

BRITISH COLUMBIA LABOUR RELATIONS BOARD

CUSTOM GASKETS LTD.

(the "Employer" or "Custom Gaskets")

-and-

INTERNATIONAL ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, AUTOMOTIVE LODGE NO. 1857

(the "Union")

PANEL: Kate Young, Vice-Chair

COUNSEL: Michael Hunter, for the Employer
Melvin Woods, for the Union

CASE NO.: 14381

DATE OF HEARING: March 17, 1993

DATE OF DECISION: March 29, 1993

DECISION OF THE BOARD

I. APPLICATION

The Union applies for certification under Section 23(1) of the *Labour Relations Code*, claiming the support of not less than 55 percent of the employees in the bargaining unit.

The Employer objects, saying that two employees are employed on a casual or temporary basis, and should therefore not be counted when calculating the percent of Union membership support. The exclusion of these two employees from the calculation of membership support results in the Union having less than 55 per cent of the employees in the unit as members in good standing.

II. FACTS

Custom Gaskets manufactures and distributes gaskets, foam products, and stainless steel shims. On the production side the Employer employs approximately fifteen individuals who operate machinery and package the product.

Custom Gaskets recently introduced a new shim product line. One customer for this product placed a substantial fixed advance order. Because of its assured market for the product, the Employer expects to develop an automated production line. This new, automated system will take at least three weeks to develop. Once the automation is complete, Custom Gaskets will require two employees to operate the production line.

During this start-up period, Custom Gaskets requires additional employees to assist on the production line. Robin Haluska started work the morning of March 9, 1993. Another person, Jason Lilley, commenced work at 12:30 p.m. on the same day.

When Haluska and Lilley started work, they were told they would be hired on a part time basis to perform work on a specific project: the new, experimental production line. They were told there were no guaranteed hours, and they would be employed on an "as needed" basis.

Other employees work a regular forty hour week, and are neither part time, nor casual or temporary.

Haluska and Lilley packaged the shims for shipping. They worked the balance of March 9, and full eight hour shifts for the rest of the week, March 10 to 12.

The Union applied for certification on March 11, 1993. On Monday, March 15, Haluska and Lilley worked a full eight hour day. On March 16, at 2:00 p.m., Haluska was advised that there was no further work for him to do, and that he could stay until the end of the shift. Haluska voluntarily left mid-day on March 16. Ken Schuler, the Production Supervisor, testified Haluska would be called back on an "as needed" basis but that at this point, he believes the Employer may only need one additional person in this position, and Haluska will likely not be recalled. Schuler expects Lilley will work only a couple of days per week for the next three weeks, and will not be required further.

Ronald Wilkinson, the Assistant General Manager, confirmed Schuler's testimony and said that two existing employees will be able to perform all the work required on the production line after automation.

The work performed by Haluska and Lilley is not of a markedly distinct nature to that performed by other employees. Other employees package product, and perform similar work. Although Haluska and Lilley are paid a lower hourly rate than others, they, like other employees, are paid on the basis of hours worked. Some other employees have little training for their jobs, and Haluska and Lilley are not distinguishable from the remainder of the bargaining unit on the basis of their training.

III. POSITIONS OF THE PARTIES

Custom Gaskets says Haluska and Lilley are casual, occasional employees who do not have a sufficient continuing interest in the bargaining unit to be included in the employee complement for the purpose of determining whether the Union has 55 percent of the employees signed up as members in good standing. The concern of Custom Gaskets is that casual employees should not be in a position to determine whether the unit will be automatically

certified, and that it is the full-time regular employees who are entitled to make this decision.

In the alternative Custom Gaskets seeks an order under Section 24(1) that a representation vote be held, arguing it would be unfair for automatic certification to be granted on the basis of membership cards signed by casual employees.

The Union responds that Haluska and Lilley are employees who work eight hours a day, just like other employees. The Union says they may be hired permanently to take a position if someone quits, and that as a general policy casual employees are entitled to be counted.

The response of Custom Gaskets is that mere employment status is not enough for the purpose of calculating membership support.

IV. FRESH EVIDENCE

Subsequent to the conclusion of the hearing, Custom Gaskets sought to place before me an additional fact: Lilley resigned from his job on the morning of March 18. The Union objects to the panel considering this fact. An adjudicator has a discretionary power to allow new evidence to be entered after the conclusion of a hearing. Slightly different tests have been proposed as to when such evidence should be admitted: *Hospital Employees' Union v. Peach Arch Hospital* (1989) 57 D.L.R. (4th) 386 (BCCA); M. Gorsky, *Evidence and Procedure in Canadian Labour Arbitration* (1981), at p.238; *Re Federated Co-Operatives Ltd. & I.W.A. Local 1-417* (1985) 19 LAC (3d) 318 (Vickers).

It is unnecessary in the circumstances before me to determine precisely the appropriate test to apply. It is my conclusion that the additional fact sought to be relied upon by Custom Gaskets would have no effect upon my decision. I therefore exercise my discretion to rule that Custom Gaskets may not reopen its case to place this further fact before me. Lilley's resignation subsequent to the hearing has no relevance to my determination that as of the date of the filing of the application, he was a temporary employee with no continuing interest in the union representation issue.

V. ANALYSIS AND DECISION

Haluska and Lilley were hired on March 9, two days before the filing of the application for certification. They were told their employment would be on an "as-needed" basis, that they would be working on a specific project, and that there was no guarantee of hours or length of employment. The work the two have been employed to perform is for a short-term project. Custom Gaskets expects neither employee will be required after the automation of the system, in three to four weeks. Haluska has already been laid off and may not be recalled. Lilley will likely reach the conclusion of his employment within the next three to four weeks. Haluska and Lilley are temporary, casual employees. The evidence proffered by the Employer on this issue was neither challenged nor contradicted by the Union.

Haluska and Lilley, despite the short term, casual, nature of their employment, are employees: *Edoco Healey Technical Products Ltd.*, BCLRB No. 81/79, [1980] 1 Can LRBR 570; *Hertz Canada Ltd.*, BCLRB No. 304/86. The Employer here does not challenge the inclusion of the two employees in the bargaining unit, and makes no assertion that Haluska and Lilley lack a community of interest with the full-time employees. But, inclusion in the bargaining unit does not necessarily result in an employee having a voice in deciding whether a bargaining unit will be certified.

The jurisprudence of the Board and the Council is well developed on the issue of who is entitled to be included when determining whether a union has sufficient membership support for an application for certification. Employees who have a sufficient continuing interest in the issue of union representation are entitled to be included in calculating union support. The sufficient, continuing interest test was affirmed by the Council in *Superior Contracting Ltd.*, IRC No. C313/88. The Council stated in part:

After carefully reviewing the submissions of the parties, the Panel is satisfied that it is appropriate to continue the Board's policy of using the "sufficient, continuing interest" test to calculate membership support and to determine eligibility to cast a ballot in a representation contest. It is our view that the "sufficient, continuing interest" test respects both the legislative scheme and labour relations policy. Because the test requires the adjudicator to consider a variety of factors and the context in which the issue arises, we find the Unions' fears of inflexibility and hardship are unfounded. (p. 7)

Employees who are not working on the date an application is filed may be found to have a sufficient continuing interest in the bargaining unit so as to justify their inclusion in the unit for the purpose of calculating membership support: *Western Canada Steel Ltd.* BCLRB No. 79/75, [1976] 1 Can LRBR 25. Conversely, persons who are employees on the day an application for certification is filed may be excluded from the calculation of union membership support. This occurs when an employee does not have a sufficient interest in the outcome of a representation question to justify including her or him when calculating majority support. An employee absent from work as a result of a permanent, disabling illness will not be counted for the purpose of ascertaining membership support, where the Board is satisfied that the employee has an insufficient continuing interest in the representation question: *Canon Optics & Business Machines Ltd.*, BCLRB No. 80/79, [1980] 1 Can LRBR 327; *British Columbia Housing Management Commission*, IRC No. C2/93.

A decision to exclude an employee, working at the time a certification application is filed, from the calculation of membership support, will not be made lightly. Section 4(1) of the Code guarantees to all employees the right to participate in the lawful activities of a trade union. Balanced against this is the recognition that the employees who will enjoy the advantage, and bear the cost, of union representation should determine whether a union will represent them.

This is not an industry which employs exclusively temporary or seasonal employees. Haluska and Lilley have a very different employment relationship than that of other employees. They are employed for a term certain, and will undoubtedly not be working under any collective agreement negotiated by this Union. I find that they do not have a sufficient continuing interest in the representation question to be counted in calculating the Union's membership support.

VI. CONCLUSION

As a result of the exclusion of Haskula and Lilley, the Union has failed to establish sufficient membership support to be granted an automatic certification under Section 23(1) of the Code. I am satisfied, however, that not less than 45 percent of the employees in the unit are members in good standing of the Union.

On March 19, 1993 I ordered a representation vote be held, with the ballots of Haluska and Lilley individually sealed, and the ballot box sealed, pending the adjudication of this matter. I now order that the ballot box be opened, and the ballots counted. Any ballot(s) cast by Haluska and Lilley shall not be counted.

LABOUR RELATIONS BOARD

KATE YOUNG
VICE-CHAIR