File No.

Decision No.
08-007

IN THE MATTER OF

AN UNFAIR LABOUR PRACTICE COMPLAINT

BETWEEN:

THE UNITED ASSOCIATION OF PLUMBERS AND PIPEFITTERS, LOCAL 721

APPLICANT

AND:

MR. PLUMBER BLAIR LAPIERRE INC.

RESPONDENT

DECISION

BACKGROUND

On the 7th day of April, 2008, the Prince Edward Island Labour Relations Board (hereinafter referred to as the Board) received an Application for Certification from the United Association of Plumbers and Pipefitters, Local 721 (hereinafter referred to as U.A. Local 721) being Application Number 08-006. The Application for Certification was filed pursuant to Section 54 of the Labour Act, R.S.P.E.I. 1988, Cap. L-1 (hereinafter referred to as the "**Labour Act**"), which section is commonly referred to as the Construction Industry Provisions.

The Board issued its decision on the 21st day of April, 2008, denying the Application for Certification on the grounds that there was no majority support.

U.A. Local 721 then filed an Unfair Labour Practice Complaint (Application Number 08-0007), dated the 11th day of April, 2008 against the employer, Mr. Plumber Blair LaPierre Inc. (hereinafter referred to as the Respondent). A response to the Unfair Labour Practice was filed by the Respondent on the 22nd day of April, 2008.

The Unfair Labour Practice Complaint outlined the issues complained of in Section 4 thereof which is reproduced below:

> 4. *The following is a concise statement of the nature of each act or omission complained of:*
>
> (a) *The Respondent issued R.O.E.'s to five employees who did not state to the employer that they quit. The Complaint is alleging that this action by the Respondent happened because of the organizing campaign started by the union on the 4th day of April, 2008.*
>
> (b) *During the course of the organizing campaign the employer (Respondent) had a meeting with the five particular employees on Friday, the 4th day of April, 2008.*
>
> (c) *On Saturday, the 5th day of April, 2008, the employer (Respondent) requested one or more of the affected five to work on Saturday, the 5th day of April, 2008.*
>
> (d) *On Monday, the 7th day of April, 2008, one of the employees phoned in sick, one was on vacation and the remaining three reported to work and the employer (Respondent) stated come back on the 8th day of April, 2008 for work.*
>
> (e) *On the 8th day of April, 2008 four of the employees affected reported to work. The employer (Respondent) issued R.O.E.'s stating quit on the form, the workers refused to accept the R.O.E.'s with quit on the form. The fifth worker was on paid vacation, the last day of work would have been Friday, the 4th day of April, 2008.*

The Unfair Labour Practice Complaint requested the following relief:

> 6. *State remedy requested*
>
> (a) *Direct the Respondent to reinstate the five employees on a retroactive basis starting the 7th day of April, 2008 and compensate them for all remuneration and benefits missed during the period until return to work.*
>
> (b) *Cease and desist from unlawful acts, contrary to Section 10 of the Labour Act.*
>
> (c) *Direct the Respondent to pay to each employee forced to quit the sum of wages or salary or other remuneration lost by the employee by reason of the employer's violation of Section 10 of the Labour Act.*
>
> (d) *Allow for automatic certification of Mr. Plumber as per the Application by the United Association Local 721.*

As required by the *Labour Act* and the Regulations made thereunder, the Unfair Labour Practice Complaint was duly sworn to by Ray McBride representing UA Local 721.

The response of the Respondent to the Unfair Labour Practice Complaint was received by the Labour Board on the 22nd day of April, 2008. It was sworn to by Blair LaPierre, the owner of the Respondent and it indicated in part the following:

> *1. Records of Employment were issued to five employees who had quit their employment on Thursday, April 3, 2008. Those employees are Leo Doucette, Chris Devens, Michael Doucette, Paul Milligan and Travis Outhouse.*
>
> ...
>
> *4. That I am advised and do verily believe that all of the named employees left the workplace without approval from their supervisor or manager at approximately 7:45 a.m.*
>
> ...
>
> *9. Following this Leo Doucette called Grant Smith at approximately 2:00 pm., I did speak with him at this time and reiterated my offer to meet with them individually. He refused, demanding a group meeting. I stated that given his actions I believed he had quit and that his ROE would be ready in due time.*
>
> ...
>
> *11. That during the evening of Thursday, April 3, 2008 I attempted to speak with the other individuals (having spoken with Leo Doucette earlier in the day) and let them know that "if you don't show up for work in the morning I can only assume you have quit".*
>
> *12. The individuals did not report ready for work Friday morning at their usual time, nor did they seek return of their keys, the truck, their cell phones, time cards or work assignments. The usual time for the workers to arrive is between 7:15 a.m. – 7:30 a.m.*
>
> *13. At on or about 8:15 am Friday April 4, 2008 I received a phone call from Michael Doucette indicating that he was not coming in but that he did not quit. I replied that I had already assumed that he had quit. At no time did he indicate that he was involved with the Union.*
>
> *14. At approximately 8:30 am on Friday April 4, 2008 Leo Doucette called and requested a meeting, I agreed. During the meeting I reiterated that as far as I was concerned he had quit and his record of employment was being prepared. Shortly after that I had the same meeting with Michael Doucette, Chris Devens and Travis Outhouse. At no time did any person indicate that the Union was in an organizing campaign, nor did any individual indicate that they had met with Union officials to explore Union representation. I had no knowledge, nor any reason to believe, that the Complainant Union was in an organizing drive. The first contact I had from the Union was through a call from Roy Doucette of the Labour Relations Board on Thursday April 10, 2008, eight days after the quits, indicating that an application for certification had been filed with the Complainant Union.*

15. *During the meetings on Friday, April 4, 2008 I reiterated to all individuals that by their actions they had quit and that I would be hiring and they could submit an application but I wasn't making any commitments. That I did have a conversation with Paul Milligan regarding a Trade Show that was booked for Saturday April 5, 2008 but advised that I couldn't talk about that at this time. If he wanted to talk about the Trade Show he could return after he had his ROE and was in a position to reapply. Milligan did call later in the day and asked about the Trade Show, I advised that I had cancelled our participation in the Trade Show. Also on Friday evening, Travis Outhouse contacted me regarding work. I advised that he could reapply, but I had not made any decisions.*

16. *That I did not request any of the individuals to work on Saturday, April 5, 2008.*

17. *That on Monday, April 7, 2008 I am advised and do verily believe that Leo Doucette called Grant Smith on his cell phone to say that he was sick. Chris Devens and Paul Milligan showed up at the work place. I had advised the Supervisor, Mark MacAdam that the service calls had been cancelled because they had quit on Thursday, April 3, 2008. Devens and Milligan then left. Outhouse came into the office to see me and I advised that the ROE's were being prepared, he then left. Shanna Carter called each of the individuals on Monday and left a message for each one to call her. She had prepared the ROE's and was wanting them to come by and pick them up. At no time did the Employer contact these individuals to report to work.*

18. *On Tuesday, April 8, 2008 three of the employees Leo Doucette, Paul Milligan and Chris Devens arrived around 8:00 am. I hand delivered the ROE's to them at that time, also enclosed were the final pay cheques and asked them to leave the property. They left the property but did not take their record of employment with them. At no time did any of the individuals mention the Union, or that they were meeting with Union officials for any reason.*

19. *That there have been continuing business losses as a direct result of the actions of these individuals on Thursday, April 3, 2008.*

20. *That the last day worked by the named individuals was Wednesday, April 2, 2008.*

21. *That hiring ads were placed with the media on April 10th, 11th, and 12th 2008, a full week after they quit.*

22. *That I had no knowledge of a Union organizing campaign throughout this period.*

The hearing respecting the Unfair Labour Practice Complaint convened on the 14th day of July, 2008, but was adjourned on that date to allow UA Local 721 sufficient time to subpoena additional witnesses. The adjournment was granted by the Board on the proviso that the delay between the 14th day of July, 2008 and the resumption of the hearing would

not be factored into any remedy which could be awarded against the Respondent. The hearing reconvened on the 17th day of September, 2008, continued on the 18th day of September, 2008 and concluded on the 2nd day of October, 2008. Written submissions were received from the Respondent at the hearing.

CASES CONSIDERED

a) *Hainsworth v. World Peace Forum Society*, [2006] BCSC 809 (B.C.S.C.)
b) *Danroth v. Farrell Holdings Ltd.*, 2005 BCCA 593 (B.C.C.A)
c) *Pollock v. First Heritage Financial Planning Ltd.*, [2002] BCSC 782 (B.C.S.C.)
d) *Coleman v. Sobeys Group Inc.*, [2005] NSCA 142 (N.S.C.A.)
e) *Ehmcke v. Penetang Bottling Co.* (1992), 41 C.C.E.L. 251 (Ont. Gen. Div.)
f) *Polo v. The City of Calgary* (1992), 44 C.C.E.L. 257 (Alta. Q.B.)
g) *Rajput v. Menu Foods Limited* (1984), 5 C.C.E.L. 22 (Ont. H.C.)
h) *Hedges v. CAWCanada,* [1996] 2 P.E.I.R. 189 (P.E.I.S.C.T.D.)
I) *C.J.A. Local 579 v. Northland Contracting Inc.* (2006), 261 Nfld. and P.E.I.R. 256 (Nfld.S.C.A.D.))
j) *McKinley v. BC Tel* (2001), 2 S.C.R. 161 (S.C.C.)
k) *Henry v. Foxco Limited,* [2004] NBCA 22 (N.B.C.A.)
l) Mik v. 298153 Ontario Ltd. (c.o.b. Castelli Bakery), [1994] O.J. No. 1121 (Ont. Gen. Div.)
m) *Hey-Way'-Noqu' Healing Circle for Additions Society (the "Employer" or "Society"), and B.C. Government and Service Employees' Union (the "Union"),* [1995] B.C.L.R.B.D. No. 469 (B.C.L.R.B.)
n) *R.B.A. Canada Inc. (Re)*, [1997] B.C.L.R.B.D. No. 292 (B.C.L.R.B.)

STATUTES CONSIDERED

a) *Labour Act,* R.S.P.E.I. 1988, Cap. L-1

TEXTS CONSIDERED

a) England, Christie and Christie, Employment Law In Canada (3rd Edition) paragraph 13.12

b) George W. Adams, Canadian Labour Law, Second Edition, looseleaf (Aurora, Ont: Canada Law Book, June 2008)

EVIDENCE

UA Local 721 presented evidence from seven witnesses, all employees of the Respondent, namely Paul Milligan, Chris Devens, Michael Doucette, Leo Doucette, Kent Mitchell, Darren MacDonald and Travis Outhouse.

The Respondent presented evidence from four witnesses, namely Mark MacAdam, Shanna Carter, Grant Smith and Blair LaPierre.

ISSUES

The issues that are to be considered and decided by this Panel of the Board are listed as follows:

1. Did the employees, Paul Milligan, Leo Doucette, Michael Doucette, Travis Outhouse and Chris Devens (the employees) voluntarily quit their employment?

2. If any or all of the employees did not voluntarily quit their employment, did the Respondent commit any of the acts alleged in the Unfair Labour Practice Complaint, namely:

   (a) Did the action happen because of an organizing campaign?
   (b) Did the Respondent meet with the employees during the organizing campaign?
   (c) Did the Respondent request one or more of the employees to work during the organizing campaign?

FACTS

Five employees of the Respondent, namely Michael Doucette, Leo Doucette, Chris Devens, Travis Outhouse and Paul Milligan showed up for work at the Respondent's place of business on the morning of Thursday, the 3rd day of April, 2008. One of the employees discovered that the door to the shed where the employees normally congregated before work was locked. One of the employees, Leo Doucette, went into the office and confronted one of the supervisors, Mark MacAdam, and questioned the reason for the locked shed door. Mark MacAdam indicated to Leo Doucette that he did not know why it was locked and if Leo Doucette did not like it, he could go upstairs and talk to management or go home. Leo Doucette walked back outside, discussed the situation with the four other employees and all

of the employees left the premises and went to Michael Doucette's house. After going to Michael Doucette's residence, Paul Milligan called the Respondent and spoke to Grant Smith. Mr. Milligan asked for a group meeting between the employees and the owner of the Respondent, Blair LaPierre. Mr. Smith indicated he would speak to Mr. LaPierre and get back to Mr. Milligan.

Later in the morning, Grant Smith phoned the employees and indicated that Mr. LaPierre wanted all the "property" returned to the shop within an hour. The employees turned in their keys, their cell phones, their trucks and everything that belonged to the Respondent. Later that same day, the employees returned their time cards for the day in question which were not due until the following week. The employees were told that Mr. LaPierre was willing to hold one on one meetings with the employees, but not as a group. The owner of the Respondent, Blair LaPierre then attempted to contact each employee individually to tell them that if they did not show up for work on Friday, they would be deemed to have "*quit*".

Employee, Paul Milligan, had been employed with the Respondent for approximately 6 months and was a single parent with 3 children, 6-year-old twin boys and one 10-year-old daughter. Mr. Milligan testified that Mr. LaPierre came to his home on Thursday evening, the 3rd day of April, 2008 around 6 p.m. and advised Mr. Milligan that if he was not in on Friday morning, he would be deemed to have "*quit*". Mr. Milligan told Mr. LaPierre that nobody was quitting and that Mr. Milligan wanted to resolve some issues and get back to work.

Mr. Milligan met with Mr. LaPierre at approximately 10:45 Friday morning, the 4th day of April, 2008. During the meeting, Mr. LaPierre and Mr. Milligan discussed the home show which was to commence Friday at noon and run all day Saturday and on Sunday as well. Mr. LaPierre was inquiring as to whether Mr. Milligan could work the home show on Saturday and Sunday as it was too late to go on Friday. At this point, Mr. LaPierre and Mr. Milligan talked about the issue of Mr. Milligan obtaining a babysitter as Mr. Milligan was responsible for childcare that weekend. Mr. Milligan and Mr. LaPierre also spoke about wages, with Mr. Milligan wanting $20.00 per hour and Mr. LaPierre offering $19.00 per hour to start and in a month or two it would be discussed as to whether or not Mr. Milligan would be raised to $20.00 per hour. Mr. Milligan indicated he had agreed with Mr. LaPierre's suggestion. Mr. Milligan was to get back to Mr. LaPierre later on Friday about working Saturday at the home show. Mr. Milligan subsequently called Mr. LaPierre and said he could not secure childcare for the children and Mr. LaPierre indicated to Mr. Milligan if he found a sitter that Mr. LaPierre would pay for it. Prior to this meeting with Mr. LaPierre, Mr.

Milligan had been advised by Leo Doucette that Leo Doucette had been told by Mr. LaPierre that he was let go and that his paperwork would be ready shortly including the Records of Employment (ROE's). Leo Doucette also told Mr. Milligan that Michael Doucette had been told the same thing and that Chris Devens had apparently been told by Mr. LaPierre that Mr. LaPierre wanted to keep Mr. Devens.

At the meeting on Friday morning, Mr. LaPierre told Paul Milligan that he wanted to keep Paul Milligan and Chris Devens and that Leo Doucette would most likely would not be coming back and he was unsure about Michael Doucette.

Mr. Milligan showed up for work on Monday morning, the 7th day of April, 2008 and was told by Grant Smith that there was nothing to do and he should come back on Tuesday, the 8th day of April, 2008. Grant Smith in his evidence disputes that he told anyone to come back to work on Tuesday.

On Tuesday, the 8th day of April, 2008, Mr. Milligan showed up for work with Leo Doucette and Chris Devens. Mr. LaPierre came in with envelopes for each of them saying "*Here's your papers, get off my property*". Mr. Milligan looked at his envelope and saw the word "quit" and left the envelope in the main shop and said that he was not accepting the document because no one "*quit*" their job.

Mr. Milligan indicated that he had been told by Ryan Gallant and Kent Mitchell, two other employees that Mr. LaPierre was aware on Monday that there had been a meeting at the Union Hall on Saturday. The Board found the evidence of Mr. Milligan to be forthright and credible.

On cross-examination of Paul Milligan, Mr. Milligan indicated:

> *What Mr. LaPierre said to me was, he says I want to keep you and Chris on staff and he says my only way of getting rid of that guy that I want to get rid of is to let you all go; but then I want you and Chris, he said I'll hire you right back, right away, so...*

Paul Milligan indicated that Chris Devans was happy about his meeting with Mr. LaPierre but was concerned about what Leo Doucette and Michael Doucette were going to say because if they were going to be let go.

Employee Chris Devens was in on a work visa working with the Respondent for approximately 13 months. Mr. Devens confirmed that he had attended at work on Thursday, the 3rd day of April, 2008 and subsequently left the premises. He indicated that he was home by approximately 2:30 p.m. Thursday afternoon and he did not hear directly from Mr. LaPierre at all on Thursday, the 3rd day of April, 2008. On Friday morning, the 4th day of April, 2008, Mr. Devens called into the shop to confirm that he was not quitting and to set up his meeting with Mr. LaPierre. Mr. Devens met with Mr. LaPierre and Mr. LaPierre told him at that time that Mr. LaPierre needed the weekend to think about it, that Mr. LaPierre was not making any decisions right now and for Mr. Devens to contact him the following week. Mr. Devens showed up for work on Monday, the 7th day of April, 2008 and was told there was no work and to return on Tuesday, the 8th day of April, 2008.

Employee, Travis Outhouse, had been employed by the Respondent as an oil burner technician since November of 2007. He testified he arrived at work at approximately 7:15 a.m. and the others were not in the back shop but rather were sitting in their trucks. After Leo Doucette had gone into the office and came back outside, he indicated that he was given two choices to go upstairs or go home and they collectively made a decision to leave. He indicated they wanted an opportunity to meet as a group with Mr. LaPierre but that Mr. LaPierre only wanted to meet with them individually. After returning the property to the Respondent, Mr. Outhouse telephoned his wife who advised Mr. Outhouse that Mr. LaPierre had contacted her and advised that if Travis Outhouse did not show up for work on Friday that he would be deemed to have "*quit*". After hearing this, Mr. Outhouse immediately went to the office and demanded a meeting with Mr. LaPierre who was unavailable. Mr. LaPierre had agreed to meet with Travis Outhouse at the hospital. At the meeting between Mr. Outhouse and Mr. LaPierre, Mr. LaPierre indicated that he would make his decision over the weekend and he would get back to Mr. Outhouse about working on Friday morning. Mr. Outhouse indicated that he had not quit and Mr. Outhouse returned home and awaited a call from Mr. LaPierre. Mr. LaPierre called him later that evening and indicated all service calls had been cancelled and there would be no work on Friday morning. Mr. Outhouse did not attend work on Friday but did show up for work on Monday, the 7th day of April, 2008. At that time, Mr. Outhouse was requested to see Mr. LaPierre and was asked by Mr. LaPierre as to whether or not there had been any involvement or organized activity over the weekend concerning the union. Mr. Outhouse said he was home all weekend and had no knowledge of union activities (which was not accurate). Mr. LaPierre indicated to Mr. Outhouse that the ROE's had not been drawn up and that he no longer had employment with the Respondent.

Michael Doucette, a burner technician, had been employed with Mr. Plumber for about a year and a half. Mr. Doucette essentially confirmed the evidence in terms of what had occurred early on Thursday morning, the 3rd day of April, 2008, confirmed that Paul Milligan had contacted Grant Smith and that Mr. Smith phoned back indicating that Blair LaPierre would not meet with them as a group but would meet individually with each of the employees. Mr. Doucette also confirmed that Mr. Smith had asked them to return the property of the Respondent to the shop. Mr. Doucette testified that he received a phone call from Mr. LaPierre on Thursday, the 3rd day of April, 2008 around 5:30 p.m. in the evening and was told that if he did not show up for work, he would be deemed to have "*quit*". Michael Doucette responded to Mr. LaPierre that he had not quit his job. Michael Doucette phoned in to the Respondent on Friday morning, the 4th day of April, 2008 at approximately 8:15 a.m. to say that he had not quit and was not coming in to work unless he had his meeting with Mr. LaPierre. Leo Doucette then phoned Blair LaPierre and asked for a meeting and went right in to see him, following which Michael Doucette then met with Mr. LaPierre. Michael Doucette indicated that at the end of his meeting with Blair LaPierre, Mr. LaPierre told Michael Doucette that he would have to think about his employment over the weekend and that Michael Doucette could call him the first of the week or the middle of the following week.

Employee Leo Doucette testified that he was a burner technician and had been employed with the Respondent just shy of two years. Leo Doucette testified that he did not speak with Mr. LaPierre on Thursday, the 3rd day of April, 2008 (Mr. LaPierre disputes this). Leo Doucette indicated that Michael Doucette had been at his residence on Thursday evening when Michael Doucette received a call from Blair LaPierre indicating that if Michael Doucette did not show up on Friday morning that he would deem him as having "*quit*".

Leo Doucette phoned Mr. LaPierre early Friday morning and said "*I'm not quitting but I'm not showing up for work*" until he talked about the issues. Mr. Doucette subsequently had a meeting with Mr. LaPierre early Friday morning. Leo Doucette figured he was going to get fired and that Blair LaPierre was looking for a reason to get Mr. Doucette out the door. Leo Doucette indicated that he asked Blair LaPierre what his status was and he said Blair indicated "*we'd discuss*" or "*phone me in a few days and I'll let you know*". Leo Doucette was the first of the group of five employees to meet with Mr. LaPierre, then Michael Doucette, Mr. Devens and then Mr. Milligan. By the time Mr. Milligan had had his meeting with Mr. LaPierre, Mr. Milligan was advised that Leo Doucette had been let go and that Mr. LaPierre wanted to keep Mr. Devens. We accept the evidence of Paul Milligan in this regard as well as that of Mr. LaPierre in that Leo Doucette was dismissed by Mr. LaPierre on Friday, the 4th day of April, 2008.

Leo Doucette indicated he phoned in sick on Monday morning, the 7th day of April, and indicated he would be in the following day. Leo Doucette showed up for work on Tuesday morning and Blair LaPierre came out with envelopes for Leo Doucette, Chris Devens and Paul Milligan. Leo Doucette opened the envelope and it was a Record of Employment indicating he had "*quit*" and he left it on the counter. Leo Doucette indicated that he was never told to keep his cell phone on by Mr. LaPierre.

The Board also heard evidence from Kent Mitchell who testified he was asked by Mr. LaPierre on Monday at 11:00 a.m. if he had met with the group. There was no mention of a union but Mr. LaPierre did call a staff meeting for Monday afternoon, the 7th day of April, 2008.

Darren MacDonald, also testified and indicated he was asked on Monday, the 7th day of April, 2008 by Blair LaPierre if he had signed a union card. In fact the day previous to Mr. MacDonald testifying before the Board, Mr. LaPierre had a discussion with Mr. MacDonald wherein he suggested to Mr. MacDonald that the conversation had happened on Thursday, the 10th day of April, 2008 and not Monday, the 7th day of April, 2008.

Blair LaPierre, the owner of the Respondent, testified. He indicated he had been in Summerside on Thursday morning, the 3rd day of April, 2008. He had received a message from Grant Smith who advised him that five of the employees had left the shop at a quarter to eight with four of the trucks. By the time Blair LaPierre got to the office, Grant Smith had advised him he had received a call from Paul Milligan requesting a meeting. He discussed the matter with Grant Smith and Mr. Smith was to call the employees back and indicate that Mr. LaPierre would have a meeting with the employees individually but he would not meet with them as a group. Mr. LaPierre requested that Grant Smith request that the employees return the trucks to the shop. Mr. LaPierre advised that the trucks were returned to the shop with the keys, the employee's cell phones, their time cards and all of the employees personal tools had been removed from the trucks.

At approximately 2:00 p.m. on Thursday, the 3rd day of April, 2008, Grant Smith was speaking to Leo Doucette when Mr. LaPierre took the phone and spoke with Leo Doucette. Mr. LaPierre testified he reiterated to Leo Doucette that the employees could meet with him individually and he indicated to Mr. Doucette that if he didn't show up for work on Friday morning, he would be issuing his ROE and assuming that he quit. Subsequently, Blair LaPierre indicated that he called Michael Doucette and advised Michael Doucette of the same message, that he called Travis Outhouse's house and left a message with his wife to the same effect and asked Michael Doucette to relay the message to Chris Devens. Subsequently, on Thursday, the 3rd day of April, 2008, Mr. LaPierre got a call from Grant Smith saying that Travis Outhouse wanted to meet with Mr. LaPierre. Mr. LaPierre agreed

to meet with Travis Outhouse at the hospital where Mr. LaPierre was going to be as a result of a family emergency. Mr. LaPierre indicated that he advised Travis Outhouse that he was going to be issuing ROE's, that all service work had been cancelled and that he could reapply for his position if he wanted. Mr. Outhouse was apparently very concerned for his job.

On Friday morning, the 4th day of April, 2008, Mr. LaPierre indicated that no one had showed up by 8:00 a.m. He indicated he made a decision at that point that the ROE's would be issued to the five individuals. He advised that he instructed his employee, Shanna Carter to prepare the ROE's for the five individuals. Subsequently he indicated that Mr. LaPierre received a call from Michael Doucette shortly after 8:00 a.m. indicating that he wouldn't be in today but that he did not "*quit*"

Mr. LaPierre met with Leo Doucette and advised Mr. Doucette he would be issuing the ROE's. Mr. LaPierre corrected some errors in the response to the Unfair Labour Practice Complaint including, paragraph 14 which indicated he met with Travis Outhouse which meeting did not occur on Friday; however, he did meet with Paul Milligan on Friday, the 4th day of April, 2008.

Mr. LaPierre confirmed that he had had a discussion with Paul Milligan about working the trade show and Mr. Milligan called him late in the afternoon and asked what they would do about the trade show. Mr. LaPierre indicated it had been cancelled because he had nobody to do it. Mr. LaPierre confirmed that Mr. Milligan had stated he could not do the home show because he could not get a babysitter and he did not have the money to pay. Mr. LaPierre indicated that had he known that he would have paid for the babysitter. Mr. LaPierre indicated that he had stated he would not negotiate with Mr. Milligan until he had put the ROE in his hands. Mr. LaPierre confirmed he saw Mr. Milligan on Saturday morning coming out of Robins Donuts.

At approximately 8:00 a.m. on Monday morning, the 7th day of April, 2008, Paul Milligan and Chris Devens showed up for work. Travis Outhouse had previously shown up at 7:15 a.m. Mr. LaPierre indicated that there was no work for any of them as all work had been cancelled and Mr. LaPierre indicated that he advised Travis Outhouse on Monday morning that the ROE's were prepared. Mr. LaPierre denied asking Mr. Outhouse on Monday about union activity. Mr. LaPierre confirmed that on Thursday morning, the 10th day of April, 2008, he heard that there had been an Application for Certification filed with the Labour Relations Board. Mr. LaPierre's evidence in relation to Travis Outhouse is that he had advised Mr. Outhouse on Thursday night, the 3rd day of April, 2008, that he was going to issue his Record of Employment and he could reapply for his job if he wished.

Mr. LaPierre denied that he spoke with Kent Mitchell at a Master Packaging job site on Monday, the 7th day of April, 2008. Darren MacDonald had testified that Mr. LaPierre had a conversation with him in the parking lot on Monday, the 7th day of April, 2008 and inquired as to whether or not he had signed a union card on the weekend. Mr. LaPierre indicated it was not Monday, the 7th day of April, 2008, but rather it was Tuesday morning that he spoke to Mr. MacDonald and that he did not ask him if he signed a union card. Mr. LaPierre indicated he had no knowledge of union activity until the 10th day of April, 2008.

On Tuesday morning, the 8th day of April, 2008, Leo Doucette, Chris Devens and Paul Milligan came in around 8:00 a.m. Mr. LaPierre was advised that they were outside and he took the envelopes that his employee, Shanna Carter, had prepared and went out to see the employees. He personally passed each of them their envelopes and asked them to leave the property indicating that they no longer worked for him.

With respect to Leo Doucette, the Board finds that Leo Doucette was dismissed and was aware that he was dismissed by Blair LaPierre on the morning of Friday, the 4th day of April , 2008.

Issue No. 1.

> ***Did the employees, Paul Milligan, Michael Doucette, Travis Outhouse and Chris Devens (the employees) voluntarily quit their employment?***

Having decided that Leo Doucette had been dismissed on Friday, the 4th day of April, 2008, the issue then becomes did the employees, Paul Milligan, Michael Doucette, Travis Outhouse and Chris Devens voluntarily quit their employment.

Counsel for the UA Local 721 (the Complainants) relies on the decision of *Hainsworth* v. *Word Peace Forum Society*, [2006] BCSC 809 (B.C.S.C.) in support of its position that the employees did not voluntarily leave their employment but were, in fact, terminated. In that case, the Defendant employer changed the job title and responsibilities of the Plaintiff who indicated that she would take the weekend to think about these changes. The Defendant gave her an ultimatum to choose and the Plaintiff chose not to accept the revised duties.

The Court in *Hainsworth, supra,* held that the rearrangement of the job duties amounted to a fundamental change to the contract of employment which equated to constructive dismissal. The Court in its decision quoted the British Columbia Court of Appeal case of Danroth v. Farrell Holdings Ltd. 2005 BCCA 593 (B.C.C.A.) in which the Court held that to be effective, a resignation must be clear and unequivocal. There must be a clear statement of an intention to resign or conduct from which that intention must clearly appear.

Counsel for UA Local 721 also relied on the case of *Pollock v. First Heritage Financial Planning Ltd.*, [2002] BCSC 782 (B.C.S.C.) where the Defendant employer issued an ultimatum to the Plaintiff employees to accept the revised terms of employment or quit. The Plaintiff employees did not accept the revised terms, but wished to continue under the pre-existing terms. The Defendant informed the Plaintiffs that this was considered a resignation by the Plaintiffs. In *Pollock, supra,* the Court held that the Plaintiffs had not resigned, but were dismissed, there was an indication of a desire to continue working on the part of the Plaintiffs. The Court stated at paragraph 31:

> *The test to be applied in interpreting the memorandum is an objective one: given all the surrounding circumstances would a reasonable person have understood from that memorandum that they had just resigned.*

The additional case of Coleman v. Sobeys Group Inc., [2005] NSCA 142 (N.S.C.A.) is relevant. Sobeys dismissed its employee Coleman for theft but another person later confessed to the theft and Coleman filed a complaint under the *Labour Standards Code.* Coleman wanted Sobeys to admit that he had been wrongfully dismissed and Sobey's refused. Coleman did not show up for work on the 22nd day of April, 2003 and continued with his complaint. In February, 2005, the Labour Standards Tribunal, ordered Sobeys to reinstate Coleman and Sobeys appealed the decision. The issue before the Court was whether Coleman's refusal to accept the reinstatement in 2003 was an abandonment of his claim to reinstatement. The Court held that the Board's conclusion that Coleman had not done or said anything to lead Sobeys to reasonably believe that he had abandoned his contract of employment, was reasonable. The Court reviewed the test for abandonment and approved the statement as stated in England, Christie and Christie, *Employment Law In Canada* (3rd Edition) at paragraph 13.12:

> *The Courts...have held that a valid resignation must have a subjective as well as an objective component. The former requires conduct on the employee's part that unequivocally manifests that he or she had the subjective intention of quitting. The latter requires conduct on the employee's part that would lead a reasonable person in the position of the employer to believe that the employee had carried out his or her subjective intention.*

In the case of _Ehmcke_ v. _Penetang Bottling Co._, [1992] 41 C.C.E.L. 251 (Ont. Gen. Div.), the Plaintiff was employed with the Defendant as production manager and asked to take the following week off for vacation which was refused. The Defendant informed the Plaintiff that if the Plaintiff took the time off contrary to the employer's order, then the Defendant would deem that the Plaintiff had quit. The Plaintiff did not show up for work the next week. The Court held that the Plaintiff's conduct amounted to a resignation. In the alternative, the Court found that the Plaintiff's conduct was willful disobedience of an explicit order of the employer and this was just cause for dismissal.

In the case of _Polo_ v. _The City of Calgary_ (1992), 44 CCEL 257 (Alta. Q.B.), the Defendant was not pleased with the Plaintiff's job performance and did not give him a promotion. The Plaintiff asked for a severance package and the Defendant's reply was that the Plaintiff could resign now or resign later. The Plaintiff took the position that he had been fired, cleaned out his desk, and did not show up for work the next week. The Defendant informed the Plaintiff after a week that the Defendant had not fired the Plaintiff and that if he did not show up for work within a week, the Plaintiff would consider that the Defendant had resigned. The Plaintiff did not return to work. In considering all of the circumstances, the Court held that the Plaintiff had unilaterally terminated his employment by way of resignation. The Court relied on the following paragraph from the decision of _Rajput_ v. _Menu Foods Limited_ (1984), 5 CCEL 22 (Ont. H.C.)

> *...what would a reasonable man understand from the words used in the context in which they were used in the particular working place and in all of the surrounding circumstances?*

A review of the case law cited above it appears to demonstrate that the test be applied in determining whether an employee has resigned or quit is that a resignation must be clear and unequivocal. To be clear and unequivocal, the resignation must objectively reflect an intention to resign or there must be conduct on the part of the employee evidencing such an intention. The cases of *Ehmke*, *supra*, and *Polo*, *supra*, stand for the proposition that an employee who has been ordered to attend work on a specific date and fails to do so can be considered to have resigned. These cases can be distinguished from the case before the Board on their facts because the employees in those cases do not appear to have informed the employer that they were not quitting, and the cases are earlier than the cases of *Hainsworth, supra*, *Pollock, supra,* and *Coleman, supra.*

In the case currently before the Board, when one looks at the evidence, it appears clear that a message was given to some of these individuals that if they did not show up for work on Friday morning the 4th day of April, 2008, they would be deemed to have "*quit*". However, there was additional information provided by both the employees and Mr. LaPierre during the subsequent discussions between the parties which would have led a reasonable person to believe that the employees, Chris Devens, Paul Milligan, Michael Doucette and Travis Outhouse were not terminated at that time, nor were they deemed to have quit. Each of the remaining four individuals expressly indicated their desire that the employment contract continue. Also, the Respondent had indicated to them that he would take the weekend to think about their status. It is therefore the decision of this Board and the Board so finds that the four employees Chris Devens, Travis Outhouse, Michael Doucette and Paul Milligan did not voluntarily quit their employment.

Issue No. 2.

If any or all of the employees did not voluntarily quit their employment, did the Respondent commit any of the acts alleged in the Unfair Labour Practice Complaint, namely:

(a) Did the action happen because of an organizing campaign?
(b) Did the Respondent meet with the employees during the organizing campaign?
(c) Did the Respondent request one or more of the employees to work during the organizing campaign?

Section 10 of the *Labour Act*, states as follows:

10. (1) No employer, employers' organization or an agent or any other person acting on behalf of an employer or employers' organization shall

(a) interfere with, restrain or coerce an employee in the exercise of any right conferred by this Act;

(b) participate or interfere with the formation, selection or administration of a trade union or other labour organization or the representation of employees by a trade union or other labour organization; or contribute financial or other support to such trade union or labour organization;

(c) suspend, transfer, refuse to transfer, lay-off, discharge, or change the status of an employee or alter any term or condition of employment, or use coercion, intimidation, threats or undue influence, or otherwise discriminate against any employee in regard to employment or any term or condition of employment, because the employee is a member or officer of a trade union or has applied for membership in a trade union;

(d) *refuse to employ any person because such person is a member or officer of a trade union or has applied for membership in a trade union or require as a condition of employment that any person shall abstain from joining or assisting or being active in any trade union or from exercising any right provided by this Part;*

[...]

(f) *call, authorize, counsel, procure, support, encourage or engage in a lockout except as permitted by section 41.*

Section 11(5) of the *Labour Act* states as follows:

> 11(5) *Where any such complaint arises out of the suspension, transfer, refusal to transfer, lay off, discharge or change of status of an employee or the refusal to employ or rehire any person, the burden of proof of the suspension, transfer, refusal to transfer, lay off, discharge, change of status or refusal to employ or rehire was for just cause and not in violation of this act is upon the person charged.*

While the Unfair Labour Practice Complaint alleged that the Respondent had violated Sections 10 (1)(a), (b), (c), (d), (e) and (f), the Board has determined that subsections 10 (a), (b), (e) and (f) are not applicable. The Board will look at Section 10(1)(c) and 10(1)(d) to determine whether or not those sections have been violated by the Respondent.

George W. Adams, Canadian Labour Law, Second Edition, looseleaf (Aurora, Ont: Canada Law Book, June, 2008) notes at page 10-8 that provisions barring discharge or discriminatory treatment "*because*" employees are engaged in union activities has

> *....been interpreted by courts as requiring scrutiny to see if membership in a trade union was present to the mind of the employer in his decision to dismiss either as a main reason or one incidental to it or as one of many reasons regardless of priority.*

Adams in *Canadian Labour Law* then goes on to note as follows:

> *Labour Boards will uphold dismissals as valid where anti union sentiment is not apparent. This is particularly true where the employer demonstrates a lack of knowledge about the existence of trade union activity at the time the decision to dismiss was made.*

The test to determine if there has been anti union animous has been stated on various occasions. In Hedges v. CAW Canada, [1996] 2 P.E.I.R. 189 (P.E.I.S.C.T.D.), Justice Jenkins commented on the issue of *anti union animous* when he stated at paragraph 38 of the decision the following:

Where there is evidence of anti union animous on the part of the employer, the employer would bear the onus of proving on the balance of probabilities that the employee's union activities were not a factor in the dismissal...

While the decision in *Hedges, supra*, was overturned on other grounds, the Court of Appeal did not overturn the summary in relation to *anti union animous.*

The case of C.J.A. Local 579 *v.* Northland Contracting Inc.(2006), 261 Nfld. and P.E.I.R. 256 (Nfld. S.C.A.D.) is relevant to the issue at hand. On Friday, the union applied for certification of a bargaining unit and on the following Monday, two members of the proposed bargaining unit were laid off by the employer. The union filed an unfair labour practice complaint with the Labour Relations Board. The Labour Relations Board accepted the employer's evidence that the employees were dismissed in accordance with the employer's pre-established lay off practice. On judicial review, the decision was upheld; however, on appeal, but the Court of Appeal overturned the decision and held that the evidence of anti union intent ought to have been clearly considered by the Labour Relations Board in reaching a decision in relation to lay offs. The Court of Appeal outlined that the established test to be used in situations where lay offs were alleged to constitute an unfair labour practice as being:

If a decision by an employer to dismiss an employee has been influenced in anyway by the fact that employees have exercised or are about to exercise rights under the Act then the employer's actions violate the Act. Proof of anti union intent is normally based on circumstantial evidence and on the totality of the evidence rather than based upon any one single piece of evidence.

In applying these general principles in this case before the Board, the following issues arise:

1. Has the Respondent demonstrated a general anti union animous?

2. Has the Respondent put forward a plausible reason for the dismissal of the four employees?

3. Was the Respondent motivated to any degree in a dismissal of the four employees by his union involvement or by an intent to intimidate or coerce other employees just by his union involvement?

Some of the factors which this Board must consider in determining whether there was anti union animous are presence of anti union activity by the Respondent, the Respondent's knowledge of the union activities, the Respondent's involvement with the activities, the matter in which the Respondent's actions were taken, and the credibility of the witnesses.

In reviewing the evidence before the Board, the Board makes the following findings of fact :

1. Mr. LaPierre told Travis Outhouse on Thursday, April 3, 2008 he would have to think about Travis Outhouse's employment over the weekend.

2. In the meetings with the four employees (other than Travis Outhouse) on Friday morning, the 4th day of April, 2008, with Mr. LaPierre, Mr. LaPierre made it clear to those four individuals that he was aware that the individuals had a scheduled meeting with Robert Yeo of the Employment Standards Board for 2 p.m. on Friday afternoon.

3. Paul Milligan negotiated wages with Mr. LaPierre on Friday, the 4th day of April, 2008 and Mr. LaPierre wanted Mr. Milligan to work at the home show on the weekend of the 5th and 6th day of April, 2008.

4. Mr. LaPierre advised Chris Devens that he needed the weekend to think about his employment.

5. Mr. LaPierre indicated to Michael Doucette that he would need to think about his employment over the weekend.

6. Mr. LaPierre testified that he had instructed Shanna Carter to prepare the five ROE's on Friday, the 4th day of April, 2008. The Board does not accept his evidence in this regard and believes that he had indicated to the employees on Friday, the 4th day of April, 2008 that he had not made up his mind.

7. Union activities took place throughout Friday and Saturday, the 4th and 5th days of April, 2008, and over the weekend.

8. On Monday morning, the 7th day of April, 2008 at 7:15 a.m., Travis Outhouse met with Mr. LaPierre and was asked about the union. Mr. Outhouse denied that he had attended a union meeting. Mr. LaPierre told Mr. Outhouse that he was finished at Mr. Plumber and that the ROE's had not been drawn up but would be ready later that day.

9. Mr. LaPierre asked Darren MacDonald on Monday, the 7th day of April, if he had signed with the union and stated that nothing would happen to him if he told him. A further conversation occurred between Mr. MacDonald and Mr. LaPierre the day before Mr. MacDonald testified before the Board where Mr. LaPierre wanted Mr. MacDonald to say that the conversation happened on Thursday, the 10th day of April, not on Monday, the 7th day of April, 2008.

10. Mr. LaPierre met with Kent Mitchell at 11 a.m. on Monday morning, the 7th day of April, 2008, and asked Kent Mitchell if he had met with "*the group*" although there was no mention of union at that discussion.

11. On Monday morning, the 7th of April, 2008, Mr. LaPierre was aware of the union activity.

12. Leo Doucette testified that he was advised by Brad MacAulay on Friday that Mr. MacAulay was going to tell Mr. LaPierre about the potential union organization.

13. Paul Milligan had been advised by Ryan Gallant and Kent Mitchell that Mr. LaPierre had asked Mr. Gallant and Mr. Mitchell on Monday as to who had gone to the union hall.

14. The Board does not accept the evidence of Shanna Marie Carter that the discrepancies on the employees typed pay stubs which show the date as the 4th day of April rather than the 7th day of April (Exhibit R-3) were due to her hitting the wrong number key on each of the five pay stubs and that the pay stubs were actually prepared on Friday, the 4th day of April.

15. Ms. Carter did not agree that the date on the ROE's had been altered from the 7th day of April to the 4th day of April. The Board has received the original ROE's and has determined that the ROE's were in fact altered before they were sent to Human Resources Development Canada and the Board does not accept Ms. Carter's evidence in this regard.

In relation to the actions alleged in the Unfair Labour Practice Complaint, there is no evidence that the Respondent had any knowledge of an organizing campaign on Thursday or Friday, the 3rd day of April or the 4th day of April, 2008 and accordingly, any meeting with the employees or requesting employees to meet during that time does not violate the *Labour Act.*

The more problematic question becomes were the remaining four employees dismissed because of the organizing campaign.

In order to determine whether or not there was cause for termination, the Board has reviewed the Supreme Court of Canada case of *MacKinley v. B.C. Tel*, [2001] SCC 38. In *MacKinley,* it enunciated the appropriate test to determine if the dismissal was for just cause. The Court stated the following test at paragraph 48:

> *The test is whether the employees misconduct gave rise to a breakdown in the employment relationship. In accordance with this test the trial judge must determine whether the evidence established the employees misconduct on a balance of probabilities. If so, whether the nature and degree of this misconduct warranted dismissal.*

In Henry v. Foxco Limited, [2004] NBCA 22, 31 CCEL (3rd) 72 (N.B.C.A.). The three judges of the Court of Appeal agreed that since the Supreme Court of Canada case of McKinley, *supra*, it must be determined that the misconduct is such as to breakdown the employment relationship to constitute just cause for dismissal.

The question then becomes whether the incident involved a matter of such importance that it resulted in the destruction of the relationship between employer and employee. Even if the conduct is a single act, if that act is of such a nature which goes to show in effect that the servant is repudiating the contract or one of its essential conditions, the employer is entitled to summarily dismiss the servant. The Supreme Court in *McKinley v. BC Tel* established a two-part test for just cause.

1) Whether the evidence established the employee's misconduct on a balance of probabilities and;

2) If so, whether the nature and degree of the misconduct warranted dismissal.

In applying these principles to the case before the Board, it would appear that the first Part of the *McKinley* test could be met by four of the individuals who did not show up for work on Friday morning as they were instructed to do so. Travis Outhouse's evidence is that he was told on Thursday night that there was no work for him on Friday thus he was not required to show up for work on Friday. The evidence of Travis Outhouse was uncontradicted.

In addition, Michael Doucette, Chris Devens, and Paul Milligan did make calls to their employer shortly after 8:00 a.m. on Friday morning to indicate that they were not quitting, but that they wanted to meet with Mr. LaPierre.

The second question under *McKinley* is whether the nature and degree of the willful disobedience warranted dismissal and this is the real issue in the case before the Board. The employees had made a collective decision not to return to work so each would have known that the individual decision to not return to work in such circumstances would cause significant harm to the Respondent. The Respondent's ability to work around the disobedience by rescheduling employees was hampered in this situation.

There is, however, an indication that several of the employees would be hired back and that the Respondent wanted some of the employees to return, just not all of them. In the meetings between Mr. LaPierre and the employees on Friday morning, it is clear that Leo Doucette was dismissed. For the other four employees, Paul Milligan, Mike Doucette, Travis Outhouse and Chris Devens, there was an invitation to come back to the Respondent's place of business the following week. This suggests that the Respondent did not consider the willful disobedience of the employees, that of not showing up for work on Friday morning, to constitute the end of the employment relationship and in fact, the employment relationship could viably continue after the misconduct. Thus, although the employees' disobedience related to a fundamental term of the contract, that of not showing up for work, and had the potential for damage to the Respondent, it is not clear that the disobedience was such that the employment relationship could not continue.

Having made these findings of fact, the Board wishes to make further comment. While it is a finding of this Board that the Respondent did not have just cause for termination of the employees, it is a concern of this Board that five individuals who were scheduled to work and who had work booked for them on Thursday, the 3rd day of April, 2008 chose to leave their place of employment as a group. It would appear that a group mentality had formed and that because one individual was upset, the other four chose to follow him off of the premises. These five individuals constituted the employer's entire service department and since none of them were at work on Thursday, the 3rd day of April, 2008, the Respondent had no choice but to cancel jobs that had already been booked for them with the potential of loss to the Respondent for damage to his business.

In reviewing all of the evidence of those individuals who gave evidence, this Board finds that the Respondent has breached sections 10(1)(c) and 10(1)(d) of the *Labour Act* in that the four employees were terminated as a result of suspected union activity, or in other words anti union animous. The Board has taken into consideration the evidence of all witnesses, the manner in which the employer's actions were taken as well as the credibility of

the witnesses with respect to the dismissal of Chris Devens, Michael Doucette, Paul Milligan and Travis Outhouse. In relation to the dismissal of Leo Doucette, this Board finds that there was no anti union animous in his dismissal by the employer, given the fact that he was dismissed on the morning on Friday, the 4th day of April, 2008, prior to any union discussions or activities having taken place.

It is a finding of the Board that the Respondent did violate the provisions of the *Labour Act* and did commit an Unfair Practice Complaint when he terminated the four employees, Chris Devens, Michael Doucette, Travis Outhouse and Paul Milligan on Monday, the 7th day of April, 2008 as a result of an organizing campaign.

In terms of the remedy, the Board will order that Chris Devens, Michael Doucette, and Travis Outhouse be paid back pay and benefits commencing the 7th day of April, 2008, the date of their termination to the date of the Decision with the exception of the period from the 14th day of July , 2008 to the 8th day of September, 2008. From the above-noted amount will also be deducted one month's salary as a result of the employees action in "*working to rule*". Of course, from the above-noted will be deducted any monies received by the employees during those periods of time through employment or employment insurance benefits.

The Board orders that full benefits and back pay be paid to the Estate of Paul Milligan (he died some time after the 14th day of July, 2008) and that these be paid to his Estate for the period the 7th day of April, 2008 to the 14th day of July, 2008. Again, from the above-noted amount will also be deducted one month's salary as a result of the employees action in "*working to rule*". Of course, from the above-noted will be deducted any monies received by the employee during those periods of time through employment or employment insurance benefits.

The actions of the individuals that occurred on Thursday, April 3, 2008 should not be condoned. Although the Board has made a finding that the Respondent did not have just cause for termination of the employees, the actions of both the Respondent and the employees in question leave much to be desired. If the Respondent was not happy with certain of the individuals that he was employing, he should have dealt with it rather than allow the situation to escalate to the point where five individuals are essentially working to rule. On the other hand, the actions of the employees in "*working to rule*" should not be condoned and the employees are not entirely without fault in this situation.

APPLICATION FOR CERTIFICATION

The Application for Certification that was filed by UA Local 721 with the Board on the 7th day of April, 2008 was filed pursuant to Section 54 of the *Labour Act*, the Construction Industry Provisions. On the 7th day of April, 2008, one of the employees who had signed a card had called in sick and one was on vacation according to the evidence given to the Board. In light thereof, neither of those employees would be entitled to be counted as they were not at work on the 7th day of April, 2008.

Sack & Mitchell in its *Ontario Labour Relations Board Law and Practice* (1985: Butterworths), at paragraph 10:2300 states the following:

> "[...] *Because of the short-term duration of the employment relationship in the construction industry, the rule is that, for the purposes of the count (as distinct from the description of the bargaining unit), the unit consists of those employed at the application date. Persons not at work in the unit on the day the application was made, or for part of the day, are not counted even though their absence may be due to uncontrollable circumstances.* [...]" (para. 10:2300)

There is also various case law that confirms that individuals working in the construction industry who were not at work on the date of the application, whether due to injury, illness or vacation are not be included in the count. Since they were not at work at the time of the application, they were not considered to be employees. In this regard, the Board relies on the following statement made from the decision of *I.B.E.W., Local 353 v. 1206468 Ontario Ltd.*, [2000] O.L.R.B. Rep. 989 (Ont. L.R.B.):

> *"It suffices to say, in the construction industry, the bench mark for determining employee status is the application date, and the Board is not required to look at who was at work on any other date [...] It is a rough an [d] ready rule designed to inject some certainty into case processing in a volatile employment environment where the work forces and work functions fluctuate and shift from day to day. So the Board focuses on the day that the certification application was filed, and uses that snapshot to make the determinations required of it under the statute."*

The Board has reviewed the Application for Certification that was filed on the 7th day of April, 2008 and noted there were sixteen (16) employees employed by the Respondent on that date. Of that number, there were nine (9) union cards that had accompanied the Application. One of those nine (9) was Leo Doucette who the Board has found was not an

employee on the date the Application was made, namely the 7th day of April, 2008. Even if it could be said he was an employee, he was not at work on the date in question. In addition, Michael Doucette was on vacation and given that the Application was made under the Construction Industry Provisions, he would not be entitled to be counted. Accordingly, there were only seven (7) valid signatures on the date of the Application for Certification which does not represent a majority of the employees of the Respondent.

Accordingly, the Application for Certification filed by UA Local 721 would fail based on the fact that two (2) of the individuals who signed cards and gave evidence in relation to the Unfair Labour Practice Complaint were not at work on the 7th day of April, 2008.

ORDER

The Board therefore orders:

1. Chris Devens, Michael Doucette and Travis Outhouse will receive full back pay and benefits from the 7th day of April, 2008 to the date of this Decision, excluding the period the 14th day of July, 2008 to the 8th day of September, 2008.

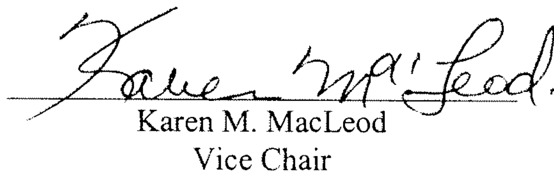
2. That the Estate of Paul Milligan be paid full back pay and benefits between the 7th day of April, 2008 and the 14th day of July, 2008.

3. That one-month's salary be deducted from any benefits due and payable to Chris Devens, Michael Doucette, Travis Outhouse and the Estate of Paul Milligan.

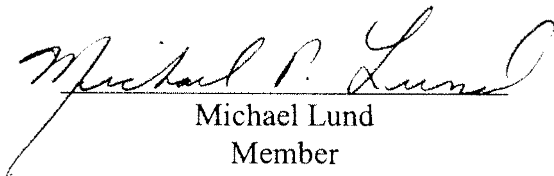
4. Any monies received by Chris Devens, Michael Doucette, Travis Outhouse and Paul Milligan during the periods of time noted above through either employment or employment insurance benefits be deducted from the amount ordered to be paid to any of them by the Respondent.

5. That should any questions arise in relation to the implementation of this Order, the parties are free to return to the Board for further direction and the Board remains seized of this matter.

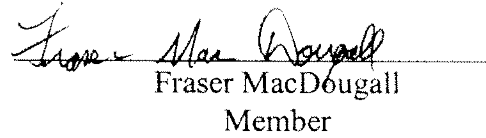
6. All other requests for relief other than that noted above are dismissed.



Karen M. MacLeod
Vice Chair

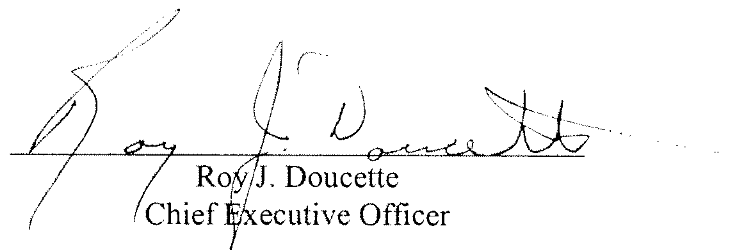


Michael Lund
Member



Fraser MacDougall
Member

This Decision made by the Prince Edward Island Labour Relations Board on the 14th day of December, A.D., 2008, and issued under the hand of its Chief Executive Officer on the 30th day of December, A.D, 2008.



Roy J. Doucette
Chief Executive Officer