

**Labour Relations Board
Saskatchewan**

**INTERNATIONAL UNION OF OPERATING ENGINEERS, HOISTING & PORTABLE &
STATIONARY, LOCAL 870, Applicant v. LINDE CANADA LIMITED, Respondent**

LRB File No. 056-09; January 19, 2010

Vice-Chairperson, Steven D. Schiefner; Members: Gerry Caudle and Clare Gitzel

For the Applicant: Mr. Gary Bainbridge
For the Respondent: Mr. Scott Wickenden

Bargaining unit – Appropriate bargaining unit – Union seeks all employee bargaining unit - Employer argues commission salespersons should not be included in proposed bargaining unit – Board finds sufficient degree of cooperation and teamwork between commission salespersons and other members of the proposed unit – Board determines that commission salesperson ought properly to be included in bargaining unit as their exclusion was more likely to result in fragmentation and instability in collective bargaining.

The Trade Union Act, ss. 3, 5(a), (b) and (c).

REASONS FOR DECISION

Background:

[1] **Steven D. Schiefner, Vice-Chairperson:** The International Union of Operating Engineers, Hoisting & Portable & Stationary, Local 870 (the “Union”) applied on June 8, 2009 to the Saskatchewan Labour Relations Board (the “Board”) to be designated as the certified bargaining agent for a unit of employees of Linde Canada Limited (the “Employer”). During preliminary proceedings and with leave of the Board, the Union amended its application with respect to the composition of the proposed bargaining unit. In its amended application, the bargaining unit proposed by the Union was as follows:

All employees employed by Linde Canada Limited in the City of Saskatoon, in the Province of Saskatchewan, except the Branch Manager.

[2] The reply filed by the Employer asserted that the proposed bargaining unit was not appropriate for the purpose of collective bargaining in that two (2) persons employed as “Outside Sales Representatives”¹ should be excluded.

[3] The Union estimated that there were seven (7) employees in the proposed unit on the date its application for certification was filed with the Board, including the two (2) disputed positions. With its application, the Union filed evidence of support from a sufficient number of the employees to satisfy the requirements of s. 6 of *The Trade Union Act*, R.S.S. 1978, c.T-17 (the “Act”) irrespective of which description of the bargaining unit the Board ultimately determined to be appropriate. As a consequence, on August 19, 2009, the Board issued a Direction for Vote of all employees (exclusive of the Branch Manager) in accordance with the requirements of the *Act*. Because there was no agreement as to the description of the bargaining unit (and thus the composition of the voters list), all ballots were sealed in double envelopes. Following completion of the vote, the Agent of the Board sealed the ballot box pending further direction from the Board.

[4] The Union’s application was heard by the Board on December 8 and 9, 2009 in Saskatoon.

Evidence:

[5] The parties agreed that the Union would proceed with its evidence first, followed by the Employer. The Union called Mr. Trent Garneau, the Union’s Business Manager. In reply, the Employer called Mr. Ryan Brodrecht, the Employer’s Retail Sales Manager (Western Region), and Mr. Earl Hand, a sales representative and incumbent of one of the disputed positions.

Mr. Trent Garneau:

[6] Mr. Garneau was the Union’s Business Manager. Mr. Garneau indicated that the Union’s efforts to organize the employees at Linde Canada Limited originated from an expression of interest from an employee at this workplace. Although the Union

¹ The parties utilized different nomenclature in describing the various positions of the Employer, which at times was confusing. In these Reasons for Decision, the Board has elected to use the names assigned to the various positions by the Employer. In the Board’s opinion, nothing turns on the particular names assigned to the various positions and only utilized the Employer’s nomenclature out of convenience.

generally represented craft units in the construction sector, Mr. Garneau testified that the Union's Constitution also permitted representation of all employee or "wall-to-wall" bargaining units (of the type proposed in their amended applications). Mr. Garneau provided examples to the Board of other workplaces for which the Union provided representation for similar units.

[7] Mr. Garneau indicated that, as part of the organizing drive, the Union did background research as to the kind of business conducted by the Employer, the nature of the workplace, and the number and type of employees involved. The Union determined that Linde Canada Limited was a supplier of specialized compressed-gas products, mostly to the construction and health care sectors. The Employer also sold welding and safety supplies through various retail outlets in Canada, including the workplace that was the subject matter of their application, which was located in Saskatoon, Saskatchewan. The Employer engaged its customers through a counter service conducted at its retail stores and through a direct sales service conducted by traveling sales representatives. The Union's research indicated that the workplace was composed of five (5) types of positions², namely two (2) "Route Sales Drivers"; two (2) "Inside Sales Representatives"; two (2) Outside Sales Representatives (the disputed positions); a summer student; and the Branch Manager.

[8] The Union understood that Routes Sales Drivers were responsible for managing the company's warehouse and for delivering the company's product to the customer; that Inside Sales Representatives provided counter service to customers at the retail location; that the Outside Sales Representatives were responsible for dealing directly with the company's customers (particularly larger customers) and for finding new customers and promoting the company's products; that the summer student generally worked at the retail location; and that the Branch Manager was generally responsible for managing the retail store and the employees working out of that location. The Union understood there to be degree of intermingling between these positions. For example, the Union understood that, although Inside Sales persons generally did not deliver product to the customer, they would do so in the absence of a Route Sales person.

² Ibid: Note 1.

[9] Based on its research, Mr. Garneau indicated that the Union agreed that the Branch Manager should be excluded from the bargaining unit on the basis of the managerial exclusion. However, the Union took the position that all other employees properly belonged in the bargaining unit and that this unit represented an appropriate unit for bargaining collectively with the Employer.

[10] In cross examination, Mr. Garneau admitted that the Union did not have a detailed understanding of the terms and conditions of employment for the employees; did not have job descriptions for any of the Employer's position; had little knowledge of the method of payment or salaries paid to employees; and did not know much about the compressed gas industry or the Employer's competition. Mr. Garneau indicated that these were the kind of details that the Union would learn through collective bargaining with the Employer.

Ryan Brodrecht

[11] The Employer called Mr. Brodrecht, the Employer's Retail Sales Manager for the Mid-West District (Alberta, Saskatchewan and Manitoba). Mr. Brodrecht testified that he had worked for the Employer for eighteen (18) years; starting as a "cylinder filler" at a fill plant; then he later became a local branch manager of a retail outlet; and then he moved to an Outside Sales Representative position, where he worked for approximately ten (10) years before accepting his current position.

[12] Mr. Brodrecht confirmed and elaborated on Mr. Garneau's description of the activities of Linde Canada Limited. Mr. Brodrecht testified that the Employer had sixty-eight (68) retail outlets across Canada, including sixteen (16) in western Canada (his region) and three (3) in Saskatchewan (Regina, Lloydminster, and Saskatoon).

[13] Mr. Brodrecht indicated that the primary responsibility of the positions described as Route Sales Driver was the safe handling and delivery of the company's goods to its customers. As such, they were responsible for complying with Transport Canada's requirements for the handling of dangerous goods and for completing pre- and post-trip inspections of their vehicles. Route Sales Drivers were also responsible for managing hard goods and cylinder inventories in the warehouse, which was done in conjunction with the Inside Sales Representatives (who also drew from these same

inventories for counter sales). Although not primarily responsible for sales, Mr. Brodrecht testified that the Employer encourages all employees at all levels in the company to sell the company's product and, thus, Routes Sales Drivers were expected to have general product knowledge and to sell the Employer's goods on an *ad hoc* basis, usually by assisting customers if they indicate they wished to make additional purchases. The Job Description provided by the Employer for the position of Route Sales Driver was consistent with above described duties and responsibilities.

[14] The primary responsibility of the Inside Sales Representatives was described by Mr. Brodrecht as being to service the customers that walked into the company's retail outlets and smaller customers (ie. less than \$5,000 annual purchases) who might phone for service. Other responsibilities of the Inside Sales persons were to manage the company's inventory in the warehouse (in cooperation with the Route Sales Drivers); to assist in processing customer orders which had been placed by and through the Outside Sales Representatives; and to provide back-up for Route Sales Drivers (in the event of their absence). Mr. Brodrecht testified that Inside Sales Representatives received more training than Route Sales Drivers, including computer training on inventory management and product knowledge from vendors. The Job Description provided by the Employer for the position of Route Sales persons was consistent with above described duties and responsibilities.

[15] Mr. Brodrecht testified that both Route Sales Drivers and Inside Sales Representatives received a base salary and were eligible to receive a performance incentive (bonus) based on the profitability of both the local branch and the company collectively. The performance bonuses were calculated in accordance with a document entitled "The Linde GASES Performance Incentive Plan", which document was periodically updated by the Employer. Mr. Brodrecht testified that a Route Sales Driver's base salary ranged between \$42,000 and \$46,000 and that an Inside Sales Driver's base salary was between \$45,000 and \$50,000, annually. Under the company's Performance Incentive Plan, both Route Sales Drivers and Inside Sales Representatives were eligible for bonuses of up to ten percent (10%) of their base salary if the Employer achieved specified net profitability targets (targets were established for both each individual branch and the company, collectively).

[16] Mr. Brodrecht testified that both Route Sales Drivers and Inside Sales Representatives worked out of a specific retail office; that they generally worked from 8:00am to 5:00pm (although overtime might occasionally be necessary); and that both types of positions reported to the local Branch Manager.

[17] Mr. Brodrecht testified that the primary responsibilities of the disputed positions of Outside Sale Representative were to service the company's larger customers (referred to as "managed accounts"); to promote and enhance sales of the company's product to new and existing customers; and to generally increase the volume of the company's sales. Mr. Brodrecht indicated that Outside Sales Representatives accounted for approximately 90% of the Employer's sales and, as such, they were generally the best trained; spent most of their time on the road; had access to a company expense account (for entertaining clients); and were some of the best paid employees of the Employer.

[18] Mr. Brodrecht testified that, generally speaking, Outside Sales Representatives were paid a base salary of between \$58,000 and \$65,000 and received a commission bonus based on their gross sales. These commissions were calculated in accordance with a document entitled "The Linde Sales Representatives' Incentive Plan", which document was updated by the Employer to periodically adjust the rate of bonuses and to annual adjust each recipient's target sales. Mr. Brodrecht testified that, unlike other employees who were only eligible for a performance bonus of up to ten percent (10%) of their base salary (under the Linde GASES Performance Incentive Plan), there was no cap on quantum of a commission bonus that an Outside Sales Representative could achieve in any given year (under the Industrial Sales Incentive Plan). The Linde Sales Representatives' Incentive Plan was only available to Outside Sales Representatives and was intended to provide, and did provide, a strong incentive to increase the Employer's gross sales. To which end, Mr. Brodrecht testified that, in a good year, a Sales Representative could receive as much as \$50,000 in commission bonuses. Mr. Brodrecht gave an example of a Sale Representative achieving a bonus of \$72,000 in one year servicing the industrial requirements near Fort McMurray, Alberta. Mr. Brodrecht testified that to achieve these kind of numbers (size of commission bonuses), it took hard work and long hours (and a strong industrial economy helped).

[19] Mr. Brodrecht testified that, unlike Route Sales Drivers and Inside Sales Representatives, Outside Sales Representatives did not report to the local Branch Manager. Rather, these employees reported to a Regional Retail Sales Manager. Also, unlike other employees, Outside Sales Representatives were not paid overtime, nor did they have fixed hours of work. In addition, Mr. Brodrecht testified that neither Route Sales Drivers nor Inside Sale Representatives had authority to offer pricing discounts to customers. Rather, the approval of either a Sales Representative or a local Branch Manager was required to do so. A schedule of discounts had been established by the Employer with the Branch Manager and Sales Representatives having similar authority to give discounts to customers, with the approval of a more senior levels of management required depending on the level of discount desired by a customer.

[20] Mr. Brodrecht testified that, although not always the case, new employees were often first hired as Route Sales Drivers, where they would learn about the Company, its products, and how the compressed-gas business worked. Later, as their product and company knowledge increased, new employees would generally move to become an Inside Sales Representative. From this point, advancement for employees would either lead them to become a local Branch Manager or to become an Outside Sales Representatives. Mr. Brodrecht testified that it was not uncommon for employees to become a local Branch Manager first and then move to Outside Sales. In response to a question from the Board as to why employees would want to move from a management position (ie. the local Branch Manager) to Outside Sales, Mr. Brodrecht indicated that, with the company's commission bonuses and hard work (ie. long hours), Outside Sales Representatives can make more money than a local Branch Manager.

[21] Mr. Brodrecht testified that the Employer encouraged all of its employees to sell and had put economic incentives in place to promote sales growth. The Employer also encouraged its employees to work as a team, both locally and regionally, to ensure that its customers were satisfied and that established sales targets were achieved.

[22] Finally, Mr. Brodrecht testified with respect to other certification Orders to which the Employer was subject in other jurisdictions. Mr. Brodrecht testified that no Outside Sales Representatives had been included in any of the certified bargaining unit. In cross examination, Mr. Brodrecht admitted that, as far as he knew, the Union's

application was the first time a trade union had sought to include Outside Sales Representatives within a bargaining unit.

Mr. Earl Hand

[23] The Employer also called Mr. Earl Hand, who was an Outside Sales Representative working out of the Saskatoon store. Mr. Hand testified that he had been an employee of the Employer for approximately twenty-six (26) years and that he had worked in a variety of positions prior to his current role, including that of a local branch coordinator (now referred to as a Branch Manager). Mr. Hand confirmed Mr. Brodrecht's description of the duties and responsibilities of an Outside Sales Representative.

[24] Mr. Hand testified that, as an Outside Sales Representative he was responsible for a portfolio of customers, generally the top 100 customers in his region. Mr. Hand indicated that he generally worked out of his home; that he worked approximately 8 – 10 hours per day, and that he was on the road approximately 75% of the time, visiting his customers or soliciting for new accounts. Mr. Hand testified that he also put on training seminars for his customers in conjunction with suppliers.

[25] Mr. Hand testified that he moved into Outside Sales because he could make more money and that, in doing so, his commission bonuses generally ranged from a low of \$2,000 per year to a high of \$60,000. In response to a question from the Board, Mr. Hand indicated that, in his twenty-two (22) years as an Outside Sales Representative, there had only been one (1) year in which he had not received a commission bonus.

Arguments:

The Employer

[26] The Employer took the position that the bargaining unit should exclude the Branch Manager on the basis of a managerial exclusion and should also exclude the Outside Sales Representatives on the basis that to include these positions would not create a unit appropriate for collective bargaining with the Employer.

[27] The Employer argued that, as this was an application for initial certification, the issue of "community of interest" ought to be a primary factor for the Board in

determining an appropriate bargaining unit and that the Outside Sales Representatives did not share a sufficient community of interest with the other employees to be included in the bargaining unit.

[28] The Employer pointed to the differences between Outside Sales Representatives and other employees, including their level of training, their reporting structure, their mode of payment (ie. commission sales vs. salary), their hours of work, and the independence and other benefits enjoyed by Outside Sales Representatives. The Employer argued that Outside Sales Representatives were expected to achieve certain sales goals, spent the majority of their time away from the local branch office, and had a greater degree of control over the conditions of their employment. The Employer relied on the decisions of this Board in *Canadian Union of Public Employees, Local 1975 v. University of Saskatchewan Students' Union*, 2007 CanLII 68928 (Sk. L.R.B.), LRB File No. 048-04, and *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. O.K. Economy Stores*, [1990] Fall Sask. Labour Rep., LRB File No. 264-89, in arguing that the Outside Sales Representatives did not share a sufficient community of interest with the other employees in the bargaining unit to be included.

[29] The Employer also pointed to the other certification Orders involving the Employer in other jurisdictions, where positions similar to Outside Sales Representatives had been excluded from those bargaining units. The Employer also relied upon previous decisions of this Board wherein the Board excluded commissioned salespersons from the bargaining unit, including *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Canadian Linen and Uniform Services Co.*, [1999] Sask. L.R.B.R. 173, LRB File No. 048-99.

[30] In conclusion, the Employer asked the Board to exclude Outside Sales Representatives from the proposed bargaining unit.

The Union

[31] The Union observed for the Board that, in this particular application, the Employer was arguing for an under-inclusive bargaining unit (ie. a unit exclusive of the Outside Sales Representatives). Simply put, the Union took the position that the Employer's request was unusual and ought to be denied, noting the Board's historic

preference for larger, all-inclusive bargaining units. To which end, the Union argued that the onus ought properly to be on the Employer to satisfy the Board that the disputed positions should be excluded from the bargaining unit. In other words, the Union argued that for the Employer to succeed, it must prove to the satisfaction of the Board that the unit proposed by the Union was not viable for the purpose of collective bargaining.

[32] The Union disputed each of the distinctions relied upon by the Employer in arguing that the Outside Sales Representatives did not share a sufficient community of interest with the other employees in the bargaining unit. The Union noted that differences in job classifications existed within most bargaining units and argued that the employees had far more in common than they had differences that distinguished them. In this regard, the Union noted the relative small size of the workplace, the inter-relationship between the duties of the different employees, and the degree to which all employees worked in a coordinated fashion toward a common goal.

[33] The Union argued that the unit it proposed was the most likely to facilitate collective bargaining, to nurture industrial stability, and to avoid unnecessary fragmentation of bargaining units. In taking this position, the Union noted that carving out two (2) Outside Sales Representatives from a bargaining unit comprised of only seven (7) members would undermine collective bargaining and was more likely to create the very fragmentation which the Board sought to avoid. The Union observed that many trade unions represent a broad range of employees, including those that were highly skilled and highly paid. The Union argued that the test for viability of the bargaining unit was whether or not the Union could sit down with the Employer and bargain collectively on behalf of the member of the unit; which it argued that it could.

[34] In advancing its position, the Union relied upon the decisions of this Board in *Graphic Communications International Union, Local 75M v. Sterling Newspaper Group*, [1998] Sask. L.R.B.R. 770, LRB File No. 174-98; *United Food and Commercial Workers Union, Local 1400 v. Ranch Ehrlo Society*, 2008 CanLII 65787 (SK L.R.B.), LRB File No. 108-07; *Communications, Energy and Paperworkers Union of Canada v. Arch Transco Ltd.*, [2000] Sask. L.R.B.R. 633, LRB No. 060-00; *Canadian Union of Public Employees, Local 1902-08 v. Young Women's Christian Association*, [1992] 4th Quarter Sask. Labour

Rep. 71, LRB File No. 123-92; and *Canadian Union of Public Employees, Local 1975 v. University of Saskatchewan Students' Union, supra*.

Relevant Statutory Provisions:

[35] Relevant statutory provisions include ss. 3 and 5(a), (b) and (c) of the *Act*, which provide as follows:

3. *Employees have the right to organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing; and the trade union designated or selected for the purpose of bargaining collectively by the majority of the employees in a unit appropriate for that purpose shall be the exclusive representative of all employees in that unit for the purpose of bargaining collectively.*

...

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;*

Analysis and Decision:

[36] There was no dispute that the Branch Manager ought to be excluded on the basis of the managerial exclusion. The only issue for the Board to decide was whether the bargaining unit proposed by the Union is an appropriate unit for the purpose of collective bargaining or is it over-inclusive. While the Union took the position that it was appropriate, the Employer argued that the inclusion of Outside Sales Representatives was inappropriate (or rather their inclusion would result in an

inappropriate unit for purposes of collective bargaining). For the reasons that follow, the Board is satisfied that the unit proposed by the Union is appropriate for this particular workplace.

[37] There are a number of decisions wherein the Board has set forth the factors that we should consider in determining whether a proposed bargaining unit is an appropriate one. Of particular interest was the review of this Board's past decisions concerning the appropriateness of under-inclusive bargaining units found in the decision of *Graphic Communications International Union, Local 75M v. Sterling Newspapers Group, A Division of Hollinger Inc.*, [1998] Sask. L.R.B.R. 770, LRB File No. 174-98. In this decision (and based upon the numerous authorities referred therein), the Board in that case concluded that an under-inclusive unit would be inappropriate where:

- (1) there is no discrete skill or other boundary surrounding the unit that easily separates it from other employees;
- (2) there is intermingling between the proposed unit and other employees;
- (3) there is a lack of bargaining strength in the proposed unit;
- (4) there is a realistic ability on the part of the Union to organize a more inclusive unit; or
- (5) there exists a more inclusive choice of bargaining units.

[38] The factors listed in *Sterling Newspapers, supra*, provide guidance, without being prescriptive; as there is no exhaustive set of rules for determining appropriateness. The first parts of the above factors are concerned with the issue of community of interest and the question of whether a rational and defensible boundary can be drawn around a proposed bargaining unit. In examining these factors the Board is called upon to examine the similarities and commonality of interests, skills, qualifications, duties and work environment of affected employees. However, in doing so, it is important to note that there will often be differences between the included employees' skills, duties and working conditions. Such is the case for a variety of reasons, including the nature of the work being performed, the degree of specialization of skills and functions to perform that work, and for the simple reason that there are often many different classifications of employees within a bargaining unit. The issue for the Board is not that there are

differences (because there usually are) but whether or not those differences are of a sufficient degree to undermine the viability and long term stability of the bargaining unit. See: *International Alliance of Theatrical, Stage, Employees and Moving Picture Machine Operators of the United States and Canada v. Saskatchewan Center of the Arts*, [1992] 3rd Quarter, Sask. Labour Rep. 143, LRB File No. 048-04.

[39] The balance of the *Sterling Newspaper* factors, *supra*, examines the appropriateness of the bargaining unit from a different perspective; a perspective not particularly relevant to the current application except to the extent that through these factors the Board examines the impact of the proposed bargaining unit on other employees and, in particular, whether other employees might be disadvantaged by the description of the proposed unit. Of particular significance to the Board is the general desire to avoid fragmentation of those employees left unrepresented and, thus, the general preference for larger, more inclusive bargaining units where possible.

[40] In the present case, the Board is presented with two (2) potential bargaining structures; the first proposed by the Union, which the Employer argued was over-inclusive; and the second, proposed by the Employer, which the Union argued was under-inclusive. In this regard, the Board notes the relative small size of the bargaining workplace and that there was no dispute that Outside Sales Representatives were “employees” within the meaning of the *Act*. The question for the Board was whether it should carve out two (2) positions, from a bargaining unit of seven (7), on the basis of appropriateness.

[41] The disputed positions (ie. Outside Sales Representatives) were described by the Employer as commissioned salespersons. The Employer noted for the Board a number of distinctions in the skills, duties, and working conditions of the disputed employees, which the Employer argued set them apart from other employees (ie. Route Sales Drivers and Inside Sales Representatives). In taking this position, the Employer relied upon this Board’s decision in *Canadian Linen and Uniform Services*, *supra*, to exclude commissioned sales persons from the bargaining unit determined to be appropriate in that case and noted the similarities between the working conditions of the disputed positions and the commissioned sales persons working for the employer in *Canadian Linen and Uniform Services*, *supra*.

[42] In *Canadian Linen and Uniform Services, supra*, the Board noted that commissioned sales persons are often (but not always) excluded from industrial units. In that case, the Board noted the subject positions were paid a “*minimum salary*”, with commissions resulting in wages “*far in excess of the general industrial wage*”. In the present case, the Outside Sales Representatives enjoy base salaries in excess of other employees (exclusive of commission bonuses). While substantial commissions were possible, the evidence indicated that commission bonuses for Outside Sales Representatives generally ranged from only a few thousand dollars (representing a modest percent of the employee’s income) to a high of \$50,000 (representing up to 86% of an employee’s base salary). In the Board’s opinion, the commission bonuses available to Outside Sales Representatives were not so dissimilar to the performance incentives paid to other employees at this workplace. While their mode of calculation was different (being based on gross sales as opposed to net profitability) and the quantum of such bonuses was potentially higher, the Board agreed with the Union’s position that these employees shared more commonality than differences with their co-workers. For example, both of the Employer’s witnesses described intermingling of positions in the nature of cooperation toward common goals, coordination of information, and teamwork born of a logical division of labour.

[43] The evidence established that Outside Sales Representatives were some of the Employer’s best trained and skilled employees, were provided the most flexibility in determining their working conditions, had a different reporting structure, and appeared to be the highest paid employees of the Employer (often paid more than management). However, it was also apparent to the Board that these employees were also part of a coordinated team, whose work was functionally interdependent with the other members of that team, creating a sufficient community of interest. The Employer used a variety of incentives to promote and encourage its economic profitability. In the Board’s opinion, neither the quantum nor the mode of calculating the economic incentives paid to Outside Sales Representatives was sufficient to remove them from the community of interests shared by other employees in the workplace (who also received performance based incentives) and, as such, the circumstances of the present case are distinguishable from the circumstances in *Canadian Linen and Uniform Services, supra*.

[44] The Board acknowledges that there were a number of factors arguing for both exclusion and inclusion of the disputed positions. However, we have concluded that the differences in the skills, duties and working conditions of Outside Sales Representatives were not sufficient to satisfy the Board that their inclusion in the bargaining unit would be inappropriate. In addition (and potentially tipping the balance), the Board was concerned that the exclusion of Outside Sales Representatives would be more likely to result in fragmentation and instability in collective bargaining than the alternative. In other words, when considering the two (2) proposed bargaining structures, the Board is satisfied that unit proposed by the Union is more appropriate, recognizing that some degree of internal conflict exists in most bargaining units and that the goal of the Board is not to avoid internal conflict, *per se*, but to promote stability in industrial relations. In the Board's opinion, carving out the two (2) disputed positions is more likely to create the kind of fragmentation and instability in collective bargaining that the Board generally seeks to avoid.

Conclusion:

[45] For the foregoing reasons, the Board finds that the appropriate unit of employees shall be as follows:

All employees employed by Linde Canada Limited in the City of Saskatoon, in the Province of Saskatchewan, except the Branch Manager.

[46] For purpose of clarity, the Board is satisfied that the summer student was an employee at the time the Union's application was filed with the Board and, if that person continued to be employed at the time the vote was conducted, we are also satisfied that he/she was entitled to participate in the representative questions. To which end, the ballot of the summer student (if such ballot was cast) ought to be counted by the Agent of the Board in the ordinary course.

[47] The Agent of the Board is hereby directed to proceed with the counting and tabulation of the ballots in accordance with the above captioned determination and to report the results therefrom to the Board and the parties in the ordinary course.

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

DATED at Regina, Saskatchewan, this **19th** day of **January, 2010**.

LABOUR RELATIONS BOARD

Steven D. Schiefner
Vice-Chairperson