Labour Relations Board
Saskatchewan

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400 Applicant v. BARRICH FARMS (1994) LTD., and TRUE NORTH SEED POTATO CO. LTD., Respondents

LRB File No. 043-07; October 24, 2008
Chairperson, James Seibel; Members: Clare Gitzel and Gerry Caudle

For the Applicant: Drew Plaxton
For the Respondents: Meghan McCreary

Certification – Practice and Procedure - Statement of employment – Absent exceptional circumstances, Board declines to consider evidence of matters or events occurring after date of application relating to the potential return to work by disputed employees.

Certification – Statement of employment – Board examines evidence respecting history and nature of work performed by disputed Employee – Disputed employees do not have sufficient tangible connection to workplace or reasonable probability of recall - Board removes employee from statement of employment.

Employee – Independent contractor – Board examines evidence respecting history and nature of work performed by truck driver – Board finds tenor of relationship between truck driver and employer more like principal/contractor relationship than employer/employee relationship – Truck driver not employee within meaning of *The Trade Union Act*.

***The Trade Union Act*, ss. 5(a), 5(b), 5(c), 10.**

REASONS FOR DECISION

Background:

[1] United Food and Commercial Workers, Local 1400 (the "Union") filed an application with the Board on April 23, 2007 pursuant to ss. 5(a), (b) and (c) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") to be designated as the certified bargaining agent for a unit of employees of Barrich Farms (1994) Ltd., and True North Seed Potato Co. Ltd. (the "Employer") described as follows:

> *all employees of [the Employer] at or in connection with its potato farming and related operations located near Outlook, Saskatchewan, except the manager, plant supervisor(s), and office staff.*

[2] In its application, the Union estimated there were 30 employees in the proposed bargaining unit. The Statement of Employment filed by the Employer listed 43 persons as being in the proposed bargaining unit in occupational classifications described as wash plant operator, equipment operator, grader operator, truck driver, mechanic, labourer and quality control. In its Reply filed with the Board the Employer disputed the assertion that the Union enjoyed majority support for the application.

[3] At the commencement of the hearing of the application Mr. Plaxton, counsel on behalf of the Union, outlined the issues. He asserted that there were in fact 32 employees on the date the application for certification was filed, and that the Union objected to the composition of the Statement of Employment as follows:

> *(1) ten (10) persons ought to be removed because they had an insufficient employment connection with the Employer and were not working for the Employer on the date the application was filed:*
>
> - *Brett Mauch – truck driver*
> - *Norm Pateman - truck driver*
> - *Duane Farden - mechanic*
> - *Art Simonson - truck driver*
> - *Dave Butler - truck driver*
> - *Greg Graham - truck driver*
> - *Karlo Simonson - truck driver*
> - *Steven Lee – equipment operator*
> - *Ed Evancheski – equipment operator*
> - *Rick Pederson - truck driver*
>
> *(2) one person (Dave Simonson - truck driver) ought to be removed because he was not an employee – i.e., the corporation controlled by him is an independent contractor to the Employer, and he is employed by the corporation;*
>
> *(3) one person (Ethel Akins – quality control) ought to be removed because she had an insufficient employment connection, and is a shareholder and officer of the Employer and a director of a shareholder company in the Employer, and,*

> *(4) one person (James Smith), who was not included on the Statement of Employment, ought to be added because he was an employee and did not cease to be employed until after the application had been filed.*

[4] Ms. McCreary, counsel on behalf of the Employer, agreed with Union counsel's statement of the issues. Counsel added that the Employer's business is a seasonal undertaking with a fluctuating workforce, depending on whether it is planting or harvesting, and the Board ought to take that into consideration and not apply the usual criteria of whether an individual is in fact employed and working on the date the application is filed. Counsel agreed that James Smith was employed on the date the application was filed, but because he quit the following day, he was properly excluded from the Statement of Employment.

[5] At the commencement of the hearing of the application the parties agreed upon the identity of the Employer and that Barrich Farms (1994) Ltd., and True North Seed Potato Co. Ltd. are common employers operating potato farms.

Evidence:

[6] The parties agreed that the Employer would present its evidence first. Eight witnesses were called to testify on behalf of the Employer.

[7] Harry Meyers is an owner and operator of each of the corporations comprising the Employer. His partner is Barry Akins, husband of Ethel Akins (whose inclusion on the Statement of Employment is disputed by the Union). He described the Employer's corporate relationships. HB Management Ltd. and Green Valley Seed Potatoes Ltd. are holding companies that have fifty percent of the shares of True North Seed Potato Co. Ltd. HB Management Ltd. manages the Employer and hires the staff and performs related administration. Barry and Ethel Akins own Be-Ja Enterprises Ltd., a holding company whose shares "flow through" to HB Management Ltd. and Barrich Enterprises (1994) Ltd.

[8] Each of the two corporations comprising the Employer owns one potato farm. True North Seed Potato Co. Ltd. grows seed potatoes sold to other producers. Barrich Farms (1994) Ltd. is a commercial and table potato grower. The Employer's

employees work on both farms as necessary. There is a complement of approximately 27 employees that work year round, but in the spring and fall, for planting and harvest, the number of employees increase to up to 44 for planting and 69 for harvest. Mr. Meyers testified that then 43 individuals listed on the Statement of Employment are those that the Employer considers to be "regular employees", particularly the truck drivers at harvest.

[9] Mr. Meyers testified with respect to the persons whose appearance on, or absence from, the Statement of Employment is disputed by the Union. In cross-examination, he admitted that he had spoken some of them – Brett Mauch, Norm Pateman, Greg Graham and Duane Farden – prior to testifying, and that his partner, Barry Akins, had spoken to the rest (except for James Smith). He said they did so because they knew the Union was objecting to their status as "employees", the Employer had "an expectation they would return" for harvest (none work during planting), and they "wanted to confirm that the Statement of Employment was accurate." They were all laid off, as per their respective Employment Insurance Records of Employment, in October 2006, and, the box entitled "Expected Date of Recall" was completed by the Employer as "Not Returning", in all cases except that of Ethel Akins. Mr. Meyers stated that he "could not swear" that they would return to work for harvest 2007, just that they had been told they could return. None have been provided written offers of employment.

[10] According to his Employment Insurance Record of Employment, Brett Mauch last worked for the Employer for four weeks in 2006, from September 13 to October 7, (and before that, in 2002). The box entitled "Expected Date of Recall" was completed by the Employer as "Not Returning." Mr. Meyers testified that at the time of hearing the Employer, nonetheless, was "considering offering him full-time employment."

[11] Norm Pateman last worked for five weeks from August 30 to October 7, 2006. Before that, he had worked for several weeks during harvest in 2005, 2004 and 2001. Mr. Meyers testified that the Employer had advised him he could return for the 2007 harvest.

[12] Duane Farden, a disputed mechanic and truck driver, last worked for three weeks from September 14 to October 7, 2006. Prior to that, he worked for the

Employer from September to October, 1998; September to October, 2001; January to March, 2002, September, 2002 to March, 2003; September to October, 2003; and November, 2003 to March, 2004. Mr. Meyers said the Employer expected him to return for harvest 2007.

[13] Art Simonsen, another disputed truck driver, worked for the Employer for a few weeks during each harvest from 2001 to 2006. Mr. Meyers testified that the Employer expected him to return for harvest 2007.

[14] Dave Butler has worked for a few weeks during harvest for several years.

[15] Greg Graham worked for a few weeks during harvest in 2006.

[16] Karlo Simonson worked for a few weeks during harvest in 2004, 2005 and 2006 as a part-time or relief truck driver on weekends in the place of his father, Art Simonson.

[17] Rick Pedersen last worked as a relief truck driver in 2005 for 64 hours, in 2004 for 19 hours and in 2003 for 32 hours.

[18] Stephen Lee had worked during planting for the last couple of years, and started work again on April 26, 2006 (*i.e.,* after the present application was filed). Mr. Meyers stated that the start of work in the spring is dependent on the weather, and was about a week later than usual in 2006.

[19] Ed Evancheski worked during planting for several years and started again on April 27, 2006 (*i.e.,* after the present application was filed), but according to Mr. Meyers, was quitting any day to take employment elsewhere.

[20] Dave Simonson has worked for the Employer off and on for some years in the 1980's and 90's, and then did not work for the Employer for many years. He has his own farming and manufacturing operation, "Triple S Industries Ltd." In 2004, he entered into a 5-year agreement with the Employer to the effect that he would use his own semi-trailer unit when he hauled for the Employer. He purchased a separate potato

trailer for the work, but he also uses his unit to do contract hauling for other parties, including hauling potatoes in Alberta, and work for the Town of Outlook and the rural municipality. The Employer sets his hours. He is paid the usual truck driver rate plus an amount for his unit, paid annually. The Employer does not make source deductions for him. He is not provided with a Record of Employment for Employment Insurance purposes when work ends for the season. He is responsible for expenses including licensing, insurance and maintenance, except when he is hauling for the Employer, whose mechanic does the maintenance on his potato trailer. Sometimes, when he can't drive himself, he hires his own employee to drive his unit for him, or he leaves his unit for the Employer to assign its own driver – usually one of the partners in the Employer, a Mr. Haughian.[1] He hauls for the Employer approximately five or six weeks per year.

[21] Ethel Akins is the spouse of one of Mr. Meyers' partners, Barry Akins, and a shareholder in, and a director of, Be-Ja Enterprises, a holding company for her husband's shares in the Employer. She has worked for the Employer off and on at different jobs, most recently as harvest quality control person in the fall of 2005. She did not work for the Employer in 2006. When she did work for the Employer, the Employer did not make source deductions from her remuneration – she provided an invoice for her work and made her own payments. She is not listed in the Employer's payroll records as an employee. The Employer's accounts payable ledger describes her remuneration as for "custom work". In cross-examination Mr. Meyers admitted that the "custom work" category is usually used for subcontracted specialty work or hiring extra equipment.

[22] James Smith, whose absence from the Statement of Employment is disputed by the Union, started work on April 16, 2007. He quit on April 24, 2006 (*i.e.,* after the present application was filed).

[23] Mr. Meyers admitted that some persons who have worked in the past, and when contacted a few weeks before the new planting or harvest time have indicated they will return, fail to show up. The Employer does not usually "firm up" its harvest work force until mid-August. He also admitted that there was a mistake made with respect to the statement of employment in that approximately only 15 employees worked "year-

[1] The contract contains an hourly rate for the rig without a driver and another rate if Mr. Simonsen drives or provides his own driver.

round", by which he said he meant they worked the most, but not necessarily all year – that is, for more than just the planting and harvest period. The bottom line, he said, is that the Statement of Employment contains the names of the Employer's "core employees" plus the increase in employees for planting plus approximately ten truck drivers that the Employer believes will return in the fall.

[24] Dave Butler, one of the disputed truck drivers, was called to testify on behalf of the Employer. He appeared under subpoena which was given to him by counsel for the Employer when she interviewed him at the Employer's premises. Mr. Akins was present during the interview, as were some of the other disputed persons on the Statement of Employment. Mr. Butler initially said Mr. Akins offered him employment for the fall 2007 harvest at the Employer's employee BBQ in the fall of 2006, and he intended to return. However, in cross-examination he admitted that all that was said was "See you next year". At the interview with Employer's counsel he was told by Mr. Akins that he would be hired back in the fall. He confirmed that his Record of Employment states "Not returning", and that he cannot compel the Employer to re-hire him. He also has his own business doing yard work and odd jobs.

[25] Duane Farden, another disputed name, was called to testify on behalf of the Employer. Although he has worked at harvest for the Employer several times as its mechanic, he has also missed some years because of his own farming operation commitments, and his own mechanical business he runs out of his farm shop. He said that, therefore, while Mr. Meyers or Mr. Akins usually tell him during the year that he can come back to work in the fall, he makes no promises to them and if he can make it he will – his own work comes first.

[26] Norman Pateman, another of the disputed names, was called to testify on behalf of the Employer. He said he has worked at harvest for the Employer about 7 times. Each year, he contacts the Employer in mid-summer and that is when the offer of employment is made. If made for harvest 2007, he planned to accept. In cross-examination, Mr. Pateman said that, at the invitation of Mr. Meyers, he attended a meeting at the Employer's premises after the present application was filed and a few weeks before testifying. He described it as a meeting of "all employees" and "a roomful", including the part-time persons from the fall before. It was attended by Mr. Akins and

Mr. Haughian on behalf of management. The group was told that the Union was trying to get in. A few weeks later he also attended another meeting with counsel for the Employer at which he was given a subpoena to testify. It was at that meeting that he was offered employment for the fall.

[27] Greg Graham, another disputed name, was called to testify on behalf of the Employer. He worked for the Employer at harvest 2006 for the first time. He testified that he was verbally offered employment for the fall of 2007 when called by Mr. Haughian after the present application was filed. He was served with a subpoena to testify at a meeting with Mr. Meyers and counsel for the Employer about two weeks before doing so. He testified that it was not until then that he knew for sure he would be going back to work for the Employer in the fall.

[28] Art Simonson, another of the disputed names, was called to testify on behalf of the Employer. He said that he had worked for about four weeks at harvest for the Employer for several years, but not on weekends, when his son, Karlo Simonson, drove in his stead. He said he was offered employment for the 2007 harvest about three weeks before he testified (*i.e.,* well after the present application was filed), which was when he would usually have found out. He said the offer was probably made at the meeting with Mr. Akins where he was served with the subpoena to testify. He acknowledged that at that meeting he spoke to him about the evidence he would give.

[29] Art Simonson also testified that one of the other disputed persons on the statement of employment – Karlo Simonson – was his son, and that he was working for a company in Lethbridge, which employment would probably run at least into the fall of 2007.

[30] Dave Simonson, one of the other disputed names was also called to testify on behalf of the Employer. He owns his own semi-trailer tractor unit and both a gravel trailer and a potato trailer. He testified that his company, Triple S Industries Ltd., has a five-year contract with the Employer to haul for the potato harvest. If his own trailer was not usable, he would be responsible under the contract to provide another. About 35 to 40 percent of his income is from this contract, which he described as `subsidizing` his other business. He employs a substitute driver when he can`t drive

himself – in spring planting 2006, he drove the unit himself only about 25 percent of the time. He also does haulage work for others.

[31] Dave Simonson confirmed that how much he profits from the contract with the Employer depends upon his costs and expenses for the equipment, inputs and substitute drivers, and that he bears the risk.

[32] Barry Akins is a partner in the Employer. He testified that he or Mr. Meyers usually talk to their "regular drivers" in the fall at the company BBQ to see if they would like to return the next fall. The arrangement is usually firmed up in July.

[33] With respect to Karlo Simonson, Mr. Akins referred to a self-serving letter to him dated July 30, 2007 confirming that he would return to drive for harvest. In cross-examination by counsel for the Union, he agreed that such a missive was unusual, and he responded in the affirmative to the assertion by counsel that the letter was written "when you decided you needed some evidence for the Labour Board". In any event, he agreed Karlo was only a "spare driver" filling in for his father on weekends.

[34] With respect to his spouse, Ethel Akins, who did not work in 2006, Mr. Akins said that he did not know whether she would be returning to work for harvest 2007, and that she had indeed been a contractor to the Employer in 2005.

[35] With respect to Brent Mauch, Mr. Akins said that although Mr. Meyers had spoken to him, he did not know whether he would be returning for harvest 2007 because of his own farming operation commitments.

[36] With respect to the meeting with some of the disputed persons a few weeks before he testified, when they were served with their subpoenas, Mr. Akins said they were "not really" offered jobs for the fall, and that it had not yet been firmed up.

[37] Brandi Tracksell is a representative for the Union who was involved in the organizing drive in the present case. She testified that when she and her colleagues were garnering the support of the employees they were asked if there was anyone else they were aware of that the Union should contact. She said the Union organizers

contacted all of the employees that they were aware of – approximately 30 people. No one identified any of the disputed persons as employees, and the Union first became aware of them from the Statement of Employment.

Arguments:

[38] Ms. McCreary, counsel on behalf of the Employer, filed a written brief of argument and copies of authorities that we have reviewed. Counsel argued that the disputed persons on the Statement of Employment all had a sufficiently tangible employment connection with the Employer that they should be included on the statement of employment for the purposes of determining support for the application notwithstanding that they were not working on the date the application was filed. Whether other employees identified them as employees or not is not determinative of the issue. A reasonably tangible employment connection and reasonable expectation of return was established at the time of lay-off in 2006. In support of this argument, counsel referred to the following cases: *Canadian Union of Public Employees, Local 3077 v. Lakeland Regional Library Board*, [1987] Oct. Sask. Labour Rep. 74, LRB File No. 116-86; *Service Employees International Union, Local 299 v. Vision Security and Investigation Inc*., [2000] Sask. L.R.B.R. 147, LRB File No. 228-99; *Fraser Valley Farms*, [1982] B.C.L.R.B. 491/82; *B.A.T. Construction Ltd*. [1993] B.C.L.R.B.D. 182.

[39] Specifically with respect to Ed Evancheski and Steven Lee, who actually started work after the application for certification was filed, counsel submitted that the start of work is weather dependent and it was too wet to start sooner. Counsel intimated that the Union had deliberately timed the filing of application to beat the seasonal start date. As long term seasonal employees, they had built an interest in the employment relationship. In this regard, counsel referred to the decision in *United Food and Commercial Workers, Local 1400 v. Pfeifer Holdings Ltd. o/a Tropical Inn*, [1998] Sask. L.R.B.R. 87, LRB File Nos. 305-97, 313-97, 375-97 and 376-97.

[40] With respect to Dave Simonson, Ms. McCreary characterized him as an “employee” or “dependent contractor”, referring to the “control” test and the decisions 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, and *Saskatchewan Government*

Employees' Union v. Saskatoon Open Door Society Inc., [2001] Sask. L.R.B.R. 210, LRB File No. 177-99.

[41] With respect to Ethel Akins, Ms. McCreary argued that she had a connection with the proposed bargaining unit and no conflict with the other persons in it. Referring to the decision in *United Steelworkers of America, Local 5917 v. Doepker Industries Ltd*., [2000] Sask. L.R.B.R. 258, LRB File No. 016-00, counsel submitted that the fact that she is the spouse of a partner in the Employer is not determinative of the matter.

[42] With respect to James Smith, Ms. McCreary submitted that because he resigned the day after the application was filed, he ought not to be considered an employee for the purposes of the certification application.

[43] Mr. Plaxton, counsel on behalf of the Union, submitted that the onus is on the Employer to convince the Board to depart from the usual principle, policy and practice that one must be an employee (but not necessarily working) on the date the application is filed to be considered in the context of level of support for a certification application, and that to be eligible to vote in the event of a representation vote, must be an employee both on that date and the date the vote is conducted. The reason for these policy choices includes the abrogation of opportunity for the Employer to manipulate the composition of the workforce after the fact.

[44] Mr. Plaxton took issue with the assertion by counsel for the Employer that the Union had timed the filing of the application to purposely avoid the planting season, pointing out that planting had commenced and a number of employees engaged in that work were working on the application date. The real question, counsel suggested is what is a date that fairly represents a cross-section of employees eligible to demonstrate whether the Union has support for the application, further suggesting that no matter what date the Union would have chosen, the Employer would raise the same objection. Counsel submitted that in adding the names of persons laid off without an expected date of return that it alleged would be working at harvest, the Employer attempted to then "backfill" evidence of an employment connection – they were given an offer of employment when they were served with a subpoena to testify (or, in the case of Karlo

Simonson, when sent a self-serving letter), well after the date the application was filed. As at the date the application for certification was filed, none of the disputed persons had an offer of employment.

[45] Mr. Plaxton asserted that it is indeed significant that none of the other employees the Union spoke to seemed to consider any of the disputed persons to be fellow employees. He submitted that the evidence shows that if the Board accepts the Employer's argument, it would be impossible for the Union to ever be able to ascertain who all the employees were for the purposes of organizing. He urged that the Board should, in its absolute discretion, under s. 10 of the *Act*, reject evidence of matters or events occurring after the date the application is filed. Indeed, one of the reasons for s. 10 is to prevent the manufacture or manipulation of "evidence" once the fact of an application for certification is known to an employer. Counsel asserted that the persons in question are not employees because the Employer is not required to accept them for work for harvest, and they have no enforceable right to return to work – they cannot compel the Employer to take them back regardless of anything that Mr. Akins or Mr. Meyers has said to them. Counsel submitted that the onus is on the Employer to show exceptional circumstances before the Board should depart from its usual policy and practice in this regard.

[46] Mr. Plaxton pointed out that because of the short time worked by the disputed persons during harvest, many of them would not be compelled in any event to join the Union pursuant to union security provisions because their employment would not exceed 30 days (See, s. 36(1) of the *Act*).

[47] Mr. Plaxton submitted that it is significant that many of the disputed persons who in any event would not be working until the fall were called to testify on behalf of the Employer, the two disputed persons who actually were working for the Employer at the time of hearing – Mr. Evancheski and Mr. Lee – were not called to testify to corroborate the Mr. Meyers' assertion that they were hired before the application was filed but did not start work until afterwards. A similar criticism was made of the failure by the Employer to have Karlo Simonson testify, and the Board ought not to accept in evidence the July 30, 2007 self-serving letter the Employer sent to him.

Indeed, his father, Art Simonson, was not certain Karlo would return to work for the Employer.

[48] With respect to Ethel Akins, Mr. Plaxton submitted the evidence did not support the contention that she was an employee – she had not worked for the Employer since 2005, and even then was admitted to be a contractor performing "custom work" responsible for her own source deductions.

[49] With respect to Dave Simonson, Mr. Plaxton submitted that the usual indicia of an independent contractor were apparent, and that, in any event, while a "dependent contractor" may be included in the definition of "employee" in s. 2(f)(i.1) of the *Act*, Mr. Simonson's situation did not meet the requirement that his contract with the Employer could be the subject of collective bargaining. The contract is with a corporate entity, Triple S Industries Inc., which determines Mr. Simonson's terms and conditions of employment, not the Employer. No deductions are made at source by the Employer, Triple S is responsible for all costs and expenses, and can hire replacement drivers (indeed, it must do so when Mr. Simonson himself cannot drive).

[50] In support of his arguments, Mr. Plaxton referred to the following authorities: *Ennis v. Con-Force Structures Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 1985, and United Brotherhood of Carpenters and Joiners of America, Local 1985 v. Con-Force Structures Ltd.*, [1992] 4th Quarter Sask. Labour Rep. 117, LRB File Nos. 185-92 and 188-92; *Canadian Union of Public Employees. Local 4188 v. Crystal Lakes School Division No. 120*, [1999] Sask. L.R.B.R. 715, LRB File No. 206-99; *Canadian Union of Public Employees. Local 4188 v. Town of Canora*, [2001] Sask. L.R.B.R. 559, LRB File No. 070-01; *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; *Lovatt v. Saskatchewan Government Employees' Union and Town of Raymore*, [2006] Sask. L.R.B.R. 28, LRB File Nos. 306-04 and 310-04; *Schan v. Little Borland Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 1985*, [1986] February Sask. Labour Rep. 55, LRB File Nos. 221-85 and 275-85; *Saskatchewan Government Employees' Union v. R. M. of Paddockwood No. 520*, [1999] Sask. L.R.B.R. 470, LRB File Nos. 059-99, 087-99 to 093-99; *Vision Security and Investigation Inc.*, *supra*; *Saskatchewan Government*

Employees' Union v. Bosco Homes Inc., [1989] Spring Sask. Labour Rep. 84, LRB File No. 246-88; *Shopmens' Local Union No. 838 of the International Association of Bridge, Structural and Ornamental Iron Workers v. Metal Fabricating Services Ltd.*, [1990] Spring Sask. Labour Rep. 70, LRB File Nos. 166-89, 193-89 to 195-89, and 214-89 to 216-89; *Pfeifer Holdings Ltd. o/a/ Tropical Inn*, *supra*.

Statutory Provisions:

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

> *5 The board may make orders:*
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> *(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;*
>
> *…*
>
> *10 Where an application is made to the board for an order under clause 5(a) or (b), the board may, in its absolute discretion, reject any evidence or information tendered or submitted to it concerning any fact, event, matter or thing transpiring, or occurring after the date on which such application is filed with the board in accordance with the regulations of the board.*

Analysis and Decision:

[52] The parties appearing at the hearing of this matter were represented by counsel, and were provided with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. These reasons for decision are based on the whole of the evidence, the demeanour of

the witnesses, and consideration for reasonable probability. Where witnesses have testified in contradiction to the findings we have made, we have discredited their testimony as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible or unworthy of belief.

[53] The evidence of support for an application for certification is determined by the situation that exists at a specific point in time. What is essential as to whether an order will be made granting certification without a representation vote is whether the applicant union has filed evidence of the the support of a majority of the employees on the date that the application is filed.[2] In this respect, the statement of employment is like a snapshot. And, like a photograph, it has little or no evidentiary worth if it has been manipulated or events occurring after the applicable date are allowed to change the representation depicted. Pursuant to s. 10 of the Act, the Board "may, *in its absolute discretion*, reject any evidence or information tendered or submitted to it concerning any fact, event, matter or thing transpiring, or occurring after the date on which such application is filed with the Board." There are good policy reasons for this provision. It serves to help prevent manipulation of the workforce or the manufacture of evidence after an employer becomes aware that an application for certification has been filed.

[54] This is not to suggest that the Employer in the present case has improperly manipulated the Statement of Employment, but rather, to demonstrate that it is not an employer's view of who is an employee on the applicable date that is necessarily determinative of the issue. It is within the discretion of the Board to make the determination. The issue in the present case is what was the complement of "employees" within the meaning of the *Act* on the date the application for certification was filed. The Employer operates an agricultural enterprise with a build-up of employees for a few weeks in each of the spring or fall. Many persons who work during either planting or harvest return to work in successive years, but some do not either. Does the Board look at only the employees who are essentially employed year-round? Or at that group plus either the spring group or fall group or both?

[2] The present application was filed and heard before the recent amendments to *The Trade Union Act* (S.S. 2008, c.26 and c.27) requiring a representation vote in every application for certification (s. 6).

[55] We have determined that there are no circumstances that should lead us not to exercise our absolute discretion in accordance with longstanding Board policy to not consider evidence of matters or events occurring after the date the application was filed. This does not mean that the composition of the statement of employment is restricted only to persons actually working on that date. It does, however, mean that we shall not admit into evidence hearsay from witnesses testifying about what persons told them after that date about whether they could, or were intending to, return to work for the harvest – such matters go to the critical issue to be determined. We are of the opinion that the critical issue of a sufficiently tangible employment connection should be determined on the basis of more reliable and objective evidence.

[56] The Board has consistently taken the view that employees who are not employed on the date an application for certification is filed do not participate in the representation question unless there are exceptional circumstances: See, *Con-Force Structures Ltd*., *supra*, *Metal Fabricating Services Ltd*., *supra*, and many others dating to at least the early 1980's. The onus is on the party seeking to have the Board deviate from this policy.

[57] In the present case, therefore, the onus is on the Employer to prove that persons other than those actually employed on the date the application was filed ought to properly be on the Statement of Employment because they have built and maintain a significant continuing interest in the representation issue on that date, or conversely, are properly not to be on the statement although they were in fact employed on that date.

[58] Addressing the latter issue first, with respect to James Smith, whom the Union contended had been improperly left off of the Statement of Employment. In *Bosco Homes Inc*., *supra*, at 85, the Board determined that persons who were working on the date the application for certification was filed, but who had earlier notified the Employer of their intention to resign, should be treated as part of the proposed bargaining unit and included on the Statement of Employment. In our opinion, James Smith, who was employed and working on the date the application was filed, ought properly to be included on the Statement of Employment for the purposes of the representation issue.

[59] We shall now address those persons whom the Union contends are improperly listed on the Statement of Employment. Certain general principles are applied by the Board in cases of a fluctuating workforce. Common examples are industries with high employee turnover, such as the hospitality and retail industries, or where project work flow requires different skills at different times as in construction, where persons may be employed for only a few days depending on the trade. Arguably, agricultural work ought to be included in this category. Then again, its nature is more like that of the seasonal work required by municipalities for grounds keeping, road building or snow removal. Decisions relating to any of these areas may be instructive.

[60] In *Canadian Union of Public Employees v. Lakeland Regional Library Board*, [1987] Oct. Sask. Labour Rep. 74, LRB File No. 116-86, the Board noted that although it was the Board's policy to include casual, temporary and part-time employees in a bargaining unit, such persons must have a "reasonably tangible employment relationship with the employer" before they are considered employees. The Board has applied such notion to the categories of employees noted in the preceding paragraph.

[61] In *Pfeifer Holdings Ltd. o/a Tropical Inn*, *supra*, a case regarding the hotel industry, an issue arose with respect to the status of persons who were offered employment with the employer prior to the date that then application for certification was filed, but who did not actually commence work until afterwards. The employer advanced the argument that they had a sufficient connection with the workplace to justify their inclusion on the statement of employment. The union argued that they should not be included for three policy reasons: it avoids the problems caused by unscrupulous employers who would use such a rule to stack the statement; it is otherwise impossible for the union to know who is an employee when organizing; and, their connection to the workplace is too tenuous in that they may not show up, nor does anything prevent the employer from withdrawing the offer of employment. Applying s. 10 of the *Act*, the Board removed such persons from the statement of employment, clarifying the policy reasons for doing so at 88-90 as follows:

> *On applications for certification, the Board consistently applies s. 10 of the Act by rejecting all evidence tendered after the date that a certification application is filed. This practice brings some finality to the application for certification by confining the issue of the status of persons as employees and the issue of support for the union to a*

precise time frame. In addition, the selection of the filing date as the cutoff period for the determination of both issues serves to reduce the opportunities for artificially altering the make-up of the unit.

. . .

There are a number of reasons for requiring persons to actually work at the workplace before including them on a statement of employment. First, it is difficult to define with any precision when a person has been offered employment. Does this occur when the employer advises the person that they have been selected for a position or when the person indicates that she or he agrees to accept the position offered by the employer? There may also be complications arising from any negotiations between the parties as to wages, working conditions, start dates and other aspects of the employment contract that result in the frustration of the relationship.

Second, persons who have been offered positions with commencement dates sometime in the future are usually unknown to the employees in the workplace and to the organizing union. Employers, generally, do not inform current employees of their intention to hire new staff in advance of the staff attending at the workplace. In the hospitality industry, such as the Employer, turnover in staff is frequent. It would seem enough of a challenge to a union's organizing drive to obtain an accurate list of those employees who are already employed at the workplace, let alone to keep track of those who have been offered employment but have not yet commenced employment. In our view, and from a labour relations point of view, a better balance is achieved by limiting the statement of employment to those employees who actually performed work at the workplace prior to the filing of the certification application. The union would have at least some opportunity for determining who is included within the scope of its proposed bargaining unit, although its knowledge will seldom be as accurate as the Employer's.

The third reason for restricting the statement of employment to those employees who have worked at the workplace before the certification application is filed is to avoid any temptation on the part of either party to artificially alter the statement of employment. The union is prevented from "salting" a statement of employment by sending its members to apply for positions during peak hiring periods; employers will be prevented from engaging new hires for the purpose of diluting the union's support.

Lastly, employees who are offered employment before a certification but who do not commence employment until a date subsequent to the date of filing have the same or less connection to the workplace as employees who are offered employment and commence work after the date the application is filed. The Board

> *held in Service Employees' International Union, Local 333 v. Metis Addiction Council of Saskatchewan Inc., [1993] 3rd Quarter Sask. Labour Rep. 49, LRB File No. 002-93, that such persons should not be included on the statement of employment, even though their employment commenced shortly after the application was filed. It would be difficult to justify on a rationale basis why any distinction should be drawn between the two groups of employees. Both become "connected" to the workplace after the date the application was filed.*

[62] The Board applies similar reasoning in cases where persons have worked "casually" during some time before an application for certification is filed. The Board establishes a standard, that varies depending on the kind of work and the specific circumstances, to determine who has a "sufficiently tangible connection to the workplace" for the purposes of the representation issue. For example, in *Vision Security and Investigation Inc*., *supra*, the Board determined that only those persons who had worked at least 35 hours in the fourteen week period before the application was made ought to be included on the statement of employment. The Board observed that among casual employees there are those "who do not depend in any financial, social or emotional sense on their employment with the employer" as evidenced by "the insignificant amount of income derived from their employment or the dated nature of their employment."

[63] The employees that were excluded in both of the preceding cases are distinguishable from those who are laid off with "a reasonable probability of being recalled to work." This situation has been faced by the Board in earlier cases. A distinction may be made where such persons have alternate employment which may erode either or both of the probabilities that they will be recalled or, if recalled, will not accept. As stated earlier in these reasons, we are not considering information or evidence of any matters or events occurring after the application for certification was filed. Several of the disputed truck drivers have other work – their own farming operations, or in one case, an on-farm manufacturing operation – that take precedence over any offer of employment by the Employer. The vagaries of agriculture are such that we accept that persons in such situations cannot be relied upon to work until they actually show up for work, regardless of any non-binding assurances.

[64] The present situation is also distinguishable from what could be characterized as “true” instances of seasonal employment, as for example, municipal landscaping and road building and clearing, which last many, or at least, several months. The present situation consists of a few weeks work, and in some instances, a few hours work over a few weeks (*e.g.,* Karlo Simonson and Rick Pedersen).

[65] In *Little Rock Construction*, *supra*, the Board held that a liberal concept of employment increased the possibility of manipulation by unscrupulous parties. Accordingly, while it would be manifestly unfair to exclude persons who are absent from work on any arbitrarily chosen day who are by any reasonable standard regular employees with an interest in the representation question, allowing the inclusion of employees whose current connection with the employer is tenuous may give a disproportionate voice in the representation question to persons whose stake is minimal.

[66] In light of the foregoing principles, in our opinion, in the circumstances of present case, none of following persons has the requisite sufficiently tangible connection to the workplace, or the reasonable probability of recall, to warrant their inclusion on the statement of employment, and their names shall be removed from the Statement of Employment:

- Brett Mauch
- Norm Pateman
- Duane Farden
- Art Simonson
- Dave Butler
- Greg Graham
- Karlo Simonson
- Steven Lee
- Ed Evancheski
- Rick Pedersen

[67] With respect to Dave Simonson, having reviewed the labour board jurisprudence applicable to his disputed status as an “employee”, we are of the opinion that he is an independent contractor. In *Saskatoon Open Door Society*, *supra*, the

Board reviewed its approach to the question of whether an individual was an employee or contractor, at 213 to 217 as follows:

> *[10] In several cases in the past few years, the Board has had occasion to track the evolution of the approach by labour relations tribunals to the employee-contractor dichotomy from the seminal decision by the Privy Council in Montreal v. The Montreal Locomotive Works Ltd., et al., [1947] 1 D.L.R. 161 (P.C.), which enunciated the well-known four-fold test, viz., (1) the degree of control over the method of providing goods and services; (2) ownership of the tools; (3) chance of profit; and, (4) risk of loss; through the "integration test" proposed by Lord Denning in Stevenson Jordan & Harrison Ltd.v. MacDonald & Evans, [1952] 1 TLR 101 (C.A.), which asks the question whether the work in issue is being done as an integral part of the employer's business and, therefore, whether the putative contractor is employed as part of the employer's business like other employees; to the addition of two tests to the Montreal Locomotive criteria by the Ontario Labour Relations Board in International Woodworkers of America v. Livingston Transportation Ltd., [1972] OLRB Rep. 488, namely, (1) whether a party is carrying on business on his own behalf or for a superior; and, (2) the statutory purpose test. 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 described the statutory purpose test in the following terms:*
>
> > *... the statutory purpose of The Trade Union Act is to protect the rights of employees to organize in trade unions of their own choosing for the purpose of bargaining collectively with their employers. Accordingly, individuals should not be excluded from collective bargaining because the form of their relationship does not coincide with what is generally regarded as "employer-employee", when in substance, they might be just as controlled and dependent on the party using their services as an employee is in relation to his employer. If the substance of the relationship between the individual and the company is essentially similar to that occupied by an employee in relation to his employer, then the individual is in fact an "employee" within the meaning of Section 2(f) of the Act and will be so designated by the Board, notwithstanding the form or nomenclature attached to that relationship.*
>
> *[11] In an article entitled "Enterprise Control: The Servant Independent Contractor Distinction" (1987) 37 U.T.L.J. 25, Prof. Robert Flannigan formulated the enterprise control test which*

emphasized the risk-taking element of entrepreneurial activity as an essential characteristic of control over the enterprise.

[12] This latter test was referred to as the economic control test by the Canada Labour Relations Board in Canada Post Corporation v. Canadian Postmasters and Assistants Association, et al. (1989), 5 CLRBR (2d) 79, which assessed its function as being,

> *. . . to update the concepts of the "fourfold test" and the "integration test" and reconstruct them to suit the modern business milieu. It focuses on the contractor's activities rather than on the employer's business. This is important for the Board as it administers the Code in today's ever-changing business world where corporate takeovers, mergers and practices such as "contracting out" and "privatization" are becoming commonplace.*

[13] The Board has subsequently approved of an economic control analysis as a fundamental part of the determination of employee-contractor status. In Retail, Wholesale and Department Store Union, Locals 539 & 540 v. Federated Co-operatives Limited, [1989] Fall Sask. Labour Rep. 60, LRB File No. 256-88, the Board stated:

> *. . . although it is not the only consideration, entrepreneurial independence or control, in the sense of the latitude to make decisions which determine the financial success or failure of the business, is the most important feature that distinguishes independent contractors from employees.*
>
> *This Board agrees with that analysis. An independent contractor is essentially a business person, an entrepreneur, a risk-taker, who takes chances in the marketplace with a view to making a profit. Success or failure of his enterprise depends upon how well he utilizes the capital and labour that he controls and how well he assesses the marketplace. Regardless of how inferior a businessman's bargaining power may be or how poor his bargain, he is not an employee within the meaning of the Act.*

[14] This approach has been adopted by the Board in several subsequent decisions including, McGavin Foods, supra; United Food and Commercial Workers, Local 241-2 v. Beatrice Foods Ltd., [1994] 3rd Quarter Sask. Labour Rep. 302, LRB File No. 264-93; Retail, Wholesale Canada, A Division of the United

Steelworkers of America v. United Cabs Ltd., [1996] Sask. L.R.B.R. 337, LRB File No.115-95; Grain Services Union v. AgPro Grain Inc., [1996] Sask. L.R.B.R. 639, LRB File No. 111-96; Regina Musicians Association, Local 446 v. Saskatchewan Gaming Corporation, [1997] Sask. L.R.B.R. 273, LRB File No. 012-97. In the last decision, the Board looked to the following criteria previously identified by the Ontario Board in Algonquin Tavern v. Canada Labour Congress, [1981] 3 Can. LRBR 337, at 360 ff.:

> *1. The use of, or right to use substitutes.*
>
> *...*
>
> *2. Ownership of instruments, tools, equipment, appliances, or the supply of materials.*
>
> *...*
>
> *3. Evidence of entrepreneurial activity.*
>
> *...*
>
> *4. The selling of one's services to the market generally.*
>
> *...*
>
> *5. Economic mobility or independence, including the freedom to reject job opportunities, or work when and where one wishes.*
>
> *...*
>
> *6. Evidence of some variation in the fees charged for the services rendered.*
>
> *...*
>
> *7. Whether the individual can be said to be carrying on an "independent business" on his own behalf rather than on behalf of an employer or, to put it another way, whether the individual has become an essential element which has been integrated into the operating organization of the employing unit.*
>
> *...*
>
> *8. The degree of specialization, skill, expertise or creativity involved.*
>
> *...*
>
> *9. Control of the manner and means of performing the work - especially if there is active interference with the activity.*
>
> *...*
>
> *10. The magnitude of the contract amount, terms, and manner of payment.*
>
> *...*

> *11. Whether the individual renders services or works under conditions which are similar to persons who are clearly employees.*

[15] Despite the fact that both the Algonquin Tavern and Saskatchewan Gaming cases defined and considered these criteria in the context of entertainers engaged to perform for the public ancillary to the respective principal's main business, the list, which is not exhaustive, is informative for other situations and industries involving the determination of employee-contractor status.

[16] While the particular facts of McGavin Foods, supra, are not particularly instructive in the present situation in that that case involved a plan by McGavin to franchise or contract out its distribution routes formerly serviced by bargaining unit employees using company-owned trucks to owner-operators, the Board's description of the operation of s. 2(f) of the Act, at 210, is beneficial:

> *Section 2(f)(i.1) of the Act sets out a purposive test for determining if the relationship between contractors, in the opinion of the Board, could be the subject of collective bargaining. Section 2(f)(iii) of the Act prevents the common law test of "vicarious liability" that was developed to determine the legal liability of a master for the acts of a servant from being determinative of employment status. In Retail Wholesale Canada, A Division of the United Steelworkers of America v. United Cabs Ltd., Johnson et al., [1996] Sask. L.R.B.R. 337, LRB File No. 115-95, the Board, at 345, held that the focus of the assessment under s. 2(f)(i.1) and (iii) of the Act is an attempt to "distinguish between persons who are genuinely operating in an entrepreneurial fashion independent of an "employer," and those who, whatever the form their relationship with that putative employer takes, are really employees whose access to the option of bargaining collectively should be protected."*

[17] In McGavin Foods, supra, the work to be performed by the franchisee was an integral part of McGavin's business. The distributorship agreement anticipated that the franchisee would be available to service customer accounts seven days a week and contained a restrictive covenant preventing the franchisee from working for a competitor. McGavin controlled the main customer list and the retail and wholesale prices of the products. The Board found that the use of employees by an owner-operator on a regular

> *basis, as opposed to casual helpers or relief help, may be a "solid indicator of his or her entrepreneurial status in that it demonstrates that he or she will profit not only from his or her own labour, but also from the labour of others." The Board held that franchise distributors working as owner-operators of their own equipment were not independent contractors, but employees within the meaning of the Act; on the other hand, those distributors who employed others to drive franchised routes were held to be independent contractors. The decision is instructive in that it illustrates that one may be considered a contractor even though there is a degree of economic dependence on the principal. Determination of the employee-contractor issue really is a matter of degree; the cases that are obviously black and white rarely come before the Board. As the Board noted in Beatrice Foods Ltd., supra, at 305:*
>
> > *There are many details of a relationship which will yield clues as to whether its essential character is closer to employment or contract. As the Ontario Labour Relations Board pointed out in the Livingston Transportation decision, supra, when a tribunal such as ours is asked to make the determination, it is often a sign that the line of demarcation is difficult to discern under the circumstances.*

[68] In *Saskatoon Open Door Society, supra*, the Board determined that the individual in question, a caretaker, was more in the nature of a contractor than of an employee and excluded the individual from the bargaining unit. The factors the Board considered in reaching its conclusion included the individual's ability to fulfill the cleaning contract through his own labour or that of someone else (*i.e.* he controlled who would do the work); ownership of the tools was split between the individual and the employer (the employer owned the vacuum cleaner and cleaning implements and had to approve the purchase of supplies while the individual supplied the tools used for maintenance work); the work the individual performed was not part of the business in which the employer was engaged; the individual did not work under similar conditions to those already determined to be employees of the employer; the individual was not restricted from pursuing other business interests; the individual could accept or reject additional work offered to him by the employer, negotiating separate remuneration for the same; and the individual assumed the risk of profit and loss (while noting that it mattered not that such a risk was small because of the modest size of the contract -- if he performed the worked efficiently, he could realize a profit). Overall, the Board determined that the individual maintained control over the cleaning and maintenance enterprise.

[69] In the present case, Mr. Simonson is in a very similar position. He bears the risk of profit or loss, as he admitted in his testimony. He has control over who does the work that his company has contracted to do for the Employer. He engages in other business activities with others, and also takes additional work offered by the Employer outside the contracted work, e.g., hauling potatoes to Alberta. He provides his own equipment. He is responsible for his own source deductions. He has other work the rest of the year which ensures that he is not reliant on the Employer in the same manner as full-time employees. Overall, his terms and conditions of work are not the same as the other truck drivers at harvest who use the Employer's equipment and are paid an hourly wage. The fact that Mr. Simonson does not himself determine *when* to do the work under the contract is of no consequence in the present case, because, in reality, the Employer does not determine it either – the nature of the agricultural enterprise, i.e., the potatoes cannot be harvested until ready, is what dictates when the work will be done. Mr. Simonsen's name shall be removed from the Statement of Employment.

[70] With respect to Ethel Akins, the issues of both her spousal connection to Barry Akins and her involvement in a shareholder company of the Employer aside, we are of the opinion that she neither has a sufficiently tangible employment connection – she had not worked for the Employer for almost two years at the time of the hearing – nor is she an "employee" by the admission of the Employer's own witnesses – she is a contractor of custom work. The Employer was not responsible for her source deductions. Not insignificantly, while Mr. Meyers and Mr. Akins testified with respect to her status, Ms. Akins herself was not called to testify, with no explanation. Her name shall be removed from the Statement of Employment.

Conclusion:

[71] Accordingly, the twelve names identified above, and originally disputed by the Union, shall be removed from the Statement of Employment, and that of James Smith shall be added. There are, therefore, 32 names on the Statement of Employment.

[72] As the Union has filed evidence of the support of a majority of employees in the proposed bargaining unit, and the proposed unit is appropriate for collective bargaining, a certification Order will issue pursuant to ss. 5(a), (b) and (c) of the *Act*. No vote is required.[3]

[73] Clare Gitzel, Board Member, dissents from these Reasons.

DATED at Saskatoon, Saskatchewan, this **24th** day of **October, 2008**.

LABOUR RELATIONS BOARD

James Seibel,
Chairperson

[3] See, f.n. 2, supra.