this at about 7:30 p.m., telling that "I have had enough." Mr. Hominiuk admitted he told Mr. Kern that he was starting another job in Estevan on December 8, 2004 with a company called Insulation Applicators. He took his clothes and tools to where he was staying. He claimed he changed his mind about an hour later, called Mr. Kern, asked if he could return to work the next morning and was told he could. He also claimed that when he showed up the next morning, December 7, 2004 at 6 a.m., Mr. Kern sent him by himself to a particular work site to do his usual job but, by about noon, Mr. Hominiuk felt he could not go on and decided once again to quit. When Mr. Hominiuk arrived at the shop at about 2 p.m., he called Mr. Kern to advise him he was quitting. He admitted that he knew the Union had filed the application for certification by that time. He said he worked on the new job at Insulation Applicators for five or six days and was then laid off for lack of work.

[21] Mr. Hominiuk admitted that he told Mr. Kern on December 6, 2004 that he was resigning to pursue better employment. However, he said he reconsidered his decision that evening and returned to work on December 7, 2004 but again told Mr. Kern that day that he was resigning. He also agreed that while he was there, Stephen Reid was working as an apprentice to Mr. Chalk.

[22] Mr. Merritt testified that he had three years' experience as a registered insulator apprentice pursuant to *The Apprenticeship and Trade Certification Act, 1999*, S.S. c. A-22.2 (the "*Apprenticeship Act* "). He said that he spoke to Mr. Kern on the phone about a job in early December 2004. He showed up on December 3, 2004 with Mr. Laing and they were hired. Mr. Merritt told Mr. Kern that Mr. Laing was also an apprentice. He denied that Mr. Kern told him the job was temporary but admitted that Mr. Kern spoke of a ten day shutdown at Christmas and said the Employer would bring some workers back after that. Mr. Merritt also testified that at some point he told Mr. Kern he was going to school for six weeks in the new year and after a query by Mr. Kern indicated to Mr. Kern that he was available to work on weekends during that time and full-time after that.

[23] According to Mr. Merritt, on December 7, 2004 Mr. Kern asked to see himself, Mr.

Laing and Mr. Currie when they got back from the field. He said Mr. Kern told them he was “not impressed” with the Union’s move to unionize the Employer and that they should continue working for the time being. Mr. Kern advised Mr. Merritt on December 13, 2007 that his last day of work would be on December 16, 2007.

[24] In the course of his evidence, Mr. Merritt mentioned having worked or having come into contact on the job at one time or another with Mr. Nykolaishen, Nathan Schindel, Mr. Adair, John Unger and Stephen Reid but said they were all workers, such as carpenters or labourers, even if they did insulating work. Mr. Merritt said that, because of an injury, Mr. Skjei was on light duties at the Employer’s shop scribing end caps used in the metalling process.

[25] Mr. Currie testified that he had 24 years’ insulating experience and membership in the Union. While he is not a registered as a journeyman under the *Apprenticeship Act*, he holds a “brown card” as qualified in the trade prior to its statutory designation. Mr. Hominiuk told Mr. Currie about the potential for a job with the Employer. Mr. Currie was hired on December 2, 2004. He worked almost the whole time with Mr. Nykolaishen, Mr. Laing and Mr. Merritt. Mr. Nykolaishen would apply the insulation and he and the others would follow with the metalling. He also worked a few times with Nathan Schindel, Stephen Reid, Mr. Chalk, and a “couple other helpers” who he did not name.

[26] Mr. Currie stated that on December 7, 2004 while he was working with Mr. Nykolaishen, Mr. Merritt and Mr. Laing, Mr. Nykolaishen told him that Mr. Kern wanted to see him at the shop when they returned at the end of the day. He, like the others, said that although Mr. Kern was upset he told them he was pleased with their work.

[27] Mr. Kern advised Mr. Currie on December 13, 2004 that his last day of work would be December 16, 2004. He said there was a large amount of insulation in the Employer’s yard when he left.

[28] Mr. Laing testified he had less than one year of insulating experience. He described himself as an insulator apprentice but said he is not registered as such under the *Apprenticeship Act*. Mr. Laing said that when he was hired by Mr. Kern on December 3, 2004 he

was told there was lots of work until at least Christmas. While he said he worked at insulating mostly with Mr. Hominiuk, Mr. Nykolaishen, Mr. Currie and Mr. Merritt, he also worked with other people whose names he could not recall. He observed Nathan Schindel, Mr. Chalk and Mr. Nykolaishen performing insulating work.

[29] On December 7, 2004 Mr. Laing said he went out on the job with Mr. Hominiuk but about noon Mr. Hominiuk said he was returning to the shop to do another job. The round trip was at least 5 hours so they had done little work, returning to the shop about 2 p.m.

[30] Mr. Laing claimed it was Mr. Nykolaishen who told he, Mr. Currie and Mr. Merritt that Mr. Kern wanted to talk to them when they returned to the shop on December 8, 2004. He said that Mr. Kern was upset about the certification application but also said he was impressed with their work and they should continue.

[31] Mr. Laing said that Mr. Kern advised him on December 13, 2004 that there was no more work and his last day would be December 16, 2004. While he said he was surprised, he did not question it.

[32] Mr. Baconfield testified that he was a journeyman insulator with 16 years' experience. He found out about the potential of a job with the Employer from the Union's business manager, Mr. Rudder. Mr. Baconfield showed up and was hired by Mr. Kern on December 2, 2004. He said he was told there was work until Christmas. He agreed there was no assurance of any work after that.

[33] Until his last day on December 16, 2004 Mr. Baconfield worked every day with Mr. Chalk except for two days with Mr. Hominiuk and one day with Stephen Reid whom Mr. Baconfield described as Mr. Chalk's apprentice. Mr. Baconfield said that, while he and Mr. Chalk had insulated upwards of 100 well sites, most of them still required the application of aluminium cladding referred to as "metalling." Mr. Baconfield said there was a large stockpile of insulation at the Employer's yard site. When Mr. Kern advised Mr. Baconfield that his last day would be December 16, 2004 Mr. Kern said it was because the work was caught up. Mr. Baconfield admitted he told Mr. Chalk that he hoped to work until Christmas but had other places he could go

if he was laid off.

[34] Mr. Baconfield said that he advised Mr. Kern he was a member of the Union but Mr. Baconfield did not say that Mr. Kern had asked him whether that was the case.

[35] While Mr. Baconfield saw Mr. Hominiuk at the Employer's yard site early on December 7, 2004 he did not observe Mr. Kern speaking to Mr. Hominiuk.

[36] Mr. Rudder is the Union's business manager. He testified that he found out from Mr. Hominiuk in November 2004 that the Employer was looking to hire full-time insulators. Later that month Mr. Hominiuk advised Mr. Rudder that the Employer needed more people to do insulating work. Mr. Rudder said he identified two insulators, Mr. Baconfield and Mr. Currie, and two insulator apprentices, Mr. Merritt and Mr. Laing, who might be available to work.

[37] Mr. Rudder described his communications with Mr. Hominiuk during the material period of time, the bulk of which are irrelevant to the issues at hand. However, Mr. Rudder did state that he knew that Mr. Hominiuk had quit his employment on December 6, 2004 but Mr. Rudder did not advise Mr. Hominiuk to get it back. Mr. Hominiuk later told Mr. Rudder he had done so.

[38] Mr. Rudder testified that the estimate of seven employees in the bargaining unit in the application for certification was based upon Mr. Hominiuk, Mr. Currie, Mr. Merritt, Mr. Laing, Mr. Baconfield, Mr. Chalk and Stephen Reid, who appeared to be the employees who only did insulating work. Carmen Schindel, Nathan Schindel, Mr. Adair and Halden Lindbjerg are all registered as carpenter apprentices under the *Apprenticeship Act*. Mr. Kern and Mr. Skjei are registered as journeyman carpenters. While Mr. Merritt and Mr. Baconfield are registered insulator apprentices, Mr. Laing is not. Mr. Currie, while not registered as a journeyman insulator, is such by way of "grandfathering" having worked in the trade prior to its statutory designation as a trade.

[39] Mr. Rudder said he received a telephone call from Mr. Kern on December 7, 2004. Mr. Kern indicated to Mr. Rudder that he would not have hired Mr. Hominiuk if he knew Mr. Hominiuk was a union organizer, that the Employer was only a small contractor and how anti-

union companies working in the oil patch were.

[40] Mr. Chalk testified that he had been a foreman with the Employer since 1992 performing the mechanical insulation of oil wells, construction of metal buildings and utilidor systems and painting. He is a journeyman carpenter. He may work alone or supervising a crew of up to ten people. He does not have journeyman insulator certification. He incorporated a company, 101001421 Saskatchewan Ltd., “for tax purposes” and entered into a contract operating agreement with the Employer in 2001. Pursuant to the agreement, the work Mr. Chalk performed for the Employer did not change. He was obliged to provide his own vehicle, tools and liability insurance. He charges out his time and the time for use of his truck on an hourly rate basis. He receives overtime after eight hours per day. He is paid every two weeks like all of the Employer’s other employees. While it was allowable for him to employ others, he did not do so and continued to work with the Employer’s other employees depending on the job. His work is billed to the Employer by invoice. The company has a GST number. Mr. Chalk uses some of his own tools and some of the Employer’s tools. He said other employees use some of their own tools also. In the last ten years or so, he has done some work for others on perhaps ten occasions on his own time.

[41] Mr. Chalk described the oil well mechanical insulation process in great detail, which we do not intend to reiterate. However, Mr. Chalk did indicate that, while it is critical to get the wells insulated in time to prevent freeze up, they can generally wait to be “metalled” and some never require such cladding. Mr. Chalk said that often he and Stephen Reid complete that work on their own. Mr. Chalk confirmed that he told Mr. Kern in early to mid December that he expected to be finished the critical insulating work within a few days and would not require Mr. Baconfield’s help after that. He also stated that, in his experience, the Employer’s regular employees were all that was required to complete the remaining work after December 16, 2004.

[42] While Mr. Chalk often works on his own, he also supervises crews of the Employer’s employees. For example, on December 12, 2004 Mr. Chalk was supervising two crews in the same area, one comprised of Mr. Laing, Mr. Currie, Mr. Merritt and Mr. Baconfield and the other comprised of Stephen Reid, Greg Reid and Mr. Unger. Mr. Chalk said that, while working with Mr. Baconfield, he taught Mr. Baconfield how to do some procedures – while Mr.

Baconfield is an experienced insulator, he had not worked in the oilfields. Mr. Chalk said Mr. Baconfield spoke of going to work at Fort McMurray after Christmas.

[43] Mr. Chalk stated that, while he mainly worked at insulating with Stephen Reid, Nathan Schindel, Carmen Schindel, Mr. Adair and Blair Dyck, all of the Employer's employees did such work. In Mr. Chalk's estimation, all of those gentlemen, as well as Mr. Lindberg and Mr. Skjei, were as adept at mechanical insulation work as he was but perhaps not as fast. Mr. Chalk said that Mr. Dyck went off work about six months before because of his health and had not yet returned. He also said that Greg Gillespie had not worked for the past year for health reasons.

[44] Mr. Nykolaishen testified that he has been working for the Employer since April 2004 primarily doing insulating of buildings and pipes and constructing utilidors, both on his own and with other employees such as Mr. Lindberg and Greg Reid. Mr. Nykolaishen referred to Mr. Chalk as a "foreman." During the time material to the present applications, Mr. Nykolaishen worked at insulating with Mr. Hominiuk, Mr. Currie, Mr. Laing and Mr. Merritt. Mr. Nykolaishen said that Mr. Hominiuk spoke to him of leaving before Christmas and the other three gentlemen spoke often of what they were going to do after Christmas and possibly working at Fort McMurray. Mr. Nykolaishen understood that they were all there for a short time to simply help get caught up on the insulating work. While working with Mr. Laing, Mr. Currie and Mr. Merritt, Mr. Nykolaishen drove the group to the worksite each day and filled in Mr. Kern at the end of each day as to the progress of the work and how long it would take to complete.

[45] Mr. Nykolaishen said that on or about December 8, 2004 Mr. Currie, Mr. Laing and Mr. Merritt indicated to him that they wanted to speak to Mr. Kern about their role in the Union's organizing drive and any potential effect on their employment. While driving back to the shop from the jobsite at the end of the day, Mr. Nykolaishen called Mr. Kern and told him that the three gentlemen wanted to talk to him when they arrived. Mr. Nykolaishen alleged that afterwards Mr. Merritt told him that, while Mr. Kern was upset about the certification application, he had told the three of them that it would not affect their employment -- that they had been hired for a purpose and would continue to work until the work was caught up. Mr. Nykolaishen testified that the work was caught up when they left on December 16, 2004.

Arguments:Certification Application

[46] Ms. Bettyann Cox, counsel on behalf of the Union, submitted that Mr. Chalk is an independent contractor and, therefore, should not be listed on the statement of employment. Counsel cited the Board's decisions in *Saskatchewan Government and General Employees' Union v. Saskatoon Open Door Society Inc.*, [2001] Sask. L.R.B.R. 210, LRB File No. 177-99 and *Saskatchewan Government and General Employees' Union v. Rural Municipality of Meadow Lake, No. 588*, [2001] Sask. L.R.B.R. 782, LRB File No. 140-01, as sources for the factors to consider in this regard.

[47] With respect to the other disputed individuals, counsel suggested that we look at certain criteria including registration status under the *Apprenticeship Act* and whether and how much each individual had performed insulator work during a reasonably representative period prior to the filing of the statement of employment, in this case, the seven-day period prior thereto. Counsel also submitted that trade "helpers" could be included in "non-compulsory" trades. In support of these submissions, counsel referred to the decisions of the Board in *United Brotherhood of Carpenters and Joiners of America (Millwrights Union, Local 1021) v. Daycon Mechanical Systems Ltd.*, [1999] Sask. L.R.B.R. 127, LRB File No. 338-97 and *United Brotherhood of Carpenters and Joiners of America, Local 1985 v. Dominion Bridge Inc.*, [1998] Sask. L.R.B.R. 365, LRB File No. 302-97.

[48] Counsel asserted that persons registered under the *Apprenticeship Act* in respect of the carpenter trade should not be included because the Employer submits the hours worked by carpenter apprentices with respect to utility construction and containment systems towards their certification in that trade. This basis for exclusion from the statement of employment would disqualify Carmen Schindel, Greg Reid, Nathan Schindel, Mr. Lindjberg and Mr. Skjei.

[49] With respect to Mr. Dyck and Mr. Gillespie, counsel argued that they should not be included on the statement of employment because they had not worked for the Employer for a considerable period of time, approximately six months and one year, respectively, they received no benefits from the Employer and there was no evidence that they were ever likely to return to work:

Saskatchewan Government and General Employees' Union v. Rural Municipality of Paddockwood, No. 520, [1999] Sask. L.R.B.R. 470, LRB File Nos. 059-99 & 087-99 to 093-99.

[50] With respect to Mr. Hominiuk, counsel argued that he ought to be included on the statement of employment because Mr. Kern had accepted his request to rescind his resignation and return to work on the evening of December 6, 2004 and provided him with a truck to drive to the worksite on December 7, 2004. Mr. Hominiuk was in fact employed on the date the application for certification was filed – December 7, 2004 – and should be included. In support of these arguments, counsel referred to the decisions of the Board in *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada v. Ram Technical Services Ltd.*, [1996] Sask. L.R.B.R. 773, LRB File No. 188-96 and *Saskatchewan Government Employees Union v. Bosco Homes Inc.*, [1989] Spring Sask. Labour Rep. 84, LRB File No. 246-88.

[51] Ms. Susan Barber, counsel on behalf of the Employer, filed a brief of her argument and copies of authorities which we have reviewed and appreciate. Counsel argued that the scope of insulator trade work is broad according to the descriptions and definition in the regulations to the *Apprenticeship Act* and the Union's constitution (certainly broad enough to include utilidor insulating system construction) and some of its work is not exclusive to the trade, for example, the application of sheet metal over the insulated piping ("metalling").

[52] Counsel argued that the representative period for examining whether the disputed employees had performed a sufficient amount of insulator work to be included on the statement of employment was the five weeks preceding the filing of the application, from November 1, 2004 through December 7, 2004.

[53] Counsel submitted that the decision of the Board in *International Union of Operating Engineers, Hoisting, Portable and Stationary, Local 870 v. Little Rock Construction*, [1995] 4th Quarter Sask. Labour Rep. 102, LRB File No. 190-95 established that, in construction, the test for inclusion on the statement of employment for the purposes of certification is whether there is a "significant continuing interest in the representation question" or a "continuing and substantial connection with the workplace."

[54] With respect to Mr. Hominiuk, counsel argued firstly that he was not employed on December 7, 2004 (the day the application was filed) and alternatively that he did not have a sufficient interest in the certification application or workplace because he really did no work that day and did not complete the day but quit part way through even though he knew the application had been filed that day. In support of this argument, counsel referred to *Surtek Industries Inc. and CAW-Canada, Local 3014* (1995), 27 C.L.R.B.R. (2d) 64 (CLRB).

[55] With respect to Mr. Dyck and Mr. Gillespie, counsel said they were long-time employees who, although they had been off work for some time, were expected to return to do insulator work once they were able.

[56] With respect to Mr. Chalk, counsel submitted that while he may be a journeyman carpenter, it is clear that he spent most of his time during the representative period doing insulator work. Although he is paid through a company that he incorporated, he is its only employee and is scheduled and paid like any of the Employer's other employees. Counsel asserted that in *International Brotherhood of Electrical Workers, Local 2038 v. Tesco Electric Ltd.*, [1990] Summer Sask. Labour Rep. 57, LRB File No. 267-89, the Board held that an employee who had incorporated a personal corporation for tax purposes was found to be an employee. In this regard, counsel also referred to the decision of the Board in *Retail, Wholesale Canada, a Division of United Steelworkers of America v. United Cabs Ltd.*, [1996] Sask. L.R.B.R. 337, LRB File No. 115-95.

[57] With respect to Mr. Nykolaishen, counsel submitted that he had spent the substantial portion of his work time doing insulator work during the representative period. Likewise, scribing metal endcaps for the metalling process as performed by Mr. Skjei on light duties was within the insulator trade work description.

[58] Counsel submitted that it was clear that Mr. Chalk, Stephen Reid and Mr. Nykolaishen spent most of their time during the period doing insulator work.

Unfair Labour Practice Application

[59] With respect to the allegations of unfair labour practices by the Employer, counsel on behalf of the Union argued that, pursuant to s. 11(1)(e) of the *Act*, there was an onus on the Employer to establish that its dismissal of Mr. Currie, Mr. Laing, Mr. Merritt or Mr. Baconfield was not related to the exercise by them of rights under the *Act*, i.e., the application for certification. Assessment of the sufficiency of just cause is not applicable to the Board's determination. All of the gentlemen testified that there was lots of insulating work when they were laid off. The employer used less-experienced or less-qualified employees to continue the work. The timing of the dismissals is suspicious because it was required that the statement of employment in the certification application be filed the next day, December 17, 2004, and the Employer thought that if they were gone they would not have to be included.

[60] Counsel argued that the meeting of Mr. Kern with these gentlemen on December 8, 2004 constituted a violation of ss. 11(1)(a) and (o) of the *Act* because they were interrogated as to their union membership status. Counsel argued that the circumstances as a whole constituted interference with the selection of a trade union in violation of s. 11(1)(g) of the *Act* and that Mr. Kern's indication, as alleged by Mr. Hominiuk, that Mr. Hominiuk would not have been hired if Mr. Kern knew he was a member of the Union, was evidence of a violation of s. 11(1)(f).

[61] In support of her arguments, counsel referred to the following decisions of the Board: *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Courtyard Inns Ltd. o/a the Regina Inn*, [1996] Sask. L.R.B.R. 719, LRB File Nos. 154-96, 155-96 & 156-96; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Imperial 400 Motel, Lloydminster*, [1993] 1st Quarter Sask. Labour Rep. 183, LRB File Nos. 226-92, 227-92 & 228-92; *Canadian Union of Public Employees, Local 4279 v. Aboriginal Headstart Program, Little Eagle Language and Cultural Nest – Regina Friendship Centre and Canadian Union of Public Employees, Local 4285 v. Regina Friendship Centre*, [2000] Sask. L.R.B.R. 481, LRB File Nos. 112-99, 113-99, 117-99, 119-99, 120-99, 123-00, 144-99 to 161-99, 166-99, 182-99, 241-99 & 242-99; *International Union of Operating Engineers, Local 870 v. Rural Municipality of Lipton, No. 217*, [1993] 4th Quarter Sask. Labour Rep. 119, LRB File Nos. 180-93, 181-93 & 182-93; *Saskatchewan Union of Nurses v. LaFleche Union Hospital*, [1985] Dec. Sask. Labour

Rep. 57, LRB File Nos. 271-85, 272-85 & 273-85.

[62] Counsel on behalf of the Employer argued that Mr. Kern was unfamiliar with the certification process and did not consult counsel prior to filing the Employer's reply to the unfair labour practice application. He was under the impression that only permanent employees were required to sign the statement of employment and did not appreciate the fact that Mr. Rudder, the Union's business manager, could insist on being present. Counsel submitted that these circumstances are not evidence of an anti-union animus and there is no evidence to substantiate the allegations of violation of ss. 11(1)(a), (e), (f), (g) or (o) of the *Act*. Furthermore, there was no evidence that any of Mr. Currie, Mr. Laing, Mr. Merritt or Mr. Baconfield was intimidated, coerced or interrogated as alleged. There was no evidence that it was a condition of employment that any of them not be members of a union nor was there evidence of interference in the selection of a trade union.

[63] While counsel acknowledged that the burden of proof shifts to the Employer under s. 11(1)(e) of the *Act*, there was a plausible explanation for the termination of the gentlemen in question – they were hired for a temporary period to remedy a glut in the work and it was manageable by the time they were laid off. Even after Mr. Kern knew that the certification application had been filed and that they were members of the Union, on December 8, 2004, he kept them on to do the work and even told them he was satisfied with their work. That, counsel said, is not consistent with an anti-union animus. In the alternative, counsel submitted that it was open to the Board to find that they would only have been kept on until Christmas in any event.

Statutory Provisions:

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

5 *The board may make orders:*

(a) *determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit or a subdivision thereof or some other unit;*

(b) *determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, but no order under this clause shall be made in respect of an application made within a*

period of six months from the date of the dismissal of an application for certification by the same trade union in respect of the same or a substantially similar unit of employees, unless the board, on the application of that trade union, considers it advisable to abridge that period;

(c) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;

...

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;

(f) to require as a condition of employment that any person shall abstain from joining or assisting or being active in any trade union or from exercising any right provided by this Act, except as

permitted by this Act;

(g) to interfere in the selection of a trade union as a representative employees for the purpose of bargaining collectively;

...

(o) to interrogate employees as to whether or not they or any of them have exercised, or are exercising or attempting to exercise any right conferred by this Act;

Analysis and Decision:

[65] There are two issues in the present case: the composition of the statement of employment for the purposes of determining the level of support for the application for certification and whether the Employer committed an unfair labour practice or practices in terminating the employment of Mr. Currie, Mr. Laing, Mr. Merritt or Mr. Baconfield.

[66] The following findings of fact, conclusions of law and determinations regarding credibility are based upon review and consideration of the evidence adduced, observation of the demeanour of the witnesses and consideration of the arguments made and briefs filed by counsel, with consideration given for reasonable probability. Where witnesses have testified in contradiction to the findings in these Reasons for Decision, we have discredited their testimony as either being in conflict with credited documentary or testimonial evidence or because it was inherently incredible and unworthy of belief.

Certification Application

[67] There is no dispute between the parties that the following five (5) persons ought properly to be on the statement of employment:

- Jared Laing
- Kevin Merritt
- Perry Baconfield
- Lyle Currie
- Stephen Reid

[68] The issue is whether any or all of the following thirteen (13) persons should be included:

- Reg Hominiuk
- Don Chalk
- Carmen Schindel
- Nathan Schindel
- William Dueck
- Greg Reid
- Paul Skjei
- Gary Nykolaishen
- Halden Lindbjerg
- John Unger
- Rob Adair
- Blair Dyck
- Greg Gillespie

[69] The procedure for determining the issue of majority support for many applications for certification in the construction industry was established by the Board in *International Union of Operating Engineers, Hoisting, Portable and Stationary, Local 870 v. K.A.C.R. (A Joint Venture)*, [1983] Sept. Sask. Labour Rep. 37, LRB File No. 106-83. In that case, the union applied to certify a unit of all operating engineers. The employer responded that it did not work according to the usual construction industry craft distinctions and hired and trained “multi-skilled” or “utility” workers who performed a multitude of job functions. The Board rejected the employer’s position and declined to deviate from the historical certification by craft. However, to determine whether the union enjoyed majority support for its application, the Board stated, at 43, that it had to “define what an operating engineer does and then decide which employees performed that kind of work on the date that the constituency is to be established.” As in the present case, the Board heard much evidence as to the actual work performed by each employee listed on the statement of employment by the employer. In making the determination, the Board confirmed that it does not only look at the work performed by the applicant union’s supporters, stating at 44, as follows:

Obviously, whether or not an employee supports the applicant does not determine whether or not he is doing the work of an operating engineer. The Board will not permit the applicant to ignore groups of employees from whom it has received only minority support but for whom it has demonstrated an effective ability to represent, simply in order to structure its unit in a way that will give it overall majority support.

[70] In *K.A.C.R.*, *supra*, the Board then established the standard it employed to determine who should be on the statement of employment: the trade in which they were employed for the majority of their time for a reasonably representative period of time prior to the filing of the application for certification determined their status. The “reasonably representative period of time” is not rigidly established, but depends on the circumstances of each case. Specifically, the Board stated as follows at 45:

Where employees are engaged in the work of different crafts the Board will characterize the craft in which they were employed for a majority of their time as the one governing their status on an application for certification. In determining which type of work employees were employed at “for a majority of their time” the Board will look not to the date of the making of the application but, rather to the period of time leading up to the date of the application. Just how far back in time the Board will go depends on the particular circumstances of the individual case. See Teamster Local Union No. 230 et al v. Johnson-Keiwit Subway Corporation, 66 C.L.L.C. 16,091 at page 912, and Chauffeurs, Teamsters & Helpers, Local 395 v. Western Caissons (Sask.) Limited, 67 C.L.L.C. 16,015 at page 983.

The Board will attempt to review actual job duties over a reasonably representative period of time and will not permit either the union or the employer to confine the review to an arbitrarily established time frame which is not indicative of normal responsibilities. In this case, it was inappropriate to take a two week “window” immediately prior to the date of the filing of the application which was, of course, during the winter shutdown, in order to determine what work the employees involved were performing the majority of their time.

[71] Interestingly, the Board did not say what the “reasonably representative period” was in the circumstances of the case but simply said that, after considering all of the evidence, it determined, at 45, that certain persons were employed the majority of their time doing the work of operating engineers.

[72] In *Daycon Mechanical Systems Ltd.*, *supra*, the union applied to certify a millwrights' bargaining unit. It estimated there were 30 employees in the proposed unit on the date the application was filed. The employer filed a statement of employment purporting to list 47 employees in the proposed unit. The millwright trade is not a "compulsory" or "mandatory" apprenticeship trade (see footnote 2, *infra*), but the union had the authority to represent the persons doing the work in the designated trade division. The Board described the factors it would consider in determining the issue of the composition of the statement of employment as follows, at 134-35:

The second issue is to determine which of the employees fall within the bargaining unit. In making this determination, the Board will have reference to a number of factors including the following:

*-status under The Apprenticeship and Trades Qualification Act: see A.V. Concrete Forming Systems Ltd., *supra*;*

*-work performed by employees for a majority of their time during a relatively representative period prior to the application: see K.A.C.R., *supra*; Vector Construction Ltd., *supra*; International Union of Operating Engineers, Hoisting and Portable and Stationary, Local 870 v. Flynn Bros. Construction Inc., [1999] Sask. L.R.B.R. ---, LRB File No. 182-98; and*

*-"helpers" will not be included in bargaining units involving mandatory trades, but may be included in non-mandatory trades: see United Association of Plumbers and Pipefitters of America, Local 179 v. Comfort Mechanical Ltd., [1998] Sask. L.R.B.R. 422, LRB File No. 082-98 and Alberta Insulation Supply and Services Ltd., *supra*.*

[73] As in *K.A.C.R.*, *supra*, in the Reasons for Decision in *Daycon Mechanical Systems Ltd.* the Board did not identify the reasonably representative period of time that it used to determine the work being done by individual employees but determined that 17 employees were doing millwrights' work as deduced from union records, hiring sheets, payroll records and certain testimony. It is clear however that, had the proper evidence been led, the Board was prepared to include "helpers" performing work incidental to the trade.

[74] In establishing standardized bargaining units for many of the designated trades in *Newbery Energy Ltd.*, *supra*, the Board held as follows with respect to the trade "helper" position at 40:

At the special hearing, representations were made by a number of unions with respect to classifications of employment which are common to more than one trade such as helpers, welders, and riggers. The representations, in most cases, suggested that these classifications be specifically mentioned in the unit descriptions. The Board has declined to do so because, to do so would defeat the purpose of the Board in defining the new unit descriptions. It is the view of the Board that these and similar classifications of employment are incidental to the trade in question and when the work so performed is incidental to the trade, the person performing the function will naturally fall into the trade unit with which the work is connected.

[75] In *International Union of Heat and Frost Insulators and Asbestos Workers, Local 119 v. Alberta Insulation Supply and Services Ltd.*, [1998] Sask. L.R.B.R. 91, LRB File No. 368-97, the Board dealt specifically with the helper position in the context of the insulators' trade. In that case, the union applied to be certified for a bargaining unit composed of "all insulators, insulator apprentices, insulator journeymen, insulator foremen." The union challenged the exclusion of a person it described as an "insulator helper." The employer joined issue that another person should then also be included as a helper. The work being done by the two persons in dispute included the cutting of bands, applying insulation wrap on steam lines, material handling and general clean up. The Board held that the two persons were performing work incidental to the insulators' trade and, as helpers, should be added to the statement of employment. The Board stated as follows at 94:

In this instance, the standardized bargaining unit describes the trade as including "insulators". This term is broad enough to include helpers who perform work that is incidental to the trade. The work performed by [the two employees] was clearly incidental to insulator's work and they ought to be added to the statement of employment.

[76] In *Little Rock Construction, supra*, the Board considered what constituted a sufficient employment relationship in the construction industry in terms of an application for certification. The case concerned the status of one individual, an employee off work due to injury. The employee in question was hired on June 27. There was a dispute as to whether when he was hired he was told the work would last for two years or would be completed by November 1 of the same year (i.e., in approximately 4 months). The employee sustained a serious injury about one week into his job on July 5 and did not work again. The union filed the certification application on

July 17. In determining that the employee should not be listed on the statement of employment, the Board made certain observations about the general nature of the process. The Board stated as follows at 104-05:

The Statement of Employment which an employer is required to file with this Board following the submission of an application for certification is meant to identify those employees who are included within the bargaining unit for which the trade union seeks to obtain representation rights. The completion of the Statement of Employment reveals any discrepancy in the relative understanding of the trade union and the employer concerning the composition of the proposed bargaining unit, and permits the Board to assess the evidence of support submitted with the application for certification.

The information set out in the Statement of Employment shows the composition of the proposed bargaining unit as of the date on which the application for certification is filed. An employer is obliged to include the names of all those who were employed on that date.

What is meant by being an employee as of the date the application for certification is filed has in some instances been a matter for debate. In deciding who should be regarded as an employee for the purpose of having a voice in the question of whether a group of employees should be represented by a trade union, the Board must consider the implications of drawing the boundaries of the franchise too narrowly or too broadly.

On the one hand, to require that an employee actually be at work on the date the application is filed in order to be included in the Statement of Employment would be clearly unfair to employees who are by any reasonable standard regular employees, and who are for some reason absent on that arbitrarily chosen date. An employee who is away on sick leave or maternity leave has a legitimate and obvious interest in the outcome of the representational question.

At the other end of the spectrum, allowing the inclusion of a large number of persons whose current connection with the employer is tenuous may give a disproportionate voice in the representation question to persons whose stake in the terms and conditions of employment in the workplace may be minimal.

[77] At 107, the Board considered the principles involved when specifically considering the position of employees off work due to disability and, more specifically, in the context of the construction industry, as follows:

In Saskatchewan Joint Board Retail, Wholesale and Department Store Union v. Brown Industries Ltd., LRB Files No. 010-95 and 012-95, the Board considered the status of an employee who was on long-term disability:

Counsel for the Employer argued that when an employee has been on disability benefits for a considerable period of time, and there is virtually no chance of a return to work, an employer is entitled to take the view that the person has ceased to be an employee. In a general sense, it is difficult to disagree with this proposition. At some point, the employer may be able to regard the person as a former employee, and to fill the position once held by the employee with someone else, despite the fact that the insurance coverage continues. In our view, however, there has to be some form of decision taken before this can be the case. Mr. Brown spoke of the discussion by company management in November of a policy which would regard employees who had been on long-term disability for twelve months as ceasing to be employed. It was not clear, however, that this policy had actually been adopted, or that any decision had been made that Mr. Moffat, specifically, was unemployable or would have no future connection with the Employer. We have concluded that Mr. Moffat should be included in the bargaining unit.

The conclusion reached in the Brown Industries decision demonstrates that the Board is prepared, in appropriate circumstances, to recognize the continuation of an employment relationship where an employee has not been working for a considerable period of time. In the case of the construction industry, however, the Board has taken a somewhat more restrictive view of the parameters of this relationship. In International Association of Bridge, Structural & Ornamental Iron Workers v. Tamtrac Holdings Ltd., LRB File No. 254-94, the Board made the following comments:

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

In the construction industry, the Board has taken a fairly restrictive view of what constitutes a relationship of employment. Many employees in this sector have employment relationships with a number of employers, and some of these, at least, will be tenuous, casual or fleeting. Counsel for the Employer argued that, to determine whether a trade union enjoys the

support of the employees of an employer, the Board has generally considered only those employees who were actually working for the employer on the date of the filing of the application for certification. This is overstating the case somewhat, as the Board has also permitted the inclusion of employees who can demonstrate a substantial connection with the employer in the period surrounding the application.

The inclusion of employees who are more tenuously connected to the employer, however, increases the risk that the list of employees can be manipulated so that a practical determination of whether the trade union enjoys majority support becomes less and less feasible.

The latter point seems worth underlining in the context of the construction industry. The composition of the workforce of any employer in this sector is typically volatile and changeable. Allowing employers to include on the Statement of Employment the names of a number of employees whose identity might be unknown to the trade union would have the capacity to jeopardize and undermine union attempts to gather support for a certification application.

[78] In *Little Rock Construction, supra*, the issue turned on what the Board succinctly described as, whether there was “a reasonable expectation” that the employee on disability would return to work.

[79] The insulator trade is not a “compulsory apprenticeship trade,” but it is a designated trade division of the construction industry under *The Construction Industry Labour Relations Act, 1992*, S.S. 1992, c. C-29.11. The compulsory apprenticeship trades are designated by regulation as those trades in which only certified and licensed journeymen or apprentices (or persons grandfathered under the legislation) as defined by the *Apprenticeship Act* are permitted to do the exclusive work of the trade.² The compulsory trades include electrical, plumbing, sheet metal and refrigeration.

[80] The job functions of the insulator trade are quite broad. The “Insulator National Labour Market Study 2002,” conducted under the guidance of a union-contractor committee, describes the scope of the heat and frost insulator occupation as “the installation and maintenance of insulation systems, for the conservation of energy and the control of the environment in buildings and premises requiring temperature control, heat transfer, sound barriers, fire protection

² See, *The Apprenticeship and Trade Certification Regulations, 2003*, R.R.S. c. A-22.2, Reg. 3, Schedule 4.

and asbestos abatement.” The scope of the work of the insulator trade is set out in the Union’s constitution under its membership eligibility requirements in article III. A brief summary includes the manufacturing, fabrication, assembling, handling, preparation, application, adjustment, repairing, dismantling and clean up of insulation, including any labour connected with the handling or distribution of insulating materials and the operation of all equipment associated with the work. One need not be a certified journeyman or registered apprentice to be a member of the Union. The occupational analysis of the insulator trade conducted by Human Resources and Development Canada and accepted by the Canadian Council of Directors of Apprenticeship as the national standard for the trade, describes the scope of the occupation in terms similar to the National Labour Market study. It describes some specific responsibilities (in Saskatchewan) as including, very briefly, laying out the work and materials, including fittings, applying jacketing materials and fastening, sealing and adhesives systems, fabricating finishing materials and removable covers, erecting scaffolding, site clean up. The occupational analysis of the carpenter trade by the same body includes the installation of insulating materials and panels.

[81] The provincial insulators’ collective agreement (for industrial construction), defines “trade autonomy” as follows:

. . . the application of pipe and boiler coverings, insulation of hot and cold surfaces, ducts, tank vessels, etc.; this to include alterations and repairing of work similar to the above and the use of all materials for the purpose mentioned.

This is to include any labour connected with the handling and distribution of insulating materials on job sites as well as the clean up of insulating materials on job sites. Also included is the on site fabrication of metal or PVC jacketing, as well as the installation of any fire-stopping

[82] There is some overlap of these activities with those performed by carpenters or labourers.

[83] The employee timesheets referred to in witness testimony in the present case include the following work activities that appear to come within the insulators’ trade functions and responsibilities based on the above descriptions, *inter alia*: unloading and distribution of insulating materials; the application of insulating materials to pipes, valves, flanges and other equipment

including buildings, compressors and utility corridors; the fabrication of insulated components including utilidor structures; the layout, fabrication and application of jacketing materials including sheet metal, fasteners, adhesives and caulks and the fabrication and installation of ancillary fittings; repair and alteration of insulated structures (e.g., holes in insulated walls for the entry of piping or left by the removal of piping); site clean up.

[84] We have examined all of the evidence including, but not limited to, trade certification documents, employee timesheets and field diary and have considered the testimony of the witnesses respecting the issue as to the work being performed by the persons in dispute during a reasonably representative period of time prior to the filing of the statement of employment all in the context of what constitutes the work of the trade as described above. In our opinion, the following persons were primarily, if not exclusively, engaged in the work of an insulator, insulator apprentice or insulator foreman trade, or work incidental thereto as insulator helpers, during a reasonable representative time prior to the filing of the application for certification: Mr. Currie, Mr. Merritt, Mr. Laing, Mr. Baconfield, Stephen Reid, Mr. Chalk, Greg Reid, Mr. Skjei, Mr. Lindjberg, Carmen Schindel, Nathan Schindel, Mr. Nykolaishen, Mr. Adair and Mr. Hominiuk.

[85] With respect to Mr. Hominiuk, we accept and find that he resigned his employment on December 6, 2004 the day before the application for certification was filed and Mr. Kern accepted his resignation. On all of the evidence, we find that Mr. Kern did not re-hire Mr. Hominiuk later that evening and, on December 7, 2004, Mr. Hominiuk was merely accommodated in retrieving his belongings from his former work site. There is no evidence that he had at any time abandoned his intention (that he admitted he had when he gave his resignation) of travelling the next day to take a job with a different employer starting first thing on December 8, 2004. In the event that we are wrong in this regard, we find that he did no work for the Employer after December 6, 2004 and did not have a sufficient interest in the representation issue after that date. Mr. Hominiuk shall not be included on the statement of employment.

[86] With respect to Mr. Chalk, we find that he is an employee within the meaning of the *Act* and is not an independent contractor in the sense used for labour relations purposes, which is not necessarily the same as that used in respect to income tax legislation. We accept and find that his holding company was incorporated only to take advantage of certain tax benefits and

thereafter he continued to work for the Employer as he had before with no real control over the work and how it was performed or any real ability to affect the income he earned. Mr. Chalk performed no significant work for other employers for the ten years that he had his company and, in any event, such work was done outside of the continuing responsibilities to the Employer in this case and not in competition or conflict with the Employer. Mr. Chalk shall be included on the statement of employment.

[87] With respect to Mr. Dyck and Mr. Gillespie, we find that they did not have a sufficiently tangible interest in the representation issue having been off work for six months and one year, respectively, with no reasonable expectation of return. They shall not be included on the statement of employment. William Dueck and Mr. Unger did not perform sufficient insulating work during a representative period prior to the application to be included on the statement of employment.

[88] Accordingly, we find that the following thirteen (13) names ought to be on the statement of employment for the purposes of determining the level of support for the application:

- Jared Laing
- Kevin Merritt
- Perry Baconfield
- Lyle Currie
- Stephen Reid
- Don Chalk
- Carmen Schindel
- Nathan Schindel
- Greg Reid
- Paul Skjei
- Gary Nykolaishen
- Halden Lindbjerg
- Rob Adair

[89] On the basis of the support evidence filed, the Union does not have majority

support for the application but it does have the support of at least 25 per cent of the persons on the statement of employment.

[90] We direct that the Board Registrar shall inquire of the Union as to whether it wishes that the Board should conduct a representation vote. In the event that the Union desires that a vote be held, we retain jurisdiction to so order and to resolve any issues regarding a voters' list.

Unfair Labour Practice Application

[91] On the whole of the evidence, we find that the Employer did not commit any of the unfair labour practices alleged. We accept that the Employer had a reasonable and plausible explanation for laying off Mr. Currie, Mr. Merritt, Mr. Laing and Mr. Baconfield as of December 16, 2004 – that being for lack of work. Although Mr. Kern knew from December 8, 2004 on that they were members of the Union, he continued to employ them for the work for which they had been hired and there is no evidence of an anti-union animus. We find that, when they were hired or shortly thereafter, each was advised that the work was temporary and, in any event, was not likely to last past the start of the Employer's usual Christmas shutdown. Indeed, Mr. Kern had advised the two gentlemen hired last that the work might not even last that long since there were now four of them. They were hired up front as temporary workers to help clean up a glut of work that developed during the fall season. Once it was completed to the point where the Employer's regular employees could complete the work, they were let go. There is no evidence that this was motivated by an anti-union animus and the Employer met the onus on it under s. 11(1)(e) of the *Act*.

[92] Furthermore, we find no evidence that any of the four gentlemen was interrogated by Mr. Kern as to their affiliation with or support for the Union or with respect to the exercise of rights under the *Act*. Indeed, they volunteered that information to him when they met with him on December 8, 2004. There is no evidence of intimidation or interference in the exercise of their rights under the *Act* or in the selection of a trade union. There is no evidence that the Employer required that any of these four gentlemen or Mr. Hominiuk refrain from the exercise of rights under the *Act* as a condition of employment.

[93] The unfair labour practice application and accompanying applications for reinstatement and monetary loss are dismissed.

DATED at Regina, Saskatchewan, this **27th** day of **November, 2007**.

LABOUR RELATIONS BOARD

James Seibel,
Chairperson