

Cited as:
Calgary Co-operative Assn. Ltd. (Re)

**IN THE MATTER OF the Labour Relations Code
Between
Office & Professional Employees International Union,
Local 379, applicant, and
Calgary Co-operative Association Ltd., respondent, and
Union of Calgary Co-operative Employees, intervenor, and
Office & Professional Employees International Union,
Local 379 and Trudy Holzmann, complainants, and
Calgary Co-operative Association Ltd., respondent, and
Union of Calgary Co-operative Employees, respondent**

[2000] Alta. L.R.B.R. 9

[2000] A.L.R.B.D. No. 2

Board Files: CR-02527, GE-03011

Alberta Labour Relations Board

D. Howes, Vice Chair, D. Herman and M. Halpen, Members

January 18, 2000.

Appearances:

For OPEIU and Trudy Holzmann: Simon Renouf, Q.C. (counsel), Marg Elliot, Trudy Holzmann.

For Calgary Co-operative Assoc.: Gordon Meurin (counsel), Peter Zakreski.

For UCCE: Barrie Chivers (counsel), Pat Rose.

Unfair labour practices - Employer - s. 146(1)(b) - Employer breaching provision by assisting union with organizing efforts.

Unfair labour practices - Employer - s. 147(b) - Employer breaching provision by requiring employees to sign document restraining them from exercising rights conferred by Code.

Unfair labour practices - Union - s. 149(f) - Union breaching provision by creating coercive environment and using threats and promises to gain employee support.

The Office & Professional Employees International Union Local 379 ("OPEIU") applied for certification of a group of employees of Calgary Co-operative Association ("Co-op"). Co-op and the Union of Calgary Co-operative Employees ("UCCE"), the certified bargaining agent for another group of Co-op employees, claimed OPEIU's certification application was untimely because of an agreement that had recently been signed between them. That agreement affected the employees that OPEIU sought to represent. Under its terms, employees were given the option of joining UCCE by completing an opt in or opt out form. Employees who did not complete a form were deemed to have opted in. The opt out forms released UCCE and Co-op from legal action, and provided that employees who opted out would remain non-union and never receive terms of employment better than those of employees who had opted in. UCCE arranged to have Co-op distribute and collect these employee choice forms.

OPEIU filed unfair labour practice complaints against Co-op and UCCE, claiming breaches of several sections of the Code.

Held, The Board found that the agreement between UCCE and Co-op was not a collective agreement because UCCE was not the bargaining agent for the employees at issue. UCCE had previously abandoned its bargaining rights in respect of the employees and there was no voluntary recognition because UCCE could not demonstrate employee support. Accordingly, the agreement between UCCE and Co-op did not create a time bar to OPEIU's certification application.

The Board held that Co-op breached s. 146(1)(b) of the Code. It supported UCCE by extending to it voluntary recognition as bargaining agent for the employees when it knew UCCE did not have their support. In addition, Co-op agreed to provide employee information to UCCE to help it gain support, distributed information about the agreement to employees, collected completed employee choice forms, refused to extend the time for employees to respond, and allowed UCCE to send notices to the work site to advise employees of meetings about the agreement.

Co-op also breached s. 147(b) by requiring employees who were opting out to sign a document that restrained them from exercising rights conferred under the Code. UCCE breached s. 149(f) by participating with the employer in the creation of a coercive environment in which employees were expected to show support for their employer's choice of union. In addition, the agreement contained threats or promises to encourage employee support for UCCE.

The remaining complaints were dismissed for lack of evidence.

REASONS FOR DECISION

1 On March 10, 1999 the Office and Professional Employees International Union, Local 379 ("OPEIU"), applied for certification of a group of employees of Calgary Co-operative Association Ltd. ("Co-op") comprising about 155 employees not represented by the Union of Calgary Co-operative Employees ("UCCE"). UCCE is certified for a unit of employees of Co-op and has a collective agreement covering those employees ("the Collective Agreement"). Both Co-op and UCCE objected first, to the timeliness of the application and second, to the inclusion or exclusion of certain persons from the bargaining unit which impacted the threshold 40% support required for a certification application.

2 On March 12, 1999 OPEIU and Trudy Holzmann (collectively referred to as "OPEIU") filed unfair labour practice complaints against both Co-op and UCCE. These complaints arise out of an agreement dated January 25, 1999 between UCCE and Co-op ("the Agreement") affecting the employees which OPEIU seeks to represent.

3 The complaints first allege Co-op and UCCE discriminated against Trudy Holzmann by imposing a penalty on her because she testified in a previous Board hearing and made a previous application under the Labour Relations Code. OPEIU says these actions violated sections 20(a), 20(c), 147(a)(i), 147(a)(iv), and 147(g)(i). Second, OPEIU claims UCCE violated section 149(f) when it obtained employee support through coercion, intimidation, threats or promises contrary to the Code. Third, OPEIU claims Co-op breached sections 146(1)(a)(i), 146(1)(a)(ii), 146(1)(b) by interfering in the formation or administration of a union or the representation of employees by a union and by contributing financial or other support to UCCE. Fourth, the complaints say, as a result of implementing the Agreement, Co-op, contrary to section 147(b), imposed a condition in a contract of employment which restrains employees from exercising their rights under the Code. Finally, OPEIU also alleges both Co-op and UCCE are dominated by the other to the point where neither Co-op nor UCCE were fit to bargain. It asked the Board to set aside the Agreement and to declare the Collective Agreement invalid under section 131.

4 The questions before the Board in this decision are:

1. Did Co-op breach sections 20(a), 20(c), 146(1)(a)(i), 146(1)(a)(ii), 146(1)(b), 147(a)(i), 147(a)(iv), 147(b), and 147(g)(i)?
2. Did UCCE breach sections 20(a), 20(c), 146(1)(b), 147(a)(i), 147(a)(iv), and 149(f)?
3. Is either Co-op or UCCE sufficiently dominated by the other that it cannot bargain collectively? If so, should the Board set aside the Agreement and the Collective Agreement under section 131?
4. Is the Agreement of January 25, 1999 between UCCE and Co-op a collective agreement under the Code? If so, is the certification application timely?

5 The Board communicated its decision by letter on July 9, 1999. We found the Agreement is not a collective agreement under the Code and does not create a time bar to the application for certification. We also found UCCE violated section 149(f). We further found Co-op breached sections 146(1)(b) and 147(b). We dismissed the rest of the applications because of insufficient evidence. These are our reasons for decision.

6 After July 9, 1999 the parties settled the outstanding objections on the 40% issue and the Board held a representation vote. OPEIU lost the vote and the Board dismissed the certification application.

The Facts

7 What follows is an abbreviated version of the facts presented to the panel.

8 Co-op is a major food retailer in Calgary operating numerous grocery stores, travel centres, pharmacies and gas bars. For about 30 years, UCCE or its predecessor represented some of the employees of Co-op. The bargaining relationship was initially a voluntary recognition relationship, but changed to a certified relationship in 1992. The certificate identifies the bargaining unit as "all employees in Calgary and Strathmore".

9 Since 1984 at least, the Collective Agreement has excluded named classifications and departments as a result of the parties' negotiations. Those exclusions covered pharmacy and travel employees and other employees which OPEIU seeks to represent in this certification application. In the latest Collective Agreement (1996 - 2001, signed March 25, 1997), Co-op recognizes UCCE as the exclusive bargaining agent for all employees covered by the collective agreement. Similar wording did not exist in prior collective agreements.

10 During bargaining for the current Collective Agreement, UCCE attempted to limit the list of excluded persons in the Collective Agreement. Co-op did not agree to do so. UCCE continued to press the idea at its regular meetings with Co-op management after the spring of 1997, but Co-op continually said UCCE should sign up the employees if it wished to represent them. After OPEIU filed its first certification application in 1998, UCCE put its request in writing to have Co-op include all the excluded employees, totalling 242 persons, collectively referred to as the "tag-ends". In support of its request, UCCE cited its certificate, its attempt in 1996 to include the persons, mutual desires to avoid fragmentation and administer one collective agreement, and appropriate bargaining unit and community of interest arguments. This request was resent on October 24, 1998. Until December, 1998, Co-op treated these letters as requests for voluntary recognition. Co-op did not change its initial position that UCCE should sign up the employees.

11 This is OPEIU's third attempt to represent some of the employees of Co-op. Its two previous attempts in 1998 were dismissed without a vote of the affected employees. In the first application, UCCE relied on its certificate and Collective Agreement to object to the timeliness of the certification application. The Board issued a decision which found UCCE had abandoned its

bargaining rights for all those persons excluded from the coverage of the Collective Agreement. A subsequent Board reconsidered the decision but did not go on to deal with the impact of the finding of abandonment. (We return to this issue later.) As a result of the Board's decision on abandonment, OPEIU's second and third applications for certification cover all employees not represented by UCCE.

12 Until 1997, UCCE and Co-op had a fairly quiet relationship. Since then, it has been more adversarial, with a large number of outstanding grievances. Witnesses described the relationship as "strained", "deteriorating" and "a serious industrial relations problem".

13 In late fall 1998, Co-op underwent significant organizational and managerial changes. In November, Co-op asked the Federated Co-operatives Limited to provide it with an interim management team. One of the persons provided was Mr. Peter Zakreski, Senior Vice President Human Resources. Mr. Zakreski has over 38 years labour relations experience. At the time, Alice Brown, elected Board Member of Co-op, was the interim CEO at Co-op.

14 Ms. Brown informed Mr. Zakreski about the difficult relationship with UCCE, the two OPEIU certification applications and the Board decisions on those applications. She mandated him to address the concerns UCCE brought forward because, in her view, they had to be corrected. Mr. Zakreski understood this to entitle him to act as he saw fit in the circumstances.

15 He almost immediately met with UCCE to identify its concerns and priorities. Of its six concerns, the tag-ends and amendments to the Collective Agreement were top priorities. At a meeting on December 9, 1999 UCCE explained its concerns. From there the parties met weekly to discuss the concerns.

16 On December 22, 1999 the parties agreed to include the pharmacy and travel employees under the Collective Agreement. They continued to meet regularly and by January 25, 1999 signed the Agreement. The Agreement extended the December 22nd arrangement to include more employees, and described a process to have the employees opt in or out of UCCE membership by February 12, 1999. It made some changes to the Collective Agreement, and identified parts of the Collective Agreement which would apply to these employees immediately and what parts would be later negotiated and how. Finally, the Agreement included provisions for discussing and deciding managerial and confidential labour relations exclusions.

17 The Agreement gave employees the option to join UCCE by completing an "opt in or opt out" form. Those employees who did not complete a form were deemed to have opted into membership. If employees chose to become members, their prior service with Co-op was credited as seniority. If employees chose to opt out, but later changed their minds, the employees would not receive credit for prior service. The Agreement provided that any employee who opted out would never receive terms or conditions of employment better than those in the Collective Agreement. This contractual provision was included in the opt out form the employee was required to sign. The opt out form contained statements releasing UCCE and Co-op from any future actions arising from the

employee's "voluntary" choice.

18 The proposals in the 1996 bargaining appear to be UCCE's first attempt to represent these employees. UCCE ratified and signed the Collective Agreement without the sought for changes. Although UCCE again raised the matter of representation with Co-op after signing The Collective Agreement, it did not attempt to contact the employees or seek their support as a bargaining agent, until June, 1998. It then sent out flyers - two to the employees' homes and several to their work sites. In the fall, 1998, after OPEIU's second attempt to certify, UCCE sent a letter to all the excluded employees to invite them to a meeting. Only one employee attended the meeting - the key organizer for OPEIU, Trudy Holzmann. UCCE obtained the mailing addresses from the regular monthly list of such information provided to the Calco Club, the Co-op employees' current social club and predecessor to UCCE.

19 After the November meeting, UCCE made no attempt to contact any of these employees by phone or mail or in person. It did not post information pertinent to them on its website. It did not attempt to have any of them sign membership applications with UCCE. While UCCE was meeting with Co-op in December, 1998 and January, 1999, UCCE did not advise these employees, its own members or its Stewards that it was negotiating an agreement with Co-op to include other persons under the Collective Agreement or to change the Collective Agreement. Prior to the Agreement, UCCE's representative conceded it had no indication from the pharmacy or travel employees that they wished UCCE to represent them.

20 After signing the Agreement, UCCE and Co-op issued a press release, being the first form of communication about the discussions. On January 27, 1999, pharmacy employees received a memo from their Director advising them of the amendment to the Collective Agreement to sweep them into the unit. Employees were told they had until February 12 to opt in or out of membership in UCCE. They were also told UCCE was being given a list of their names, addresses and phone numbers so it could initiate the signing of the opt in or out forms. The memo directs employees to send their questions to Mr. Zakreski or the Director. It further directs employees to send all completed opt in or opt out forms to Co-op's Industrial Relations Director.

21 UCCE and Co-op discussed how to distribute the Agreement and the forms. As a result of a concern about potential complaints about intimidation and coercion, UCCE agreed to let Co-op distribute and collect all the materials, including the opt in or opt out form and releases.

22 Co-op arranged several information meetings with the employees to explain the Agreement. UCCE was not invited to the meetings. Employees asked Co-op to schedule more meetings and to extend the time limits for their reply, but Co-op refused. UCCE also held four of its own meetings between February 4th and 10th. It mailed the first meeting notices to employees at their homes. Notices for the latter two meetings were faxed to the work sites. Less than 60 employees attended the meetings.

23 By March 1st, Co-op had received 30 forms back from the employees - 23 to opt out and 7 to

opt in. Pharmacists testified they did not want to join UCCE and thought the arrangement between UCCE and Co-op had a seedy appearance. They felt uncomfortable with the options and the release, as well as with the lack of contact by UCCE. Some of them took no action because they could not support UCCE but did not want to risk losing their service as seniority in the future (which they saw as a penalty). They also did not believe they should have to release UCCE and Co-op from future actions concerning the Agreement.

24 UCCE later scheduled meetings with the travel and pharmacy employees to obtain their input for collective bargaining. Only five travel employees attended. Negotiations began but never concluded.

25 OPEIU did not actively organize any Co-op employees between the time the Board dismissed its second certification application and the time employees signed cards for this application after January 25, 1999. It knew it had to wait 90 days after failing its second attempt. By November, 1998 the organizers chose to wait until after the New Year. By January, the key organizer decided to run for election as a Board Member for Co-op, again delaying the sign up campaign for OPEIU. However, it did continue to work in the background to maintain its organizing structure, to send its message out on its website and to talk to employees. On December 11, 1998 OPEIU prepared and distributed a leaflet about dismissals at Co-op's head office. The leaflet was left on every car in the parking lot at the head office. The President of UCCE, Pat Rose, Ms. Brown and Mr. Zakreski saw the leaflet in December. Ms. Rose said they all knew OPEIU would come back, and the leaflet made her aware it would be sooner rather than later.

Discrimination

26 OPEIU alleges UCCE and Co-op discriminated against Trudy Holzmann. It cites sections 20(a) and (c) as well as sections 147(a)(i) and (iv) and 147(g)(i) as the provisions breached by the UCCE and Co-op. Those sections read:

20 No employer or trade union or any person acting on their behalf shall discriminate against a person in regard to employment or membership in a trade union, or intimidate or coerce a person or impose a pecuniary or other penalty on a person, because he

- (a) has testified or otherwise participated in or may testify or otherwise participate in a proceeding authorized or permitted under a collective agreement or in a proceeding under this Act,

...

- (c) has made an application or filed a complaint under this Act.

147 No employer or employers' organization and no person acting on behalf of an employer or employers' organization shall

- (a) refuse to employ or to continue to employ any person or discriminate against any person in regard to employment or any term or condition of employment because the person
 - (i) is a member of a trade union or an applicant for membership in a trade union, ...
 - (iv) has testified or otherwise participated in or may testify or otherwise participate in a proceeding under this Act, ...
- (g) discriminate against a person in regard to employment or membership in a trade union or intimidate or threaten to dismiss or in any other manner coerce a person or impose a pecuniary or other penalty on a person, because the person
 - (i) has testified or otherwise participated in or may testify or otherwise participate in a proceeding authorized or permitted under a collective agreement or a proceeding under this Act, ...

27 Other than the existence of the Agreement, there is no evidence of any actions which discriminate against Ms. Holzmann. The Agreement does not discriminate either - it gives each employee the same options with the same results. There is no evidence that Ms. Holzmann was a member or applicant for membership in OPEIU. Ms. Holzmann did testify in a previous Board hearing, but no action was taken against her by either Co-op or UCCE for doing so. We dismiss these complaints for lack of evidence.

Domination

28 OPEIU alleges UCCE is dominated by Co-op and Co-op is dominated by UCCE to the extent that neither is fit to bargain collectively. It asks the Board to set aside the Agreement and the Collective Agreement on this basis. Section 131 provides:

131(1) Any collective agreement entered into between an employer or an employers' organization and a trade union may be declared by the Board to be

void when in its opinion the administration, management or policy of the trade union is

- (a) dominated by an employer, or
 - (b) influenced by an employer so that the trade union's fitness to represent employees for the purpose of collective bargaining is impaired.
- (2) Any collective agreement entered into between an employer or an employers' organization and a trade union as a result of the employer's recognition of the trade union as a bargaining agent may be declared by the Board to be void when in its opinion the recognition
- (a) resulted from picketing of the place of employment of the employees affected or elsewhere, or
 - (b) is by an employer whose administration, management or policy is
 - (i) dominated by a trade union, or
 - (ii) influenced by a trade union so that the employer's fitness to bargain collectively is impaired.

29 In support of its claim about UCCE's domination of Co-op, OPEIU points to two actions: (1) the campaign support given by UCCE to certain of the elected Co-op Board members, and (2) a majority of the Co-op Board members were elected on slates sponsored by UCCE. OPEIU points to two actions which demonstrates Co-op's domination of UCCE: (1) the Agreement, and (2) the involvement of one of Co-op's Board members in the development of UCCE's website.

30 UCCE engaged in a political action process where, each year, it determined which candidates it preferred and informed its members about those candidates. No other support was given to candidates. No commitments were sought or obtained in exchange for that endorsement. UCCE members comprise less than one tenth of the Co-op membership. Sometimes the candidates were successful and other times, such as in 1999, they were not. Less than one half of the Co-op Board members were supported by UCCE. This type of political action is common for unions whose employers have elected boards. Indeed, OPEIU engaged in similar conduct when it supported Ms. Holzmann in her campaign for a Co-op Board member position. It does not constitute domination.

31 The evidence about the UCCE website reveals that a Co-op Board member introduced UCCE to a website contractor. An administrative error was made by the contractor setting up the website when he named the Co-op Board member as the administrator for the website. Otherwise, UCCE

paid for, developed and maintains the website independent of Co-op.

32 Finally, the Agreement itself does not demonstrate domination of UCCE by Co-op. UCCE pushed for and freely participated in negotiating the Agreement.

33 We find these allegations lack all foundation. There is no evidence to support the allegations of domination on either side. We dismiss the request to make a finding or to set aside the Agreement or the Collective Agreement on this basis.

Support to a Trade Union

34 OPEIU asks the Board to find that Co-op contributed other support to UCCE contrary to section 146(1)(b) which reads:

146(1) No employer or employers' organization and no person acting on behalf of an employer or employers' organization shall

(a) contribute financial or other support to a trade union.

35 This Board has not dealt extensively with what constitutes unlawful support to a trade union. However, a few decided cases bear strong resemblance to the type of support given by Co-op to UCCE in this case. See: *International Union of Operating Engineers, Local 955 v. Vertex Construction Services Ltd. and Christian Labour Association of Canada*, [1999] Alta. L.R.B.R. 183; *Westfair Foods v. Teamsters Local 987* [1992] Alta. L.R.B.R. 274; *Sie-Mac et al v. Labourers 1111, Plumbers 488 and O.E.'s 955 et al* [1991] Alta. L.R.B.R. 847. Among the prohibited types of conduct in these cases we find: giving employee information to the union, giving access to work places to the union, and extending voluntary recognition or signing a collective agreement advantageous to the union when the union does not have the support of the employees. It also includes allowing the union to conduct union business, or hold captive audience meetings, or sign membership cards at the work place during working hours before the union enjoys bargaining agent status.

36 Section 146(2) provides some exceptions to this type of conduct by the employer, if the actions are for a union that is a bargaining agent for the employer's employees. Again, the Code requires the union being supported to be the bargaining agent. The protection does not extend if the union is the bargaining agent for a different group of employees than those the support is directed towards. In other words, Co-op cannot rely on the protection of section 146(2) because UCCE was not the bargaining agent of the employees in question before us.

37 We find many of these same prohibited actions present here, in addition to some others. In December, 1998, Co-op made an about face on its position regarding the inclusion of these employees in the UCCE bargaining unit. For years it had participated in a bargaining process which

resulted in UCCE under bargaining its certificate. In 1998 the Board signalled that this would mean that UCCE had abandoned its bargaining rights for these employees.

38 At the time of their discussions around the Agreement, the President of UCCE knew OPEIU would attempt to organize these employees again. She knew of OPEIU's leaflet of December 11, 1998 and expected them to return sooner rather than later. At the same time, UCCE knew the Board had once already found it to have abandoned its bargaining rights for these employees. We infer this knowledge added urgency to UCCE's demands that Co-op include these employees in the UCCE unit.

39 Mr. Zakreski was also aware of OPEIU's earlier certification attempts and the leaflet on December 11th. We infer he also knew about Co-op's previous position on extending the UCCE Collective Agreement to cover excluded employees. He had a mandate from Alice Brown to deal with UCCE's concerns. He said the OPEIU presence did not influence his actions. We find it more plausible that a person with his experience would appreciate the subtleties of the impact of OPEIU's reappearance on UCCE's agenda of items to resolve. Such a finding is also more consistent with the subsequent events which occurred - the weekly meetings, the focus on the pharmacy and travel employees first, and the secrecy surrounding the discussions until after January 25, 1999. It is also consistent with his reaction to the advice given to him in early January by Mr. Buda, Co-op's Director of Labour Relations, who was excluded from the discussions until the Agreement was signed. Mr. Buda warned Mr. Zakreski about the problems which may arise. Only when the Agreement was done did Mr. Zakreski instruct him to give the employee information to UCCE and begin the bargaining process to amend the Collective Agreement.

40 We find UCCE was attempting to extend its status as bargaining agent to become the sole bargaining agent for all employees of Co-op in the shadow of a known OPEIU presence and a concern of renewed organizing efforts by OPEIU. We also find Co-op, in exchange for obtaining an improved relationship with UCCE, supported UCCE by extending to it voluntary recognition as bargaining agent for these employees, knowing UCCE did not have the support of these employees. Indeed the last trade union these employees supported, of which Co-op would have been aware, was OPEIU. Further, Co-op agreed to provide information to UCCE about these employees so that UCCE could approach the employees to get the support both knew it needed.

41 Co-op also distributed the Agreement and opt-in/out forms to the employees at their work places with a memo from their supervisor. Co-op management was identified as the sole source for contact and information to the employees and the collection point of their signed indications of support for UCCE. The parties discussed the potential impact of UCCE approaching these employees and concluded it may result in complaints about intimidation and coercion. They should have also considered the impact on the employees of first, having their employer send them information about their new union and second, having their employer collect their forms, which are equivalent to indications of support for the union. This type of conduct by an employer is usually more intimidating and coercive to employees because of the economic power which the employer

holds over the employees' working life.

42 When we also consider the short time frame for response and the employer refusals to extend the time, we conclude it created a coercive environment in which these employees were expected to show support for their employer's choice of trade union. The result was reasonably predictable - few employees responded; only a handful supported UCCE. The wording of the Agreement and forms further added to the environment. Those employees who did not respond were deemed to show support for the union. The process was not designed to and could not produce a free and voluntary expression of the employees' wishes about UCCE. If the majority of employees had signed opt-in forms, we would have, as we did in Westfair Foods (cited above), refused to accept those forms as evidence of support for the union.

43 Finally, Co-op allowed UCCE to send faxes and notices to the work sites of these employees to advise of meetings about the Agreement. The Collective Agreement allows UCCE to contact its members at the work sites; it does not speak to organizing efforts at the work sites.

44 All of these actions by Co-op are prohibited forms of support of a trade union under section 147(1)(b) of the Code.

Interference with the Activities of a Trade Union

45 Section 146(1)(a) says an employer shall not participate in or interfere with the formation or administration of a trade union or the representation of employees by a union. Interference with formation of a union normally refers to activities related to the union's organizing efforts. Administration has been defined to mean the internal workings of the union - meetings, elections, collecting and disbursing money. Representation includes establishing terms and conditions of employment, attending at disciplinary or grievance meetings, and extends to an employer questioning employees about their union membership. See: *AUPE v. Crown in Right of Alberta* [1994] Alta. L.R.B.R. 117; *Alberta Food and Commercial Workers Local 401 v. TAS Communications Ltd.* [1981] Alta. L.R.B. 81-045; *CALCO Club v. Calgary Co-operative Association Ltd.* [1992] Alta. L.R.B.R. 77; *IBEW, Local 424 v. Stuve Electric Ltd.* [1989] Alta. L.R.B.R. 69.

46 We have no evidence about active organizing efforts by OPEIU during the times in question. OPEIU had suspended their active organizing and membership sign up until after the Co-op annual meeting and elections. There is no evidence about Co-op interference in the internal workings of OPEIU. As Co-op's actions did not interfere with active efforts by OPEIU to organize, ongoing at the time, we find there was not interference with representation. For these reasons we dismiss this part of the complaints.

Conditions in a Contract of Employment

47 Under section 147(b) an employer cannot "impose any condition in a contract of employment

that restrains, or has the effect of restraining, an employee from exercising any right conferred on him by this Act". The Agreement provides that the terms and conditions of employment of employees who opt out will at no time exceed those applicable to employees who opt in. It also provides that employees can, at a future time opt in but without recognition for their full service with the employer. Employees who chose to opt out signed a form which states, in part:

I hereby elect not to become a member of the Union, not to be bound by the Collective Agreement between the Co-operative and the Union and not to be represented by the Union of Calgary Co-op Employees. I understand that I will remain a non-union employee and that I will not be included within the bargaining unit.

I understand that my wages, salary, compensation, benefits, bonuses and terms and conditions of employment will not exceed the wages, salary and compensation, benefits, bonuses, terms and conditions of employment specified in the Collective Agreement between the Co-operative and the Union and which are applicable to employees who exercise the election to opt in.

I hereby release and discharge the Co-operative and the Union from any and all causes of action in any form whatsoever including any action under the Alberta Labour Relations Code and the Collective Agreement in respect of the application and operation of my election hereunder.

48 The signed opt out form becomes part of the employee's individual contract of employment. In doing so, it prohibits that employee from changing his or her mind on membership in UCCE in the future. It also prohibits that employee from choosing to join or participate in the activities of another union, whether to replace UCCE or to represent the opted out employees if they could establish an appropriate bargaining unit. Both fall within rights protected under section 19 of the Code. Section 19 says an employee has the right to be a member of and to participate in the lawful activities of a trade union and to bargain collectively with his employer through a bargaining agent. The principle behind the prohibition on what is commonly called "yellow dog contracts" is that asking employees to contractually commit to not join a trade union is inherently chilling to the employee's right to be collectively represented. The kinds of commitments contained in the opt out form (e.g. I won't change my mind. I will remain a non-union employee. I forego any efforts to achieve working conditions better than in the UCCE Collective Agreement.) create just such a chill.

49 Further, the form says the employee releases both Co-op and UCCE from any actions under the Code or the collective agreement. This would preclude the employee from applying to the Board for, among other orders, a remedy for a breach by Co-op under this section (the very nature of this part of this complaint) or for a remedy for a finding of breach of a duty of fair representation by

UCCE under section 151.

50 We find Co-op breached section 147(b) when it required opting out employees to sign this document which restrains, or has the effect of restraining, an employee from exercising rights conferred on the employee by the Code.

Is the Agreement a Collective Agreement?

51 Co-op and UCCE say the Agreement is a collective agreement under the Code or creates an amendment to the Collective Agreement, either of which creates a time bar to OPEIU's application for certification. OPEIU says it is neither because UCCE did not have the support of these employees to enter into a collective agreement on their behalf.

52 Before considering whether this Agreement or any amendments to the Collective Agreement can be a collective agreement under the Code, we must address the issue of whether UCCE can exert a claim to represent these employees under its certificate. We find it cannot.

53 Although the certificate is wide enough to cover these employees, we find UCCE has voluntarily given up or abandoned its bargaining rights for these employees. In 1998 a panel of the Board chaired by Vice Chair Wallace came to the same finding of fact, but went on to give directions to amend the wording of the certificate. UCCE sought reconsideration of that decision based on a breach of natural justice because it had not been given an opportunity to address the issue of the consequences of the Board's finding. Chair Blair, on behalf of another panel, agreed to reconsider the decision, but went no further because there were no active applications before the Board by that time. UCCE suggests this reconsideration decision overturns the finding of fact by the Wallace panel. We disagree. Findings of fact are made by the panel hearing the evidence and are rarely overturned by reconsideration panels. UCCE had not asked the Board to reconsider the decision on an error of fact, but rather only on the grounds that it had not been able to present its argument on the consequences of that finding.

54 Whether or not the Wallace panel's finding of abandonment continues, we heard evidence which convinces us afresh that UCCE abandoned its bargaining rights. Since at least 1984, UCCE has agreed to exclude these people from its collective agreement. It has voluntarily under bargained its certificate for all these years. In 1996 it attempted to reassert its bargaining rights, but without any attempt to first seek the support of the affected employees. UCCE signed the Collective Agreement for a five year term, again excluding these employees.

55 At labour management meetings, UCCE attempted to persuade Co-op to include these employees in its Collective Agreement. Co-op refused. UCCE continued its efforts with Co-op through to December, 1998. It held one meeting to attempt to sign up these employees as members, but received no more than one employee's attendance at the meeting.

56 Although UCCE had a certificate whose description included these employees and it wanted

to be their bargaining agent, it was no more their bargaining agent in December, 1998 than OPEIU was. We therefore consider the questions from the view of whether UCCE concluded a voluntary recognition collective agreement to cover these employees.

57 The leading Alberta case on voluntary recognition agreements is *Sie-mac* (cited earlier). Beginning at page 880, Chair Sims starts by rejecting the proposition that a trade union and employer have an unrestrained authority to sign a collective agreement and bind employees. The decision goes on to determine that under section 40 the words "with a voluntary recognized trade union acting on behalf of his employees" requires some employee choice and some real representational capacity. Not only must the union claim to represent the employees, it must have their actual support for acting in the role of their bargaining agent. When the employer extends voluntary recognition, it is accepting the proposition that the union has the required support. As stated at page 883: "Voluntary recognition is not a way of circumventing the employee's freedom to choose union representation, but of facilitating that choice." *Sie-mac* was adopted and applied in *Westfair Foods* (cited earlier).

58 From these cases, we draw the following principles:

- A union cannot conclude a valid voluntary recognition collective agreement unless it represents employees at the time the employer extends recognition.
- If a union procures benefits from an employer to obtain a result which it is unable to attain on its own (eg. support from the employees), the union may become beholden to the employer. This can detrimentally impact the union's ability to represent employees.
- The Board may find an employer in breach of the Code for interfering with or supporting a trade union which does not have support.
- The Board may, under section 131, set aside any collective agreement where the union's relationship with the employer is unsuitable given its statutory role as bargaining agent.
- Prior to seeking recognition from the employer, a union can demonstrate support from the employees using signed application for membership cards, membership in good standing or signed petitions or by dispatching employees to the employer from the union hiring hall. It can demonstrate post recognition support by, for example, obtaining a mandate from the employees before it negotiates and concludes a collective agreement or by having a majority of employees properly ratify the collective agreement.

59 On the facts of this case, UCCE could not demonstrate any form of employee support for it to be the bargaining agent of these employees. It never contacted the employees to join UCCE after November 17, 1998. Until then, UCCE had only sent out some flyers to employees' homes and work sites, but had not obtained actual support from any employee. It did not contact or consult

with or receive a mandate from the employees before it entered into the Agreement; to the contrary, UCCE acted in haste and in secrecy to conclude an agreement and close off any opportunities for OPEIU to restart its organizing. UCCE further relied on improper support from Co-op to try to garner the employee support it needed. This action by UCCE and the action by Co-op previously set out demonstrates to us a complete lack of concern by either of these parties about the wishes of the affected employees.

60 After the deadlines in the Agreement had passed, UCCE attempted to meet with the pharmacy and travel employees to get their input for bargaining. Only five travel employees attended. In no way can this satisfy the possible option of obtaining a mandate from the employees in these circumstances. There are too few employees attending when viewed against the backdrop of resistance to UCCE representation.

61 Although UCCE said it intended to ask the employees to ratify the changes to the proposed collective agreement, it only intended to do so for those parts of the Collective Agreement which required change to accommodate these employees. UCCE did not intend to allow these employees to ratify everything in the purported collective agreement which would impact them, some of which applied almost immediately after February 12th. A union cannot demonstrate employee support by showing the employees ratified only part of the collective agreement negotiated on their behalf.

62 UCCE has, therefore, never been a bargaining agent for the employees covered by this application. As a result, the Agreement is not a collective agreement. In addition, to the extent UCCE or Co-op could contend the Collective Agreement was amended to cover these employees and is a collective agreement under the Code which binds these employees, we also find it is not. Accordingly, there is no time bar to the certification application; it is timely.

Obtaining Employee Support

63 Section 149(f) of the Code says "no trade union and no person acting on behalf of a trade union shall use coercion, intimidation, threats, promises or undue influence of any kind with respect to any employee with a view to encouraging or discouraging membership or activity in or for a trade union". OPEIU says UCCE obtained its alleged employee support, contrary to this section, by making promises and threats in the Agreement and the information provided to the employees. UCCE, says OPEIU, also participated in creating a coercive and intimidating environment in which these employees were asked to show their support for UCCE, and their concurrent lack of support for OPEIU.

64 We found Co-op created a coercive environment in which these employees were expected to show support for their employer's choice of union. It did not do so alone. UCCE cooperated in creating that coercive environment. In choosing to advance its own interests over those of the affected employees, UCCE agreed to very short time frames for employees to make their choices, with all information being generated from and returning to their employer. The Code contemplates a union, within limits, approaching employees to obtain their support for the union to become their

bargaining agent. It does not contemplate (indeed it prohibits) a union asking the employer to be its agent in such activities, because of the inherent power of persuasion which an employer holds over its employees. By using Co-op as the collector of the signed employee choice forms, UCCE participated in sending employees a message that the union and the employer had made a deal and the employees should come on board or risk losing the favour of their employer. This is coercive and intimidating for the employee and interferes with the employee's voluntary expression of his or her own wishes on representation.

65 Some of the employees testified about how they felt intimidated by the process. Those employees feared losing future entitlements if they opted not to join UCCE, but did not wish to join UCCE. They felt cornered into taking no action, which UCCE and Co-op agreed to interpret as being action in support of UCCE.

66 The Agreement also contains provisions which create threats or promises to employees with the view to encouraging their support for UCCE. For example, the Agreement shows Co-op has agreed to never give opted out employees better terms and conditions than in the Collective Agreement. It promises to give employees who opt in certain terms and conditions of employment immediately, with other negotiated terms to follow. These provisions are more than statements made by a union in a normal organizing initiative where the union may promise to make its best efforts to get certain terms and conditions for the employees. At that stage, the union does not have an agreement with an employer, it must negotiate one. In this case, UCCE already had the Agreement in place with Co-op. Certain terms and conditions were pre-agreed, enabling UCCE to make promises to entice employees to support it. At the same time, it was able to threaten employees who may not choose to support it by saying they risked being forever subject to the terms and conditions negotiated by UCCE anyway, but without the benefit of input.

67 We find these actions taken by UCCE breach section 149(f) of the Code.

Summary

68 In summary, the Board finds Co-op breached sections 146(1)(b) and 147(b) of the Code. UCCE breached section 149(f). The Agreement between Co-op and UCCE dated January 25, 1999 is not a collective agreement within the meaning of the Code and does not create a time bar to OPEIU's certification application. Further, the entire Agreement is of no force and effect as it was concluded when UCCE did not have the support of the affected employees to be their bargaining agent. The opt-in and opt-out forms signed by various employees are not binding.

69 The remaining complaints are dismissed on the basis of insufficient evidence.

cp/i/qldrk

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