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**HEALTH CARE EMPLOYEES UNION OF ALBERTA, Applicant and THE GENERAL HOSPITAL (GREY NUNS) OF EDMONTON, Respondent and ALBERTA ASSOCIATION OF REGISTERED NURSING ASSISTANTS, Intervenor. Board Files: GE-00090, GE-00099. May 26, 1989.**

*K. Aldridge, Vice-Chairman, K. Kreklewetz and L. Schell, Members*

For H.C.E.U.A.: D. Howes

For the General Hospital: R. Neuman Q.C.

For AARNA: W. Johnson

**Certification - s. 32(2) - Applicant attempting to displace incumbent certified Union -Build-up principle not applicable.**

**Unfair Labour Practices - s. 149(d) - Widespread and repeated distribution of campaign literature on Employer premises - Whether violation occurring.**

**Remedies - s. 16(1)(d)(i) - Board discretion - Whether appropriate in circumstances to decline to certify Applicant.**

*The Applicant sought certification for a unit of hospital employees, thereby replacing the Intervenor union as bargaining agent. The Intervenor advanced several preliminary objections to the certification application. It argued that the application was premature since there was a significant build-up of the unit anticipated in the next few months. It further contended that an additional 19 persons should be added to the unit. In addition, the Intervenor filed several unfair labour practice complaints, principally concerning distribution of the Applicant's campaign literature on the Employer's premises. The Applicant, in turn, alleged that the Intervenor had committed several unfair labour practices.*

*The Intervenor's preliminary objections were dismissed. The build-up principle does not apply where a union is already certified, since the employees have already chosen a bargaining agent. In any event, the current employee complaint was a representative part of the ultimate total of the workforce. The 19 persons were not added to the unit since they had only accepted employment and had not actually commenced work.*

*However, the Applicant had violated s. 149(d) of the Code. The impugned literature was a clear attempt to criticize the Intervenor and persuade employees to join the Applicant. The material had been given widespread and repeated distribution at the workplace, where it was very likely to be read during working hours. Consent from the Employer had not been obtained. The Board chose to exercise its discretion under s. 16(1)(d)(i) and dismiss the certification application. A principal feature of the organizing campaign involved the intentional and broad distribution of this literature in hospital working areas. Further, in the context of an organizing campaign involving a raid on another union, ignoring such a widespread contravention could give an unfair advantage to one of the parties.*

*All other complaints filed by the parties were dismissed.*

### **REASONS FOR DECISION**

**A.K. Aldridge, Vice-Chairman:** On March 14, 1989, the Health Care Employees Union of Alberta (“H.C.E.”) applied to become the certified bargaining agent of certain employees of the General Hospital (Grey Nuns) of Edmonton (the “Employer”). There are two hospital locations in this case - the Edmonton General and the Grey Nuns. The Alberta Association of Registered Nursing Assistants (“AARNA”) is the incumbent bargaining agent of the employees. H.C.E. wanted to replace AARNA as bargaining agent for a bargaining unit composed of:

All employees when employed in auxiliary nursing care.

Both unions filed unfair labour practice complaints against each other. These reasons will deal with those complaints as well as the certification application. They were promised to the parties on April 10, 1989 when the board orally dismissed H.C.E.’s certification application. The Board also issued separate written reasons today for dismissing a preliminary objection by A.A.R.N.A. regarding H.C.E.’s application for certification.

With respect to the certification application, the Board found that H.C.E. was a trade union within the meaning of the Code. Its application was timely and the proposed unit is a standard bargaining unit in the hospital sector. H.C.E. also apparently had the 40% employee support needed to obtain a representation vote of employees under section 31 of the Code.

AARNA submitted several preliminary arguments on the certification application which we will now address. The first concerned a projected build-up of this bargaining unit from 261 to 350 persons over a three to four-month period. AARNA argued that these prospective employers should also have a voice in choosing a bargaining agent. The inference was that H.C.E.’s certification application was premature. However, we reject the buildup argument where a union is certified, since the employees already have

chosen a bargaining agent.

It is our view, in the alternative, that the 261-person group is a major part of the ultimate total. The size of the unit at the time of application is thus representative of the whole. Secondly, the length of the build-up period could result in a collective agreement renewal which would bar a competing union's certification application. That result would inappropriately deny the choice of a bargaining agent to the employees for that agreement renewal term.

AARNA contended that some 19 persons should be added to the unit. They were individuals who had been offered and accepted employment in the unit but who had not started that work. Mr. Johnson claimed that they were not hired as casuals and had employee status at the certification application date. We disagree on the basis that these persons were not entitled to or in receipt of wages under section 1(l) of the Code. They had not yet worked for the Employer and thus could not have been employees.

AARNA also argued that H.C.E. should be required to meet the 40% employee support requirement at both hospital locations. We reject that argument. The bargaining unit in this case encompasses the two locations in one bargaining unit. In our view, the matter of support by location is, therefore, irrelevant.

Superficially, at least, H.C.E.'s certification application appeared to be in good order. However, A.A.R.N.A. alleged on March 20, 1989, that H.C.E. violated sections 149(d) and (f) in its organizing campaign. Those provisions read as follows:

*149 No trade union and no person acting on behalf of a trade union shall*

*(d) except with the consent of the employer of an employee, attempt, at an employee's place of employment during the working hours of the employee, to persuade the employee to become, to refrain from becoming or to cease to be a member of a trade union;*

*(f) use coercion, intimidation, threats, promises or undue influence of any kind with respect to any employee with a view to encouraging or discouraging membership or activity in or for a trade union;*

AARNA's March 20, 1989 complaint to the Board referred to H.C.E. or its supporters continuously spreading organizing literature on the Employer's premises. AARNA claimed that the repeated distribution of the literature shows it was intended to be received during working hours. Mr. Johnson, for AARNA, argued that the literature was aimed at persuading employees to join H.C.E. during working hours contrary to section 149(d).

Prior to the Board's March 14th receipt of the certification application, H.C.E. distributed two items of literature to the employees. The first was an announcement of an H.C.E. information meeting on February 22, 1989 to tell Registered Nursing Assistants about H.C.E. The notice said that the meeting would provide R.N.A.'s with "an opportunity for choice regarding which union would represent them". We did not view the content of this notice as an attempt to persuade employees to join H.C.E.

The second piece of literature was H.C.E.'s March 6, 1989 circular to employees which was given repeated widespread distribution on the Employer's premises. The March 6 circular commented on a number of reported AARNA statements about H.C.E. It made many specific criticisms of AARNA and solicited employee support of H.C.E. versus AARNA. The overleaf side of the circular is reproduced below:

5. AARNA has lied to you many times. Section 38(3) of the Labour Relations Code clearly states that:

Your existing Collective Agreement will automatically flow to the HEALTH CARE EMPLOYEES UNION OF ALBERTA upon certification. (Your Benefit Plans as well as your classification and salaries will be maintained by the HCEUA.)

We will then submit notice to bargain to improve your existing Collective Agreement.

AARNA HAS SOLD YOU DOWN THE RIVER

As all of you are aware, I was very much concerned that AARNA would settle a tentative agreement that would not address your concerns but would only meet AARNA's needs of "locking up" the employees for 2 more years so you couldn't choose another Union after March 31, 1989.

WHAT ABOUT JOB PROTECTION?

AARNA did nothing.

WHAT ABOUT IMPROVED BENEFITS?

AARNA did nothing.

WHAT ABOUT STRENGTHENING CONTRACT LANGUAGE?

AARNA did nothing.

WHAT ABOUT MONEY?

AARNA obtained a pathetic 1% for Nursing Attendants in 1990 for employees with less

than 4 full years.

AARNA obtained a pathetic 2% for RNA's with less than 4 full years and severely impacts on Part-Time and Casuals.

Look around you. RN salaries are going up and up! Your salary as a RNA is dropping heavily in relation to RN salaries, in fact, Dietary and Custodial staff salaries are passing you by!

Because we can bargain again on certification, we are your only hope for job protection and increased benefits.

“AARNA HAS SOLD THE FARM”

We have many RNA's who have signed up with the HEALTH CARE EMPLOYEES UNION. Let's get moving and make AARNA a thing of the past - a bad dream!

JOIN THE HEALTH CARE EMPLOYEES UNION OF ALBERTA TODAY!

A plain reading of that excerpt leads us to conclude that H.C.E. was:

1. Severely criticising AARNA's representation of employees;
2. Presenting itself as the obvious alternative to AARNA;
3. Asking the employees to join it.

We found that H.C.E.'s March 6 circular was a clear attempt to persuade employees to join H.C.E. H.C.E.'s own witnesses testified that the circular was repeatedly distributed on the Employer's premises. Mr. Johnson contended that, by repeated distribution of H.C.E.'s literature in working areas, it was likely read by employees during working hours. We agree with his contention. H.C.E. made the circular widely available on the Employer's premises with the probability that it would be read during working hours.

In particular, it was distributed in the conference room of each wing at one of the hospitals. The conference room, where shift handovers and some charting work is done, is not principally a coffee or lunch room. One employee organizer testified about checking and replenishing the supply of circulars each morning as necessary. Supplies of the circular were also given to unit clerks with a request to provide them to R.N.A.'s at those locations. Other employees contacted employees on the job to seek their support of H.C.E.

Mr. Hodgins, the President of H.C.E., said he wasn't surprised if literature from both unions would be around the premises. He said that he wanted the employees to see it. H.C.E.'s office manager, Jo Anne

Michaud, said she was heavily involved in administering the organizing campaign at issue, including campaign literature.

Ms. Michaud said she understood the statutory prohibition against enrolling applicants for union membership during working hours. She also stated her understanding that attempting to persuade employees to join a union would be prohibited during working hours. She testified that she instructed H.C.E.'s employee organizers to place campaign literature on coffee tables on the premises. She said that its purpose was to set out various facts and to persuade employees to join H.C.E. In her words, "if the employees got H.C.E.'s organizing literature during working hours, I couldn't control it".

### **RELATED JURISPRUDENCE**

One of the limitations placed upon an organizing campaign under the Code is the prohibition against soliciting employee support during working hours. The limitation arises from the employer's right to control his property and to maintain an efficient enterprise. Employees, on the other hand, have the statutory right to engage in lawful union activities which includes the right to organize a union. The balancing and accommodation of these competing interests are canvassed in *Canadian Labour Law* by Adams at pp 519-29.

All but two Canadian jurisdictions have a statutory prohibition against persuading an employee to join a Union at the workplace during his working hours. (ref. Adams at p. 520). Our section 149(d) prohibits attempting to persuade employees to become union members during their working hours. Those persuasive efforts are prohibited because they may or do interfere with work. In *International Association of Machinists and Aerospace Workers, Local Lodge 2583 and Volk Industries Ltd.* (August 26, 1983) A.L.R.B. 83-057, our Board observed that:

It matters not whether the persuasion is successful and an application for membership card is signed or whether the persuasion is unsuccessful and no signature is obtained. Once there has been an attempt to persuade, then if the other requirements of the provisions are met the offence has been committed. On the facts before us, our concern is with the attempt to persuade an employee to become a member of a trade union.

Union memberships emanating from that persuasion would be improperly obtained and would not count in a certification application.

There is little Canadian jurisprudence regarding the use of literature in union organizing campaigns. Certain Ontario cases have dealt with the so-called no-solicitation rules of employers which prohibit all canvassing on an employer's premises. The Ontario Board has rejected such rules as a blanket denial of employees' statutory rights to engage in lawful union activities.

Employee rights to participate in union organizing activities, however, may be limited by the employer's property rights. The common Canadian limitation, in the result, is that union organizing activities are not permitted on the employer's premises during the working hours of the employees. The Canada Labour Relations Board dealt with this limitation in *Bell Canada and the Communications Workers of Canada* (August 22, 1975), unreported, judicial review application dismissed, as follows:

The Board finds that the crucial issue in the instant case is whether Bell Canada can prevent its employees from soliciting membership in a trade union and distributing union literature on company premises by making such behaviour subject to disciplinary action, when these activities take place outside the working hours of the employees involved. The Board finds that Bell Canada may not do so without violating the provisions of the Canada Labour Code (Part V - Industrial Relations), and particularly the provisions of Section 184(1)(a) and 184(3)(b) of the Code. (Emphasis added.)

Section 110(1) of the Canada Labour Code guarantees to employees the right to join the trade union of their choice and "to participate in its lawful activities". The basic freedoms thus protected include the right to distribute or otherwise disseminate and receive information about a trade union and its activities and the right to sign a membership card, provided these activities do not take place during the working hours of the employees involved. (Emphasis added.)

The British Columbia Board referred to this matter of "working hours" in *Cominco Ltd. and Canadian Association of Industrial Mechanical and Allied Workers, Locals 23, 24, 25, 26 and 27 and United Steelworkers of America, Locals 480, 651, 8320, 9705 and 9672* (October 20, 1981) [1981] 3 Can LRBR 499. At p. 505, the British Columbia Board noted the employees' statutory rights to participate in lawful union activities. The Board declared that those rights included union organizing activity during non-working hours at the employer's premises.

In *Cominco*, the B.C. Board cited the United States *National Labour Relations Board v. Magnavox Company of Tennessee* (1974), 415 U.S. 322. In *Magnavox*, the union had challenged a long-standing company rule barring distribution of literature on company premises. In upholding the union's complaint, the U.S. Supreme Court stated:

The place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options available to the employees. So long as the distribution is by employees to employees and so long as the in-plant solicitation is on non-working time, banning of that solicitation might seriously dilute (statutory rights of employees to associate and organize for bargaining purposes). For Congress declared in

Section 1 of the Act that it was the policy of the United States to protect “the exercise by workers of full freedom of association, self organization and designation of representatives of their own choosing. (Emphasis added.)

While declining to rule explicitly on what constituted “working hours” in *Cominco*, the B.C. Board did state:

The question must be answered by reference to the particular employee. If employees are away from their work stations, having a lunch break or coffee break, we do not consider that time to be during “working hours,” notwithstanding that other employees may still be working.

### **BOARD DETERMINATIONS RE CERTIFICATION APPLICATION**

From Hodgins’ and Michaud’s evidence, it is clear that H.C.E. intended to distribute its organizing literature on the Employer’s premises. The Board concluded that H.C.E.’s March 6 circular was a clear attempt to persuade employees to join H.C.E. Through its widespread distribution at the workplace, we also concluded it was very likely to be read during working hours. H.C.E. acknowledged that it had not sought the Employer’s consent regarding any of its organizing activities. The Board determined that H.C.E. contravened section 149(d) through repeated, widespread distribution of its literature in working areas.

The Board considered what action it should take in these circumstances. One possibility might have been to set aside whatever employee support had been obtained contrary to section 149(d). However, there was no practical way of identifying such employees. Alternatively, the Board could refuse to certify the trade union as bargaining agent pursuant to section 16(1)(d)(i) of the Code. In this case, we chose to exercise our discretion under that provision to dismiss H.C.E.’s application for certification.

In our view, the March 6 circular could have had a significant impact upon the employees. H.C.E.’s membership evidence was, therefore, called into question by its repeated, widespread distribution of organizing literature on the employer’s premises. The prohibited activity also occurred during an organizing campaign in which one union was attempting to raid another. To ignore a contravention involving broad, repetitious conduct as we have found, could give an unfair advantage to one of the parties.

The Board recognizes that union literature is commonly distributed in union organizing campaigns and may sometimes be found on the employer’s premises. This case, however, was materially different in that regard. There was intentional, repeated distribution and replenishment in hospital working areas of literature which would likely be read during working hours. A principal feature of this organizing campaign was the repeated, widespread distribution of H.C.E.’s March 6 circular contrary to section 149(d). We found H.C.E.’s circular campaign here to be a broadly pervasive contravention of section 149(d) and, therefore, dismissed its certification application.

This decision of the Board was based upon the particular circumstances of this case. Any such future cases will be determined on a case-by-case basis from the particular facts at hand.

#### **OTHER AARNA COMPLAINTS AGAINST H.C.E.**

AARNA complained that H.C.E. approached employees and asked them to sign union application cards during working hours contrary to section 149(d). H.C.E. acknowledged that there were some such occurrences and there was supporting evidence to that effect. The Board found that such instances were small in number. In view of our dismissal of the Union's certification application, we do not find it necessary to make any detailed findings on this complaint.

AARNA also claimed that H.C.E. coerced some employees to sign membership applications contrary to section 149(f) of the Code. We were not satisfied from the evidence that such a complaint was established under section 149(f) and, therefore, dismiss that allegation.

AARNA further alleged under section 149(f) that H.C.E. informed employees that they would have to apply for membership in H.C.E. to be entitled to vote in a representation vote. The only evidence which could relate to that complaint was the testimony of Mrs. S. Garib. We were not satisfied that any such representation was made to her or so understood on her part. The Board accordingly dismisses AARNA's allegation that H.C.E. used intimidation or undue influence to induce employee membership in H.C.E.

#### **H.C.E.'S COMPLAINTS AGAINST AARNA AND CERTAIN INDIVIDUALS**

H.C.E. filed a number of complaints in a March 7 filing with the Board. H.C.E. alleged that AARNA representatives Roberta Metheral and Mike Canic violated section 149(f) of the Code. That provision prohibits intimidation, coercion, threats or undue influence to encourage or discourage union membership. No evidence was led in respect of the complaints against Metheral and Canic and, therefore, the complaints against them are dismissed. AARNA was also named as a respondent in those matters and the same complaints against it are also dismissed.

H.C.E. stated in particular 1 of its March 7 complaint that an AARNA bulletin to members entitled *The Cold, Hard Facts* suggested that wages would be cut if its members joined H.C.E. We reject the contention that such a suggestion was made in the bulletin nor do we find that it was necessarily implied or can necessarily be inferred.

H.C.E. complained that the AARNA Bulletin violated section 149(f) by suggesting the RNA registration of employees who joined H.C.E. would be imperilled. However, there was no direct evidence that employees were intimidated by that reference or that it was incorrect. That complaint is consequently dismissed.

We found there was no evidence of particulars numbered 2, 3 and 4 in H.C.E.'s March 7 complaints and they are accordingly dismissed.

Two other complaints dated March 31, 1989 were filed by H.C.E. against AARNA.

The first complaint claimed that two AARNA publications were intimidatory towards H.C.E. supporters in stating that they could not vote in ratifying AARNA's new collective agreement because of the pending certification application. The statement at issue was as follows:

AARNA has negotiated a memorandum of settlement with the Alberta Hospital Association which will become a collective agreement upon ratification by both sides. Full ratification is expected to occur on March 31, 1989 at 4:30 p.m. It is a condition of the memorandum of settlement that it does not apply to those locations where another union has applied for certification. As a result the ratification vote and the memorandum of settlement does not apply to the Edmonton General Hospital/Grey Nuns at this time.

There was no evidence of the statement being incorrect. In the absence of such evidence, we are not prepared to find the statement to be untruthful. If the statement is correct, then it might be unwelcome news but we would not find it to be coercive or intimidatory contrary to section 149(f).

The second complaint was against incoming AARNA chapter President, Sue Machlin, who crumpled some H.C.E. literature in front of two H.C.E. supporters. There was no evidence that they were intimidated. One of them retrieved the H.C.E. literature from the waste basket and smoothed it out. Sue Machlin took no further action. We find her action more symbolic than intimidatory and do not find that it violated section 149(f) of the Code.