

BRITISH COLUMBIA LABOUR RELATIONS BOARD

SEARS CANADA INC.

(the "Employer")

-and-

RETAIL WHOLESALE CANADA, CANADIAN SERVICE
SECTOR DIVISION OF THE UNITED STEELWORKERS
OF AMERICA, LOCAL 700

(the "Union")

PANEL:	Laura Parkinson, Vice-Chair Colin Snell, Member Bob March, Member
COUNSEL:	Michael Hunter, for the Employer Casey McCabe, for the Union
CASE NO.:	37367
DATES OF HEARING:	September 15 and October 16, 1998
DATE OF DECISION:	November 27, 1998

REASONS FOR THE BOARD'S DECISION

I. NATURE OF APPLICATION

1 The Union applied for certification of a bargaining unit of employees except
Resource Protection Officers formerly employed at the Employer's outlet store in Delta
and now employed at its outlet store in Burnaby. The Employer raised an objection to
the application on the basis of the imminent build-up in the number of employees with
the opening of the new store.

2 Shortly after the hearing, we issued a brief letter to the parties setting out our
conclusion that the application should be dismissed: BCLRB No. B422/98. These are
the reasons for that decision.

II. FACTS

3 The Union applied for certification on July 23, 1998. The Industrial Relations
Officer's report indicated that as of that date there were 46 individuals on the Tentative
Voter List. The employees on the Tentative Voter List included employees in the
classifications of sales personnel, material handlers, and catalogue and office
administration staff.

4 At the time of the certification application, the Employer was in the process of
closing its Delta store, and relocating it to a new location on Austin Road in Burnaby.
On the date of the application, the employees were still working at the Delta location.
The employees began working at the new location in Burnaby on August 6, 1998 and
the Delta location closed on August 8, 1998. The employees working in the Burnaby
store include those transferred from the Delta store, and those newly hired.

5 The move from the Delta store had been planned for some time. The lease on
the Delta premises had expired, and the Employer continued to lease the premises on
a 6 month extension while it looked for alternate premises. Plans to move to a new
location were approved in March 1998. The actual decision to close the Delta store was
made in May 1998 when the Employer became aware that the Burnaby premises were
available. The Employer obtained possession of those premises on June 1, and
opened the new store in Burnaby on August 6, 1998.

6 Part of the reason for the move was that the Employer determined there was a
need for more outlet stores to handle the amount of distressed goods it accumulates.
An "outlet store" differs from the other retail stores run by the Employer which handle a
full line of retail goods. Outlet stores handle excess merchandise from the catalogue
sales inventory when sales projections fall through. They also carry other types of
distressed goods that have been returned. The Employer decided to realign the floor
space at the new Delta outlet store to accommodate the greater volume and different
types of distressed goods it has for sale.

7 The new store in Burnaby is in a more central location bordering on three municipalities; that location has more than doubled its potential customer base in terms of the number of households in the surrounding market area. The parking and access to those premises is superior to the old premises.

8 The new premises in Burnaby are approximately double the size of the former Delta store. It is able to handle more merchandise with its greater floor space and its larger loading dock. Now 80% of the store's inventory is out on the floor, as opposed to 20% in the past. The proportion of "hard goods" to "soft goods" has changed in the new store. (Hard goods, or hard line goods as they are also described, are items such as furniture, appliances and electrical goods; soft lines include such goods as apparel and other fashion items). By their nature, soft goods are more labour intensive as there are more pieces to tag and to display, and more handling is required to maintain an attractive and orderly presentation.

9 The amount of apparel now carried in the Burnaby store has increased significantly. The amount of floor space dedicated to apparel is now 70% as opposed to 40% in the old store. There are now more racks in menswear in the new store than there were racks in the whole of the old location. There were between 150 and 170 store fixtures for fashions in Burnaby; there are 500 fixtures in the new store.

10 Since the new outlet store in Burnaby opened, there has been an increase in the volume of business done. In the first three weeks of its operation, the new outlet store in Burnaby showed a 78% increase over the previous year's figure for the same month to date. Sales from August through to mid-October showed an overall 67% increase in sales compared to sales in the Delta store for the same period. The fourth quarter of the year, beginning in September through to December, is the busiest season for retail stores, and places the highest demand on staffing levels.

11 Evidence was led about the equivalent staffing at other outlet stores across the country with comparable projected sales. The Brampton, Ontario store with past sales of 12.5 million dollars had a staffing level of 79 employees in 1997. The Kenmore store in Toronto was also used as a benchmark in estimating the number of employees required for the Burnaby outlet store. With net sales of 18.7 million in 1997, it employed 129 employees with a majority of those being part-time employees. (The exact portion of part-time employees and the hours they worked at the Brampton store, however, was not known.)

12 Based on that experience, the Employer determined that 60 to 70 employees would not be enough to accommodate the projected 18 million dollars in sales at the new outlet store in Burnaby. The decision on the actual numbers of staff required was made by Ray Wojtas, the Manager of the Burnaby store, in consultation with Roger McMillan, the Field Manager for Outlet Stores for the Employer.

13 Wojtas determined initially that the store would need 30 or so more people. His rough calculation of 32 additional staff required was based on the gross sales expected. He worked backwards from the figure of 18 million dollars of projected sales, and

figured out what was required per week in the store by calculating the total number of staff hours in each department based on the number of hours a week the store was open. He used a figure at 24 hours a week for each employee.

14 In arriving at his estimate, Wojtas followed the guideline that payroll should not represent more than 10.5% of net sales. A Union witness, Cathy Wright, who had formerly been an acting Manager of the Delta store on an informal and temporary basis, quarreled with that ratio. She testified that the figure used in the past to determine staffing levels was the rule that payroll was not to exceed 10% of net sales.

15 On July 9, at the request of McMillan, Wojtas revisited his earlier estimates and determined that 28 additional staff were required beyond the 32 already forecasted. That revised figure was arrived at based on the projection of expected sales, the increased customer base and the larger square footage. Wojtas went through each department and calculated the number of staff required and ended up with a total figure of 60 new hires, using an average number of hours of 27 hours per person.

16 Recruitment for more staff began in early July. Ads for more workers were placed in local newspapers beginning on July 5. After a screening process, interviews were held between July 20 to July 23. Twenty-five employees were hired at this time, and these new hires began reporting for training on July 28 and 29 at the new facility in Burnaby, which was not yet open to the public.

17 To get the new premises ready, the Employer used the services of a temporary employment agency to supply some workers during this start-up phase; it also used some employees on loan from the Coquitlam store to help out at this point.

18 On August 7 a hiring plan to engage more workers for the outlet store was approved. On August 12 another ad was placed seeking applications for employment for the new outlet store. Twelve more employees were hired with staggered start dates ranging between August 18 and 31. The ad for more workers was rerun on August 30. Eleven more employees started on September 14, and twelve more on September 15 for a total number of new hires of 60, with a complete employee complement of 106 by the middle of September 1998. The Employer had 103 employees within the scope of the proposed bargaining unit on September 29. As of October 13, it had 107 employees. Included within those figures were some individuals on long term disability benefits, maternity leave and possibly vacation (although there was an evidentiary dispute as to whether those on vacation were listed on the schedule or not; earlier schedules did show employees on vacation).

19 The new hires at the Burnaby store worked in both of the general classification categories of sales and material handling. There were no new hires on the catalogue and office administration side.

20 Almost all the employees at both the new and old store were part-time. Only 4 employees within the scope of the proposed unit at the Delta store worked full-time. The average number of hours worked in the pay period ending July 25 was 29.1 hours.

In subsequent pay periods for the weeks ending October 3 and October 10, the average dropped to 26.5 hours. However, the 29.1 hours a week figure was for the period immediately before the move when work demands were higher than normal given the packing required to move the stock.

III. POSITIONS OF PARTIES

21 The Union maintains that the application should not be dismissed on the basis of the build-up principle as the 46 employees employed at the time of application were a representative sample. The same classifications in the Burnaby store remain as were in the Delta store. An increased volume of business does not result in any qualitative change. The Union argues that qualitatively and quantitatively the two stores are similar, with the same classifications of employees in both stores and the same basic line of goods.

22 The Union submits that the 50% rule usually applied under the build-up principle can be tempered by circumstances: *Noranda Mines Limited*, BCLRB No. 26/82, [1982] 2 Can LRBR 475, at p. 486. The Union notes the difficulty in "pigeonholing" the retail industry into the case law developed in the context of construction and other production facilities. The Union argues that the staffing formulas used by the Employer are comprised of variables which depend on fluctuations in consumer demand. Those market forces in the retail industry are beyond the control of the Employer. It maintains that there are too many variables in the retail industry to apply the build-up rule in a mechanical fashion, and the evidence is too speculative.

23 Lastly, the Union argues that the Employer is attempting to inflate the number of employees to defeat the application for certification. It notes that the same number of total hours of work can be accomplished by dividing up work between more employees working fewer hours.

24 The Employer argues that the Board is not asked to deal in speculation as it has evidence before it of the actual numbers employed. The Employer says that the 46 employees are fewer than half of the roughly 105 employees by the end of September, and the Board has never granted a certification in the face of a build-up objection where less than 50% of the total employee complement was employed as of the date of application. The Employer says that result illustrates the basic majoritarian principle underlying the Code that the choice of representation should be made by the majority of the employees.

25 In support of its further argument on a qualitative change in the operations, the Employer points to the significant change in the type of merchandise and its increased emphasis on soft goods as well as the larger amount of merchandise in the new store.

26 The Employer says that the evidence refutes the Union's allegation that it is "stacking" the list, but also objects to the Union advancing this argument when that suggestion was never put to its witness.

IV. ANALYSIS

27 The factors the Board considers in applying the build-up principle are:

- (i) the nature of the employer's operations;
- (ii) the imminence and certainty of the build-up;
- (iii) the nature and degree of the build-up; and
- (iv) the representative character of the existing employees

28 Under the first factor of the nature of the operation, we address the Union's submission that the build-up principle should not apply to a retail operation. Although the build-up principle may more commonly arise in an industrial operation with a pre-production phase, the same issues may arise in a retail store. The build-up principle has been applied before in the retail industry in strikingly similar circumstances in *Overwaitea Food Group*, BCLRB No. B124/93. While there may be differences in the industries, some cases may have similarities that invoke the rule. There may be cases, such as the present, where there is a significant increase in a relatively short period of time as a store becomes fully operational; to that extent, a retail store in the course of an expansion is akin in some sense to a business undergoing an initial start-up phase, such as may be found in mine construction.

29 Under the next factor of imminence and certainty of the build-up, the Board looks to see if the plans for the work force expansion are firm, rather than speculative. The Board does not always accept at face value the staffing estimates provided; it examines the projections for their consistency with the probabilities surrounding existing conditions to see if the estimates are accurate or inflated: *Great Canadian Casino Company Ltd.*, BCLRB No. B181/97, at paras. 21 and 26.

30 We find the build-up here is neither speculative nor uncertain. This case is unlike others when the Board is asked to rely chiefly on subjective predictions of an employer of its expected employee complement without any objective evidentiary base. Due to the scheduling of the hearing and its continuation, events have overridden the usual relevance of this factor. The predictions at the original certification hearing were borne out, and what was anticipated has taken place. Hiring of more staff has occurred, and employment begun by the time the matter was heard.

31 On the nature of the build-up, this is not a case where the increase in the work force is due to seasonal fluctuations inherent to the industry. It is a one time increase in the size of the staffing to accommodate the increased size of the premises and the expansion of the business; the size of the work force is likely to remain static after that initial flush of hiring, at least until the end of the fourth quarter. That expansion of the work force is significant and the jobs created are permanent.

32 Under the remaining factor, the build-up principle requires the Board to look to the composition of the work force in terms of the numbers and classifications to

determine if the employee complement on the date of application represents a substantial segment of the work force to be employed in the near future.

33 We agree with the Union that the qualitative element has been met. There is no change in employee composition in terms of classifications, only in the absolute numbers. The classifications of cashier, sales associates, receiving personnel, catalogue sales and office administration staff were present at the old store, and remain at the new store. No new classifications were hired. The nature of work performed is the same by both groups of old and new hires. To that extent, the employee group at the time of application was representative of the range of classifications that would ultimately remain.

34 Although there is a representative sample of classifications, the real issue in this case is whether a sufficient number of employees is found. The Employer relies heavily on the argument that the build-up principle prevents certification where less than 50% of the total ultimate work force is represented. The Employer overstates to some extent the rule and its rigour. Normally, the Board will not entertain an application for certification until the employees present number more than half of the full anticipated complement, and all or most of the classifications contemplated are represented: *B.C. Coal Ltd.*, 36/82, [1982] 3 Can. LRBR 177. In its application, the rule usually requires more than 50% of the full complement of employees, but exceptions may be allowed. For instance, where the increase in the number of employees hired will not be permanent, the build-up principle may not apply with the same force, even where the employee complement is somewhat less than one-half of the ultimate complement: *Kingfisher Sales Inc.*, BCLRB No. 73/86, at p. 6.

35 We agree with the Union's submission that the application of the build-up principle should be flexible. The Board retains a discretion in its application, and does not apply the rule in rote fashion: *Overwaitea, supra*; and *Weyerhaeuser Canada Ltd.*, IRC No. C150/89 (Reconsideration of C112/89). The combined effect of other factors, such as the relative impermanence and the speculative nature of the increase, may prevail over the 50% rule of thumb.

36 The facts in this case present a close call. When faced with a set of hard facts, we must weigh the competing interests against the policy rationale for the rule, and consider the objects of the legislation in encouraging collective bargaining with a "freely chosen representatives of employees". The purpose of the rule is to ensure the choice of union representation is made by a majority of a representative sampling of the work force. The build-up principle is grounded in the concern for the potential interest of future employees to have a say in the choice and exercise of representational rights, Disenfranchisement of a major portion of bargaining unit is the mischief at which the policy is aimed: *Kingfisher Sales, supra*.

37 On these facts, we are required to balance the interests of both present and future employees - on the one hand, the right of current employees to obtain certification, and on the other, the right to future employees to have a say in the choice of bargaining rights: *Overwaitea, supra*. When faced with a case on the margin of the

50% threshold, we decide to err on the side of ensuring that the choice of bargaining agent is the choice of a majority of the employees ultimately working. While the 50% rule is not absolute, it is one of the most critical factors: *Weyerhaeuser Canada, supra*.

38 We find the 46 employees employed on the date of application did not represent a substantial enough segment of the work force to be employed in the near future. That number fell below the 50% rule of thumb, with the precise number varying as the employee count fluctuates depending on the precise date of assessment in September or October. However, under either assessment, the number is below 50% of the eventual employee complement. When assessed against the permanence of the build-up, we find that deficiency to be fatal to the application. That result may be perceived by some as arbitrary, and as thwarting the wishes of the existing employees for representation, but the scheme of the legislation is by design a numbers-based system under which proof of threshold membership support is required for certification.

39 As a closing observation, we also add that we have remained alive to the Union's suggestion of manipulation of the hiring practices. We have not overlooked the Union's argument that the hiring of the new hires was a deliberate move to stack the Voter's List, but we found no proof of that allegation. Although the Union did not file any unfair labour practice complaint over the hiring of the new staff and the assignment of work, it invited us to review the evidence with a skeptical eye. In theory, there is merit in the Union's observation that the number of staff hired is a function of how the Employer divides the hours among the total number of staff hired. Had there been more dramatic variations in the average hours worked per week, there may well have been some basis for skepticism. But, the facts here allay any such suspicions we might have had. Recruitment was underway before the Union's organizing campaign was made public by the filing of the application for certification. The change in premises, with the increase in size and the expansion of the new store's operations, resulted in a large increase in the number of employees. The demands of increased sales lead as predicted to the need to hire more workers; the justification for hiring more workers was the expansion of the business and the move to bigger premises with sales targeted on more labour intensive items. There was no suggestion in the evidence that the new hires remained idle while at work so that there was insufficient work to justify their hiring. Had there been such evidence, our conclusion may have been different.

V. CONCLUSION


40 We dismiss the application for certification as premature under the build-up principle. The existing employees at the date of application were representative qualitatively of the eventual employee complement, but are not representative in quantitative terms. The expansion of the work force that occurred shortly after the application was both permanent and significant.

LABOUR RELATIONS BOARD

LAURA PARKINSON
VICE-CHAIR

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COLIN SNELL
MEMBER

A handwritten signature in black ink, appearing to read 'Bob March', written in a cursive style with a long horizontal line extending to the right.

BOB MARCH
MEMBER