

July 23, 1998

To Interested Parties

Re: Naya Inc. (the "Employer" or the "Company") -and- Industrial Wood and Allied Workers of Canada (I.W.A. Canada), CLC, Local Union Number 1-417 (the "Union") -and- Certain Employees  
(Section 18 - Case No. 36636)  
(Sections 7(1), 9 and 140 - Case No. 36723)  
(Sections 7(1) and 9 - Case No. 36740)

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(i) Nature of Application

1 The Union applies under Section 18 of the *Labour Relations Code* for a bargaining unit described as: "employees except supervisors, foremen, office workers and sales persons". The Union asserts that three employees should be added to the employee list. The certification application was filed May 13, 1998. The initial certification hearing was held May 20, 1998.

2 Certain employees apply under Sections 7(1) and 9 of the Code asserting that the Union's organizing campaign occurred on Company time and that organizers misrepresented facts to persuade individuals to join the Union.

3 The Employer applies under Sections 7(1), 9 and 140 of the Code asserting that organizing took place on Company time, employees were harassed during working hours and misrepresentations were made by the organizers.

4 The parties agreed to hearing dates of July 2 and 3, 1998. After all parties had closed their cases, and just prior to commencing argument, the Union requested to file a Section 7(1) complaint against Certain Employees, based on evidence regarding the securing of revocation letters during working hours. Certain Employees and the Employer objected.

5 I ruled that the application was untimely and would not be considered. The Union was aware of several revocation letters at the initial certification hearing on May 20, 1998. Any Section 7(1) application should have been investigated and filed prior to the commencement of argument in the cases before me. However I did note that the facts surrounding the revocation letters may impact the argument with respect to the alleged disruption of work caused by the Union's organizing campaign.

(ii) Background

6 The Employer operates a water bottling business, 45 kilometres from Revelstoke, B.C. In high season the Employer operates 7 days a week, 24 hours a day. Employees work 12 hour shifts, with alternating days off. The shifts overlap by one half-hour. For example, one shift is 6 a.m. to 6.30 p.m., and another is 6 p.m. to 6.30 a.m.

7 The Union organizing campaign commenced May 8, 1998. Union officials met with several staff in the evening to review various aspects of an organizing campaign. The Union advised the employees to be discreet and not to organize on Company time, not to promise anything and not to threaten or coerce anyone. The major focus of the discussion was to refrain from signing membership cards on Company time.

8 Two employees were key organizers: Don Thompson and Ramona Bareham. Thompson works in the quality control laboratory. The functions of his job result in him being throughout the plant during his shift. Thompson went to work early on May 9 in order to talk to the employees who were finishing their shift at 6.30 a.m. He arrived at the plant prior to 6 a.m. On his way to the plant floor he saw Bonny Radcliffe, a Shift Supervisor, in the lunch room. Thompson testified that he asked her if "it would bother her if he went around and asked people about the Union". Thompson stated that Radcliffe said it would not bother her.

9 Radcliffe testified that she met Thompson outside the lunch room. She commented that he was in early. Radcliffe denied that Thompson asked to talk to employees about the Union. In cross-examination she acknowledged he may have said he was going to talk to people but he never mentioned the Union.

10 Thompson proceeded to enter the plant just prior to 6 a.m. He talked to two employees, Willow Rolfe and Jordan Eadie. Thompson advised the employees that if they were interested in joining the Union, they should come to the laboratory after the shift to sign a card. Another employee, Sandra Patterson, overheard the conversation. Patterson testified that she advised Thompson that he could not organize on Company time. Patterson testified further that Thompson stated he had permission from the manager. Thompson testified that he told Patterson he had permission and that she should mind her own business. In her evidence Rolfe did not refer to Thompson stating he had permission.

11 Patterson reported to Radcliffe that Thompson was talking about a union to Rolfe and Eadie and that he stated that he had permission to do so. Radcliffe called David

Royce, the Plant Manager. Royce had not granted permission. Royce called the plant to talk to Thompson. By this time Thompson was working beside a piece of machinery. He did not hear his name being paged several times. He was advised later that he had been paged. He returned to the laboratory. Royce eventually contacted Thompson and advised him not to organize during business hours. Thompson stated that employees approached him in the laboratory to sign cards from that point on.

12            Rolfe signed a membership card later that same day. She testified that "a couple of days later" she changed her mind. Rolfe approached Thompson in the laboratory to get her card back. Rolfe testified that Thompson told her the cards had already been sent in, but that he would see what he could do. Thompson never followed up on the matter with Rolfe.

13            Thompson testified that Rolfe asked if the Union had the requisite numbers. Thompson said yes. Rolfe then advised Thompson to forget it. Thompson recalled the conversation occurring the week after the membership cards had been filed with the Board.

14            After the conversation with Thompson, Rolfe discussed the matter with two other employees, one of whom was Patterson, who was by this time organizing the signing of revocation letters. Rolfe signed a revocation letter on May 17, 1998.

15            There is also a dispute over the signing of a membership card by Trent Kroll. Kroll testified that he was in the laboratory on May 10. Thompson asked him how he felt about the Union. Kroll wanted more information. Kroll testified that Thompson handed him a card, and said "this will get you more information". Kroll testified that: he was under the impression he would receive more information; the card was "not for voting purposes"; he was in a hurry; and he did not read the card as he took Thompson's word that he would receive more information. He denied approaching Thompson for a card.

16            Thompson testified that he did not approach Kroll as he was characterized as a "non-signer". Kroll approached Thompson and asked several questions. The next day Kroll asked for a card to sign. Thompson advised Kroll to wait until lunch. Kroll told Thompson not to worry, no one would see, and he signed a card.

17            Approximately one week later Kroll had a conversation with Patterson. She advised Kroll he had in fact signed a Union membership card. Kroll testified he was upset because he had no intention for voting for the Union until he knew "what we would get". He sent a letter dated May 19, 1998 to the Board which stated:

Approximately one week ago I was asked to sign a Union voting card under the impression that it was for information purposes only.

I was told it was not for voting in the Union but for obtaining information on the services that the Union would offer us and provide for us, as a group of employees.

My intention was to gain more information about the IWA before committing myself.

18 Sean Habermehl testified that he was approached eight to ten times during work hours during a two-week period. Bareham approached him at shift change. Habermehl was busy and told her to put a card in his backpack. Bareham also contacted him outside of working hours at his residence. Habermehl has a second job as the caretaker where he lives. The call from Bareham caused concerns for Habermehl as his second employer was aware of the call. Habermehl also testified about two occasions where work was disrupted when an organizer was approaching employees. On both occasions the training of employees (Sean Kusper and Mike Hill) was interrupted. In the case of Hill, the bottles were backing up on the palletizer. On this occasion, another organizer, Evan Evans, was telling Hill that the Union would get the employees \$17 per hour, their "own" spot on a shift, and no loss of benefits. The conversation took 15 to 20 minutes.

19 Bareham disputed the number of conversations with Habermehl. She claimed there were only two conversations. Bareham testified that when employees approached her about the Union she advised them that cards were in her backpack. Although Bareham did not have employees sign membership cards on Company time, she did admit to several conversations with various employees on the production line about the pros and cons of unionization.

20 The Union asserts that three employees (Thompson, D. Lavine, J. Hedley) should be added to the list of employees. All three were employed on the date of the certification application but resigned shortly thereafter. Thompson's resignation is dated May 13, to be effective May 25. The Employer asserts that Thompson advised the Employer of his resignation prior to May 13. Lavine's resignation letter is dated May 15, to be effective the same date. Hedley's resignation letter is dated May 14, to be effective May 19.

(iii) Analysis and Decision

21 I note at the outset that there is conflict in key aspects of the testimony. Consequently, in reviewing the evidence I have determined the version that I prefer based on principles set out in *Faryna v. Chorney*, [1951] 4 W.W.R. (NS) 171, [1952] 2 D.L.R. 354 (B.C.C.A.).

22 There are four components to this case: the alleged violations of Section 9; the alleged violations of Section 7; the alleged misrepresentation in securing membership cards; and, the inclusion/exclusion of three individuals. I will deal with the issues in that order.

A. Section 9

23 A union is not permitted to coerce or intimidate employees into signing membership cards. As noted in *Sacpyr Investments Ltd., doing business as Best Western Cowichan Valley Inn*, BCLRB No. B237/96, at para. 124:

The words "intimidation" and "coercion" evoke images of compulsion with its accompanying fear and insecurity: *Focus Building Service Ltd.*, IRC No. C90/87, at p. 17. Those words are defined as the use of threats or force for the purpose of controlling or influencing conduct: *South Surrey Hotel Ltd. (Best Western Pacific Inn)*, BCLRB No. B25/94, at p. 11. Their mere existence of economic or social persuasion or even rancorous argument is insufficient: *North Shore Home Support Services Society*, BCLRB No. B307/95, at p. 4.

24 I conclude that Bareham's approaches to Habermehl did not reach eight to ten times over a two week period as testified by Habermehl. The organizing did not commence until May 9, and the certification application was filed May 13. However, I conclude that there was persistent discussion about unionization at the work place. Bareham admitted to talking to several employees on the production line. I conclude further that Evans made promises to Hill.

25 However, persistent peer pressure and promises of what the Union may be able to achieve in collective bargaining does not amount to intimidation or coercion. It is not unusual during a union organizing drive for employees to divide into two camps with opposing views. Antagonism may develop. The Board has stated that employees may be subject to peer pressure and campaign "puffery", but it is up to the employee to consider whether to sign a membership card or not: *T. Jordan Inc.*, BCLRB No. B51/96, at para. 9.

26 I conclude there is no evidence of intimidation or coercion. The Section 9 applications by the Employer and Certain Employees are dismissed.

B. Section 7

27 The most recent Board decision cited by all counsel is *Lansdowne Dodge City Ltd.*, BCLRB No. B165/97. Rather than summarize Board policy flowing from that case, and previous cases, I intend to quote extensively from the *Lansdowne* decision, as I chaired the panel in that case:

The policy objective of Section 7(1) was discussed in *Granville Island Hotel & Marina Ltd.*, BCLRB No. B95/95. In that case, the employer advanced two policy objectives. First, an employer has the right to manage its business without disruption by a union organizing drive during working hours. Second, the important decision to join a union should not be contemplated while

someone is busy at work. The Board accepted the first argument but rejected the second:

The policy objective underlying Section 7(1) is to recognize an employer's right to manage its business and control its workforce without disruption from employee exercise of organizing rights: see *Jim Pattison Industries Ltd.*, BCLRB No. 39/79, [1979] 2 Can LRBR 517 (at p. 520), and *Erickson Gold Mining Corporation*, IRC No. C183/89 (at pp. 3-4).

I do not accept the second policy objective submitted by the Employer. Section 7(1) prohibits union organizing activity during working hours. Employees do not contravene the Section if they attempt to persuade others to join a trade union during the lunch hour or other work breaks: see *Jim Pattison Industries Ltd.*, at pp. 520-521. Union organizing activity could take place, for example, during an employee's coffee break: see *Cominco Ltd.*, BCLRB No. 72/81, [1981] 3 Can LRBR 499 (at p. 507). Union organizing in that brief time frame may be just as hurried as organizing during working hours. Nevertheless, Section 7(1) does not prohibit that. Thus, I accept the first policy objective submitted by the Employer, but I do not accept the second. (paras. 21-22)

Section 7(1) is a prohibition against organizing "at an employer's place of employment during working hours". Employers must be able to operate their business free from an employee exercising the right to join, or not to join, a union. Employees can persuade others to join, or not to join, a union during lunch breaks and coffee breaks, however, such persuasion cannot occur during working hours.

Disruption to the work place is not a prerequisite to a determination of a violation of Section 7(1). If that was the case it results in an open invitation to conduct organizing campaigns on company premises during working hours as long as a disruption was not noticeable. Section 7(1) does not limit prohibited activity to the physical signing of cards either. Prohibited activity also includes the attempt to persuade an employee to join, or not to join, a union.

As is the case with other Sections of the Code, a violation of Section 7(1) results in the Board fashioning an appropriate remedy. One of the purposes of a meaningful remedy is to create disincentives for violations of the Code. The severity of the remedy will be based on the nature of the breach and the circumstances of each case.

In the situation where an organizing drive is taking place over an extended period of time potential remedies are more

obvious. If an employer becomes aware of an employee violating Section 7(1), the employee may be put on notice to cease such activity and/or be subject to appropriate discipline. The employer can also seek a cease and desist order from the Board. If disruption can be proven, the employer may have access to other remedies such as damages.

However, in a small business setting where an organizing drive is completed very quickly and a violation of Section 7(1) is proven after the certification application is filed, fashioning a meaningful remedy may be more problematic. For example, a cease and desist order is meaningless.

What should the Board consider when determining an appropriate remedy? There are numerous work environments where employees carry on casual conversations about topics unrelated to work without disruption to the work place. It would be naive to think that during an organizing drive the topic of unionization is not discussed in such casual conversation. Some people may argue that the topic of unionization can be discussed by employees during working hours without violating Section 7(1) because persuasion is not involved. There may be a fine line between casual conversation and persuasion. As in the case of potential unfair labour practices when the Board advises employers to avoid entering the debate on unionization, unions would be advised to counsel organizers not to discuss the matter during working hours in order to avoid crossing the above noted fine line. In a situation where there has been a minimal breach, for example an inside organizer attempting to persuade a colleague to join the union while both continue to work, a declaration of the breach and/or a cease and desist order may be an appropriate remedy. Such a remedy would be analogous to situations where an employer violates Section 6(1) of the Code and the Board issues a declaration and/or a cease and desist order. On the other hand if an experienced union organizer blatantly violates Section 7(1) by having membership cards signed on an employer's premises disrupting production, discounting the membership cards may be appropriate. Again we note the comparison to a more serious violation of Section 6 of the Code when the Board issues a more severe remedy affecting an employer, such as remedial certification. We note that the extreme remedy of discounting cards has not been ordered by the Board in the past. The above examples demonstrate that there should be a spectrum of remedies utilized depending on the circumstances of each case.

In the case at hand the Employer is requesting that the representation vote be counted as a remedy. Representation votes flowing from remedies due to violations of the Code are normally ordered because the Board is concerned about the true wishes of the employees (e.g. violations of Sections 6, 9 or 33). In *The*

*Original Dutch Pannekoek House Ltd.*, BCLRB No. 62/78, [1979] 1  
Can LRBR 212. The Board stated:

Counsel takes the position that a violation of Section 4(1) [now Section 7(1)] of the Code is "a serious cloud of unfairness hanging over the organizational drive". In our view, that argument is completely misconceived. Assuming a violation of Section 4(1) of the Code occurred, that simply is not the type of unfair organizational tactic contemplated by the above passage. The legislative assumption inherent in Section 45(1) of the Code is that an employee's signature on a membership card is an indication of his or her wishes. Only if the Board is of the view that the membership evidence does not accurately reflect the employees' wishes will a representation vote be held. Whether the employees sign the membership cards at the employer's premises during office hours or at a union meeting in the evening has no bearing on the true wishes of the employees. In the absence of some evidence of coercion, intimidation or some other such conduct on the part of the union designed to interfere with the employees' freedom of choice, we must assume that in signing the membership cards the employees have in fact indicated their desire to be represented by the trade-union. (p. 214)

We agree that ordering a representation vote simply based on a violation of Section 7(1) is not meaningful. It may simply confirm a union's support that was gathered during company time. One situation where a representation vote may be an appropriate remedy is where an employer can prove that an employee signed a card in violation of Section 7(1) and the fact that the organizing occurred on company time led the employee to believe that the employer endorsed the organizing. In such a case it could be argued that the employee's true wishes were not evident. (pp.11-14)

28           The Union concedes that there was a breach of Section 7. There were brief conversations on Company time with no significant disruption in work. Employees are not restricted from talking on the production line and during shift change. The revocation letter campaign conducted by Patterson also occurred during Company time. Thompson believed he had permission from the Shift Supervisor. The Union argues that unless there is doubt about the true wishes of the employees, the discounting of membership cards is inappropriate. The Union asserts the appropriate remedy is a declaration.

29           Certain Employees argue that there was blatant and repeated violations of Section 7. Production was disrupted. Membership cards should be disregarded entirely as the cards were solicited on Company time. In the alternative, Certain Employees argue the only effective remedy is a representation vote.

30 The Employer adopts the submission of Certain Employees and argues further  
that the Board should exercise its discretion and order a representation vote for two  
reasons. First, the membership evidence is suspect. Secondly, there is doubt about  
the prospects for collective bargaining: *Craun Drugs Ltd.*, BCLRB No. B175/98 (Leave  
for Reconsideration of BCLRB No. B290/97).

31 In addition to the Union's concession that Evans and Prentis violated Section 7, I  
conclude Thompson and Bareham did as well.

32 Thompson went to work early on May 9, the day after the Union meeting, to  
specifically talk to employees coming off shift. While the technical act of signing  
membership cards may have been completed while an employee was off duty, I  
conclude that Thompson attempted to persuade employees to join the Union while they  
were on the production line and/or during the one-half hour overlap period. Employees  
also signed cards in the lab during working hours.

33 I conclude Thompson did not have permission from Radcliffe to talk to  
employees about unionization for three reasons. First, at the Union meeting on May 9  
the Union officials advised Thompson and Bareham to be discreet. I find it  
inconceivable to think Thompson would then, the very next day, announce his intentions  
of organizing the employees by asking permission to talk about the Union.

34 Second, Radcliffe's immediate reaction when she heard from Patterson that  
Thompson was discussing the Union in the plant, was to telephone Royce. I conclude  
she would have acted similarly if Thompson had asked for permission in the first place.

35 Third, when Royce contacted Thompson and advised him not to organize on  
Company time Thompson did not tell Royce he had Radcliffe's permission. I conclude  
that a reasonable person would have done so had he had permission in the first place.

36 Bareham also solicited Union membership in her conversations with employees  
on the production line.

37 I conclude further that there was minimal disruption to the work place. Radcliffe  
testified that employees from opposite shifts are allowed to talk to employees while the  
production line is running. Employees are not restricted from engaging in casual  
conversation during working hours. The one-half hour overlap in shifts is busy for some  
employees but not others. The only evidence of any disruption related to the palletizer  
when Evans was recruiting Hill.

38 I note further that the Employer did not monitor the work flow even though Royce  
knew Thompson had engaged in organizing on Company time. In addition, Patterson's  
revocation letter campaign occurred during Company time. I make no conclusion on  
whether the Employer was aware of Patterson's activities or not. I note this fact simply  
to emphasize that there were two campaigns ongoing in the work place with seemingly  
little disruption to work.

39 Certain Employees and the Employer argue that all membership cards should be disregarded because the organizing occurred on Company time. Such an extreme remedy has not been ordered by the Board in the past. As noted in *Lansdowne Dodge City Ltd., supra*, at para. 62, such a remedy may be appropriate in exceptional cases.

40 However, in the case at hand I conclude that disregarding cards is not appropriate. The Union organizers were not experienced organizers. The organizing drive happened very quickly over a four day period. There was minimal disruption to work. Not all the membership cards were signed on Company time.

41 In the alternative, Certain Employees and the Employer argue that a representation vote should be conducted. As noted in *Lansdowne Dodge City Ltd., supra*, at para. 64, a representation vote is a potential remedy if the Board concludes that organizing which occurred on company time led employees to believe that the employer endorsed the organizing. In such a case the true wishes of the employees may not be evident. Such a conclusion must be based on objective evidence.

42 Certain Employees and the Employer argue I should reach such a conclusion because Thompson advised employees he had the supervisor's permission to talk about the Union. The evidence does not support this assertion.

43 I conclude that Thompson approached employees and asked if they were interested in the Union. If the answer was yes the employees were directed to see him in the lab to sign a membership card. The only time he referred to permission from the Employer was in response to Patterson when she challenged him organizing on Company time. There were only two other employees present at the time, Rolfe and Eadie. Of those two employees only Rolfe testified. In her testimony she did not state Thompson said he had permission. Rolfe testified that Thompson was cut off by Patterson. I cannot conclude that Rolfe and/or Eadie heard Thompson's comment to Patterson. I do conclude that similar comments were not made to other staff. I conclude further that employees were not influenced to sign membership cards because organizing was occurring on Company time.

44 For the foregoing reasons, I conclude that an appropriate remedy for the violation of Section 7(1) by employees, on behalf of the Union, is a declaration.

C. Misrepresentation in Soliciting Membership Cards

45 The solicitation of two membership cards must be considered.

1. Rolfe

46 Rolfe voluntarily signed a membership card on May 9. Thompson forwarded membership cards to the Union on May 13. The certification application was filed May 13.

47 Rolfe requested the return of her membership card. If the request was made before the membership cards were submitted, and such a request was refused, her card should not be counted. If the membership cards had been submitted to the Union, but the certification application had not been filed with the Board as yet, and a revocation letter would have been timely, Rolfe should have been advised of the revocation procedure.

48 Rolfe testified that she requested the return of her card "a couple of days" after she signed it. Thompson asserted the conversation occurred the following week after the cards were submitted to the Union.

49 Rolfe worked May 9, 10, 11, 12, 16, 17 and 19. Her membership card is dated May 9. Her revocation letter is dated May 17, 1998. The certification application was filed May 13. The timing of Rolfe's conversation with Thompson is important.

50 I conclude that Rolfe requested the return of her card after the certification application was filed. Based on Rolfe and Thompson's work schedules the conversation would have occurred May 17. I reach this conclusion because Rolfe testified she had changed her mind by weighing the pros and cons of unionization. It was important to her to retrieve the membership card. Having made the decision to revoke her membership, I cannot conclude the decision was made between the date the card was signed (May 9) and her last day of work in that shift rotation (May 12). It is not probable that after receiving an unsatisfactory response from Thompson that Rolfe would not act on the matter until May 17. It is more probable that Rolfe changed her mind and talked to Thompson on May 17. When Thompson could not return her card, the issue was important enough for Rolfe to immediately discuss the matter with other employees. This resulted in the signing of the revocation letter.

51 Having concluded that the conversation with Thompson occurred after the date of the certification application, it is unnecessary to reconcile the different versions of the conversation.

2. Kroll

52 The card based certification system necessitates a high degree of integrity. In *T. Jordan Inc., supra*, the Board addressed the issue of misrepresentation in the solicitation of membership cards:

The law on representations with regard to membership cards is not as clear as we might otherwise like it to be. However, the cases do form a pattern which is helpful to the issue in this particular case. In *North Shore Home Support Services Society*, BCLRB No. B366/95, (Leave for Reconsideration of BCLRB No. B307/95), the Board confirmed that a union is entitled to some latitude, indeed, considerable latitude, with regard to puffery and promises which it can make during the course of an organizational campaign. The limits placed on that latitude are in the area of coercion and intimidation: a union is not permitted to coerce or intimidate employees into signing membership cards: *Dencan Restaurants Inc.* BCLRB NO. B113/93 and *Dencan Restaurants Inc.*, BCLRB No. B255/93 (Leave for Reconsideration of Decision dated March 31, 1993). In addition, the Board will carefully scrutinize membership evidence to include instances of alleged misrepresentation. However, before misrepresentation vitiates a card, it has to be material and has to have a direct effect on the meaning of the card or the freedom of choice of the employee to select union membership. And by that I mean the following.

In *Royal City Taxi*, BCLRB No. B266/94, the Board held that membership cards were vitiated because representations by the union organizer had made them conditional. The organizer promised that a meeting would be held to explain the benefits of unionization and a vote taken amongst employees by the union organizer to determine whether the employees of Royal City Taxi wanted to be unionized or not "prior to their cards being used to support certification. The employees were led to believe that the signing of the membership card would not therefore mean immediate membership but that membership would only follow after such a meeting and vote was held. As it turned out no meeting and no vote took place and the union pursued certification. The employees who had signed cards under that representation complained to the Board and the Board determined that the cards were conditional as a result of that representation. [Footnote Omitted]. The representation went directly to the meaningful nature of membership and the language on the card itself was insufficient to overcome that representation. Clearly, this is not a case of that kind. The representation or misrepresentation here did not condition membership in any way. (pp. 2-3)

53 The question that must be answered is whether any misrepresentation affected the meaning of Kroll's card or his freedom of choice.

54 I conclude that Kroll did not read the card. That fact is not a reason to disregard the membership card. Individuals are responsible for documents that they sign. The membership card contains the required statement that it will be used for applying for certification. However, even if Kroll had read the card closely, misrepresentation by an organizer may override the specific wording of the membership card. If an employee signs a card and it is clear that there was a condition placed on the signing of the card, the card may not reflect an intent by the individual to join the union for purposes of union membership.

55 The evidence of Kroll and Thompson must be reconciled on this point. Thompson admitted that he was not interested in Kroll initially as Kroll was considered a "non-signer". He answered Kroll's questions but put him off to Bareham. Given this attitude toward Kroll, I conclude Thompson did not pay a great deal of attention to Kroll.

56 Kroll on the other hand was very clear about the conversation. He specifically asked for more information. Kroll testified that Thompson said "this will get you more information". The reference to "this" was signing the membership card. Kroll admitted he did not read the card because he was in a hurry. Kroll did not believe he was signing the card for the purpose of joining the Union. When he realized later he had signed a membership card he immediately sent a letter to the Board in an effort to revoke the card.

57 It is not necessary to conclude whether Thompson intentionally misled Kroll or not. I conclude Kroll signed the membership card with the understanding that it was for the purpose of securing more information and specifically not for the purpose of membership. Given that conclusion, Kroll's membership card will not be considered for the purpose of calculating membership support.

#### D. Inclusion/Exclusion of Thompson, Lavine and Hedley

58 The Union argues that all three individuals should be included in the bargaining unit for purposes of calculating membership support. The Union argues that the proper date for considering membership evidence is the date of the certification application. Certain Employees and the Employer argue that the three individuals resigned shortly after the date of the certification application and therefore do not have a sufficient continuing interest in the bargaining unit.

59 There is no dispute that the test to be applied is whether an employee has a sufficient continuing interest in the bargaining unit. The question is whether there is a specific date on which the test is to be considered. In *Surtek Industries Inc.*, BCLRB No. B109/95 (Leave for Reconsideration of BCLRB No. B346/94), (1995), 27 C.L.R.B.R. (2d) 64, the Board considered the circumstances in which employees would be excluded from a bargaining unit even though they were at work on the date of the certification application:

17. We do not propose to set out an exhaustive analysis as to when the Board will exercise its authority to exclude an employee,

who is at work on the date the Board receives an application for certification. We do propose to set out some general principles that will serve as a guide to the labour relations community.

18. First, a decision to exclude an employee who is working on the date that the Board receives an application for certification, should only be made in exceptional circumstances.

19. Second, we should avoid a policy that will enhance the potential for manipulation of the bargaining unit through employer-initiated action such as layoffs, transfers or firings.

20. Third, to the extent that a decision will not conflict with the second principle above, persons who will not be working in the bargaining unit very shortly after the date that the Board receives the application for certification, should not be included in the bargaining unit. That is because they will not have a sufficient, continuing interest in whether or not the union is certified. By the time the union is certified, if it is, or by the time the unions begins to draft its collective bargaining proposals, those persons will have no interest in collective bargaining between the union and the employer, because they will no longer be working for the employer.  
(p. 68)

60 The specific circumstances in *Surtek* involved individuals who had given notice of their resignation prior to the date of the certification application, but who were still at work on the date of the application. In the case at hand the individuals resigned shortly after the date of the certification application.

61 In other Board cases following *Surtek*, it is not possible to determine whether a consistent approach has been adopted by the Board. In cases where an employee has not been included in the unit due to a resignation, it is not always clear whether the resignation was tendered before or after the date of the certification application. For example, in *Spectra Restaurants Inc.*, BCLRB No. B194/96 (Upheld on Reconsideration in BCLRB No. B55/97), three employees were not included in the unit "given their departure from the workplace either prior to the date of application or within a short period after the date of application" (para. 24). In *Wilpark Foods Ltd.*, BCLRB No. B449/97, an employee whose "employment ceased" the day after the date of the certification application was not included in the unit. In both the above cases it is not clear when the employees tendered their resignations.

62 In *United Used Auto and Truck Parts Ltd.*, BCLRB No. B294/95, the Board addressed a situation where an employer challenged the ballot of an employee after the close of the poll because the employee resigned three days after the poll and therefore lack a sufficient continuing interest in the unit. The Board stated:

In these circumstances, I find Boudreau is entitled to cast a ballot in the representation vote. On the date of the application for certification, as well as the day of the vote, Boudreau had a

sufficient, continuing interest in the unit. There is no evidence he decided to quit prior to the vote, but delayed giving notice until after the close of poll. Unless there is evidence of fraud or other misconduct, an employee who decides to quit and gives notice to his or her employer subsequent to the vote, will not be deprived of the right to cast a ballot. While the Board must ensure those persons included within the voting constituency have a sufficient, continuing interest in the bargaining unit, a line must be drawn at some point to ensure certainty in the composition of the bargaining unit and finality in the Board's proceedings. For obvious policy reasons, the Board would not vacate a certification granted under Section 23(1) of the Code on the ground that a person employed on the date of the application subsequently quit. Similarly, the Board would not cancel the results of a representation vote on the ground that a person who was an employee on the day of the vote subsequently quit. The need to ensure employees who participate in a representation vote have a sufficient, continuing interest in the unit must be harmonized with the need for certainty in the certification process. (pp. 5-6)

63 Likewise, the Board must establish a specific date for the calculation of membership support. The date established for this purpose should be the date of the certification application. Employees in the unit on that date will normally be included in the calculation of membership support. As noted in *Surtek*, one exception is when an employee tenders a resignation prior to the date of the certification application and will not be working in the unit shortly after the date of the certification application. A resignation tendered after the date of the certification application will not affect the calculation of membership support, otherwise, the date for considering membership evidence will be continually shifting. An exception would exist if there is evidence that an employee intended to resign prior to the date of the certification application but withholds the resignation for the sole purpose of being included in the calculation of membership support. Therefore, the proper test for determining membership support is whether the employee has a sufficient continuing interest in the unit as of the date of the certification application. I note that resignations may be verbal, or in writing, as long as the resignation meets the legal requirement of containing the objective and subjective elements.

64 The use of a specific date is consistent with the Board's approach in relation to two other elements of the certification process. First, *bona fide* new hires after the date of the certification application are not included in the calculation of membership support.

65 Second, an employee who may have been included in the calculation of membership support, but who subsequently quits prior to a representation vote, will not be entitled to vote. A *bona fide* new hire after the date of the certification application is not included in the calculation of membership support, but is entitled to vote. The specific date to determine eligibility for voting purposes is the date of the representation vote.

66 Given the above policy I conclude that Hedley and Lavine are included in the bargaining unit for the purpose of calculating membership support. With respect to Thompson, the parties were at odds regarding his resignation date. Even if I accept Thompson's version of events, he submitted his resignation at the end of his shift in the morning of May 13. Thompson submitted the membership cards to the Union after his shift on May 13. The Union filed the certification application on the same day. Thompson tendered his resignation prior to the certification application being filed with the Board. Therefore, he will not be included in the bargaining unit for the purpose of determining membership support.

(iv) Conclusion

67 For the foregoing reasons I conclude that:

1. The Section 9 applications filed by Certain Employees and the Employer are dismissed.
2. I declare that employees, acting on behalf of the Union violated Section 7(1) of the Code.
3. Kroll's membership card will not be included in the calculation of membership support.
4. Rolfe's membership card will be included in the calculation of membership support.
5. Thompson is not included in the bargaining unit for the purpose of determining membership support.
6. Hedley and Lavine are included in the bargaining unit for the purpose of determining membership support.

7. Given the above conclusions the Union has the requisite support for automatic certification. The certification is granted.

LABOUR RELATIONS BOARD

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