



**ALRB cite:** Certain Employees of Orlovsky Painting (1972) Ltd. v. Painters, Wallcoverers, Drywall Finishers, Glaziers, Glassworkers, Architectural Aluminum Installers, Floorcoverers & Allied Workers, Local No. 177 et al. [1995] Alta. L.R.B.R. 251

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**CERTAIN EMPLOYEES OF ORLOVSKY PAINTING (1972) LTD., Applicant and PAINTERS, WALLCOVERERS, DRYWALL FINISHERS GLAZIERS, GLASS WORKERS, ARCHITECTURAL ALUMINUM INSTALLERS, FLOORCOVERERS & ALLIED WORKERS, LOCAL NO. 177, Respondent and ORLOVSKY PAINTING (1972) LTD., Intervenor. Board File: GE-01782. May 26, 1995.**

*J. Robert W. Blair, Chair, Mike Halpen and William Kondro, Members*

For the Applicant: Maria Salzano, Kerry Schoenleber

For the Respondent: Robert R. Blakely, Ray Barker

**Revocation - s. 52(1) - Revocation application supported by employees hired contrary to hiring hall clause of collective agreement - Violation of hiring hall clause being an “other relevant matter” for Board to consider in dealing with revocation application.**

**Revocation - s. 49(2) - Revocation application supported by long-term employees not hired pursuant to hiring hall clause - Union not pursuing rights under registration collective agreements for many years - Board declining to exercise discretion to dismiss application on basis of collective agreement violation.**

*Employees brought an application to revoke the Union’s bargaining rights. The Union had been certified for the Employer, but had failed to enforce successive registration collective agreements against the Employer for almost a decade. In the meantime, the Employer had hired employees directly, contrary to the hiring hall clause of the collective agreement. The revocation application was supported by several long-serving employees hired in this way. The Union, citing Ernest Painting & Decorating (1982) Ltd. [1995] Alta.L.R.B.R. 120, argued that these employees were not employees in the bargaining unit for purposes of the application and that it should therefore be dismissed for lack of support.*

*The Board ordered a representation vote. The Board accepted the policy reasoning behind Ernest Painting and the Ontario case of April Waterproofing Ltd., which it had adopted. Under the Labour Relations Code, however, it was more appropriate that support among employees hired contrary to a collective agreement be dealt with under the Board’s discretion to consider any “other relevant matter” under s. 42(1). In this case it was necessary to take account of the interests of employees who had enjoyed long continuing employment relationships with this employer. In the absence of any explanation why the Union had not enforced its*

*collective bargaining relationship with the Employer before now, the Board would not use its discretion to dismiss the revocation application.*

### **REASONS FOR DECISION**

**J. Robert W. Blair, Chair:** Certain employees of Orlovsky Painting (1972) Ltd. have applied for revocation of the Union's bargaining rights. The Union opposes that application, alleging that the employees were hired in contravention of its collective agreement with the Employer, and that therefore, they are not "employees" for purposes of this application. The Union also takes a related but slightly different position that in any event the fact that the employees were hired in alleged contravention of the collective agreement constitutes an "other relevant matter" which should incline us to dismiss the application.

This revocation application follows shortly on the heels of an earlier application that was dismissed because it was out of time. The employees were therefore required to seek consent from the Board to file this application within 90 days of the first. Such consent was granted by an earlier panel, and the Union seeks reconsideration of that decision.

A hearing was held both in respect of the reconsideration application (which was dismissed orally) and the revocation application. The panel indicated that it would provide written reasons for the dismissal of the reconsideration application. The panel further ordered that a vote proceed on the revocation application, but with the ballots sealed pending the Board's decision on the merits of the Union's objection.

This decision includes our written reasons for dismissing the reconsideration application, as well as our decision on the merits of the revocation application.

#### **I. The Reconsideration Application**

Section 55 provides as follows:

*55 Notwithstanding anything in this Act, if an application for*

- (a) certification as a bargaining agent,*
- (b) revocation of the certification of a bargaining agent,*
- (c) a declaration that a bargaining agent is no longer entitled to bargain collectively,*
- (d) registration of an employers' organization, or*

*(e) cancellation of the registration certificate of an employers' organization,*

*has been refused by the Board or withdrawn by the applicant, the applicant shall not, without the consent of the Board, make the same or substantially the same application until after the expiration of 90 days from the date of the withdrawal or refusal.*

It will be noted the section applies equally to several kinds of applications, including certification applications. It was pointed out by the Union that over the years the Board's practice in respect to s. 55 may not always have been consistent. Certainly, the Union is of the view s. 55 has been applied fairly restrictively and to its detriment in certification applications.

In the case at hand, the employees, notwithstanding they received some advice from a labour relations consultant, filed the application a couple of days early. That error was fatal to the first application. In respect of this, the Union takes the position that "ignorance of the law is no excuse." It is asserted, therefore, that there is no explanation for the early filing of the first application to which the Board should accord any weight. The Union asserts it follows that the s. 55 application should have been dismissed.

In our view, the discretion conferred on the Board in s. 55 must be exercised with a view to balancing the various interests that might be at play in a particular set of circumstances. A question which must be asked is whether or not prejudice results to any other party as a result of the proposed second application. The Board must consider whether the "mischief" to which section 55 is directed is present and if so, to what degree.

The Board recently considered section 55 in the case of: *Alberta Union of Provincial Employees v. The Franciscan Sisters Benevolent Society* [1995] Alta.L.R.B.R. 124. It stated as follows:

Section 55 clearly contemplates that various kinds of applications (certification, revocation, registration and cancellation of the registration certificate) will, from time to time, be appropriately brought within 90 days of a withdrawal or refusal of the same or similar application. It may only happen, however, subject to the Board's supervision.

In our view, the Board must look to the purpose of s. 55 in deciding how to exercise its supervisory role. The Board has said that the "mischief" which s. 55 attempts to cure "... would be the mischief of the same applicant continually making applications for certification." See: *Steelworkers, Local 722 v. Handleman Co. of Canada Ltd.* [1988] Alta.L.R.B.R. 431 at 434. In our view, the reason this can be characterized as a mischief is that applications such as certification and revocation applications involve potential disruption of the workplace and create an element of uncertainty. In every case, a balance must be struck between the rights and interests of all the parties. The Board must consider the degree to which the first application had disrupted the workplace and the degree of likely further

disruption of the same workforce by a second application. One significant factor would obviously be whether or not a representation vote had been held in connection with the first application. If it had, the applicant would obviously have to present more compelling reasons for seeking consent to reapply within the short time frame. Another factor, in our view, is whether a different or substantially different group of employees would be the target of the campaign of persuasion in support of the second application.

The above factors are not exhaustive. The Board must consider all of the facts surrounding a particular application and engage in a careful balancing of the various rights and interests.

In the case at hand, it is evident that the original certification application could have been made with more finesse. To some degree, the original panel must have seen the Union attempting to cure an error which was quite easily avoidable. But, in our view, a proper application of the principles would also take into account the fact that there had not yet been a representation vote and the fact that if the Union did propose to reapply for an “all employee” unit (that is, a unit which included the other program areas) it would have had to target a different group of employees for organization. In our view, the attendant disruption and uncertainty in all the circumstances would not have been sufficient to persuade us to withhold the granting of consent.

Although that decision was not before us when we dismissed the reconsideration application orally, it reflects our approach to s. 55. In the case at hand, the “mischief” which repeated applications entails was simply not present.

## **II. The Revocation Application**

The Board heard evidence from Kerry Schoenleber, who was responsible for filing the revocation application. He is a painter employed by the Employer and has been employed by Orlovsky for 16 or 17 years. He was not hired through the hiring hall. At least for a period of time, it appears he was a member of the Union, and dues were deducted on his behalf. That has not been so since the early 80’s.

It is clear from the evidence the Employer was certified to the Union, and would have been bound by the registration agreements over recent years. Beyond that, until recently, there was no evidence of a relationship between the Union and the Employer. The Board heard testimony from Ray Barker, the Union’s Business Manager. He commenced his current position with the Union in August, 1993. On becoming Business Manager, Mr. Barker reviewed all of the Local’s certifications and learned of the existence of Orlovsky. At the time, in terms of the Union’s records, Orlovsky did not appear to be active — no dues or other remittances were being received. Around Christmas of that year, it came to Mr. Barker’s attention that the Employer was active. He testified there is an outstanding grievance as a result, although we did not see a copy of it.

We have sketched out the facts in only their barest details. What they show is that Orlovsky operated for a good solid decade as though it had no relationship with the Union. Nothing was done by the Union until Mr. Barker came on the scene. In the meantime, employees such as Mr. Schoenleber had continuing employment relationships with the Employer. Now that the Union has reappeared on the scene, certain employees have decided that they do not wish it to represent them.

### III. The “April Waterproofing” Doctrine

The Board in *Certain Employees of Ernest Painting & Decorating v. Painters Local 177 et al.* [1995] Alta. L.R.B.R. 120 has recently invoked a principle developed by the Ontario Labour Relations Board in *April Waterproofing Ltd.* [1980] O.L.R.B. Rep. November 1577. In *April Waterproofing*, the employer had hired individuals directly in contravention of a collective agreement. A second union attempted to raid the incumbent, relying on support from that employee group. At page 1578 the Board stated:

There can be little doubt but that at the relevant time there existed a common-law employee-employer relationship between the respondent and the three individuals challenged by the intervener. That by itself, however, is not determinative of their status as bargaining unit employees. See *Local 273, International Longshoremen’s Association v. Maritime Employer’s Association*, [1979] 1 S.C.R. 120. In our view, the bargaining unit is comprised of employees employed under the terms of the applicable collective agreement. To be so employed, an employee must have been hired in accordance with the provisions of the agreement. The three individuals in dispute were not hired in accordance with the provisions of the collective agreement and accordingly, in our view, they do not come within the bargaining unit covered by the collective agreement. This being so, we are satisfied that in ascertaining the number of employees in the bargaining unit for the purposes of section 7(1) of the Act, the three individuals in dispute should not be taken into account.

In *Ernest Painting and Decorating (1982) Ltd., supra*, the facts were somewhat different than in the case at hand. In particular, the employees whose status the Union was objecting to in that case do not appear to have been long-term employees like Mr. Schoenleber. Indeed, it would appear that the employees in question were transferred to the employment of Ernest Painting and Decorating (1982) Ltd. only a matter of months before the apparent violation of the agreement came to the Union’s attention and was acted on. There was some argument, rejected by the Board, that the Union had somehow acquiesced in the arrangement. The Board, in adopting *April Waterproofing*, made the following comments:

Taking the above into account, we adopt the *April Waterproofing* principle as it has been refined by the subsequent case law. Individuals hired or transferred in the bargaining unit contrary to a collective agreement’s provisions, do not come within the bargaining unit covered by the collective agreement. We are not satisfied the Union waived its rights to the extent suggested by the employer. We find the Union is not estopped from claiming a

violation of the collective agreement. We are therefore satisfied that the employees in question are not employees within the unit as contemplated by section 51(2) of the *Code* and therefore find, for the purposes of the *Code*, that there are no employees in the bargaining unit. The application lacks the necessary support under the *Code* and we dismiss the application...

Further, under section 52(1) of the *Code* the Board may consider “any other relevant matter” in assessing whether the bargaining rights of the trade union should be revoked. We consider how the applicant employees were hired to be a relevant matter. Therefore, we are not satisfied we should revoke the bargaining rights of the trade union in any event.

We have no difficulty in agreeing with the panel in *Ernest Painting and Decorating (1982) Ltd.* that the principle arising out of *April Waterproofing* is a sound one, although as that panel notes, the Ontario Labour Relations Board has made certain exceptions to the principle. For example, if the Union has somehow waived its rights under the collective agreement, the principle in *April Waterproofing* will not apply. See: *Raymond Thibault et al. v. F.H.R. Construction Ltd.* [1991] O.L.R.B. Rep. August, 977.

We do not need to go as far as the Ontario Labour Relations Board did in *April Waterproofing* to achieve the same policy result. The Ontario Board had to conclude that the individuals hired in contravention were not “employees” for purposes of making a decertification application. As the panel in *Ernest Painting and Decorating (1982) Ltd.* noted, under s. 52(1) of the *Code*, we may consider “any other relevant matter.” In our view, the extent to which employees might have been employed contrary to the terms of a collective agreement should properly be considered as a potential “relevant matter.” Thus, although an unlawfully hired employee might still be an employee, the Board would have the discretion not to grant a revocation application made by such employees in appropriate circumstances. At the hearing, it was conceded by Counsel for the Union that the “other relevant matters” provision was probably the best place to found an *April Waterproofing* approach under our *Code*.

Is this an appropriate case to exercise our discretion against granting a revocation application because of the apparent collective agreement violations? We find it is not. The Union has been unable to explain to our satisfaction why it never took any steps at all to enforce its collective agreement with the Employer prior to Mr. Barker’s coming on the scene. In the meantime, employees like Mr. Schoenleber enjoyed long continuing relationships with the Employer absent any union representation. We have to balance the interests of those employees against the other interests at play. If Mr. Schoenleber had been hired off the street in contravention of the collective agreement shortly before the application for revocation was made, that would be one thing. Given his lengthy employment history, however, it would be entirely inappropriate to refuse the application as the Union requests. Nor has the Union persuaded us that there are any circumstances which would lead us to a different conclusion in respect of any of the other employees. In the circumstances, the balancing of the interests inclines us not to exercise our discretion to refuse the application.

For these reasons, we order that the sealed ballots be counted. The success of the application will be determined by the result of the vote.