



ALRB Cite: International Brotherhood of Electrical Workers Local
Union 424 v. TNL Industrial Contractors Ltd. and Ivan Lund
[1996] Alta.L.R.B.R. 194

**INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 424,
Applicant and TNL INDUSTRIAL CONTRACTORS LTD. and IVAN LUND, Respondents.
Board File: GE-02052. May 27, 1996.**

Gerald A. Lucas, Q.C., Vice-Chair, Robin Campbell and Roy Wotherspoon, Members

For the Applicant: William J. Johnson, Gordon Graham

For the Respondents: Thomas W. Wakeling

Reconsideration - s. 11(4) - Timeliness - Union objecting to late reconsideration application by company - Board taking company's timely filing of judicial review application and union's own reconsideration application into account - Reconsideration application filed three and one-half months after decision not untimely in circumstances.

Unfair labour practice - s. 146(1)(a) - Complainant union neither bargaining agent nor applicant for certification - No interference with union "formation" or "representation" - Board not erring by declining to speculate that long-range organizing campaign underway.

Refusal to employ - s. 147(a) - Board dismissing 30 of 36 complaints for lack of evidence - Board not erring by failing to evaluate as complaint on behalf of union - Union filing complaint only in representative capacity.

Refusal to employ - s. 147(a) - Prohibition on refusing to hire because of union membership applying whether or not different union already holds bargaining rights with employer.

Unfair labour practices - Onus of proof - Board not misdirecting onus of proof - Board entitled to draw "reasonable and necessary inferences" from union's evidence.

Natural justice - Board adding additional persons as complainants after hearing evidence - No breach of natural justice - Reasonable to exercise discretion to add persons to existing complaint rather than require filing of new complaint.

In previous proceedings (see [1995] Alta. L.R.B.R. 547) the Board found that TNL Industrial Contractors ("TNL") and its divisional manager ("Lund") had violated s. 147(a)(i) by refusing to hire six of the 36

complainants because they were members of the Union (“IBEW”). Both the Union and the respondents applied for judicial review. Concurrently the Union applied for reconsideration. TNL and Lund in responding to IBEW’s reconsideration application alleged that the hearing panel committed other errors that warranted overturning the decision. The Board treated this as another reconsideration application. The Union objected that it was untimely because three and one-half months had passed since the decision was issued.

The Board held that the Respondents’ application was timely. The respondents’ filing of a timely judicial review application and the Union’s own reconsideration application had to be taken into account. The timely judicial review application made it impossible for the Union to claim that it had been prejudiced by the delay in filing for reconsideration. Though each case is determined on its own facts, generally the Board would consider a reconsideration application to be made in a reasonable time if it is filed within 90 days of commencing judicial review proceedings. In the circumstances of this case, the reconsideration application was timely.

The Union’s application supplied no basis to reconsider the hearing panel’s decision. The Board did not err by finding that Lund’s hiring practices did not interfere with the Union’s “formation” or “representation.” The Union was neither the employees’ bargaining agent nor an applicant for certification. The Board was not required to speculate whether the long-range intention of the Union was to displace the existing bargaining agent. Nor did the Board commit any error in its application of s. 147(a). It was not required to analyze the Union’s s. 147 complaint separately and differently from its members’ complaint; the Union had filed its complaint in a representative capacity rather than on its own account and had sought no separate relief. The Board correctly did not find a violation of s. 147(a)(viii). The Board having found a breach of s. 147(i), the allegations of breach of s. 147(a)(viii) based on the same facts were duplicitous.

Neither did the Respondents’ application disclose any basis for reconsideration. It was not an error to find the Respondents in breach of s. 147(a) when a different trade union than the complainant was the certified bargaining agent. The prohibition against refusing to hire because of union membership equally protects members of the certified bargaining agent and members of other unions. Second, the Board did not misdirect the onus of proof in the proceeding. It had not imposed any onus of proof on the Respondents; it had only heard the evidence, drawn the inferences that were reasonable and necessary, and concluded that the Union’s burden of proof was satisfied. Finally, the Board did not err by adding three additional persons as complainants in the course of the proceedings. It had possessed the discretion to do so. It was not a wrong exercise of the discretion to bring the persons into the existing proceeding rather than to require them to file a new complaint.

REASONS FOR DECISION

I. The Application

By letter dated January 10, 1996 the Union seeks reconsideration of the Board's decision of December 13, 1995. In that earlier decision the Board (sometimes referred to as the "Howes Panel") was dealing with complaints from 36 members of the Union, and the Union itself, alleging that TNL Industrial Contractors Ltd. (referred to as the "TNL"), TNL Construction Ltd., Ivan Lund and certain other named persons, refused to hire the individual complainants because of their membership in the Union, contrary to sections 146(1)(a)(i) and (ii) and sections 147(a)(i) and (viii).

After 10 days of hearings and listening to the evidence of 16 witnesses, the Howes Panel dismissed the complaints of 30 of the individuals on the basis they failed to prove they applied for work during the relevant period. It also dismissed the complaints filed against TNL Construction Ltd. and two named persons on the basis there was no proof any of them had breached the provisions of the Code.

With respect to the remaining 6 individual complainants, the Howes Panel found that Ivan Lund (sometimes referred to as "Lund"), acting on behalf of TNL, had refused to hire them because of their membership in the Union, contrary to s. 147(a)(i). The Board directed the parties to attempt to resolve the matter of damages and reserved its jurisdiction to deal with that issue in the event they could not agree.

The Union's reconsideration application was amended prior to the hearing, by deleting certain portions of it, so what remained were the following grounds for reconsideration:

2. That the Labour Relations Board made an error of jurisdiction and/or an error of law that is patently unreasonable when it failed to consider whether applications for employment made prior to January 1, 1995 were or were not considered for employment subsequent to January 1, 1995 when the Respondents' were hiring employees in the time period of January 1, 1995 to May 30, 1995.
3. That the Labour Relations Board made an error of jurisdiction and/or an error of law on the face of the record that is patently unreasonable when it concluded that there was no violation of Sections 146((1)(a)(i) and (ii) merely because there was no application for certification being contemplated at the exact time of the filing of the application for employment by the employees.
4. That the Labour Relations Board made an error of jurisdiction and/or an error in law on the face of the record that is patently unreasonable when it concluded that the complaints were individual complaints and not union complaints.

5. That the Labour Relations Board made an error of jurisdiction and/or an error of law on the face of the record that is patently unreasonable when it failed to consider whether or not the alleged conduct was also a violation of Sub-section 147(a)(i) and (viii) from the prospective (sic) of the applicant...

The Union explained in its letter seeking reconsideration that it had also filed an application for judicial review with the court. It then stated that its grounds for the reconsideration application were the same as those set out in the originating notice filed in the judicial review proceedings.

When describing reasons for a reconsideration application, a practice of merely repeating the wording used in the originating notice outlining the grounds on which relief is claimed in judicial review proceedings, may not always be an acceptable compliance with the Board's requirement that detailed reasons for the requested reconsideration be stated. Concepts relevant to judicial proceedings in which Board errors are described as jurisdictional errors, or patently unreasonable errors, or errors appearing on the face of the record, have little meaning in the proceedings of the Board.

One of the bases on which the Board will exercise its power to reconsider is to correct substantial errors of fact or errors of law. In that instance the concern of the Board is with whether the alleged factual errors are indeed "substantial" or with whether errors of law exist, and not with whether the errors are jurisdictional or might be viewed by a court as being patently unreasonable. Therefore, when stating the reasons in an application to the Board for reconsideration, the use of terms that are relevant to the determination of whether a court has jurisdiction to review the Board's decision, raises the possibility of the required reasons being inadequately stated, or being obfuscated by a plethora of irrelevant comments.

In this case, even though the Board requested a response to the Union's reconsideration application by March 15th, 1966, it did not receive a response from the Respondents until receipt of a letter from their Counsel, dated March 29th. In that letter issue is taken with a number of the allegations made by the Union's Counsel and it then carries on to state:

We agree with the union that the Board made patently unreasonable errors. But we disagree with the union on what those errors are. In the originating notice of motion filed by TNL Industrial Contractors Ltd. and Ivan Lund on January 11, 1996 the applicants allege that "[t]here was no evidence which could serve as a foundation for a rational inference that TNL and Ivan Lund refused to hire six complainants because they were union members", that the "Board breached the rules of natural justice in deciding to add, over TNL's objection, Blaine MacDonald and Peter Siebel as applicants after six union witnesses had testified and Mr. MacDonald's direct examination was concluded" and that the "Board imposed on TNL and Ivan Lund a burden to prove that they complied with section 147(a)(i) of the Labour Relations Code."

Although we do not agree with the union's allegation that the Board decisions the union highlights were errors, we do not object to the Board reconsidering its challenged decision provided that the Board reconsiders all its errors.

In response to this letter, Counsel for the Union submitted a letter, dated April 2nd, in which the reconsideration application was amended by deleting certain of the grounds and which carries on to state the following:

2. Pursuant to Information Bulletin #6 the circumstances for the reconsideration are to correct alleged substantial errors of fact or errors of law;
3. To the extent that Mr. Wakeling asks that the panel reconsider the decision based on errors alleged by TNL, IBEW 424 objects most strenuously. TNL did not file an application for reconsideration and pursuant to its reply to the application of IBEW 424, it cannot now ask for reconsideration. In addition, any application by TNL for reconsideration is untimely;

At the commencement of the Board's hearing on April 4th, Counsel for the Respondents was advised the Board was viewing his letter of March 29th to be an application for reconsideration. Therefore, it would be up to him to raise the issues mentioned in his letter as the Board was not reconsidering the decision on its own motion. This did not preclude the Union from raising arguments relating to the timeliness of this application or to any alleged lack of particulars.

Both Counsel asked that the Board first consider whether or not to grant reconsideration and that any inquiry into the merits of the application be deferred until after that issue was decided. The Board would not normally favour bifurcated proceedings, at least in those cases, as here, where the parties have previously been advised the scheduled hearing will deal with both aspects of the application. However, since it appeared that, if reconsideration was granted, evidence might be required from a number of persons, none of whom was present, and that the evidence may require more than the one hearing day that was scheduled, it was decided to have Counsel present arguments restricted to the issue of whether the Board should reconsider.

II. The Submissions of the Union

The substance of the Union's arguments regarding the errors allegedly made by the Howes Panel can be summarized as follows:

- (a) The Board failed to consider relevant evidence. There was evidence before the Howes Panel that some of the complainants had applied for work with TNL prior to January 1, 1995 and that their names had been retained by TNL on its computer listing of potential employees. This evidence was ignored, apparently on the basis that the original complaints only mentioned a failure by TNL to hire the complainants during the

period from January to May, 1995. The Board should have taken account of the evidence of those who applied for employment in 1994, if their names still appeared in TNL's computer listing, and of the fact that TNL refused to hire employees off of its own computer listing, to conclude that TNL was refusing to employ these persons during 1995 because they were union members.

Generally, the courts are of the view that the failure by an administrative tribunal to consider relevant and material evidence is a jurisdictional error which will result in the quashing of the tribunal's decision: see *Calgary v. Public Health Advisory and Appeal Board* (1987) 78 A.R. 241 (Alta. C.A.) and *Johnson et al v. Fort McMurray (City)* (1992) 130 A.R. 143 (Alta. Q.B.)

(b) The Board failed to properly interpret sections 146(1)(a)(i) and (ii) from the perspective of the Union and should have taken account of the fact that the SALT and COMET programs were long range organizing initiatives unaffected by the existence of a certification held by, or a collective agreement involving, another trade union.

An administrative tribunal's failure to comment upon a relevant necessary issue in extended reasons for judgment, especially in a complicated case, may be evidence that the tribunal missed the issue and therefore its decision should be quashed: see *Lakeland College v. Lakeland College Faculty Association*, unreported (January 10, 1990, Alta. C.A.); *International Association of Firefighters, Local 2130 v. St. Albert (City)* (1990) 109 A.R. 161 (Alta. C.A.), and *Sherman v. Securities Commission (Alta.)* (1991) 120 A.R. 1 (Alta. C.A.).

The fact there was no bargaining relationship between the Union and TNL is irrelevant to a determination that there was an interference in the organizational efforts of the Union of the type proscribed by section 146(1)(a)(i): see *Bank Employees v. CIBC* [1979] 1 Can LRBR 391. Also, the fact that Lund was asking those complainants who applied for work about their participation in the SALT program was a violation of section 146(1)(a): see *Ont. Bus Industries Inc. v. CAW-Canada* (1989) 5 CLRBR (2d) 161. In any event, section 15(1) permits the Union to file a complaint about any breach of the Code.

(c) The Board failed to properly interpret section 147, by ignoring the fact that all complainants were participating in the SALT program, an activity protected by section 19(1)(a), and also by failing to consider section 147 from the perspective of the Union.

The proper interpretation of section 147 is found in *International Association of Machinists and Aerospace Workers Local Lodge 2583 v. Volk Industries Ltd.* (1983 - McBain) LRB 83-357 and in *IWA-Canada, Local 1-207 et al. v. Sundance Forest Ind. Ltd. et al.* [1992] Alta.L.R.B.R. 745.

(d) In view of the findings of fact by the Howes Panel that Lund varied from his standard hiring criteria, that he hired a relatively small number of Union members for the Blue Ridge project, and that he admitted

asking candidates if they were Union members or participants in the SALT program, from which the inference was drawn that he intended to eliminate Union members and Union influence from that job site, the dismissal of the complaint of the individuals and of the Union based on section 147(a)(viii) is perverse and should be reversed.

In addition, the actions of Lund constituted discriminatory treatment of the Union members who were applying for work and should justify a finding that section 147(a)(viii) was breached.

III. The Submissions of the Respondents

The submissions of the Respondents are summarized as follows:

(a) The determination by the Howes Panel that Lund, acting on behalf of TNL, refused to hire 6 of the complainants because of their Union membership, contrary to section 147(a)(i), is based upon significant misinterpretation of facts, including:

(i) it ignores the earlier finding that a collective agreement was in effect between TNL and the CISIWU that was not in an open period;

(ii) it ignores the earlier finding that Lund said the persons he hired were often “at the right place at the right time”;

(iii) it is based upon an erroneous description of the hiring practices followed by Lund and is contrary to the description of those hiring practices that is outlined earlier in the decision;

(iv) it is premised upon a determination that, in hiring employees, Lund was concerned about the Union’s potential organizing efforts when in fact all the evidence indicated the union was not attempting to organize TNL and that TNL was party to a collective agreement with another union;

(v) it is premised upon a determination that Lund departed from his stated hiring criteria when there is no evidence to support any such departure; and,

(vi) it is premised upon there being a dramatic change in Lund’s hiring practices which ignores the determination made earlier in the decision that Lund hired 28 Union employees for the Blue Ridge project.

(b) The Howes Panel improperly imposed a reverse onus upon TNL and Lund, requiring them to prove they had not breached section 147(a)(i), when the Code imposes no such onus.

(c) The Howes Panel breached the rules of natural justice and deprived TNL and Lund of a fair hearing by its decision to add two persons as additional complainants after six other witnesses had testified and after one of the two additional complainants had already been examined by the Union's Counsel.

IV. Decision

(a) *Preliminary objection to Respondents' reconsideration application*

As a preliminary objection to the reconsideration application filed by the Respondents, the Union raised the lack of timeliness of that application. The decision of the Howes Panel was dated December 13, 1995 and the Respondents reconsideration application was not filed until March 29, 1996, some 107 days after the decision. In the Union's view this is not a timely application within the meaning of Information Bulletin # 6. It urged the Board apply a 90 day time limit, similar to that mentioned in section 15(1.1), with the result the application ought not to be considered.

In the Board's view it possesses a discretion in deciding whether or not a reconsideration application will be accepted at any particular time. The reason for that is simply to permit the Board to take account of any peculiar circumstances which may affect a particular case. In a similar vein section 15(1.1) confers a discretion on the Board as to whether it should refuse to accept a complaint after the elapse of the 90 day period: see *Vijay Gulerya v. Amalgamated Transit Union* [1994] Alta.L.R.B.R. 495.

In this case both parties apparently filed with the court, on January 11, 1996, originating notices seeking judicial review of the decision of the Howes Panel. As well, on January 10th, the Union filed its reconsideration application with the Board. We can safely assume that these developments would have come to the attention of the opposite party within a few days of the occurrence of them.

As a result, it was known to the Union, within approximately 30 days of the date of the decision of the Howes Panel, that the Respondents were taking steps to have that decision quashed and what the reasons were for their dissatisfaction with that decision. Insofar as the Board is concerned, this knowledge makes it all but impossible for the Union to now argue that it would in any way be prejudiced by the delay on the part of the Respondents in the filing of their reconsideration application. Generally, the commencement of judicial review proceedings within the time limited by section 18(2) will make it most difficult for objections to the timeliness of a subsequent reconsideration application to succeed, provided the reconsideration application is filed within a reasonable time after the commencement of the court proceedings. As to what constitutes a "reasonable time", that will have to be determined on the facts of each case. However, it seems to us that if the reconsideration application is filed within 90 days of commencing the court proceedings that would constitute a reasonable time.

Of course, we are not here considering the situation that would exist if no timely judicial review proceedings are commenced. In that circumstance this Board has previously indicated that a reconsideration application

filed after the elapse of 3 months from the date of the decision, in the absence of some satisfactory explanation for the delay, is not timely: see *Edmonton Fire Fighters Union v. The City of Edmonton* [1995] Alta.L.R.B.R 212, at 235. Although not a reconsideration case, in the *Vijay Gulerya* decision, supra, the Board found that because of the presence of mitigating circumstances, a delay of 6 months in the filing of a complaint was not so extreme as to cause it to exercise its discretion, pursuant to section 15(1.1), to dismiss that complaint.

In the case before us there is also present another factor affecting our determination as to whether the Respondents reconsideration application is timely, that being the fact the Union, itself, filed a reconsideration application. What the Respondents say in their application is that the Union is correct in asserting substantial errors of fact or law on the part of the Board, but the errors alleged by the Union are the wrong ones and, instead, reconsideration should be granted because of the other errors the Respondents allege the Board to have committed. Although it is the hope of the Board that this situation is unique and will not often arise, nevertheless, when the Union has initiated the reconsideration process there is an apparent element of unfairness if we were to allow it to restrict the Respondents to a position of only being able to argue that the Board was right and to foreclose the Respondents from the possibility of saying the Board was wrong but for other reasons than those alleged by the Union.

Of course the answer to that, as was argued by the Union, is that if the Respondents wanted to ask for reconsideration they should have done so at an earlier time, without concern for any application the Union might elect to file. The Respondents reply by saying they were quite content to have these matters determined by the court, in the judicial review proceedings, and it was only because the Union was pressing its reconsideration application that they decided to file the letter which the Board elected to treat as a separate reconsideration application.

This peculiar situation is considered by us to be another factor affecting our decision as to whether to dismiss the Union's preliminary objection and allow the Respondents reconsideration application to proceed. Had there been no timely judicial review proceedings commenced by the Respondents it is unlikely the mere fact the Union filed a reconsideration application would induce us to accept a separate reconsideration application from the Respondents that was filed after the elapse of 3 months from the date of the decision. But the combination of the commencement of timely judicial review proceedings and the Union's prior reconsideration application have caused us, in this case, to decide that the Respondents reconsideration application can proceed and, therefore, the Union's preliminary objection is dismissed.

(b) *Failure to consider relevant evidence*

Turning now to the substance of the two applications, the Union first argues the Howes Panel failed to consider relevant evidence. The example given was the failure to consider employees who applied for work in 1994 as having been refused employment during the period of January 1 to May 30, 1995. It was the Union and the individual complainants who chose the period of January to May 1995 as being the relevant period

during which TNL allegedly did not hire electricians because of their membership in the Union. This period was selected as being the time when TNL was apparently hiring electricians for the Blue Ridge project. Evidence presented at the original hearing indicated the duration of the Blue Ridge project, at least as it related to the employment of electricians, was not one contiguous period but was comprised of three parts extending from October 15, 1994 to the end of August, 1995.

Apparently there was no attempt made at the hearing by the Union or the individual complainants to amend the complaints to take account of a greater period of time than described in the original complaints. Insofar as the Howes Panel was concerned the evidence relating to most of the complaints that were dismissed failed to establish the necessary causal link between applications for employment made in 1994 and the refusal by TNL to hire any of these persons between January and May, 1995. The only exception appears to be Robert Agate, who worked for TNL at Blue Ridge until January 6, 1995, at which time he laid off, but in respect of him the Howes Panel stated there was no evidence he applied for work with TNL after January 6th. In light of these circumstances, we see no error by the Howes Panel in its determination to dismiss the complaints of those persons in respect of whom there was no evidence of them applying for work with TNL during the period of time described in their complaints.

The Howes Panel has recounted the substance of much of the evidence presented to it and we have not been convinced that this is a case in which relevant and material evidence was ignored or not mentioned in the reasons. Merely omitting reference to some portions of the evidence is not a substantial error of the sort that would prompt a reconsideration. The Alberta Court of Appeal in *L.R.B. v. I.W.A. Local 1-207 and Zeidler* [1989] Alta.L.R.B.R. 33 said, at 36:

It is not obligatory for the Board to refer to all of the evidence adduced before it, nor is it an error to omit reference to portions of the evidence in its decision. Laskin, J., in *Woolaston v. Minister of Manpower and Immigration* [1973] S.C.R. 102 at page 108 stated:

I am unable to conclude that the Board ignored that evidence and thereby committed an error of law to be redressed in this Court. The fact that it was not mentioned in the Board's reasons is not fatal to its decision. It was in the record to be weighed as to its reliability and cogency along with the other evidence in the case, and it was open to the Board to discount it or to disbelieve it.

and Dickson, J., in *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association et al.* [1975] 1 S.C.R. 382 at page 391 stated:

A tribunal is not required to make an explicit written finding on each constituent element, however subordinate, leading to its final conclusion.

(c) *Misinterpretation of section 146(1)(a)*

Next, the Union takes issue with the Board's interpretation of sections 146(1)(a), which provides as follows:

146(1) No employer or employers' organization and no person acting on behalf of an employer or employers' organization shall

(a) participate in or interfere with

(i) the formation or administration of a trade union, or

(ii) the representation of employees by a trade union,

The Union suggests the Howes Panel ignored the possibility that the SALT and COMET programs are long range organizing initiatives. As well, there was no consideration given to the position of the Union in respect of the alleged breach of this provisions by TNL. The comments of the Board with respect to this section are set out at page 25 of the decision as follows:

This section (s. 146) deals with the activities of the trade union, either in its initial stages or in its ongoing activities on behalf of its members. We heard no evidence about an attempted organizing campaign by employees working for TNL. On the contrary, Mr. Graham and other witnesses confirmed CISIWU is the certified bargaining agent for the employees of TNL and has a collective agreement containing a term that had neither expired nor progressed to the point of being open under the *Code*. In addition, we heard no evidence of the Union attempting to represent any of the employees of TNL during this time as a bargaining agent. The only activity the Union was engaged in for its members was in encouraging them to apply for work at TNL.

Having no evidence before us which substantiates the allegation of breach, we dismiss the complaints filed under section 146. In our view, this case involves the rights of the individuals as opposed (sic) the rights of the trade union as a bargaining agent under the *Code*.

Earlier in its reasons, the Howes Panel described at length the evidence relating to the SALT and COMET programs from which it is clear the Panel knew these programs were intended to assist the Union in organizing the unorganized. While it is true the reasons make no specific mention of the programs being "long range" organizing initiatives, the exhibits that were before the Howes Panel relating to these programs, and to which we were referred, do not appear to clearly describe the programs in those terms. The thrust of those exhibits is that the programs are aimed at unorganized workers and they contain no mention of being put to use in a "raid".

Although it is not necessary, in establishing a breach of section 146(1)(a), to prove any anti-union animus on the part of the employer, the complainant must still offer evidence that there has been, in this case, an “interference” by the employer with either the “formation or administration” of the Union or with the “representation of employees” by the Union, or with both. The Howes Panel found no such proof had been offered.

Subject only to the provisions of sections 149(d) and (f), the *Code* does not prohibit the Union from attempting to attract as members those employees already represented by CISIWU and, in such circumstances, it matters not that there happens to be a collective agreement in effect between CISIWU and TNL. But under those circumstances it will likely be more difficult for the Union to establish employer “interference” with the “formation” or “administration” of the Union or with the Union’s “representation of employees”, to satisfy the requirements of section 146(1)(a). Since TNL could point to the CISIWU collective agreement and the obligation it imposes on all employees to be members of that union, the complainants would need to carefully marshal the evidence in support their complaints. Presumably such evidence would involve some mention of the COMET and SALT programs being used to “raid” another trade union but there was none of that.

It is not for the Board to speculate upon what the intentions of the Union might be at some future time. The argument now advanced by the Union in support of its reconsideration application, that the long range organizing effects of the COMET and SALT programs were ignored by the Howes Panel, seems to imply the Panel should have intuitively known some long range organizing efforts were underway that would come into fruition upon the open period of the CISIWU agreement being reached. It is not an error on the Board’s part if it declines to engage in this sort of speculation.

Another aspect of the Union’s argument, that section 146(1)(a) was misinterpreted, was that since Lund asked most of those who applied for work if they were members of the Union or participants in the SALT program that, in itself, was improper and a violation of this section.

Subsections (i) and (ii) of section 146(1)(a) are virtually identical with section 94(1)(a) [previously section 184(1)(a)] of the *Canada Labour Code*. In *NABET v. ATV New Brunswick Ltd.* [1979] 3 Can LRBR 342 the Canada Labour Relations Board made the following comments upon what was then s. 184(1)(a) at p. 346-7:

Section 184(1)(a) deals with the formation of a trade union, the administration of a trade union and the representation of employees by a trade union. In our view, this enumeration corresponds generally to the three basic functions embraced by this Code and are directed to the protection of these functions which are:

1. The formation of a union. This is the initial stage, and can be viewed as the first step towards collective bargaining. The trade union must have a recognized status.

2. The administration of the union. This is directed at the protection of the legal entity, and involves such matters as elections of officers, collecting of money, expenditure of this money, general meetings of the members, etc. in a word all internal matters of a trade union considered as a business. This is to assure that the employer will not control the union with which it will negotiate and thus assure that the negotiations will be conducted at arms length....

3. The representation of employees by a trade union. We are of opinion that “representation” as used here deals mainly with collective bargaining. The main objective of 184(1)(a) is to protect the bargaining rights of the bargaining agent to negotiate collectively. It is because of this subsection that the employer cannot negotiate working conditions directly with his employees, either collectively or individually, without the permission of the union. It is a necessary corollary to protect the rights of the union given to it by section 136(1) of the Code.”

The union contends that the combined effects of section 184(1)(a) plus 136(1) gives to it an exclusive right to represent the employees in the unit and is of such a nature that it precludes the employer from being able to meet with said employees without the express permission of the union.

There are two locations in time where the employer may be confronted with such a situation while the union is in the picture: 1) before the signing of a collective agreement; 2) after the signing of such collective agreement.

1. Before the signing of a collective agreement -

Until such time as a union is certified, there are no restrictions on the employer as regard to 184(1)(a), as the union has yet to possess this right to represent the employees collectively...

In a later decision of the Canada Labour Relations Board, *Bank Employees v. CIBC*, supra., the Board offered further comment upon the reference in section 184(1)(a) to the “formation” of a union, at page 409:

The activity of the employees involved in deciding that they want a bargaining agent to represent them is a part of the formation of a union. What is essential is the objective of the employees involved not the procedure followed.

That the formation of a union is to be considered as being primarily, for the purposes of the Code, related to the organization of employees in bargaining units is further borne out by the fact that the prohibition against interference with its formation is directed solely against the employer or a person acting on his behalf. Section 184(1)(a) is not a general prohibition against anyone's interference but is restricted to that of an employer whose actions would almost certainly be directed against his own employees in their efforts to form a union at his place of employment and to acquire bargaining rights under the Code. An employer acting in contravention of the section would have as his objective the impairing of the eligibility of a prospective bargaining agent to certification through such interference including that directed at the organization of support among the employees. This would constitute interference in the formation of a trade union.

Also, in that same case, the Canada Board had this to say about the interpretation of "representation by a trade union", at page 410:

While the reference in section 184(1)(a) to "representation by a trade union" has been stated by this Board to deal "mainly with collective bargaining", it is not viewed as the only or exclusive application of the term. There have been many occasions where unions represent, upon their authorizations, individual employees, in a variety of applications or complaints under the Code not involving collective bargaining situations. On these occasions the union is clearly the representative of the employee. Such representation may take place, as it often does in unfair dismissal cases, in the absence of any bargaining relationship between the union and the employer. The absence of such a relationship does not affect the representative nature of the union's role on behalf of the employee.

Our Board has also extended the protection against interference with "the representation of employees by a trade union" beyond the collective bargaining stage. For example, in *I.B.E.W. Local 424 v. Stuve Electric Ltd.* [1989] Alta.L.R.B.R. 69 the protection was extended to a trade union, whose status was that of an applicant for certification, when the employer, upon learning of the application being filed with the Board, threatened to fire all union supporters. Also, in *Union of Calgary Co-op Employees v. Calgary Co-op Assn.* [1993] Alta. L.R.B.R. 335, an employer who communicated directly to his employees during the term of the collective agreement, for the purpose of seeking revisions to that collective agreement, was held to have interfered with the union's representation of the employees.

Accordingly, we are not convinced that, on the facts of this case, the conduct of Lund in asking prospective employees about their membership in the Union or in the SALT program would constitute a breach of section 146(1)(a). At that point in time the Union had no status insofar as concerned its relationship with TNL and Lund's questions were directed at those who were merely seeking employment, not at employees. It may very well be that an employer who questions employees, as opposed to prospective employees, about such matters

does violate this section. Also, the questioning of prospective employees regarding such matters may be evidence of a violation of another section of the Code, as was found to be the case by the Howes Panel.

It was the view of the Howes Panel that there was no evidence of interference with the formation or administration of the Union, nor with the Union's representation of employees. It seems likely this was because CISIWU was the certified bargaining agent of the employees of TNL and was party to a collective agreement with that employer. Consequently, there was no need for the Howes Panel to explore the meaning or application of section 146(1)(a) to different, but hypothetical, factual circumstances. This would be especially so when such other factual circumstances, according to the comments made to us by Counsel for the Respondents, had not been raised in argument by the Union before that Panel. In view of this, we have not been convinced the Howes Panel failed to state or comment upon a relevant and necessary issue.

Finally, the Union argued that the Howes Panel failed to consider section 146(1)(a) from the perspective of the Union. It is difficult to see the rationale for this argument unless it is based upon the last sentence of the portion of the decision that is quoted above. That sentence stated:

In our view, this case involves the rights of the individuals as opposed to the rights of the trade union as a bargaining agent under the *Code*.

Given that this sentence follows the dismissal by the Howes Panel of the complaints filed under section 146, it does not appear to be a comment upon the meaning or interpretation of that section. Rather, it seems to be a comment upon the Panel's perception of the importance of the next portion of its decision, dealing with section 147. Again, we are told by Counsel for the Respondents that at the proceedings before the Howes Panel the thrust of the Union's case was stated to be the alleged breach of section 147(a)(i) which involved the question of whether the individual complainants were not hired because of their membership in the Union. This seems supported by the contents of the written briefs filed with the Board following the hearings held by the Howes Panel. In that context, it is, perhaps, understandable that the Panel viewed the rights of the individual complainants as being of more concern than the rights of the Union, especially in light of the fact that there was no evidence of the Union seeking to protect or assert rights conferred upon it by the *Code* in its capacity as a bargaining agent for the employees of TNL.

In the result, we are not convinced the Howes Panel failed to consider section 146(1)(a) from the Union's perspective and, similarly, have not been convinced that Panel misinterpreted that section.

(d) Misinterpretation of section 147(a)(i) and (viii) alleged by the Union

Section 147(a)(i) and (viii) state the following:

147 No employer or employers' organization and no person acting on behalf of an employer or employers' organization shall

(a) refuse to employ or to continue to employ any person or discriminate against any person in regard to employment or any term or condition of employment because the person

(i) is a member of a trade union or an applicant for membership in a trade union;...

(viii) has exercised any right under this Act;

(i) The first concern raised by the Union related to the alleged failure by the Howes Panel to consider this section from the perspective of the Union. In that regard the Union suggested that section 15 entitled it to file a complaint with regard to an alleged breach of any section of the *Code* and, therefore, it could file its own complaint, separate from those of the individual complainants, alleging a failure by the Respondents to comply with section 147(a)(i) or (viii).

The issue is more broadly stated by the Union than needs to be determined by us. In fact, the Union's complaints (it is named as a complainant in three separate complaints that are similar except for the names of additional complainants) relating to the alleged breach by the Respondents of section 147(a)(i) and (viii) were made in its capacity as representative of the individual complainants who were its members. In that representative capacity there is no doubt the Union could file these complaints and the question of whether it might also be able to complain on its own behalf is a matter that can be decided on some other occasion. In this instance, the Union was not seeking any remedy for its own benefit and the complaints filed with the Board stated the requested remedies in these terms:

Compensation in full for lost wages and benefits. All other such remedies that are relevant.

Regardless of the identity of the complainants, the Board would require evidence in support of the three statutory conditions that were identified by the Howes Panel in the quotation taken from the Board's decision in *IBEW Local 424 v. Flint Canada Inc.* [1995] Alta.L.R.B.R. 48. The evidence relating to whether there was a refusal to employ by TNL, or by Lund acting on its behalf, because a complainant was a member of the Union, was examined by the Howes Panel. That examination would be the same from the perspective of either the individual complainants or the Union as the representative of the complainants, and no error is committed by the Board in failing to indicate the perspective from which its examination was done.

(ii) The Union also raised a suggestion that the Howes Panel erred in its interpretation of section 147(a)(i) by failing to give meaning to the prohibition that the employer shall not "discriminate against any person in regard to employment" because that person is a member of a union. The argument it advanced was that since Lund was asking potential employees if they were members of the Union or participants in the SALT program

he was obviously discriminating against such persons in regard to their employment. There is no doubt the decision of the Howes Panel makes no mention of this argument but we have not been satisfied the argument was raised in the proceedings before that Panel. We suspect this was so because of the emphasis apparently being given to the argument that the employer refused to employ the complainants because of their membership in the Union. In any event, given the evidence that was before the Howes Panel, it is likely the suggestion the employer “discriminated” against the complainants was subsumed in the finding that the employer “refused to employ” them. As was stated by the Board in the *Volk Industries* decision, supra, in dealing with section 1373(a) of the Act which is the same as section 147(a) of the *Code*, at page 18:

...we are satisfied that Section 137(3)(a) should not be interpreted to expose an employer twice to the same complaint.

(iii) Finally, the Union argues the Howes Panel erred in dismissing the complaints alleging a breach of section 147(a)(viii). In that regard, the decision, at page 32, stated:

We see no evidence of the complainants exercising other rights under the *Code* and, therefore, dismiss the complaints regarding section 147(1)(a)(viii).

The decision inadvertently misstated the section reference by adding mention of a subsection (1) but elsewhere in the decision references to the section are correctly stated.

This argument encompassed two components: the section was not considered from the perspective of the Union; and, it failed to take account of the complainants rights under section 19(1). As to the first component, the argument does not convince us that any error occurred for the same reasons as already mentioned in considering this argument in connection with section 147(a)(i). That is, the Union’s complaints regarding this provision are made in a representative capacity, on behalf of the individual complainants, and are not advanced on its own behalf. Whether the Union can advance such a complaint on its own behalf can be decided at some other time. The finding by the Howes Panel of no evidence is sufficient to dispose of the Union’s complaints in its representative capacity, subject to what follows relating to section 19(1).

The second component of the argument, relating to the effect of section 19(1) upon the interpretation of section 147(a)(viii), does not appear to have been raised before the Howes Panel, at least no reference to it appears in the decision. Counsel for the Union did not state he had previously raised this matter before that Panel except to the extent of suggesting to us that the Board should know the sections of the *Code* and, therefore, the Board ought to take account of any section that might have some relevance, even if not argued. In the Board’s view, when a party before it is represented by experienced counsel it not appropriate for that party to later suggest the Board has some kind of obligation to assist in fashioning arguments that might be relevant to that party’s case.

The Union says the interrelationship of section 19(1)(a) and section 147(a)(viii) have been considered by the Board in *Sundance Forest Ind. Ltd.*, supra, where the following is stated at page 752:

The IWA claims Sundance violated sections 147(a)(viii) and 147(c) of the *Code*. Section 147(a)(viii) has four components.

- the action must be by an employer or person acting on behalf of an employer.
- the employer must refuse to employ or to continue to employ a person or discriminate against a person.
- the action must be in regard to employment or any term or condition of employment.
- the action must be because the person exercised a right under the *Code*.

and later, at page 753, the Board stated:

Sundance argues that the individual employees who were terminated were not exercising a right under the *Code*. They state that they were not members of a trade union nor had they applied for membership in a trade union. Sundance contends that the only section the employees can possibly fall under is section 19(1)(a). It is their position that mere discussions with a trade union representative does not constitute exercising a right under this section. Section 19(1)(a) reads:

19(1) An employee has the right

(a) to be a member of a trade union and to participate in its lawful activities,

The essence of the employer's argument is that the preliminary stages of organizational activities do not constitute lawful activities of a union within the meaning of the *Code*. They seek a very narrow reading of section 19(1)(a). In our opinion, this is not the interpretation which the Legislature intended. Rather section 19(1)(a) protects the interests and rights of employees throughout all of the organizational activities that a union undertakes, including the initial set up telephone calls. We also note that s. 149(d) of the *Code* makes working-hours organizing unlawful. This section reads:

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;

This section then impliedly makes other organizing activities outside this section, a “lawful” activity of a trade union. Section 19(1) requires only that the union activity be “lawful”, not that it be independently protected elsewhere in the *Code*.

We adopt the statements set out by the Board in *International Association of Machinists and Aerospace Workers Local Lodge 2583 v. Volk Industries Ltd.* (1983 - McBain), 83-057 starting at page 9.

A principle objective of the Labour Relations Act is to allow employees to freely select a bargaining agent with the objective of having that bargaining agent negotiate terms and conditions of employment with their employer. To compel the employer to bargain, it is first necessary for the bargaining agent to apply to the Board to become a certified bargaining agent. If the trade union obtains that status, not only can it compel the employer to bargain (Section 73(1)(a)(*now section 57(1)*), but it has exclusive authority to bargain on behalf of the unit for which it is certified. However, to obtain that desired status, it must be able to demonstrate majority support in the unit, by membership in good standing, or by application for membership and payment. A very substantial portion of the Labour Relations Act would be rendered meaningless if a person or a fellow employee could not ask and attempt to persuade persons to become members of a trade union. In so saying, of course, we have not lost sight of the fact that there are restrictions on the exercise of that right such as Sections 138(d) and (e)(*now sections 149(d) and (f)*). However, these provisions set restrictions on the exercise of the right and cannot be considered an absolute proscription of the exercise of that right.

We are satisfied that organizational activities that do not offend the general law, or the provisions of the Labour Relations Act are a lawful activity of a trade union and that an employee has a right to participate in that prime and important trade union activity as an organizer. That right is established by Section 32(1)(a) (*now section 19(1)(a)*) of the Labour Relations Act.

The facts in the *Sundance Forest Industries* case are not of assistance to the Union’s argument as in that case the complaint before the Board, insofar as it related to section 147, was based upon the termination of employees being contrary to section 147(a)(viii), and did not also involve section 147(a)(i). So while that case does examine the relationship between section 19(1)(a) and section 147(a)(viii), to the extent mentioned in the quotations, it contains no comments upon the interrelationship between the two subsections of section 147(a) that are now in issue.

In the *Volk Industries* case the Board found that an employee was dismissed from his employment because he was a union organizer and, in view of that fact finding, the Board dismissed the complaint based on an alleged breach of section 137(3)(a)(i) (*now section 147(a)(i)*) and only considered the alleged breach of section 137(3)(vi) (*now section 147(a)(viii)*). The above quotations from that decision, on which the Union relies, are made in that context.

But in *Volk Industries* the Board does specifically comment upon the interrelationship between section 137(3)(a)(i) and (vi). Those comments are made in the context of the termination of a second employee, who was dismissed from employment because, as found by the Board, he was an applicant for membership in the trade union, which was contrary to section 137(3)(a)(i). An argument was raised that the termination of this second employee should also be found to be in violation of section 137(3)(a)(vi), that is, a termination because the employee was exercising a right under the Act, being the right to be a member of the trade union. The Board did not accept that argument and at page 18 stated:

...[W]as it the legislatures' intent as shown by Section 137(3)(a) that an employer who terminates an employee because the employee is an applicant for membership has not only contravened Section 137(3)(a)(i) but is also in contravention of Section 137(3)(a)(vi)? We are unable to come to that conclusion.

Sub-clauses (i) to (vi) contain a variety of specific activities each of which may be the subject matter of a specific unfair labour practice complaint. Sub-clause (vi) finishes with the phrase "exercise any right under this Act". Certainly those words may be of great scope. Was it intended then by the use of this general wording that the specific offences set out in (i) which make it an offence for an employer to terminate a person because he is an applicant for membership is precisely duplicated by the general wording used in (vi). That does not appear to us to be a reasonable interpretation of Section 137(3)(a) for to do so results in an employer being twice found in violation of precisely the same offence. In our view (vi) should not be interpreted to duplicate other specific unfair labour practice provisions but rather is limited to rights under the Act that are not by legislation itself made the subject matter of specific unfair labour practice complaints.

Undoubtedly the Howes Panel would have been aware of the views expressed by the Board in the *Volk Industries* decision. Therefore, having concluded that the Respondents violated section 147(a)(i), that Panel would know the same facts would not also support an alleged violation of section 147(a)(viii), even if that violation was based upon section 19(1)(a). It was no error on the part of that Panel to omit reference to this issue and it was sufficient for the Panel to simply conclude that there was no evidence of other facts that would support the complaint based on section 147(a)(viii).

(e) Misinterpretation of section 147(a)(i) alleged by the Respondents

The Respondents also allege a misinterpretation by the Howes Panel of section 147(a)(i), in concluding the Respondents were in violation of that provision. This misinterpretation is allegedly based upon a number of factual errors. These factual errors are dealt with in the sequence they were argued by Counsel for the Respondents.

(i) The Howes Panel found that Lund's evidence convinced them that his concern was directed towards the Union's potential organizing efforts and the Panel also inferred that he hired fewer members of the Union for the purpose of eliminating Union members and Union influence from the Blue Ridge work site. But these findings are contrary to the earlier determinations that the CISIWU was the certified bargaining agent for the TNL employees and there was a subsisting collective agreement in effect between TNL and CISIWU which was not in the open period. In view of the status of CISIWU and the existence of a collective agreement, the Union could not carry out any organizing efforts nor have any meaningful influence at the site, all of which would have been known to Lund.

This argument fails to take account of the proper meaning of section 147(a)(i). The operation of that section is not suspended simply because there happens to be an incumbent union or a subsisting collective agreement. The activity by an employer that is prohibited by this section, which in this case is the refusal to employ a person because of that person's membership in the Union, applies equally to a circumstance when there is no incumbent union as it does when there is one. Since it was the view of the Howes Panel that there was evidence to establish a violation of the section, no error was committed in not giving any effect to the CISIWU certification or collective agreement.

In suggesting this is the proper interpretation of section 147(a)(i), we note the Canada Labour Relations Board, in *Staniewicz v. Tri-line Expressways Ltd. et al* (1987) 88 CLLC 16,011, arrived at a like conclusion in its interpretation of section 184(3)(a)(i) [now section 94(3)(a)(i)] of the Canada Labour Code. This provision is similar, although slightly broader in scope, to our section 147(a)(i). In that case a lease operator was terminated for his attempts to interest other employees in forming a lease operators association. The employees were covered by the terms of a collective agreement between the employer and the Teamsters Union. The termination was found to be a breach of the section which stated:

184(3) No employer and no person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person in regard to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union.

In that case the Canada Board stated, at pages 14,074 and 14,075:

A further question to be determined is whether such activities fall within the terms of section 184(3)(a)(i) of the Code. Or were they simply the kind of troublemaking that might well leave an employee open to dismissal - troublemaking pure and simple, not activity (troublesome though it might be for the employer), the punishment of which would be proscribed by the Code.

The fact of the matter is that the company saw Mr. Staniewicz as being engaged in trying to get support for a lease operators' association in order to do something about what the operators felt to be deficiencies in the terms and conditions under which they worked.

That he was not particularly successful and may have even stirred up some animosity among his fellows does not affect the clarity of the picture. He was, at least in the eyes of the company, if certainly not in their words, participating in the "promotion, formation or administration of a trade union", within the meaning of section 184(3)(a)(i) of the Code - and punishment of him for that kind of activity is prohibited.

One might ask, how could this board find that the company could and did interpret his activities in that fashion when there was already a union purporting to represent the employees of Tri-Line, including lease operators? The answer is that section 184(3)(a)(i) does not operate only in respect of union activity when there is no incumbent union. It also has force and effect where an employee engages in activity which may well have as its aim, or potential consequence, or may be directed towards, the displacement of all or part of the bargaining rights of one organization of employees by another. The Code prohibits an employer from punishing an employee who is active in either circumstance.

(ii) Although the Howes Panel accurately stated, at pages 10 and 11 of their reasons, the hiring practices followed by Mr. Lund, these practices are misdescribed at pages 28 and 29, and the Panel relies upon the misdescribed practices to make fact findings and to draw inferences that are adverse to the Respondents.

While it is correct that the Howes Panel does not follow the same sequence in describing the hiring practices at pages 28 and 29, as they did earlier in their decision, we have not been convinced the Panel was intending the commentary at pages 28 and 29 be a reflection of a particular sequence of steps that may have been followed by Mr. Lund. The Panel's use of the terms "first", "second", "third", and so on, merely reflects that

the Panel was giving separate consideration to a variety of practices or criteria adopted by Mr. Lund when hiring employees. These comments by the Panel would appear to be capable of being reorganized to follow the same sequence that was mentioned earlier in the decision, without that having any effect upon the outcome of the decision. The fact the sequence of the steps was not of any particular relevance to the Panel is, we believe, made clear at page 30 of the decision where reference is made to the “totality of the evidence about TNL’s hiring practices”. It was the totality of this evidence that influenced the Panel, and not necessarily its individual components or the sequence of those individual components.

Although the decision may have been easier to understand if the comments upon the hiring practices, at pages 28 and 29, had followed the same sequence as identified at pages 10 and 11, that does not result in the Howes Panel having committed any substantial error of fact.

(iii) Also, in the context of Mr. Lund’s hiring practices, the Respondents suggest the Howes Panel ignored Mr. Lund’s evidence that the persons he hired were often “at the right place at the right time”.

This evidence of Mr. Lund is referred to in the decision but it is of little significance in considering whether the Respondents violated section 147(a)(i). So long as there is evidence that the Respondents were refusing to hire some persons as employees because those persons were members of the Union, a violation of the section has occurred. If other persons were hired because they were at the right place at the right time then obviously those hirings are not going to be a violation of the *Code*. Even if Mr. Lund’s evidence on this point was of significance there appears to be difficulties with it, as described at page 12 of the reasons. There the Panel mentions that Mr. Lund testified that at the relevant times he was receiving too many calls and so began refusing to take calls. Under those circumstances it is difficult to appreciate how someone might thereafter be at the right place at the right time. Regardless, this is not a substantial error of fact.

(iv) The Respondents raise an issue based upon the following comments made by the Howes Panel at page 30 of the decision:

The totality of the evidence about TNL’s hiring practices persuades us to look to any explanations which TNL would provide to satisfy us about the reasons for the lack of conformance to its stated hiring practices. What occurred in the fall of 1994 or between then and the start up of the Blue Ridge project which could explain Mr. Lund’s change of approach in hiring primarily Union workers or to explain his departure from his stated hiring criteria?

Mr. Lund testified without hesitation that the previous projects completed by TNL in Alberta had been heavily staffed by Union members. We have no explanation from Mr. Lund for his change in practice which resulted in him hiring less than one third of the employees from Union candidates. The 1/3 ratio is generous, using Mr. Lund’s belief that 28 of the employees were connected to the Union. It is not unlikely a person who professes Mr.

Lund's knowledge of the Union membership would know equally as well those who were no longer active or current Union members with the Union. We consider it more likely the Union's numbers of nine members are more accurate. That reduces the percentage of Union employees to about 10%. In either case, it is a dramatic change in hiring practices with no apparent explanation for the change.

The concern expressed by the Respondents with these comments is that they state or imply that Mr. Lund had formerly had a practice of hiring Union workers. But there was no evidence to establish that this was so. Instead, it is argued that the Howes Panel confuses a "result" with a "practice".

The argument the Howes Panel was confusing "result" with "practice" is mere sophistry. We see no substance to it. It seems clear the Howes Panel was convinced, based upon Mr. Lund's evidence, that previous TNL projects had been heavily staffed by Union members. Since it was also the evidence that Mr. Lund did all the hiring for those previous projects, the fact they were heavily staffed by Union members would seem to have come about due to conscious choices made by him. Whether this heavy staffing by Union members is described as a "result" of Mr. Lund's choices or as a consequence of a "practice" he adopted is simply of no consequence. In any event, these comments do not reflect a substantial error of fact by the Howes Panel.

(v) The Respondents also argue that it was erroneous for the Howes Panel to have characterized the change in Mr. Lund's hiring practices as being "a dramatic change". If 1/2 the electricians at the Grande Prairie project had been Union members and 1/3 of them at the Blue Ridge project were Union members, then how, ask the Respondents, can that be characterized as a "dramatic change".

It is apparent the Howes Panel did not accept Mr. Lund's estimate that 1/3 of the electricians at the Blue Ridge project were Union members and, instead, preferred the Union's evidence that only 10% were Union members. Their decision also indicates that at other TNL projects 100% of the electricians had been Union members. At what point a change becomes a "dramatic" one is likely a matter of subjective analysis that may vary from one observer's point of view to that of another. But regardless of how the change might be characterized, the comment by the Howes Panel is not a substantial error of fact.

In the result, we are not satisfied there were any substantial errors of fact made by the Howes Panel resulting in a misinterpretation of section 147(a)(i).

(f) *Improper imposition of a reverse onus upon the Respondents*

The Respondents argue the Howes Panel improperly imposed an onus upon them to disprove their breach of section 147(a)(i) when the *Code* imposes no such onus.

Issues relating to the onus of proof in unfair labour practice complaints has come before the Board on a number of occasions. In *UFCW local 401 et al. v. Mariposa Stores* [1986] Alta.L.R.B.R. 661, the Board made the following comments, at pages 676 and 677:

Section 137(3)(a) (*now section 147(a)*) sets out certain prohibitions against employers or employers' organizations and persons acting on behalf of them. The prohibitions are against refusing to employ or continuing to employ any person or discriminating against any person in regard to employment or any term or condition of employment. However, these are not blanket prohibitions. The section uses the word "because" and sets out 8 sub clauses of reasons. Therefore, in order to be in violation of s. 137(3)(a), the reason for the refusal to employ etc. must have been "because" of one or more of the 8 sub-clauses (See Spiess Construction p.2).

In determining matters relating to alleged violations of s. 137(3)(a) it is arguable that it is still necessary for the complainant or complainants to satisfy the Board that there has been a failure to comply with the section. Ontario legislation, unlike Alberta legislation, has a specific provision regarding the burden of proof...

and also at page 676:

The fact that Ontario has legislation which specifically places the burden of proof on the employer in matters such as those that were before this Board, does not mean that without such legislation the employer can sit idly by, simply taking the position that there was no, or insufficient evidence led by the complainant or complainants to prove a violation has taken place. Even before the enactment of the burden of proof legislation in 1975, the Ontario Labour Relations Board said that the complainant is not bound to demonstrate by direct evidence each and every fact or conclusion of fact upon which the issue in dispute depends. In National Automatic Vending the Ontario Board stated:

The fact that the primary onus for establishing the merits of the complaint lies on the complainant, does not, of course, mean that the complainant is bound to demonstrate by direct evidence each and every fact or conclusion of fact upon which the issue in dispute depends. Reasonable and necessary inferences may and must be drawn from all the evidence adduced and that which is clearly inferable from the evidence is as much proved as if it had been established by direct evidence.

That Board went on to discuss the quantum of proof required by the Courts where the facts of an issue to be proved lie peculiarly within the knowledge or means of knowledge of the opposite party. They quoted from Taylor on Evidence, 12th ed., vol. 1, pp.262-263:

...where the facts lie within the knowledge of one of the parties, very slight evidence may be sufficient to discharge the burden of proof resting on the opposite party.

The absence of a statutory onus in Alberta was also noted in the Board's decision in *IWA-Canada, 1-207 v. Zeidlers* [1987] Alta.L.R.B.R. 31, page 50:

...we could note one important distinction between B.C. law and Alberta law. In B.C. the onus of proving an unfair labour practice complaint is on the employer while in Alberta there is no such reverse onus, and the burden of proof remains with the Union (assisted by whatever presumptions may be raised and inferences drawn) on the balance of probabilities.

In the decision of the Howes Panel it does not appear that Panel misdirected itself as to where the onus of proof lay. It gave consideration to all the direct evidence adduced from the numerous witnesses and based on that evidence drew reasonable and necessary inferences. We have not been convinced the Panel improperly imposed any onus of proof upon the Respondents and, therefore, fail to see that the Panel committed any substantial error of fact or error of law.

(g) Breach of natural justice by adding additional complainants

The Respondents take exception to the decision by the Howes Panel to add two persons as additional complainants. This occurred on the second day of the hearings, after six witnesses had testified and after the direct examination of one of the two additional persons had been concluded by Counsel for the Union. The Howes Panel deals with this issue at pages 7 to 9 of its reasons. It appears the Panel accepted the two additional complaints based upon an exercise of the Board's discretion under section 15(1.1). As well, it was the view of that Panel that it made labour relations sense to add these complainants to the proceedings already under way rather than having them file separate complaints that would result in new hearings.

The Howes Panel exercised a discretion it possessed under the *Code*. It is not the usual practice of this Board to have a reconsideration panel simply substitute its exercise of a discretion for that of the earlier panel, at least in cases, such as here, where the earlier panel set forth reasonable and proper grounds for the exercise of its discretion.

V. Conclusion

Our consideration of the submissions made by both Counsel have not resulted in us being convinced that the Howes Panel made substantial errors of fact or errors of law. Nor was it suggested there existed any other grounds that would justify a reconsideration of that Panel's earlier decision.

In the result, both reconsideration applications are dismissed.