

BRITISH COLUMBIA LABOUR RELATIONS BOARD

CANWOOD FURNITURE FACTORY INC.

(the "Employer")

-and-

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS
OF AMERICA, LOCAL NO. 2511

(the "Union")

PANEL: Maria Giardini, Vice-Chair

COUNSEL: Peter Sheen, for the Employer
Casey McCabe, for the Union

CASE NO.: 20874

DATE OF DECISION: December 5, 1994

DATE OF REASONS: January 27, 1995

DECISION OF THE BOARD

I. INTRODUCTION

1 The Union applied for certification for a unit of employees working for the Employer. Its application for certification was filed on November 3, 1994. The issue to be decided in this case is whether membership cards signed August 5, 1994, are valid cards for the determination of membership support pursuant to Section 24(3) of the *Labour Relations Code*. An answer to this question requires a determination of how the 90-day period set out in Regulation 3 is to be calculated.

II. FACTS

2 On November 3, 1994 the Union applied to be certified as bargaining agent for a unit of production employees of the Employer. The unit, as proposed by the Union, was composed of 98 employees and excluded leadhands, maintenance department, office and clerical staff. The Employer raised objections regarding the appropriateness of the proposed bargaining unit. It argued that maintenance department employees and leadhands should be included. The unit said to be appropriate by the Employer consisted of 111 employees.

3 No matter which of these two proposed units was deemed to be appropriate the Union did not enjoy sufficient support in either proposed unit to warrant automatic certification under Section 23(1) of the Code. However, if the cards signed on August 5, 1994 are found to be valid evidence of membership support then the Union has sufficient support to require a representation vote regardless of which of the two proposed bargaining units is found to be appropriate. If the cards are not valid evidence of membership support the Employer's challenge regarding bargaining unit appropriateness must be adjudicated. Accordingly, it was decided that this preliminary issue should be addressed first.

 After reviewing the written submissions of the parties I concluded the membership cards signed on August 5, 1994, were not valid evidence of membership support because they were signed outside of the 90-day period set out in Regulation 3(c). This conclusion was

communicated to the parties by way of a very brief, unnumbered, letter dated December 5, 1994. This decision sets out the positions of the parties and the reasons for my conclusion. It should be noted that after receiving my December 5, 1994, letter the parties resolved the remaining issues and the scheduled hearing became unnecessary.

III. POSITIONS OF THE PARTIES

4 The Union argues that the membership cards signed on August 5, 1994, were valid evidence of membership in the Union. First, the Union argues its application is pursuant to Section 24(2) and the difference in wording between Section 23(1) (the automatic certification provision) and Section 24(2) is significant. The Union argues Section 23(1) specifically requires the Board to be satisfied "on the date it receives an application for certification" that a union has no less than 55% of the employees in the bargaining unit as members in good standing. The Union argues that the same wording is not found in Section 24(2).

5 Section 24(2) makes no mention of the date of receipt of an application but merely states "on an application". The Union submits the legislature clearly intended that, where the level of union support amongst employees is such that automatic certification may be granted, the Board must be satisfied that on the date of the application the union enjoyed sufficient support. However, where a union does not enjoy sufficient support for automatic certification then, argues the Union, the Board has some discretion in determining whether a union enjoys sufficient support to order a representation vote. One of the factors which the Board may consider in exercising its discretion is the timing of the membership evidence.

6 According to the Union, when the Board considers an application which may be granted by automatic certification the cards are, in effect, a substitute for a ballot. Therefore, in such circumstances the Board must be strict in considering only membership evidence on the date of application. However, the Union argues, when the Board considers an application which only results in a representation vote, the Board has more latitude in that it can view the membership evidence as showing general support for the bargaining unit in question. In doing so the Board need not strictly apply the date of application criteria to calculate membership support.

7 In the alternative, the Union submits Section 25 of the *Interpretation Act*, RSBC 1979, C.

206, when applied to the facts in this case, results in the inclusion of the cards signed on August 5, 1994. The Union argues that when Sections 25(1), (3), (4), of the *Interpretation Act* are read together they allow for the calculation of time to begin on August 6, 1994. This would make November 3, 1994, the date of application, the ninetieth day.

8 In summary, the Union submits the Board should not adopt a rigid interpretation in this case. Rather, based on the distinction between an automatic certification and a representation vote, the Board should adopt a more liberal approach. The Union further submits that, where the purpose of the inquiry is to determine whether there should be a representation vote, it is inconsistent with the general policy of the Code (to facilitate collective bargaining) for the Board to adopt a narrow interpretation of the 90-day limit.

9 The Employer argues that the cards signed on August 5, 1994 should be excluded because they fall outside of the 90-day period specified in Regulation 3. The Employer points out that Regulation 3 sets out the minimum criteria for membership in good standing. The criteria include the stipulation that the membership card must be signed within 90 days of the application for certification or, alternatively, active membership must have been maintained by dues payments.

10 The Employer traces the history of the time limits regarding membership evidence and points out that the regulations to the current *Labour Relations Code* set a finite 90-day period to replace the three month policy which had been developed by the Board in its earlier jurisprudence. Accordingly, the Employer argues, the discretion has been taken out of the Board's hands. The Employer submits the starting point for the analysis of Regulation 3 is the date of the application for certification. That date is key because it is the date on which the Board reviews membership support. The Employer, therefore, argues the first day of the 90-day period is the date of the application for certification. Counting back from November 3, 1994, (the date of application) results in August 6, 1994 being the ninetieth day. Hence, the Employer argues, August 6, 1994, is the last day upon which an employee could sign a membership card and still be within the 90-day requirement of Regulation 3.

11 With respect to the *Interpretation Act* the Employer argues Section 25(4) of the *Interpretation Act* is not applicable because the Regulation uses the word "within". Section 25(4) of the *Interpretation Act* only applies to cases where the specific phrases therein set out have been

used. "Within" is not one of the phrases.

12 Section 25(5) of the *Interpretation Act* provides that, in the calculation of time not referred to in Section 25(4), the first day shall be excluded and the last day included. The Employer argues that Section 25(5) is not applicable in this case because Section 2(1) of the *Interpretation Act* provides that provisions of the *Interpretation Act* do not apply where a contrary intention appears in the *Interpretation Act* or in an enactment.

The Employer submits that a reading of the certification provisions of the Code and the Labour Relations Regulation shows the legislature did not intend to exclude the date on which the application for certification was received. The Employer re-states its position that the first day of the 90-day period is the date of the application for certification. If Section 25(5) of the *Interpretation Act* were found to apply, the date of application for certification could not be included in the calculation of the 90-day time period. If this were so then a Union could not apply for certification on the same date on which it signed-up members because those cards would not be considered valid. The Employer notes the latter proposition was expressly rejected in *P.A. Building Maintenance*, BCLRB No. B222/94.

IV. ANALYSIS AND DECISION

13 The issue which I must decide is how the 90-day period set out in Regulation 3 is to be calculated and/or applied. Relying on the difference in wording between Section 24(2) and Section 23(1), the Union argues the Board still has a discretion to decide how to calculate and apply the 90-day limitation. I do not find that argument persuasive. Section 22(3) provides that "membership in good standing in a trade union must be determined on the basis of membership requirements prescribed in the regulations". Regulation 3 provides:

For the purpose of establishing membership in good standing in a trade union where that trade union is making an application for certification, the following minimum criteria apply:

(c) within 90 days of the application for certification,

(i) the membership card must have been signed, or

(ii) active membership must have been maintained by dues payments.

The requirements set out in Regulation 3 are minimum requirements. It is clear, though perhaps not explicitly stated, that "within 90 days of application" refers to the date on which the Board receives an application. There are sound policy and practical reasons why this should be so. The parties and the Board must be assured that there is an objective way of determining the date on which an application is made. The best way of assuring objectivity is to choose the date acknowledged by the Board as the date on which it received the application. Much mischief and uncertainty would result from any other interpretation of the words "within 90 days of the application for certification".

14 The Union's position that a different interpretation should be given to Section 23(1) and 24(2) is unsound because it would require the Board to use different criteria for assessing the date of membership support depending on the degree of membership support obtained by a union. This would mean that the parties and the Board would have no objective way of knowing, in advance, which method would be used by the Board in determining membership support.

15 The legislative changes made to the current Regulation 3 evidence a move from the somewhat flexible three-month rule, previously accepted by the Board and the Industrial Relations Council, to a strict and finite 90-day rule now contained in the legislation. Regulation 3 sets minimum requirements. An interpretation of Regulation 3 or the Code which introduces discretion into this process is clearly contrary to the intent of the regulation. Accordingly, I conclude that any discretion which may have existed under previous legislation does not exist under the current legislation therefore the 90-day period set out in Regulation 3 must be strictly construed.

16 The question which I must now address is how that 90-day period is to be calculated. The Employer based its calculation of the period (therefore its opposition to the application of the *Interpretation Act*) on the assumption that the date of certification is the first day of the time period in question. However, for the purposes of determining the validity of membership evidence I do not view the date of application for certification as being the first day. Rather, I view the date of application for certification as being the last day, in other words, the ninetieth day in the period specified in Regulation 3.

17 The *Interpretation Act* provides as follows:

25.(4) In the calculation of time expressed as clear days, weeks, months or years, or as "at least" or "not less than" a number of days, weeks, months or years, the first and last days shall be excluded.

(5) In the calculation of time not referred to in subsection (4), the first day shall be excluded and the last day included.

The use of the terms "first" and "last" in the *Interpretation Act* implies a chronological order during the period of time specified. It makes no sense to conclude that the date of application for certification is the first day then count backwards in order to determine the ninetieth day in the period. Consequently, having considered Regulation 3 and the provisions of the *Interpretation Act*, I conclude that the date of application for certification is the last day in the 90-day period and should be included in the calculation of time. Given this conclusion, Union membership cards signed on August 5, 1994, do not fall within the 90-day period and cannot be relied on for determining membership support.

V. CONCLUSION

18 When calculating time to determine whether a union has membership support for certification, the date of application for certification is the last day in the period and is included in the calculation of time. In this case, that means that cards signed on August 5, 1994, fall outside the 90-day period. Therefore, those cards will not be counted for the purpose of determining the Union's membership support.

LABOUR RELATIONS BOARD

MARIA GIARDINI

VICE-CHAIR