

EXECUTIVE INN, BURNABY

(the "Employer")

-and-

AEROSPACE AND AGRICULTURAL
IMPLEMENT WORKERS UNION OF CANADA
(CAW-Canada), LOCAL 3002

NATIONAL AUTOMOBILE,

(the "Union")

PANEL: Joan Gordon, Vice-Chair
COUNSEL: M. Grant Gayman, for the Employer
John Bowman, for the Union

CASE NO.: 14502

DATE OF HEARING: March 30, April 1, 2, 1993

DATE OF DECISION: April 19, 1993

DECISION OF THE BOARD

I. NATURE OF THE APPLICATION

The Union applies under Section 18 of the *Labour Relations Code* to be certified for a unit of employees at the Executive Inn, Burnaby, except office, sales, and supervisory staff. The Employer objects to the application. It says that the employees included in the proposed bargaining unit are not its employees -- they are the employees of another company known as H.R.N. Human Resources Novations Inc. ("HRN").

At issue, then, is whether the Employer is the true employer of the employees included in the proposed bargaining unit.

II. FACTS

Based on the testimony, documents, and argument presented during the hearing, I find the material facts in this case to be as follows.

The Executive Inn, Burnaby is a hotel located at 4201 Lougheed Highway, Burnaby, B.C. It opened for business in April 1992. The hotel is owned by Pan Afric Holdings Ltd. ("Pan Afric"). Noordin Sayani ("N. Sayani") and Farida Sayani ("F. Sayani") own Pan Afric. The Sayanis operate the hotel through two proprietorships: the Executive Inn, Burnaby (the "Executive Inn") and Tivolis Too restaurant ("Tivolis"). The Executive Inn operates the rooms portion of the hotel while Tivolis operates the restaurant, the lounge, and the banquet facilities. The Sayanis also own the Executive Inn, Richmond.

F. Sayani is the General Manager of the Executive Inn and Tivolis. She is responsible for the day-to-day operation of the hotel. She operates the hotel with the assistance of a number of managers and supervisors. The management staff are on the payroll of either the Executive Inn or Tivolis, depending on their area of responsibility.

Documents tendered into evidence by N. Sayani disclosed that both the Executive Inn and

Tivolis use the services of the Canadian Imperial Bank of Commerce for payroll purposes and that payroll records are maintained by the accountant at the Executive Inn.

On January 29, 1993, Pan Afric, carrying on business as the Executive Inn and Tivolis, entered into "service agreements" with HRN. The agreements were effective February 1, 1993. The agreement between HRN and Pan Afric carrying on business as the Executive Inn, Burnaby was tendered into evidence. In this agreement, HRN agrees to provide "contract staffing" to Pan Afric for a number of listed job positions. Although the agreement provides that HRN has the sole responsibility for recruiting, hiring, training, evaluating, replacing, supervising, disciplining, and firing the persons it assigns to fill the listed job positions, the evidence disclosed that most of this authority and responsibility is, with the exception of recruiting, exercised by F. Sayani and her management staff at the hotel. Indeed, another provision of the agreement gives Pan Afric the right to terminate any employee sent by HRN if Pan Afric is not satisfied with the employee's performance.

Pan Afric paid HRN a set-up fee and continues to pay HRN a service fee which is tied to gross employee earnings. Under cross-examination, N. Sayani said that he also pays HRN an additional service fee of \$1,800.00 per pay period for each of the Executive Inn and Tivolis. Additionally, Pan Afric pays HRN for all Worker's Compensation, Canada Pension Plan, and Unemployment Insurance premiums, vacation pay, and any other payroll expenses and benefits provided to or made on behalf of the employees by HRN. Pan Afric pays the cost of annual paid vacation leave and any accrued or deferred vacation required by law. To guarantee Pan Afric's performance of these and other terms of the agreement, it must maintain a \$25,000.00 security deposit payable by way of cash or letter of credit from a chartered bank. When asked why he had to provide this security deposit and other funds to HRN, N. Sayani explained that HRN could draw on it if he (Sayani) did not provide sufficient funds to protect "HRN's employees" one hundred percent. N. Sayani said that HRN has the right to ensure that he maintains the "right amount of money in the security deposit to cover wages and benefits for all the employees". Moreover, on August 1st of each year of the agreement, Pan Afric must pay to HRN an additional security deposit for severance pay. This additional security deposit is also tied to gross employee earnings.

N. Sayani said that he entered into these agreements with HRN for "business reasons" --

he and his wife found it difficult to manage all aspects of the business and they felt that a company like HRN could take care of the "burdens of management" and "time constraints".

Pan Afric and HRN notified the employees at the hotel of this arrangement via letters attached to their pay cheques. The Executive Inn's letter dated January 31, 1993 provided, in part, as follows:

... effective February 1, 1993 we have contracted with HRN Human Resources Novations Inc., a locally-owned B.C. Company, to provide our hotel the employees in the running of the operation [sic].

HRN has agreed to appoint you effective February 1, 1993 in the same position and the same location. They will be providing to you a letter of appointment shortly.

HRN's letter dated January 26, 1993 advised the employees at the hotel that it was "an employee leasing company" which had contracted with Pan Afric to supply employees to Tivolis and the Executive Inn. HRN offered the employees a position performing the same work, and it asked the employees to complete an attached application form and information sheet.

Zdenka Loncar, a front desk clerk at the hotel, testified about events which occurred following her receipt of these letters with her paycheque. She first went to see her manager. He told her to keep quiet about the letters and to not say a word to anyone. He said that she would know more in the afternoon. That afternoon, N. Sayani held a meeting of the front desk employees and management staff. Loncar's and N. Sayani's testimony about his remarks during this meeting differ. Loncar testified that N. Sayani addressed those present as "my loyal employees". He said that as a result of all of the work involved in employee hirings and turnover, he and Mrs. Sayani had put some funds into "Human Resources". He assured those present that they had nothing to worry about, that all procedures at the hotel would remain the same, and that they should continue to take any problems to him or Mrs. Sayani; they would still run business as before. In terms of raises, holidays, and "anything that comes into conflict" he said that the Sayani's were still their employer and were still responsible. Loncar denied the suggestion that N. Sayani told those present that HRN would now be their employer.

N. Sayani said that he told those present at this meeting that Mrs. Sayani was finding it difficult to operate both the Executive Inn in Burnaby and Richmond and that HRN was to provide all of the employees to the hotels. This way, Mrs. Sayani could spend her time in marketing and promotion activities. He denied telling the employees that he put funds into HRN. He said the sole reason for the meeting was to tell the employees that he and Mrs. Sayani were no longer their employer and that HRN was now their employer. He could not recall whether he made some of the other comments attributed to him by Loncar.

I prefer Loncar's testimony regarding this meeting to N. Sayani's. Loncar was a forthright witness whose evidence was not shaken in cross-examination. Her evidence is also consistent with the events which occurred after this meeting. On the other hand, N. Sayani's portrayal of his arrangements with HRN was altered during cross-examination and questions from the Panel. Additionally, as F. Sayani's testimony later revealed, the arrangement with HRN did not accomplish N. Sayani's stated purpose - her time continued to be taken up with hiring, firing, and the "burdens of management". N. Sayani denied that his wife and other management personnel interviewed and hired employees. This was later contradicted by F. Sayani herself.

Two employees testified about their experience working at the hotel from its opening to the date of the hearing: Loncar from the Executive Inn, and Timber Tabak from Tivolis. Their evidence established the following:

1. They were initially hired by F. Sayani when the hotel first opened. From then until sometime in February 1993, they received paycheques bearing the name of the Executive Inn and Tivolis respectively. After February 1, 1993 their paycheques bore the name HRN.
2. Loncar completed the HRN documents attached to her paycheque; Tabak did not. The Executive Inn's accountant and Tabak's manager in the restaurant approached her and asked her to sign the documents. She refused, stating that she wanted assurances as to who she was working for. The accountant told her that she would not receive her paycheque unless she signed the documents. Despite her refusal to sign, Tabak continued to receive all of her paycheques.

3. Immediately following the meeting in N. Sayani's office, Loncar asked him for a raise in pay. N. Sayani said he would ask Mrs. Sayani about it.
4. Nothing changed at the Executive Inn and Tivolis after February 1, 1993 with respect to the scheduling of work, applications for vacation leave and time off, interviewing, hiring, and training of new staff. All of these functions still involved the relevant managers and in some cases, F. Sayani. Indeed, employees continued to fill out Vacation Request Forms bearing the name and address of the Executive Inn, Burnaby. These forms require the signature of the employee, the department head, and the approval of F. Sayani "owner/managing director". During the week prior to the hearing, Tabak approached her manager about her vacation. He indicated that this form would have to be signed by Mrs. Sayani.
5. With respect to discipline, Loncar received a written warning from HRN on March 20, 1993. The opening words of this letter state, "We are in receipt of an Official written intimation from Executive Inn, Burnaby that there have been frequent lapses on your part as far as your performance is concerned." This letter was preceded by a letter from Loncar's manager to HRN in which her manager states, "We regret to inform you that Ms. Zdenka Loncar who is working as a front desk clerk is no longer required at the desk. Effective immediately, her services should be terminated from this front office."
6. In early February, 1993 Tabak received a Crown Life Group Identification Cards showing the Executive Inn as the policy holder. No new card was issued thereafter.
7. The Standards of Employee Conduct manual in use at the hotel bears the name Executive Inn Hotels.
8. The employees at the hotel do not know who Mr. Jamani, the owner of HRN, is. He only attends at the hotel to deliver paycheques to various managers who in turn hand them to their staff.

9. The employees continue to perceive Mr. and Mrs. Sayani to be their employer.
10. If front desk employees experience problems when management staff are not on shift, they contact either the managers, Mrs. Sayani or someone else in the Sayani family at home. If serious problems arise, Mrs. Sayani is contacted immediately.
11. Tabak was approached by both F. Sayani and the chef in Tivolis regarding her involvement with the Union. F. Sayani denied having conversations with employees at the hotel about the Union. However, during cross-examination and in response to questions from the Panel, it became evident that she had, very recently, done just that. Consequently, where her evidence differs from Loncar's and Tabak's, I have preferred the latter.
12. On March 20, 1993 Loncar was approached by the restaurant manager who asked her if she had received a Union card. The next day, she also witnessed and became involved in a conversation about the Union between the restaurant manager and another front desk employee.

Sayani's testimony confirmed that HRN refers prospective employees to the hotel but that she and/or the relevant manager conducts the interview, decides whether the applicant "fits in with our organization", and advises HRN that the person is approved for hiring.

HRN has no manager or other representative at the hotel.

On February 9, 1993, F. Sayani held a delayed Christmas party for all of the employees at the Executive Inns in Burnaby and Richmond.

III. POSITIONS OF THE PARTIES

The Employer

The Employer's submissions were extremely brief. The Employer submits that three questions arise for determination in this application: whether the applicant is a trade union;

whether the unit is appropriate for collective bargaining; and whether on the date the Board received the application not less than fifty-five percent of the employees in the unit were members in good standing of the Union. The Employer concedes that the applicant is a trade union and does not challenge the appropriateness of the bargaining unit. The Employer submits, however, that the Union has failed to satisfy the third requirement because the only people on the Executive Inns payroll on March 22, 1993 were those people excluded from the bargaining unit: office, sales, and supervisory staff.

The Union

The Union submits that despite the arrangements between HRN and Pan Afric, the evidence clearly shows the true employer of the employees in the proposed bargaining unit it is: the owners of the Executive Inn, Burnaby. Relying on a decision of the Canada Labour Relations Board in *Nationair* (1987), 19 CLRBR (NS) 81, the Union submits that the question to be answered is who exercises fundamental control over labour relations? The Union submits that mere appearances and contracts with recruiting agencies are not determinative.

The Union submits that the contract between HRN and Pan Afric is instructive as to who the true employer is. Under this arrangement, Pan Afric pays all employer premiums, wages, and severance pay, and retains the right to discipline and fire employees. The Union notes that N. Sayani gave as one of the reasons for this arrangement, his understanding that at law, the directors of the hotel could be personally liable for such payments.

Turning to the evidence, the Union submits that HRN merely recruits individuals for employment at the hotel. All of the management staff are employed by the Executive Inn and Tivolis and these persons perform the work scheduling functions. From the perspective of the public and the employees, the Executive Inn hotel is the employer. The decisive role in interviewing and hiring is performed by F. Sayani and her management staff, and all training is conducted in-house. F. Sayani and her management staff control the termination of employees who are not satisfactory. While paycheques come from HRN, it is the owners of the Executive Inn, Burnaby who ultimately pay the money to HRN, who are responsible for raises, and who exercise day-to-day direction and control of the employees at the hotel.

Employer's Reply

The Employer submits that if the Board decides that it is the true employer for labour relations purposes, there is no evidence before the Board as to the number of employees in the bargaining unit on March 22, 1993. Therefore, the Union has not established that it has the requisite membership support for automatic certification and the application must be dismissed.

IV. PROCEDURAL RULING

Prior to making his opening statement, counsel for the Employer referred to the Industrial Relations Officer's ("IRO") report which had been disclosed to the parties prior to the hearing and in particular, paragraphs 6 and 7 which contain information provided by HRN and the Employer during the investigation. Counsel for the Employer asked for the Panel's guidance as to whether this report constituted evidence on which it could rely in its case. The Union argued that the report was not evidence in the proceeding and could not be relied on by the Employer; rather, the Employer had to prove the merits of its objection with relevant testimony and documentation.

I decided that in view of the Union's challenge to the information contained in the IRO's report, and in view of the nature of the Employer's objection to the Union's application, the Employer could not rely on the IRO's report as evidence in the proceeding.

V. ANALYSIS AND DECISION

The issue before me is whether the Employer is, for labour relations purposes, the true employer of the employees in the proposed bargaining unit. This issue has been considered in numerous decisions of the former Board and Council as well as the Canada and Ontario Labour Relations Boards: see, for example, *Quinsam Coal Limited*, IRC No. C139/89; *Mustang Engineering and Construction Ltd.*, IRC No. C128/90; *British Columbia Rapid Transit Company Ltd.*, BCLRB No. 174/85; *Kelowna Cabs (1981) Ltd.*, BCLRB No. 230/85; *Nationair, supra*; and *Kennedy Lodge Inc.* (1984), 7 CLRBR (NS) 157 (Ont LRB). These decisions disclose that in answering the question for determination in this case, the Board will review a number of factors

or criteria, the objective of which is to identify who, for labour relations purposes, exercises fundamental control over the working lives of the employees in question. These factors or criteria are as follows:

1. The party exercising direction and control over the employees performing the work;
2. The party bearing the burden of remuneration;
3. The party imposing the discipline;
4. The party hiring the employees;
5. The party with authority to dismiss the employees;
6. The party who is perceived to be the employer by the employees; and
7. The existence of an intention to create the relationship of employer and employees.

The above-noted decisions also reveal that the seventh factor, an intention to create the relationship of employer and employee, must be construed objectively from what a reasonable third party would infer from the words or conduct used.

I conclude without hesitation that the true employer of the employees included in the proposed bargaining unit is Pan Afric Holdings Ltd. carrying on business as the Executive Inn, Burnaby and Tivolis Too at 4201 Lougheed Highway, Burnaby, B.C. Day-to-day direction and control over the employees performing the work at the hotel is exercised by F. Sayani and her management staff. The evidence discloses that from the outset of their employment at the hotel to date, the employees in the proposed bargaining unit turn to their managers and to F. Sayani for direction and guidance when problems arise on the job. Additionally, the managers perform the work scheduling function, authorize time off, and are the first level of approval for vacation leave. Applications for vacation leave must then obtain the approval of F. Sayani. Similarly,

employees turn to the Sayanis to request a raise in pay. None of this changed after February 1, 1993, the effective date of the agreements between Pan Afric and HRN.

With regard to the burden of remuneration, I find that the ultimate burden is borne by Pan Afric carrying on business as the Executive Inn and Tivolis. Although HRN prepares the paycheques for the employees at the hotel and delivers them to the hotel's managers, the substance of this arrangement is such that Pan Afric carrying on business as the Executive Inn and Tivolis bears the ultimate responsibility for the payment of wages. As N. Sayani explained, the reality of the various security deposits and other funds provided to HRN by Pan Afric is that Pan Afric remains one hundred percent responsible for wages, benefits, severance pay, and so on for all of the employees at the hotel.

With respect to discipline, the evidence established only one such incident - the written warning and threat of dismissal against Loncar. The warning letter itself, as well as the preceding letter from Loncar's manager, reveals that the responsibility for discipline rests with management at the hotel.

The party hiring the employees continues to be F. Sayani and her management staff. While HRN appears to perform a recruiting function, the decision to hire ultimately rests with either the department manager or F. Sayani. One or both of these individuals conducts the hiring interview, decides whether the applicant is acceptable, and advises HRN of the decision to hire or not. Similarly, Pan Afric carrying on business as the Executive Inn and Tivolis retains the authority to dismiss any employee whose performance is unsatisfactory. This is clear from the face of the agreement between Pan Afric and HRN, from F. Sayani's testimony, and from the letter dated March 26, 1993 from Loncar's manager to HRN.

The employees clearly perceive the Sayanis to be their employer. Loncar and Tabak testified that this was their perception as well as the perception of other employees with whom they worked. This did not change after February 1, 1993 despite Loncar's completion of the application form and information sheet for HRN. Her day-to-day work experience and the conduct of the Sayanis and her manager remained the same. Neither Tabak nor Loncar had any dealings with Mr. Jamani from HRN and they knew nothing more of him than that he delivered paycheques to their managers.

Finally, in terms of the existence of an intention to create the relationship of employer and employees, I turn to the contracts between Pan Afric and HRN and the conduct of the Sayanis. I find that the reality of the service agreements for the purposes of the Code is that Pan Afric, carrying on business as the Executive Inn and Tivolis, continues to exercise fundamental control over the working lives of the employees working at the hotel. The Sayanis testified that the business reason for entering into the service agreements was to relieve Mrs. Sayani of the time constraints involved in interviewing and hiring new employees and the burdens of management; however, the evidence unmistakably reveals that the service agreements do not, and were not truly intended to, relieve her of these burdens and constraints.

It is also significant to note that Tabak's refusal to fill out the documents forwarded to her by HRN had no impact on her employment at the hotel. Despite the fact that she was approached on several occasions by management to complete these documents, she steadfastly refused to do so. This refusal had no impact on her employment or paycheque.

Additionally, the objective evidence of the Sayanis' conduct subsequent to the execution of these service agreements establishes their intention to continue as the employer of the employees at the hotel. I find N. Sayani addressed the front desk employees and management staff at the meeting in his office as "my loyal employees". He counselled them to continue to turn to himself and F. Sayani for problems relating to their employment. The recent and belated Christmas party for the employees at both the Executive Inn, Burnaby and the Executive Inn, Richmond was a function hosted by F. Sayani. Moreover, it was F. Sayani and management staff who approached the employees about the Union. As noted earlier, the day-to-day employment experience of the employees at the hotel remained consistent with their experience prior to February 1, 1993.

For all of these reasons, I conclude that Pan Afric Holdings Ltd. carrying on business as the Executive Inn, Burnaby and Tivolis Too at the Executive Inn, Burnaby hotel, exercises fundamental control over the working lives of the employees in the bargaining unit and is, for labour relations purposes, their true employer.

I now turn to the Employer's argument that the Union's application must, nevertheless, be

dismissed because it failed to prove that it enjoyed the membership support of not less than fifty-five percent of the employees in the unit on March 22, 1993. This argument overlooks Section 124 (3) of the Code and the confidential portion of the IRO's report prepared pursuant thereto. Section 124 (2), (3) and (4) provides as follows:

124. (2) The board may request and receive a report from a person it appoints to investigate an application or to investigate and attempt to settle a dispute under this Code, a collective agreement or the regulations, and, despite section 146 (3), the board shall disclose the report to the parties.
- (3) Information relating to membership or any record that may disclose whether a person is or is not a member of a trade union produced in a proceeding before the board is for the exclusive use of the board and its representatives.
- (4) No person shall, except with the consent of the board, disclose whether a person is or is not a member of a trade union.

Under Section 124 (2), the Board must disclose to the parties the investigation report of an application for certification. That was done in this case. However, under Section 124 (3) the IRO prepares an additional confidential report containing information relating to the applicant trade union's membership support among the employees in the proposed bargaining unit. This information is produced in the proceeding before the Board and in accordance with Section 124 (3) is for the exclusive use of the Board and its representatives. It is this aspect of the IRO's report that enables the Board to determine whether a union satisfies the membership in good standing requirements of Section 23 (1) of the Code. A union need not adduce evidence of membership in good standing at an oral hearing: see Section 124 (4).

I am satisfied that on March 22, 1993 the Union met the required percentage membership support for automatic certification under the Code. I am also satisfied that the Union is a trade union and that the unit is appropriate for collective bargaining.

During the Employer's cross-examination of Tabak, and during F. Sayani's direct examination, counsel for the Employer pursued questions designed to support an argument that a number of the individuals whose names would appear on the IRO's confidential report were, in fact, supervisors and should be excluded from the unit for the purposes of determining the

Union's percentage membership support on March 22, 1993. This position was not advanced in final argument. I note that even if it had been, and even if the persons referred to as supervisors were excluded from the bargaining unit, the Union would still satisfy the statutory requirement of not less than fifty-five percent members in good standing.

At the outset of the hearing, counsel for the Employer reserved the right to argue that the Executive Inn, Burnaby and Tivolis Too were two separate employers. Subsequently, this objection was withdrawn.

Accordingly, a certification order which accurately reflects the bargaining unit applied for will be issued shortly.

LABOUR RELATIONS BOARD

JOAN GORDON
VICE-CHAIR