[1979] O.L.R.B. Rep. 1220, [1980] 1 Can. L.R.B.R. 99, 80 C.L.L.C. 16,003

1979 CarswellOnt 1308

U.S.W.A. v. Radio Shack

United Steelworkers of America, Complainant, v. Radio Shack, Respondent

Ontario Labour Relations Board

George W. Adams, Chairman, and Board Members C.G. Bourne and O. Hodges

Judgment: December 5, 1979
Docket: Doc. 1004-79-U

Counsel: James Hayes for the Complainant.

R.A. Werry for the Respondent.

Subject: Labour and Employment

Labour Law --- Collective bargaining -- Duty to bargain in good faith -- Remedies -- Miscellaneous remedies

Collective Agreement -- Damages -- Duty to Bargain in Good Faith -- Interference in the Trade Union -- Company violating several provisions of Act -- Offering voluntary revocable check-off of dues -- Whether maintaining minimum statutory position on union security bargaining in bad faith -- Broad remedial order issuing -- Damages awarded to Union and Employees.

Decision of the Board:

1 The Respondent's name is amended in the complaint to read Radio Shack.

2 The Complainant brings this complaint on behalf of itself and all employees in the bargaining units it represents at the Respondent's distribution centre in Barrie, Ontario. It complains that the employees and their union have been dealt with by the Respondent contrary to sections 14, 56, 58, 59, and 61 of *The Labour Relations Act*. The relief requested is substantial. The Complainant's request was set out in Schedule "A" to its application.

SCHEDULE 'A'

The Complainant requests that the Board order the following relief:

[1979] O.L.R.B. Rep. 1220, [1980] 1 Can. L.R.B.R. 99, 80 C.L.L.C. 16,003

1. Declaration that the Respondent has violated *The Labour Relations Act*.

2. That the Ontario Labour Relations Board determine all outstanding issues and direct that the parties execute a collective agreement.

3. In the alternative, that the Ontario Labour Relations Board appoint an arbitration board to determine all outstanding issues, and direct that the parties execute a collective agreement incorporating the terms settled by the aforementioned arbitration board.

4. In the further alternative, that the Complainant union be compensated for all its organizing, negotiating, strike administration, and legal expenses associated with its attempt to pursue its statutory rights in connection with Radio Shack.

5. In the further alternative a direction that the Respondent bargain in good faith with the assistance of mediation.

6. Such further and additional relief as counsel may advise at the hearing and the Board sees fit to grant.

3 This request was amended by the Complainant's counsel at the beginning of the hearing. The amendment consisted of five additional requests:

1. A notice be posted in the Respondent's plant announcing to all the employees that the Respondent had violated *The Labour Relations Act* and that it undertakes not to in the future.

2. The same notice be mailed to every employee in the bargaining units on the date the Board's decision is rendered and at the Respondent's expense.

3. The Complainant be provided by the Respondent with access to bulletin boards in the plant where notices to employees are commonly posted.

4. The Complainant be provided with access to the Respondent's plant to address, on company time, all employees in the bargaining units who may be in the plant.

5. The Respondent provide the Complainant with a mailing list containing the name and address of every employee in bargaining units the Complainant represents and to keep this list updated until the passage of one year.

4 Counsel for the Respondent took the position that the relief requested was either beyond the Board's jurisdiction or irrelevant to the issues properly before the Board. As a general matter, it took exception to all particulars relating to events more than a year removed from August 9, 1979, the time at which the Complainant commenced a lawful strike against the Respondent. The Complainant, in reply, submitted that the Respondent's most recent conduct during negotiations could be fully understood only in the context of its entire relationship with the Complainant and its supporters from the time the Respondent's employees were first organized. The Board reserved its decision on the actual relevance of the proposed evidence and ruled that it was prepared to admit the evidence on the basis of "arguable relevance".

5 The history of this case is considerable. Radio Shack is a division of Tandy Electronics Limited (Alberta) which in turn is a wholly owned subsidiary of Tandy Corporation, Forth Worth, Texas -- a company engaged in the manufacturing and retailing of stereo and other electronic equipment on a worldwide basis. This collective bargaining relationship is very recent in origin. It is also fair to say that its establishment was subject to considerable litigation before this Board and the courts. The present application arises out of the Complainant's attempt to negotiate a first collective agreement with the Respondent.

6 The Complainant relies on all the legal findings in the earlier cases between these parties before the Board on the basis of the doctrine of *res judicata*. It was submitted that direct authority for our power to do so arises out of one of these earlier cases where the Board, in an application for certification by the Complainant under section 7a, relied upon findings of fact and law made in a preceding section 79 complaint before another panel of this Board. The Respondent challenged the propriety of doing so in the Supreme Court of Ontario, and by a unanimous decision of that Court, the Board's decision was upheld. (See *Tandy Electronics Limited v. United Steelworkers of Ameriva and The Ontario Labour Relations Board* (1979), 79 CLLC ¶14,216.

7 The history to this application begins with a decision of the Board dated September 27, 1978, written reasons being issued October 12, 1978 (Board File No. 274-78-U). That decision dealt with complaints under section 79, wherein it was alleged that five employees had been dismissed by the Respondent contrary to sections 56, 58 and 61 of *The Labour Relations Act*. Evidence before that panel, and confirmed by evidence before this panel, established that the complainant's campaign to organize the employees of the Respondent at its Barrie facility formally began in March of 1978. Meetings with employees were held on April 17th, 24th and May 1st of 1978. The employees were terminated on May 3rd. The Board found that two of these employees (Henry North and Stephen Gradon) had been discharged in contravention of *The Labour Relations Act*. Both employees were reinstated into the employ of the respondent with the direction that they be compensated for their monetary losses. Subsequently, the Complainant alleged that the Respondent was in wilful non-compliance of the Board's decision. Explaining that North had found employment elsewhere, the Complainant proceeded only on its non-compliance complaint with respect to Gradon. By decision dated December 4, 1978, [1978] OLRB Rep. Dec. 1128, the Board found that the Respondent had failed to restore Gradon to his previous job as directed and at paragraph 19 of its decision observed:

> In the Board's view Gradon in presenting himself for employment on October 2nd, and in accepting the assignments given him between October 2nd and 18th, and in endeavouring to have his work assignments brought within the terms of the Board's Order, through discussions with his superiors, had acted with mature discretion and had done everything which could be reasonably expected of him to facilitate an implementation of the Board's Order. The Respondent employer, on the other hand, was embarked on a deliberate course of devising work assignments for Gradon such as would isolate him from contacts with other bargaining unit employees, and it is this course which is at the root of the failure to restore Gradon to his previous job.

8 By decision dated November 24, 1978, [1978] OLRB Rep. Nov. 1043, the Board certified the Complainant as the exclusive bargaining agent for a full-time bargaining unit excluding office, sales staff and part-time employees, inter alia, and reserved its decision with respect to a unit of part-time employees, pending the receipt of evidence under section 7a. This decision also reviewed evidence submitted by the Respondent in support of an allegation that membership support had been obtained by intimidation and coercion. The Board concluded that the charges were unfounded. The Board further concluded that it was not satisfied that a statement of desire filed in opposition to the certification application represented a voluntary expression of those employees who signed it and therefore declined to order a representation vote. It held that the Respondent had given its tacit support and approval to the circulation of the anti-union petition on company premises during working hours. Finally, in that same decision, the Board refused a request by the Respondent to inquire into the Form 8 charges filed by the Complainant holding that it had no allegation before it that if proven would support the impeachment of the declarations made in the Form 8.

9 The Respondent applied to the Court for judicial review of the Board's decisions dated November 24, 1978 and December 4, 1978.

10 The application for certification under section 7a for a bargaining unit of part-time employees was granted by the Board in its decision of March 29, 1979, [1979] OLRB Rep. March 248. Certification under section 7a of the Act is directed at those extraordinary situations where employer misconduct has, in the opinion of the Board, eliminated the reliability of any representation vote that might be held. In granting the union's application under this section, the Board relied on the earlier unfair labour practice dismissals; the failure of the Respondent to comply with the Board's order in respect of the employee Gradon; and the Respondent's conduct in relation to the circulation of the anti-union petition. It was also established that, in violation

of the Act, a company foreman warned two bargaining unit employees that if the union gained a foothold the company would "move out west", thereby lending substance to rumours to this effect in the plant. The Board also took strong exception to the Respondent's written comment disparaging an examination conducted under the Act into the duties and responsibilities of four employees whose inclusion the bargaining unit the Respondent had challenged. The examination was conducted by a Labour Relations Officer at the direction of the Board as is the Board's practice. At paragraph 25 of its decision the Board wrote:

> There is no question that the company's statement was designed to give the employees a false impression of the Board's procedures and, more importantly for our purposes, to convey to the employees the employer's disrespect for these procedures. It is the Board's view that the statement, which borders on contempt, served to further erode the confidence which employees normally have in the processes established under the Act to guarantee freedom of choice and redress employer violations of the Act. The statement must be considered by the Board in conjunction with the continuing failure of this employer to comply with the Board's order in respect of the reinstatement of Mr. Gradon in deciding whether or not, in the context of this organizing campaign, the true wishes of the part-time employees would likely be ascertained in a secret ballot vote.

Finally, the Board took notice of the Respondent's conduct in distributing bright red "T" shirts embossed on the front with the words, "We're company finks" and on the back with "and proud of it". The Board viewed these actions as "a deliberate and unsophisticated attempt to polarize the workforce..."

11 The Respondent again applied to the Court to have this decision reviewed and this application together with the earlier application pertaining to the Board's "interim" certification of the full-time bargaining unit were dismissed by that Court in its decision of August 8, 1979 referred to above.

12 In accordance with our ruling that the Board would admit evidence relating to the Complainant's organizing campaign, Donald Gallagher was called as a witness by the Complainant. He is now employed by National Grocers, but was employed by the Respondent in the Barrie area as a security officer from March 1977 to September 1978. He and Roy Murden (who until recently occupied the position of Director of Personnel and Security) had known each other as colleagues in the City of Oakville Police Department, where Murden had been a member of that police department's "drug squad". Gallagher had been very active in undertaking investigations and making arrests in this area of police work and, as a result, came to know Murden. After Murden joined the Respondent he apparently approached Gallagher with a job offer which the latter accepted.

13 Gallagher testified that sometime between Christmas of 1977 and spring of 1978, Murden told him the Complainant was trying "to organize a union with Radio Shack" and that he was going to hire two employees who would infiltrate the union to obtain information on it. Subsequently, Gallagher saw two employees working at the Barrie plant whom he knew had been associated with criminal activity in the Oakville area. Murden told Gallagher not to take notice of them so that he would not "blow their cover". Sometime later he accompanied Murden to the Bar Motel in Barrie where he witnesses a meeting between Murden and these two individuals. Murden advised them that he no longer required their services and paid them in cash then and there. Gallagher thought the two informants had been employed by the Respondent for a total of two weeks, but on cross-examination admitted that they might have been employed for as short a period as a day or two.

14 Gallagher also testified that in the summer of 1978 Murden directed him to photograph the Barrie Y.M.C.A. parking lot and building entrance because the Complainant was convening organizing meetings there. He testified that the purpose of these photographs and diagrams was to give guidance to a private investigation firm whom Murden had retained to take photographs of everyone who attended union meetings.

15 During August of 1978 Gallagher observed a woman working in the Barrie plant whom he knew as Brenda Thom. He said that she had been one of his informants in Oakville and that he approached her at the Barrie plant to confirm her identity. Later, Murden called him to his office and told him to stay away from the woman because he had "nearly blown her cover". Murden told him that she had been hired to infiltrate union meetings and to observe who was organizing the plant.

[1979] O.L.R.B. Rep. 1220, [1980] 1 Can. L.R.B.R. 99, 80 C.L.L.C. 16,003

16 Gallagher testified that he had talked to Murden about the Respondent's labour relations on many occasions and Murden, on one such occasion, advised him that he had been told "by Fort Worth to get rid of the union, no matter what the cost, even if it cost a million dollars". During one of these same conversations, Gallagher asked him "what would happen with the union, with their slim majority' and Murder said, "if they did not have a contract within a year, that they could apply to have the union dissolved". Murden then told Gallagher that the union would not get a contract within a year.

17 Murden asked for Gallagher's resignation in September of 1978 because of an incident unrelated to the union and the events surrounding this case. Gallagher testified that he did not tell the union anything about these matters until about the time of the last Federal election in May of 1979. Counsel for the Respondent cross-examined him extensively on this timing. Gallagher admitted that it was possible he might have told "someone" about these matters as early as September or October of 1978, but he believed his recollection of when he first advised the Complainant was accurate.

18 Frank Berry is a staff representative of the Complainant and was assigned the responsibility for negotiating collective agreements with the Respondent. He has been employed by the Complainant for thirteen years. He served the Respondent with notice to bargain under section 13 of *The Labour Relations Act* for the full-time bargaining unit on November 30, 1978. By letter dated December 5, 1978 Berry asked the Respondent for certain bargaining unit information so that the Complainant could bargain "from a point of full knowledge of all the conditions involved...". This letter asked for: (1) a list of all employees in the bargaining unit; (2) each employee's classification; (3) each employee's seniority date; (4) each employee's wage rate; (5) the details of all fringe benefits, Plant holidays, vacations, medical and insurance plans, stock option plans, etc. This Board has sanctioned such request under the duty to bargain in good faith, ruling that the provision of this kind of information helps to avoid "informational strikes" and facilitates informed discussion at the bargaining table. In the Board's view, providing the exclusive employee bargaining agent with access to this kind of information is basic to an employer's bargaining duty, particularly when the union is a newly certified bargaining agent. The response of the Respondent was to provide the information to the Complainant, but at the same time to disparage the request in a memorandum to all of its employees, dated January 9, 1979. This memorandum reads:

> MEMO TO: ALL HEAD OFFICE EMPLOYEES
>
> **REF: LETTERS FROM TRADE UNION**
>
> Attached are copies of correspondence the Company has received from the union.
>
> (a) Letter of November 30, 1978, demand to bargain.
>
> (b) Letter of December 05, 1978, request of personal information of full time employees.
>
> The Company must supply the information or again be attacked by the union. Up until present your *income*, your *job*, and your *personal employment information* has been confidential. This information now has to be sent to the union so Gaye Lambe can go back on radio, television and the newspaper and *tell all*. The Company is sorry to have to release this previously confidential information, but it has no choice in the matter.
>
> As has been Company policy we will continue to keep you informed.
>
> The Management

19 The Complainant subsequently sent a copy of the proposed collective agreement to the Respondent to commence bargaining. By memorandum dated January 11, 1979, the Respondent communicated the following information to all of its employees, attaching a copy of the Complainant's initial proposals.

[1979] O.L.R.B. Rep. 1220, [1980] 1 Can. L.R.B.R. 99, 80 C.L.L.C. 16,003

TO: ALL HEAD OFFICE EMPLOYEES

Well, *here* it is! From the attached letter you will note the Company has received the *demands* of the union.

We are enclosing both the letter received and the *demands*. Note page 3, article *6* - "6:01 It shall be a condition of employment that all *members must become and remain* members of the respective union in good standing."

Management *bets* they mean *EMPLOYEES* instead of members.

We have told you before and we tell you again -- *no one* has to be a *union* member *TO WORK AT RADIO SHACK* -- *NOW* or *EVER*.

No One -- *NOW* or *EVER* has to *pay TO WORK AT RADIO SHACK*, read article 6:02.

This is *Canada*. You are *free* to work without paying Gaye Lambe or the United Steelworkers of America any money.

Again -- if you want to join a union -- you are free to. If you do not want to -- you do not have to.

You will note we have suggested one of three days to commence collective bargaining with the union at the Holiday Inn at Barrie. Tuesday, 16th of January, 1979, or Wednesday, 17th of January, 1979, or Friday, 19th of January, 1979.

The Management

20 The first negotiation meeting between the parties was held on January 19, 1979 and the Respondent sent another "newsletter" about this meeting bearing the same date to all the employees. The letter reads:

January 19, 1979

TO ALL HEAD OFFICE EMPLOYEES

The first negotiation meeting lasted from 10:00 A.M. to 12:20 P.M. January 19, 1979.

The Union demands were explained and the following revealed:

1. Article 2.01 The demand was to cover part-time employees as well as full time. The Labour Board has not given the Union this right.

2. Article 6.02 The Union dues are now known:

(i) For full time employees -- 2 hours of your gross earnings per month.

(ii) For part-time employees -- 1.15% of your gross earnings per month.

(iii) Additional "Fees and Assessments" were not explained.

3. Article 17.03(B)

17.03(C) Management said they would never consider these because our housewife programme and part-time employees would have to be discharged.

4. The Union has demanded to include all Truck Drivers -- (over 20 drivers) to be included in the Bargaining Unit.

5. The Union refused to take turns to pay for room for negotiations. They claim they have no money.

The next negotiation meeting is be held Friday, February 16, 1979 at 10:00 A.M. at the Department of Labour in Toronto.

The Management

21 After the second meeting, the Respondent sent the following newsletter to all of its employees together with its counterproposal.

February 16, 1979

TO ALL HEAD OFFICE EMPLOYEES

The second negotiation meeting lasted from 10:00 A.M. to 12:20 P.M., in the Holiday Inn at Barrie.

The Company presented the enclosed counterproposal to the Union Bargaining Committee.

In return, the Company received the enclosed monetary demands from the Union. If the direct wage increase were granted it would mean the following percentage changes:

UNION DEMANDS

Mechanic	Start rate + 8%/Top rate - 1%
Maintenance	Start rate + 22%/Top rate + 12%
Maintenance Assistant	Start rate + 41%/Top rate + 29%
Technician #1	Start rate + 5%/Top rate - 3%
Technician #2	Start rate + 5%/Top rate - 16%
Local Truck Driver	Start rate + 29%/Top rate + 11%
Fork Lift Driver	Start rate + 20%/Top rate + 12%
Shipper/Receiver	Start rate + 31%/Top rate + 19%
Quality Control Inspec.	Start rate + 28%/Top rate + 15%
Order processor	Start rate + 18%/Top rate + 15%
Salvage Clerk	Start rate + 26%/Top rate + 11%
Inventory Clerk	Start rate + 22%/Top rate + 8%
Order Pickers	Start rate + 26%/Top rate + 11%
Order Packers	Start rate + 27%/Top rate + 12%
Cafeteria Workers	Start rate + 31%/Top rate + 16%

Does this make sense to you? Why should some employees get a 41% increase and other employees suffer a 16% decrease?

The above percentage demand does not include the cost of Appendix "A". Our reply to this was simple -- we would be prepared to give a fair increase to existing rates. We also stated we could not come close to these demands.

The Union claims *all* employees should get $12,000.00 per year as anything less is *poverty*.

In addition to all of this --

The Union is now trying to take the shirt off your back. They are claiming the Company should not have given out "T" shirts. They have run to the Labour Board and filed an application against the Company. We will have the hearing to defend this accusation on Tuesday, February 20, 1979 at Toronto.

Management will try and keep the *shirt* on *your* back.

REMEMBER THE STEEL WORKERS JACKETS?

There will be a new supply of "T" shirts available at the Personnel Office on Wednesday, February 21, 1979. These "T" shirts are available to anyone who wishes to have one. (This means *everyone* -- even union employees.)

The next meeting to negotiate is scheduled for Monday February 26, 1979 at 6:00 P.M., in the Holiday Inn at Barrie.

As usual, we will keep you advised.

The Management

22 The Complainant drew the Board's attention to the following provisions in the Respondent's counterproposal:

ARTICLE RELATIONSHIP

.01 The Union shall not by itself, its officers, members or agents, directly or indirectly, intimidate or coerce, or attempt to intimidate or coerce, any employee or employees into membership in the Union or otherwise, or solicit membership in the Union, collect union dues or engage in union activity on company time or during working hours, or hold meetings without the permission on the company premises. Violation by an employee of any of the foregoing shall be deemed just cause for immediate discharge of such employee by the Company.

.02 There shall be no distribution, release or printing, oral or otherwise by the Union, its officers, members or agents, naming or referring by suggestion or innuendo therein the Company or any of its officers, officials or agents, or any of its employees during the term of this agreement without written authorization by the president of the Company prior to any such distribution or release or printing. Any such breach hereof shall from the subject of a grievance and proceed immediately to a Board of Arbitration without first exhausting the grievance procedure. Proof of such breach may be made to the Board of Arbitration by filing of the document transcript or release with the Board.

The decision of the Board shall be as follows:

(a) an order directing the Union to cease such action and a written public statement withdrawing the earlier release in the same form, and,

(b) and order the trade union pay as damages to the United Appeal of Barrie a sum of not less than $5,000.00

and not more than $10,000.00 for each day following the release, printing or oral statement until such withdrawal is made.

RULES AND REGULATIONS

VIOLATIONS:

For violation by any of the following, an employee shall, for the first offence, be warned in writing; for a second offence, suspension of not more than three (3) days; for a third offence, discharge --

(a) Failure to advise the Company of correct address;

(b) Failure to identify yourself if requested by a watchman or Company official;

(c) Failure to be in your department ready for work at starting time and to remain at work until quitting signal is given;

(d) Failure to care for Company tools and equipment;

(e) Failure of employee to maintain quality workmanship;

(f) For spending unnecessary long or repeated periods in rest rooms, at drinking fountains, or in First Aid Room;

(g) Failure to maintain reasonable production;

(h) For throwing any articles or engaging in horseplay;

(i) For eating lunches other than at lunch period or at rest period;

(j) For loitering in any department or preventing another employee from working;

(k) For selling any chances or promoting any games of chance or gambling of any kind;

(l) For failure to observe "Safety Rules and Regulations".

An employee shall be subject to immediate discharge for violation of any of the following:

(a) Theft of any Company property or any person's property;

(b) Deliberate damage or waste of Company property;

(c) Insubordination or failure to follow any instructions of a Supervisor or Company official, except where it may endanger safety;

(d) Entering the plant in an impaired condition or bringing any intoxicant on the property;

(e) Giving any false statements or refusing to complete any Company or government forms;

(f) Fighting on Company property;

(g) Deliberately punching another person's time card or changing any reading on a time card;

(h) For smoking in any place where smoking is prohibited;

(i) Repeated tardiness or absence without permission;

(j) Walking off the job without permission;

(k) The distribution of pamphlets, newspapers, or printed material on premises of the Company without first obtaining approval from the Company.

NOTE: It is impossible to list all the situations in which disciplinary action will be necessary, and the above list while no all-inclusive will be changed when necessary by Management.

A change may be effected by sending by registered mail to the office of the Union the change to the rules with the appropriate penalty.

Any alteration, addition or deletion in the aforementioned manner shall have the same effect as it being included in the collective agreement for the purpose of alteration of penalty by a Board of Arbitration. Under the provisions of Section 37(8) of the Labour Relations Act.

Employees are not to enter the premises more than fifteen (15) minutes before starting time and must leave the premises not later than fifteen (15) minutes after official quitting time.

23 By letter dated April 9, 1979, the Complainant served the Respondent with notice to bargain in respect of the Respondent's part-time employees, indicating its hope to include these employees in the negotiations then under way.

24 Berry testified that little or no progress was made in the negotiations until the Respondent retained another lawyer to represent it in bargaining in early June. He testified that the subsequent progress that was made related to the settlement of a great deal of contract language, but that by August of 1979 five outstanding central issues were still on the bargaining table and he believed the Respondent's position on these items was designed to preclude the signing of an agreement. These issues were identified as: (1) a new set of "rules for personal conduct" the respondent wanted incorporated into the collective agreement; (2) a provision permitting the transfer of employees for up to six months without regard to seniority; (3) a wage proposal containing an 83 cent range between the minimum and maximum wage rates for all classifications regardless of the skill content of the classification to be administered by the respondent on the basis of merit; (4) a provision that would permit the fining of the Complainant if it mentioned the Respondent's name without permission (the above reproduced "Relationship" clause); and (5) the Respondent's insistence on the voluntary check-off of union dues (referred to by the parties as "union security").

25 The transfer clause takes the following form:

A 'temporary transfer' is defined as a transfer of an employee from one classification to another classification or from one department or [sic] another department for a period not to exceed six (6) months. The Company may 'temporarily transfer' an employee without regard to the employee's seniority and without regard to job posting and bidding.

[1979] O.L.R.B. Rep. 1220, [1980] 1 Can. L.R.B.R. 99, 80 C.L.L.C. 16,003

26 By August the article entitled "Rules for Personal Conduct" had been modified to include the following preamble along with the application of a four-step progression of penalties from verbal warning to dismissal for some thirty-nine categories of possible employee misconduct.

> The purpose of the following rules and regulations is to define and protect the rights of all employees and to insure the orderly operation of the plant. Rules For Personal Conduct will be enforced by Management in order to maintain safe working conditions and conduct on Company premises.
>
> The following chart of penalties for violations is intended as a guide under ordinary circumstances. Every effort will be made to administer the penalties with fairness.
>
> The step at which action begins is determined by the rule and is listed along with successive steps for continued violations. Each additional violation calling for the same or lower step results in moving to the next higher step.

27 However, the intended legal result of this provision continued to be the avoidance of review by arbitration of any imposed penalty once the Respondent established the occurrence of misconduct by proper proof.

28 The following job classifications to which the range of wage rates applied was set out in the respondent's first wage proposal made on July 24, 1979, almost eight months after the Complainant delivered its notice to bargain:

		WAGES		
		GENERAL		
Description		Grade	Min.	Max.
Cafeteria		1	3.88	4.74
Picker/Packer		2	4.12	4.96
Order Processor - Parts	2	4.12	4.96	
Ident. Clerk - Parts	2	4.12	4.96	
Picker/Packer Verifer		3	4.37	5.21
Stockhandler General		3	4.37	5.21
Co-ordinator - Parts	4	4.59	5.44	
Co-ordinator - Whse.	4	4.59	5.44	
Stockhandler Shipping/Receiving		5	4.84	5.68
		SKILLED		
Q.C. Modifer		3	4.37	5.21
Q.C. Inspector, Jr.		3	4.37	5.21
Clerk		5	4.84	5.68
Forklift Operator		6	5.06	5.92
Maintenance		6	5.06	5.92
Q.C. Inspector, Sr.		6	5.06	5.92
Driver - Local Van		7	5.30	6.15
Leadhand		8	5.34	6.39
Assistant Mechanic		9	6.94	7.80
Technician, Jr.		9	6.94	7.80
Driver - Shunt	10	7.19	8.04	

Mechanic	11	8.84	9.76
Technician, Sr.	11	8.84	9.76
Drivers - Transport	Not Applicable		

Minimum to maximum six (6) increments -- three (3) months, six (6) months, twelve (12) months and annually thereafter. Subject to objective performance evaluation. Drivers -- transport to be increased pro-rata.

29 Also in issue between the parties in August was the Respondent's insistence on the incorporation of an "Absenteeism and Tardiness" policy into any collective agreement. This policy set out a check list of possible reasons for absence and specified those for which a measure of excessive absenteeism would be applied together with a code of discipline.

30 On the issue of union security Berry testified that by the second or third meeting the Complainant had moved from a "union shop" proposal to a request that all employees in the bargaining unit pay union dues and that those employees who had signed union membership cards remain as union members. Berry testified that on the issue of "Rules and Regulations" the Complainant took the position that the Respondent had ample authority to promulgate rules of conduct, but the Complainant was opposed to the universal restriction on an arbitrator's powers of penalty substitution by incorporating such rules into the collective agreement. Berry also testified that the Respondent had never officially relented in its position on the so called "Relationship" clause until the Complainant received the Respondent's reply to the instant complaint wherein it advised this Board that "the Company, some time before the breakdown of negotiations, had dropped the 'relationship clause'...".

31 Berry explained that, against the background of this employer's anti-union conduct, the Respondent's position on each of the outstanding items made it impossible for the Complainant to do anything other than call a strike. In his view, the Respondent's voluntary check-off proposal would require union supporters to identify themselves to the company and, once identified, there was the risk that these employees (1) would not receive the discretionary wage increases envisaged by the Respondent's wage proposal; (2) would be transferred without their consent under the Respondent's temporary transfer proposal; and (3) would be disciplined under the Respondent's restrictive personal conduct rules. Signing a collective agreement containing the relationship clause would permit the fining of the union almost "at will" he further testified. By letter dated August 17, 1979 addressed to Bruce Binning, the Respondent's new counsel, Berry renewed an earlier request offering to submit all outstanding differences to binding arbitration. Binning replied by letter dated August 21, 1979 stating that his law firm did not agree with the arbitration of industrial disputes and that he would not be recommending the offer to his client.

32 At the conclusion of his testimony-in-chief, Berry told the Board that the conduct of the Respondent had completely demoralized the members and supporters of the Complainant and many had now quit the company's employ.

33 On cross-examination, he admitted that Binning asked him to point out those rules of conduct the Complainant objected to and that he would discuss them with his client. However, Berry insisted that the rules should not appear in the collective agreement. He agreed that there had been negotiating meetings with the Respondent on June 7, 14 and 29; on July 4, 24 and 26; and on August 8, 1979. He also agreed that many things had been agreed to during these meeting (i.e. many pages of contract language). He agreed that the Respondent was willing to allow the denial of merit increases to be the subject matter of a grievance, but said that this was meaningless because an arbitrator would be reluctant to substitute his judgment for management's. He did not recall the company offering to assume the burden of proof that its decisions were without discrimination, but he agreed that he was not told that the company's proposal for a merit system was its final position. With respect to the relationship clause, he said that he had never discussed it with Binning. Binning took over the negotiations for the Respondent in early June and Berry said the last time the clause was discussed was in February. He agreed that the union's proposals of July 24 and July 26 and its special meeting notice of July 31, 1979 made no mention of the relationship clause. He explained that at those times he had forgotten about the clause and may have assumed that the company had dropped the clause. However, in reviewing all outstanding items on August 8th he came across that proposal and realized it had never been officially withdrawn. On August 8th, the parties did not have a face to face negotiating meeting, but as a result of information received that day he honestly believed the issue was still on the bargaining table. On the first day of the strike, and many times subsequently, there had been reports in the newspaper that the issue was still in contention between the parties and at no time was he advised by the Respondent that the issues was no longer being pursued.

34 Berry agreed that most if not all of the progress in the negotiations was made after the arrival of Bruce Binning and that by August 8th the parties had narrowed their differences to the five outstanding items listed above. He said that many documents had been exchanged on the seniority provision containing the transfer clause with various alterations. He told the Respondent's counsel that the .83¢ spread in wages left too much discretion in the hands of the Respondent's foremen. He said the vast majority of the jobs could be learned in a short period of time and that therefore the spread was much too large. He said it would have been a different matter had the merit increases been only five cents.

35 Berry recalled a meeting in July (probably July 4th) with Binning, Steward Gordon, the Respondent's American lawyer, and Fraser Keene, the mediator of record. Berry indicated at this time that he would be seeking the appointment of a conciliation board and the Respondent's representatives objected. Both Binning and Gordon said they would not be able to get any movement on the outstanding issues until the respondent was facing a strike. Binning added that in the face of a strike both parties might have to change their positions. The meeting adjourned with a "gentlemen's agreement" that Keene would time his recommendation that no conciliation board be appointed to achieve an August 1st strike deadline. Berry also recalled telling Binning that he had yet to demonstrate that the Respondent was interested in achieving a collective agreement and Binning, in a jocular manner, replied that anybody who was not getting his own way could make that statement.

36 The last face to face meeting of the parties was held on July 26, 1979. Gordon asked Berry if both the union security and the rules and regulations issues were strike issues and Berry replied that they were. Berry went on to say that if the union had to strike, it would try to boycott the Respondent's stores across the country. He also told Gordon "if the dues shop fell into place, the others would as well". Keene then arranged a meeting of the parties for August 8th for a last attempt to resolve all outstanding items, but the Board was advised that no face to face meeting took place on that date and a strike commenced the next day.

37 Florence J. Tims, one of the striking employees, testified that Jack MacDonald, a security consultant retained by the Respondent at the outset of the strike, told her and another employee that some employees had retained a lawyer and were doing the work preliminary to an application to the Ontario Labour Relations Board for decertification. The actual filing of the application had to wait until November or December. He further advised them of the percentage of bargaining unit employees who had decided to work in the face of the strike. Finally, he told them that the company only needed "a certain percentage" of the employees to decertify the union. Margaret Russell, another striking employee, testified that some time in September she spoke with Bob Van Nispen, an executive of the Respondent company. He told her that there had been quite a bit of damage caused by people (non-employees) who were supporting the Complainant's picket line and parading on it. He then mentioned the name of Fred Lee, a husband of one of the Respondent's employees, and allegedly said "don't think people don't know where he lives and that things aren't going to start happening to him". The evidence is that a number of people not employed by the Respondent have appeared on the picket line and that vehicles going into the Respondent's facility have been scratched and have sustained tire damage. There is no evidence that any of the damage has been inflicted by the Respondent's employees.

38 Jack MacDonald testified and admitted that he may have talked to some employees on the picket line about decertification. However, he said he would have been merely repeating various rumours he had heard. On cross-examination he said his duties related to the effect of the picket line on the respondent's operations. He admitted that each day he directs the taking of photographs of people on the picket line. This is done as those who wish to enter the plant cross the picket lines in the morning and again in the afternoon as they leave. He said that Murden had arranged for the photography equipment before the strike began and that the pictures have been taken since the outset of the strike. He denied having discussed the issue of decertification with any member of the respondent's management; he denied making reports on the strike activity or having discussions with any executive of the Respondent's "inner circle"; and he denied being familiar with the decertification procedures in the Province of Ontario. He admitted that on a number of occasions since the beginning of the strike he has met socially with the ranking officer of the Barrie Police Department responsible for the proper conduct of the picket line. He said he has known the man for over ten years.

39 Stewart Gordon practices labour law in Columbus, Ohio and has acted for Tandy Corporation in the United States for

the past three years. He testified that he became involved in the negotiations of the Respondent on December 15, 1978 on the request of John Roach, Executive Vice-President of Radio Shack in Fort Worth. He said that he met Roach and the American parent's comptroller, John McDaniel, in Toronto on December 20, 1978 and he proceeded to testify about what he was told by these people. Counsel to the Complainant objected to any reliance being placed on this testimony because of its hearsay nature. The Board decided to admit the evidence, but indicated to the Respondent that the complainant's inability to cross-examine Gordon on the hearsay portions of his testimony would undoubtedly affect the weight to be accorded to such evidence.

40 He testified that he was told that management in Fort Worth had only been advised of the Canadian subsidiary's labour problems in December and that this lack of communication was because the Canadian management resented American involvement and had been quite successful from a financial viewpoint. However, on being appraised of the situation, the American parent became concerned and for that reason Roach, McDaniel and Gordon met with the Canadian management and their Ontario labour lawyer on December 20, 1978 to review matters. At the conclusion of that meeting it was decided that Gordon should become involved in the negotiations in an effort to keep the Fort Worth people abreast of events and to ensure that no more unfair labour practices were committed. He said it was apparent that the Canadian subsidiary had alienated itself from the Ontario Labour Relations Board and it was a position the American parent did not want to be in. However, because the Canadian management resented American involvement and because the Ontario labour lawyer, Donald McKillop, Q.C., refused to allow Gordon to sit at the negotiating table as either an observer or spokesman, Gordon commenced his involvement on the basis that he was to be kept advised of events as they unfolded. By May he became concerned with the direction of the negotiations and with the blessing of management at Fort Worth convened a meeting of the Canadian management with its labour lawyer. This meeting was attended by McKillop, Murden, Van Nispin, Gordon and Jerry Colella. The Board was told that Colella had been "brought in from the United States in February of 1979 and made Vice-President and General Manager of the Canadian operation". After this meeting he consulted with McDaniel, Collella, Roach and a Hubert Wynne. Gordon testified it was decided that the Canadian management was not keeping Fort Worth sufficiently abreast of matters and that Gordon should go to the negotiating table and possibly take on the role of spokesman. McKillop was advised and, according to Gordon, promptly resigned from the case finding these conditions unacceptable. Gordon said he therefore was in need of an Ontario labour lawyer and one who would not "offend the hell out of the Labour Board". After interviewing a number of lawyers, he decided to retain Bruce Binning. He said he wanted a labour lawyer who would make sure there would be no more unfair labour practices.

41 Negotiations with Gordon and Binning at the table commenced on June 7, 1979. He said that almost twenty-six articles with one hundred and twenty-five sections were outstanding and that after meetings on June 7, 14, 29, July 4, 24 and 26 the outstanding issues had been reduced to three: (1) the absenteeism policy; (2) the incorporation of a set of rules and regulations into the collective agreement; and (3) union dues check-off. Gordon said that he told Berry that the Respondent would modify the absenteeism policy and the personal conduct rules in all areas Berry believed them to be improper, but Berry insisted that neither matter should be included in the contract. Gordon's position was that a company and union should have a relationship whereby both parties clearly understood the "rules of the road". He did not want the union coming back on the Respondent disputing the discipline meted out and he wanted the only issue for an arbitration to be whether alleged improper conduct had occurred or not. Gordon said he advised Berry that he believed both parties were in a situation where they were only going to get serious with "their backs up against a deadline". Berry agreed and with the result that an August 9th strike deadline was set by the union. He said Binning kept the Respondent constantly mindful of its obligations under the Act through June, July and August. He testified that "it was not the company's intent not to sign a collective agreement".

42 On cross-examination he testified that he did not become concerned about the direction of the negotiations until May because he had not been kept properly informed. However, he had no knowledge of possible communications between the Fort Worth and Barrie managements throughout that period of time. He said that McKillop had drafted the respondent's initial proposal and that when he finally saw it he was "disturbed and concerned about several" provisions. As examples of his concern, he referred to the relationship clause and the rules and regulations as they were then drafted. He did not think the rules and regulations were sufficiently clear and he thought the relationship clause was absurd. Gordon did not know who drafted the employee newsletters, but that, to his knowledge, no more were issued after he became involved in the negotiations. Explaining the discontinuance of their issuance he said he thought there was absolutely no reason to issue the newslet-

ters and that he had been advised that they might be unlawful. Gordon also testified that while the American parent requested to have an inpute into the negotiations at the December 1978 meeting in Ontario; in fact, McKillop drafted the Respondent's first proposal without any consultation with either Gordon or the executives of the parent corporation.

43 He said that he became involved in the negotiations because the American parent recognized that its subsidiary had violated the legislation in significant ways, but that the Canadian company did not keep him sufficiently informed. For example, in explaining the delay in his concern over the direction of negotiations, he said that no one advised him on March 27, 1979 that the part-time bargaining unit had been certified under section 7a. When asked, he said that to the best of his knowledge there were no other certified bargaining units in the "Tandy empire", but on re-examination said that he knew of no unfair labour practice findings against his client in the United States for the period he has been associated with the company.

44 On the issue of the relationship clause he said that this provision, in his opinion, had "fallen through the floor boards" and, at the outset of the strike, no longer represented a difference between the parties. On the issue of union dues or check-off, he testified that the Respondent had no "business justification" for its resistance to this proposal of the union. It simply based its position on the belief that the union had never manifested "much support" by the employees. He said that at the time of certification, the Complainant had only one membership card in excess of the fifty-five per cent requirement for outright certification and with "seventy per cent" of the employees now crossing the picket line, the Respondent was confirmed in this view. He denied that the respondent felt a loyalty to the employees who have continued to work during the strike and denied that it had tried to divide the picketers from those who have crossed their lines. However, he acknowledged the following "open letter" published in a very recent publication of the Respondent under the heading "A Debt of Gratitute" and bearing Colella's signature:

> This section of Watts Up is dedicated to those Radio Shack employees who have demonstrated their courage and fortitute by exercising their right to work in the face of a strike called by a minority of workers.
>
> All Radio Shack sales personnel throughout Canada owe these people an expression of gratitude. Without their loyalty and dedication to their jobs, we would not be experiencing the sales and sales growth that we are enjoying.
>
> Perhaps it is fitting that we should find ourselves in this particular circumstance. It should make everyone who earns their living selling Radio Shack products aware that these people who work in the warehouse are more than "just warehouse workers". These people are as important and vital to our success in their job as a store manager who produces a $500,000 store is in his.
>
> All of you out in the field should express your gratitude towards these people. We have said our thanks from here -- we would like to hear from you.

45 Gordon testified that the Respondent's decisions on the outstanding issues were ultimately made by Jerry Colella. For example, Collela made the decision on union security after Gordon and Binning gave him "the parameters". The final decision was that because the Complainant had only a bare majority of employees as members, the Respondent would not be moving. On the other hand, the Respondent was willing to do what the law required on this issue and Gordon said its overall position "was not in cement". He said that Colella never gave instructions that there could be no movement although he did not know who had instructed McKillop. He denied that from June of 1979 the Respondent bargained only with a concern for the Labour Board and with no real desire to achieve a collective agreement. In his view, negotiations reached an impasse on union security and the rules and regulations issues. Berry told him an overall agreement could be achieved if the union could obtain its position on these issues. But Berry refused to make a counter proposal on any of the other outstanding issues until and unless the respondent agreed to compulsory check-off of union dues. Gordon said that the Respondent did not have a chance to conclude negotiations because the Complainant advised that it was not prepared to negotiate further. A strike was called on August 9, 1979.

46 Bruce Binning gave evidence. He said that at the meeting of July 26, Berry advised that "if dues check-off and the rules

come off everything else would fall into place". He said the relationship clause was not an issue in the negotiations after he became involved. He said the parties did not negotiate from the Respondent's earlier proposals and that he did not refer to that document more than once during the negotiations. He said that his understanding of all outstanding issues was based on the Complainant's document of July 26, 1979 listing sixteen items, and making no reference to the relationship clause. Binning said he advised the press of this fact after the strike had commenced when a reporter asked him if the clause was still an issue. He said it "was not the company's intent not to sign a collective agreement".

47 On cross-examination Binning said that the Rand Formula had been an issue in many collective bargaining disputes; that the Complainant had been involved in similar disputes in the past; and that in such situations, many of the unions, including the Complainant, had signed a contract without Rand. He said the Respondent's theory behind its position on union security was that a union was only entitled to the Rand Formula where it manifested a high degree of support from employees. The fact that the union had to represent all bargaining unit employees fairly in negotiations was not persuasive. The Respondent made a judgment on the actual degree of employee support by listening to people working throughout the plant. Its foremen, and possibly Murden, gave the negotiators information about these matters.

SUBMISSIONS OF THE PARTIES

The Complainant

48 It was submitted generally that the Respondent and its American parent had chosen as a matter of corporate policy: (a) to prevent the formation of a legal bargaining agent at its Barrie operation; (b) to ensure that no collective agreement would ever be signed, following certification; and (c) after being satisfied that it had achieved (a) and (b), to seek to redeem its public reputation with the Board and the community.

49 Under the heading of "Espionage", the complainant submitted that the retention of informants to infiltrate the union amounted to a violation of sections 56, 58 and 61 of *The Labour Relations Act*. American authority relied on included, *Ohio Power* (1940) 3 LC ¶60,169 (CA-6); *Bethlehem Steel* (1941) 4 LC ¶61,436 (CA-DC); *Atlas Underwear* (1941) 3 LC ¶60,228 (CA-6); *Grower-Shipper* (1941) 4 LC ¶60,609; *Joplin Motel* (1975) 220 NLRB 700 and *Powell Valley* [1975] CCH NLRB ¶19,449. The Complainant also contended that the hiring of private investigators to surveil protected activity under the Act as the Respondent had done was equally prohibited. It submitted that the regular photographing of striking employees, a decision made by the Respondent long before there was any damage on the picket line, was part and parcel of a scheme to coerce and intimidate union supporters.

50 The Complainant asked the Board to have regard to the totality of the facts surrounding this complaint. In particular, it asked us to take account of: (1) the earlier firing of two key in-plant union organizers; (2) the Respondent's tacit support of the circulation of an anti-union petition in contravention of its own no-solicitation rules; (3) the respondent's defiance of the Board's reinstatement of Gradon; (4) the Respondent's earlier threats to move its plant to Alberta; (5) the respondent's expressed contempt for the Board's examination procedures as described in an earlier decision of the Board; (6) the respondent's hiring of labour spies, private investigators, and two former police officers as a "labour relations consultant" and a "personnel director", respectively; (7) the "moral" crusade and vilification of the union and collective bargaining waged by the Respondent through its newsletters and "T-shirt" give away; (8) the Respondent's predetermined and rigid position on union security; (9) the presentation of "absurd" contract proposals which would, in many instances, give the employees less rights than they had before the arrival of the union; and (10) the continued divide-and-conquer tactics of the Respondent represented by MacDonald's circulation of unfounded rumours about petitions, Van Nispen's threats, and Colellas's tribute to "the right to work" in the Respondent's recent publication of Watt's Up. Authority relied on for the application of the "totality" approach to bargaining complaints included *Electri-Flex Company* [1978-79] CCH NLRB ¶15,224; *Truitt Manufacturing Company* (1956) 30 LC ¶69,932; *Reed and Prince Manufacturing Company* (1951) 96 NLRB 851; *May Aluminum* (1968) 58 LC ¶12,767 (CA-5); and *Maguire Transport Company* (1952) 22 LC ¶67,075.

51 The Complainant submitted that this employer has never recognized the union and this fact distinguished the instant

case from *Journal Publishing Co. of Ottawa Ltd.* [1977] OLRB Rep. June 309 where previously the Board said it lacked the power to impose a collective agreement. It was contended that the Respondent has in recent months engaged in a classic exercise of "surface" bargaining -- agreeing to many uncontroversial items but resisting on items it knows to be necessary for the signing of a collective agreement. The Complainant directed the Board to a number of earlier decisions condemning sham bargaining as a violation of good faith negotiations. The cases included *The Daily Times* [1978] OLRB Rep. July 604; *The Ottawa Journal* [1977] OLRB Rep. June 309; *Herman Sausage* (1960), 39. LC ¶66,253 (CA-5); *J.P. Stevens* [1978-79] CCH NLRB ¶15,369; *Noranda Metal Industries Limited* [1975] 1 Can. LRBR 145 (BCLRB)

52 The Complainant urged the Board to have regard to the substantive proposals made by the Respondent in evaluating its approach to bargaining and distinguished a number of American cases which appeared to reject this kind of evaluation as turning on the peculiar wording of the American legislation. In this respect the Complainant relied on *Noranda Metal Industries Limited, supra; Reed and Prince Manufacturing Company, supra*; and *Dominion Directory Co. Ltd.*, [1975] 2 Can. LRBR 345 (BCLRB).

53 It was submitted that the Respondent's position on security amounted to taking the benefit in bargaining of a number of earlier and surrounding unfair labour practices designed to prevent employees from supporting the union. Having successfully deterred a large number of employees from supporting the Complainant, it now relied on the resulting lack of employee support in resisting the Complainant's demands on union security. The Complainant submitted that the Respondent's position was entirely circular and unlawful.

54 The Complainant also asserted that the Respondent was now hiding behind its new lawyer. No member of the Respondent's "inner management circle" was called to give evidence and yet it was clear that these were the people who controlled the Respondent's action and were responsible for the earlier unfair labour practices.

55 On the issue of remedies counsel to the Complainant submitted that this case cried out for the most innovative relief the Board could fashion. The claimed relied listed at the outset of this decision reflects this submission. With respect to the posting and mailing of notices of violations by the Respondent, the Complainant submitted that the flagrant nature of the previous unfair labour practice violations required relief that would assure all employees that there would be no repetition. In addition, the Complainant asked that both itself and all the employees be compensated for their losses as a result of the Respondent's unlawful conduct. These losses were said to include legal costs, organizing expenses, and loss of wages. For authority, the Board's attention was directed to *Academy of Medicine* [1977] OLRB Rep. Dec. 783; *Kidd Brothers Produce Limited* [1976] 2 Can. LRBR 304; *Robinson and Little*, letter decisions of BCLRB dated March 15, 1976 and November 22, 1976. American cases to which the Board was referred, included *H.K. Porter et al* #1 (1967) 56 LC ¶12,332 (CA-DC), #2 (1968) [1968] CCH NLRB ¶20,040, #3 (1969), 60 LC ¶10,043, and #4 (1970) 62 LC ¶10,686; *Ex-Cello Corporation et al* #1 [1970] CCH NLRB ¶22, 251, and #2 (1970) 65 LC ¶11,801; *Heck's Inc. et al* #1 [1971] CCH NLRB ¶23, 259, #2 (1973), 70 LC ¶13,508 (CA-DC), #3 (1974), 74 LC ¶10,031 (USSC), and #4 [1974]75] CCH NLRB ¶25,529; and *Tidee Products Inc. et al* #1 (1970) 62 LC ¶18, 535 (CA-DC), #2 [1972] CCH NLRB ¶23,831, #3 [1972] CCH NLRB ¶23,831, and #4 [1973] 73 LC ¶14,482 (CADC); *Betra Manufacturing Co.* [1978] CCH NLRB ¶18,828; *John Singer Inc.* (1967) 56 LC ¶12,054 cert. denied 56 LC ¶12,341; *J.P. Stevens and Company Inc.* #1 (1967) 56 LC ¶12,054 cert. denied 56 LC ¶12,341, and #2 [1978-79] CCH NLRB ¶15,369.

56 Finally, and in the alternative, the Complainant asked that the Board impose a collective agreement on the parties either by determining the content of such a contract itself or by appointing an arbitrator. It was submitted that only in this way could the situation created by the Respondent's unlawful conduct be rectified. The Complainant urged that the Board find that it has the power to award such extraordinary relief and attempted to distinguish the *H.K. Porter* decision, *supra*, in which the United States Supreme Court held that the National Labour Relations Board lacked such statutory authority.

57 The Board was asked to remain seized of the complaint to deal with the quantum of damages should the Board find monetary relief appropriate.

[1979] O.L.R.B. Rep. 1220, [1980] 1 Can. L.R.B.R. 99, 80 C.L.L.C. 16,003

The Respondent

58 Counsel for the Repondent submitted that the Complainant's position makes the assumption that a company cannot change its attitude and approach to collective bargaining once having been found to have violated the Act. In counsel's view, this assumption was entirely inconsistent with the issuance of directions -- the standard and workable remedy in duty to bargain cases. A cease-and-desist directive in the nature of a bargaining order assumes that companies are controlled by individuals who will abide by the law once it is made clear that their earlier conduct has violated *The Labour Relations Act*, he submitted.

59 Counsel emphasized that Frank Berry admitted to significant progress in the negotiations once Bruce Binning was inserted; that in the last week of the pre-strike negotiations the parties had narrowed their differences to the rules and regulations including the absenteeism policy, wages, temporary transfers and union security; and that by the strike deadline Frank Berry made it clear that union security was the only real issue between the parties. On the issue of wages he pointed out that the Respondent had offered to permit arbitration on differences over the awarding of merit increases and on the issue of the incorporation of rules and regulations into the collective agreement he asked the Board to note that the Respondent was willing to review any rule the complainant found objectionable. Counsel further contended that on union security the respondent was willing to abide by the terms of section 36a of the Act which provides for what is known as "voluntary revocable check-off" and it was submitted that in *The Daily Times* [1978] OLRB Rep. July 604 the Board held that such an offer could not be in violation of the Act.

60 The Respondent submitted that all of its actions prior to June of 1979 became irrelevant after it began to amend its initial offer and conduct negotiations in a meaningful way. It was submitted that the Complainant is not a union unable to achieve a collective agreement, but rather the Complainant has, until present, been unable to achieve the agreement it wants. It cannot get a "dues shop". Counsel asked why the Complainant caused its supporters to go on strike if it thought the Respondent had been bargaining in bad faith. Why did it wait so long to bring forward this unfair labour practice complaint? Counsel submitted that the real explanation was simply that the Complainant thought it could successfully strike on the issue of union security and that it had not done as well in this regard as it had expected. It was contended that the Board could only rely on the substantive proposals of a party in making a finding of bad faith where those proposals were patently unreasonable, a condition which could not be said to exist in the instant case.

61 It was pointed out that the Respondent was never advised that voluntary check-off was unacceptable to the union because it would cause union supporters to identify themselves and that going on strike and engaging in picketing would have this same effect in any event. On the other hand, the Respondent has refused to agree to a Rand Formula because it believes the union lacks sufficient employee support and it is not unusual for a trade union to accept the voluntary revocable check-off of union dues in a first collective agreement.

62 With respect to the remedies requested by the Complainant, the respondent took the position that the requested relief was primarily directed at events that were more than one year old; that the Board lacked jurisdiction to impose a collective agreement and previous decisions of the Board including *De Vilbiss* (*Canada*) *Limited*, [1976] OLRB Rep. Mar. 49 at 66; *The Journal Publishing Company of Ottawa Limited*, [1977] OLRB Rep. June 309 at 323 and *The Daily Times, supra* at 611 confirmed this view; and that monetary relief was an inappropriate remedy for enforcing the bargaining duty.

DECISION

63 This case merits a review of a number of basic legal principles together with consideration of their relationship to the bargaining duty. When a trade union is certified as the bargaining agent of employees in an appropriate bargaining unit under section 7 of *The Labour Relations Act*, it has the status of exclusive agent for every one of the employees in the unit so defined. It is with this organization and with this organization alone that the employer must deal once proper notice to bargain has been given. This exclusive nature of the bargaining agent's role is made clear by sections 35, 41, 42, and 59 of *The Labour Relations Act* and by such well known cases as *John I. Case Co. v NLRB* (1941) 321 U.S. 332; *Le Syndicat Catholique*

des Employés de Magasins de Quebec Inc. v Le Compagnie Paquet Ltée (1959), 18 D.L.R. (2d) 346 (S.C.C.); and *General Motors of Canada Ltd. v Brunet and U.A.W.*, [1977] 2 S.C.R. 537. This exclusivity accrues despite the fact that a substantial minority of employees in a bargaining unit were opposed to the trade union at the time the certificate was issued. Like in other systems based on the majoritarian principle, the trade union's role as the exclusive representative can be triggered by a bare majority of employees. However, once a trade union is given this privileged role, it owes an affirmative statutory obligation to represent each and every employee in the bargaining unit fairly and in good faith by virtue of sections 60 and 60a of *The Labour Relations Act*.

64 The legal result of these provisions in the context of bargaining is that once a certificate is issued to a union by this Board, an employer cannot embark on negotiations with a view to rewarding or protecting those employees it believes to have opposed the trade union. Such conduct undermines the exclusive bargaining agent status of the trade union and the minority of employees are amply protected by collective bargaining realities and numerous provisions of the Act. They have the right to participate in the affairs of a trade union (section 3) and their views must be considered by the bargaining agent acting on their behalf (section 60). The collective bargaining reality is that any union representing them will require their cooperation in effecting economic sanctions against an employer if negotiations reach the impasse stage. Indeed, ongoing employee dissatisfaction ultimately can manifest itself in the form of an application for decertification. Thus, while it may be tempting for some employers to conduct bargaining with a view to fostering dissension in a bargaining unit by attempting to protect those employees who intially opposed the trade union, it is improper and in violation of the Act to do so. Such conduct interferes with the rightful choice made by the majority of the employees in the bargaining unit, and simply feeds the anxiety of those employees who, for whatever reason, had earlier doubts about the need for or vialibility of collective bargaining in their workplace.

65 Bargaining with the obvious view of creating and fostering dissension within a bargaining unit, is also a failure to abide by the requirements of section 14 which obligates trade unions and employers alike to "bargain in good faith and make every reasonable effort to make a collective agreement." On numerous occasions this Board has said that the bargaining duty fortifies the employer's obligation to recognize the duly certified bargaining agent of its employees. See generally *De Vilbiss* (*Canada*) *Limited, supra*. This means that employer conduct during the bargaining process aimed at undermining the credibility of a trade union in the eyes of the employees not only violates sections 56, 58, and 61, it will also amount to a failure to negotiate in good faith. Section 14 demands that both parties have the common intention of signing a collective agreement provided that they can reach agreement on its terms.

66 Unfortunately, because of the latter proviso, the application of this legal framework to particular cases can be difficult. The duty to recognize a trade union and to bargain in good faith does not require an employer to enter into any collective agreement proposed by a union. It is apparent from the structure and history of the legislation that the Legislature has assumed that the parties are best able to fashion the details of their relationship. The assumed strength of this approach is that labour and management are more likely to accept an employment relationship which they themselves create than one that is imposed on them. So too, their agreement is likely to be more accommodative of the economic and social demands that each faces. Accordingly, both parties are entitled to bargain hard for the agreement that they believe to be acceptable. This is so even if one of the parties has as overwhelming strength at the bargaining table and is able to achieve most or all of its needs. The exercise of such raw bargaining power in good faith does not offend the bargaining duty imposed by this Act. See *York Regional Board of Health* (1978), 18 L.A.C. (2d) 255 at 263 (Adams).

67 Thus, from an employee viewpoint the right to engage in collective bargaining is not a right to achieve the terms of employment employees may wish. It is simply an opportunity to combine together to try and achieve their needs with the possibility that economic realities will dictate quite a different result in any particular situation. This perspective of the bargaining duty was explained by the Board in *CCH Canadian Limited* [1974] OLRB Rep. June 375 at page 381 in the following way:

> There was no evidence to suggest that the company's position on these items was other than "hard bargaining". There is no requirement that a company must make concessions or agree to a particular agenda of discussions. The parties met often and bargained hard. Because the union might have to accept an agreement "tailored to the company's measurements", to use a modified version of Mr. Peacock's own chosen words, is no reason to conclude that the

> company was bargaining in bad faith. (see *Regina ex. rel. Hearn v. Norfolk General Hospital* (1957) 119 C.C.C. 290 (Ont. Mag. Ct.). There was no evidence to suggest that the company was unprepared to sign an agreement; but of course it wanted an agreement on its own terms. Collective bargaining is redolent of self interest and without evidence to suggest that the company's terms were so unreasonable as to suggest that, in reality, it wanted no agreement and no trade union, the Board is unprepared to grant the application.

68 Of course, difficulties may arise in trying to distinguish those actions of an employer that are properly characterized as "hard bargaining" from conduct designed to destroy the union. And first contract bargaining presents the Board with no greater challenge in this respect.

69 In order to make necessary but sensitive assessments of bargaining conduct the Board must assess the totality of a collective bargaining relationship. For example, the occurrence of flagrant employer unfair labour practices at the same time the parties are engaged in collective bargaining may belie an employer's claim that a negotiating position is merely hard bargaining with a trade union unwilling to accept its lack of negotiating "clout." Or patently unreasonable contract proposals lacking any semblance of business justification may suggest an employer's desire to embarrass the union and encourage its abandonment by the employees. The legislation requires the parties to make every reasonable effort to make a collective agreement, a duty which patently unreasonable proposals fly in the face of. On the other hand, this Board must exercise considerable restraint in intervening in negotiations between parties who are committed to reaching a collective agreement -- a commitment which is more and more self-evident as parties proceed together beyond their first collective bargaining agreement. Too penetrating a review by this Board will only insert it as a third party in the bargaining arena to be tactically used by the negotiators, diverting their attention from the principal task at hand. This is the sense of the note of caution registered by the British Columbia Labour Relations Board in its touchstone *Noranda* case, *supra* at page 160:

> Collective bargaining is not a process carried on in accordance with the Marquess of Queensbury rules, and that is especially the case when a lengthy strike is going on. Archibald Cox has warned of the long-range consequences of too close scrutiny by the Board of the tactics of negotiators:
>
> > There is also danger that the regulation of collective bargaining procedures may cause negotiators to bargain with a view toward making the strongest record for NLRB scrutiny. The report of the Truitt negotiations bears ample evidence of the jockeying of lawyers. Hammering out a labour agreement requires all the negotiators' skill and attention. To divert them from the main task by putting a value on building up or defeating an unfair labour practice case diminishes the likelihood that the negotiations will be successful.
>
> Accordingly, while we interpret s. 6 as requiring adherence to certain fundamental principles of reasonable bargaining procedure, we also consider that this Board must exercise considerable restraint in intervening in negotiations between parties who are committed to reaching a collective agreement.

These principles are of fundamental significance to the facts at hand.

70 We begin by considering the matters attested to by Gallagher. The content of his testimony was quite removed in time from the collective bargaining in June to August of 1979, but we are satisfied that it is relevant and sufficiently timely to be considered in the context of this case. The complaint filed by the Complainant alleges a violation of sections 56, 58, and 61 as well as section 14. Gallagher's testimony goes directly to section 56, 58, and 61 and is relevant to the totality of facts against which the Complainant's section 14 claims must be viewed.

71 Gallagher testified that through Roy Murden the Respondent hired certain persons to infiltrate and obtain information about the union. He testified that Murden hired a private investigation firm to take pictures of persons attending union meetings. He further testified that Murden told him he had been advised by "Fort Worth to get rid of the union no matter the cost." Neither Murder nor any other person employed in the management of either the Respondent or its parent corporation was called to rebut this testimony. Gallagher was cross-examined extensively with respect to the timing of the matters he attested

to. While this cross-examination revealed some uncertainty over the issue of timing, we cannot find that the answers obtained from him on cross-examination were anywhere near sufficient to impeach the testimony or to render it so uncertain that this Board should not rely on it. We therefore find that the events to which he testified are factual. We further find that the hiring of the private investigation firm to perform the service it did and the hiring of persons Gallagher knew to be informants to infiltrate and obtain information about the union and its supporters amount to flagrant violations of sections 56, 58, and 61 of *The Labour Relations Act*. These actions, without rebuttal testimony, must be seen as going hand in hand with the termination of two employees and the threat of plant removal which the Board, in earlier proceedings, also found to be in violation of the Act. We have difficulty in imagining conduct that could be in greater conflict with an employer's obligations not to interfere with the selection of a trade union (section 56) and not to intimidate employees exercising their rights under the Act (section 58 and 61). Even if the employees lacked the knowledge that they were being watched and reported on, we are of the opinion that surveillance activity can only have purposes of aiding an employer in "interfering" with the selection of a trade union and in "coercing" and "restraining" employees from engaging in protected activity and, with these purposes, constitutes a *per se* violation of sections 56, 58, and 61 of *The Labour Relations Act*. See *Grower-Shipper Vegetable Association of Central California, supra* at page 61,807; *Bethlehem Steel Company et al, supra* at page 61,440; *The Atlas Underwear Company, supra*; and *The Ohio Power Company, supra*.

72 We further find that the overt taking of movie pictures or photographs of employees on the picket line at the very commencement of the strike, in the context on this case, had the coercive purpose of intimidating the employees engaged in protected strike and picketing activity against the Respondent. All of the camera equipment was acquired by Murden before the commencement of the strike and the Respondent, through MacDonald, began taking pictures well before any damage had been sustained to vehicles crossing the picket lines. MacDonald did not know why the equipment had been retained so early and Murden was not called as a witness to provide the Board with an explanation. Just when the picture took on the bona fides purpose of being in response to or of deterring improper activity on the picket line we need not determine.

73 MacDonald's interaction with employees on the picket line also gives the Board cause for concern. The Complainant adduced evidence that MacDonald told employees that an application for decertification was being prepared by employees and that they had already retained a lawyer. MacDonald admitted that he may have discussed "rumours" about a decertification application with employees on the picket line. On the evidence before us we are satisfied that he did tell employees on the picket line that a decertification application was being prepared and that this information, being untrue, was conveyed for the purpose of deterring the employees from exercising their right to strike and engage in other union activities protected by the Act. On cross-examination he admitted that he had no firm knowledge about the matters he related to Florence Times and another employee giving rise to the reasonable inference that he conveyed the information she said he did and that his purpose was to demoralize, confuse and coerce the employees on strike.

74 This brings us to the specific charge that the Respondent has not bargained in good faith and made reasonable efforts to reach an agreement. In discussing the nature of the bargaining duty, we noted the difficulty of distinguishing hard bargaining from conduct which is more in the nature of "going through the motions", and lacking any real intention of signing an agreement -- "surface bargaining" if you will. Experience has taught this Board that it must be particularly sensitive to this distinction in first contract situations. Few employers willingly embrace collective bargaining, but most accept the right of the employees to participate in that process and negotiate first agreements with duly certified bargaining agents without rancor or controversy. This, of course, does not mean that all first agreement controversy is a product of anti-union animus or that good faith bargaining in first agreement situations must always end in a contract. Neither proposition would be true. However, the Board and the Legislature of this Province are painfully aware of a number of situations where employers have resisted the organization of their employees by patently unlawful means and the economic dependence of an employee on his employer has been shown to be a very fertile environment for the improper manipulation of employee wishes. Indeed, so delicate is the employment relationship in this respect that the Legislature, in its wisdom, deemed it necessary to enact section 7a, an extraordinary provision which permits the certification of a trade union where, because of improper employer conduct, "the true wishes of employees ... are not likely to be ascertained..." Unfortunately, the issuance of a certificate by this Board does not always bring an end to unlawful employer conduct. A trade union is in no more vulnerable a position in many situations then after the issuance of a certificate, particularly where its organizational campaign has attractd the commission of employer unfair labour practices. Some employers are therefore tempted to continue the controversy over recognition in the knowledge

that further delay in negotiating an agreement and the spectre of continued employer hostility will demoralize a sufficient number of employees that no collective agreement will need be signed. Accordingly, in order to effectuate the underlying policies of the Act including section 7a, the Board must be most circumspect in applying the bargaining duty to first agreement negotiations. The Board should not conclude lightly that an employer is merely engaging in hard bargaining in such situations or that it is exercising its freedom of speech in communicating directly with bargaining unit employees. The nuances of each case must be considered and earlier employer unlawful conduct may trigger a detailed assessment of bargaining activity. The legitimate concern for "freedom of contract" or "freedom of speech" ought not to blind the Board to abuses committed under either banner, and that strike at other equally fundamental tenets of the legislation.

75 In the facts at hand, the Respondent commenced bargaining after having dismissed two employees; threatened to move the company out west; given tacit support to an anti-union petition; refused to reinstate an employee at the direction of the Board; and disparaged the Board's normal certification procedures. It also engaged in the other flagrant unfair labour practices established in this case and commented on above. Notice to bargain was given in November of 1978 and meetings began in January. As bargaining commenced the Respondent was distributing T-shirts to its employees that another panel of this Board described as "further polarizing the workforce and further identifying itself as a combatant in the process." Against this background, we then find the Respondent sending a newsletter to all of its employees at the conclusion of each bargaining session and exchange of proposals. The Board has held that parties in first agreement situations ought not to bargain "in the dark" and that an employer is obligated to provide an employee bargaining agent on request with the details of all existing terms and conditions of employment of bargaining unit employees. See *De Vilbis supra*. The failure to provide such information is a failure to make every reasonable effort to make a collective agreement and only perpetuates confusion and distrust at the bargaining table. The Complainant made a request of the Respondent for this kind of information and, while it was eventually provided, the newsletter to employees dated January 9, 1979 ridiculed and disparaged the request. The review of the union's first proposal in its newsletter of January 11, 1979 is in equally intemperate language. These communications, in this particular context, can only be considered as having the purpose of discrediting the Complainant in the eyes of the employees in order to undermine its position as their exclusive bargaining agent. While an employer is entitled to communicate directly with his employees notwithstanding the certification of a trade union, this right must be exercised judiciously and cannot be used to undermine the trade union's bargaining role. Nor, obviously, can it be used for subtle or not so subtle coercion and intimidation of employees. These communications, in our opinion, carried with them a veiled reminder of the Respondent's earlier coercive conduct and evidenced to them that the issuance of the certificate had had no impact on its anti-union attitude. We also find that the contents of these newsletters cannot be justified as attempts either to clarify employee misunderstandings or to persuade employees about the merits of a particular employer proposal. See *B.C. Sugar Refining Co. Ltd.*, July 14, 1978 (unreported). This was also the case in *A.N. Shaw Restoration Ltd. et al* [1978] OLRB Rep. May 393 where at 398-99 the Board had the following to say about the proper approach in employer communications of this kind:

> The existence of this well-established principle of exclusivity of bargaining rights means that employers must be circumspect when communicating with employees represented by a bargaining agent, especially when these communications occur during the course of negotiations. The need for circumspection on the part of employers, however, does not mean that all communications between employer and employees are prohibited. Section 56 of the Act, prohibiting employer interference with the formation, selection or administration of a trade union or the representation of employees by a trade union, expressly provides that this very general prohibition does not 'deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence'. Where communications occur between employer and employees during negotiations, the Board must draw a line dividing legitimate freedom of expression from illegal encroachments upon the union's exclusive right to bargain on behalf of the employees. The line is not an easy one to find, and can only be discovered by asking whether such communications in reality represent an attempt to bargain directly with the employees. If employer communications can be characterized in this manner, they must be regarded as unduly influencing employees and, therefore, falling outside the protection provided to freedom of expression in section 56. Once outside this protected area, such communications can be characterized as a violation of section 59 of the Act, and also a violation of the duty to bargain in good faith if they serve to undermine the viability of the bargaining agent.
>
> The question in this case is whether the respondent company's communications to its employees can be characte-

> rized as an attempt to bargain directly with them. The first communication was the letter of February 6th, coming just over two weeks from the first bargaining session. This letter cannot be characterized as an attempt by the employer to explain its bargaining position, nor as an attempt by the employer to set the record straight by clearing up a perceived misunderstanding on the part of the employees. Rather, the respondent company took upon itself to disparage the union's proposal in no uncertain terms. Even more significant, at the very outset of the negotiations before any real discussions had taken place with the union, the company had indicated to the employees that it would take a rigid position on the referral system, while at the same time raising in the minds of the employees the uncomfortable spectre of a strike. The nature and timing of these remarks raises a serious question of whether the employer was indeed attempting to bargain directly with the employees.

We therefore find that the Respondent's direct communications with its employees violated sections 14, 56, 58, 59, and 61 of *The Labour Relations Act*.

76 We are also of the view that the content of the Respondent's first contract proposal was calculated to impair any progress in the negotiations by inserting the inflammatory relationship clause and the almost equally destructive openended proposal on employee conduct with its related penalties. The Respondent, in its evidence, did not seek to give any rational justification for those two demands and, indeed, Stewart Gordon made his disdain for these proposals clear. This Board must be extremely careful in passing on the contents of contract proposals for all of the reasons that support free collective bargaining, but it cannot disregard rigid proposals which are obviously calculated to exacerbate conflict and which are fundamentally at odds with the reasonable efforts required of both parties by the bargaining duty.

77 Bargaining over these inflammatory proposals then dragged on until the month of June 1979 with no discernable progress. Stopping at this point, we have no hesitation in concluding that the Respondent from November 1978 until June of 1979 utterly failed in its duty to bargain in good faith and make every reasonable effort to make a collective agreement. We are also of the view that its negotiating conduct during this period was a blatant continuation of its earlier anti-union animus and clearly aimed at further dividing its employees and undermining the trade union's statutory role in violation of sections 56, 58, and 61 of *The Labour Relations Act* and their underpinning principles discussed above.

78 This brings us to the months of June, July and August of 1979 and the Respondent's conduct at that time. There can be no doubt that the parties made "progress" after the insertion of Bruce Binning. A substantial portion of the language that would go into any collective agreement was agreed to between June and August and by the end of July the outstanding central issues had been narrowed to union security, merit wage increases, the transfer clause and the rules and regulations of the Respondent. Gordon testified that he had become dissatisfied with the "direction" of the negotiations by May and in retaining Bruce Binning wished to avoid the commission of any further unfair labour practices. Binning testified that the Respondent's position was not rigid on union security; that it was willing to submit disputed merit increases to arbitration; and that it was willing to review any rule the Complainant thought unreasonable. On the surface all of this evidence appears consistent with the Respondent's claim of a complete "change in heart."

79 So too, some of Berry's evidence is consistent with this theory. After narrowing the issues to four, Berry agreed to the issuance of a no-board report by the Minister apparently to facilitate the mutual need for a strike deadline. This could be said to be a peculiar approach to take with respect to an employer the Complainant thought was bargaining to destroy it. As the strike deadline approached Berry said that if there could be an agreement on union security and the rules, "everything else would fall into place." The union then waited until it was at least three weeks into its strike before commencing this complaint -- a timing which might suggest the Complainant simply miscalculated its capacity to strike the employer, its strength having been dissipated by the Respondent's earlier lawless conduct.

80 We have, however, a number of serious misgivings which preclude adopting this view. For one thing, neither Gordon nor Binning had the final say in developing the Respondent's negotiating position. Apparently, Jerry Colella had the ultimate responsibility in this respect and Colella was not called to testify. The evidence indicates that Colella was in control of the Respondent from February of 1979 and, thus, would have been party to the earlier bad faith bargaining which we have found occurred up until at least June of 1979. We further note the recent publication of the letter of "thank you" bearing Colella's

picture and signature to those employees who have continued to work during the strike and its resemblance to earlier improper tactics aimed at dividing the employees and undermining the Complainant. By itself the letter could be viewed as no more than an emotional response to a heated strike situation, but the overall conduct of the Respondent makes it difficult for the Board to be confident in characterizing the letter this way. Viewed in the totality of the Respondent's conduct, Colella's "thank you" is more suggestive of an unmitigated desire to destroy the Complainant by fostering employee opposition and belies any apparent change of heart. In the context of this case, the publication also constitutes a violation of section 56 as well as casting light on the proper construction to be given the Respondent's other actions.

81 Apart from Jerry Colella, there has been no significant change in the identity of those people managing the Respondent since the issuance of the certificate for the full-time unit and, yet, no one from the Respondent's management came forward to testify about the underlying basis to the instructions given to Gordon and Binning from June to August in contradistinction to the style of bargaining the Respondent had engaged in before that. Of additional concern is Gallagher's testimony that Murden told him "Fort Worth" wanted to get rid of the union at any cost and that the union would not get a contract within the year following notice to bargain. This testimony was inconsistent with Gordon's evidence that the American parent had been kept in the dark. Indeed, the insertion of Colella by the American parent in February of 1979 is inconsistent with Gordon's view of the Respondent as an independent Canadian subsidiary which was keeping its parent and its advisor in the dark. We are also concerned that neither Murden nor anyone associated with the parent came forward to rebut Gallagher's testimony or to explain to the Board firsthand that such deep-seated attitudes no longer permeated the Respondent's actions. Gordon explained his understanding of the change in attitude, but he is not an officer of either the American parent or the Respondent and his evidence about the change in attitude was, by and large, hearsay. Furthermore, he had no direct knowledge of any communication links between the Respondent and its parent and the role the parent was playing, if any, in the negotiations. Berry dealt exclusively with Gordon and Binning and even in the eleventh hour of the negotiations he doubted the sincerity of the Respondent. With the insertion of a new face in the negotiations, it is not surprising that the union delayed bringing this complaint and instead made a serious effort to test and judge the Respondent's apparent change in heart. That the Complainant called a strike before launching this complaint is not irrelevant to the issues before us but may only reflect its stated uncertainty over the Respondent's true intentions. After hard reflection on this issue, we have come to the conclusion that any ambivalence it may have had over the actual intentions of the Respondent was not unreasonable in the circumstances and ought not to deprive it from asking this Board to make its own judgment about the Respondent's sincerity in light of all the evidence.

82 In making our assessment, the absence of direct testimony from company officials is of great significance because of the rigid positions taken by the Respondent on the central issues in the negotiations. There can be little doubt that its positions on wages, transfer, union security and rules of conduct cut to the very heart of a collective agreement. That they would be strike issues with the Complainant in the context of this dispute is hardly surprising. That the Complainant would see an anti-union animus connecting the Respondent's position on each of these issues is also not unreasonable given the history to this relationship. Against the background of the Respondent's earlier misconduct, this Board is entitled to a detailed explanation justifying the Respondent's position on each item in order to be satisfied that the positions were not taken for the purpose of provoking the Complainant into an untenable strike.

83 To be fair to Bruce Binning and Stewart Gordon, they tried to give a rationale for some of the positions taken, but it was clear that they were merely giving their personal in terpretations of what they thought the Respondent's intent was. The fact that they told Berry a strike deadline might affect the Respondent's resolve is demonstrative of their limited direct knowledge of the Respondent's motives.

84 The absence of direct testimony on motivation is of particular importance on the issue of union security because the Respondent's position on this issue fits hand in glove with the entire pattern of earlier unlawful conduct aimed at fostering employee opposition to the Complainant to undermine its status as exclusive bargaining agent for all of the employees in the bargaining unit. Binning testified that the Respondent's position was not rigid on this issue, but saying this does not make it so. The rigidity in a party's position must be gleaned as much from its conduct as from what it says to this Board. While we have no doubt that Bruce Binning thought his client might react differently in the face of a strike, the fact is that it did not. It is also a fact that Colella was the decision maker and he did not come forward to provide the Board with his understanding of

the Respondent's current position on this issue and to explain how it differs from the Respondent's intemperate declaration on union security published in its January 11, 1979 newsletter. Nor was he called to explain how his "thank you" note to employees not honouring the picket lines related to the Respondent's earlier improper tactics aimed at discouraging support for the Complainant. From the Respondent's bargaining conduct one can detect no change on the union security issue from the period during which its actions were rife with anti-union animus to the more recent period where it claims to have engaged in hard bargaining. Furthermore, we have difficulty with Bruce Binning's explanation that the Respondent's position on union security is simply an unwillingness to agree to a Rand Formula where the union lacks a very large degree of employee support. Where the employer adopting this position has played no significant role in unlawfully contributing to the absence of such support, the position is unobjectionable. Such a difference in principle is not foreign to collective bargaining and cannot, by itself, be considered a product of bad faith bargaining. See *The Daily Times, supra* page 610. But where an employer adopts this stance after having engaged in the kind of pervasive unlawful conduct that the Respondent has engaged in, the underlined caveat in the following excerpt from *The Daily Times* leaps out from the rest of the paragraph which the Respondent asked the Board to take note of:

> The union claims that the company has coupled its wage offer with an offer of union security which it knows the union cannot accept and which, therefore, is designed to make it impossible to conclude an agreement. Section 36(a) of the Act provides that on written request of the trade union there shall be included in the collective agreement a clause providing for voluntary revocable check-off. An offer of the form of union security provided for in Section 36(a) of the Act cannot be in violation of the Act. *This is not to say that an intrasigent offer of this form of union security coupled with other relevant facts might not cause the Board to conclude in a given case that an employer had failed to bargain in good faith*. Even if the Board were to make such a finding, however, it could not impose a form of security different than that set-out in section 36(a) of the Act. If the Board was to make an order of the type sought by the trade union in this case, it would be ignoring the policy of voluntarism which is embodied in the Act and, having regard to the provisions of Section 36(a), it would be thrusting itself into the role of legislator; a role which it cannot assume. [emphasis added]

85 It is not unusual for the ranks of a union to be swelled by bargaining unit employees after the issuance of a certificate. In fact, Bruce Binning made this point during his testimony. Employees who have been noncommital may subsequently support the union once it has been certified by the Board. And this is true even for those employees who may have opposed the union prior to certification. But the Respondent did not refrain from the commission of unfair labour practices in November of 1978 after the issuance of the full-time bargaining unit certificate and did not commence to bargain in good faith. For the Respondent to then base its position on union security on an absence of employee support in August of 1979 tends to taint its motivation on this issue with its earlier unlawful conduct. Without persuasive evidence to the contrary, there is no reason for not concluding that the Respondent's rigid position on union security continues to be part and parcel of a longstanding scheme to undermine the statutory role of the Complainant as exclusive bargaining agent.

86 In coming to this conclusion we are particularly sensitive to the nature of section 36a, the benefit of which a trade union is entitled to as a matter of right and which is all the Respondent has ever been prepared to offer. Section 36a requires an employee to come forward and advise his employer that he wishes union dues to be deducted from his wages. Where an employer has acted as the Respondent has and over so long a period of time, it may require a particularly courageous employee to make such a request. Therefore, when this same employer rigidly ties his position to voluntary revocable check-off, his conduct is open to the inference that he is motivated by a desire to deter his employees from supporting the union in this manner. The Respondent has, in the circumstances, failed to adduce sufficiently cogent evidence to rebut this inference. It is simply wrong to conclude that offering what the statute requires as a bare minimum in the area of union security cannot be held to constitute bargaining in bad faith. Standing alone this may be the case. But when considered in the light of other employer actions, it can be one of the most coercive elements of a scheme to discourage and undermine trade union support. Surely the Legislature did not intend to preclude the Board from so finding. We therefore find that the Respondent's position on union security violates sections 14, 56, 58, and 61 of *The Labour Relations Act*. As for counsel's argument that employees have to identify themselves when they go on strike in any event, this submission does not respond to the coercive significance of section 36a to non-member employees and, if the Respondent's own assessment of strike support is accurate, it may be telling that fewer employees than originally supported the Complainant's application for certification are now on strike. In

fact, we find it quite remarkable that the Respondent could seriously rely on the "intelligence" about union support gathered by supervisors in developing its position on union security. With the history to this complaint, an employee would have to consider the wisdom of admitting support for the Complainant to the Respondent's supervisors and, as a Board, we are concerned that the Respondent is even monitoring employee sentiment in this respect in these circumstances.

87 To the extent that absolute rigidness is inconsistent with good faith bargaining and reasonable effort, it should be clear from our reasoning above that we are of the view that an employer can be no more rigid and unbending on union security than he can be on any other issue. Section 36a simply provides the union with a very limited form of union security as a matter or right. Any other form of union security is still clearly negotiable and, thus, an employer's bargaining obligation remains unchanged. Indeed, the very fact that the Legislature thought it necessary to enact section 36a conveys a statutory recognition of how important this issue is to trade unions and the problems associated with employer opposition. It would therefore be strange for this Board to interpret the presence of a provision benefiting trade unions to some limited degree in a manner which would encourage employer resistance and thereby exacerbate collective bargaining conflict in relation to this very sensitive issue. The issue is easily manipulated by an employer intent on undermining the exclusive role of a certified bargaining agent arising as it does in first agreement controversies. The Board must therefore judge bargaining with this fact clearly in mind.

88 After the long period of bargaining in bad faith that has been established in this case (together with the other unfair labour practices committed by the Respondent), there is an onus to prove the alleged change of heart in the latter stages of negotiations with the most cogent evidence available. This must be so because of the labour relations reality that apparent changes in heart may be little more than an awareness that "hard bargaining" is now sufficient to preclude the execution of any agreement or to cause so unsatisfactory a contract that continued employee support of the Complainant will be impossible. Neither of these approaches to "hard bargaining" is permissible and the Respondent is in the best position to explain its motivation in adopting the bargaining postures that it has.

89 After carefully analyzing all of the evidence, we have also come, on balance, to the more general conclusion that the Respondent was not bargaining in good faith and making every reasonable effort to enter into a collective agreement from June to August. This is not to deny that "progress" was made in negotiating the language of a possible agreement. But we think it more likely than not that the Respondent's rigid position on union security, as well as other items central to the negotiations, had the purpose of avoiding a collective agreement and was part and parcel of its earlier conduct aimed at undermining the trade union in the eyes of the employees in order to foster its early demise. This conclusion relies heavily on the totality of the evidence, arising as it does in a first agreement context, and draws its conceptual support from the following description of "surface bargaining" found in *The Daily Times, supra* at para. 15.

> 'Surface bargaining', is a term which describes a going through the motions, or a preserving of the surface indications of bargaining without the intent of concluding a collective agreement. It constitutes a subtle but effective refusal to recognize the trade union. It is important, in the context of free collective bargaining, however, to draw the distinction between 'surface bargaining' and hard bargaining. The parties to collective bargaining are expected to act in their individual self interest and in so doing are entitled to take firm positions which may be unacceptable to the other side. The Act allows for the use of economic sanctions to resolve these bargaining impasses. Consequently, the mere tendering of a proposal which is unacceptable or even 'predictably unacceptable' is not sufficient, standing alone, to allow the Board to draw an inference of 'surface bargaining'. This inference can only be drawn from the totality of the evidence including, but not restricted to, the adoption of an inflexible position on issues central to the negotiations. It is only when the conduct of the parties on the whole demonstrates that one side has no intention of concluding a collective agreement, notwithstanding its preservation of the outward manifestations of bargaining, that a finding of 'surface' bargaining can be made.

We therefore find that the Respondent's more general bargaining posture during the months of June to August was in violation of sections 14, 56, 68, and 61 of *The Labour Relations Act*.

90 These findings bring us to the issue of remedy. What remedies are available to the Board and appropriate in this case?

The Complainant has asked for a declaration, a posting of notices, access to employees and their addresses, damages, the imposition of a collective agreement and, as an alternative to the imposition of an agreement, a bargaining order. In requesting these remedies, the Complainant raised some fundamental concerns over the effectiveness of the Board's bargaining order as an almost exclusive remedy in respect of breaches of section 14. On the other hand, the Respondent took the position that the Board lacked the jurisdiction to impose an agreement and argued that much of the earlier conduct complained of was irrelevant to any matter now before the Board.

91 Section 79(4) is the section of the Act under which remedies of the kind relevant to this case are made. Its very open-ended wording presents this Board with both the greatest opportunity to fashion carefully tailored effective remedies and the greatest temptation to exceed proper statutory bounds. The Solomonic difficulty in applying the broad powers granted to the Board under this section are apparent from the words used.

> 79(4) ...where the Board is satisfied that an employer, ... has acted contrary to this Act it shall determine what, if anything, the employer, ... shall do or refrain from doing with respect thereto and such determination, without limiting the generality of the foregoing may include, any one or more of,
>
> (a) an order directing the employer, ... to cease doing the act or acts complained of;
>
> (b) an order directing the employer, ... to rectify the act or acts complained of; or
>
> (c) an order ... to compensate in lieu of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer, ...

92 Guidance, however, can be gained from a number of first principles that are apparent from the structure of the legislation and that have evolved through experience with the section. Moreover, because of the breadth of the requested relief in the instant case and because one such principle has been severely challenged by the Complainant, the Board has decided to review its approach to unfair labour practice remedies and to explain more fully its role in these matters.

93 It is trite to say that all rights acquire substance only insofar as they are backed by effective remedies. Labour law presents no exception to this proposition. An administrative tribunal with a substantial volume of litigation before it faces a great temptation to develop "boiler plate" remedies which are easy to apply and administer in all cases. This temptation must be resisted if effective remedies are to buttress important statutory rights. An important strength of administrative tribunals is their sensitivity to the real forces at play beneath the legal issues brought before them and there is no greater challenge to the application of this expertise than in the area of developing remedies. To be effective, remedies should be equitable, they should take account of the economics and psychology permeating the situation at issue; and they should attempt to take into account the reasons for the statutory violation. Remedies should also be sensitive to the interests of innocent bystanders. This means then that the Board should try and tailor remedies to each particular case. It is equally true, however, that the Ontario Labour Relations Board cannot police the entire labour relations arena. As important as it is for this Board to safeguard the substantive rights it administers, ultimately, compliance with the Act depends on the vast majority of unions and employers according at least minimal respect to the legislation, the Board and the Board's directives. With its limited resources and the time that must be taken to adjudicate fairly issues of controversy, the Board must rely on the co-operation of employers and trade unions in the day to day administration of the Act. For this reason, the Board cannot get too far ahead of the expectations of the parties it regulates. It must be concerned that its decisions are perceived, in the main, as reasonable and fair to attract as much self-compliance as possible. It has therefore been said that the ideal Board order must be both an instrument of education and of regulation. See generally St. Antoine, *A Touchstone for Labor Board Remedies* (1968), 14 Wayne L. Rev 1039; Ross, *Analysis of Administrative Process Under Taft-Hartley*, [1966] Lab. Rel. Yearbook 299. Giving effect to these general considerations, three basic principles that underpin section 79 have emerged.

(1) A Remedy is Not A Penalty

94 If deterrence was all that the Board had to keep in mind, it would be a simple matter to set up a system of penalties which would achieve this end. There is little doubt that penalties could be devised which would provide second thoughts to anyone intent on violating *The Labour Relations Act*. But the Legislature did not provide the Board with this role and probably with good reason. See *Little Bos.* (*Weston*) *Limited* [1975] OLRB Rep. Jan. 83, at 91. Section 85 of the Act is a section that sets out penalties for contraventions of the legislation and allocates the role of applying these penalties to the Provincial Court. Additional penalties may exist elsewhere in appropriate situations. See *Criminal Code*, R.S.C. 1970, c. C-34, s. 5, 423(2)(a); *Re Regina v. Gralewicz et al* (1979), 45 C.C.C. (2d) 188 (Ont. C.A.) By implication, and by the absence of punitive language elsewhere in the statute, it is reasonable to conclude that the Board should not fashion its remedies under section 79 with the primary view of penalizing parties. This is not to deny that effective remedies will likely have a deterrent effect, but the primary purpose of a remedy should not be punishment. If it were otherwise, the Board's accommodative and settlement role under section 79 and more generally would be a most difficult one to maintain. Offenders would be wary of compromise lest their candor be subsequently met by stiff penalties issued by the very agency that encouraged an informal and early resolution of a complaint. Indeed, settlement and compromise might have to give way to a public clamor for a more tangible enforcement of the legislation not unlike the current concern over plea bargaining in the criminal law context. Labour law has historically been more interested in accommodation than "two-fisted" enforcement. But of course, the failure to comply with a Board order can result in the application of penalties by the Court in the exercise of the Court's contempt jurisdiction.

95 In the immediate case this principle has importance. For example, affirmative orders that an employer post notices indicating that he has violated the Act and directives that he publicly commit himself to future compliance with the legislation cannot have as their purpose public humiliation, embarrassment and, thereby, punishment. These remedies may be appropriate as might direct trade union access both to employees on an employer's time and to employee addresses, but only as directives aimed at the removal or rectification (to use the language of the statute) of the consequences of a violation. These types of remedies, and their nature is almost infinite, should have as their purpose the amelioration of the lingering psychic effects of unfair labour practices and the consequent injury to a union's organizational or bargaining strength. The jurisprudence developed by the National Labour Relations Board is repleat with other examples and demonstrates the great potential for developing affirmative labour relations remedies under Section 79. See McDowell and Huhn, *NLRB Remedies for Unfair Labour Practices*, Wharton School of Finance, Univ. of Pa. (1976). However, the Board must consider the appropriateness of each remedy in a Canadian context and in the light of our own statutory framework. For example, *quare* the application of certification extension in Ontario: *Mar-Jac Poultry* (1962) 136 NLRB 785.

(2) Monetary Relief is Compensatory

96 This is a corollary to the no-punishment principle. While it may be discouraging to the Board where, for example, the reinstatement of an employee with back pay, is simply inadequate to deter repeated offences, this is no justification for the application of additional monetary penalties in the guise of compensation. Thus, it is conceivable that the Board might change its policy and no longer require the mitigation of losses by employees who are subject to an unfair labour practice discharge. The change might be justified by the argument that the employer is paying no more than he would have had to pay had the person been employed up to the date of his reinstatement. However, it would be clear to those who regularly appear before the Board that our primary purpose was more in the vein of making unfair labour practice compensation orders more painful. On the other hand, our back-pay and compensation awards should be as fully compensatory as possible and, on request, could bear interest. Our approach might be analogous to that provided for by *The Judicature Act*, R.S.O. 1970, c. 228, as amended S.O. 1977 c. 51, s. 38. See also *Sedgewick and Metropolitan Toronto Zoological Society* (1979), 22 O.R. (2d) 225.

97 An order directing compensation for loss of earnings is not the only manner of awarding monetary relief under section 79. The language of section 79 provides the Board with the broadest power to provide relief with paragraph (a), (b) and (c) of section 79(4) being but illustrations of this broad power. This is made clear from the general direction of the section stating that the board "shall determine what, if anything, [a party] shall do or refrain from doing with respect thereto" and from the subsequent introductory phrase to the specific powers "without limiting the generality of the foregoing..." An additional and important justification for concluding that the Board has power to award, in effect, general damages arising from a breach of

the Act was well expressed in *The Journal Publishing Company of Ottawa Limited, supra* at para. 61, thusly:

> The language of section 79(4)(c) is intended to clear up any doubts about the Board's power to reinstate employees, a remedy not available at common law, and not to restrict the awarding of damages to this one situation. The power of an arbitrator to award damages in the absence of express statutory authority has had longstanding approval from the Supreme Court of Canada. See: *Polymer Corp.* (1962), 33 D.L.R. (2d) 124. It would be strange indeed if the Labour Board did not have at least equal remedial authority, where the language of the legislation so clearly provides for it.

98 The power was exercised in *De Vilbiss* (*Canada*) *Limited, supra* where the Board directed the payment of certain allowances and holiday pay that had been denied the union's negotiating committee members as part of the scheme to subvert bargaining. More recently, we have seen the power characterized as permitting "make whole" remedies, a term popularized before the National Labour Relations Board and U.S. courts, but amounting to no more than broad compensatory relief in respect of flagrant unfair labour practices. Such relief has included a trade union's organizing costs or extraordinary organizing costs, depending on the circumstances. It has also included all wasted negotiating costs and necessarily incurred legal costs caused by the commission of unfair labour practices. For example, in the *Academy of Medicine, Toronto Call Answering Service, supra* an employer closed part of his business in response to the certification of a trade union to bargain on behalf of its employees. In awarding the union all "reasonable organizational, bargaining, legal and other expenses" and the affected employees some three months of wages, the Board articulated the following compensatory rationale:

> The Board, having regard to the seriousness of the respondent's unfair practices, to the impracticality of making order for rectification, and to the fact that the employer is continuing in operation other aspects of its enterprise, has concluded that this case is an appropriate one for the granting of a 'make whole' order. The Board orders the respondent to reimburse the union for all reasonable organizational, bargaining, legal and other expenses associated with its efforts to acquire and pursue its statutory rights. Such expenses are to include the costs of proceedings before the Board, proceedings which would not have been necessary but for the unfair practices of the respondent. While this part of our order is equivalent to an award of costs, it should not be taken as signaling a retreat from the Board's general practice of not awarding costs as against an unsuccessful party. This is a case, however, where the employer's contraventions of the Act are so serious that the resulting legal costs to the union cannot be ignored. Moreover, the rationale underlying the Board's practice of not awarding costs -- that of not identifying a 'winner' and a 'loser' -- is of no application where, as here, the conduct of the employer has made it impossible for the parties to live together in the future. (See *Repac Construction and Material Limited*, [1976] OLRB Rep. Oct. 610.) It should be stated, however, that the Board has not attempted in this decision to exercise any general procedural power to award costs. What the Board has done is exercise its remedial authority under section 79(4)(c) of the Act so as to, as nearly as possible, restore the union to the position it was in prior to the respondent's unfair practices. Given the impracticality of an order for rectification, full compensation, including all reasonable legal expenses, ought to be awarded to the union.
>
> Compensation must also be considered for the discharged employees. What the employees have lost is their employment status. This status has been lost by reason of the illegal closure of their place of employment. As stated, employees in this Province do not run the risk that their employer will close down simply because it is unwilling in principle to operate with a union. The Labour Relations Act contemplates the continued status of strikers as employees and provides employees on a lawful strike with a right to be reinstated in their former positions upon the making of an unconditional application to return to work, within six months. While no such applications were made in the instant case, the Board finds that, because the respondent had by June 9th permanently discontinued its Call Answering Service, applications for reinstatement by the employees would have been fruitless and were therefore unnecessary.
>
> Damages resulting from a loss of employment status cannot, of course, be measured with precision. However, since the uncertainty of the measurement is directly attributable to the aggravated character of the violation, the employer should not be able to avoid an assessment on that ground. The Board must make its best estimate of the value of the

> employee's loss in all the circumstances of the case.
>
> To compensate the employees of the Call Answering Service for the loss of their employment status, the Board has determined that the respondent should pay to each of the employees listed on Schedule "A" [deleted] a sum of money equivalent to the amount they would have earned from June 9, 1977 -- the date of the closure -- until September 9, 1977, such compensation to be computed on the basis of the employees' respective wage rates as of June 9th. This assessment, which is designed to afford the employees a reasonable period in which to secure alternate employment without loss of income, is based on the assumption that the respondent would not have discontinued its Call Answering Service Division for cause within the foreseeable future. The evidence is that the respondent had operated its Call Answering Service for forty years, and that the service was an expanding one. It must, therefore, be assumed that the Call Answering Service would have continued had not the employees chosen to exercise their rights under the Act to join a trade union and to participate in its lawful activities. To ensure that no employee receives a windfall as a result of the employer's unfair practices, those employees finding alternative employment during the period in question, and the evidence indicates that there are some, will have their damages reduced accordingly.

Other Canadian examples can be found in *Kidd Bros., supra* and the *Robinson and Little case, supra* both decisions of the British Columbia Labour Relations Board.

99 However, the Board has held that there are clear limitations to its power to award general damages. In *The Ottawa Journal* case the Board was requested to impose "the contractual terms that [the parties] would have been expected to reach had there been good faith bargaining, ... [and] damages to the employees for loss of wages and other employment benefits from the time of [a] lockout" such damages to reflect the collective agreement that would have been in place. The Board held it was without jurisdiction to impose an agreement and went on to decline to award the damages requested because of a concern that an award of damages should not result in the indirect imposition of a collective agreement and the belief that there should be no compensation for damage resulting from the use of legal economic sanctions. Its reasoning is found at paragraph 61 of the decision.

> The existence of the power to award damages does not necessarily mean that such relief is appropriate. Although we do not agree with the employer's argument that damages are never an appropriate method of remedying a failure to bargain in good faith, we recognize that this type of remedy must be imposed with care. There are two concerns of particular importance. First, the awarding of damages should not result in the indirect imposition of a collective agreement. In this case, therefore, it would be inappropriate to award damages for loss of wages suffered as the result of the lock-out, since this approach would require the Board to determine terms and conditions of employment for those employees during that period. Second, the Board should not compensate for damage that results from the use of legal economic sanctions. The problem, in this case, is that the lost wages and employment benefits flow from the lock-out -- an action that was timely, and not prohibited by the *Labour Relations Act*. The mere existence of an element of bad faith bargaining cannot convert an otherwise legal strike or lock-out into an illegal act, that would give rise to extensive liability in damages. The wrong lies with the manner in which the negotiations are conducted, not with the use of the economic sanction. To hold otherwise would introduce into the strike and lock-out an element of uncertainty that would disrupt the process of labour relations as it now exists in Ontario. In this case, although it is clear that the lock-out was not connected initially with any failure to bargain in good faith on the part of the employer, it could be argued that the employer's later failures to bargain in good faith subsequently tainted the lock-out. We do not accept this argument. The lock-out continued to be legal and damages, if any, must relate to extra negotiating costs that might have been caused by the employer's conduct, and not to the economic losses resulting from the lock-out itself.

100 After reviewing these policy pronouncements, we have decided that some qualification is demanded by our experience and by a need to ensure our remedies remain effective. While we admit that monetary relief based on the collective agreement that would have been negotiated had there been good faith bargaining requires the assumption that an agreement would have resulted, awarding no monetary relief is tantamount to assuming no agreement would have arisen out of good faith bargaining. Clearly, reality is usually some-where in between in the sense that either proposition may be valid in any particular

case. What trade unions like the Complainant and the employees it represents lose in cases of this kind is "the loss of an opportunity" to negotiate a collective agreement or the loss of an opportunity to achieve an agreement at an earlier point in time. Employees join a trade union with, in their minds at least, the reasonable prospect of obtaining an improvement in their working conditions. In fact, the Complainant may be able to statistically document the reasonableness of such employee expectations. When an employer responds with flagrant unfair labour practices, he wrongly prevents his employees from realizing their expectations or delays having to deal with any of their demands. For example, an employer may be able to escape with no contract at all if the initial organizing strength of the union can be so eroded by unfair labour practices that a strike can be outlasted. Moreover, the employer receives an unfair competitive advantage over those employers who do bargain in good faith, making the unlawful conduct attractive to other employers. In labour relations terms these employee losses are real; the potential employer gains unjust; and both are accomplished by the violation of a fundamental duty imposed by the legislation -- bargaining agent recognition. The failure to consider any monetary relief seems to encourage these consequences. See generally: Note, *An Assessment of the Proposed Make Whole Remedy in Refusal to Bargain Cases* (1968), 67 Mich. L. Rev. 374; Note, *An Analysis of The NLRB Objections To a Make Whole Remedy in Refusal to Bargain Cases* (1971), 3 Rutgers-Camden L.J. 272.

101 It can, of course, be argued that damages for the loss of such an opportunity are too speculative to estimate and if arbitrarily set would be punitive in nature -- a result that would appear to contravene the first tenet discussed. The argument, however, is inconsistent with the long accepted principle that one whose wrongful act precludes the exact determination of damages should not be able to evade his duty to compensate for that damage because of an uncertainty caused by his own wrongdoing. See *Mayne and McGregor on Damages* 12th ed., 1961, para. 174. In private litigation before our courts, a party is not burdened with an unattainable standard of accuracy in the assessment of damages. Business losses in commercial law suits and the compensation awarded in personal injury cases to persons who may never have been employed are important examples. See for example: *Withers v. General Theatre Corporation*, [1933] 2 K.B. 536; *Roach v. Yates*, [1938] 1 K.B. 256 (C.A.). Even more directly in point are those cases that explicitly grapple with the wrongful loss of an economic opportunity.

102 *Chaplin v. Hicks*, [1911] 2 K.B. 786 (CA) first recognized the principle of compensating for the loss of an opportunity in the context of a beauty contest. The case involved a breach of contract to enter a contest from which the loss of an opportunity to win a prize flowed. In determining whether the breach of contract resulted in injury to the plaintiff, Lord Justice Fletcher Moulton, at 795 commented:

> Is expulsion from a limited class of competitors an injury? To my mind there can be only one answer to that question; it is an injury and may be a very substantial one. Therefore the plaintiff starts with an unchallengeable case of injury and the damages given in respect of it should be equivalent to the loss.

103 A similar situations arose in *Domine v. Grimsdall*, [1937] 2 All E.R. 119 where a plaintiff recovered £15 from a defendant bailiff who had improperly failed to execute judgment against a debtor of the plaintiff, the loss of chance being that the debtor would pay off his debt to avoid the execution against his goods.

104 In *Hall v. Meyrick*, [1957] 2 Q.B. 455 a solicitor negligently failed to warn the plaintiff that her marriage would revoke a will made in her favour by her intended husband. The damages she suffered as a result of this negligence was the loss of opportunity to secure the benefits of a new will. However, in valuing the opportunity Ashworth, J. at 471 noted that, "[T]he more the contingencies the lower the value of the chance or opportunity of which the plaintiff was deprived." The damages awarded were £1250.

105 The Supreme Court of Canada approved this principle in *Kinkel et al. v. Hyman et al*, [1939] 4 D.L.R. 1. Where the defendant directors had sold the plaintiff's stock in a company without obtaining the consent of 51% of the shareholders for whom it was held in trust. The plaintiff had resold stock to the defendants for an option to repurchase provided that the defendant directors called a meeting of the shareholders to ratify the first transaction. The defendants failed to call a meeting within the life of the option. The court found a breach of contract, but awarded only nominal damages as there was no proof that the shareholders would have ratified. At page 7 Mister Justice Crockett observed:

[1979] O.L.R.B. Rep. 1220, [1980] 1 Can. L.R.B.R. 99, 80 C.L.L.C. 16,003

> For my part I can find no authority in either *Chaplin v. Hicks* or *Carson v. Willitts* justifying any Court in awarding any more than a nominal sum as damages for the loss of a mere chance of possible benefit *except upon evidence proving that there was some reasonable probability of the plaintiff realizing therefrom an advantage of some real substantial monetary value*. [Emphasis added]

106 In the B.C. Supreme Court case of *Hornak v. Paterson et al* (1967), 62 D.L.R. (2d) 290, the plaintiff established a breach of contract by the defendant union in failing to notify him of an employment opportunity. Damages were awarded for the lost wages of the particular job in question but were not awarded for the loss of opportunity for future employment, again because of lack of proof of the opportunity materializing. In discussing the onus of proof Mister Justice Aikins, at 298, had this to say:

> In my view before damages may be awarded for the loss of a chance the existence of the chance said to have been lost must be established in accordance with the usual requirement in a civil case, that is on the balance of probabilities. The proof is insufficient if it is left as a matter of conjecture whether there was a loss of a chance or not. This simply means that there must be acceptable evidence showing directly that there was the chance claimed or leading to the same conclusion by reasonable inference.

107 *McWhirter v. University of Alberta* (1978), 7 A.R. 376, 80 D.L.R. (3d) 609 is another and very recent case involving this issue. A professor alleged that the University had failed to follow certification procedures set out in the University of Alberta Faculty Handbook when considering him for tenure. As a result, he lost the chance to be considered the following year for tenure. The Court assessed damages for breach of contract at $12,000 which reflected the chance of success in the new hearing and the likelihood he would have been accepted and have remained at the University in any event.

108 American cases have also adopted this principle. In *Kansas City, M. & O.R. Co. v. Bell*, 197 S.W. 322, the defendant delayed a shipment of pedigree hogs in breach of contract. The plaintiff recovered as damages the value of the chance to win the amount of the price he claimed he would have won at the stock show in which he missed entering his pigs. Boyce, J. discusses how the chance would be valued:

> Evidence as to all such matters as would tend to show the probability that the plaintiff would be successful in the competition would be admissible, and, as one of the judges in the English case says, it would then be left to the good sense of the jury trying the case to determine the value of the plaintiff's chance on the competition.

109 Similarly in *Wactel v. National Alfalfa Journal Co.*, 176 N.W. 801, a contestant in a magazine subscription contest recovered the value of the chance to win where the defendant wrongfully declared the contest abandoned in the plaintiff's district.

110 More recent cases valuing the losses sustained in the breach of vacation contracts are further examples of the willingness of the courts to provide effective relief for the violation of private rights. See *Jarvis v. Swans Tours Ltd.*, [1973] 1 All E.R. 71 (C.A.).

111 If the courts have not shied away from attempting to provide effective monetary relief for the violation of private rights, should the Ontario Labour Relations Board be any less sensitive when confronted with the intentional defiance of statutory policy? The answer must surely be in the negative unless this approach conflicts fundamentally with more important principles and we do not think this is the case.

112 A general damage award to all of the employees in the bargaining unit of the kind we have in mind, would not amount to the dictation of contract terms. Rather, it acknowledges that the wrong the Board is addressing is not the denial of a right to a particular collective agreement, but rather the right to bargain collectively in pursuit of such a contract. Thus, it is the prospects of the employees of increased earnings from the exercise of the trade union's bargaining capacity in negotiations which

have been impaired by the employer's wrongful acts and refusal to engage in collective bargaining. It is therefore this "loss" -- the bargaining expectancy -- that must be assessed. Never having tried to value this loss, we are unable and unwilling to conclude that such losses cannot be established from relevant and statistically meaningful material available to the parties. The law of damages has recognized as probative the experience of others similarly employed and, with the plethora of collective bargaining data available to the parties, it would not seem rash to think that reasoned argument can be made on this issue too. Indeed, at least one American statute specifically provides for such an approach. See *California Labor Relations Act of 1975*, incorporated as Part 3.5 (sections 1.40 to 1166.3) of Division II of the California Labor Code. Also see Yates, *The "Make Whole" Remedy for Employer Refusal to Bargain: Early Experience Under the California Agricultural Labor Relations Act* (1978) 29 Lab. L.J. 666.

113 The first case decided under that statute was *Adam Dairy* (1978), 4 ALRB 24 which set out the California Agriculture Labor Relations Board's approach to estimating bargaining loss in the following excerpt:

> By contrast, legislation now pending before Congress to add the make-whole remedy to the National Labor Relations Act approaches the calculation of the amount of the award far more narrowly than was envisioned in *Ex-Cell-O* in 1970. HR 8410 provides that the award:
>
> > Shall be measured by the difference between (i) the wages and other benefits received by such employees during the period of delay, and (ii) the wages and fringe benefits such employees were receiving at the time of the unfair labor practice multiplied by the percentage change in wages and other benefits stated in the Bureau of Labor Statistics, Average Wage and Benefit Settlements, Quarterly Report of Major Collective Bargaining Settlements for the quarter in which the delay began. If the Secretary of Labor certifies to the Board that the Bureau has, subsequent to the effective date of the Labor Reform Act of 1977, instituted regular issuance of a statistical compilation of bargaining settlements which the Secretary determines would better effectuate the purposes of this subsection than the compilation specified herein, the Board shall, in administering this subsection use the compilation certified by the Secretary.
>
> This formula achieves a reasonable estimate of the actual loss to employees while avoiding the necessity for arguing the relevance of a range of data in each case in a post-hearing setting. We note also that it altogether by-passes litigation of the issue of whether or not a particular employer would have reached contract or agreed to a particular provision. In view of the fact that this issue is created by Respondent's conduct in refusing to bargain, this approach is entirely consistent with the purposes of the Act. cf. *Fibreboard Paper Products Corp.*, 180 NLRB 142, 72 LRRM 1617 (1969), *enf'd sub nom Steelworkers v NLRB*, 436 F 2d 908, 75 LRRM 2609 (DC Cir. 1970). Respondent in *Fibreboard Paper Products Corp.*, 138 NLRB 550, 51 LRRM 1101 (1962), violated Section 8(a)(5) by failing to bargain about its decision to contract out its maintenance operations. During proceedings to determine the amount of backpay owed to the employees terminated as a result of its decision, Respondent contested the formula selected by the Board with the argument that it could not be assumed, and in fact was unlikely, that Respondent would have agreed to that formula if it had bargained. The Board's decision stated:
>
> > In the words of the Supreme Court, "it is not possible to say whether a satisfactory solution could [have been] reached...." Indeed, as the Respondent contends, the Union might not have been able to persuade the Respondent not to contract-out or retain the "Pabco formula". On the other hand, it is by no means clear that the parties could not have reached an agreement in 1959 which would not have eliminated the "Pabco formula". The fact that the Respondent did not give the Union an opportunity to attempt to reach such an agreement was found violative of the Act. Thus, any uncertainty with respect to what wage rates the backpay claimants would have received except for termination was created by the Respondent, which bears the risk of that uncertainty. *Fibreboard Paper Products Corp., supra*, 180 NLRB at 144.
>
> We do not have statistics on wages or collective bargaining settlements in agricultural labor comparable to the BLS data used in the proposed NLRB formula and could not therefore adopt such a precise formula at this early stage. However, we do think it appropriate to try to reduce the number of elements which are subject to dispute in each

case, and to simplify the calculation of the amount of the award to each employee.

In addition to these practical advantages, we think this approach is preferable in terms of its impact on the bargaining process. We prefer to leave to the parties the tasks of costing out and weighing one particular provision against another. We think that an award based on a more general estimate of the cost of a contract allows more room for this negotiation process to be worked out in the manner most appropriate in each case, because it does not inject the Board into the process of assessing alternatives. Furthermore, since such an award is based to an extent upon generally applicable data drawn from employers who bargained in good faith, it will reflect the settlements they have reached. This will tend to eliminate any competitive advantage obtained by an employer who bargains in bad faith over employers who pay higher labor costs because they complied with the law, thereby further reducing 'the incentive to mock the statute's promises....'

We therefore shall proceed on the basis of these principles to calculate the amount of the make-whole award.

114 Another view on possible approaches is found in the following excerpt from the opinion of former NLRB Chairman Frank McCulloch and Board Member Brown in *Ex-Cello Corp.* (1970), 185 NLRB 107 at p. 118-119:

Accordingly, uncertainty as to the amount of loss does not preclude a make-whole order proposed here, and some reasonable method or basis of computation can be worked out as part of the compliance procedure. These cannot be defined in advance, but there are many methods for determining the measurable financial gain which the employees might reasonably have expected to achieve, had the Respondent fulfilled its statutory obligation to bargain collectively. The criteria which prove valid in each case must be determined by what is pertinent to the facts. Nevertheless, the following methods for measuring such loss do appear to be available, although these are neither exhaustive nor exclusive. Thus, if the particular employer and union involved have contracts covering other plants of the employer, possibly in the same or a relevant area, the terms of such agreements may serve to show what the employees could probably have obtained by bargaining. The parties could also make comparisons with compensation patterns achieved through collective bargaining by other employees in the same geographic area and industry. Or the parties might employ the national average percentage changes in straight time hourly wages computed by the Bureau of Labor Statistics.

And there is other available significant data which may be utilized to indicate the value of the lost collective-bargaining opportunity. For example, the Bureau of Labor Statistics conducts an annual study of union wage scales in the building, construction, local transit, local trucking, and printing industries. This study covers all local unions in 68 selected cities. BLS similarly makes a quarterly wage survey of seven major construction trades in 100 selected cities. The Bureau also issues monthly reports of wage and benefit changes under collective-bargaining agreements in manufacturing establishments employing 1,000 or more production and related workers. A related survey of wage developments in smaller manufacturing units covers both unionized and nonunionized establishments. There are other Bureau of Labor Statistics facts which may bear on the remedy. One of significance is the periodic wage and benefits survey of 50 manufacturing and 20 nonmanufacturing industries. The data collected in this program reports on about 20 million employees on both a national and regional basis, usually with listings by size of establishment, size of community, collective-bargaining coverage, and type of product or plant group. Another Bureau of Labor Statistics program periodicaly gathers wage and benefits data on a Standard Metropolitan Statistical Area basis for more than 60 occupational categories in all but the smallest establishments. Depending on the type of industry, these surveys cover from 8 to 72 metropolitan areas. Guidance may also be forthcoming, on occasion, from other forms of data frequently cited in the collective-bargaining process, such as Consumer Price Indices and productivity statistics. Other relevant wages and benefit information will be available to the General Counsel and the parties from private sources and their use and usefulness in the compliance process will likely vary with the particular circumstances of the individual case. Furthermore, additional data could become available through new compilations which might later be undertaken by the Bureau of Labor Statistics or other agencies, including this agency, as well as by unions, employers, and private and public organizations and institutions.

[1979] O.L.R.B. Rep. 1220, [1980] 1 Can. L.R.B.R. 99, 80 C.L.L.C. 16,003

> In the instant case, as noted above, a *prima facie* showing of loss can readily be made out by measuring the wage and benefit increments that were negotiated for employees at Respondent's other organized plants against those given employees in this bargaining unit during the period of Respondent's unlawful refusal to bargain. Granted that the task of determining loss may be more difficult in other cases where no similar basis for comparison exists, this is not reason enough for the Board to shirk its statutory responsibilities, and no reason at all for it to do so in a case such as this where that difficulty is not present.

115 We are sensitive that too arbitrary an approach to this kind of monetary loss might have the effect of unduly burdening employers and, accordingly, we embark on this new direction with caution. However, if we make no effort to chart this course, employees and trade unions will continue always to bear the loss. The fear of over compensation, in many contexts, has all too often resulted in no compensation with iniquitous results. To a very real extent, bargaining orders simply direct an employer to do what was originally required except that by virtue of the unlawful conduct the employer may have weakened the bargaining position of the union and thereby strengthened his own position. If awarding employees compensation for economic losses established by reasonable proof has the incidental effect of making such misconduct less attractive, it would be unduly restrictive to rule out this more effective remedy because of the incidental deterrent effect. Clearly, the preamble to the Act demands this Board to devise a compensatory remedy where this is at all possible. See Note, *The Need For Creative Orders Under Section 10*(*c*) *of the NLRA* (1963), 112 U.Pa.L.Rev. 69.

(3) A Collective Agreement Cannot be Imposed

116 In earlier cases the Board has concluded that it lacks the power to impose a collective agreement under section 79. The first case to consider the issue was *De Vilbiss* (*Canada*) *Limited, supra* where the Board sounded its reservations at paragraph 23 without deciding the matter. The panel in that case, which included the present Chairman and Board Members Bell and Hodges, made the following observations.

> As for the complainant's request that the respondent be directed to enter into a collective agreement, we have serious reservations that it is the appropriate remedy in the circumstances. We would first note that the United States Supreme Court has told the National Labour Relations Board that it does not possess the power to impose such a remedy. (See *H.K. Porter Company Inc. v. NLRB* (1970) 62 L.C. ¶10,696.) While the facts at hand might be distinguished from *H.K. Porter* on the basis that here the trade union is asking for little more than the employer unilaterally implemented during the negotiations in breach of the Act and the wording of section 8(d) of the *Wagner Act* is much more specific with regard to the parameters of the bargaining duty, this Board cannot ignore the fact that labour relations in the private sector has, for the most part, been based upon a concept of voluntarism or freedom of contract. For this reason -- a reason that figured prominently in the *H.K. Porter* decision -- we have doubts that the Board possesses the authority to respond to this particular request of the complainant. However, it is unnecessary to finally resolve this issue because we believe that in the circumstances the parties are quite capable of arriving at their own agreement provided the employer immediately commences to bargain in good faith and makes all reasonable efforts in the direction of making a collective agreement. If the complainant is satisfied with the terms that the respondent recently implemented, bargaining can be narrowed to the few outstanding issues that remain. Accordingly, we direct the respondent to begin to bargain in good faith and make all reasonable efforts to make a collective agreement with the trade union. And in this regard, we also direct the respondent to commence negotiations by arranging to meet with the complainant within a reasonable period of time from the release of this judgment. There is no need for the Board to retain jurisdiction over this matter in that a subsequent failure to bargain in good faith would amount to non-compliance with our direction. Upon following the appropriate procedure (see *USW and Chairtex Manufacturing Ltd. et al*, [1971] 3 O.R. 154), such non-compliance would cause the Board to file a copy of this determination in the office of the Registrar of the Supreme Court "Whereupon the determination shall be entered in the same way as a judgment in order of that Court and is enforceable as such".

117 Counsel for the Complainant stressed that the *De Vilbiss* case demonstrated the inadequacy of the Board's conclusion because a collective agreement was not subsequently achieved by the parties. We would note, however, that an application alleging non-compliance with the Board's bargaining order was never undertaken by the trade union in that case. Surely, it is

incumbent on the beneficiary of a bargaining order to husband the directive carefully and, in a non-compliance proceeding, there is a heavy onus on a respondent to persuade this Board that its subsequent conduct is consistent with the spirit and intent of the Board's bargaining order. This is particularly the case in first agreement situations for all of the reasons associated with the difficulty of distinguishing continued bad faith from hard bargaining. Once having breached the Act, offending parties should not be surprised to find that to establish a bona fides intent they may be required to act temporarily in ways that the Board does not demand of others.

118 Following *De Vilbiss* the Board had two other occasions to consider further the existence of a power to impose an agreement. On both occasions the Board held that it lacked the authority to do so. See *Ottawa Journal, supra* page 322 *et sequitur* and *The Daily Times*, supra at page 610-11.

119 In the *Ottawa Journal* case, supra beginning at paragraph 54 the Board reasoned:

> The relief requested by the unions was what they termed a "make-whole" order. The components of this relief, as argued by the unions, would be the imposition by the Board of the contractual terms that they would have been expected to reach had there been good faith bargaining, such terms to be retroactive to the expiry date of the paper's own contracts, damages to the employees for loss of wages and other employment benefits from the time of the lock-out, and damages to the union for its litigation and lock-out expenses. Put more bluntly, the unions were asking that the Board resolve this dispute by acting as an interest arbitrator, arguing that such a remedy was the only effective deterrent against failures to bargain in good faith.
>
> This request for "make-whole" relief has serious implications for the collective bargaining process in this Province. This process, as it is defined in the *Labour Relations Act*, clearly provides that labour disputes are to be ultimately resolved by recourse to economic sanctions -- The strike and the lock-out. Compulsory interest arbitration has never been an ingredient of this statutory scheme. Does the existence of bad faith bargaining allow the Board to deviate from the clear scheme of the Act when exercising its remedial authority? We think not.
>
> The obligation contained in section 14 is an obligation to bargain. Parties to collective negotiations are required to bargain in good faith and to make every reasonable effort to make a collective agreement, but they are not required to reach a collective agreement. Good faith bargaining cannot be equated to the execution of a collective agreement and, conversely, bad faith bargaining cannot be equated to a failure to reach agreement. In other words, it is possible for the parties to comply with the obligation set out in section 14, and still not reach agreement. Where the obligation is breached, therefore, it cannot be assumed that an agreement would have been reached but for the existence of bad faith bargaining. The imposition of a collective agreement, therefore, is not within the scope of the Board's remedial authority where it is attempting to redress a failure to bargain in good faith.
>
> Not only would the imposition of an agreement be inconsistent with the scheme of the Act, but it would be a remedy that would be difficult for the Board to implement. What would be the terms of the collective agreement that the Board would impose? The unions argue that it would be the agreement that would have been reached if the failure to bargain had not occurred. It is possible, however, that, even if there was a breach of section 14, a collective agreement might not have resulted. And, even if we were to conclude that a collective agreement would have been reached, we might also conclude that the terms of that agreement would be most unfavourable to the unions. The problem with the remedy proposed by the unions is that it would require the Board to engage in an exercise of speculation. The Board would be venturing into the uncertain sea of interest arbitration without benefit of even such rudimentary navigational aids as the criteria that are found in those statutes that provide for interest arbitration.
>
> The use of interest arbitration as a section 14 remedy would also pose dangers to the collective bargaining process itself. There would be a great temptation for parties to abandon the bargaining table for the Board where the bargaining process was not working in their favour. In other words, parties might well seek to gain concessions at the Board that they could not gain at the bargaining table. We do not consider that the Legislature ever intended to supplant the

> bargaining process by imposing a duty to bargain in good faith, and providing the Board with extensive remedial powers. This duty, and the Board's remedial powers, exist to complement the bargaining process, not to displace it.

120 The Complainant has asked, in effect, that we reconsider this conclusion arguing that the Board has put the most effective remedy beyond its reach and that, without specific direction from the Legislature, it should assume it has the power, subject to the courts advising the Board to the contrary. Counsel to the complainant went on to point out key differences in wording between Ontario's legislation and the American legislation construed by the United States Supreme Court in *H.K. Porter Company et al* (1967) 56 LC¶12, 322 (CADC); [1968] CCH NLRB¶20,040; (1969) 60 LC 10,043. This argument is not unpersuasive; indeed it is tempting. But after careful reflection the Board remains of the view that it lacks jurisdiction to grant the requested relief. It is tempting for the Board to approach its remedial powers in the suggested manner particularly where it believes its directives are being flouted or treated as a licence fee for continued violations. But to give vent to such emotional responses is to adopt the position that this Board will exceed proper statutory parameters anytime it believes the legislation to be inadequate. If the statute, as currently drafted, is inadequate to get at the roots of first agreement recognition conflict, it is as much a function of this Board's expertise to point this problem out as it is to elaborate properly the general language used. Admittedly, no legislature can specify in detail the powers or mandate of an administrative tribunal. The use of general language is usually the wiser course, relying as it does on a thoughtful and pragmatic case by case adjudication by persons knowledgeable in the matters that come before them. This Board has tried to elaborate the statute to give ongoing life and meaning to the Legislature's intent, but there comes a point where the legislation ends and the Board can go no further. It is no more realistic to say that the Legislature should be specific on the limits of the Board's remedial jurisdiction than it is to demand specificity in any other area of the Board's mandate. Accordingly, we confirm the reasoning in the *Ottawa Journal* case, and wish to add a few additional thoughts because of the importance of this issue to the ongoing process of labour law reform.

121 The Act was amended in 1975 and for the first time the Board was given original jurisdiction to administer the duty to bargain in good faith. When that change was made one can assume that the legislative draftsmen were familiar with the *H.K. Porter* case and the constraint it imposed on labour law remedies. If it was intended that the Board have a power to impose contracts, and to avoid the *H.K. Porter* result, the wise course would have been to make this power explicit. It is also of note that the only jurisdiction which had accorded such a power to its labour board by 1975 was the Province of British Columbia and there the power was and remains exercisable only on a reference from the Minister of Labour and only in first contract situations. In addition, the power is confined to the imposition of a one-year contract. Those constraints reflect both the fundamental nature of this kind of government intrusion into an otherwise free collective bargaining system and the basic value of voluntarism that underpins our political system. Where other jurisdictions have followed suit, they have not conferred a general power to impose contracts, but have adopted British Columbia's more limited approach. (See *Canada Labour Code* R.S.C. 1970, c.L-1, s. 171.1 and *Quebec Labour Code* R.S.Q. 1964 (as amended 1977, Bill 45, s. 81d.) In the face of that 1975 legal climate, it is simply unreasonable to conclude that the Ontario Legislature intended to give this Board the power to impose collective agreements of unspecified durations on any bargaining relationship by simply removing the word "person" from the opening words of section 79 thereby making it clear "any complaint alleging a contravention of [this] Act" could be resolved under the section. See *De Vilbiss, supra* at page 60.

122 It is also interesting to observe that the only reference to interest arbitration in the 1975 amendments was the now litigation-prone addition of section 34c providing a legal structure to encourage and support the *voluntary* arbitration of interest disputes. In our view, this amendment embodies the sentiment expressed in the following excerpt from *York Regional Board of Health, supra* at page 263, and points in the opposite direction to that which the complainant would have this Board take.

> A study of our labour laws reveals a presumptive right of employees to withdraw their services if they cannot accept the terms and conditions of employment offered to them by an employer and the correlative right of an employer to refuse to employ employees on terms and conditions which it considers to be unacceptable. Whether viewed as a carry-over from classical economic theory; as a fundamental expression of Western values; or as a pragmatic assessment of the most acceptable way to resolve employment related conflict, the fact is that we have adopted a system of countervailing power to resolve disputes over terms and conditions of employment -- a system called collective bargaining. As a general matter exceptions are not made for groups of employees or individual employees who

lack the raw bargaining power to "win" what they want or need under these ground rules. Once the power of collective action is granted to a group of employees, they and their employer must come to terms with this relationship and the "logic" of the economic forces that constrain their freedom of action. Similarly, exceptions are not made on the basis of the preferences of employees and employers for some other approach. The Labour Relations Act must accommodate an array of industries, any one of which may be more suited to a very different approach to its labour relations.

123 Finally, reference should be made to the explicit scheme of the Act. Wherever contractual terms have been imposed on the parties, the Legislature has done so specifically. This is so in respect of the no-strike and lock-out pledges (section 36), grievance arbitration provisions (section 37), contract term (section 44), union security (section 36a), and religious exemptions from union security arrangements (section 39). This is another indication that one cannot lightly conclude the Board has the power to impose directly all the terms of a collective agreement on particular parties.

124 However, we wish to make it very clear that all of the foregoing is not to say that bargaining orders, cease and desist directions, and findings of bad faith cannot have an indirect impact on the content of a collective agreement. For example, surely this Board has the power to direct a party to cease and desist in the making of unlawful or inflammatory proposals and, in doing so, the content of any resulting collective agreement will be indirectly affected. Nothing we have said above is inconsistent with this result. Any other view would unduly constrain the Board in fashioning effective relief and amount to an overly technical application of this third general principle.

ORDER OF THE BOARD

125 In the facts at hand, the Board is of the view that a broad range of remedies is required to attempt to redress the persistent and flagrant unfair labour practices of the Respondent. The Complainant has advised the Board that its supporters are almost totally demoralized and that many have quit the Respondent's employ. Its opinion in this respect is not inconsistent with the history of this collective bargaining relationship. Any remedy should have the purpose of redressing monetary losses and providing the Complainant with a reasonable opportunity to recapture the early momentum that sparked both certification applications.

(a)(i) The Board declares that the Respondent has failed to bargain in good faith and make every reasonable effort to make a collective agreement at all times relevant to this complaint.

(ii) The Board further declares that the Respondent's position on union security violates sections 14, 56, 58, and 61 of *The Labour Relations Act*.

(iii) The Board declares that the Respondent contravened sections 56, 58, and 61 of *The Labour Relations Act* in hiring persons to infiltrate the Complainant; in hiring a private investigation firm to surveil meetings held by the Complainant; and in photographing employees on the picket line at the commencement of the strike.

(iv) The Board declares that various conversations of Jack MacDonald with employees on the picket line about possible decertification applications amounted to violations by the Respondent of sections 56, 58, and 61 of *The Labour Relations Act*.

(v) The Board declares that the Respondent's earlier direct communications with its employees by way of newsletters violated sections 14, 56, 58, 59, and 61 of *The Labour Relations Act* and that the recent publication thanking non-striking employees violated section 56.

(b)(i) The Board directs the respondent to bargain in good faith and make every reasonable effort to make a collective agreement. To this end, the Board specifically directs the respondent, on the receipt of this decision, to convene forthwith a series of bargaining meetings between itself and the complainant with the assistance of a Ministry of La-

bour mediator and, at the initial meeting, to make a complete proposal that the respondent is willing to accept as a collective agreement. In making this proposal the respondent is directed to cease and desist in its position on union security that we have found to be part of a continuing scheme to divide the loyalties of its employees; to undermine the exclusive bargaining agent status of the trade union; and to coerce employees into withdrawing support from the complainant or from commencing to support their complainant.

(ii) The respondent and its agent are directed to cease and desist from all other activities found by the Board to have been in violation of the Act and, more specifically:

A. Engaging in surveillance of employees' activities in respect to union organization;

B. Intimidating and coercing employees into withdrawing from the complainant union or from supporting the complainant union;

C. Causing employees to act as informers in an effort to determine the extent of union activities of other employees in the bargaining unit;

D. Communicating directly with employees with a view to undermining the exclusive bargaining agent status of complainant union;

E. In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join or assist the United Steelworkers of America or any other labour organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining, or to refrain from any or all such activities.

(c)(i) The respondent is directed to post copies of the attached notice marked "Appendix" after being duly signed by the respondent's representative, in conspicuous places at its places of business where bargaining unit employees are employed in Barrie, Ontario, including all places where notices to employees are customarily posted and to keep these notices posted for 60 consecutive working days. Reasonable steps shall be taken by the respondent to insure that the said notices are not altered, defaced or covered by any other material. Reasonable physical access to the premises shall be given by the respondent to two representatives of the complainant to satisfy itself that this posting requirement has been and is being complied with.

(ii) The respondent is directed, at its own expense, to mail a copy of the attached notice marked "Appendix" after being duly signed by the respondent's representative, to the residence of each employee in the said bargaining units forthwith. An employee who must scan the Board's notices hurriedly while at work under the scrutiny of others, will not be as able to absorb the meaning and hence to understand his legal rights as one who reads them at home in a more relaxed fashion.

(iii) The respondent is further directed to publish, at its own expense, a copy of the notice marked "Appendix" duly signed by the respondent's representative, in the next issue of "Watts-Up" following the receipt of this decision, or the next subsequent issue thereto. The order is aimed at counteracting the widespread impact of the respondent's earlier improper statements made in this employee publication.

(iv) The Respondent is directed forthwith to convene during working hours a meeting of all bargaining unit employees in both bargaining units currently working on company premises and a representative of the Respondent is directed to read the attached notice marked "Appendix" to the employees. The Respondent is further is further directed to afford two representatives of the Complainant a reasonable opportunity to be present at the said meeting and to address the employees for no longer than thirty minutes immediately following the reading of notice by the Respondent's representative.

(v) The Respondent is directed forthwith to provide the complainant with a list of names and addresses of all the employees in both bargaining units and to keep this list updated for one year from the receipt of this decision. This request is justified under section 14 as essential bargaining unit information to permit the Complainant to communicate with all the employees it represents in the most reasonable and complete manner. In addition, the employer's misconduct in this case, including the improper surveillance, is likely to have inhibited other forms of communication that might have been available to the Complainant. In this sense our direction is based on a need for the employer to rectify the distortion it has caused in communications between the Complainant and those people it represents. The Complainant must insure that access to this information is limited to responsible and accountable trade union officials.

(vi) The Respondent is directed to provide the Complainant for a period of one year from the receipt of this decision with reasonable access to all employee notice boards at the subject locations for the posting of union notices, bulletins and other union business literature in order that the employees may have free and ready access to information in the workplace from the Complainant concerning all aspects of collective representation and the collective bargaining negotiations.

(d)(i) The Board further directs the Respondent to pay all of the Complainant's negotiating costs incurred to the date of this decision and all extraordinary organizing costs arising out of the organizing of both the full and part-time bargaining units as damages caused by the improper actions of the respondent. The Board will remain seized of this issue and on application by the Complainant will determine the actual and allowable losses in this respect. We have decided against awarding the Complainant its legal costs in this matter. The Board is hesitant to pursue this line of compensation because of the possibility that the denial of legal costs to those parties who successfully defend against complaints may be misunderstood and perceived as unfair. This policy may be reviewed by the Board from time to time.

(ii) The Board further directs that the Respondent is obligated to pay to all bargaining unit employees all monetary losses that the Complainant can establish by reasonable proof as arising from the loss of opportunity to negotiate heretofore a collective agreement due to the Respondent's earlier unlawful conduct, the said damage, if any, running up to the date of the first meeting convened by the Respondent in accordance with paragraph (b)(i) of the Board's order, together with interest as appropriate. The Registrar is directed to reschedule this matter for hearing and determination on the issue of damages on the application of the Complainant and the Board remains seized of this case for such purposes.

(e) Having regard to the history of unfair labour practices in this case, the Respondent is directed to give the Complainant reasonable notice should any supervisor or company agent convene any group of bargaining unit employees and address them on the question of union representation within one year from the receipt of this decision. The respondent is further directed to afford two representatives of the Complainant a reasonable opportunity to be present at the speeches and upon request to permit one of them to address the employees for the same amount of time as the Respondent's address.

Decision of *Board Member, C.G. Bourne*:

1 I dissent.

2 The history of events at the respondent's location in Barrie, up until May 1979, is unsavoury, to say the least. But it must surely be the events subsequent to that time which are the subject of bad faith bargaining in this instance.

3 It was the testimony of Stewart Gordon that the Fort Worth headquarters of Radio Shack (Tandy Electronics) had left the Barrie operations in the hands of local management; that they had not bothered to keep abreast of developments there, and

had not been kept informed of the certification proceedings and Court actions. In December 1978, it was testified, corporate management, greatly concerned, sent Stewart Gordon to obtain a first-hand report of the poor image resulting from its labour relations.

4 As a result of Gordon's report, a new bargaining structure was devised, with Gordon actively participating with the assistance of new counsel in the person of Bruce Binning.

5 Both parties are in substantial agreement with the progress of the new round of bargaining. Sessions were held June 7, 14 and 29, July 2, 24, 26 and August 8. This last meeting was not face to face but conducted by Mediator Fraser Kean.

6 Gordon testified that when the new round of negotiations started on June 7, "almost twenty-six articles, with one hundred and twenty-five sections, were outstanding, and that after meetings (in June and July) the outstanding issues had been reduced to three, viz: absenteeism, rules and regulations and dues check-off". The testimony goes on to say that (Gordon) "told Berry that the respondent would modify the absenteeism policy and the personal rules in all areas Berry believed them to be improper", *but Berry insisted that neither matter should be included in the contract*". (My emphasis).

7 On July 26 Berry confirmed that the union security and rules and regulations issues were strike issues. When asked by counsel in cross-examination whether or not rules and regulations were a non-negotiable issue, Berry did not answer directly, but merely said "we didn't even want them in the collective agreement."

8 In his testimony Berry admitted he had said to Gordon that "if the dues issue fell, the others would drop". This was enlarged upon in Gordon's cross-examination in quoting Berry's statement that "if we would exclude rules and regulations and absenteeism and changed our position on check-off we would have an agreement"

9 The majority award has found that these bargaining sessions were "surface bargaining", which is to say, there was no real intent to arrive at a collective agreement. The shadow of negotiations before the entrance of Gordon and Binning has convinced the other members of the Board that the leopard hasn't changed its spots. Yet the evidence persuades me that both parties had entered into "hard bargaining" and had run across intractable positions on both sides by August 8 -- the company's stance with regard to the dues check-off being countered by the union's adamant position on rules and regulations as well as check-off.

10 The Board appears to be in agreement with a definition of bargaining in bad faith but differs in its interpretation of the events in this case. The majority award sees the totality of events as the determining factor and cannot believe the professions of change of heart on the part of the new team. For my part, I find the explanation perfectly believable. There is no reason to doubt Tandy Electronics' policy of a "hands off" approach so long as the profit picture was satisfying. And there is certainly no reason to doubt that their preference would be to get along without a union. On the other hand it is equally credible that they should be alarmed at the bad publicity the company had evoked by their reaction to events in 1978. Events speak louder than words and their new team, which brought a whole grab-bag of unresolved issues down to three between June 7 and August 8, 1979, surely gives an indication of bargaining in good faith. Their resistance to the check-off is mirrored in the union's equally adamant position to secure one.

11 The literature on good/bad faith bargaining is extensive, and is listed in some detail in the majority report, so there is no need to repeat it here. Perhaps the approach is best summed up in two extracts -- from *Journal Publishing Co. of Ottawa Ltd.*, [1977] OLRB Rep. 309:

> The obligation contained in section 14 is an obligation to bargain. Parties to collective negotiations are required to bargain in good faith and to make every reasonable effort to make a collective agreement, but they are not required to reach a collective agreement. Good faith bargaining cannot be equated to the execution of a collective agreement and, conversely, bad faith bargaining cannot be equated to a failure to reach agreement. In other words, it is possible for the parties to comply with the obligation set out in section 14, and still not reach agreement. Where the obliga-

> tion is breached, therefore, it cannot be assumed that an agreement would have been reached but for the existence of bad faith bargaining. The imposition of a collective agreement, therefore, is not within the scope of the Board's remedial authority where it is attempting to redress the failure to bargain in good faith.

and in *Canadian Industries Limited*, [1976] OLRB Rep. May 203:

> Recognition requires each party to approach collective bargaining with the objective of entering into a collective agreement. This means that a failure to reach a collective agreement cannot be motivated by an unwillingness to recognize the other party. The requirement to recognize the other party does not mean, however, that a party can establish a failure to bargain in good faith by simply proving that its terms were not accepted by the other party. This type of proof, going to content of the proposals rather than to the conduct of the negotiations, would be insufficient to establish a lack of recognition.

12 Taking all the above into consideration I would rule that the parties be directed to bargain in good faith with the assistance of mediation. To quote from paragraph 66 of the majority award:

> ...both parties are entitled to bargain hard for the agreement that they believe to be acceptable. This is so even if one of the parties has an overwhelming strength at the bargaining table and able to achieve most or all of its needs. The exercise of such raw bargaining power in good faith does not offend the bargaining duty imposed by this Act.

13 Since, in my opinion, bargaining in bad faith has not been established, I cannot agree with the remedies suggested. In particular, I find the order in paragraph 125(b)(i) "that the Respondent be directed to cease and desist in its position on union security" an imposition that flies in the face of the Board's established policy and practice.

Decision of *Board Member Oliver Hodges*:

1 I concur with the Chairman in finding that the Respondent's actions, from the moment it became aware of the Complainant's organizing activity, were intended to prevent its employees from being represented by the trade union of their choice in collective bargaining, and thus hold that the Respondent had contravened sections 56, 58 and 61 of the Act. Furthermore, I am satisfied that the conduct of the Respondent at the bargaining table from November until the beginning of June was overt bargaining in bad faith. While I agree that substantial progress in bargaining towards an agreement was made after that time, nevertheless I am of the view that the Respondent did not *ever* intend to enter into a collective agreement with the Complainant. The Respondent's collective bargaining stance after June, although tough, appeared somewhat conciliatory. However, in the absence of any direct evidence from responsible company officials indicating a change in the Respondent's motives, I am in agreement with the Chairman in holding that the actions of the Respondent after the beginning of June, when considered together with the earlier unlawful conduct, amounted to bargaining in bad faith in violation of section 14 of the Act.

2 The Chairman has attempted to provide the Complainant and the employees in the bargaining unit with a remedy for the damages which they have suffered as a result of the Complainant's violations of *The Labour Relations Act*. I concur with the Chairman in holding that the circumstances of this call for the exercise of almost all of the remedial powers which the Board has been given by the Legislature. I agree with the granting of the remedial relief set out by the chairman, as far as it goes. However, I disagree with the Chairman's interpretation of section 79(4) of the Act which holds that this Board does not have the jurisdiction to impose a first collective agreement.

3 The position taken by the Respondent before the Board in the earlier certification and unfair labour practice proceedings leads me to doubt the efficacy of the remedial relief fashioned by the Chairman, notwithstanding the representations made by counsel that the respondent had seen the error of its ways and had changed its attitude towards the Complainant and the Board. In the circumstances of this case, having regard particularly to the absence of any first hand evidence from an officer or official of Radio Shack regarding a change in attitude or motive, I am concerned that the remedial relief in this case, which does not include the imposition of a first collective agreement, is an invitation to the Respondent to continue with bad faith

"surface" bargaining. In my opinion, when the Board is faced with an employer which has stated that it will get rid of the union no matter the cost, the Board must respond with a remedy which will ensure that the Union can achieve a collective agreement. In this case, that remedy is a collective agreement, the terms of which may be determined by this Board, based upon the final positions taken by the parties immediately prior to the strike.

4 The Board has the authority, as the Chairman has noted, under section 79(4) of the Act to provide an effective remedy for violations of the Act. In my view, that remedy must be a realistic and practical one. It must recognize that the respondent in this case has exhibited an atavistic attitude towards trade unions and the rights of employees to engage in collective bargaining reminiscent of the 1920's. To direct the Respondent to bargain in good faith and to cease and desist from its position on the issue of union security is one step towards forcing the Respondent closer to a collective agreement with the complainant. To award damages resulting from the Respondent's violation of section 14 of the Act based upon the loss of the opportunity to enter into a collective agreement at an earlier point in time, the amount of those damages to be assessed by the Board, is another step towards forcing the Respondent closer to a collective agreement with the Complainant. However, the relief fashioned by the Chairman is not enough.

5 This employer has already flouted the law and has failed to comply with earlier Board orders. The Union was precluded from engaging in fruitful collective bargaining by the Respondent. The Board has been advised of the outstanding bargaining issues and is aware of the parties' respective positions. The Board's cease and desist order with respect to union security will result in the compulsory deduction of union dues from the wages of all employees in the bargaining unit if a collective agreement is signed. In my opinion, *The Labour Relations Act* confers upon the Board the necessary jurisdiction to take the next step to guarantee that this employer will not benefit from its earlier wrongdoings; that step being the settlement of a collective agreement imposed by the Board.

6 Should the Union not be able to agree upon the Employer's complete proposals for a collective agreement prepared pursuant to the Board's directions, the Board should remain seized with this complaint in order to decide upon the resolution of the outstanding bargaining issues. I would then direct the parties to sign and be bound by the collective agreement determined by the Board.

Appendix

Appendix The Labour Relations Act NOTICE TO EMPLOYEES Posted by Order of the Ontario Labour Relations Board

> We have issued this notice in compliance with an Order of the Ontario Labour Relations Board issued after a hearing in which both the Company and the Union had the opportunity to present evidence. The Ontario Labour Relations Board found that we violated the Ontario Labour Relations Act and has ordered us to inform our employees of their rights.
>
> The Act gives all employees these rights:
>
> > To organize themselves;
> >
> > To form, join or help unions to bargain as a group, through a representative of their own choosing;
> >
> > To act together for collective bargaining;
> >
> > To refuse to do any and all of these things.
>
> We assure all of our employees that:

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT threaten our employees with plant closure or discharge or with any other type of reprisals because they have selected the United Steel Workers of America as their exclusive bargaining representative.

WE WILL NOT attempt to get employees to inform on union activities and the desires of their fellow employees.

WE WILL NOT engage in surveillance of employee activities with respect to union organization.

WE WILL NOT intimidate or coerce employees in any way into withdrawing from the United Steel Workers of America or from supporting the United Steel Workers of America.

WE WILL NOT refuse to bargain collectively with the United Steel Workers of America as the certified bargaining agent representative of all employees as directed by the Board in the following units:

(1) All employees of the respondent in Barrie save and except foremen and persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.

(2) All employees of the respondent who are regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except foremen, and persons above the rank of foreman, office and sales staff.

WE WILL NOT in any other manner interfere with or restrain or coerce our employees in the exercise of their rights under the Act.

WE WILL make whole the United Steel Workers of America for all losses suffered by reason of our refusal to bargain in good faith as directed by the Board.

WE WILL make whole all bargaining unit employees who suffered losses by reason of our failure to bargain in good faith as directed by the Board.

WE WILL comply with all other directions of the Ontario Labour Relations Board including:

(1) Providing the United Steel Workers of America with reasonable access to employee notice boards in our warehouse facility for a period of one year;

(2) providing the United Steel Workers of America with a list of names and addresses of all bargaining unit employees and to keep this list up to date for a period of one year;

(3) providing the United Steel Workers of America with a reasonable opportunity to be present and to reply to any speech made by management representatives to assembled employees;

(4) providing the United Steel Workers of America with an opportunity to address bargaining unit employees on company time and company premises for a period of time not exceeding thirty minutes following the reading of this notice.

[1979] O.L.R.B. Rep. 1220, [1980] 1 Can. L.R.B.R. 99, 80 C.L.L.C. 16,003

WE WILL bargain collectively with the United Steel Workers of America as the duly certified collective bargaining representative of our employees in the above units as directed by the Board and if an understanding is reached, we will sign a contract with the Union.

RADIO SHACK

Dated: Per: (Authorized Representative)

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

END OF DOCUMENT