



File No. 97-055

Decision No.

**IN THE MATTER OF AN APPLICATION UNDER SECTION 39 OF THE
PRINCE EDWARD ISLAND LABOUR ACT RSPEI 1988 CAP L-1(SUCCESSOR
RIGHTS)**

BETWEEN:

**INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, LOCAL 1432**

APPLICANT

AND

TRIGEN PEI/TRIGEN ENERGY CANADA INC.

RESPONDENT

**Representing the Applicant
Counsel for the Respondent**

**Ray McBride
John P. Mitchell**

BACKGROUND

The Applicant Union Local 1432 of the International Brotherhood of Electrical Workers (IBEW) was representative of a number of employees of the University of Prince Edward Island (UPEI) including power engineers employed in the operation of the heating plant services on the University Campus. In August 1995 it became apparent that the University wished to transfer operations of the heating plant services to Trigen Energy Canada Inc.

Negotiations commenced between the University and Union Local 1432 in August of 1995. A Memorandum of Agreement was executed on the 23rd day of August, 1996 between the University of Prince Edward Island and Union Local 1432 of the IBEW. The actual transfer of operations of the physical plant occurred in the Spring of 1997. This Application to the Board was filed on the 5th day of December 1997.

PRELIMINARY MATTERS

The Respondent moved for the dismissal of the Applicant's Application on the basis of the Applicant being estopped from proceeding as it had bargained away its successor rights by acceptance of the severance package and as well estopped on the basis of a delay in filing the Application amounting to a waiver of successor rights.

The panel heard submissions from both representatives in regards to this motion and the Board then recessed to consider the issue and arguments raised.

Upon reconvening the Board denied the Respondent's motion. The Board ruled that there were triable issues, not the least of which was the nature of the transaction between UPEI and Trigen. The Board also adopted the rationale of the British Columbia Labour Relations Board Decision Re: Central Taxi Dispatch Limited, to the effect that:

"At the same time, before depriving someone of the prima-facie right to an adjudication on the merits of a case, an Arbitration Board or this Board should be thoroughly satisfied not only that a settlement was reached but also that the terms of the settlement were such as to firmly embrace and resolve the issue at hand."

ISSUES

The Board acknowledges the Applicant's stated position that this matter is "site specific" to the operations on the UPEI Campus and not aimed at any other TRIGEN PEI/TRIGEN ENERGY Canada Inc. operation. Upon the concession on the part of Counsel for the Respondent that, within the meaning of the Act, there had been a "transfer" of operations, the Board was left to consider the issues; a) Was there a bargaining away of successor rights by the Applicant, b) Was there a waiver of successor rights by the Applicant and c) Was there an "intermingling" of employees so as to extinguish any successor rights.

FACTS

The evidence presented by the Applicant was in the form of oral testimony from Gerard Gauthier, a power engineer and David Paul Bradley, a plumber pipe fitter. Mr. Gauthier was a power engineer with the University of Prince Edward Island and one of the parties affected by the transfer of operations. Mr. Bradley was a member of the negotiation committee on behalf of the Union Local 1432 in regards to the transfer of operations of the heating plant services.

Tendered into evidence as Exhibit A1 was a memorandum from Glynne Squires of the University of Prince Edward Island Personnel Office dated August 16, 1995, wherein Mr. Gerald B. Hoganson, Director of Personnel, purported to address concerns raised in correspondence to Mr. Hoganson on August 7, 1995 and August 11, 1995 from Ray McBride, Business Manager for Local 1432.

Next submitted as Exhibit A2 was a memorandum from Gerald B. Hoganson, Director of Personnel, University of Prince Edward Island, dated November 1, 1993 which attached job descriptions for Power Engineer and Maintenance Repair II (Plumber).

The final exhibit tendered by the Applicant was Exhibit A3, the Collective Agreement between the University of Prince Edward Island and Local 1432 (International Brotherhood of Electrical Workers) for the period May 1, 1996 to April 30, 1999.

The evidence presented by the Respondent was in the form of oral testimony from John David Godkin, General Manager for Trigen's Energy from Waste Plant in Charlottetown, Prince Edward Island and two exhibits being a log of UPEI boiler room operation hours Exhibit R1 and a listing of the power engineers employed by Trigen as of September 1998 as Exhibit R2.

Both parties submitted the Memorandum of Agreement made the 23rd day of August, 1996 between the University of Prince Edward Island and Local Union 1432 International Brotherhood of Electrical Workers. This piece of evidence is central to each of the issues the Board has been asked to consider. In its entirety it reads:

" *MEMORANDUM OF AGREEMENT*
MADE THIS Twenty-third DAY OF August _____, A.D. 1996

BETWEEN:

The University of Prince Edward Island, a body corporate
(Hereinafter referred to as the "University")

-and-

Local Union 1432, International Brotherhood of Electrical Workers
(hereinafter referred to as the "Union")

***WHEREAS** the University and the Union are parties to a Collective Agreement with an effective date of May 1, 1996 and an expiry date of April 30, 1999;*

***AND WHEREAS** the Union is the certified bargaining agent of a classification of employees listed in the Collective Agreement as Power Engineer;*

***AND WHEREAS** the parties wish to make an agreement providing for the terms and conditions of the separation of the employment of these Power Engineers from the employment of the University as a result of the transfer of the heating plant services from the operation of the University to Trigen Energy Canada Inc., which transfer is scheduled to take place in 1996.*

THEREFORE; the parties agree as follows:

1. *Until such time as the transfer takes place, the Power engineers shall remain as employees of the University and shall be entitled to all of the rights and benefits of the Collective Agreement and other employment conditions of the University presently enjoyed by the employees;*
2. *If any of the present Power Engineers suffers a direct loss of employment as a result of the transfer of the heating plant operation, a separation payment will be made to each employee as follows:*

Severance Pay:

1. *Seventeen (17) week's pay in lieu of notice; plus*

Regular Severance:

2. *For employees with a minimum of five (5) years of continuous service at the date of termination of employment, one (1) week's pay per year of service.*

Special Severance:

3. *One (1) week's pay per year of service up to ten (10) years, and two (2) week's pay per year of service in excess of ten (10) years.*
 4. *The payment may be taken as a retirement allowance to a maximum of two thousand (\$2,000) dollars per year of service prior to 1996 and transferred to an RRSP or a deferred annuity with the remainder, if any, taken as a cash payment; or the complete severance payment may be taken in cash.*
3. *To qualify for this severance payment, the present Power Engineers are required to:*
 - (a) *Apply for, and make a reasonable effort to obtain, employment with Trigen Energy Canada Inc. When its positions are advertised;*
 - (b) *If offered employment with Trigen, in a similar capacity, the employee must accept that employment;*
 - (c) *Continue in the employment of the University until September 30, 1996, or the date on which Trigen Energy Canada Inc. Formally takes over the operation of the heating plant and the employment relationship with the University is formally severed.*
 - (d) *Lose their employment as a direct result of the takeover of the heating plant operation by Trigen Energy Canada Inc.*

These provisions shall be in lieu of, and not in addition to, any other severance benefits contained in the Collective Agreement.

The University of Prince Edward Island

*Local Union 1432,
International Brotherhood of
Electrical Workers*

_____”

The Board did not have the benefit of any evidence from the representatives of the University of Prince Edward Island who executed this Agreement but did have testimony from David Bradley to the effect that successor rights were not specifically discussed by either party during the negotiations or at the time of the execution of this Agreement.

From the testimony of Gerard Gauthier, the Board has concluded as a finding of fact that, at least this one member of the Union affected by the transfer after the official takeover in the Spring of 1997, believed that he was no longer in a position to exercise grievance rights or did he consider himself a Union Member. The Board hastens to add that it makes no finding of fact as to whether or not Mr Gauthier was actually a Union Member, but simply that it was his belief that he was then an employee of Trigen and no longer represented by the IBEW.

LAW

The Board considered the provisions of Section 39 of the *PEI Labour Act*, RSPEI 1988, Cap L-1.

The Applicant submitted the cases of re: *Moore Packaging Corp., and CPU Local 1150 (1993) 34L.A.C.(4th) 293(Ontario Court of Appeal)* and the decision of the PEI Labour Relations Board in *United Foods and Commercial Workers Union, Local 1252 (In trusteeship) versus Lobster Specialties Limited April 26, 1991.*

In support of the Respondent’s submissions and arguments, there were 3 cases submitted being re: *Central Taxi Dispatch Limited [1997] B.C.L.R.B.D. No. 206*, re *Associated Clinical Laboratories, [1996]Alta. L.R.B.R.. 70*, and *The Brantford General Hospital, [1994] OLRB August 1103.*

CONCLUSION

The Applicant seeks a ruling of this Board that, in relation to the Plant Operators on the UPEI Campus, successor rights did survive or were transferred pursuant to Section 39 of the Act by virtue of the transactions that took place between the University of Prince Edward Island and Trigen. Flowing from such a finding, the Applicant also claimed that the Board should rule that while the plant is operating it must be operated by Union Members and the personnel operating should be paid Union rates for work performed.

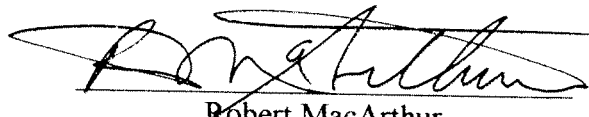
It also asked the Board to rule that Trigen failed to collect Union dues since its commencement of operations in the Spring of 1997 and that these monies are due and owing. It was submitted that the Board has a right to make such a ruling pursuant to the Applicant's interpretation of Section 39(3) of the Act.

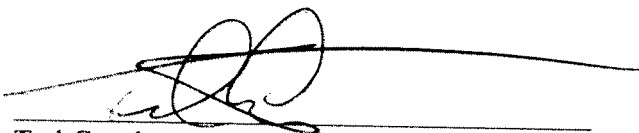
The Board rules with respect to the initial submission of the Applicant, and on the basis of the concession made by the Respondent, that there was a "transfer" of operations as envisioned by Section 39 of the Act.

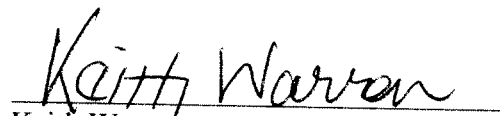
As to the relief sought by the Applicant, the Board cannot concur with the Applicant's interpretation of Section 39(3) as empowering it to make such an Order.

The Respondent submitted that there was either bargaining away of successor rights as evidenced by the Agreement, a waiver of successor rights by reason of acquiescence of the Respondent from the Spring of 1997 to the date of this Application December 1997, or such an intermingling of employees as to extinguish successor rights. The Board, at this time, and on the basis of the evidence currently before it, is not prepared to so rule.

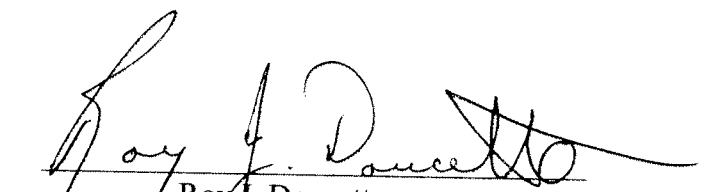
In summary, the Board has granted the site specific Application to the extent that successor rights flow with the subject transfer of operations. The Board does not have the power nor the evidentiary basis to grant anything other than successor rights.


Robert MacArthur
Chair


Ted Crockett
Member


Keith Warren
Member

THIS DECISION made by the Labour Relations Board on this 11th day of January, 1999, and issued under the hand of its Chief Executive Officer.


Roy J. Doucette
Chief Executive Officer