UNFAIR LABOUR PRACTICES BY TRADE UNIONS

INTRODUCTION

Trade unions must operate within the *Labour Relations Code's* rules of fair conduct. This policy discusses Section 151—which deals with unfair labour practices by trade unions. Each subsection describes a different prohibited practice. Some involve trade union dealings with employers while others involve their dealings with employees.

This policy discusses unfair labour practices affecting the employer, including:

- bargaining without the employees' authority;
- violating another trade union's bargaining authority;
- interfering with employers' organizations;
- organizing on employer's premises; and
- encouraging illegal work stoppages.

It also discusses those affecting employees such as:

- coercion in organizing efforts;
- requiring employee termination;
- imposing discipline for respecting the Labour Relations Code; and
- discipline for engaging in employment.

This policy describes each of these prohibitions, the considerations unique to each prohibition, and applicable decisions. It neither discusses how to process complaints nor appropriate remedies. See: [*Accepting and Processing Complaints, Chapter 27(a); Remedies, Chapter 24(d); Rule of Procedure 7; Information Bulletin #2*].

BARGAINING WITHOUT THE EMPLOYEES' AUTHORITY

Section 151(a) states:

> 151 No trade union and no person acting on behalf of a trade union shall
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> (a) seek to compel an employer or employers' organization to bargain collectively with the trade union if the trade union is not the bargaining agent for a unit of employees that includes employees of the employer;

A trade union can only try to bargain with an employer if it is a bargaining agent for the employees concerned. It is not enough that it be a trade union. It must also represent the employer's employees

in the sense of having authority from those employees to bargain for them. A union without such authority must not try to force an employer to bargain for a collective agreement.

The Code does not prevent a bargaining agent from appointing another organization or agent to carry out tasks for the bargaining agent. A union with limited resources may delegate responsibilities to another union without necessarily contravening Section 151(a). The Code does not, however, allow unrestricted assignment of bargaining rights. The basic authority to bargain collectively vested in the first union cannot be delegated entirely. The second union may offend Section 151(a) if it attempts to force bargaining on its own behalf.

VIOLATING ANOTHER TRADE UNION'S BARGAINING AUTHORITY

Section 151(b) states:

> 151 No trade union and no person acting on behalf of a trade union shall
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> (b) bargain collectively or enter into a collective agreement with an employer or employers' organization in respect of a unit, if that trade union or person knows, or in the opinion of the Board ought to know, that another trade union is the bargaining agent for that unit of employees;

If one union legitimately represents a group of employees, the Code prohibits another union from negotiating for, or entering into, a collective agreement for those same employees. If the Board has certified the first union, that union has *exclusive* bargaining rights. This provision also protects a voluntarily recognized union with a collective agreement.

If a union gains support amongst a group of employees already represented by another union, it must be certified in the place of (i.e., raid) the other union before it can seek to bargain with the employer. See: [*Certification, Chapter 21*]. Sometimes this sub-section arises when two unions, each representing a unit of employees for the same employer, disagree about their border between the units.

Because of this subsection, it is good practice for a union to inquire about whether another union represents employees before it tries to bargain with an employer. Unions can violate this section in situations where they "ought to know" that another union held bargaining rights. Lack of actual knowledge is an insufficient defence to a complaint under this section.

INTERFERING WITH EMPLOYERS' ORGANIZATIONS

Section 151(c) states:

> 151 No trade union and no person acting on behalf of a trade union shall
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> (c) participate in or interfere with the formation or administration of an employers' organization;

An employer's organization is a group of employers who have joined together for the purpose of regulating relations between employers and employees. A union must not interfere with the formation or administration of an employers' organization. For a union to do so would destroy the arm's length relationship the parties traditionally hold and impair the integrity of the collective bargaining relationship.

Formation refers to the initial setting up of the organization, including the adoption of the constitution and bylaws of the organization. The administration of an organization refers to internal matters such as the holding of meetings, collecting of money and selection of officers. The mirror provision of Section 148(1)(a)(i) protects trade unions from employer interference, including interference with the designated representatives that represent and speak for the union in collective bargaining. The same logic would presumably apply to representation of employers' organizations.

ORGANIZING ON EMPLOYER'S PREMISES

Section 151(d) states:

> 151 No trade union and no person acting on behalf of a trade union shall
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> > (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 subsection is designed to prevent the illegal or unnecessary disruption of the workplace through union organizing efforts, while balancing employee rights to union representation.

Working vs. Non-Working Hours

A trade union cannot conduct an organizing campaign on the employer's property **during working hours** unless the employer grants consent. Working hours are those times for which the employee receives pay. Non-working hours include lunch time, coffee breaks and rest periods. In *XL Beef Employees Association v. L.K. Resources Ltd.* [1983] Alta.L.R.B. 83-005, the Board found that organizing activity during a lunch hour is not a contravention of this section because that time is not considered "hours of work."

Employee vs. Non-Employee Organizers

The Board makes a distinction between an employee organizing on the employer's premises and an outside union organizer attempting to organize on the employer's premises. An employer may restrict outside union organizers from organizing on its premises without resorting to the argument of efficient running of business. Adams states,

> Legislatures are also saying that if employees have the right to carry on organizing activity on company premises, it is not an unfair balance of interests to limit strangers to the usual channels of communications with those employees. See: [*Adams, Canadian Labour Law 2nd Ed.* 1993, para 10.620].

Whether an outside organizer is allowed access to the employer's premises requires the Board to balance the commercial interests and property rights of the employer against employee rights to organize and obtain bargaining rights. Elements that this Board would look for in a complaint under this subsection:

- did the union seek to enter the property and have that request denied;
- can the union demonstrate that its proposed activities are protected by Section 21;
- can the union show that communicating with employees in other ways is impractical; and
- can the union show that its interest in the employment site is not speculative and that there is express employee interest in having the union represent them? See: [*OE 955, Plumbers 488 & Labourers 92 et al. v. Midwest Pipeline* [1990] Alta.L.R.B.R.455].

On or Off Employer Premises

This section protects the organizing activities of an employee when off the employer's premises. In *Hull's Foods v. UFCW 401* [1991] Alta.L.R.B.R. 685, the Board decision (speaking of then Section 149(d)) states:

> Section 149(d) is aimed at regulating conduct occurring during working hours at the employee's place of employment, and not elsewhere. As a result a trade union engaging in attempts to persuade an employee to become a member at some other location other than the place of employment is not acting in violation of this provision. This is so regardless of whether the employee is paid for the time during which she is away from her workplace and, in particular, if the employer is unwittingly paying her for this period of time.

The type of activity prohibited by Section 151(d) is clearly spelled out. The Board must look to the purpose of the activity to decide if a contravention has occurred. In *Hull's Foods, above at p.718,* the distribution of union literature that is confined to the lunchroom or lounge or other non-working area did not constitute a violation of the section.

ENCOURAGING ILLEGAL WORK STOPPAGES

Section 151(e) states:

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

(e) authorize, encourage or consent to a refusal by any employee in a unit in respect of which the trade union is the bargaining agent to perform work for his employer for the reason that other work was or will be performed or was not or will not be performed by any persons or class of persons who were not or are not members of a trade union or a particular trade union;

Section 151(e) makes illegal non-affiliation clauses in collective agreements that permit employees not to work if the employer hires non-union or non-affiliated unions' (e.g., CLAC) members to work on a site. This does not preclude collective agreement clauses wherein the employer promises to hire only building trades union members. Rather, it precludes clauses allowing mid-term strikes over the issue. The issue should properly be resolved at rights arbitration.

COERCION IN ORGANIZING EFFORTS

Section 151(f) states:

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

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

A union cannot pressure employees in its organizing efforts. Undue pressure tactics used by a union are forbidden where the intention is to encourage (organizing efforts) or discourage (a raid situation) union membership. The conduct must go beyond mere persuasion and amount to coercion. The intent of the subsection is to protect the employees' right to voluntarily select their own bargaining agent. The Board considers the following in complaints filed under this subsection:

- does the union act of coercion have as its intent encouraging or discouraging membership;
- is there evidence that the union's actions influenced the employees; and
- was there a threat of penalty?

The intent of the conduct is a critical factor in determining whether a breach of the section has occurred. Conduct engaged in for different purposes, unrelated to union activity or membership, fall outside the scope of this section.

REQUIRING EMPLOYEE TERMINATION

Section 151(g) states:

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

(g) require an employer to terminate the employment of an employee because the

> employee has been expelled or suspended from membership in the trade union for a reason other than a failure to pay the periodic dues, assessments and initiation fees uniformly required to be paid by all members of the trade union as a condition of acquiring or retaining membership in the trade union;

This subsection distinguishes between an employee's status as an employee and status as a union member. The Code puts an individual's employment interest above the loss of union membership.

The intent of this subsection is to prevent trade unions from extending their internal discipline processes into the workplace. Once a union expels or suspends a member for something other than non-payment of dues, it cannot then demand that the employer deliver punishment as well. If an employee does not make the required payment of dues, the union (in a union-shop situation) can ask the employer for that employee's termination. A union cannot, however, expel a person for disciplinary reasons, refuse to accept dues, and then seek termination for non-payment. Points to look for in cases under this subsection:

- was the employee terminated or suspended from union membership;
- was it for a reason other than non-payment of dues or other union fees; and
- is the payment required by all members of the trade union as a condition of membership? A trial committee fine would not be a fee uniformly required to be paid.

IMPOSING DISCIPLINE FOR RESPECTING THE CODE

Section 151(h) states:

> 151 No trade union and no person acting on behalf of a trade union shall
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> (h) expel or suspend a person from membership in the trade union or take disciplinary action against or impose any form of penalty on a person by reason of the employee having refused to perform an act that is contrary to this Act;

Unions cannot use disciplinary actions to force employees to act contrary to the Code, even if the act is supported by the union. Unions, for example, cannot impose a penalty on an employee who refuses to participate in an illegal work stoppage.

DISCIPLINE FOR ENGAGING IN EMPLOYMENT

Section 151(i) states:

> 151 No trade union and no person acting on behalf of a trade union shall
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> (i) expel or suspend a person from membership in the trade union or take disciplinary action against or impose any form of penalty on any person
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> (i) for engaging in employment in accordance with the terms of a collective agreement between his employer and the trade union, or

A union cannot discipline members because they perform work in accordance with a collective agreement between their employer and the union. A difference of interpretation of the collective agreement might lead to such a situation. For example, working overtime when the union feels the employee should not, may lead to a difference between the employee and the union. Until the dispute is resolved, the employee cannot be punished for doing the work required by the collective agreement. If the employee refused to do the work, this could amount to an illegal work stoppage. Section 151(i) also states a union may not:

> 151 No trade union and no person acting on behalf of a trade union shall
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> (i) expel or suspend a person from membership in the trade union or take disciplinary action against or impose any form of penalty on any person
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> (ii) for engaging in employment with an employer who is not a party to a collective agreement with the trade union if the trade union fails to make reasonable alternate employment available to that person within a reasonable time with an employer who is a party to a collective agreement with the trade union, unless the trade union and that person are participating in a strike that is permitted under this Act.

Many union constitutions prohibit union members from working non-union or for an employer that bargains with another union (e.g., CLAC) without union consent. If the union cannot dispatch its members, the Code allows these members to seek non-union or other union work without penalty despite the constitution. This section balances employees' right to work and a union's internal rules.

Points to look for in a complaint filed under this subsection:

- Has the union attempted to provide reasonable alternate employment in a quantity sufficient to give the union the right to penalize someone for working non-union? The work offered by the union does not have to be at the same wage level as the non-union work, but it must be of sufficient length (or at least predicted length) to provide some reasonable alternative employment to the work the union asks the member to forego.

- Has the union attempted to do this in a reasonable amount of time?
- Is there a legal strike occurring? If so, the union may discipline the employee for working for the employer during the strike. Note that the exception applies if there is a strike, not if there is only a lockout.

The Board does not need to defer to internal union appeal procedures under this subsection.