application No 88-001

GOVERNMENT OF PRINCE EDWARD ISLAND

LABOUR RELATIONS BOARD

M. Lynn Murray, B.B.A., LL.B
Chairman

Roy J. Doucette
Chief Executive Officer

DEPARTMENT OF LABOUR
P.O. BOX 2000
CHARLOTTETOWN
PRINCE EDWARD ISLAND
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DECISION

RE: APPLICATION TO WITHDRAW PREVIOUSLY FILED APPLICATIONS WITHOUT IMPOSITION OF A TIME-BAR AND FILE NEW APPLICATIONS FOR CERTIFICATION

BETWEEN:

NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA), CANADIAN AUTO WORKERS

APPLICANT

AND:

UNITED FOOD AND COMMERCIAL WORKERS' UNION, LOCAL 1252 (IN TRUSTEESHIP) and UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION

INTERVENORS

Counsel for the Applicant - David W. Hooley

Counsel for the Intervenors - Eugene P. Rossiter

1. The Application presently before the Labour Relations Board (hereinafter referred to as the Board), involves a request made to the Board on June 6, 1988 by the National Automobile, Aerospace and Agricultural Implement Workers' Union of Canada (CAW-Canada), Canadian Auto Workers (hereinafter referred to as CAW-Canada) to withdraw the Applications for De-Certification and the Applications for Certification filed with the Board on June 11, 1987 with respect to Cavendish Farms and those filed on May 8, 1987 with respect to Garden Province Meats (1985) Inc. Contingent upon these requests being granted by the Board without imposition of a Time-Bar, CAW-Canada has also submitted new Applications for Certification dealing with the two Plants noted aforesaid, said applications being received by the Board on June 6, 1988.

2. CAW-Canada and the Intervenors (hereinafter referred to collectively as UFCW) have a somewhat litigious history before the Board and the Supreme Court of this Province. Suffice it to say that since the first Applications were filed with

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the Board in May and June of 1987 on behalf of CAW-Canada, both parties have been before either the Board or a division of the Supreme Court of this Province. The recent decision of the Prince Edward Island Supreme Court, Appeal Division on May 24, 1988 affirmed the decisions of the Honourable Kenneth R. MacDonald, Chief Justice of the Prince Edward Island Supreme Court, Trial Division. At the trial level, MacDonald, C.J.T.D. quashed all decisions of a previous panel of the Board because an apprehension of bias existed. In affirming the trial decisions, Mitchell, J.A., in writing for the Court of Appeal stated at page 3:

> A new panel should be struck by the Chairman of the Labour Relations Board as soon as possible to deal with all the applications before the Board to which the Appellants and Respondents are parties. ...

3. A new panel was, in fact, struck, but prior to the panel convening dates for hearings, the Board was requested by CAW-Canada to permit the withdrawal of the previous Applications it had filed with the Board (which Applications will hereinafter be referred to as the "Old Applications") without imposition of a Time-Bar and file new Applications for Certification upon this event occurring. While CAW-Canada requested this Board's permission for the withdrawal of the Old Applications, without imposition of a Time-Bar, and file the most recent Applications, if the Board saw fit to impose a Time-Bar, CAW-Canada indicated it would rely on the Old Applications. While the preferable course would be for an Applicant to elect which course it wished to proceed with, for the reasons hereinafter stated, it will become evident that it was unnecessary for the Board to concern itself with this point.

4. By a letter under date of June 8, 1988, addressed to the Board, Counsel for UFCW raised a number of matters which were referred to as preliminary issues. While some of those matters are felt by the Board to have no immediate relevance to the application currently before the Board, the issues of whether or not the Old Applications could be withdrawn, new ones filed and/or a Time-Bar imposed were clearly raised. By a letter addressed to the Board and bearing the date of June 23, 1988, Counsel for CAW-Canada addressed the issues raised in the letter from UFCW Counsel under date of June 8, 1988. Counsel for CAW-Canada indicated that the issues raised as numbers 1 and 2 in the June 8, 1988 letter were the "only legitimately preliminary issue (sic) raised". This reference dealt with whether or not the Applications could be withdrawn, whether or not a time bar should be imposed and whether or not new applications should be filed. After the above noted correspondence was received, the Board on July 4, 1988 received correspondence from Counsel for UFCW which enumerated in clear and concise terms the objections of UFCW to the Old Applications being withdrawn without imposition of a Time-Bar and the new applications being filed in their place and stead.

5. The Board commenced hearing this matter on July 4, 1988, which hearing was continued on July 7, August 9, August 10, August 11, August 13, and September 10, 1988. Post Hearing Briefs were to be submitted on September 26, 1988 and were in fact received by the Board on that date. Any rebuttal briefs were to be filed with the Board on September 28, 1988.

6. At the hearing on July 4, 1988, CAW-Canada elected to call no evidence in support of its Application, but rather it sought to rely on a Pre-Hearing Brief which was marked as Exhibit A-3. In Exhibit A-3, CAW-Canada stated that the primary reason for seeking the Withdrawal of the Old Applications was to enable this panel of the Board to have fresh membership evidence in front of it and not be "beseiged with the baggage of past events and past Board decisions" (page 7 - Exhibit A-3). The Board does not believe it is beseiged with the "baggage of past events and past Board decisions" as the Prince Edward Island Supreme Court, Appeal Division affirmed the trial decision which quashed all past decisions of the Board including those that were administrative in nature. In light of this ruling, the Board has no prior decisions to contend with, and in effect only has the Old Applications before it.

7. In Exhibit A-3 and its submissions to the Board, CAW-Canada raised the issue of "Motive", and while suggesting that Motive was relevant, CAW-Canada did not call evidence to demonstate that its Motive was either proper or improper. The submissions made by CAW-Canada on this point would appear to indicate that the Motive behind the current application relates only to providing the Board with fresh membership evidence to enable it to assess the applications for Certification. However, a Pre-Hearing vote is and has been requested and the Board is of the view that the Pre-Hearing vote, if a vote was in fact ordered, would provide the Board with the fresh information that CAW-Canada state the Board requires .

8. UFCW, on the other hand, called extensive evidence at the hearing into whether or not the Board should grant permission to withdraw the Old Applications. At the conclusion of the evidence called on behalf of UFCW, CAW-Canada sought to call evidence in the nature of rebuttal. While unusual in practice in light of the fact that it had called no evidence, the Board permitted CAW-Canada to adduce rebuttal evidence. The Board determined that in accordance with Sub-section 3(11) of the Labour Act, R.S.P.E.I. 1974, Cap. L-1, it had the authority to make this determination and so ordered.

9. The first issue the Board must address its mind to is whether or not it has jurisdiction to grant or refuse an application to withdraw previously filed Applications. After considering the legislative authority found in the Labour Act, supra, namely, Subsection 3(11) and Section 4, as well as reviewing the common law, the Board has determined that it does in fact have the jurisdiction to decide whether or not any application or applications should be withdrawn.

10. Turning now to the issue of whether or not a Time-Bar should or could be imposed if the withdrawal was granted, the Board has referred itself to Sub-section 12(7) of the Labour Act, supra which states:

> If the board is not satisfied that the applicant trade union is entitled to be certified under this section, it shall dismiss the application and may designate the length of time that must elapse before the same applicant may make a new application.

While this provision does contemplate the imposition of a Time-Bar, the Board is of the view that the proceedings presently before the Board are not at the stage

to permit the Board to determine whether or not the Old Applications should be dismissed. Section 12 of the Labour Act, supra deals with whether or not the unit is appropriate for collective bargaining, and whether or not the majority of employees support the trade union in question. While the Board has heard some allegations pertaining to these matters, it does not believe those points have been adequately addressed to permit the Board to make such a decision. The Board notes that the only matter before it is the Application to withdraw the Old Applications. There is no application before the Board to dismiss the Old Applications and it is not the practice of the Board to make decisions or determinations on matters not currently before it.

11. In light of the foregoing comments, the Board is of the opinion that there is no legislative authority to impose a Time-Bar without dismissing the Old Applications. Since the Board does not believe any application to dismiss the Old Applications is before it, and in any event, the matters necessary for a dismissal have not been argued sufficiently, the Board does not believe it appropriate to make an order dismissing the Old Applications. This being so, the Board does not believe it has the jurisdiction to impose a Time-Bar on an application to withdraw any previous applications.

12. UFCW argued, during the course of the Hearing, that the Motive of CAW-Canada in requesting the withdrawal was questionable as there were irregularities in terms of the Old Applications filed with the Board that could permit the dismissal of the Old Applications at a later time. These perceived irregularities were confusion, intimidation and coercion of the employees of both Cavendish Farms and Garden Province Meats (1985) Inc., non-paid up cards being submitted to the Board as proof of membership evidence and documents required to be filed with the Board not in fact being filed. Much of the evidence adduced by UFCW was directed at demonstrating that there was confusion, intimidation and coercion of employees at the two plants during the 1987 card signing campaign, as well as irregularities in the membership evidence submitted to the Board with the Old Applications.

13. On this latter point, the Board heard evidence from Brian Williams who testified that he did sign a CAW-Canada card during the 1987 campaign. The Board has, in fact, reviewed the membership cards submitted and has determined that a card bearing the signature of Brian Williams was, in fact, submitted with the application for certification in the Cavendish Farms situation. Brian Williams also testified that he did not pay the $2.00 membership fee to join the Applicant Union at the time the membership card was signed nor did he pay the fee at any time thereafter. Two witnesses testified for CAW-Canada with regard to this point, namely, Arnold Gallant and Gordon Whitlock. Mr. Gallant testified to the fact that it would have been irregular if Mr. Williams had not paid the $2.00 but he did not remember him specifically paying it. In this regard, the Board has reviewed the transcript of evidence (August 11, 1988; Vol. II, page 253) and specifically re-states the relevant parts thereof, namely:

> Mr. Rossiter: Mr. Gallant, to the best of your recollection, you don't know if he paid the two dollars? You can't specifically remember him, here's the two dollars? It would have been unusual if he didn't pay the two dollars?
>
> Mr. Gallant: Yes, it would have been unusual and I would have remembered that, yes.

Mr. Rossiter: I didn't ask if you remembered, I said it would have been unusual?

Mr. Gallant: Pardon?

Mr. Rossiter: It would have been unusual not to pay two dollars?

Mr. Gallant: Not to pay two dollars, yes.

Mr. Rossiter: But the fact that you don't specifically remember him paying the two dollars, specifically recall specifically him handing the two dollars in cheque or in cash or in change, you don't remember that specifically, do you?

Mr. Gallant: No.

14. The Board has reviewed the evidence of Mr. Whitlock who stated that Mr. Williams handed him the two dollars. In this regard, the Board is left with the evidence of Mr. Williams who states he did not pay the two dollars, Mr. Gallant who does not specifically remember it being paid and Mr. Whitlock stating it was, in fact paid. From the foregoing conflicting testimony, the Board must determine who it will believe.

15. The Board has reviewed the case law submitted on behalf of CAW-Canada and specifically the case of United Steelworkers of America v. Lilo-Rail of Canada Limited and Modern Plating Company Limited v. Group of Employees ,[1983] O.L.R.B. Rep. May 672. The Board agrees wholeheartedly with the comment expressed therein at page 675 where it is stated:

> When the Board inquires into such alleged fraud and, as so often happens, finds itself faced with diametrically opposed evidence on the one hand from the collector and on the other hand from the person who signed the card, so that credibility is the only issue and there is nothing to choose between their evidence, the Board will usually give effect to the signed statement appearing on the membership and receipt card acknowledging payment of the dollar. ... [emphasis added]

The Board agrees that if there is nothing in the evidence or in the demeanor of the witnesses to assist the Board in determining who was the more credible witness, the Board would likely give effect to the signed statement on the membership card signed by Mr. Williams. Here, however, the Board does not find itself in that position.

16. The Board has reviewed the evidence and bases its conclusion in part on the demeanor of the witnesses. The Board found Mr. Williams very forthright, and a person who had no hesitation in answering the penetrating questions posed to him on cross-examination including some dealing with a very personal problem. It was later demonstrated by Mr. Gallant and Mr. Whitlock, that these questions had no relevance to the events on the day in question. The Board has heard evidence that Mr. Williams is now employed by Summerside Sea Products, and thus has no vested interest in the situation that currently exists at Cavendish Farms.

17. While Mr. Gallant could not specifically remember Mr. Williams paying the two dollars. on the other hand, Mr. Whitlock was certain the two dollars was paid. Hence, the Board is left with the conflicting testimony of Mr. Williams on the one hand and Mr. Whitlock on the other hand.

18. Having assessed the demeanor of Brian Williams and Gordon Whitlock, the Board prefers the evidence of Mr. Williams. For the reasons noted herein, the Board finds as a fact that the membership card of Mr. Williams was, in fact, submitted to the Board when he had not, in fact, paid the $2.00 membership fee.

19. Although the issues of coercion and intimidation were addressed, it is unnecessary for the Board to rule on these issues at this point in time.

20. Finally, while there was some suggestion advanced regarding the filing or non-filing of certain documents, this point was not adequately addressed for the Board to make a ruling on same and thus it will not presuppose arguments that will undoubtedly be made at a later time on this issue. Although the Board has determined that it is not necessary to deal with any of these points at this stage, the Board notes that these issues may be relevant to the next stage of the proceedings.

21. In the Post-Hearing Brief filed on behalf of CAW-Canada, at page 3 thereof, it is submitted :

> The request before this panel of the Board is simply to allow CAW-Canada to withdraw its old certification applications and to replace them with the fresh applications and fresh membership evidence, which is the best evidence available to the Board, (short of a pre-hearing representation vote), to measure the continued degree of employee support for the Applicant CAW-Canada. ...

After hearing the evidence and reviewing the submissions of Counsel for both parties, the Board is of the unanimous opinion that it will not permit the withdrawal of the Old Applications. The Board is not convinced that the only reason for requesting the Withdrawal is to put fresh evidence before the Board. By the very submissions of CAW-Canada, it has indicated that better evidence would be a Pre-Hearing Vote. The Board can take notice of the fact that this very vote has been requested in the new applications that were submitted to the Board on June 6, 1988, while not requested in the Old Applications filed in 1987.

22. The Board is also accutely aware of the fact that it was asked on no less than three occasions during the course of the hearing to order a vote. The Board ruled on all three occasions that it did not feel it had the jurisdiction to order a vote until the issue of which Application was going to be before the Board was ultimately determined. To put it in plain terms - The Board would be ordering a vote but have no idea on which application it would be so ordering; - On the Old Applications that CAW-Canada was seeking to withdraw, or on the new Applications that technically had not been filed with the Board, although they had in fact been submitted. The Board determined that any decision regarding a vote would be premature until this very issue was resolved.

23. A further reason for denying the request of CAW-Canada is that valid labour relations reasons for the withdrawal have not in fact been demonstrated to the Board. A review of the cases dealing with this issue seem to indicate that this is a crucial factor that must be proved. This Board can see no good reason to allow the withdrawal of the Applications and no such evidence was adduced by CAW-Canada.

24. For the reasons stated herein, the Board will not permit the withdrawal

of the Old Applications and thus will proceed to hear the old Applications that were filed in 1987 with respect to both Cavendish Farms and Garden Province Meats (1985) Inc. These matters will be brought on at the earliest possible opportunity, in accordance with the direction given by the Prince Edward Island Supreme Court, Appeal Division on May 24, 1988.

This decision was made by the Labour Relations Board on October // , 1988, issued under the hand of its Chief Executive Officer.

ROY J. DOUCETTE
CHIEF EXECUTIVE OFFICER

M. Lynn Murray, Vice-Chairman (at date of hearing)
Gerry Doyle, Member
Elizabeth MacFadyen, Member