

BRITISH COLUMBIA LABOUR RELATIONS BOARD

OVERWAITEA FOOD GROUP, A DIVISION OF
GREAT PACIFIC INDUSTRIES INC.

(the "Employer" or "Overwaitea")

-and-

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL
UNION, LOCAL 1518

(the "Union")

PANEL: Emily M. Burke, Vice-Chair

COUNSEL: A. Keith Mitchell, Q.C. and Derek J. May, for Overwaitea
Theodore C. Arsenault, for the Union

CASE NO.: 14702

DATES OF HEARING: April 20, 21, and 22, 1993

DATE OF DECISION: April 28, 1993

DECISION OF THE BOARD

On April 13, 1993, the Union applied under Section 18 of the *Labour Relations Code* for certification of the employees at Overwaita Foods, Store No. 8 at 32720 South Fraser Way, Clearbrook, BC except those employed in the meat department and pharmacists. The Employer objects to the application given the imminent build up of employees. It maintains the application should be dismissed as premature or a vote ordered under Section 24 of the Code.

II. BACKGROUND

Overwaita has operated a grocery store since 1981 in Clearbrook on South Fraser Way in the Westbrook Mall. The store is approximately 31,000 square feet and typically employed between 100 to 135 bargaining unit employees plus the meat and deli department. Normally, the entire store complement is approximately 163 employees. Some time in 1991 or 1992, the Employer decided to replace the old premises with an expanded store. Construction of a new premise adding to the Westbrook Mall was undertaken. Those premises are now complete and encompass approximately 66,000 square feet. The expanded store is tentatively scheduled to open on May 15, 1993. Although the present store remains open, work is under way to ensure the replacement store is fully operational by its opening date.

The store presently employs 125 bargaining unit employees excluding the meat and deli department. Employees in that department are represented by UFCWU, Local 2000. Late in February, a meeting was held with the staff to outline plans for the replacement store. At that meeting, Wayne Perry, the store manager, indicated to the employees approximately 120 additional new employees would be hired. Overwaita commenced hiring those employees just prior to April 5. April 5 was possession date of the new store. Ten new employees were hired to commence work on April 5. On that date both new hires and employees from the existing store were deployed to work in the new store. In addition, the Employer continues to hire new employees. By April 26, 1993 the Employer had hired 61 new employees, including 25 store clerks and 24 store cashiers. By May 1, 1993, it expects to have a complement of 102 new hires. Of those employees, the vast majority would be part-time employees.

The expansion is part of a evolution in the food industry which commenced in the 1980s. Stores in the range of 30-50,000 square feet have expanded to 50-100,000 square feet. Opening hours for stores now range from 8 a.m. to midnight, seven days a week. The size and extension of hours has resulted in a large increase in employees. In addition, the expanded stores now include departments such as fast foods, cosmetics, pharmacies, floral departments, shoe repair, video, and photographic departments.

Jerry Kenyon, district manager for Overwaitea Foods testified for the Employer. The replacement store in Clearbrook will comprise new departments including a tobacco shop, a fast foods department, a book store, a cosmetic department, and a juice and melon bar. The fast food department will be a restaurant style operation where a customer can purchase hot ready-to-eat foods. Beverages are available and a seating area is included. Twenty-five new employees (service staff and cooks), will be required to staff this department. The book department is a large area replicating a full service book store and includes a complex computerized inventory and ordering system. The present store sells magazines and pocket books only. The juice and melon bar is a specific area set aside to sell exotic fruits and drinks. The present produce section sells some of these products. The cosmetic department will sell beauty lines and employ a trained cosmetician.

The Union currently has a collective agreement with Overwaitea for a large number of its stores. Kenyon testified that Overwaitea also applies the terms of that collective agreement to its non-union employees. A classification structure is set out in Section 6 of the collective agreement. Classifications include general clerks, clerk cashiers, service clerks, utility clerks, and specialty department clerks. The wages of the employees are determined based on that structure. The existing group of employees presently contains individuals falling within each of the classification structures with the exception of utility clerks. Utility clerks are not expected to be employed in the replacement store. Employees hired for the replacement store will be paid according to the existing classification structure. Generally, those in the specialty departments are paid a specialty department rate of pay.

III. ARGUMENT

The Employer maintains the application should be dismissed on the basis of the build-up principle. By May 1, 1993, more than 100 new employees will be on the payroll of the store. At present the bargaining unit is 135 employees. Six are in controversy but the uncontradicted evidence is that by May 1, 102 more people will be hired. The bargaining unit will grow from 125 to 227 employees, an increase of over 75%. The decision should be made on the fairest possible basis without defeating the right of the trade union to have a reasonable adjudication of its application. The essence of the case is fairness. Harmonious relations will not be facilitated when almost one in two employees do not get a chance to voice their opinion. (See Section 2(1)(a) and (d).)

The Employer notes an analysis of the build-up principle was set out in both *Plateau Mills Ltd.*, BCLRB No. 87/76, [1977] 1 Canadian LRBR 82, and *Noranda Mines Limited*, BCLRB No. 26/82, [1982] 2 Can LRBR 475. That analysis incorporates a flexibility that ensures each case is decided on its facts. Even if 50% of the ultimate bargaining unit is already present, the build-up principle may still apply.

The Employer relies heavily on *Wastech Services Ltd.*, IRC No. C34/89, emphasizing the discretion in the Board in applying the build-up principle. In that case the Board dismissed an application on the basis of that principle where a build-up was to occur from 29 to 53 employees. The Employer also argues the factors set out in the more recent case of *Weyerhaeuser Canada Ltd.*, IRC No. C150/89, which establish applicability of the build-up principle, are satisfied in this case. The existing employee complement is not representative of the eventual complement. Five departments are not presently represented. These include the book store, cosmetics, food service, tobacco, and the juice bar. One in particular is very large; 25 people which equals 10% of the whole unit. The skills are obviously different in the food services department. In addition, it is evident from the nature of the Employer's operation this is a one time massive growth. The nature and degree of the build up is significant being an increase of 125 to 227. The build-up is permanent in nature and could in fact be larger.

Accordingly, the Employer maintains the Board should dismiss the application. Alternatively, the Employer requests a vote under Section 24 to be scheduled for the 15th of May

when the full employee complement will be in existence. Finally, the Employer maintains, even if the build-up principle is not applicable, a vote is appropriate under Section 24. The Board retains a general discretion which should be exercised on the basis of new employees hired to date.

The Union maintains the Board should dismiss the Employer's objections. The Union argues first, the build-up principle does not apply to an expansion of an existing business. The employees have a history of employment in an ongoing business. The policy of the Act mandating automatic certification requires this right to be recognized.

The Union also argues the build-up principle does not apply. The essential criteria set out in *Noranda Mines Limited, supra*, have been met. The present complement of employees is at least 50% of the expected workforce and is representative of the classifications which will be present once the expansion is complete. Accordingly, certification should be granted. The Employer has not met the high onus established in *Weyerhaeuser, supra*, once 50% of the expected workforce is established.

The Union differs with the Employer on the analysis of the numbers relevant to the case. It argues only 91 new hires are involved. As a result the present bargaining unit of 135 plus the six assistant managers is 141. Ninety-one new hires to that results in a total of 232. The trade union has applied for 141 out of 232. This is significantly more than the 50% rule of thumb articulated in *Noranda* and other cases.

Dealing with the question of whether the existing employees are representative of the new complement, a review of the character of the bargaining unit establishes all classifications are represented. The Employer operates a chain of predominantly union grocery stores. The non-union stores are run on the same basis as the union stores. As a result, the existing bargaining unit can be analyzed on the basis of the collective agreement in place with the Employer's other stores. The existing store includes general clerks, which includes bakery, cashiers, special department, service clerks. The replacement store will simply reorganize existing work functions under the existing classifications system in the collective agreement.

To apply the build-up criteria in this case, the Employer must meet a high onus. The

facts in this case meet the *Noranda* criteria in a compelling way. The Employer falls short of its heavy onus to defeat the statutory rights of the employees.

IV. ANALYSIS AND DECISION

Under Section 18 of the *Labour Relations Code*, the Union is entitled to apply for certification of the employees. If not less than 55% of the employees in the proposed unit are members in good standing, the Union is certified for the employees (see Section 23(1)). The Employer in this case objects on the basis that the complement of employees presently in place is not representative of the bargaining unit. It argues this on the basis of an imminent and significant build-up in that complement.

The previous Labour Relations Board considered the build-up principle in both *Plateau Mills Ltd., supra*, and *Noranda Mines Limited, supra*. *Plateau Mills Ltd., supra*, dealt with the build-up principle in the context of when the Board should exercise its discretion under Section 43(1) to order a vote in a certification application. It found the use of a vote should be confined to the "atypical certification application". The Board in *Plateau Mills* considered special cases for a vote, including the situation of a tiny group of employees present by comparison with the number present either on the date of the certification itself or in the immediate future. It noted:

The simple solution to these relatively rare cases is to order a representation vote to obtain the actual majority verdict of the current and qualitatively different group. (p. 88)

In *Noranda Mines Limited, supra*, the Board found the proposed unit at the time of application was inappropriate in that a substantial and representative group of employees was not present. This was in the face of an overwhelming build-up firmly scheduled to take place. In normal circumstances, however, in considering a certification application in the shadow of an imminent build-up the Board said:

. . . when the employees present number in excess of half of the full complement and all or most of the classifications contemplated are represented, the unit should be considered appropriate. However, the Board's policy must be considered flexible, since it

must be able to meet the peculiarities of various projects. . . . (pp. 485-6)

The Employer takes issue in this case with the 50% rule of thumb and the representative character of the present complement of employees. The Employer forcefully maintains the 50% rule is not absolute but flexible.

The 50% rule arises out of the above statement in *Noranda Mines Inc.*, *supra*. Both that case and *Plateau Mills Ltd.*, *supra*, however, provide that flexibility is retained in applying the rule. That is the meaning of a "rule of thumb". To begin, it is clear in this case that by whatever calculations are undertaken the number of employees present in the proposed bargaining unit, do exceed the 50% mark. More important than that, however, is the question of the representative character of the employees in the unit. *Plateau Mills* focused on whether a vote was necessary to obtain a verdict of the "current and *qualitatively* different group" of employees. *Noranda Mines Inc.*, *supra*, combined the 50% rule with the requirement that "all or most" classifications contemplated must be represented. *Weyerhaeuser Canada Ltd.*, *supra*, found this to be at the heart of the build-up principle.

These considerations reflect the Board's concern for the overall appropriateness of the bargaining unit and the legitimacy of collective bargaining for that unit. In doing so, they balance the interests and rights of both present and future employees (see *Noranda Mines Inc.*, *supra*). The purposes of the Code set out in Section 2 encourage collective bargaining and conditions favourable to the orderly settlement of disputes between employees and unions. The considerations attempt to strike a balance between competing interests. One concerns the rights of present employees to obtain certification and the other the right of future employees to have a say in this matter. The proper application of the build-up principle avoids certification of an unrepresentative group of employees.

The Council in *Weyerhaeuser Canada Ltd.*, *supra*, emphasized the need to retain flexibility in the application of the build-up principle. It set out a number of relevant considerations articulated in *Kingfisher Sales Inc.*, BCLRB No. 73/86. It went on to note:

A party seeking to have the Council dismiss an application for certification as premature when the trade union has at least 50% of

the proposed complement where all or most of the classifications or departments are represented within the existing group, will have to make a particularly compelling case on the first three factors listed above. (p. 6)

Those factors were noted as considerations in *Kingfisher Sales Inc.* and included the nature of the employer's operations, the nature and degree of the build-up and the imminence and certainty of the build-up.

In this case, I find that the present complement of employees is representative both qualitatively and quantitatively of the ultimate complement of employees. Quantitatively, the present complement of employees includes over 50% of the ultimate unit.

A significant increase in employees is no doubt imminent. That increase, however, occurs in the context of an expansion of an operating business. That expansion will necessitate some changes. Those changes, however, do not translate into the addition of a number of distinct categories which are not represented at this time. I agree with the Union that the changes represent an expansion or reorganization of existing work functions. In *Noranda Mines Inc.*, the Board noted that under normal circumstances, where employees represent in excess of half of the full complement and all or *most* of the classifications contemplated are represented, the unit should be considered appropriate.

In this case, the most the Employer can argue is that the food services department is not represented. Virtually all of the classifications contemplated are represented. The absence of the food service group is not sufficient to override the statutory right of employees seeking certification at this time. Accordingly, I find a representative and substantial group of employees is present in the bargaining unit applied for.

Finally, I do not find a compelling case made out on the basis of other considerations. Although the build-up is significant and imminent, the context in which it occurs militates against the dismissal of the application on the basis of build-up. This is not the start-up of a new operation. It is not the organization of a "rump group" of employees of a school district during a summer break. It is an expansion of a business existing for some years. These considerations lend force to the conclusion that a representative group of employees exists at the work place in

this case.

Accordingly, I find the build-up principle does not apply in the circumstances of this case. I find no reason to exercise my discretion under Section 24 of the Code to order a vote. The addition of employees *simpliciter* does not persuade me. That factor is encompassed in the articulation of the build-up principle. The conclusion that the principle is not applicable is determinative on that point.

The Employer has raised the issues of the inclusion/exclusion of the certain individuals in the unit. A determination on this issue does not affect the requisite support for the application. In accordance with the Board's practice and the expedited nature of these proceedings, the issue will not be determined by this Panel. The parties can file the appropriate application or resolve the issues themselves. In view of this, the Union meets the requirements under Section 18 of the Code. The application for certification is granted.

LABOUR RELATIONS BOARD

EMILY M. BURKE
VICE-CHAIR