ONTARIO LABOUR RELATIONS BOARD

0137-02-R National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Applicant v. **National Grocers Co. Ltd.**, Responding Party v. United Food and Commercial Workers International Union, Local 1000A, Intervenor.

0139-02-R National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Applicant v. United Food and Commercial Workers International Union, Local 1000A, Responding Party v. **National Grocers Co. Ltd.**, Intervenor.

0179-02-R United Food and Commercial Workers International Union, Local 1000A, Applicant v. **National Grocers Co. Ltd.**, Responding Party v. National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada), Intervenor.

0450-02-U United Food and Commercial Workers International Union, Local 1000A, Applicant v. **National Automobile, Aerospace, Transportation and General Workers Union of Canada**, Responding Party v. United Food and Commercial Workers International Union, Local 175/633, Intervenor.

BEFORE: Laura Trachuk, Vice-Chair.

APPEARANCES: Anthony F. Dale and Dan MacPherson for CAW-Canada; Robert W. Kitchen; Steve Bujna and H. Urban for National Grocers Co. Ltd.; A. M. Minsky and I. Anderson for UFCW Local 1000A; John Evans, Travis Kearns and Mark Flannigan for UFCW Local 175;

DECISION OF THE BOARD; October 10, 2002

1. Board File No. 0137-02-R is an application for certification filed by the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (referred to as the "CAW"). Board File No. 0139-02-R is an application under section 66 of the *Labour Relations Act, 1995* (the "Act") filed by the CAW seeking to terminate bargaining rights held by the United Food and Commercial Workers Union, Local 1000A (referred to as "Local 1000A"). A related application under section 96 of the Act by the CAW was dismissed in a decision dated July 18, 2002. Board File No. 0179-02-R is an application for certification filed by Local 1000A. Board File No. 0450-02-U is an application under subsection 96(7) of the Act filed by Local 1000A alleging that the CAW breached a settlement between them by filing these applications. United Food and Commercial Workers Local 175 was a party to that settlement and has intervened in Board File No. 0450-02-U.

2. There are many interesting legal issues related to the above files. The debate on the issues was very well presented by counsel and it is tempting for the Board to address all of the arguments which were raised. However, after considering the facts and the parties' submissions,

the Board has decided that Local 1000A should be successful with its application under subsection 96(7) of the Act. As a remedy for that violation the Board is dismissing the applications in Board File Nos. 0137-02-R and 0139-02-R. It is therefore unnecessary to proceed with the application in Board File No. 0179-02-R. In the circumstances, it would be unwise for the Board to offer its views on what the outcome of those applications might have been and the Board will resist the temptation to do so. This decision will therefore only provide reasons for the Board's determination that the CAW has breached the settlement and for the remedy for that breach.

Facts

3. Kevin Corporan, the President of Local 1000A, was the only witness who testified in this matter. Most of the facts are therefore not in dispute. Local 1000A has a longstanding collective bargaining relationship with National Grocers Co. Ltd. (referred to as "National Grocers") for some of its warehouses. National Grocers has acquired other warehouses where the employees were represented by the Retail Wholesale and Department Store Union/Canada (RWC) (which subsequently merged with the CAW) and by other trade unions. Prior to 1994, Local 1000A had a province wide bargaining unit for the National Grocers warehouse employees. However, in 1994, the language of the collective agreement was changed. There is a dispute between the parties as to whether Local 1000A continued to have a province wide bargaining unit for warehouse employees (excluding those warehouses where the employees were represented by other trade unions) or whether it had an agreement that National Grocers would voluntarily recognize it as the bargaining agent for the employees at any new warehouse. Mr. Corporan's undisputed testimony was that the parties continued to have a province wide bargaining unit subject to agreed upon exceptions and that Local 1000A therefore had pre-existing bargaining rights for any new warehouse. The language used in the collective agreement and the fact that all new facilities were, in fact, separate bargaining units suggests otherwise. However, as the Board has decided that the application under subsection 96(7) should be successful it is not necessary to resolve that dispute.

4. In 1998, Local 1000A learned that National Grocers would be opening a new facility for "fresh" product. At the time it was expected that the new facility would be in Georgetown and that the employees would be drawn from other warehouses where the employees are represented by Local 1000A. The parties were negotiating early renewal collective agreements for their other facilities and they also negotiated a collective agreement for the new "fresh" facility which would commence operation when the facility was opened. The four new collective agreements, including the "fresh" one, were ratified by members of Local 1000A working at existing warehouses. The parties asked for, and received, permission from the Board to terminate their collective agreements prior to their termination date. National Grocers and Local 1000A have conducted themselves on the understanding that they have been bound to the renewal agreements since the date of the Board's decision. However, through an apparent oversight, the collective agreements were not actually signed until May 2001.

5. Prior to February 2000, Local 1000A and Local 175 were involved in a number of disputes with the RWC. In February 2000 they reached an agreement to respect each others' bargaining rights and to withdraw all outstanding litigation against each other. The Memorandum of Agreement (M.O.A.) provides as follows:

MEMORANDUM OF AGREEMENT

BETWEEN:

RETAIL WHOLESALE CANADA/CAW DIVISION A DIVISION OF THE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS OF CANADA ON ITS OWN BEHALF AND ON BEHALF OF ITS LOCAL UNIONS

(Collectively referred to as "RW/CAW Division")

-and –

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 175

(UFCW Local 175)

- and -

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 1000A

(UFCW, Local 1000A)

MEMORANDUM OF AGREEMENT

WHEREAS a number of disputes have arisen between the trade unions referred to above, concerning the right to represent employees at specific locations:

WHEREAS the parties are interested in reaching a full and final settlement including a resolution of proceedings before the Ontario Labour Relations Board and arbitrators appointed under the collective agreements as follows:

1. The parties collectively undertake and agree to respect the bargaining rights of the other trade union parties whether acquired by certification or by voluntary recognition.

2. Should any potential dispute arise in the future concerning the bargaining rights of any of the parties, a meeting shall be held between the affected parties for the purpose of resolving the dispute. Each party shall produce all documentation in support of its claim to bargaining rights.

3. RW/CAW Division hereby withdraws its Application under s. 69 of the *Labour Relations Act* in respect of Sean's No Frills (Board File No. 0906-98-R).

4. RW/CAW Division hereby withdraws its grievance dated February 24, 1998 in respect of Campbellford No Frills.

5. RW/CAW Division and UFCW Local 175 hereby agree to withdraw any and all complaints or applications before the Ontario Labour Relations Board in respect of the Maxi store located in Waterdown, Ontario, (Board File Nos. 0320-98-R, 2325-98-U, 2035-98-R).

6. UFCW Local 175 agrees to withdraw its application before the Ontario Labour Relations Board pursuant to s. 1(4) (Board File No. 0754-99-R).

7. This memorandum of settlement is binding upon any successor trade unions to the parties hereto.

"Illegible Signature"
Retail Wholesale Canada/CAW
Division a Division of the
the National Automobile,
Aerospace, Transportation and
General Workers of Canada (on its
own behalf and on behalf of its
Local Unions)

"Illegible Signature"
United Food and Commercial
Workers International Union,
Local 175

"Ken Corporan"
United Food and Commercial
Workers International Union,
Local 1000A

DATED at Etobicoke February 22/2000

6. National Grocers did not open the new "fresh" facility in Georgetown. In early 2000 it advised Local 1000A that it would be opening the "fresh" facility at the corner of Fountain Street and Maple Grove in Cambridge (the Maple Grove warehouse). It subsequently advised Local 1000A that the facility would be larger than anticipated and that it would be closing three of its warehouses where the employees were represented by the Teamsters and CAW (formerly RWC). It was anticipated that employees would be transferred from those warehouses as there would not be sufficient applicants from the Local 1000A warehouses. Local 1000A and National Grocers had negotiated a Letter of Understanding to staff a previous new facility (L.O.U. #3). It provided that employees in the bargaining unit whose work was being transferred would have the first opportunity to apply for the jobs at the new facility. Any remaining vacancies would be filled by Local 1000A members in any of its other facilities. However in March 2001, after it was apparent that there would be transfers from facilities where Local 1000A did not have bargaining rights, they negotiated another letter of understanding (L.O.U. #6). L.O.U. #6 provides that jobs would first be offered to full-time Local 1000A members and then to employees of the facilities to be closed where Local 1000A did not hold bargaining rights. Any employees hired from the facilities where Local 1000A did not hold bargaining rights would keep their seniority in the new bargaining unit. Seniority would be dovetailed. However, the seniority for the employees who came from the bargaining units where Local 1000A did not hold bargaining rights would not count if they applied for jobs at other Local 1000A facilities. After positions were offered to the full-time employees at all the warehouses they would be offered to members of Local 1000A who worked part-time. Both of the Letters of Understanding were ratified by the members of Local 1000A working in its existing bargaining units.

7. The Maple Grove warehouse opened on July 23, 2001. Pursuant to L.O.U.#6, positions were offered first to employees in Local 1000A warehouses. Positions were subsequently offered to employees in the other warehouses. For the first few months, most of the employees working at the Maple Grove warehouse were Local 1000A members. They had transferred from warehouses where Local 1000A had bargaining rights and the collective agreements required employees to be members. Employees from other warehouses were transferred over the next ten months. By April 2002 there were more employees from warehouses which had not been represented by Local 1000A and new hires than from warehouses where Local 1000A had represented the employees. Local 1000A and National Grocers have always agreed that the employees at the Maple Grove warehouse are covered by the collective agreement

it negotiated in 1998 which took effect the day the Maple Grove warehouse commenced operations. That agreement will terminate on April 15, 2006.

8. In or about September 2001, CAW started organizing the employees at the Maple Grove warehouse. Some of the people involved in that campaign were involved in the negotiations of the Memorandum of Agreement in February, 2001. On October 10, 2001 Mr. Corporan advised the CAW that Local 1000A took the position that it was in violation of the settlement set out in paragraph 5 above. Mr. Corporan asked for a meeting in accordance with paragraph 2 of the M.O.A. The CAW did not respond to Mr. Corporan's letter and no meeting was held. However, there were other meetings during this period between representatives of Local 1000A, Local 175 and the CAW about respecting each other's bargaining rights.

9. The CAW filed its applications on April 17, 2002. It claims that the Maple Grove collective agreement between Local 1000A and National Grocers is a voluntary recognition agreement. It says, among other things, that Local 1000A did not represent a majority of employees in the Maple Grove bargaining unit when the collective agreement was entered into since there was no bargaining unit at that time. Local 1000A denies that the collective agreement is a voluntary recognition agreement and claims that it had pre-existing bargaining rights to represent employees in the new warehouse. It says that the section 66 application should fail and that the CAW certification application is untimely. It filed its application for certification in case it was not successful in resisting the section 66 application. It also argues, however, that the CAW should not be permitted to bring these applications as they are violations of the Memorandum of Agreement signed by the parties in February, 2001. It says that the agreement was a settlement of Board proceedings and is therefore enforceable under section 96(7) of the Act.

Decision

10. The relevant sections of the Act provide as follows:

> **7.** (1) Where no trade union has been certified as bargaining agent of the employees of an employer in a unit that a trade union claims to be appropriate for collective bargaining and the employees in the unit are not bound by a collective agreement, a trade union may apply at any time to the Board for certification as bargaining agent of the employees in the unit.
>
> (2) Where a trade union has been certified as bargaining agent of the employees of an employer in a bargaining unit and has not entered into a collective agreement with the employer and no declaration has been made by the Board that the trade union no longer represents the employees in the bargaining unit, another trade union may apply to the Board for certification as bargaining agent of any of the employees in the bargaining unit determined in the certificate only after the expiration of one year from the date of the certificate.
>
> (3) Where an employer and a trade union agree that the employer recognizes the trade union as the exclusive bargaining agent of the employees in a defined bargaining unit and the agreement is in writing signed by the parties and the parties have not entered into a collective agreement and the Board has not made a declaration under

section 66, another trade union may apply to the Board for certification as bargaining agent of any of the employees in the bargaining unit defined in the recognition agreement only after the expiration of one year from the date that the recognition agreement was entered into.

(4) Where a collective agreement is for a term of not more than three years, a trade union may apply to the Board for certification as bargaining agent of any of the employees in the bargaining unit defined in the agreement only after the commencement of the last three months of its operation.

(5) Where a collective agreement is for a term of more than three years, a trade union may apply to the Board for certification as bargaining agent of any of the employees in the bargaining unit defined in the agreement only after the commencement of the 34th month of its operation and before the commencement of the 37th month of its operation and during the three-month period immediately preceding the end of each year that the agreement continues to operate thereafter or after the commencement of the last three months of its operation, as the case may be.

...

66. (1) Where an employer and a trade union that has not been certified as the bargaining agent for a bargaining unit of employees of the employer enter into a collective agreement, or a recognition agreement as provided for in subsection 18 (3), the Board may, upon the application of any employee in the bargaining unit or of a trade union representing any employee in the bargaining unit, during the first year of the period of time that the first collective agreement between them is in operation or, if no collective agreement has been entered into, within one year from the signing of such recognition agreement, declare that the trade union was not, at the time the agreement was entered into, entitled to represent the employees in the bargaining unit.

(2) Before disposing of an application under subsection (1), the Board may make such inquiry, require the production of such evidence and the doing of such things, or hold such representation votes, as it considers appropriate.

(3) On an application under subsection (1), the onus of establishing that the trade union was entitled to represent the employees in the bargaining unit at the time the agreement was entered into rests on the parties to the agreement.

(4) Upon the Board making a declaration under subsection (1), the trade union forthwith ceases to represent the employees in the defined bargaining unit in the recognition agreement or collective agreement and any collective agreement in operation between the trade union

and the employer ceases to operate forthwith in respect of the employees affected by the application.

...

68. (1) Where a trade union claims that by reason of a merger or amalgamation or a transfer of jurisdiction it is the successor of a trade union that at the time of the merger, amalgamation or transfer of jurisdiction was the bargaining agent of a unit of employees of an employer and any question arises in respect of its rights to act as the successor, the Board, in any proceeding before it or on the application of any person or trade union concerned, may declare that the successor has or has not, as the case may be, acquired the rights, privileges and duties under this Act of its predecessor, or the Board may dismiss the application.

(2) Before issuing a declaration under subsection (1), the Board may make such inquiry, require the production of such evidence or hold such representation votes as it considers appropriate.

(3) Where the Board makes an affirmative declaration under subsection (1), the successor shall for the purposes of this Act be conclusively presumed to have acquired the rights, privileges and duties of its predecessor, whether under a collective agreement or otherwise, and the employer, the successor and the employees concerned shall recognize such status in all respects.

...

96. (1) The Board may authorize a labour relations officer to inquire into any complaint alleging a contravention of this Act.

(4) Where a labour relations officer is unable to effect a settlement of the matter complained of or where the Board in its discretion considers it advisable to dispense with an inquiry by a labour relations officer, the Board may inquire into the complaint of a contravention of this Act and where the Board is satisfied that an employer, employers' organization, trade union, council of trade unions, person or employee has acted contrary to this Act it shall determine what, if anything, the employer, employers' organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto and such determination, without limiting the generality of the foregoing may include, despite the provisions of any collective agreement, any one or more of,

(a) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to cease doing the act or acts complained of;

(b) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to rectify the act or acts complained of; or

(c) an order to reinstate in employment or hire the person or employee concerned, with or without compensation, or to compensate instead of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer, employers' organization, trade union, council of trade unions, employee or other person jointly or severally.

...

(7) Where a proceeding under this Act has been settled, whether through the endeavours of the labour relations officer or otherwise, and the terms of the settlement have been put in writing and signed by the parties or their representatives, the settlement is binding upon the parties, the trade union, council of trade unions, employer, employers' organization, person or employee who have agreed to the settlement and shall be complied with according to its terms, and a complaint that the trade union, council of trade unions, employer, employers' organization, person or employee who has agreed to the settlement has not complied with the terms of the settlement shall be deemed to be a complaint under subsection (1).

Is the CAW a successor to the Division?

11. (RWC and CAW entered a merger agreement on November 1st 1999. The agreement provided for a two year transition period during which the RWC locals would merge with the CAW but would be part of a the Retail Wholesale Canada/CAW Division, a Division of the National Automobile, Aerospace, Transportation and General Workers Union of Canada (the "Division"). The Memorandum of Agreement set out in paragraph 5 was signed in the name of the Division. The merger agreement provided that at the end of the two year transition period, if neither party sought to end the agreement, the RWC would be fully merged with the CAW and the Division would no longer exist. That merger took place as planned. The CAW argues however that it is not bound to the M.O.A. because it was signed by the Division. The CAW argues that its Constitution does not permit the Division to bind the national organization. It relies upon Section 7 of its constitution which prohibits a subordinate body from binding the national union without its authorization. However, Local 1000A is not arguing that the Division bound the national union. The national union may not have been bound to the M.O.A. while the Division remained in effect. However, the Division merged with the national union and as a result the national became bound to all of its contracts, including all of its collective agreements as well as the February 22, 2000 M.O.A.

12. Whether or not the Division on its own could bind the CAW during the transition period there is no doubt that once the full merger occurred the CAW was its successor. Furthermore, the parties knew that the Division was temporary and that the full merger was pending. Mr. Corporan testified that the UFCW locals attempted to have the CAW national organization specifically bound to the agreement at the time the agreement was signed. He explained that when that was not successful they introduced the successorship clause in paragraph

7 to ensure that the deal would survive the Division when the full merger occurred. Paragraph 7 was therefore included in the M.O.A. to cover this very situation. Section 68 of the Act provides that a successor trade union acquires the rights, privileges and duties of its predecessor. The Board finds that the CAW is the successor to the Division and has acquired all of its rights, privileges and duties. The CAW is therefore bound to the Memorandum of Agreement signed by a representative of the Division on February 22, 2001.

Should the Board enforce the Memorandum of Agreement under section 96(7)?

13. The *Labour Relations Act, 1995* contemplates that a union is entitled to represent employees if it is certified by the Board; if an employer voluntarily recognizes it or an employer enters a collective agreement with it. In the latter case the agreement is vulnerable to challenge during its first year of operation. However, a successful challenge does not have the effect of making the agreement void as if it were unlawful. It only has the effect of terminating it. If the agreement is not challenged in the first year it is immune from challenge until the "open period" like a collective agreement achieved after certification. Thus, the Act does not reflect a policy against voluntary recognition agreements. Voluntary recognition agreements are not inherently suspect as being somehow tainted with employer influence. The scheme of the Act encourages parties to reach agreement among themselves without resort to litigation. However, the scheme of the Act also ensures that employees have a choice in the matter of who will represent them. This is not an unrestricted choice, there are many circumstances in which an individual employee, or group of employees, may find themselves represented by a trade union without having had the opportunity to vote or sign a membership card. However, the one year window to challenge a voluntary recognition agreement provides a limited opportunity for employees who may prefer not to have a union, or who would prefer a different union, to have their say.

14. As noted above, the Act also reflects a policy of encouraging parties to resolve their own disputes. The Board has always considered that a resolution parties can reach themselves is preferable to one the Board could come up with. An agreement parties achieve themselves is more likely to reflect their real needs than a remedy imposed by the Board after divisive litigation. Of course, a settlement also saves the public and the parties the time and expense of litigation. The Act's enforcement mechanism highlights the interest its drafters had in promoting settlements. Under section 96(7), a breach of settlement is considered to be a complaint under section 96(1) i.e. that there has been a violation of the Act itself. The Board therefore has the full range of remedies under section 96(4) at its disposal in determining what consequences should flow from the breach. If a party settles a Board matter by promising to do something and then does not do it, that party will be in the same situation as if it violated the Act.

15. Local 1000A, Local 175 and the CAW have an agreement pursuant to section 96(7). The Memorandum of Agreement set out in paragraph 5 is a settlement of several Board proceedings which were ended when the parties fulfilled their promises to withdraw the applications. If the M.O.A. has been violated, the Board has the full range of remedies under section 96(4) to choose from to restore Local 1000A to the position it would have been in had the breach not occurred. The CAW argues that the M.O.A. is not a settlement under section 96(7) because the employer parties to the earlier disputes were not parties to the agreement. It relies upon certain comments of the Board (differently constituted) in *Penegal Trim & Supply Ltd.* [1998] O.L.R.D. No. 3834 (referred to as *Penegal Trim No.1*). The facts of this case are different from *Penegal Trim No. 1* and it is distinguishable on that basis. The agreement in issue in *Penegal Trim No. 1* involved the division of work among trades in the construction industry. It is the employers who normally assign the work to the different trades. Therefore, the fact that the employers had not been parties to that agreement may have had a significance that does not exist

in this case. Furthermore, the relevant comments in *Penegal Trim No.1* appear to be *obiter*. Nevertheless, to the extent that *Penegal Trim No.1* stands for the principle that a settlement of a Board proceeding must be signed by all parties to that proceeding in order to be enforceable against the signatories I respectfully disagree. Local 1000A and Local 175 and the CAW's predecessor were parties to the litigation listed in the M.O.A. They clearly entered into the M.O.A. to resolve that litigation. The disputes in those cases, like this one, were essentially disputes between the unions. The settlement required that the applications be withdrawn which they were. Section 96(7) does not require all of the parties to a Board proceeding to sign an agreement in order for it to be enforceable. Of course, the settlement is only binding on those who do sign it. In this case it is binding on the three unions.

16. The promises the parties made to each other in the M.O.A. were to cease their ongoing attacks on each other before the Board and at arbitration and also not to attack each other in future. They promised to respect each other's bargaining rights. The CAW argues that the word "respect" is not defined in the agreement and therefore can be given little meaning. Local 1000A rejects that assertion and says that everyone knows what "respect" means in this context. It points out that the word is used in the Canadian Labour Congress constitution to connote a ban on raiding. The Board agrees that the word "respect" used in this context is not ambiguous. The Board is informed by its experience in labour relations matters. It knows that when trade unions talk about "respecting" each other's bargaining rights they are talking about not seeking to displace each other as the representative of employees. In the M.O.A., the parties have not only agreed to respect each other's bargaining rights, they have clearly stated that the agreement applies whether those rights were achieved by certification or voluntary recognition. Local 1000A has bargaining rights for the employees at Maple Grove warehouse. It either has pre-existing rights to represent those employees or it has obtained them through voluntary recognition. The CAW is seeking to have those bargaining rights terminated and to replace Local 1000A as the representative of the employees. That is a violation of M.O.A. The CAW says that the agreement does not mean that it cannot challenge voluntary recognition agreements under section 66. However, it is difficult to understand what else the parties could have intended when they chose to specify rights gained through voluntary recognition. The CAW never explained what else it had promised by saying it would "respect" bargaining rights achieved by voluntary recognition if it was not promising not to bring applications such as these. The CAW called no evidence to demonstrate that the words meant something besides their obvious meaning. The Board finds that the CAW violated the M.O.A. by filing the applications.

17. The CAW also says that the only thing it has promised to do under the M.O.A. if an issue came up about bargaining rights is found in paragraph 7. It says it has only promised to meet with the other parties to exchange documents and information. The CAW says that meeting effectively took place but even if it did not, the dismissal of the applications is not an appropriate remedy for that breach of the agreement It says that the parties did not contemplate any ramifications for failing to respect each other's rights other than the holding of a meeting. It bases that claim on the fact that they did not say that the agreement could be enforced through the Board or through some private arbitration process. However, parties need not specifically contract into the remedies in subsection 96(4). Those remedies are available for any violation of the Act or subsection 96(7). Parties need not advert to a settlement being binding under subsection 96(7) in order to make it so. Subsection 96(7) applies to any settlement of a Board proceeding. This M.O.A. was a settlement of several Board proceedings. By including the requirement of a meeting, the parties were not agreeing that would be the remedy for any alleged violation of paragraph 1. Paragraph 2 is a step in resolving a dispute that arises with respect to Paragraph 1. The parties presumably hoped that step would obviate the necessity for doing anything further. One party would show the other a certificate or a collective agreement and that

would be the end of the matter. The agreement does not go further and set out a mechanism for dealing with challenges to bargaining rights because the whole point of paragraph 1 is that bargaining rights would not be subject to challenge.

18. The CAW raised the issue of the M.O.A. having no end date and therefore affecting the parties' rights under the Act in perpetuity. Local 1000A responds that, as with any agreement with no end date, the agreement may be ended by one party giving notice to the other. The Board agrees that is the norm with trade agreements, letters of understanding or other agreements in the labour relations context. (See for example *Electrical Power Systems Construction Association* [1992] OLRB Rep. Aug. 915). The M.O.A. may therefore be ended by either side giving reasonable notice to the other. In this case no such notice was given prior to the CAW's applications being filed.

19. The CAW also argued that the Board ought not to enforce the settlement because Local 1000A knew in September 2001 that it was organizing the employees yet it did not file the application under subsection 96(7) until May 2002. However, the subsection 96(7) application is filed in response to the CAW's certification and section 66 applications. They were filed in April, 2002. Local 1000A asserts that it is those applications which violate the M.O.A. and it is those applications which it seeks to have withdrawn or dismissed. Local 1000A did advise the CAW in October, 2001 that it considered its actions to be a breach of the agreement so the CAW cannot claim that it incurred the expense of an organizing campaign without knowing what position Local 1000A would take. The Board is therefore not persuaded that it ought to exercise its discretion not to enforce the settlement because of any delay in filing it.

20. Local 1000A asks the Board to remedy the CAW's breach of the agreement by dismissing its certification and its section 66 applications. The CAW argues that that is an extraordinary remedy which the Board cannot, or should not, grant. It is certainly unusual for the Board to dismiss a certification or section 66 application as a remedy for a breach of a subsection 96(7) settlement. However, the Board has no doubt that it can do so under the extremely broad powers of subsection 96(4) if that is necessary to put the parties in the position they would have been in had the agreement been complied with. Subsection 96(4) says that where "...the Board is satisfied that an...trade union... has acted contrary to this Act it shall determine what, if anything, the ...trade union...shall do or refrain from doing with respect thereto..." The subsection goes on to say that the remedy may include an order that the trade union cease doing the acts complained of and/or that it rectify the acts complained of. Ordering the dismissal or withdrawal of the CAW's applications would fit within those broad parameters. The Supreme Court of Canada has recognized that the remedial jurisdiction of a labour board is broad and that its discretion in exercising that remedial authority should not be interfered with providing the remedy is not punitive in nature; does not infringe the Charter of Rights and Freedoms; has a rational connection to the breach and its consequences and does not contradict the objects or purposes of the governing legislation. (See *Royal Oak Mines Inc. v. Canada Labour Relations Board*, [1996] 1 S.C.R. 369; 133 D.L.R. (4th) 129).

21. The Board therefore finds that the CAW has breached the M.O.A. and that pursuant to subsection 96(4) of the Act it has the authority to order that its applications be withdrawn or to dismiss them as a remedy for the breach. However, in any application under subsection 96(4) the Board has a discretion as to whether it will grant a remedy. In this case the most persuasive argument against the Board dismissing the applications, or ordering their withdrawal, is a discretionary one. As noted above, one of the policies enshrined in the Act is that employees should be able to choose their bargaining agent. By ordering the dismissal or withdrawal of these applications, the Board would be preventing the employees at the Maple Grove warehouse from

choosing the CAW as their bargaining agent until the open period of Local 1000A's collective agreement with the company. (Assuming that the CAW has given reasonable notice that it is terminating the M.O.A. by then.) It was the Board's concern for the right of employees to choose their bargaining agent which caused the Board to express reservations about the remedy being sought in its decision of July 18, 2002. That was also one of the concerns expressed by the Board in *South Huron Hospital* [2000] O.L.R.D. No. 915. However, the applications in *South Huron Hospital* did not deal with settlements of Board proceedings in which the parties clearly undertook not to challenge each other's bargaining rights. The Board has considered this matter further since its decision of July 18, 2002 and has decided that the competing policy concerns weigh in favour of enforcing the settlement. First of all, this application (unlike *Penegal Trim No. 1, supra*) was not brought by the employees themselves and Local 1000A acknowledges that the settlement would not be enforceable against them. The CAW says it is bringing the application "on behalf of employees". However, the distinction is a significant one. The CAW has agreed to "respect" the bargaining rights of Local 1000A and has therefore agreed not to act on "behalf of employees" if that means it is not respecting Local 1000A's bargaining rights. Any application for certification, or under section 66, is on behalf of some employees. The CAW must have contemplated that when it signed the M.O.A. Nevertheless, there is an impact on those employees who want to be represented by the CAW. However there is a limited impact on the employees in the bargaining unit overall. The employees themselves could have filed an application under section 66 of the Act in the first year of operation of the collective agreement if they did not want to be represented by a trade union. That right was not affected by the M.O.A. The employees may exercise that right in a few years when the open period occurs. Furthermore, a decision to enforce the settlement does not affect the employees' right to be represented by a different trade union. Any other trade union could have filed a section 66 and a certification application during the first year of the collective agreement and may do so in the next open period. Therefore, when the Board's concern about the employees being able to choose the CAW *this year* is weighed against enforcing a settlement of several Board proceedings, the balance is in favour of enforcing the settlement. The settlement presumably saved the Board and the parties considerable time and litigation expense. The CAW promised not to file an application like the ones it has filed here. Local 1000A and Local 175 may not have entered that settlement without that mutual promise.

22. The Board was asked on a previous occasion to enforce an agreement between trade unions and declined. The CAW relies on the Board's decision in *Penegal Trim No.1 supra.* However, as noted above, the circumstances in that case were significantly different. One of the parties sought to enforce the settlement against the international parent of a local which had signed the agreement. There was no suggestion that the international was a successor trade union. The Board noted in that case that the jurisprudence establishes that the local and the parent are separate trade unions so a settlement by a local would not bind the parent. Furthermore, the agreement in *Penegal Trim No. 1* did not clearly require the two trade unions to "respect" each other's bargaining rights. Rather the Board found that the part relevant to the dispute before it was more about the division of work. The Board also found that even if it were to apply the agreement it was too soon to find that a breach had occurred. Furthermore, in *Penegal Trim No. 1*, the section 66 application was brought by employees. The employees had not signed the agreement so the Board found that the agreement could not apply to them. In this case, by contrast, the application was filed by the successor to the trade union which signed the agreement. The CAW relies on the Board's comment *Penegal Trim No. 1* that subsection 96(7) does not provide a "free-standing platform" to enforce the "peace treaty". However, the Board goes on to say in that part of the decision that it will not perform that function in proceedings involving other employers and *employees*. The Board's concern about playing that role in *Penegal Trim No. 1* was based on the circumstances of that case and the particular agreement

before it. The Board did not say that a section 96(7) settlement between unions could never be enforced. For the reasons expressed above, the Board considers it appropriate to exercise its discretion and enforce this settlement.

23. The Board has decided to enforce the settlement. But should the Board order the application to be withdrawn or dismissed? The goal, in ascertaining an appropriate remedy, is to put the aggrieved party in the position it would have been in had the settlement never been breached. In this case, that is to put Local 1000A as much as possible in the position it would have been in had the applications not been filed. From that point of view, the most appropriate remedy would be to order the CAW to retract what should never have been submitted. In other words, to "rectify" the breach. However, forcing the CAW to take an action to bring these proceedings to an end might delay or complicate the matter further. The most expeditious way to put Local 1000A in the position it would have been in had the M.O.A. been adhered to is to dismiss the applications. The applications in Board File Nos. 0157-02-R and 0139-02-R are therefore hereby dismissed. The application in Board File No. 0179-02-R is terminated.

Damages

24. Local 1000A and Local 175 have indicated that they may seek damages for breach of the M.O.A. The CAW says that they have not pleaded any support for a claim for damages. Local 1000A and Local 175 are directed to file submissions with the Board on or before October 25, 2002 indicating if they are seeking damages and if so what they are. The CAW may file its response to those submissions on or before November 8, 2002. Local 1000A and Local 175 may file their replies by November 15, 2002. The Board will decide after reviewing the submissions whether or not damages should be awarded or whether it is necessary to hold a hearing on that issue.

"Laura Trachuk"
for the Board