



## ONTARIO LABOUR RELATIONS BOARD

OLRB Case No.: **3402-14-R**

International Union of Operating Engineers, Local 793, Applicant v.  
955140 Ontario Inc. o/a **Pickard Construction**, Responding Party

**BEFORE:** Harry Freedman, Vice-Chair

**DECISION OF THE BOARD:** February 27, 2015

1. This is an application for certification filed under the construction industry provisions of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") the applicant elected to have dealt with under section 128.1 of the Act. This application was filed on February 19, 2015.

2. The Registrar has certified that the applicant has been found to be a trade union in an earlier proceeding under the Act and Melissa Atkins-Mahaney, the solicitor for the applicant with knowledge of its affairs has declared the applicant is a trade union that according to established trade union practice pertains to the construction industry. Therefore, having regard to section 113 of the Act, the Registrar's certificate and the applicant's declaration, the Board finds that the applicant is a trade union within the meaning of sections 1(1) and 126(1) of the Act.

3. The Board further finds that this application does not relate to the industrial, commercial and institutional sector of the construction industry referred to in section 126 of the Act.

4. The applicant is an affiliated bargaining agent and seeks certification for a bargaining unit pursuant to section 158(2) of the Act. Section 158(2) provides:

Despite subsection 128(1), a trade union represented by an employee bargaining agency may bring an application for certification in relation to a unit of

employees employed in all sectors of a geographic area other than the industrial, commercial and institutional sector and the unit shall be deemed to be a unit of employees appropriate for collective bargaining.

5. The responding party filed its response with the Board within the time stipulated by Rule 25.5 of the Board's Rules of Procedure and provided the Board with the requisite information in accordance with subsection 128.1(3) of the Act.

6. In its transmittal letter, the applicant advised the Board that it was enclosing photocopies of the membership evidence that it had filed in connection with an earlier certification application in respect of a different geographic area (Board File No. 3291-14-R) and asked that the membership evidence it had filed in connection with that earlier application also be considered by the Board in determining this application.

7. When a trade union requests that membership evidence it had recently filed in an earlier certification application be applied to a subsequent application, the Board has routinely done so. See *Westgate Nursing Home*, [1981] OLRB Rep. April 503 where the Board wrote at pages 505-506:

11. The Board has an established practice of transferring membership evidence to a certification application from a previous application for certification at the request of the applicant, provided the request is made on or before the terminal date of the (subsequent) application (see *Precision Automotive Co. Limited*, [1967] OLRB Rep. Nov. 741; *Joffre Lapointe & Sons Limited*, [1971] OLRB Rep. Sept. 621, 626 and 629; *A.P. Woodworking Shop*, [1967] OLRB Rep. May 153; and *Falconbridge Nickel Mines*, [1966] OLRB Rep. July 258 and 259). Although such transfer is generally made in a situation in which the prior application has been disposed of, there is nothing to preclude such transfer at a time when both files are pending before the Board. The transfer does not result in the cards becoming inapplicable to the previous file; rather it results in the cards being applied to each file in succession.

At the applicant's request, the Board has applied the membership evidence the applicant had filed in Board File No. 2672-14-R to this application.

8. The applicant had also included with its application and transmittal letter original membership evidence that had not been filed in that earlier application. In its transmittal letter, the applicant also referred to several other pieces of membership evidence that were being sent to the Board by Canada Post Priority Courier from one of the applicant's other offices.

9. The applicant included with its transmittal letter an original Declaration Verifying Membership Evidence (Form A-74) in relation to this application in respect of all the membership evidence on which it relies in this application: the photocopies of the membership evidence that had been filed earlier in Board File No. 3291-14-R, the membership evidence appended to the application materials and transmittal letter, and the membership evidence sent under separate cover from another office of the applicant.

10. The Board actually received the application materials, some membership evidence and the transmittal letter on February 23, 2015. The Board received the balance of the membership evidence that was sent from the other office of the applicant on February 24, 2015.

11. The application materials including the membership evidence accompanying the transmittal letter and the membership evidence from the applicant's other office were all sent to the Board by Canada Post Priority Courier on February 19, 2015. Therefore all the application material was filed with the Board on February 19<sup>th</sup> despite having been received by the Board on two different days. See Rule 24.2 of the Board's Rules of Procedure and *N.G.P. Steel Inc.*, [2000] OLRB Rep. Jan./Feb. 100.

12. For the reasons expressed by the Board in *N.G.P. Steel Inc.* at page 101, despite the membership evidence on which the applicant relies having arrived at the Board on different days, in different envelopes and from different sources, because all that material was filed (or sought to be applied to this application) on the same day, the application included all the membership evidence on which the applicant relies for purposes of Rule 25.1 of the Board's Rules.

13. The applicant listed two job sites in Board Area 17, two job sites in Board Area 18 and two job sites in the "white area" and estimated there were 9 employees at work in its proposed bargaining unit on the application date. The two job sites in the "white area" were in McDougall Township and Ryerson Township.

14. The responding party in its response referred to three job sites in Board Area 17, two of which were listed by the applicant; four job sites in Board Area 18, two of which were listed by the applicant; and four job sites in the "white area", two of which were listed by the applicant. The other two job sites in the "white area" listed by the responding party were in Seguin Township.

15. The responding party agreed with the bargaining unit description proposed by the applicant and contended there were 14 employees at work in the bargaining unit on the application date.

16. The Board observes that although the parties agreed to the bargaining unit description, the responding party claimed that it was working in the township of Seguin on the application date. While some of the townships adjacent to the township of Seguin are in the agreed upon bargaining unit description because they come within Board Area 18 or because they are also either adjacent to the township of McDougall or the township of Ryerson or, it appears that there are two geographic townships adjacent to the township of Seguin that are not in the agreed upon bargaining unit: the township of Humphrey and the township of Foley. It seems to me that if, in fact, the employees the applicant seeks to represent were at work in the township of Seguin as claimed by the responding party, the adjacent townships of Humphrey and Foley ought to be included in the bargaining unit. See *Procon Developments Ltd.*, [1990] OLRB Rep. April 459, *Alcan Aluminium Limited*, [1997] OLRB Rep. May/June 305, and *South Side Ltd.*, [2002] OLRB Rep. May/June 510.

17. However, since the parties have agreed upon the bargaining unit description and as the applicant has not claimed that the responding party was working in the township of Seguin on the application date, the Board is prepared to accede to the parties' agreement with respect to the bargaining unit description.

18. The Board further finds on agreement of the parties and pursuant to section 158(2) of the Act that all employees engaged in the operation of cranes, shovels, bulldozers and similar equipment,

and those primarily engaged in the repairing and maintaining of the same, and employees engaged as surveyors in the employ of the responding party in within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, the County of Simcoe and the District Municipality of Muskoka and in the Township of McDougall and adjacent townships of Carling, Whitestone, McKellar, Seguin and Parry Sound, and in the township of Ryerson and the adjacent townships of Magnetawan, Strong, Burk's Falls, Armour, Perry, and McMurrich-Monteith, in all sectors of the construction industry other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the responding party appropriate for collective bargaining.

19. On the basis of only the information provided in the application (including the information and membership evidence filed by the applicant) and the information provided under subsection 128.1(3) of the Act, the Board is satisfied that the applicant has filed membership evidence on behalf of more than 55% of the employees who, according to the list of employees filed by the responding party, were at work in the bargaining unit as of the date the application was filed. According to the responding party, there were 14 employees at work in the bargaining unit. The applicant filed membership evidence on behalf of 103 individuals, 8 of whom were on the list of 14 employees.

20. Seven of the eight applications for membership that correspond with the list of employees filed by the responding party had been filed earlier by the applicant in Board File No. 3291-14-R. The Board (differently constituted) in its February 13, 2015 decision in Board File No. 3291-14-R wrote at paragraphs 6 and 7:

6. The responding party states that this application should be dismissed pursuant to section 15 of the Act on the basis that it arises directly from organizing efforts that were engaged in with the support and ongoing involvement of a management employee, which involvement was known to the employees and to the applicant. The responding party states that the management employee threatened, coerced and unduly influenced employees under his direct supervision to sign union cards and to become members of the applicant, contrary to section 76 of the Act, and requests that the application be dismissed in

accordance with subsections 128.1(8) and 128.1(9) of the Act.

7. In the circumstances the Board is not able to determine the percentage of employees in the bargaining unit who were members of the applicant as of the date the application was filed. The Board will determine that, along with all other issues in dispute, following a Case Management Hearing.

Since the allegations made in Board File No. 3291-14-R related to the membership evidence that the applicant had filed in that application, and as the applicant has asked the Board to apply that membership evidence in this proceeding, the Board cannot determine the percentage of employees in the bargaining unit who were members of the applicant before determining whether the membership evidence relevant to this application was secured by the applicant contrary to section 76 of the Act.

21. It appears from a review of the membership evidence filed by the applicant in this matter that the membership evidence was signed, based on the dates on the individual membership documents, between July, 2014 and February 2015. One piece of membership evidence is undated. However, the 8 membership documents relevant to the disposition of this matter all appear to have been signed, based on the dates on those 8 documents, after January 1, 2015.

22. Four other documents in the identical form (two of which relate to the same individual) were filed with the Board by facsimile transmission on February 20, 2015. There was no transmittal letter with those four documents, no indication who had sent them, and no contact information for the individuals who appear to have filled them in and signed them. It appears that each form was downloaded from a website ([www.labourwatch.com](http://www.labourwatch.com)) and filled in by hand. A blank form of that document is attached as Appendix A to this decision. The one individual who filled in two of the forms appears to have signed that document on February 12, 2015 and had it witnessed by someone on February 19, 2015. One of the forms appears to have been signed and witnessed on February 19<sup>th</sup> and the other appears to have been signed and witnessed on February 20<sup>th</sup>. Each one of the forms indicates that those individuals do not wish to be represented by the applicant in relation to their employment with the responding party and purports to revoke any membership document they may have signed.

23. It appears the applicant had filed membership evidence on behalf of those three individuals. The membership documents that relate to those three persons (and to a number of other persons) were signed and dated in January 2015. However, the three individuals who appear to have filled in those forms are not on the list of employees filed by the responding party and therefore neither those four documents nor the membership evidence the applicant had filed in relation to those three individuals are material to the disposition of this matter.

24. The applicant in its application had named the Labourers International Union of North America, Ontario Provincial District Council (the "OPDC") as a trade union "known to the applicant which claims to represent any employees who may be affected by this application". The applicant did not deliver a copy of the application to the OPDC within two days of filing this application.

25. The OPDC by letter dated February 26, 2015 advised the Registrar that the applicant had provided it with a copy of the application on February 24, 2015. It simply asks that it be copied on any future correspondence in connection with this matter. The OPDC in its February 26<sup>th</sup> letter did not seek to intervene nor did it file an intervention in this proceeding.

### **Status Disputes**

26. Given that the applicant has filed membership evidence in relation to more than 55% of the employees in the bargaining unit, it does not appear to the Board there are any status disputes material to the disposition of this matter. Nevertheless, if there are status disputes either party wishes to raise, they may do so in accordance with Information Bulletin No. 9: Resolving Disputes in Certification Applications in the Construction Industry.

### *Applicant*

27. The Board directs the applicant no later than five days from the date of this decision to deliver to the responding party and file with the Board its challenges to any person whose name the applicant asserts should not be on Schedules A and B (lists of employees) filed by the responding party along with the names of any additional persons it asserts should be on the Schedule A (list of employees). In

the case of names the applicant asserts should be added to the list of employees, the Board directs the applicant to file with its list of names all the basic facts on which the applicant relies. The basic facts should include at least where the individual was working and what the applicant asserts the individual was doing.

*Responding Party*

28. The Board directs the responding party no later than 10 days from the date of this decision to deliver to the applicant and file with the Board a statement of its position in response to the applicant's challenges and additions, together with its reasons for those positions and the basic facts on which it relies. The basic facts should include at least where the individual was working and what the responding party asserts the individual was doing. The Board further directs the responding party to include in its submissions all relevant documents, including payroll records, time sheets, invoices and any other document relating to the payment of money for work performed with respect to those persons whose status is challenged.

*Applicant*

29. The Board directs the applicant no later than 15 days from the date of this decision to deliver to the responding party and file with the Board a statement of its position in response to the responding party's position, together with its reasons for those positions and the basic facts on which it relies that it has not already pleaded. The Board further directs the applicant to include in its submissions all relevant documents in its possession.

**Other Disputes**

30. If there are any factual or legal disputes that the Board will be required to determine at any time during the course of this application, the party wishing to raise the issue must, within 15 days of the date of this decision, provide to the other parties and the Board a statement of the legal or factual issues including all the relevant facts on which the party relies. All facts must be pleaded in accordance with Rule 5.1, and copies of the basic relevant documents must be included in the submissions.

## **Particulars and Disclosure**

31. In the event that any party is not satisfied with the particulars or the production of documents by any other party with respect to status or any other issues, then within five days of the other party's last submissions, that party is required to advise the other of all the additional factual particulars it seeks to have pleaded and all the documents that it seeks to have produced. A copy of this request is to be filed with the Board. Within five days of receipt of such demand the party of whom the demand is made must provide the particulars and documents, or set out the reasons in writing for its refusal.

## **Case Management Hearing**

32. The date and time of the Case Management Hearing are set out in the Confirmation of Filing.

33. The purpose of the Case Management Hearing is set out in Information Bulletin No. 9. It is not merely a pre-hearing conference. The parties must be prepared to make submissions addressing all issues they have identified in their written materials. The Board at the Case Management Hearing will deal with both procedural and as many substantive issues, including status disputes, as it is able when in the opinion of the Board the parties have had an adequate opportunity to address those issues in their written submissions, and no further evidence is necessary.

34. The Board directs the responding party to post copies of this decision immediately in a location or locations where they are most likely to come to the attention of individuals in the bargaining unit. These copies must remain posted for a period of 45 business days.

"Harry Freedman"

for the Board



## ONTARIO LABOUR RELATIONS BOARD

OLRB Case No.: **3404-14-R**

Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. 955140 Ontario Inc. o/a **Pickard Construction**, Responding Party

**BEFORE:** Harry Freedman, Vice-Chair

**DECISION OF THE BOARD:** March 2, 2015

1. This is an application for certification filed under the construction industry provisions of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") the applicant elected to have dealt with under section 128.1 of the Act. This application was filed on February 19, 2015.

2. The Registrar has certified that the applicant has been found to be a trade union in an earlier proceeding under the Act and Ben Katz, counsel for the applicant with knowledge of its affairs has declared the applicant is a council of trade unions that represents trade unions that according to established trade union practice pertain to the construction industry. Therefore, having regard to section 113 of the Act, the Registrar's certificate and the applicant's declaration, the Board finds that the applicant is a trade union within the meaning of section 1(1) and a council of trade unions within the meaning of section 126(1) of the Act. Having regard to the information provided by the applicant the Board is satisfied that Locals 183, 247, 493, 506, 527, 607, 625, 837, 1036, 1059, 1081 and 1089 are constituent trade unions of that council and that each of them vested appropriate authority in the council to enable it to discharge the responsibilities of a bargaining agent.

3. The Board further finds that this application does not relate to the industrial, commercial and institutional sector of the construction industry referred to in section 126 of the Act.

4. The applicant is an affiliated bargaining agent and seeks certification for a bargaining unit pursuant to section 158(2) of the Act. Section 158(2) provides:

Despite subsection 128 (1), a trade union represented by an employee bargaining agency may bring an application for certification in relation to a unit of employees employed in all sectors of a geographic area other than the industrial, commercial and institutional sector and the unit shall be deemed to be a unit of employees appropriate for collective bargaining.

5. The responding party filed its response with the Board within the time stipulated by Rule 25.5 of the Board's Rules of Procedure and provided the Board with the requisite information in accordance with subsection 128.1(3) of the Act.

6. The applicant proposed a bargaining unit of construction labourers encompassing a number of geographic townships in a white area<sup>1</sup> of the province. The applicant identified four projects where the employees it seeks to represent were working on the application date, one in the geographic township of McDougall, two in the geographic township of Seguin, and one in the geographic township of Ryerson. It estimated there were 13 employees at work in its proposed bargaining unit on the application date.

7. The applicant proposed the following bargaining unit:

all construction labourers in the employ of the responding party in the Townships of McDougall, Seguin and Ryerson and adjacent townships of The Archipelago, Carling, Parry Sound, Whitestone, McKellar, Magnetawan, Strong, Armour, Perry, McMurrich-Monteith, Muskoka Lakes and Georgian Bay, in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman

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<sup>1</sup> An application for certification arising from a project that is not within a defined Board geographic area has been described as an application for certification relating to a "white area" of the Province. (See *Procon Developments Ltd.*, [1990] OLRB Rep. April 459.) The "white area" of the Province is explained in *South Side Ltd.*, [2002] OLRB Rep. Mar./Apr. 510 at 514.

8. The responding party in its response disagreed with the bargaining unit proposed by the applicant. It identified four projects that appear to be the same four projects identified by the applicant, one in the geographic township of McDougall, two in the geographic township of Seguin, and one in the geographic township of Ryerson. The responding party contended there were 12 employees in the bargaining unit proposed by the applicant.

9. The responding party submitted that the applicant's proposed bargaining unit failed to include the township of Burk's Falls, which is adjacent to Ryerson township, one of the townships in which the responding party was working on the application date. The responding party also objects to the applicant's inclusion of the townships of Muskoka Lakes and Georgian Bay, which are in Board Area 18 and therefore not in the "white area". In any event, I note that while the township of Muskoka Lakes is adjacent to the township of Seguin the township of Georgian Bay is not, nor is it adjacent to either the township of Ryerson or the township of McDougall. The responding party therefore contends that the applicant's proposed bargaining unit cannot be appropriate for collective bargaining.

10. The Board accepts the responding party's position with respect to the applicant's failure to include the township of Burk's Falls in its bargaining unit description. The appropriate bargaining unit in this application ought to include the township of Burk's Falls.

11. The responding party's objection to the inclusion of the townships of Muskoka Lakes and Georgian Bay in the bargaining unit description is sustained. It is clear that those two townships come within Board Area 18 and therefore ought not to be included in a bargaining unit that relates to a project being undertaken in the "white area". See *South Side Ltd.*, [2002] OLRB Rep. May/June 510 at page 514.

12. The responding party also submits that the appropriate bargaining unit ought to include the Dokis Reservation Lands on Keso Bay Road and the adjacent townships of Patterson, Hardy and McConkey. The responding party in its response contends the applicant has selectively ignored some locations in the "white area" where it was working that are close to the projects in the "white area" the applicant has included. The responding party submits that the applicant ought to be required to include all locations in the "white

area” where it was working on the application date that are in the vicinity of the projects that the applicant had identified.

13. There is in my opinion no merit to the responding party’s submission in relation to the inclusion of the Dokis Reservation Lands in the bargaining unit description.

14. The “white area” of the province is not a single Board Geographic Area. While a trade union seeking certification outside of the industrial, commercial and institutional sector must include all projects in the Board Area that is the subject of the application, a trade union is not required to include all the Board Areas where an employer is working when it makes such an application. A trade union is free to select which Board geographic area or areas it wishes to include in its application for certification provided there are employees at work in the Board Area or Areas it has selected. See the analysis in *Primeline Plumbing Ltd.*, [2001] OLRB Rep. Sept./Oct. 1240 where the Board wrote at page 1242:

...the Act does not oblige an applicant trade union to attempt to organize all unrepresented employees at work on the application date in every geographic area in which the employer is carrying on construction work on the date of application. See, for example, *Harold’s Demolition and Recycling*, unreported, Board File No. 1648-99-R, decision dated January 18, 2001, Q.L. cite [2001] OLRD No. 2947, in which the Board stated at paragraph 23:

There is no requirement under the Act for a trade union to apply for a bargaining unit which includes more than one geographic area even if the employer has employees working in a different geographic area which would fall outside of the bargaining unit.

See also *Dagmar Construction Limited*, [1987] OLRB Rep. April 480 and *Beling Cement Construction Limited*, [1989] OLRB Rep. July 709.

15. The Board’s approach in determining the geographic scope of the bargaining unit in relation to the “white area” was succinctly set out in *South Side Ltd.*, *supra* where the Board wrote at page 514:

The Board's normal practice with respect certification applications relating to the "white areas" is to describe the geographic element of the appropriate bargaining unit by reference to the township in which the project is located and to all of the surrounding adjacent townships.

In the same way that an applicant seeking certification outside the industrial, commercial and institutional sector in relation to a particular Board Area must include employees working at all locations in that Board Area, the applicant must include all employees of an employer working in a "white area" of the province who are in the geographic township in which the project is located and in any of the adjacent geographic townships in the "white area".

16. The responding party acknowledged that the Dokis Reservation Lands are not adjacent to any of the townships that are in the applicant's proposed bargaining unit. If an employer such as a road builder, utilities contractor or pipeline contractor was doing work in two adjacent geographic townships in the "white area" a union could not obtain certification in relation to the employees working in only one of the two adjacent townships by excluding employees who were working in the other adjacent township. There is, however, no obligation on a union to attempt to organize employees who are working in disparate locations in the white area of the Province. In my view, employees who are working in geographic townships that are not adjacent to one another are working in disparate locations.

17. The Board pursuant to section 9 of the Act must determine the description of the appropriate bargaining unit. A trade union in its certification application must propose a bargaining unit description. See section 7(12) of the Act. Even if the Board concludes that the bargaining unit proposed in an application could not be appropriate for collective bargaining, that conclusion does not necessarily result in the Board dismissing the application. If the Board can determine on the basis of the materials filed by the parties the description of the appropriate bargaining unit and the Board's determination of the appropriate bargaining unit description does not prejudice the parties or the employees affected, the application will proceed based on the description of the appropriate bargaining unit as determined by the Board. See *Pepsi-Cola Canada Ltd.*, [1995] OLRB Rep. Aug. 1131 at 1140-41.

18. The Board further finds that all construction labourers in the employ of the responding party in the Townships of McDougall, Seguin and Ryerson and adjacent townships of The Archipelago, Carling, Parry Sound, Whitestone, McKellar, Magnetawan, Strong, Armour, Perry, McMurrich-Monteith, and Burk's Falls in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the responding party appropriate for collective bargaining.

19. The applicant in its transmittal letter advised the Board that it was enclosing some original membership evidence with its application materials. It also advised that additional membership evidence was being filed by one of its organizers by Canada Post Priority Courier. As both the application materials and the additional membership evidence referred to in the transmittal letter were sent to the Board on the same day by Canada Post Priority Courier, that additional membership evidence was included with the application for purposes of Rule 25.1 of the Board's Rules of Procedure. See Rule 24.2 of the Board's Rules and *N.G.P. Steel Inc.*, [2000] OLRB Rep. Jan./Feb. 100.

20. The applicant in the Declaration Verifying Membership Evidence filed with its application advised that it was also relying on membership evidence that it had submitted in two earlier certification applications that were filed on December 30, 2014 (Board File No. 2943-14-R) and on February 5, 2015 (Board File No. 3295-14-R) for purposes of this application. The applicant confirmed the veracity of the Declarations Verifying Membership Evidence that had been filed in those earlier applications in the Declaration it had filed with this application. The applicant also filed photocopies of the membership evidence and the Declarations that had been filed in those two earlier applications.

21. As noted earlier, the applicant had estimated there were 13 employees in its proposed bargaining unit. The applicant filed original membership evidence on behalf of 11 persons who it believed were employees in the bargaining unit on the application date. In its Declaration Verifying Membership Evidence in respect of this application it represented that it had filed membership evidence on behalf of 11 of those 13 employees.

22. The applicant had also filed membership evidence<sup>2</sup> in respect of another 92 individuals who it believed were employees of the responding party but were not employees in the bargaining unit that is the subject of this application. That additional membership evidence had been filed by the applicant in its earlier applications in Board File Nos. 2943-14-R and 3295-14-R. It seeks to rely on that additional membership evidence in the event the responding party claims any of those other persons were in the bargaining unit.

23. The applicant filed membership evidence on behalf of 102 persons, 9 of whose names appear on the list of employees who the responding party contended came within the bargaining unit proposed by the applicant. The membership evidence that had been filed by the applicant in its earlier applications in Board File Nos. 2943-14-R and 3295-14-R did not correspond with any of the names of the 12 employees on the list of employees filed by the responding party. In other words, 9 of the 11 original pieces of membership evidence that the applicant had filed in connection with only this application corresponded with the names of the 12 employees on the list of employees filed by the responding party.

24. In its decision dated February 12, 2015 in Board File No. 3295-14-R, the Board, differently constituted, noted that the responding party had filed allegations relating to the membership evidence that been filed in that application. That membership evidence was also filed by the applicant in this application. Since the membership evidence that is material to this application did not include any of the membership evidence that was the subject of the allegations made by the responding party in relation to the application in Board File No. 3295-14-R, the relevant and material membership evidence filed by the applicant (that is, the membership evidence that corresponds with the names on the list of employees filed by the responding party) can be relied on by the Board without further enquiry in determining this matter.

25. Three other identical documents were filed with the Board by facsimile transmission on February 20, 2015. There was no transmittal letter with those three documents, no indication who had

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<sup>2</sup> The Board at the request of an applicant union routinely applies membership evidence the applicant had filed in an earlier application to a subsequent application provided that request is made at the time it files that subsequent application. See *Westgate Nursing Home*, [1981] OLRB Rep. April 503

sent them, and no contact information for the individuals who appear to have filled them in and signed them. It appears that each form was downloaded from a website (www.labourwatch.com) and filled in by hand<sup>3</sup>. One individual appears to have signed that document on February 12, 2015 and had it witnessed by someone on February 19, 2015. One of the forms appears to have been signed and witnessed on February 19<sup>th</sup> and the other appears to have been signed and witnessed on February 20<sup>th</sup>. Each one of the forms indicates that those individuals do not wish to be represented by a constituent local of the applicant in relation to their employment with the responding party and purports to revoke any membership document they may have signed.

26. Only one of the three persons who signed the form purporting to revoke any membership evidence that he or she may have signed is on the list of employees filed by the responding party with its response in this application. The applicant had also filed membership evidence on behalf of that one person.

27. Even if the document filed with the Board with the name and signature of the one person whose name is on the list of employees actually revoked the membership evidence the applicant had filed in relation to that one person, a proposition with which the Board has considerable doubt, and even if the Board assumes that the revocation of that individual's membership in the applicant results in the Board disregarding the membership evidence filed by the applicant in respect of that one individual, there are still 8 persons on the list of 12 bargaining unit employees filed by the responding party who remain as members of the applicant on the date this application was filed.

28. Therefore, on the basis of the information provided in the application (including the information and membership evidence filed by the applicant), the information provided under subsection 128.1(3) of the Act) and the material received by the Board on February 20<sup>th</sup>, the Board is satisfied that more than 55% of the employees in the bargaining unit were members of constituent locals of the applicant at the time the application was filed. Therefore, pursuant to section 12(3) of the Act, those individuals are deemed to be members of the applicant on the date the application was filed.

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<sup>3</sup> The actual form of the document is appended to the Board's decision that was released on February 27, 2015 in Board File No. 3302-14-R. The decision relates to a certification application filed by the International Union of Operating Engineers, Local 793 in relation to the responding party.





## ONTARIO LABOUR RELATIONS BOARD

OLRB Case No.: **3291-14-R**

International Union of Operating Engineers, Local 793, Applicant v. 955140 Ontario Inc. o/a **Pickard Construction**, Responding Party

**BEFORE:** Harry Freedman, Vice-Chair

**APPEARANCES:** Melissa Atkins-Mahaney and Ron Hillis for the applicant; David L.W. Francis and Maurice Pickard for the responding party; Lorne A. Richmond, Ben Katz, D. DeSousa, M. Cordeiro, M. Tenes and T. Lampman for Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1059

**DECISION OF THE BOARD:** October 15, 2015

1. This construction industry certification application being dealt with under section 128.1 the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") was listed for hearing together with a construction industry certification application filed by the Labourers' International Union of North America, Ontario Provincial District Council (Board File No. 2943-14-R) in respect of the responding party and an unfair labour practice complaint filed by the Labourers' International Union of North America, Local 1059 (Board File No. 2342-14-U) against the responding party pursuant to the Board's decision in this matter dated March 20, 2015.

2. The Board noted in its March 20<sup>th</sup> decision that the only outstanding issue in this application was the responding party's motion to dismiss this application on a number of grounds relating to the collection of the membership evidence relied on by the applicant. At the second day of hearing, the responding party advised the Board that it wished to withdraw all the allegations it had made with respect to the membership evidence filed by the applicant.

3. Given that the responding party has withdrawn all its allegations relating to the membership evidence filed, the parties agreed that the Board ought to proceed to determine this application on the basis of the agreed upon list of employees in the bargaining unit and the membership evidence that had been filed.

4. The Board (differently constituted) in its decision dated February 13, 2015 determined, among other things, that this application does not relate to the industrial, commercial and institutional sector of the construction industry and the description of the appropriate bargaining unit. The Board in that February 13<sup>th</sup> decision found that all employees of the responding party engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, in all sectors of the construction industry other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman, constituted a unit of employees of the responding party appropriate for collective bargaining.

5. On the basis of the information provided in the application, including the information and membership evidence filed by the applicant, the information provided under subsection 128.1(3) of the Act, and the agreements reached by the parties, the Board is satisfied that more than 55% of the employees in the bargaining unit were members of the applicant on the date the application was filed.

6. The parties agreed that the list of 19 persons filed by the responding party were the employees of the responding party who were at work on the application filing date (February 5, 2015) in the bargaining unit.

7. The applicant had filed membership evidence on behalf of 96 individuals with its application. 13 of the 96 persons for whom the applicant had filed membership evidence were on the agreed upon list of 19 bargaining unit employees.

8. In addition, several documents purporting to be revocations of membership that appear to have been downloaded from a website ([www.labourwatch.com](http://www.labourwatch.com)) in the form attached to the Board's February 27, 2015 decision between these parties (*Pickard*

*Construction*, [2015] OLRD No. 690) had also been filed. None of those documents purporting to be revocations of membership corresponded with any of the 13 persons in the bargaining unit for whom the applicant had filed membership evidence. Therefore those purported revocations of membership are irrelevant to the disposition of this matter.

9. The applicant has asked that it be certified pursuant to section 128.1(13)(a) relying solely on the number of persons in the bargaining unit who are its members. The applicant is entitled to do so under section 128.1. There is nothing raised in this file by any party that would cause the Board to consider directing a representation vote.

10. The Board is satisfied that it should certify the applicant.

11. Therefore, pursuant to subsection 128.1(13)(a) of the Act, a certificate will issue to the applicant trade union in respect of all employees of 955140 Ontario Inc. o/a Pickard Construction engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, in all sectors of the construction industry other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

12. The hearings scheduled for October 26, 2015 and January 7, April 7 and April 8, 2016 are hereby cancelled.

13. The Board directs the responding party to post copies of this decision immediately in a location or locations where they are most likely to come to the attention of individuals in the bargaining unit. These copies must remain posted for a period of 45 business days.

“Harry Freedman”  
for the Board



## ONTARIO LABOUR RELATIONS BOARD

OLRB Case No.: **0192-15-R**

International Union of Operating Engineers, Local 793, Applicant v. **Pickard Construction**, Responding Party v. Labourers' International Union of North America, Ontario Provincial District Council; Labourers' International Union of North America, Local 625; Labourers' International Union of North America, Local 1089, Intervenors

**BEFORE:** Harry Freedman, Vice-Chair

**DECISION OF THE BOARD:** April 30, 2015

1. This is an application for certification filed under the construction industry provisions of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") the applicant elected to have dealt with under section 128.1 of the Act. This application was filed on April 21, 2015.

2. Based on my review of the records maintained by the Board, I am satisfied that in an earlier proceeding under the Act the Board had found that the applicant was a trade union. Melissa Atkins-Mahaney, the solicitor for the applicant with knowledge of its affairs has declared the applicant is a trade union that according to established trade union practice pertains to the construction industry. Therefore, having regard to section 113 of the Act, my review of the Board's records and the applicant's declaration, the Board finds that the applicant is a trade union within the meaning of sections 1(1) and 126(1) of the Act.

3. The responding party filed its response with the Board within the time stipulated by Rule 25.5 of the Board's Rules of Procedure and provided the Board with the requisite information in accordance with subsection 128.1(3) of the Act.

4. The responding party in its response contended that the intervenors have an interest in this matter and delivered the application and other requisite materials to them on April 27, 2015.

5. The intervenors filed an intervention on April 29, 2015. The intervenors included membership evidence with their intervention. The membership evidence the intervenors filed corresponds with at least one person on the list of employees filed by the responding party. The intervenors therefore have standing to intervene.

6. The Board further finds that this application does not relate to the industrial, commercial and institutional sector of the construction industry referred to in section 126 of the Act.

7. The applicant proposed its standard craft bargaining unit in respect of all sectors of the construction industry other than the industrial, commercial and institutional sector in Board Areas 1 and 2. The applicant identified six projects where the responding party was working on the application date, three in Board Area 1 and three in Board Area 2. The applicant also asserted that the only unrepresented trades at work at those six projects were operating engineers.

8. The responding party in its response indicates that although it accepts that the bargaining unit proposed by the applicant would be an appropriate bargaining unit if the employees the applicant seeks to represent were not already represented by another trade union, it contends that there were no unrepresented trades at work on the application date and that this application is untimely.

9. The responding party asserts there were either 12 employees or no employees in the applicant's proposed bargaining unit. The responding party listed 11 job sites in Board Area 1, one of which corresponded with the three job sites in Board Area 1 identified by the applicant and listed 6 job sites in Board Area 2, two of which corresponded with the three job sites in Board Area 2 identified by the applicant.

10. The applicant is a trade union represented by an employee bargaining agency. This application is not made in relation to the industrial, commercial and institutional sector of the construction industry. In these circumstances, section 158(2) of the Act is applicable. Section 158(2) permits the applicant to apply for a unit of employees in all sectors of the construction industry in a geographic area other than the industrial, commercial and institutional sector, and that unit "shall be deemed to be a unit of employees appropriate for collective bargaining."

11. The applicant has proposed its normal craft unit as an appropriate bargaining unit. Therefore the description of the appropriate bargaining unit is not affected either by there being no unrepresented trades at work on the application date or by the timeliness of the application.

12. The intervenors made no submissions with respect to the description of the appropriate bargaining unit.

13. The Board further finds pursuant to section 158(2) of the Act that all employees engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of the same, and employees engaged as surveyors in the employ of the responding party in the Counties of Essex, Kent and Lambton, in all sectors of the construction industry other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the responding party appropriate for collective bargaining.

14. The applicant claimed there were 11 employees at work in its proposed bargaining unit. The responding party filed a list containing the names of 12 employees.

15. The applicant had filed<sup>1</sup> membership evidence on behalf of 109 individuals and asserted that 9 of those 109 individuals were employees of the responding party who were at work in the bargaining unit on the application date. Based on the Board's review of all the membership evidence filed by the applicant and the list of names filed by the responding party, the Board finds that 7 of the 109 pieces of membership evidence filed by the applicant correspond with the names on the list of employees filed by the responding party.

16. Two of the seven pieces of membership evidence that correspond with the names on the list of employees filed by the responding party were among the six pieces of new membership evidence the applicant had filed with its application; four of the seven

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<sup>1</sup> The applicant in its transmittal letter indicated it was filing new membership evidence on behalf of six persons and was also relying on the membership evidence it had filed in two earlier applications relating to different Board Areas (Board File Nos. 3291-14-R and 3402-14-R). It is entitled in this application to rely on the membership evidence it had recently filed in earlier applications. See *Pickard Construction*, 2015 CanLII 12145; [2015] OLRD No. 690 and *Westgate Nursing Home*, [1981] OLRB Rep. April 503.

pieces of membership evidence that correspond with the names on the list of employees filed by the responding party had been filed in Board File No. 3291-14-R and the remaining one piece of membership evidence that corresponds with responding party's list of names had been filed in Board File No. 3402-14-R.

17. The Board in its decision dated March 20, 2015 in Board File Nos. 3291-14-R and 3402-14-R (*Pickard Construction*, 2015 CanLII 16100; [2015] OLRD No. 772) dealt with allegations relating to the membership evidence the applicant had filed in relation to those two applications. The Board in that decision dismissed the applicant's motion to dismiss the responding party's allegations for failing to disclose a *prima facie* case relating to the collection of the membership evidence relied on by the applicant in relation to the application in Board File No. 3291-14-R and allowed the applicant's motion in relation to the membership evidence relied on by the applicant in Board File No. 3402-14-R.

18. Two of the four pieces of relevant membership evidence that had been filed in Board File No. 3291-14-R appear to have been signed before October 21, 2014 (one was dated October 3, 2014 and the other was dated October 17, 2014) while both of the two other pieces of relevant membership evidence that had been filed in Board File No. 3291-14-R appear to have been signed on October 24, 2014.

19. Five other documents in the identical form were filed with the Board by facsimile transmission. Three of those five documents were received by the Board after 5 p.m. on April 24, 2014, and the other two were received by the Board after 5 p.m. on April 27, 2014. There was no transmittal letter with those five documents, no indication who had sent them, and no contact information for the individuals who appear to have filled them in and signed them. It appears that each form was downloaded from a website ([www.labourwatch.com](http://www.labourwatch.com)) and filled in by hand. A blank form of that document (the "labourwatch form") is attached as Appendix A to this decision.

20. Two of the three labourwatch forms that were filed on April 25, 2015<sup>2</sup> were signed, witnessed and dated April 22, 2015 and the other one was signed, witnessed and dated April 23, 2015. One of the two labourwatch forms filed on April 29, 2015 was signed, witnessed and dated April 27, 2015 and the other one filed on that

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<sup>2</sup> Documents received by the Board after 5:00 p.m. will be deemed to be filed the next day—see Rule 3.5 of the Board's Rules.

date was signed, witnessed and dated April 28, 2015. Each one of the labourwatch forms indicates that the individuals who completed and signed them do not wish to be represented by the applicant in relation to their employment with the responding party and purports to revoke any membership document they may have signed.

21. It appears the applicant had filed membership evidence on behalf of those five individuals. The membership documents that relate to four of those five persons (and to a number of other persons) were signed and dated in October 2014. The membership document that relates to one of those five persons was signed and dated after January 1, 2015.

22. Three of the five individuals who appear to have filled in those labourwatch forms are on the list of employees filed by the responding party. Two are not.

23. The labourwatch forms and membership evidence relating to the two individuals who are not on the list of employees filed by the responding party will not be material to the disposition of this application unless the applicant successfully challenges their omission from the list.

24. How the Board applies the membership evidence filed and the effect, if any, of the labourwatch forms filled in by the three individuals who appear on the list of employees on that membership evidence can be determined, if necessary, when the degree of membership support becomes material to the disposition of this application. The parties' submissions, if any, relating to the membership evidence and the labourwatch forms may be filed in accordance with the Board's direction relating to "Other Disputes" set out below.

25. On the basis of only the information provided in the application (including the information and membership evidence filed by the applicant), the information provided under subsection 128.1(3) of the Act, and the material filed with the Board prior to the date of this decision, the Board is not able to determine the percentage of employees in the bargaining unit who were members of the applicant as of the date the application was filed. The Board will determine that, along with all other issues in dispute, following a Case Management Hearing.

26. The responding party and intervenors assert that the responding party became bound by the collective agreement between the intervenors and the Utility Contractors' Association of Ontario (the "Utilities Agreement") by virtue of the intervenors<sup>3</sup> having been certified to represent bargaining units of construction labourers in Board Area 1 (Board File No. 3779-10-R) and Board Area 2 (Board File No. 3657-10-R) by decisions of the Board dated March 11, 2015 and by virtue of an accreditation order issued by the Board in June 2013 to the Utility Contractors' Association of Ontario Incorporated.<sup>4</sup>

27. According to the responding party, the bargaining unit in the Utilities Agreement is not limited to just construction labourers. Both the responding party and the intervenors contend that they had agreed that as of April 1, 2015 the Utilities Agreement would apply to both equipment operators and construction labourers employed by the responding party in Board Areas 1 and 2. As a result, the responding party and intervenors claim that this application is untimely because the employees who come within the bargaining unit that is the subject of this application were at the time the application was made in the bargaining unit set out in the Utilities Agreement by which the responding party and intervenors are bound.

### **Status Disputes**

28. Status Disputes are determined in accordance with Information Bulletin No. 9: Resolving Disputes in Certification Applications in the Construction Industry.

#### *Applicant*

29. The Board directs the applicant no later than five days from the date of this decision to deliver to the responding party and intervenors and file with the Board its challenges to any person whose name the applicant asserts should not be on the Schedule A (list of employees) filed by the responding party along with the names of any additional persons it asserts should be on the Schedule A (list of

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<sup>3</sup> The Board issued certificates to the Labourers' International Union of North America, Ontario Provincial District Council (the "OPDC") in its March 11<sup>th</sup> decision.

<sup>4</sup> See the Board's decision dated June 21, 2013 in *The Utility Contractors' Association of Ontario Incorporated*, 2013 CanLII 34966 by which The Utility Contractors' Association of Ontario Incorporated was accredited to represent in collective bargaining all employers of construction employees engaged in utility construction for whom the OPDC and its affiliated local unions hold bargaining rights.

employees). In the case of names the applicant asserts should be added to the list of employees, the Board directs it to file with its list of names all the basic facts on which the applicant relies. The basic facts should include at least where the individual was working and what the applicant asserts the individual was doing.

### *Responding Party and Intervenors*

30. The Board directs the responding party and intervenors no later than 10 days from the date of this decision to deliver to the applicant and file with the Board a statement of their positions in response to the applicant's challenges and additions, together with their reasons for those positions and the basic facts on which they rely. The basic facts should include at least where the individual was working and what the responding party and intervenors assert the individual was doing. The Board further directs the responding party to include in its submissions all relevant documents, including payroll records, time sheets, invoices and any other document relating to the payment of money for work performed with respect to those persons whose status is challenged. The Board directs the intervenor to include in their submissions all documents on which they intend to rely in relation to any person whose status is in dispute.

### *Applicant*

31. The Board directs the applicant no later than 15 days from the date of this decision to deliver to the responding party and intervenors and file with the Board a statement of its position in response to the responding party's and intervenors' position, together with its reasons for those positions and the basic facts on which it relies that it has not already pleaded. The Board further directs the applicant to include in its submissions all relevant documents in its possession.

### **Other Disputes**

32. If there are any factual or legal disputes that the Board will be required to determine at any time during the course of this application, the party wishing to raise the issue must, within 15 days of the date of this decision, provide to the other parties and the Board a statement of the legal or factual issues including all the relevant facts on which the party relies. All facts must be pleaded in accordance with Rule 5.1, and copies of the basic relevant documents must be included in the submissions.

### **Particulars and Disclosure**

33. In the event that any party is not satisfied with the particulars or the production of documents by any other party with respect to status or any other issues, then within five days of the other party's last submissions, that party is required to advise the other of all the additional factual particulars it seeks to have pleaded and all the documents that it seeks to have produced. A copy of this request is to be filed with the Board. Within five days of receipt of such demand the party of whom the demand is made must provide the particulars and documents, or set out the reasons in writing for its refusal.

### **Case Management Hearing**

34. The date and time of the Case Management Hearing are set out in the Notice of Cancelled Hearing Date and Rescheduled Hearing Date dated April 28, 2015 issued by the Registrar.

35. The purpose of the Case Management Hearing is set out in Information Bulletin No. 9. It is not merely a pre-hearing conference. The parties must be prepared to make submissions addressing all issues they have identified in their written materials. The Board at the Case Management Hearing will deal with both procedural and as many substantive issues, including status disputes, as it is able when in the opinion of the Board the parties have had an adequate opportunity to address those issues in their written submissions, and no further evidence is necessary.

36. The Board directs the responding party to post copies of this decision immediately in a location or locations where they are most likely to come to the attention of individuals in the bargaining unit. These copies must remain posted for a period of 45 business days.

"Harry Freedman"  
for the Board



## ONTARIO LABOUR RELATIONS BOARD

OLRB Case No.: **0192-15-R**

International Union of Operating Engineers, Local 793, Applicant v. **Pickard Construction**, Responding Party v. Labourers' International Union of North America, Ontario Provincial District Council; Labourers' International Union of North America, Local 625; Labourers' International Union of North America, Local 1089, Intervenors

**BEFORE:** Harry Freedman, Vice-Chair

**DECISION OF THE BOARD:** May 8, 2015

1. In its decision dated April 30, 2015 in this construction industry certification application being dealt with under section 128.1 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") the Board, among other things, determined the appropriate bargaining unit, reviewed the membership evidence filed by the applicant and determined that 7 of the 109 pieces of membership evidence filed by the applicant corresponded with 7 of the 12 names on the list of employees filed by the responding party.
2. The applicant by letter dated May 7, 2015 advised that it has no challenges to the list of bargaining unit employees and did not seek to add anyone to that list.
3. The applicant also indicated that it believed that the membership evidence it had filed corresponded with 8 of the 12 names on the list of employees, not 7 as the Board had found. As a result of the applicant's assertion, the Board reviewed both the membership evidence and the list of employees once again. The Board is now satisfied that the applicant is correct. It appears there was a minor difference in the spelling of the last name of one individual between the spelling of that person's name on the responding party's list and the spelling of that person's name on the one piece of membership evidence filed.

4. The Board had stated at paragraph 16 of its April 30<sup>th</sup> decision that “two of the seven pieces of membership evidence that correspond with the names on the list of employees filed by the responding party were among the six pieces of new membership evidence the applicant had filed with its application”. In fact, three of the eight pieces of membership evidence that correspond with the names on the list of employees filed by the responding party were among the six pieces of new membership evidence the applicant had filed with its application.

The Board at paragraphs 19 through 24 of its April 30<sup>th</sup> decision disclosed that five documents the Board identified as “labourwatch forms” had been filed on April 25 and April 29, 2015. The Board had also disclosed that it appeared that the applicant had filed membership evidence on behalf of those five individuals and that three of the five individuals who appear to have filled in those labourwatch forms are on the list of employees filed by the responding party.

5. Several more labourwatch forms were filed with the Board on May 6, 2015. One of those May 6<sup>th</sup> labourwatch forms was dated April 27, 2015 and the name on that labourwatch form filed on May 6<sup>th</sup> corresponds with a name on the list of employees for whom the applicant had filed membership evidence.

6. As the Board noted in its April 30<sup>th</sup> decision, how the Board applies the membership evidence filed and the effect, if any, of the labourwatch forms filled in by that fourth individual for whom the applicant had filed membership evidence who appears on the list of employees will be determined, if necessary, at a later date.

7. The applicant in its May 7<sup>th</sup> letter also asserts that the intervenor does not hold bargaining rights for the employees the applicant seeks to represent. It maintains that the intervenor obtained bargaining rights through certification for the construction labourers employed by the responding party. It also asserts the collective agreement by which the responding party became bound by virtue of the Utility Contractors accreditation cannot expand the intervenor’s bargaining rights beyond construction labourers. To the extent that the responding party extended bargaining rights to the intervenor through voluntary recognition, the applicant asks that the Board treat this certification application as an application under section 66 of the Act for a declaration terminating the bargaining rights the intervenor secured through voluntary recognition.

8. The issues raised by the applicant in its May 7<sup>th</sup> letter may be addressed, together with all other issues, in accordance with the Board's directions set out in its April 30<sup>th</sup> decision and may be dealt with at the Case Management Hearing.

9. The Board directs the responding party to post copies of this decision immediately in a location or locations where they are most likely to come to the attention of individuals in the bargaining unit. These copies must remain posted for a period of 45 business days.

"Harry Freedman"  
for the Board