



ALRB cite: Certain Employees of Zeidler Forest Industries Ltd. v. IWA-Canada
Local 1-207 and Zeidler Forest Industries Ltd.
[1993] Alta. L.R.B.R. 3

**CERTAIN EMPLOYEES OF ZEIDLER FOREST INDUSTRIES LTD., Applicants and IWA-CANADA, LOCAL 1-207 and ZEIDLER FOREST INDUSTRIES LTD., Respondents.
Board Files: RV-00203, GE-01137. January 27, 1993.**

Andrew C.L. Sims, Q.C., Chair, Judy Gulayets and Donna Neuman, Members

For the Applicant: John Gill (Counsel), Karen Trace (Co-Counsel)

For the Respondent: Robert A. Philp (Counsel), Mike Pisak

For the Respondent: Craig Neuman (Counsel)

Revocation - s. 51 (L.R.C.) - Lengthy strike commenced under Labour Relations Act - Board deciding eligibility for representation vote - Those covered by collective agreement should one be concluded being employees entitled to vote - Decision including new hires since strike began -Exception being group of new hires equal in number to remaining striking employees.

Voting Rules - s. 14(4)(c) (L.R.C.) - Voting Rule 16 - Lengthy strike commenced under Labour Relations Act - Board deciding eligibility for representation vote - Those covered by collective agreement should one be concluded being employees entitled to vote - Decision including new hires since strike began - Exception being group of new hires equal in number to employees remaining on strike.

In earlier proceedings, the Board concluded the strike remains governed by the Labour Relations Act - see: [1992] Alta.L.R.B.R. 369, [1992] Alta.L.R.B.R. 668. After almost five years of strike a group of employees applied under s. 49 of the Labour Relations Code to revoke the Union's bargaining rights. The parties disputed which employees were entitled, under s. 51, to vote in the representation vote. Of those employed when the strike began, some remained on the picket line and some had returned to work. The employment of others had since ended by their own choice or by employer decision. The Employer had also hired new employees since the strike began. Some took work of the striking employees, while others filled positions subsequently vacated through attrition. Others took new positions created by the Employer as part of an ongoing and legitimate expansion.

The Board decided that those employees that would be covered by a collective agreement should one be concluded, were entitled to vote. This is so whether or not Voting Rule 16 applies to a proceeding commenced under the former Act. Such employees are the ones who have a sufficient continuing interest in the fate of the bargaining unit. As the Employer has an ongoing duty to bargain in good faith, the striking employees could potentially return to work. An equal number of new hires must therefore be considered temporary. Temporary workers do not share a community of interest with the balance of the unit and are ineligible to vote. Other new hires would be covered by a collective agreement and can vote. The Board ordered a representation vote and set the procedure for determining which employees would be considered temporary workers.

REASONS FOR DECISION

Andrew C.L. Sims, Q.C., Chair: The I.W.A., Local 1-207 (“the Union”) struck Zeidler Forest Industries Ltd.’s Edmonton Plant on March 17, 1988. That was four years and ten months ago.

When the strike began, 154 employees fell within the bargaining unit. The Union struck the plant with only a narrow strike mandate of about 55%. Two things became clear almost immediately. First, the company intended to recruit new employees and continue operating. Second, a significant number of the employees crossed Union picket lines and resumed work.

Despite the picketing, and efforts to organize a boycott of Zeidler products, the employer has continued to operate the plant throughout. It has even expanded its operations, adding new equipment and an extra shift. As of November 23, 1992, the number of employees working in the plant stood at 194, up 40 from the time the strike began. Nothing suggests a company effort to inflate the workforce artificially, and none was alleged.

A group of employees sought the Board’s consent to bring an application for revocation under the following section:

50(1) No application for revocation of bargaining rights shall be made without the Board’s consent while a lawful strike or lawful lockout is in effect.

After hearing submissions, on November 23, 1992, the Board granted that consent. The applicants filed a revocation application supported by two petitions that same day. The first petition contained signatures of employees who worked for the company on March 17, 1988 and remain with the company still. The second contained signatures of employees hired since the strike began. The applicants filed their petitions in this way anticipating the very problem we face now. That is, — Which employees are entitled to apply for, and vote upon, a revocation application during a strike?

Rule 16 of the Board’s Voting Rules provides:

16(2) Unless the Board otherwise directs, where a lawful strike or lockout is in effect only those persons

(a) employed in the bargaining unit on a full-time or regular part-time basis at the commencement of the strike or lockout, and

(b) in the opinion of the presiding officer likely to return to work in the bargaining unit upon termination of the strike or lockout,

shall be deemed to be employees eligible to vote in a representation vote.

The Union argues that everybody except those working on March 17, 1988 are “replacement employees.” As such, they have no right to apply for, or to vote upon, revocation of the Union’s bargaining rights. They are not employees within the bargaining unit and have no continuing interest in the dispute. A straight application of Rule 16 supports this conclusion.

However, Rule 16 may not resolve the matter. First, it is a Rule passed on November 28, 1988 with the introduction of the Labour Relations Code. This dispute started under the Labour Relations Act. The Board has already ruled that the dispute remains governed as if the Act still applied (see below). Second, the Rules remain subordinate to the legislation, and the Applicants argue that some or all of what the Union calls “replacement employees” are “employees within the bargaining unit.” Thirdly, Rule 16 governs “unless the Board otherwise directs.” The Applicants advance reasons why the Board should make such a direction.

The Applicants, conceptually, divide the workforce into several groups, and advance different arguments for each. However, in the result, they say that all the employees now working in the plant, plus all the remaining strikers, fall within the unit and should be entitled to vote on revocation. We will describe these groups below.

I. Related Proceedings

We pause to note some related proceedings. First, at the hearing on December 14, 1992, the Board found that, based on either party’s argument, the applicants had the necessary 40% for a representation vote under section 51(2). They had at least 40% of the original employees, based on the first petition. They also had at least 40% of the total employees based on the first and second petitions together. To expedite the proceedings, the Board ordered a vote right away, but with two segregated ballot boxes. If the result was the same either way (for or against revocation), the Board would revoke the certification, or deny the application, without further proceedings. This, the Board felt, was desirable, given the length of this difficult dispute.

The Board directed that the matter be referred back to the panel for decision in the event of divergent results, with the results sealed. The result was inconclusive. Inadvertently, the results were placed on the Board's records without sealing. While unfortunate, this is of no consequence as all parties now waive any objection due to the disclosure.

Second, the Board ordered the December 18th vote subject to a "no-electioneering" ban. The applicants now complain about certain Union conduct during that vote. They say this conduct violated the electioneering ban. They also say other conduct offended section 149(f) of the Labour Relations Code. They ask us to rectify this by setting aside and reconducting the vote.

Third, an earlier decision of this Board dealt with the applicability of the Labour Relations Act as opposed to the Labour Relations Code to this collective bargaining dispute. The strike began under the Act.

The Code has a specific transition provision in section 205. The Board interpreted the effect of that provision in *IWA, Local 1-207 v. Zeidler Forest Industries Ltd.* [1992] Alta.L.R.B.R. 369. The Employer challenged that case by certiorari. The Court of Queen's Bench upheld the Board's ruling, but it is now under appeal to the Court of Appeal. The appeal is on a limited question. Did the Union, when it brought certain unfair labour practice complaints under the Code, waive any right to have the ongoing dispute governed by the Act?

The significance of this earlier case now lies in the position the parties take over section 88 of the Labour Relations Code. That section creates new return-to-work rights for striking employees. We describe below the arguments the parties present based on section 88.

II. The Makeup of the Present Workforce

We now return to people's eligibility to vote on the question of continued union representation. We begin with a more detailed review of the numbers involved.

1. There were 154 employees at the date of strike, all represented by the Union.
2. As of November 23, 1992, 60 of those persons were no longer employees. This is because they had died, been fired, quit or otherwise ended their bargaining unit employment. This left 94 "old timers," (as several witnesses referred to them).
3. Of the 94 old timers, by November 23, 1992, 54 had returned to work, while 40 remained on strike.
4. As of November 23, 1992 the company employed 140 people hired after the strike began. This 140, plus the 54 old timers who returned to work, make up the present complement of 194 people working in the plant.

5. The resulting groups are, therefore:

- 60 original employees whose employment ties are gone. Everybody agrees their employee status is severed and they have no right to vote.
- 40 original employees who remain on strike. Everybody agrees these people continue to have the right to vote.
- 54 original employees who have returned to work. Everybody agrees these people also have the right to vote. The Union says they are the only people working in the plant who are entitled to vote.
- 140 people, hired since the strike began, who are still working. The Union says they are all replacement employees, outside the bargaining unit, with no right to vote. The Applicants say they consist of:
 - 60 people hired since the strike began, to fill permanent positions left vacant by the 60 original employees who have left Zeidler's employment.
 - 40 people, legitimately hired since the strike began, to fill permanent positions newly created as a result of expansion.
 - 40 people, originally hired as temporary strike replacements, now doing the work, which, were there a settlement, would be resumed by the remaining 40 strikers.

The applicant argues that people hired to fill vacancies are permanent employees entitled to vote. Similarly, the 40 hired for expansion replace no one. They are also permanent employees entitled to vote. Lastly, they acknowledge the 40, actually occupying the 40 positions the strikers would have if they were working, present the most difficult issue. Since, in their view, the strike is lost, they argue that they have become permanent employees by the passage of time. They say they are now employees within the bargaining unit entitled to a vote.

The breakdown of the 140 new hires is conceptual. The employer simply hired people, without ear-marking them into such categories. However, the breakdown gives a useful framework for analysis. We begin by looking at the statutory provisions applicable in Alberta.

III. The Statutory Provisions

Section 49 provides, in part:

49(1) An application to revoke bargaining rights may be made by the trade union, the employees within the unit, or the employer or former employer to whom the bargaining rights relate.

(2) If an application for revocation of bargaining rights is made by the employees within the unit, the application shall be supported by evidence, in a form satisfactory to the Board, that at least 40% of the employees within the unit have indicated in writing their support for the revocation of the bargaining rights of the trade union.

The key phrase here is “the employees within the unit.” Section 51 speaks of the Board’s responsibilities following a revocation application:

51(1) Before granting an application for revocation the Board shall satisfy itself, after such investigation as it considers necessary, that

(a) the application is timely,

(b) in the case of an application by an employer or by the employees in the unit, the employees have voted, at a representation vote conducted by the Board, in favour of the revocation of bargaining rights of the trade union as their bargaining agent,

...

(2) Before conducting a representation vote on an application for revocation brought by employees the Board shall satisfy itself, on the basis of the evidence submitted in support of the application and the Board’s investigation in respect of that evidence, that at the time of the application for revocation 40% of the employees within the unit indicated in writing their support for the application for revocation.

Again, the section refers to the “employees within the unit.” Section 52(1) describes when the Board will grant revocation, and 52(2) sets out the consequences of that revocation.

52(1) When the Board is satisfied with respect to the matters referred to in section 51(1) and satisfied, after considering any other relevant matter, that the bargaining rights of the trade union should be revoked, the Board shall grant a declaration that the trade union’s bargaining rights are revoked, and revoke any certification.

(2) *When the bargaining rights of a trade union are revoked,*

(a) the employer is not required to bargain collectively with the trade union,

(b) any collective agreement in effect at the time of the revocation becomes void and of no effect with respect to that employer and his employees in the unit represented by that trade union, and

(c) the trade union shall not negotiate or enter into a collective agreement or apply for certification for the same or substantially the same unit with the employer to whom the bargaining rights relate for a period of 6 months from the date of the revocation of the bargaining rights.

We now consider the building blocks that go into these sections.

IV. Employee Status of Strikers

Section 87 deals specifically with the status of strikers during a lawful strike:

87 No person ceases to be an employee within the meaning of this Act by reason only of his ceasing to work as a result of a lawful lockout or a lawful strike.

There is no dispute that, in this case, the 40 remaining strikers are employees within the unit. Nor is there a dispute that 60 others have, for a variety of reasons, ended their employment status. However, several cases referred to in argument deal with the test of when a striker, notwithstanding s. 87, ceases to be an employee. We refer briefly to the authorities on point.

Rule 16 requires that strikers, to vote, must be “in the opinion of the presiding officer likely to return to work in the bargaining unit upon termination of the strike or lockout.” This rule functions to recognize the test set out in the earlier Board decision of:

International Union of Operating Engineers, Local Union No. 955 v. Manalta Coal Ltd. and the United Mineworkers of America (Feb 2, 1983, Alta.L.R.B.R. 83-004, McBain, Chairman)

At page 10, the Board dealt with the status of striking employees:

By virtue of Section 49(2) of the Alberta Labour Act, which provision is now contained in Section 1(2) of the Labour Relations Act - “No person ceases to be an employee within the meaning of this Act by reason only of his ceasing to work as a result of a lockout or strike or by reason only of his dismissal contrary to the Act.” This provision does not guarantee that a person who was an employee at the time of a permitted strike retains that status in perpetuity. He does, however, retain that status, and must be counted as an employee in the unit now applied for unless he does some act or there is some fact that is inconsistent with continuing this status. The act of resignation or the acceptance of other permanent employment are examples of acts that are inconsistent with a continuation of that person as an employee, as is the fact that the person has given up permanent residence at or near the struck plant or mine, and moved permanently to a residence from which it would be quite impossible to commute to work at the struck [sic] premises.

An earlier Alberta case suggests that, even though employees may have taken alternate employment, they still remain employees.

Employees’ Association of North Canadian Forest Industries v. North Canadian Forest Industries Ltd. et al. (1964) C.L.L.C. ¶16,008 (Alta. BIR).

In answer to the Employer’s assertion that people taking alternate employment ceased to be employees, the Board said, at p. 655:

If this assumption is taken as being a correct interpretation of section 70, sub-section (2), this would leave 19 persons still actively engaged in strike action and deemed to be employees of the Company. However, the Board suggests that this assumption that termination by the employee cannot be considered conclusive evidence to remove such persons as employees of the Company.

In many cases where employees are on a legal strike, employees will seek employment elsewhere and it cannot be determined whether or not the employment would be on a temporary basis or a permanent basis, until the dispute is settled. The law does not prohibit strikers being gainfully employed elsewhere while still maintaining their interest and participation in a legal strike against their employer involved in the dispute.

We agree that strikers may often take temporary jobs during a strike. Doing so does not necessarily mean they have lost interest in the dispute and will not return to their original jobs at the end of the strike. Whether a person’s employment relationship has been severed, or whether they remain an employee reasonably likely to return to work, is a question of fact in each case. To the extent *North Canadian Forest Industries* goes beyond that point, we see it based on the specific wording in s. 70(2)(a) and (b) of the statute then in force, which read:

70(2) A person shall be deemed to be an employee within the meaning of and for the purposes of this Part

(a) during the period following the date of the appointment of a conciliation commissioner and until the dispute is finally settled after a strike or lockout or otherwise, or

(b) when a strike or lock-out has taken place after compliance with the provisions of sections 82 to 94, during the procedure for settlement of the dispute and until it is finally settled,

if that person was an employee immediately before the date referred to in clause (a) or the commencement of the strike or lock-out referred to in clause (b), as the case may be.

Rule 16 renders eligible to vote people “likely to return to work in the bargaining unit upon termination of the strike or lockout.” Those taking temporary employment elsewhere may well meet this test. Those who have committed themselves to permanent employment elsewhere will be unlikely to. The Rule leaves the decision on the representation vote to those employees who “maintain sufficient continuing interest in the fate of the bargaining unit,” to adopt the test used in British Columbia. See: *Emergency Health Services Commission v. C.U.P.E., Local 873* (1989) 6 C.L.R.B.R. (2d) 111.

In this case, the 40 remaining strikers meet this test, as shown by the officer’s investigation and the agreement of the parties over the voter’s list.

V. Employees Within the Bargaining Unit

The trade union’s bargaining unit consists of:

All employees of the Plywood Division, Edmonton, except office personnel.

Bargaining units are living things. Once certified for such a group, the Union is the exclusive bargaining agent for those persons who, from time-to-time, work for the employer in jobs falling within the unit description. New hires are automatically bound. Once persons cease to be employees, they are no longer bound. Thus, in the ordinary course of labour relations, the Union’s constituency, the bargaining unit, changes with the workforce.

Certification for a bargaining unit gives bargaining rights. What the IWA has been striking for is a new collective agreement to cover the employees within the bargaining unit. It reaffirms its objective, which is to

negotiate a collective agreement covering all the employees who will work within the bargaining unit once the agreement is in place. That is, it intends an agreement that covers the full complement of 194 employees.

Some of those 194 employees, it believes, must be the strikers. However, it also seeks to bind the original employees who returned to work, plus any (what it now calls) replacement employees kept on after the strikers return. Any collective agreement negotiated through bargaining would normally cover such people. Section 126(1) provides in part:

126(1) The provisions of a collective agreement are binding on

(a) the bargaining agent and every employee in the unit on whose behalf it was bargaining collectively;

(b) the employer, where the employer acted on his own behalf;

Section 51(1)(b) requires a representation vote. Section 56 provides:

56(1) A representation vote shall be decided on the basis of a majority of the ballots cast by employees in the bargaining unit.

(2) For the purposes of conducting any representation vote, the Board may deem a person to be an employee or not to be an employee on a given date where in the Board's opinion it is appropriate to do so.

Once again, in 56(1) we see the words “employees in the bargaining unit.” It is this section that is said to override Rule 16 if any of the employees hired since the strike are properly categorized as employees in the bargaining unit.

VI. The Impact of Section 88

Section 88 is new with the Labour Relations Code. It gives strikers return-to-work rights over replacement employees. It came into force on November 28, 1988, 10 months after the strike began. It refers specifically to replacement employees. It provides:

88(1) When a strike or lockout ends

(a) as a result of a settlement,

(b) on the termination of bargaining rights of the bargaining agent, or

(c) on the expiration of 2 years from the date the strike or lockout commenced,

any employee affected by the dispute whose employment relationship with the employer has not been otherwise lawfully terminated is entitled, on request, to resume his employment with the employer in preference to any employee hired by the employer as a replacement employee for the employee making the request during the strike or lockout.

(2) The request of an employee under subsection (1) must be made in writing

(a) within 14 days of the date on which the employee learns that the strike or lockout has ended and in any case within 30 days of the date on which the strike or lockout ended, if the strike or lockout ends in the manner referred to in clause (a) or (b) of that subsection, or

(b) forthwith, if the strike or lockout ends in the manner referred to in clause (c) of that subsection.

(3) Nothing in subsection (1)

(a) prevents the parties to a dispute from agreeing on a mechanism for an orderly return to work within a reasonable period after a strike or lockout is over, or

(b) requires an employer to reinstate an employee where

(i) the employer no longer has persons engaged in performing work the same or similar to work that the employee performed prior to his cessation of work, or

(ii) there has been a suspension or discontinuance for cause of an employer's operations or any part thereof, but, if the employer resumes those operations, the employer shall first reinstate those employees who have requested a resumption of employment.

(4) An employer shall, on the request of any employee returning to work at the end of a strike or lockout, where there is no collective agreement in place, reinstate the employee in his former employment on any terms that the employer and the employee may agree on, and

the employer in offering terms of employment shall not discriminate against the employee because of his exercising or having exercised any rights under this Act.

This section gives an express statutory right to reinstatement when a dispute ends. It contemplates a strike ending as a result of one of three events: a settlement, a termination of bargaining rights, or the passage of two years from the date of commencement. However, it only gives reinstatement rights for “any employee affected by the dispute whose employment relationship with the employer has not been otherwise terminated.”

As noted above, the Board decided the question of the applicability of the Code or the Act to this dispute in earlier litigation between the Union and the Employer. The Union argued, and the Board held, that this whole collective bargaining dispute, having commenced under the Labour Relations Act, continues to be governed as if the Act had remained in effect. As explained above, that decision is now before the Court of Appeal.

Despite this, the Union now says this is a revocation application under the Code. If granted, it will trigger a right in the striking employees to reinstatement under s. 88(1)(b) and 88(4). It follows from this that the strikers would displace the replacement employees. They are therefore, by law, temporary. As such, they should be viewed as outside the bargaining unit and get no vote. The Union argues from this that section 88, by implicitly defining replacement workers, excludes all people hired during a strike from the bargaining unit.

The question of whether section 88(1)(b) may give these strikers a new right to reinstatement is not now directly before us. It was not fully argued and we are specifically not deciding the issue. However, we do not accept the Union’s argument that section 88 irrevocably creates one class of “replacement employees” separate from the bargaining unit employees who made up the workforce at the start of the strike.

Section 88 refers to replacement employees, but only to define who will be replaced by those strikers with a right to return. That is, “those employees whose employment relationship with the employer has not been otherwise lawfully terminated.” Thus, the only “employees” (and the section uses that term in respect to replacement employees) liable to be displaced are those for whom there exists a striker being temporarily replaced. It does nothing to exclude any other employees from the bargaining unit or otherwise distinguish them because they were hired after the strike began.

The Applicants also draw an argument from section 88. They argue that it recognizes that after an extended period, a strike is effectively over. People who began as temporary employees at that point become permanent. Section 88 suggests that point is two years, a point long since passed. At best, this is an argument by analogy, given our ruling on the applicability of the Act not the Code to this dispute. The strike, while lagging, is still active. Picketing continues and neither the Union nor the remaining 40 strikers show signs of giving up. The Labour Relations Act imposed no statutory limit on the duration of the strike.

We are not inclined to read a time limit on strikes into the Labour Relations Act regime just because one now exists in the Labour Relations Code.

VII. The Cases in Support of the Union's Position

The Union's position is that only those employed on March 17, 1988 are entitled to vote in a revocation representation vote. It says all other employees, hired since then, are replacement workers ineligible to vote. It argues they are temporary employees, hired for the duration of the strike, who have no community of interest with the strikers. It says they are not "employees in the (bargaining) unit."

The Code gives no direct definition of a replacement worker. One could define "replacement employee" as a person filling a job that, if the strike were over and the strikers returned to work, would be taken back by one of those returning strikers. If so, the Union and the applicant are only 40 employees apart in their definition. One could define replacement employee (as the Union does) as any employee hired after the strike to do work previously done by bargaining unit employees. If so, they are 140 employees apart.

These conflicting definitions make it important to look carefully at the reasons given for each decision as well as the underlying facts. The facts here are unusual because of the length of time this has all gone on, and the high rate of attrition and return to work. In many of the cases referred to, these groups of employees simply do not exist. Often employers hire no replacements. Even when they do, some hire only new hires, refusing to use people willing to cross the picket line, for fear of sabotage or infiltration, or to keep pressure on the Union.

The Union presents only two alternatives. It says the choice is between the remaining original employees (the 94) or the original employees plus the replacement workers (the 94 plus the 140). It sees no justification for any breakdown amongst the 140. In the Union's view, they are all replacement employees with no right to vote. We begin by examining the authorities said to support this proposition. The Union relies upon

Re: Brandon Packers Ltd. [1960] 33 W.W.R. 58 (Man. Q.B.).

The employer faced a lawful strike. It fired the employees, hired replacements and sought decertification. The Manitoba Board ordered a vote. It proposed to poll (separately), the remaining strikers and the replacement employees working in the plant. The Court reversed the Board's decision on the basis that the Board had no power to order the vote at all. However, in the course of the judgment the Court said, at p. 63:

Sec. 2(3) defines "unit" as a group of employees, and the various sections which refer to a "unit appropriate for collective bargaining," indicate that the power to designate such a unit rests with the board. There is nothing in the Act establishing the principle that "once a unit, always a unit," or that the composition of the unit cannot be changed, or that its composition must be related to designated categories of employees. It seems clear that it is for the board

to decide what group of employees at any given moment is a unit appropriate for collective bargaining. The words “appropriate for collective bargaining” embody the idea of a group of employees having common economic interests so that it is just and equitable that they should be represented by one bargaining agent. It must be assumed that immediately prior to the strike, Local 255 of United Packinghouse Workers of America represented the majority of the employees in the unit which had been designated as a unit appropriate for collective bargaining. A strike is a means taken by employees to induce the employer to agree to their demands and if it is successful it must lead to further collective bargaining. It would appear to be consistent with the purpose of the Act that there should be continuity of representation during the negotiations following the calling of a strike. From the standpoint of their economic interest, the striking employees remain a group quite distinct from workmen who have been hired to replace them. In my opinion the board has a duty to recognize this fact by treating the strikers as a unit appropriate for collective bargaining. The board would therefore only consider revoking the certification of the bargaining agent of the strikers if it formed the opinion that it no longer represented a majority of the striking employees. In forming this opinion it would not be influenced by the views of workmen who had been hired to replace the strikers. If it had the power to take a vote, the board should have confined the vote to the striking employees.

This decision draws no distinctions amongst the replacement employees. Indeed, no such distinction was necessary or possible. The Employer purported to fire all the strikers. There was also little time for attrition. The strike began on February 29, 1960 and the Board’s hearing took place on June 21, 1960.

The second case relied upon by the Union is

Arthur T. Ecclestone and NABET v. CKLW Rodeo Broadcasting Ltd. [1978] C.L.R.B.R. 306 (Can.L.R.B.R.).

The Canada Labour Code only allowed a revocation application during a strike if the Union failed to make a reasonable effort to conclude a collective agreement. Employees applied for revocation but were denied because the Union had made reasonable efforts. The Board declined to decide the voting constituency. It emphasized the difficulty of the issue by saying, at p. 309.

Preliminary to determining the wishes of the employees it is necessary to establish the constituency whose wishes are to be canvassed. In most cases this is relatively easy. This case, however, poses very difficult questions as yet unaddressed under the Code or resolved in Canadian labour relations law. We will begin by outlining the perimeters of the problem, but first the factual question to be answered. In determining the employees wishes, do we consider only the wishes of employees who were employed when the strike commenced,

only those currently working for the employer including employees hired to replace striking employees, or both?

After an extensive review of the policy issues, the Board concluded, at p. 314:

These fine questions about when a strike is no longer a strike and whether replacement employees may participate in a decision or actually make a decision to remove or displace the union representing persons they replace are serious fundamental questions of policy in our collective bargaining system. This review of the various statutory provisions and judicial and board decisions demonstrates there is no consensus of opinion on the best approach. In fact, because the issues are so socially sensitive, they have been cautiously approached or deliberately avoided by the legislators and adjudicators. Even commentators and policy advisors have few firm proposals to make.

We do not propose in this case to be any more adventuresome. The representations of the parties did not fully focus on the issue of who is entitled or should participate in the representation issue raised by this case and because we do not consider a final decision on it necessary to dispose of this case we make no decision on the issue.

Despite this protestation of caution, the Board then went on to make the following observation, upon which the Union now relies:

We do wish to say that it is our initial conclusion that the divergent economic interests recognized by Bastin, J. in *Re Brandon Packers Limited, supra*, and fleshed out by Professor Arthurs lead us to favour a decision in which only those who were employed on the day of the commencement of the strike and still have an interest in the issue should decide the representational question. We do not consider that accepting employment elsewhere, no matter how temporary or permanent, is determinative of the question whether there is a continuing interest for an individual. Parliament has not placed a time limit on legitimate economic conflict and we are well aware of disputes that resulted in collective agreements several years after their commencement.

The intervening policy discussion is helpful, but turns more on the options open to legislators than upon the interpretation of statute. It does make the point that the delicate balance in these situations is influenced by, and can be protected by, several legislative tools. Who gets to vote is just one issue. Another protection may be statutory reinstatement provisions and any related time frames that may, directly or indirectly, define the duration of the strike. Others include time limits, consent requirements or preconditions to revocation applications during a lawful strike. The Alberta Labour Relations Code requires Board consent. Section 88 now covers some of this other ground.

A similar issue to that in *Ecclestone* arose in

Association des Employés de CJMS and CJMS Radio Montreal Ltd. [1980] 1 C.L.R.B.R. 270 (C.L.R.B.R.).

A union applied for certification for a unit of employees who had been on strike for fifteen months. During the strike the employer hired replacements for the strikers, as well as replacements for employees who had resigned or been dismissed. Some of the original employees had returned to work. The Board found that the employer transferred an additional group of employees into the unit for the purpose of diluting or flooding the union's support. The Board referred extensively to *Ecclestone (CKLW)*, (*supra*) in reaching its decision, and said, at p. 280:

If we apply the obiter in the CKLW decision,

- (1) those employees who were employed by CJMS when the strike was called on January 26, 1977 and who were not officially dismissed or did not officially resign, and
- (2) those employees who were hired to replace those who had resigned or been dismissed

are entitled to vote. It follows that those persons who were hired to replace the striking employees are not considered employees for the purpose of determining the majority status of the unit in question. As replacements, they occupy temporary positions pending the return of those whom they are replacing. They therefore have no possible community of interest with the incumbents of these positions.

What is the case with employees who were hired to occupy positions that were created after the strike began and who, as of May 26, 1978, were employed by CJMS Radio (Montreal) Quebec? As a general rule, these persons should have the right to vote.

We feel that this general rule, according to which persons who are hired to occupy positions created after the beginning of a strike are entitled to vote, is justified since the new positions to be filled might have been filled by persons recruited from the outside. These persons normally have a community of interest with those who enjoy a right associated with the positions that exist when a strike is called.

It may happen, however, that new positions that are created have the effect of flooding the vote of the striking employees. In such cases, the votes of those persons who occupy the

new positions might not be considered. It all depends on the particulars of the case in question.

This decision, and its interpretation of the earlier *CKLW* decision from the same Board, treats people hired to fill new positions differently from those hired to do the work of strikers. At page 286, the Board makes it clear it makes a similar distinction for workers hired to replace strikers who resigned or were dismissed during the strike. This authority goes against the Union's position, and supports the breakdown into categories suggested by the Applicants.

The last Canada Labour Relations Board decision relied upon by the Union is

Eastern Provincial Airways Ltd. v. Canadian Air Line Pilot's Association [1983] 3 C.L.R.B.R. (NS) 75 (CLRB).

This case is authority for the proposition that an employer cannot, without committing an unfair labour practice, hire a permanent replacement employee to fill a job temporarily vacant as a result of an employee exercising the right to strike. The striker under the Canada Labour Code has no absolute right to return. However, it would be bargaining in bad faith for the Employer to refuse to negotiate for that person's return because of commitments, made to replacement employees, to give them priority. This approach to the statute recognizes and protects the rights of strikers available to return to work. The same considerations do not apply to persons hired to positions to which no striker could reasonably be expected to return. *Eastern Provincial Airlines* says nothing about that situation at all.

The Union refers to the 1964 Alberta decision in *Employees Association of North Canadian Forest Industries v. North Canadian Forest Industries et al.*, (*supra*). Mostly, that case dealt with strikers who had obtained work elsewhere. However, the Board made one additional observation in that case which is pertinent here. It said, at p. 656:

... the Board must be mindful of the position and rights of the employees legally on strike and some of the problems are enunciated above. Since the Board appreciates there is an absence of settlement of the existing dispute, the question arises as to how long a period of time must elapse from the commencement of a legal strike and, in this case, where the Company was successful in the recruiting of a sufficient complement of employees to maintain the plant operation, for the employees presently employed to enjoy collective bargaining. The present strike has been in effect for a period of approximately ten months. It would be illogical to suggest that when a strike could continue for an indefinite period that employees gainfully employed by the Company would be barred indefinitely from the right of joining a trade union and enjoying collective bargaining.

Concerns such as these led this Board to grant the consent necessary to bring this application.

The following British Columbia's Labour Relations Board decisions support the position advocated by the Union.

Muckamuck Restaurant Ltd. [1979] 3 Can.L.R.B.R. 301 (B.C.L.R.B.)

Adams Laboratories Ltd. et al. [1980] 2 Can.L.R.B.R. 101 (B.C.L.R.B.)

Employees of T.A. Steadman Marketing Consultants et al. v. Retail Clerks Union, Local 1518 [1985] C.L.L.C. ¶16,030 (B.C.L.R.B.)

The *Adams Laboratories Ltd.* case, drawing on *Muckamuck*, said, at p. 103:

The reconsideration panel [in *Muckamuck*] went on to discuss the issue of the proper “constituency” in cases of this kind — i.e., where the application for cancellation is made in the course of a lawful strike; and where the employer is continuing to operate by hiring replacement employees as well as maintaining the employment of those employees who chose not to go out on strike. The panel said this:

... The submissions made on behalf of both the employer and the applicant in the course of these review proceedings address the issue of the appropriate constituency in decertification applications made during a lawful strike. With the benefit of those submissions, we are now prepared to define what we consider to be the proper constituency in these circumstances. In our view, the policy underlying the correct approach to this question is concisely articulated by Bastin, J. in *Re Brandon Packers Limited* (1960), 33 W.W.R. 58 (Man. Q.B.). ... [*The quote from Brandon Packers, reproduced above, then follows.*] ...

While this analysis leads to the conclusion that it is the “striking employees” whose wishes are determinative, it does little to define that group except to distinguish those employees from “replacement employees.” In our view, the criteria by which the striking employees are to be identified were correctly stated by the Canada Labour Relations Board in the *Arthur T. Ecclestone* case, *supra* only those who were employed on the day of the commencement of the strike and still have an interest in the issue. It will be seen immediately that the term “striking employees” may be a misnomer, in some cases the employees identified by these criteria will include as is the case in these proceedings employees who have continued to work despite the strike.

The following two propositions emerge from the several passages quoted above. First for the purposes of Section 52(2), the issue of whether the trade union has lost majority support is determined by reference only to those employees who were employed at the time the strike began and who may reasonably be regarded as having a continuing interest in the outcome of the dispute. The so called replacement employees simply do not count. Secondly, the Board will be reluctant to grant decertification while a lawful strike is in progress.*

*It is interesting to note that the same reluctance has found legislative expression in Alberta. Section 76 of the Alberta Labour Act which sets up the ground rules for decertification applications, contains a subsection which says that no such application may be made while a strike or lockout is in effect without the consent of the Board of Industrial Relations. *[This was a footnote in the decision.]*

This analysis adopts the C.L.R.B.'s approach from *Ecclestone*, but ignores the limited scope given to the term "replacement employees" in the later C.L.R.B. decision in the *CJMS* case. In *Adams Laboratories*, the only dispute over who could vote involved whether four people had quit and "were no longer interested in the outcome of the dispute." They had no need to address any issue about new hires who may not be "replacing" strikers.

By 1985, the legislation in B.C. had changed somewhat. In particular, a new section provided that:

55(3) All persons who are employees within a unit at the time of an application for certification or decertification is received by the board, and who remain employees within the unit at the time of the vote, are eligible to vote in a representation vote with respect to the application.

The issue came before the Board again in *Steadman*, (*supra*).

The Board, once again, drew on *Brandon Packers* to hold that all subsequently hired employees were outside the bargaining unit. They concluded, at p. 14,208:

For that reason, we consider that employees hired after the date of the strike do not share a community of interest with the employees hired prior to the commencement of a strike. As a result and, in keeping with the line of authority established by this Board, we determine that only those employees who were employed at the time the strike began and who may reasonably be regarded as having a continuing interest in the outcome of the dispute are the employees whose wishes are determinative in this application for cancellation.

Again, this case makes no analysis of persons hired after the strike began, who will form part of the unit, and be bound by a collective agreement, if and when an agreement is concluded and all the strikers return to work.

The last case relied upon by the Union is:

Bird Machine Co. of Canada v. United Steelworkers of America [1990] 10 C.L.R.B.R. (2d) 251 (Sask. L.R.B.).

A lawful strike took place. The employer hired a full complement of replacements and continued operating. No strikers crossed the line to work. At the end of the strike, the Employer terminated all the replacement workers and the strikers returned. The Union asked the Saskatchewan Labour Relations Board to order the company to pay union dues on account of the replacement employees. The Union did so based on a specific right to demand dues contained in s. 32(1) of the Saskatchewan legislation. That right applied to employees in the bargaining unit represented by the union.

The question before the Board became — Were these replacement employees, all of whom were temporary, within the union's bargaining unit? The Board reviewed many of the cases referred to in this decision. It concluded at p. 260:

Replacement workers are employed to advance management's interest in times of strike or lockout. They have no immediate interest in, nor do they derive any benefit from, negotiating the conclusion of a collective bargaining agreement with the employer. This observation of the function of replacement workers is in no way pejorative, but rather a reflection of the reality that they do not share a community of interest with striking employees in attaining the fundamental goals of collective bargaining.

Considering that one of the basic purposes of the *Trade Union Act* is to facilitate the right of employees to organize for the purpose of bargaining collectively, it becomes apparent that replacement workers cannot be part of the bargaining unit because of their obvious conflict with the community of interest shared by members in the appropriate unit.

Again, this case did not examine the position of people who would be staying on after a strike.

VIII. The Cases in Support of the Applicant's Position

This brings us to the Applicants' position. They divide their submissions into categories. They begin with the definition of an employee. They divide the balance of their submissions into three issues, described below.

Issue 1: Should the 60 permanent employees (**the "New Permanent Employees"**) who have filled vacancies arising from retirement, resignation, promotion, death and firing be permitted the right to vote?

The Applicants rely upon the *CJMS* decision quoted above. The text of that decision, at page 286, makes it clear its exclusion of replacement workers from the unit does not apply to those hired to fill the positions of people who had resigned or been dismissed. The Applicants also rely upon an Alberta case:

International Union of Operating Engineers, Local Union No. 955 v. Manalta Coal Ltd. and the United Mineworkers of America, (supra).

The *Manalta* case involved a certification application during an ongoing strike, following Board consent. This occurred after 3 years of strike. The officer's report in that case outlined how the Board arrived at the employee list.

The officer started with the employees at the date of strike, then deleted those unlikely to return to the mine because they had since left to work elsewhere. The officer then added all employees, newly hired since the strike began, who remained at work on the date of the certification application. Some of these subsequent hires were on lay-off on the date of the certification application. However, they had an expectation of recall, so an issue arose about their status.

It is clear from the Board's determinations that it viewed subsequent hires as employees entitled to be counted as within the bargaining unit for the purposes of a certification application. This was so long as they were likely to return to work. The case says nothing about replacement employees vs. other classes of post-strike hires. However, it clearly proceeds on the assumption that all such people are within the unit. The facts of the case suggest, upon any settlement and a reopening of the mine, no conflict over available jobs would arise between original employees and replacements. This is because there would be enough work available for both groups.

Issue 2: Should the 40 permanent expansion employees (**the "Expansion Employees"**) be permitted the right to vote?

The Applicants' position is that the 40 Expansion Employees should be permitted to participate in the representation vote. They are permanent employees with a sufficient and continuing interest in the bargaining unit. We heard evidence concerning the expansion. These positions were not created by the employer for the purpose of diluting, padding or flooding the vote. Even if the 40 striking employees return to work, the 40 expansion employees would not be replaced. These employees will be bound by the vote.

The Applicants again rely upon the *CJMS* decision at p. 281, which clearly treats such persons as included within the bargaining unit.

We feel that this general rule, according to which persons who are hired to occupy positions created after the beginning of a strike are entitled to vote, is justified since the new positions to be filled might have been filled by persons recruited from the outside. These persons normally have a community of interest with those who enjoy a right associated with the positions that exist when a strike is called.

It may happen, however, that new positions that are created have the effect of flooding the vote of the striking employees. In such cases, the votes of those persons who occupy the new positions might not be considered. It all depends on the particulars of the case in question.

Additional support for the “flooding” caveat is given by

Frank Newbold et al. v. Custom Aggregates (1978) 1 C.L.R.B.R. 561 at 563.

We find that Alberta’s section 56(2) provides a ready means of protecting against any such “flooding” abuses, should they arise under the Labour Relations Code.

Issue 3: Should the 40 remaining replacement employees (**the “Replacement Employees”**) be permitted the right to vote?

The Applicants argue that the 40 Replacement Employees should be permitted to participate in the representation vote. Their status has shifted from temporary to permanent due to a number of factors including the length of the strike. These replacement employees have acquired sufficient and continuing interest in the bargaining unit due to length of service. It is likely that many or all of these employees will continue to work and will be bound by the vote.

The Applicants begin with the definition of employee in s. 1(1) of the Code. All replacement employees obviously meet that definition. As such, they say, they have the section 19(1) right to be members of a trade union and to participate in its lawful activities. From there, they point out the Board’s power under section 11(3)(b) to make rulings on whether a person is an employee for the purposes of the Code. This power is augmented by the ability to deem persons to be employees, or not to be employees, under section 56(2).

They then argue that, as employees, section 56(1) entitles them to vote on revocation. In support of this general proposition they rely upon:

Lambert and Ottawa Newspaper Guild, Local 205 v. Journal Publishing Company of Ottawa Ltd. (1978) C.L.R.B.R. 585 at 588 (Ont. L.R.B.).

In that case, the striking Union challenged the voluntariness of a petition signed, in part, by replacement employees. The Ontario Board said, at p. 588:

The facts upon which the respondent seeks to rely are as supportive of the inference that the replacement employees moved to terminate the union's bargaining rights of their own volition and in their own self-interest (i.e. in order to preserve their employment), as they are of any other reason for their making the application and signing the statement.

Replacement employees are employees within the meaning of the Act and are entitled to exercise their rights under Section 49 of the Act.

The *Manalta Coal*, (*supra*), case stands for the same principle. However, as we noted above, the facts in *Manalta* presented no need to deal with the issue because all employees would probably return to work upon a settlement.

Alternatively, the Applicants argue, even though strike replacements start out as temporary employees, and thus may be outside the bargaining unit, they can evolve into permanent employees. They suggest that, in making such determinations, Boards have taken into account conditions such as the duration of the strike, the conduct of the Employer and the conduct of the Union. In essence, this argument is that the Union has in all probability lost the strike. Since it is over, the temporary replacements should now be treated as permanent.

As we noted above, we are not persuaded, because section 88 now puts a time limit on strikes, to read an analogous limit into strikes governed by the Labour Relations Act. Nor are we persuaded that this strike is over, given the continuing activity by the bargaining agent and its supporters. The duty to bargain remains on both sides during the life of the bargaining relationship. The employees on strike continue to be employees under section 87 and its legislative predecessors. Therefore, the prospect of settlement and consequent reinstatement remains. This in turn means some subsequent hires might still be replaced following a settlement.

IX. Conclusions on the Voting Constituency

Having considered all these cases and arguments, the Board has come to a conclusion about which employees are entitled to be polled because they are in the bargaining unit. The bargaining unit is the unit for which the union is collectively bargaining. That means the persons who will be covered by a collective agreement if and when one is successfully concluded. It includes strikers returning upon a settlement and excludes only those who would be displaced.

We think this approach is sound in policy as well as law. It includes all those persons who, to use the B.C. Board's words, have "a sufficient, continuing interest in the fate of the bargaining unit." See: *Emergency Health Services Commission v. C.U.P.E. Local 873*, (*supra*).

This approach leads us to adopt the following principles over the entitlement to vote in this case. We believe this flows directly from the various statutory sections, in particular, sections 51(1)(b) and 56(1). If not, the policy reasons underlying our decision are, in any event, convincing. We would exercise our discretion under s. 56(2) to achieve this same result.

The employees within the bargaining unit for this revocation come from two groups:

Group 1. This group includes all striking employees who were employed by the company on the date of the strike and who maintain a sufficient and continuing interest in the dispute as of November 23, 1992. Those whose employment relationship has been severed, or who have done some act inconsistent with their continuation as an employee, are excluded.

In this case, based on the Board's investigation and the agreement of the parties, we find that, of the 154 employees at the commencement of the strike:

- 40 striking employees maintain a sufficient and continuing interest in the dispute. They are within the bargaining unit.
- 54 people remain employed in the plant. They are also within the bargaining unit.
- 60 people no longer have a sufficient and continuing relationship. They are, therefore, excluded from the unit.

Group 2. This group includes the 140 people working in the plant as of November 23, 1992 who were not employees at the time of the strike. The evidence suggests, and the law implies that, if their continued employment may involve a clash with a returning employee over a position, their employment must be considered temporary. This is for the reasons explained in cases such as *CJMS*, (*supra*). We emphasize that this view of the law is based on the law as it was under the Act. The Code, and in particular s. 88, may well change this situation, after the two year point, when by law, disputes come to an end.

In this case, there could be such a clash in the case of 40 employees. The other 100 would not involve a clash. These 100 employees can be broken down as follows:

- For 40 of those employees this is because they were hired to new jobs. There is no evidence of bad faith or "flooding" in respect of these jobs. Forty employees fall within the bargaining unit for this reason.

- For 60 of these employees, their hiring has become permanent because of attrition amongst the original workforce. The persons occupying these positions also fall within the bargaining unit.

There remains 40 employees whose employment remains temporary while the dispute continues unended. The Employer's ongoing obligation to bargain in good faith with the Union leaves the potential for their displacement. Their original hiring was temporary and remains so. As such, they are in a conflict position, and do not share a community of interest with the balance of the workforce. They truly remain replacement employees, excluded from the unit for the reasons given in cases such as *Brandon Packers*, *CJMS* and *Adams Laboratories*.

Two difficulties emerge. First, we conducted a vote based on the proposition that either the 94 from Group 1 would count alone, or else that the full 140 would count as well. Argument has convinced us this was wrong in principle. We have decided to set aside the original vote and reconduct it on the basis of a revised Group 2 voters list. We are again going to conduct the balloting in two segregated parts. This is because of the chance of ongoing litigation and is an effort to bring some certainty to this dispute. The voters list for Group 1 in the reconducted vote will remain the same as the vote on December 18, 1992.

Second, these categories are conceptual. Who is now permanent and who remains temporary? Our job is not to decide who will stay or who will go. That is a matter for negotiation between the Union and the Employer should a settlement be reached. Our job is to decide who is within the bargaining unit for the purposes of the representation vote. This is often a less than precise decision when unusual circumstances are involved. This is why section 56(2) gives the Board the discretion to deem certain employees included or excluded in appropriate circumstances.

We believe the interests of labour relations are best served in this case when the group voting on the revocation, as nearly as possible, reflects the group that would be covered by a collective agreement should one be negotiated. If the employees vote against revocation and bargaining continues, it is this group for whom the Union will be bargaining.

We have decided to use these principles in arriving at this approximation:

- The voters' list will again be based on status as of November 23, 1992.
- The 40 remaining strikers are entitled to vote in preference to replacement employees, 40 of whom will be excluded.
- We will use date of hire as a replacement employee as the best available way of estimating which employees might be displaced, so that it will be the 40 latest hires who are displaced (subject to the next point).

- The Employer's workforce distinguishes between part-time and full-time employees. Of the remaining strikers, 18 are part-time employees and 22 full-time. The number of excluded part-time and full-time replacement employees (based on date of hire) will also be 18 and 22 respectively.

We recognize that this method is imperfect. However, a form of seniority has been used for many years at Zeidlers. We find it the most reliable method of distinguishing between the 140 persons hired since the strike began. Pursuant to s. 56(2), we deem the 40 persons who were last hired by Zeidlers not to be employees within the bargaining unit for the purpose of the representation vote. We are persuaded it is appropriate to exclude them because, as the most junior replacement employees in each category, they are the ones most likely not to remain employed should a collective agreement be achieved. Put in reverse, we deem the 100 most senior people to be employees for the purposes of the vote. The Group 2 list will, therefore, be revised by the Board's investigating officer based on these principles. Any difficulties in finalizing this list will be referred to the Board panel for resolution.

Our conclusions about who is included with the bargaining unit affect the voting constituency. However, they might also have affected the question of the necessary 40% support in the unit. Our findings establish that, no matter which 40 employees are taken from the revised list, the Applicants cannot fall below the necessary 40% support within any revised bargaining unit list.

X. The Electioneering Complaints

During the last vote, events occurred that raise concerns. The Board banned electioneering in the following terms:

The Board bans all electioneering at or near the Argyll Plaza during the vote.

Despite this ban, the Union maintained a "hospitality suite" throughout the day of the vote in the hotel which constitutes the core of the Argyll Plaza. The Union argues that this was just for its scrutineers, with coffee and donuts for its supporters only after they voted. They say there was no element of electioneering involved. We do not need to decide this issue because we have ordered a new vote for other reasons. However, if it was not electioneering it came dangerously close to it, and appeared as such to some people. It was at least an unwise risk to take.

The Applicants urged us to find that the Union gave out \$1,000 Christmas bonuses from its hospitality suite. These bonuses were similar to ones given out at about the same time in previous years. We find that the bonuses were distributed from the Union's strike headquarters, not from the Argyll Plaza hospitality room.

Second, at about 3:00 p.m., the day before the vote, picketers outside the plant handed out a Union produced “information sheet” to employees. On one side was an article by well known Edmonton media commentator Eddie Keen. In part, it said the Union had accepted Zeidler’s last offer. The Applicants complain this was incorrect as a result of the Union’s subsequent withdrawal of that acceptance. The Union’s statement on the other side offered all the clarification that was necessary, and no fault can be found with that aspect of the leaflet. However, other aspects of the leaflet are troubling. It reads, in part:

This Friday, December 18, 1992, you will be making one of the most important decisions of your [sic] working career. The Labour Relations Board will be conducting a supervised vote to determine whether or not the bargaining rights of the IWA should be revoked. If the vote is in favor of revocation, then the IWA will no longer be entitled to represent any employees at Zeidlers, Edmonton.

Most of you know that we recently withdrew our acceptance of Zeidlers offer of May, 1992. We continue to be ready, willing and able to bargain with Zeidlers. Should the IWA lose the vote on December 18, 1992, then Zeidlers will get all they want for Christmas - **“NO UNION”**.

What are the consequences if there is **NO UNION**. For the former IWA members, it is our sincere belief that you will have performed your duty, by training your own replacements. If the IWA is gone, it is our view that you won’t be far behind us.

For replacement workers a successful revocation vote means that many of you will lose your jobs, because the striking workers by Section 88 of the Labour Relations Code will be able to return to work in preference to replacement workers.

The position the Union now takes about section 88 is set out above. Given the Board’s earlier ruling on the applicability of the Code, the statement that replacement employees will lose their jobs because of section 88 is controversial. The Applicants says this was a threat, contrary to s. 149(f). All they seek as a remedy is a new vote, which we are ordering already for other reasons. Therefore, we adjourn the unfair labour practice complaint *sine die* (without a date) because it is probably academic. Suffice to say the presentation of such a message to employees, so close to the vote, and with little opportunity for discussion or advice, has encouraged us to impose much stricter electioneering rules for the second vote. Those rules are included in the notice of vote included with this decision.

For these reasons, the Board sets aside the vote conducted on December 18, 1992. It directs a new representation vote amongst the bargaining unit of 194 employees as defined above. The voters’ list will be prepared by the Board’s officer immediately. The vote will be conducted in accordance with the directions contained in the notice of vote issued concurrently with this decision. The success or failure of the application for revocation will depend upon the results of the new representation vote thus ordered.

