
CORNISH ADVOCATES
BARRISTERS AND SOLICITORS

THE SKY HAS NOT FALLEN:
REPLACEMENT WORKER LAW UNDER BILL 40

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April, 1994

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Revised and updated from original version
presented to the Canadian Bar Association
- Ontario's 1994 Institute of Continuing
Legal Education : The Legacy of Labour Law
Reform - Bill 40, One Year Later on Friday,
January 28, 1994, and to the OFL Conference
*Bill 40 - One Year Later - March 28, 1994

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1/2/94



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1. Introduction

Despite the catastrophic predictions of labour law reform opponents, Ontario's businesses continue to function one year after the implementation of the Labour Relations Act ("Act") amendments restricting the use of replacement workers during a strike.

This paper canvasses the history of the replacement worker provisions, gives a very brief description of the provisions, and reviews the applications and decisions to date dealing with the provisions with particular emphasis placed on the Ontario Labour Relations Board's most recent decision in Service Employees International Union, Locals 204 and 532 v. Red Cross et al. Restrictions on the paper's length necessarily limited its scope to a survey of activity under the replacement worker provisions since they came into effect.

2. History of the Replacement Worker Provisions

Prior to Bill 40, the Labour Relations Act did not restrict the ability of employers to continue to have the work of striking or locked out workers performed.

Many advocates of labour law reform believed that the absence of such restrictions had contributed to picket-line violence, to the lengthening of labour disputes and to worsening labour-management relations. They argued that replacement workers were most likely to be used in circumstances involving relatively unskilled and economically insecure workers, who are often women, members of visible minorities and other disadvantaged groups. Such workers could be replaced easily and quickly. Historically, this operated as a significant disincentive for such workers to organize and had been a factor in their lower rates of unionization.

Central to the debate respecting replacement workers was and remains the weighing of the interests of employees in effectively exercising their right to strike against the interests of employers in

continuing to do business during a strike and the interest of the public in maintaining essential services.

After lengthy consultation, the Ontario Government proceeded with its replacement worker provisions on the basis that balance needed to be restored to the situation facing striking or locked out employees.

While many of the recommendations of the reform proponents were adopted by the Legislature, a number of provisions designed to meet the concerns of employers and the public interest were also passed and these have limited the usefulness of the provisions in certain circumstances.

In moving second reading of Bill 40 on July 6, 1992, the Minister of Labour stated:

The replacement worker provision is intended to make the right to strike meaningful and to encourage both parties to work harder for a negotiated settlement. ...

The Labour Ministry's research also reveals that the most confrontational strikes last year in Ontario all involved situations where replacement workers were used.

It is clear that the use of some replacement workers prolongs labour disputes, uses up costly police resources, creates an air of conflict and all too often leaves a legacy of bitterness. (Hansard, p. 1849)

3. Purpose and Description of the Replacement Worker Provisions

These provisions set out in sections 73.1 and 73.2 of the Act are detailed and complex.

It is not possible in this short paper to fully describe these sections. However, it is essential for anyone involved in providing advice concerning these sections to review them very carefully and consider how the various subsections interrelate and apply to any particular fact situation.

The Board has generally described the provisions and their purpose as follows:

The purpose of section 73.1 is to inhibit a struck employer's ability to carry on business. The Legislature has decided that it is appropriate to enhance the union's power to wage a successful strike, by limiting the means open to an employer to resist. When bargaining unit members withdraw their labour, the employer is prohibited from drawing upon specified pools of replacement labour (bargaining unit members who don't support the strike and may wish to work, employees from other locations, managers from other locations, transferees after the notice to bargain is given, the employees of a subcontractor, volunteers, etc.) Section 73.1 is not confined to "strike breakers" in the traditional sense. It encompasses a wide variety of potential sources of substitute labour. It is substitute labour or "replacement workers" that is the focus of the section, and it is in that light that one must consider the concept of bargaining unit work; the statute prohibits employers from using replacement workers to get the strikers job done. Famous Players Inc. No. 2 p.17

In the first place, in order for a union to gain the right to prevent an employer from using replacement workers, there must be a lock-out or a lawful strike authorized by at least 60% of bargaining unit members who vote in a secret ballot strike vote taken after the notice to bargain or the bargaining, whichever occurs first. see Section 73.1(2) The strike vote must be conducted in accordance with sections 74(4) to (6).

Generally, sections 73.1 and 73.2 of the Act provides a fairly comprehensive code respecting the use of replacement workers. Section 73.1 lists the types of prohibitions placed on the performance of work during a strike or a lock-out. They cover certain people and employees as well as the location and nature of the work. Section 73.2 sets out the exceptions to the prohibitions. Furthermore, it provides for certain procedures, certain rights to perform the work, a method for the parties to agree on the use of replacement workers, and an avenue to seek directions and obtain enforcement.

Subsection 73.1(4) prohibits the use of bargaining unit employees during the strike or lock-out. Subsections 73.1(5) and (6) then prohibits the performance of struck or locked out work and of the normal work of a person who in fact does perform struck or locked-out work during the strike by certain other persons. (As this suggests, the amendments to the Act did not place an outright ban on the performance of struck work.)

Section 73.1 (5) places restrictions on the use of replacement workers at any place of operations operated by the employer, while section 73.1 (6) places somewhat different restrictions on the use of replacement workers at the struck location itself. At the struck location, the employer is prohibited from using non-managerial employees of the struck location itself or employees or other persons, including managers, transferred after the earlier of the date on which the notice to bargain is given and the date on which bargaining begins, from one of the employer's places of operation that is not on strike or locked out. As well, the employer cannot use any persons "contracted in": "employed, engaged or supplied" by another party to do struck work at the struck location. Taken together, subsections 73.1 (5) and (6) constitute a comprehensive ban on the performance of work at the place of operations which is on strike or locked-out.

Subsection 73.1 (8) ensures that the employer takes no reprisals against a person who refuses to perform "struck or locked-out" work.

Finally, subsection 73.1 (9) places the burden of proof upon the employer to demonstrate that it did not act contrary to section 73.1.

In addition to the persons who are allowed by section 73.1 (in that they are not prohibited) to do the struck or locked-out work, section 73.2 allows the employer, in certain circumstances to use "specified replacement workers." That is, it allows the employer to use persons who it is otherwise prohibited from using by application of subsections 73.1(5) and (6). Subsection 73.2 provides that "specified replacement workers" may be used "to the extent necessary" to enable the employer to provide certain enumerated essential human services (s-s. 73.2(2)) or to prevent certain described dangers, destruction or damage (s-s. 73.2(3)).

In the event that an employer wished to invoke one of the above exceptions, it must notify the union of how many replacement workers it needs and for what work (73.2 (4)). The union then has the right to agree to the use of bargaining unit employees (73.2(7)). The employer is then required to first use the bargaining unit employees made available to it for the positions and work it requires. Only in an emergency or unforeseeable circumstances, can the employer use replacement workers before giving notice to the union (73.2(11)). But if it does, it must give notice to the union as soon as possible (73.2 (6)). Then, the union has the right to replace those workers with bargaining unit members.

Finally, subsections 73.2 (16) to (22) contemplate agreements reached between the employer and the trade union governing the use of bargaining unit employees and of replacement workers during a strike or lock out.

Procedures

Subsection 73.2 (12) provides the parties with access to the Ontario Labour Relations Board to get directions concerning the use of specified replacement workers. An application can also be made under section 91 complaining that an employer has violated sections 73.1 or 73.2. The Board has adopted rules which enable it to deal with them quickly. Rules 59 to 56 of the Board's Rules of Procedure govern applications to the Board concerning replacement workers. Rules 99 to 108 should be followed to request expedited hearings on a replacement worker matter.

4. Summary of Applications and Decisions to Date

In 1993, there were approximately 15 applications filed with the Ontario Labour Relations Board dealing with the replacement worker provisions of the Act. Most were settled. Board decisions dealing with the replacement worker provisions are as follows: United Food and Commercial Workers International Union, Local 175 v. Pizza Pizza Limited (hereinafter "Pizza Pizza"), 1993 OLRB Rep. Apr. 373 (Surdykowski); Graphic Communications International Union, Local 500M v. Reliable Bookbinders

Limited v. Attorney General of Ontario and Attorney General of Canada (hereinafter "Reliable Bookbinders Inc."), unreported decision of Chairperson McCormack, dated July 27, 1993, 22 pages; International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 357 v. Famous Players Inc. (hereinafter "Famous Players Inc. No. 1"), unreported decision of Alternate Chair MacDowell dated October 7, 1993, 2 pages, followed by formal reasons released December 16, 1993; The Great Atlantic & Pacific Company of Canada Limited v. United Food & Commercial Workers International Union, Locals 175 and 633 (hereinafter "Great Atlantic & Pacific Company"), unreported decision of Chair McCormack dated November 25, 1993, 3 pages, followed by formal reasons released on February 16, 1994; International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 357 v. Famous Players Inc. (hereinafter "Famous Players Inc. No. 2"), unreported decision of Vice-Chair Liang dated December 20, 1993, 1 page, followed by formal reasons released on February 4, 1994; and Service Employee International Union v. The Canadian Red Cross Society Ontario Division et al (hereinafter "Red Cross Society"), unreported decision of Chair McCormack dated January 10, 1994, 39 pages and National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW - Canada) and its Local 636 v. Canada Stamping and Dies Limited, unreported decision of Vice-Chair K.G. O'Neill, released March 2, 1994.

All of the applications were heard on an expedited basis. The two Famous Players decisions were one day hearings heard within three days of the filing of the application. The Great Atlantic and Pacific Company hearing began on the Monday that the company filed its application for a restriction on picketing. That day the Union filed its section 73.1 complaint which the Board consolidated with the company's application. After three hearing days, the Board issued its decision and formal reasons followed on February 16, 1994. Given the urgency of these matters, the Board issued "bottom line" decisions in all but the Red Cross Society case. In Red Cross Society, the case took 22 days to be

heard finishing in early June, 1993 at which time the Board reserved its decision which was not released until January 10, 1994.

On the basis of these decisions, the Board found in the union's favour twice and in the employer's favour once. In the two other decisions, the Board confined its decision to preliminary issues regarding the application of the replacement worker provisions.

5. Survey of Decisions to Date

Pizza Pizza

The first Board decision dealing with the replacement worker provisions of the Act arose as a result of an application under section 91 in which the United Food and Commercial Workers Union alleged that Pizza Pizza Limited and other named respondents violated section 73.1. The Union began a strike on October 5, 1992. Furthermore, people were engaged to perform the struck work prior to January 1, 1993 and continued to do so after January 1, 1993. The responding parties brought a preliminary motion seeking that the Board dismiss the application because section 73.1 was only proclaimed on January 1, 1993. The Board had to determine whether section 73.1 applied to a situation in which a strike arose prior to the coming into effect of the section and continued thereafter. In finding that it did, the Board examined authorities dealing with the construction of statutes and the presumption against retrospective effect of newly-enacted legislation. It discovered that only legislation which attaches prejudicial consequences to prior events attracts the presumption against retrospectivity.

In this regard, the Board stated:

22. We are unable to see how applying section 73.1 in this case would constitute a penalty. The Labour Relations Act is not a penal statute and section 73.1 is not a penalty provision. Nor does section 73.1 attach any other kind of prejudicial consequences to events or behaviour which occurred prior to January 1, 1993. The "prejudicial consequences" of section 73.1, insofar as there are any, relate to current events or conduct which are (in this case) partly rooted in past events. This does not attract the presumption against retrospectivity.

23. Section 73.1 imposes no penalty and attaches no other prejudicial consequences to events or behaviour of an employer prior to January 1, 1993. Whether or not an employer

employed replacement workers prior to January 1, 1993, or indeed since then but prior to a strike becoming a "strike" within the meaning of section 73.1, is irrelevant. Section 73.1 merely prohibits the use, or continued use, of replacement workers after the date when the preconditions of section 73.1 are satisfied. ... (at page 380)

For these reasons, a majority of the Board concluded that section 73.1 applied to the facts and ruled that the application should proceed.

Reliable Bookbinders Limited

The second decision involved an application by the Graphic Communications International Union under section 91 of the Act dated January 12, 1993 alleging that an employer, Reliable Bookbinders Limited had violated section 73.1 by using replacement workers. This decision related to the threshold question of whether a lockout which had commenced on May 22, 1991 had ended or whether it continued past January 1, 1993 thus triggering the application of the replacement worker ban.

Notice was given to the Ontario and Federal Attorneys General because issues were raised by the Company and a group of employees concerning the constitutionality of the replacement worker sections and its application to a lockout commenced prior to January 1, 1993. However, these issues were never ultimately dealt with.

Chair McCormack, speaking for a majority of the Board on January 27, 1993, gave a "bottom line" oral decision holding that "the lockout of May 22, 1991 had not ended as a result of the letter of July 23rd..." which stated that "any employees who are prepared to return to work on the terms and conditions set out in (the company's most recent) offer, remain free to do so."

On February 2, 1993, counsel for the company wrote a letter to each employee which the Board found "clearly and unambiguously (states) that the lockout is over." The hearing then reconvened to determine whether this letter had ended the lockout and the Board gave a further "bottom line" decision stating that the lockout had been ended by the February 2, 1993 letter.

The Board then issued detailed written reasons dated July 27, 1993. These reasons first canvass in detail the jurisprudence respecting lockouts and its application to the particular facts and then, analyze and interpret the letters dated July 23, 1991 and February 2, 1993 to determine whether the lockout of the union members had ended.

The Board rejected the employer's argument that its July 23, 1991 letter had ended the lockout. The Board was not persuaded "that the company was no longer refusing to employ a number of employees for the purpose of compelling them to agree to terms and conditions of employment" and as a result found that the lockout continued. As the February 2nd, 1993 letters were found to be an "unconditional invitation to return to work" and clearly state that lockout is over, the Board found that such letters ended the lockout.

The Board noted that the Company was not attempting to:

compel employees by any means at all to agree to those changes. Rather it simply unilaterally imposed those changes upon them, whether or not they agreed. [para. 46 p. 18]

The employer was entitled to change the terms and conditions of employment as conciliation had been exhausted.

In considering the issue of whether the act of changing working conditions itself would be enough to constitute a lockout as opposed to changing such conditions in the context of bargaining and refusing to employ employees, the Board noted that:

The new provisions of sections 73.1 and 73.2 with respect to replacement workers bring this problem into sharper focus in terms of the overall scheme of the Act. If altering working conditions amounted to a lockout, it would mean that when an employer unilaterally imposed such changes, the replacement worker provisions would be triggered. This would, among other things, prohibit the employment of bargaining unit employees, except in certain circumstance, a result which may well be problematic from both the employer and the union's point of view. In other words, what might be considered a kind of constructive lockout under the reasoning of [Maloney Steel Limited, (1986) 16 Can LRB (N.S.) 270 (Alberta Labour Relations Board)] would be transformed into an actual lockout. There is no indication that the

legislature intended the ambit of the replacement worker provisions to extend to such a far-reaching result. (p. 15 para. 36)

In considering the employer's ability to change the terms and conditions of employment of employees (as they are allowed to do after conciliation), the Board stated

to the extent that such unilateral initiative suggests an imbalance of economic weaponry under the Act, this problem is significantly alleviated by the replacement worker provisions. (para. 47 p. 18)

Famous Players Inc. No.1

The Board again issued a brief "bottom line" majority decision dated October 7, 1993 of a Board panel chaired by Alternate Chair MacDowell. Formal reasons followed on December 16, 1993. The decision upheld the section 91 complaint of Local 357 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada that Famous Players had violated section 73.1.

The Board found it was a violation of section 73.1 for the employer to assign a "recently-transferred managerial employee" a Mr. Phillips to operate the "film projector and performing other ancillary functions in the projection booth" which were found to be the work of an employee in the bargaining unit that was on strike. The Board also found it to be a violation to use such a managerial employee to supervise the work of another employee, Christine Knudsen, as that function was the work of a bargaining unit employee.

The Board ordered Famous Players to discontinue using the managerial employee and stated it would deal with the claim for damages if the parties were unable to resolve that issue themselves.

Famous Players argued that the work of a manager Mr. Phillips in supervising another manager Ms Knudsen was not bargaining unit work and therefore could not be performed. The transferred manager

had the necessary skills required by the Theatres Act to supervise an apprentice employee in running the film projector. Here the apprentice employee was an on-site manager who could not lawfully carry out the work without the supervision of the transferred manager. Famous Players argued that such supervisory work had never been performed by bargaining unit personnel before and therefore was not bargaining unit work. The bargaining unit projectionist was sufficiently skilled that he did not require such supervision.

The Board rejected Famous Player's argument and found that:

the fact that the employer is trying to get that work done in a different way, using managerial personnel, does not alter its characterization as bargaining unit work. p. 19

The Board held that there must be a "more general or common sense approach" to determining "the work of an employee in the bargaining unit that is on strike," bearing in mind that the purpose is to "prohibit the substitution of replacement labour for that of bargaining unit members" p. 18

The Board found that evidence a function is specified in the collective agreement to be bargaining unit work is persuasive. However, past practice needs to be looked at differently since the "impact of a strike may well prompt an employer to modify the way in which the work is performed, so that there may not be an exact correlation with what went before." p. 18

Using this approach, the Board held that the work of an employee in a projectionists' bargaining unit was the operation of projection equipment and this requires a set of skills and a licence. While prior to the strike this was combined in one person, now it requires the two managers working together to do the work of the striking projectionist. Even on the basis of past practice and collective agreement terms, the Board found it was bargaining unit work since such supervision work had been done before by bargaining unit members and was covered by the terms of the collective agreement.

Famous Players Inc. No.2

The Board issued another brief written decision dated December 20, 1993 dealing with a further application by Local 357 in the same Famous Players strike. The Board again found that Famous Players had contravened section 73.1 when it used the managerial employee, namely Christine Knudsen, who was found to have been transferred to a struck location after the notice of desire to bargain was given. This decision is currently being judicially reviewed.

Once the employer was prohibited by the Famous Players No. 1 decision from using a transferred-in Manager, Mr. Phillips, to supervise the apprentice manager, Ms. Knudsen (who ordinarily worked at the location, the employer was forced to close down the Kitchener cinema location. The employer then decided to get Ms. Knudsen training in its other operations in order that it could reopen the cinema. Ms. Knudsen then worked 56.5 hours in Toronto cinemas and 576 hours in Montreal.

The issue before the Board was whether the employer's subsequent attempt to return the newly trained Manager to her previous Kitchener location was a "transfer" within the meaning of section 73.1(6) and therefore was an unlawful use of the services of a person transferred after the date of the notice to bargain.

The Board found that the employer's actions of relocating Ms. Knudsen to other locations to train her and then returning her to the Kitchener location did constitute a "transfer". Accordingly, the Board ordered the employer to stop using Ms. Knudsen at its Kitchener location. The Board reasoned as follows:

In short, the term "transfer" is in its ordinary sense capable of being applied to the facts before us. Further, we find no absurdity, and no irrational labour relations result in such an interpretation. The statute precludes an employer from using the services of a person who has been transferred into a struck location to perform bargaining unit work, where that person is transferred after the date that notice to bargain was given. There is no reason to read these provisions as applying only at the point at which notice to bargain is given, such that there is from that moment on, a fixed pool of persons not lawfully entitled to perform bargaining unit work. A person may be

lawfully entitled to perform bargaining unit work at the time notice to bargain is given. The language of the statute allows for the possibility that an employer will lose the capacity to use that person to perform bargaining unit where she is transferred out of the location and transferred back to the location. There may well be situations involving temporary absences which do not constitute "transfers" because they do not constitute any meaningful relocation of a person's place of work from one operation of the employer to another. p.12

The Board went on to find that the general thrust of section 73.1(5) and (6) is to:

focus on the type of attachment that an individual has to the (in this case) struck location or employer. A change to the nature of that attachment, and the date at which that occurs, may have consequences on an employer's ability to use that person to perform bargaining unit work during a strike. By focusing on these changes and the time at which they occur, the provisions of section 73.1 in a sense encourage the preservation of a status quo during the period of bargaining. They discourage employers from re-configuring their workplaces in anticipation and to avoid the effect of a strike, by limiting the type of persons that may be used as replacement workers. It is entirely in keeping with this notion to consider the status quo as having been broken when an individual is re-located to another place of operation to serve what is essentially a period of apprenticeship, to enable her to return to work, not so much as a manager, but as a projectionist. p. 12

The Great Atlantic & Pacific Company "Miracle Food Mart"

Chair McCormack, sitting alone, dealt with an application brought by The Great Atlantic & Pacific Company of Canada Limited under section 11.1 of the Act to restrict picketing and a section 91 complaint brought by United Food and Commercial Workers International Union alleging that the company was using replacement workers contrary to section 73.1.

Because the parties requested an immediate decision, the Board issued another "bottom line" decision in written form dated November 25, 1993, together with reasons which it noted were "extremely abbreviated". Further and more extensive reasons were released in a 27 page decision dated February 16, 1994.

The company was engaged in the business of selling retail food under the names of Dominion, A&P and Miracle Food Mart. On Tuesday, November 16, employees at 63 stores were in a legal position to strike and in preparation for this, the company halted delivery of perishable products to them on Saturday, November 13. On Thursday, November 18, the company decided to restock but later in the day, negotiations broke down and in a secret ballot, 96% of the employees voted to strike.

In accordance with its earlier decision, the company closed the struck stores. They also decided to pack up the perishables for re-sale or foodbank distribution and planned to bring them out through the picket lines. In the process of doing this, however, the company used the services of persons who ordinarily worked in non-struck stores out of its head office.

The company made two arguments: the employees at issue were not performing the work of striking employees when they were packing up and loading products on November 19 given the volume and freshness of the particular food involved. In the alternative, if the Board found that this was the work of bargaining unit employees, counsel argued that in the early hours of a strike, the Board should allow a certain grace period given that there was likely to be some confusion and taking into account as well the newness of the replacement worker provisions in the Act.

The union, on the other hand, was of the opinion that there was no authority to support the idea of a grace period. Further, they maintained that what was being done was the work of bargaining unit employees and that the decision to parachute workers in was made by the highest level of company management.

The Chair found that the company had improperly used replacement workers and the Board again rejected a narrow reading of section 73.1(5) 2. Instead, and in keeping with the structure of sections 73.1 and 73.2, the chair held that the "work of an employee in the bargaining unit" may encompass a significantly broader category of work.

There is no question on the evidence in this case that removing products from shelves, packing them up and loading them is work normally performed by bargaining unit employees. The argument that the work was beyond the reach of section 73.1(5)2 because of its unusual volume or degree of freshness suggests a reading of that provision which is very narrow, and one which is incongruous with the structure of sections 73.1 and 73.2. This is not to say that "the work of an employee in the bargaining unit" means only work ordinarily performed by bargaining unit employees; indeed, the contrast with section 73.1(5)3 which reads in terms of "the work ordinarily done" implies that the work of an employee in the bargaining unit may encompass a significantly broader category of work. However, at the very least it would apply to the type of work ordinarily performed by employees in the bargaining unit, and the distinctions urged upon the Board by the company in these circumstances are so fine as to be singularly unpersuasive. p.8

The Chair also rejected the company's argument that a grace period was allowed. Noting that section 73.2(11) did provide for a transition or interim period in which an employer may use employees during an emergency, the Board noted that the company did not base its arguments on that section. Further, the Chair found no evidence that the employees who had been doing bargaining unit work did so because of any state of confusion existing at the company.

Red Cross Society

This decision of a Board panel headed by Chair McCormack represents the first substantial written review of sections 73.1 and 73.2 by the Board and therefore will be described here in some detail.

Description of Complaint

The case involved a section 91 complaint by Locals 204 and 532 of the Service Employees International Union alleging that the Red Cross Society and other responding parties had violated sections 15, 73.1, 73.2, 65, 67 and 71 of the Act.

The Applicant Locals requested a declaration, an order prohibiting the use of replacement workers by all the responding parties, an order awarding damages to bargaining unit employees compensating them for wages and other remuneration lost as a result of the employer's failure to offer them an opportunity to perform replacement work due to failure to comply with section 73.2, an order awarding damages to the Locals for costs incurred as a result of the respondents' failure to comply, and the usual posting.

In light of the reverse onus in section 73.1(9), Red Cross and eleven other responding parties who appeared at the hearing proceeded first.

Facts

The case deals with a branch of the health care sector which provides a variety of therapeutic and support services to clients in their homes. It involved a strike by employees of the Red Cross at its Brantford and Dundas locations, who provide homemaking services such as personal care, laundry, cooking meals, shopping and banking to clients many of whom have recently been discharged from hospitals and need various kinds of rehabilitative or palliative care or for whom the homemaking care helps to delay their entry into an institution such as a nursing home.

Financing for this program is granted by both the Ministry of Health and the Ministry of Community and Social Services who fund Home Care agencies, here, the Brant County Home Care Program ("Brant Home Care") Hamilton-Wentworth Home Care Program-Victorian Order of Nurses ("HW Home Care") and the Regional Municipality of Hamilton-Wentworth Support Services ("The Region"). These agencies accept clients who require home care services, and then contract out to another set of agencies ("service providers") whose employees actually provide that care. Service providers bill the Home Cares on a regular basis and the fees paid as a result are regulated by the Ministry of Health.

Case managers employed by the Home Cares access clients referred to them and arrange for the appropriate services to be provided by one of the service providers with whom they contract. The Home Cares' case managers continue to be involved with the clients to some extent, reassessing them on a regular basis.

In this case, the Red Cross offices in Dundas and Brantford are "service provider" agencies, as their homemaker employees provide the homemaker services to the Home Care's clients.

The events which led to the union application were as follows. During bargaining the Red Cross warned the Locals as it had in the previous negotiations that in the event of a strike the Home Cares would take back the clients that they had referred to the Red Cross. The Red Cross even maintained that the threat of a strike might lead to a drop in referrals in the event of strike. Over the next couple of months, the Red Cross gave similar warnings directly to its homemaker employees. As a strike deadline approached, the Red Cross asked the Locals to consent to the use of some bargaining unit members during a strike for "critical" clients, but provided the Locals with no details other than the number of homemakers that might be required. The Locals at first refused, then asked for more information. The Red Cross next requested the Local's consent by letter, this time referring to "high risk clients", but again refused to provide the Locals with information regarding the need for the continuation of services during a strike. It did say it would indicate which employees it would need shortly, but never did so. No further attempts were made by the Red Cross to gain the consent of the union to the use of specified replacement workers.

Meanwhile, the Home Cares were aware that a strike was looming and consequently developed contingency plans. These plans in essence involved contacting other service providers to see if they could provide services to the clients that the Red Cross homemakers were currently servicing. Shortly before the strike, Home Care case managers stopped referring new clients to the Red Cross and

contacted existing Red Cross clients to discuss arrangements for homemaking with other service provider agencies in the event of a strike.

Accordingly, when the Red Cross went on strike, the Home Cares reassigned the Red Cross's clients to other service providers. In time Brant County Home Care reassigned 300-400 of 1200 clients, while the rest went without professional homemaking services. At first, this reassignment was temporary, then as the strike went on, the duration of the reassignment became less clear. Hamilton-Wentworth Home Care meanwhile permanently reassigned all its clients on the second day of the strike, and the Region made similar arrangements to replace the Red Cross homemakers that it was funding, in the event of a strike.

The effect of these arrangements was that homemakers employed by other service providers were now doing the work of the striking Red Cross homemakers in the same workplace as the striking employees had worked, namely, the clients' homes. Ten days into the strike, the Red Cross closed its Dundas homemaking office and terminated the striking Dundas homemakers. Shortly thereafter it applied for a final offer vote of its striking employees in Brantford, and notified them what had happened in Dundas. The Brantford homemakers then voted strongly against the Red Cross's final offer.

The Board described the relationship of the parties as follows:

The relationship between the Home Cares, Red Cross and the other service providers is structurally an arm's length one in the sense that there was no evidence of overlapping directors, and so forth. In addition, it is clear that the other service providers are actually competitors of Red Cross for referrals from the Home Cares. Red Cross does have a fairly close working relationship with the Home Cares because their staff communicate about the needs of the clients, but this appears to be the extent of it. There is no evidence that Red Cross requested the Home Cares to take the clients back or refer them elsewhere during the strike, although it is clear that it assumed that this would happen. In other words, Red Cross never thought that it would be stuck with clients for whom it could not provide service. Prior to the strike, Red Cross kept the Home Cares updated on the state of negotiations and the possibility of a strike. It also advised the Home Cares that it could not service clients during the strike. The Home Cares developed their contingency plans without Red Cross's involvement, although in one conversation, a Red Cross official suggested the names of several not-

for-profit service providers in this regard. There was no communication at all between Red Cross and the other service providers. When the Home Cares referred the clients elsewhere, Red Cross discharged them from its program. p. 14

The Parties' Arguments

The unions argued that the Home Cares and/or the service providers were acting on behalf of the Red Cross in accepting the Red Cross clients, and thus fell within the definition of "employer" under section 73.1. As a result, the employees of the service providers were prohibited replacement workers. In the alternative, the Unions argued that the Home Cares alone were employers of the homemakers, and that they contracted out to the service providers for replacement workers contrary to section 73.1(6)5.

The unions acknowledged that the evidence did not reveal any formal arrangements between Red Cross and the others, but argued that the actions of the Home Cares and the service providers relieved the Red Cross of the dilemma it would have been in as a result of the strike. This dilemma was one the legislation intended it to be in, and for which there was a comprehensive code with respect to the use of specified replacement workers.

In the alternative, the unions argued that the Board should define employer broadly in keeping with the purpose clause in section 2.1 of the Act, and the scheme of the replacement workers sections, where the intention was clearly to prevent replacement workers from doing struck work at the strike location (the "place of operations" in respect of which a strike or lockout is taking place). In interpreting "employer" in sections 73.1 and 73.2, the Unions asked the Board to look not only to the purpose of the provisions, but also by analogy, to sections 1(4), 64.1, and the allied doctrine for picketing, which were also relevant to the question of whether the responding parties were acting on behalf of Red Cross.

The unions argued that unless the Board found that what happened here violated the Act, it would be impossible for homemakers to organize since they would not be able to strike in any meaningful sense as the work will be immediately removed. In the unions' view, Red Cross had circumvented the scheme of replacement worker provisions, when it could easily have taken care of the critical clients and met its labour relations obligations by functioning within that scheme.

The unions also argued that the responding parties violated sections 65, 67, and 71 by choosing a course of action that destroyed the bargaining rights of homemakers when other courses of actions were available, and by intimidating and coercing homemakers through the sequence of events set out above. In this connection, the unions also assert that Red Cross was prepared to give up the clients because it wanted to set an example for its unorganized homemakers of the disastrous consequences of organizing.

The argument of Red Cross and the other responding parties may be broken down to three main submissions. First, they argued that sections 73.1 and 73.2 are not struck work provisions. To buttress this point, they argued that these provisions do not prohibit everyone from doing the work; rather, they prohibit certain categories of people from doing the work. Second, they argued that the "Home Care" agencies and the "Service Provider" agencies were not acting on behalf of Red Cross and in the absence of such a finding could not be found to be employers. These agencies were acting in their own interests and functioning completely independently. Third, Red Cross was not obligated to comply with the consent provisions under section 73.2 because it did not intend to use specified replacement workers and, in fact, was not employing replacement workers.

Board Decision

The Board dismissed the union's complaint that the respondents had violated sections 73.1 and 73.2 and found that neither the Red Cross, the Home Cares or the Service Providers had improperly used replacement workers.

...Purpose of sections 73.1 and 73.1...

In reaching its decision, the Board reviewed the purpose of the replacement worker provisions:

We adopt the submissions of several of the responding parties to the effect that the purpose of these amendments is to preserve the integrity and effectiveness of the strike as an economic weapon and to prove countervailing economic power to employees. In addition, both the unions and several of the responding parties referred us to material related to the legislative process which indicated that in a more general sense, the Legislature intended these provisions to reduce industrial conflict, facilitate the entry of women, collective bargaining, and encourage compromise. p. 24

...Intent...

The Board also rejected any suggestion that any specific intent was required to violate the sections although such intent may be relevant:

It is apparent that they are not "motive" provisions in the sense that anti-union animus or some specific kind of intent is required. Like section 81 which provides for a statutory freeze, an anti-union intent may be relevant, but not necessary. In contrast, for example, section 72(2) defines a "professional strike-breaker" as someone whose primary object is to interfere with, obstruct, prevent, restrain or disrupt the exercise of rights in connection with a strike or lockout, and provides that "strike-related misconduct" has a similar motive-oriented meaning. p. 24

...Scope of sections 73.1 and 73.2...

The Board reviewed these sections and found that they were very comprehensive in scope but did not purport to ban completely the performance of the work of striking employees. The Board stated:

Section 73.1 sets out various kinds of prohibitions with respect to the performance of work during a strike. Those prohibitions relate to the type of person or employee involved, the nature of the work, the location of the work, reprisals, and certain conditions and definitions. Section 73.2 then provides exceptions to those prohibitions, various procedures and rights with respect to the performance of work in those

exceptional conditions, a mechanism for agreement and provisions for directions and enforcement. p. 25

It is clear that these sections do not purport to ban the performance of the work of striking employees absolutely. For example, in addition to the named exceptions set out in section 73.2, the structure of section 73.1 permits the use of certain types of persons either explicitly or by omission. At the same time, however, it is also apparent that the prohibitions are very comprehensive in scope, particularly in the case of work performed at the strike location. p. 25

...Restrictions at struck work place...

As the restrictions differ depending on whether the work is being performed at the struck work place (see section 73.1 (6)) or at any other place of operations of the employer (see section 73.1(5)), the Board first analyzed the following definition of "at a place of operations in respect of which the strike or lock-out is taking place." and applied it to the facts:

"place of operations in respect of which the strike or lock-out is taking place" includes any place where employees in the bargaining unit who are on strike or who are locked out would ordinarily perform their work.

The Board held that the situation fall within the more stringent prohibitions of section 73.1(6) as the homemakers ordinarily perform their work in the home of a client and the homemakers furnished by the replacement service providers were also provided in the same homes. Therefore each client's home was a struck location and the work performed by the homemakers provided by the other service providers was struck work.

The Board reasoned as follows:

a reading of sections 73.1(5) and (6) together indicates that the Legislature intended that there be a more comprehensive ban on the performance of work at the strike location, presumably in part because that location is considered a more sensitive flash point with respect to picket line conflict. In this case, the homemakers ordinarily perform their work at the home of the client, making it a place of operations in respect of which the strike or lock-out is taking place. There was no dispute that the employees of the service providers currently furnishing homemaking services to those clients are also doing so at the home of the client, as the nature of the service itself implies. As a result, this

situation falls within the more stringent prohibitions set out in section 73.1(6). pp. 25-26

Despite this finding that replacement homemakers were performing the work of the striking homemakers at the struck location, the Board went on to find that the replacement worker prohibition was not available to these homemakers:

Critical to this case however, is the fact that section 73.1(6) prohibits the employer from using the persons described to perform the relevant work. In the circumstances before us, the evidence make it clear that Red Cross was not itself using anyone to do the work in question.
p. 26

...Expanded definition of employer....

The Board then considered whether the expanded definition of "employer" found in section 73.1(1) applied to the Home Cares and/or the Service Providers.

"employer" means the employer whose employees are locked out or are on strike and includes an employers' organization or person acting on behalf of either of them:

"person" includes,

- (a) a person who exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations, and
- (b) an independent contractor; p. 26

The Unions had argued that the Board should give the word "employer" a meaning which would sweep in both the Home Cares and the service providers, based on the concept of the allied doctrine with respect to picketing, an analogy to section 1(4) of the Act with respect to related employers, the kind of reasoning the Board uses in considering who is the real employer in contracting out circumstances such as those reflected in Kennedy Lodge, (1984) OLRB Rep. July 931, and the purpose of the provisions in a manner consistent with Haldimand-Norfolk (No. 3) (1989) 1 P.E.R. 17.

The Board concluded that the Home Cares and the Service Providers could not be considered to be "employers" within the meaning of section 73.1(1) because they did not exercise sufficient control over them: The Board reasoned as follows:

the definition of employer in section 73.1(1) is exhaustive, rather than inclusive, unlike the definition of "person". In light of this, and keeping in mind the specific expansion set out in the provision with respect to persons acting on behalf of the employer, the plain meaning of "employer" alone does not at first glance suggest that it would encompass, for example, arm's length competitors like the other service providers in this case. We accept the sound proposition in Haldimand-Norfolk, supra, that we should be giving "employer" a meaning most consistent with the purposes of these provisions. However, it must also bear some relationship to the plain meaning of the word itself, a match that can be made in the circumstances of Haldimand-Norfolk, supra, but which is very weak here. Even with respect to the relationship between the Home Cares and Red Cross, it is quite simply stretching things to describe the Home Cares as employers of the Red Cross homemakers on the facts before us. We accept that the fact that Red Cross hires, fires, disciplines, trains, directs, supervises and pays the homemakers is not necessarily determinative; the Board has made it clear in both Kennedy Lodge, supra, and Brantwood Manor Nursing Homes Limited, [1986] OLRB Rep. Jan. 9 that it is not merely a question of which party performs these functions, but how they do so and to what degree. In this case, however, the facts do not give rise to a finding that the Home Cares have the kind of fundamental control over the homemakers that would establish they were in reality their employer. pp. 28-27

...Section 1(4) relationship...

The Board specifically declined to comment on whether the various relationships between Red Cross, the Home Cares, and the other service providers amount to the circumstances which would qualify for a declaration under section 1(4) of the Act since the applicants subsequently made such an application, which is currently adjourned sine die other than to note that it did not explore some of the qualifications and nuances in the evidence which might relate to that issue.

..."Employer" since "acting on behalf" of Red Cross...

The Board also rejected the Unions' argument that the Home Cares and the service providers were acting on behalf of Red Cross.

In doing so, however, the Board refused to accept the argument put forward by the Home Cares and the Service Providers that a party could not be acting on behalf of another if it had a sustainable business reason of its own. The Board found that its decision, T. Eaton Company Limited, [1985] OLRB Rep. June 941 did not stand for that proposition.

The Board concluded that for a party to be "acting on behalf of" another, at least part of the reason for an action must be to benefit that party or be at the behest of the other party.

The Board reasoned as follows:

We agree that it is indeed a useful part of the process of attempting to identify why a responding party is embarking on a particular course of conduct to consider whether they have a business reason. However, this is simply part of the process of examining the facts of a case and drawing reasonable and probable inferences in the particular circumstances. It does not suggest that the existence of such a reason is determinative, but rather that it will be a significant fact among others in coming to relevant conclusions. A party may well be acting on behalf of another and at the same time, have business reasons of its own for a particular course of conduct. p. 28

Because the issue of whether a person is "acting on behalf" of another is essentially factual, we think it would be a mistake to overanalyze it or set up some more elaborate test, as some of the parties argued. The plain meaning of the phrase suggests that to come within its ambit, at least part of the reasons for a party's activities must be to provide some benefit to another or at the behest of another. p. 28

The Board then reviewed the facts of the case and found that there was no evidence to suggest that even part of the reason why the Home Cares and the Service Providers had acted to provide replacement workers was to aid the Red Cross in its opposition to the strike or that there had been any agreement to hold the clients during the strike. The Board stated:

The other service providers in this case did nothing to assist Red Cross in any way. They were competitors who were only too pleased to obtain either a share of the work, or a larger share of the work at the expense of Red Cross. The only restraint shown in this regard related to the service provider who did not wish to jeopardize its relationship with SEIU. This competitiveness was even manifest in one of the other not-for-profit service providers who was also happy to pick up the clients and indicated that if Red Cross was out of the picture permanently, it wished to submit a proposal for the work. The service providers accepted the work solely to improve their own positions, and with no interest or intent to assist Red Cross in any manner. There was some indication that they were interested in assisting the Home Cares; that, however,

was clearly based on the status of the Home Cares as a source of business, and a desire to use this opportunity to obtain more of that business. In any event, that would only be relevant for our purposes if the Home Cares were acting on behalf of Red Cross. Again, we find on the facts before us that this is simply not the case. p. 28-29

The Board did find that if employers who were competitors did act in a tacit kind of mutual aid relationship during a strike this could be "acting on behalf of".

In this connection, we accept that where employers who are normally competitors conduct themselves so as to provide a kind of tacit, mutual aid arrangement during a strike, that may amount to "acting on behalf" of one, whether or not, for example, it would also amount to making them allies for the purposes of picketing. However, those are simply not the facts before us. p. 28

The Board dealt as follows with the Unions' argument that the effect of the actions of the Home Cares and the Service Providers in relieving the Red Cross of its caseload during the strike was to provide a benefit to the Red Cross.

We accept that it is important to make these assessments in context, and that in the health care sector, relieving a not-for-profit agency of clients it could no longer service might well be a significant benefit, particularly in an agency so concerned about its reputation as some of the evidence indicated. We also accept the proposition in I. Eaton Company Limited, supra, to the effect that intent may be inferred in those circumstances. Indeed, the fact that the action of the Home Cares extricated Red Cross from precisely the pressure that a strike in the health care sector exerts might well lead us to the conclusion that it was acting on behalf of Red Cross in other circumstances. However, in this case, the evidence made it clear that the Home Cares took the clients back because they felt both legally and morally obliged to provide them with service. In fact the Home Cares, far from wishing to assist the Red Cross, acting with somewhat ruthless disregard for its welfare. The most obvious example of this is the decision of HW Home Care to make the new assignments permanent, a decision it maintained even in the face of information that it would mean the closing of the Dundas service of Red Cross. To some extent it appeared that this decision was made with reference to HW Home Care's legal position; it was certainly difficult to justify on the basis of continuity of care given the very early point in the strike when it was made. Even discounting for some self-serving aspect, however, it amply demonstrates the relative indifference with which the Home Cares conducted themselves in relation to Red Cross. p. 29

In other words, the facts of this case do not fit into the language of section 73.1, even on the most generous interpretation. As a result, and in the absence of a finding that the Home Cares, the service providers and Red Cross are related employers under section 1(4), we find that neither the Home Cares or the other service providers were either employers of the homemakers or acting on behalf of Red Cross so as to bring themselves within the expanded definition of employer in section 73.1.

...Broad interpretation of "use" ...

The Board also rejected the Unions alternative argument that the term "use" in section 73.1(6) should be interpreted broadly enough so that even if "employer" did not include the Home Cares or the service providers, the Board should conclude that Red Cross was indirectly using the employees of the service providers so as to bring them within the ambit of the ban. The Board reasoned as follows:

.. the relationship between Red Cross and the homemakers employed by the other service providers was so remote as to defy even the most liberal construction of "use". Among other things we note again that the service providers were arm's length competitors, that they were not acting on behalf of Red Cross and that Red Cross had no control or even influence over either the other service providers or the homemakers employed by them. These are not circumstances which lend themselves to the conclusion that Red Cross was using the other service providers' employees. The effect is that neither they nor Red Cross violated section 73.1, since there is no evidence that Red Cross itself utilized replacement workers. p.30

...No Violation of Section 73.2...

The Board found, on these facts, that there was no violation of section 73.2 and rejected the Unions' argument that the Red Cross had an obligation to use the mechanisms set out in section 73.2 concerning negotiating with the union about using specified replacement workers. The Board reasoned as follows:

Since we have found that the ban on replacement workers does not extend to the other responding parties, and since Red Cross did not itself attempt to use replacement workers, whether or not Red Cross conducted itself in accordance with the mechanisms for agreement or resolution with respect to the use of specified replacement workers or bargaining unit employees is not in issue, at least for the purposes of considering a violation of section 73.2. p.30

...Board concerns about effect of decision...

After reaching the conclusion sections 73.1 and 73.2 did not protect the striking Red Cross workers, the Board noted the following concerns:

We cannot leave this subject without noting with some concern the contrast between the intent of these provisions and their application in this context, where structural contracting out has diffused accountability between the Home Cares and the service providers. The effect of this is the bargaining rights. We recognize that in choosing how far these provisions will reach out to cover strangers to the employment

relationship, the Legislature has drawn what would normally be reasonable lines. The result, however, in these circumstances is troubling. p. 30

The Board did find, however, that the Red Cross's actions in threatening employees with the loss of their jobs if they went on strike did amount to an unfair labour practice contrary to sections 65, 67 and 71 of the Act. The Red Cross Society is currently arguing that the Board had no jurisdiction to issue that part of the decision as it alleges the complaint was withdrawn.

Canada Stamping and Dies Limited

This most recent Board decision deals with two issues; firstly, whether the strike vote met the preconditions in section 73.1 (2) for the replacement worker provisions to apply and secondly, the application of section 73.1 to part-time and occasional employees who are not part of the bargaining unit, as well as to an employee who was promoted out of the bargaining unit to a management position created after the date of the notice to bargain.

Strike Vote Preconditions

The Board concluded that a vote conducted 4 months before the strike took place met the requirements of giving the employees a reasonable opportunity to vote. The Board found that:

there was no indication that any event bearing on the employees opportunity to vote on the issue occurred between the holding of the vote and the calling of the strike. If a lapse of time, without more, between the authorization and calling of a strike had been intended to be a bar to relief, it would have been up to the Legislature to make that clear. p.5

The Board also rejected the employer's arguments both that 6 days notice of the vote was insufficient and that the notice had only referred to voting "in favour" of a strike.

The Board found that it was clear the voters were being asked to give the Union a strike mandate and the statute did not specify the question that must be put to voters. As to whether sufficient notice was given, the Board found that the notice was posted prominently; all of the eight employees in the unit were told verbally as well; all eight employees voted; and no employee complained of the lack of notice. Further, an employee whose recall rights had expired and who was not given notice was not an employee in the bargaining unit. In any event, the Board found that, given the breadth of the margin in favour of the strike, his vote would not have affected the margin of 60% even if the vote had been against striking.

The Meaning of "Engaged"

Section 73.1(5) provides that an employer shall not use a person who is "hired or engaged" after, on our facts, the date of the notice to bargain, to do the work of an employee in the struck bargaining unit. The Board found that this section

demonstrates a general legislative intention to limit the employer's use of new people to do the work of striking employees. Union counsel referred to this as a "snapshot" taken at the earlier of the notice to bargain or the commencement of bargaining which is then frozen if the strike takes place. p.6

The Board found that the Legislature must have intended the term "engaged" to mean something different from "hired" since the terms "hired or engaged" were both used. The Board held:

Engaged is used in the passive voice, i.e. the person is engaged by the employer, but the statute does not further qualify the term. It is clear that it was meant to, at least, cover persons who were not paid, as the employer argues. However, there is nothing in the section to indicate that it is limited to that meaning. We are of the view that an appropriately purposive interpretation of the word "engaged" in context includes contracting with a person for a specific task or discrete period of time. p.7

"The work an employee in the bargaining unit"

Section 73.1(5) restricts replacement workers from doing "the work of an employee in the bargaining unit." The Board stated that while the terms of the collective agreement are "centrally important" to defining this "work", it is also important to look at "what work the bargaining unit employee was doing rather than whether or not it is specifically addressed by the collective agreement." p. 7.

The Board adopted the following approach to defining what such work is:

We note firstly that the Legislature did not use the wording "bargaining unit work", words sometimes associated in labour relations parlance with the idea of work reserved to the bargaining unit. Rather, the legislature used wording which appears broader as it focuses on the work of the employee, i.e. what he or she actually has done, which may be more or different than what is mentioned in the collective agreement. p.7

(Citing arbitral jurisprudence) An approach which looks to the substantive, regular content of the work of an employee in the bargaining unit is the most appropriate in our view. p. 7

As to functions performed by both employees inside and outside the bargaining unit, they may be the work of both. In order to give a sensible interpretation to the section as a whole, it may be appropriate to determine where the work of any employee in the bargaining unit leaves off and that of an occasional begins by reference to the relationship if any between the work of each type of employees, including the relative proportion of work done in normal, non-strike periods. p. 8

The Board then applied this approach to a number of different fact situations which the Union alleged were the unlawful use of replacement workers.

...Creation of management position after the notice to bargain...

The Board found that the promotion of a bargaining unit person to a management position newly created after the notice to bargain is a circumstance covered by the term "hired or engaged". Accordingly, the new manager was prohibited from doing the work of the bargaining unit or the work of anyone performing that work.

The Board stated:

Although the legislation does not list that particular eventuality, we are of the view that it was not necessary. The general word is broad and it is sensible that the legislature did not attempt to anticipate every fact situation. It is very clear that if a new management position had been created and filled by someone not already in the employ of the company, it would be covered by section 73.1(5). We are not of the view that, from a purposive point of view, it should matter whether the position is filled from individuals who had been working in a different position for the employer, or by a new employee. Section 73.1(5) seems squarely aimed at "extra" people., people beyond the employee complement in place at the date of notice to bargain. It is not clear that the section was meant to focus on the individual identity of the person in question. From a purposive point of view, the size of the complement available to do the work of the striking workers seems more central. Creating and filling an extra position in management directly before a strike, especially when the job purports to bring with it work of employees in the bargaining unit, appears to be at odds with the purpose and general scheme of the replacement worker provisions set out above. As it was put in *Famous Players Inc.*, cited above, at paragraph 42, the statute prohibits employers from using replacement workers to get the strikers' job done. p. 12

...Contract employee doing incidental driving...

The Board allowed the employer to employ someone after the notice to bargaining to do "driving", since the Board found that "driving" was work that was ordinarily performed by an outside carrier and was only "incidental to the work of the employees in the bargaining unit." p. 14

...Casual or part-time employee offered new work at start of strike...

The Board found that the Production Supervisor's wife had, prior to the strike, worked on a casual basis to "fill in". She worked as an adjunct to the regular complement of people for a specific period or task to cover events such as "things gone wrong". At the commencement of the strike she was specifically brought in to do the very work which the bargaining unit employees would normally do.

As a result, the Board found that she was "engaged" since the notice to bargain had been given. The Board rejected the employer's argument that she was engaged long before the notice to bargain and found rather that she was "engaged anew each time she committed to a specific task or a particular period of time." p. 16

In finding this, the Board noted that she was able to turn down any engagement offered to her. The

Board reasoned as follows:

There was no regular pattern of work reserved to her nor evidence of her use to staff the plant on some kind of ongoing basis, as in other industries where casual and part-time employees are used to staff the normal work of the enterprise, if on a more flexible basis of scheduling. p.16

The Board therefore concluded that:

the circumstance of being offered a new engagement at the outset of the strike to do the normal work of the bargaining unit, rather than excess or things gone wrong, is one that we find in breach of section 73.1(5). p. 16

The Board also found improper the similar use of the owner's son who was a full-time student and worked prior to the strike on a casual basis but less frequently than the Production Supervisor's wife. The Board noted that the less tenuous nature of his relationship to the workforce made it even more appropriate that he not be allowed to do the work of the bargaining unit during the strike.

...Mailed posting ordered as relief...

As in prior cases, the Board ordered the employer not to use the prohibited employees and to cease and desist from violating the replacement worker provisions. This time the Board also issued a posting order.

The employer was required to mail to each of its employees within one week of receipt of the decision a posting which stated that the employer had violated the Act in using certain employees and had not violated the Act when it used the driver.

6. Conclusion

This paper has reviewed the Board's seven decisions dealing with the replacement worker provisions. It is apparent from the relatively few applications dealing with these provisions, the number of

settlements reached, that the replacement worker law is being implemented relatively uneventfully.

We are able to draw certain conclusions from the Board's decisions dealing with sections 73.1 and 73.2. Firstly, the Board generally is taking a purposive approach to the provisions and analyzing the effect of an employer's actions to stop improper attempts to use prohibited persons from doing the work of the bargaining unit. Secondly, the sections do not raise a presumption against retrospectivity and, consequently, apply to strikes which started prior to January 1, 1993 and continued thereafter. Second, instances where an employer unilaterally alters working conditions (outside of the context of bargaining and refusing to employ employees) cannot be construed as a "constructive lock-out" and trigger the sections. Third, there is a large loophole affecting employees working in the broader public sector. It appears a public agency can take away the contract from their employer, which is the basis for their employment, and give it to another agency which offers similar services. That agency can then send its employees to do the striking employees work without triggering the replacement worker law.

Many issues still remain to be litigated.

In conclusion, sections 73.1 and 73.2 are far from the draconian amendments some quarters made them out to be. The Board is taking great care to balance the need for expediency and the need for well-reasoned decisions which will guide labour practitioners in their future dealings with the replacement worker provisions.