MANITOBA LABOUR BOARD
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CASE NOS. 109//06/LRA and 111/06/LRA

IN THE MATTER OF: ***THE LABOUR RELATIONS ACT***

- and -

IN THE MATTER OF: **An Application by**

University of Manitoba Faculty Association,
Applicant,

- and -

UNIVERSITY OF MANITOBA,
Respondent/Employer,

-and-

C.B., P.D., J.B.D,
S.P., J.R. and M.S.,

Persons Concerned.

BEFORE: **C. S. Robinson, Vice-Chairperson**

M. Steele, Board Member

B. Atamanchuk, Board Member

APPEARANCES: **Mr. G. Smorang, Q.C., Counsel for University of Manitoba Faculty Association**

L.G., Executive Director, University of Manitoba Faculty Association

B.Y., Professional Officer, University of Manitoba Faculty Association

Mr. K. Maclean, Counsel for the University of Manitoba

L.H., Staff Relations Officer, University of Manitoba

D.D., Dean, Faculty of Physical Education and Recreational Studies, University of Manitoba

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This Decision/Order has been edited to protect the personal information of individuals by removing personal identifiers.

I. Background

The Applicant, University of Manitoba Faculty Association ("UMFA"), filed two Applications with the Board concerning certain acts initiated by the Respondent, University of Manitoba ("the University") in relation to the Persons Concerned. The Application for Board Ruling requested that the Board determine that the Persons Concerned are Instructors in the bargaining unit for which UMFA is certified and / or that a group of employees including those individuals is an appropriate bargaining unit. In addition, the Applicant filed an Unfair Labour Practice Application which alleged that the University interfered with its rights and the rights of the Persons Concerned contrary to sections 5, 6, 17, and 29 of ***The Labour Relations Act*** ("the ***Act***").

The University replied to the Applications. It denied that it committed any unfair labour practice. As regards the Application for a Board Ruling, the University indicated that UMFA was not entitled to the declarations which it sought and further that the University itself sought a declaration to the effect that the Persons Concerned were not properly included in the bargaining unit for which UMFA is certified as they did not, or would not in the future, hold academic rank. The parties agreed that the cases ought to be heard together.

In support of its Applications, UMFA called its Executive Director, L.G. The University called four witnesses: L.H., Staff Relations Officer; C.D., Athletic Director, R.K., Vice-President (Academic) and Provost, and T.V., Executive Director, Human Resources. In addition to the *viva voce* evidence, the Board received 74 Exhibits as well as extensive documentation appended to the Applications and Replies thereto.

The Applications involve concerns relating to the University's decision to introduce a new employment model for certain individuals who hold term positions which involve coaching duties for the University's varsity athletics teams. Prior to the introduction of the new

employment model, the head coaches of those teams had been granted appointments with academic rank as Instructors within the bargaining unit and, accordingly, were covered by the terms of the collective agreement. The new employment model developed and introduced by the University without notice to or consultation with UMFA, offered term appointments without academic rank to the Persons Concerned. As a result of the University's decision to offer appointments without academic rank, the positions held by those persons were deemed by the University to fall outside of the bargaining unit for which UMFA is certified.

Following consideration of the material filed and the evidence and argument presented, the Board determined that the University had committed an unfair labour practice contrary to sections 5, 6, 17, and 29 of the ***Act***. In addition, the Board made determinations to the effect that the Persons Concerned were included in the bargaining unit for which UMFA is certified. The University subsequently requested reasons for the Board's decision.

II. Facts

A) The Bargaining Unit and Academic Rank

UMFA is the certified bargaining agent for a unit of employees described in Manitoba Labour Board Certificate No. 3998, dated March 27, 1986, as follows:

> All persons employed full-time by the University of Manitoba holding the rank of Instructors I, Instructors II, Senior Instructors, Lecturers, Assistant Professors, Associate Professors, Professors, and Academic Librarians,…

The above-noted Certificate amended the bargaining unit as described in Manitoba Labour Board Certificate No. 3431, dated February 19, 1980, by including persons holding full-time appointments in the ranks of Instructor I, Instructor II, and Senior Instructor. L.G. testified that there are approximately 174 individuals employed in the Instructor series who are UMFA members, which constitutes approximately 15% of the UMFA bargaining unit.

The concept of "academic rank" was of critical importance in the hearings into these Applications. L.G. acknowledged that UMFA does not represent individuals who have

appointments without academic rank. The Certificate quoted above specifically refers to individuals holding certain ranks. L.G. accepted that the word "rank" in the Certificate has the same meaning as in the collective agreement and means "academic rank". In this regard, Article 1.5 of the collective agreement sets out the term "Academic staff members with faculty rank" which is defined as "all individuals in a department holding full-time academic appointments at the rank of instructor I, instructor II, senior instructor, lecturer, assistant professor, associate professor or professor".

Academic rank is conferred by the Board of Governors of the University. An appointment with academic rank permits an individual to apply for promotion to a higher rank as set out in the collective agreement and subject to the approval of the Board of Governors. The decision of the University to deny the Persons Concerned appointments with academic rank effectively denied them inclusion in the bargaining unit.

B) Instructors

With the exception of S.P. who serves as an Assistant Coach and was never in the bargaining unit, the Persons Concerned each held contiguous full-time term appointments with academic rank at the Instructor I level prior to the University's decision to proceed with the new employment model. In addition, three other Head Coaches held, and continue to hold, continuing appointments with academic rank within the Instructor series. All of the coaches are members of the Faculty of Physical Education and Recreation Studies. The Board heard a great deal of evidence with respect to the terms and conditions of employment of Instructors under the collective agreement. It is useful to review some of those provisions at this stage.

Article 34 of the collective agreement relates to Instructors. Instructors may be granted contingent, term, probationary, or continuing appointments. Term appointments are governed by Article 19.C.5 of the collective agreement.

Instructors are considered to be academics pursuant to the collective agreement, albeit with roles that differ, at least in part, from other faculty members included in the bargaining unit. The

Board heard that the normal variety of academic duties expected of faculty pursuant to the terms of the collective agreement entered into between the parties includes teaching, research, and service. However, pursuant to Article 34.1 of the agreement, a member of the bargaining unit whose "duties involve any one or more but not all of the normal variety of academic duties expected of faculty members" may be appointed to one of the Instructor ranks.

The collective agreement contains provisions relating to the normal qualifications that an Instructor is typically expected to possess. Specifically, Article 34.4 provides the following:

> 34.4.2 Initial appointment shall normally be at the rank of instructor I. Qualifications should be appropriate to the particular position and would normally require a Master's degree or its equivalent.
>
> 34.4.3 Appointment to the rank of instructor II shall normally be restricted to those who hold a Master's degree or its equivalent and who have five (5) or more years' experience in a University or equivalent position.
>
> 34.4.4 Appointment to the rank of senior instructor shall normally be restricted to those who hold a doctoral degree or its equivalent and who have ten (10) or more years' experience in a University or equivalent position.

Each of the University's coaches holds at least one University degree (the majority have attained multiple degrees); however, only R.S. holds a Master's degree and none of the coaches possesses a Ph.D. Clearly the University permits the appointment with academic rank within the Instructor series to individuals who do not possess a Master's degree or higher. This is certainly permitted by the terms of the above-quoted collective agreement provisions which speak of the "normally" required educational qualifications or their "equivalent". Moreover, this phenomenon is not unique to the Faculty of Physical Education and Recreation Studies or to the individuals who function as coaches. The Board received a list of all of the individuals who are employed by the University within the Instructor classification which shows the highest degree earned by each of those persons (Exhibit 27). The list indicates that a significant number of the University's Instructors do not possess a Master's degree or higher, and this circumstance exists in several University Faculties.

The procedure for the promotion of Instructors in general and the coaches in particular was canvassed by the parties in considerable detail during the hearing. Article 34 of the collective agreement provides that the promotion procedures set out in Article 20.A of the agreement apply to Instructors. Unlike most industrial workplaces, the promotion process as well as the criteria and weightings for promotion involve the participation of the promotion candidate's peers, in this case members of the faculty. In particular, Article 20.A.1.3 of the collective agreement provides that "the dean/director, after receiving the advice of his/her faculty/school council, shall be responsible for establishing the criteria for promotion and the weightings of these criteria, if any, to be used in the making of a promotion recommendation". Once established by the dean/director, the criteria remain in effect until such time as he or she elects to change them, again after receiving the advice of the faculty/school council. In the Faculty of Physical Education and Recreation Studies, peer participation manifests itself in the form of faculty membership on the Tenure and Promotions Committee ("TAP") and Faculty Council, and the faculty members' contributions to those bodies.

The collective agreement does not indicate that the Vice-President (Academic) has any responsibility for the determination of promotion criteria or the weightings of those criteria. Notwithstanding that fact, T.V., L.H., and R.K. each testified that the Vice-President (Academic) does have a role to play in the establishment of promotion criteria and weighting. In particular, R.K. advanced the view that he is responsible for ensuring consistency in promotion criteria across the faculties and schools at the University. He stated that he works with the Deans and reviews proposed promotion criteria and weightings prior to their adoption. R.K. would not accept that the collective agreement's silence as to his role in this regard had the effect of ousting his office's jurisdiction to intervene in the setting of promotion criteria. He acknowledged that the role of faculty in the development of promotion criteria and weightings was rooted in the belief that the best judge of such matters at the University is the faculty. And, while R.K. testified that he placed a high value on the recommendations of Faculty Council, he countered that their perspective is not the only one of significance and that he retains an important role in this area to make certain that individuals are "judged according to the academic standards of the institution".

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It is open to an Instructor to apply for promotion whenever he or she wishes. Promotion is based upon the contribution that the individual has made to his or her discipline, department and the University taking into account the aforementioned promotion criteria and weightings purportedly established by the dean/director following receipt of the advice of Faculty Council. An application for promotion is considered and evaluated by a number of entities and individuals, each of whom provides either a positive or negative recommendation with reasons therefore, in a multi-layered process that is set out in the collective agreement. Early in the process, a promotion application is evaluated by an entity referred to as the "promotion committee". Pursuant to Article 20.A.2.1, the Dean, again having had the benefit of the advice of Faculty Council, is responsible for establishing "a faculty-based promotion committee to which shall be added representatives for each department". The collective agreement further provides that, where possible, the majority of the members of the committee shall be persons from the promotion candidate's department who "have the expertise to judge" the candidate's achievements. Once again, the collective agreement, as indicated in the provisions described herein, codifies the key principle of faculty participation in the promotion process.

An Instructor applies for promotion on the basis of the established promotion criteria and weightings. He or she is given the opportunity to meet at least once with the promotion committee. That committee then makes a written recommendation regarding the candidate's application, which is forwarded to the department head, the Dean and the faculty member. Following receipt of the promotion committee's recommendation, the head of the candidate's department also makes a recommendation to the Dean. The Dean, in turn, makes a recommendation regarding the promotion which is forwarded along with the recommendations of the promotion committee and the department head, to the Vice-President (Academic). The Vice-President (Academic) then arrives at his own recommendation and provides it in writing, along with the other recommendations, to the President of the University. Ultimately, the application must be approved or dismissed by the Board of Governors. At each stage, the application is to be measured against the promotion criteria set by the Dean, which are known to

the candidate. This somewhat cumbersome process may take eight months and it is quite possible for different recommendations to be made at the various stages.

Promotion criteria may, and often do, differ from Faculty to Faculty. Moreover, within the Faculty of Physical Education and Recreation Studies, there are specific criteria for the promotion of coaches within the Instructor rank. These criteria indicate that a candidate for promotion from Instructor I to Instructor II would have a Master's degree or Level 4 of the nationally recognized coach training and certification program known as the National Coaching Certification Program (NCCP). In addition, the candidate should be able to demonstrate at least five years of successful performance of duties at the Instructor I rank, an acceptable record of professional and service involvement in the faculty, the University and the community, and success in other responsibilities. Similarly, in the case of promotion from Instructor II to Senior Instructor, the candidate will be expected to have a Master's degree and Level 4 NCCP certification or a PH.D. plus meet the requirements of successful performance of duties at the Instructor II rank and an acceptable record of professional and service involvement as noted above. In addition, in evaluating the coach's performance, the criteria list areas of specific concern to coaching including such matters as recruitment, published articles in coaching journals, national championships and won/loss records. These promotion criteria were established by the Dean, having received the input of Faculty Council, and were in effect at the time that the University determined that it would only offer coaches positions under its new model for the employment of coaches. It should be noted that since 1995, promotion criteria specific to coaches had been in effect and coaches had in fact applied for promotion pursuant to those criteria. The present criteria have been in effect since 1998 and are published in the current edition of the Faculty's "Staff Handbook of Policies, Procedures and Regulations".

As shall be discussed below, Faculty Council approved a change to the specific promotion criteria for coaches at a meeting held on February 2, 2004. The minutes of that meeting indicate that D.H. confirmed that the motion to change the promotion criteria had passed and that he would "forward it to the Vice-President (Academic) and Provost for information". He added that the changes "did not affect the collective agreement". These revised promotion criteria were not

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ultimately adopted and published in the faculty Handbook as the Vice-President (Academic) indicated that the criteria were not acceptable to him. The new employment model for coaches was thereafter developed and implemented by the University.

The Board also heard that Instructors appointed on a term basis have certain rights relating to notice of non-renewal and reappointment. These rights are set out in the following sections of Article 19 of the collective agreement which are deemed applicable to Instructors by the express wording of Article 34.1:

> 19.C.5.1 A faculty member may receive a term appointment if the Board of Governors, after considering a recommendation from the President, makes such an appointment.
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> 19.C.5.2 Except as provided in s. 19.C.5.3, no notice of intention not to grant another appointment is required to be given by the University and no notice of intention not to accept another appointment is required to be given by the faculty member.
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> 19.C.5.3 A faculty member who has received continuous full-time term appointments for a period in total of more than three (3) years shall receive from his/her dean/director at least three (3) months' notice of intention not to grant another appointment or shall give his/her dean/director at least three (3) months' notice of intention not to accept another appointment.
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> 19.C.5.4 Effective January 1, 2002, subject to the provisions of s. 19.C.5.6., where
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> a) a faculty member on a term appointment has held contiguous full-time term appointments for at least six (6) consecutive years; and
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> b) the faculty member has performed satisfactorily; and
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> c) a subsequent term appointment performing the same or substantially the same duties as set out in the letter of offer for the faculty member's most recent term is to be made within four (4) months of the end of that appointment;
>
> d) then the faculty member shall be offered the subsequent term appointment.

> 19.C.5.5 A faculty member who has a full-time term appointment and has received a notice of intention not to grant another appointment and has reason to believe that he/she is not being reappointed for exercising his/her academic freedom or that s. 19.C.5.4 has not been complied with, may request a hearing with the President within ten (10) working days of receipt of such notice.

Accordingly, coaches who held continuous full-time term appointments for more than three years and those who held such appointments for at least six years, had vested rights relating to notice and/or reappointment pursuant to these provisions in the collective agreement. As shall be discussed, there is no evidence that they were advised of these rights by the University when the employment model for coaches was introduced.

The pay of Instructors under the collective agreement was also referred to in the evidence. The University has a great deal of flexibility under the collective agreement to fix the salaries of Instructors. Article 24 of the collective agreement establishes the salary schedule for all classifications, including Instructors. The schedule indicates a "floor" below which the University cannot pay for each level within the Instructor series. While a "maximum" rate is also listed, L.H. agreed that the collective agreement merely provides for the minimum rates that must be paid and that there is no ceiling on salaries. Instructors can be offered any salary above the floor set by the agreement, including amounts that exceed the maximum, as inducement to accept a position. L.H. added that she was quite sure that there are a number of people at the Instructor level who are paid more than the top rate in the collective agreement.

Article 24 also contains provisions allowing the University to provide extraordinary increases to a bargaining unit member's base salary. These increases were referred to as Extraordinary Salary Increases or ESI's. The University is virtually unrestricted in how it provides ESI's, although the total amount of such increases may not exceed $250,000.00 in any contract year. In fact, the Board heard that the University recently twice provided ESI's to the entire department of computer science, citing "market comparisons". Moreover, the Board heard that J.B.D., one of the Persons Concerned, was a recipient of an ESI in 2002. By letter dated March 8, 2002, L.H. wrote to UMFA to advise that J.B.D. had been granted an ESI in the amount of $8,619.65 as he had been offered a lucrative position elsewhere and his departure

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would have been a "great loss to the football program". The letter goes on to say that J.B.D. "now meets the criteria for promotion to the rank of Instructor II and he will be applying for promotion". Despite this fact, and for reasons not shared with the Board, J.B.D. did not apply for promotion and he remained an Instructor I.

C**) The Coaches and Their Roles and Responsibilities**

The University employs nine individuals who serve as full-time varsity coaches within the Faculty of Physical Education and Recreation Studies. Six of the full-time coaches are the Persons Concerned. Three other coaches have continuing appointments rather than term appointments and the University determined that the new employment model could not apply to them as a result. The evidence relating to the individuals whom the University employs on a full-time basis and who perform coaching duties indicated the following:

a) C.B., one of the Persons Concerned, commenced employment with the University on July 1, 2003 as a full-time term appointment at the rank of Instructor I with duties that included acting as the Head Coach of the Bison Track & Field / Cross-Country programs. His initial term appointment was for a period of one year and he received subsequent contiguous full-time term appointments of one year in duration, the last of which ended on June 30, 2006. By letter dated March 22, 2006, C.B. was offered a three-year term appointment without academic rank to the position of "Head Coach" of the Bison Track & Field / Cross-County programs.

b) P.D., one of the Persons Concerned, commenced employment with the University on April 1, 2002 as a full-time term appointment at the rank of Instructor I with duties that included acting as the Head Coach, Bison Women's Basketball program. Her initial term appointment was for a period of one year and she received subsequent contiguous full-time term appointments of one year in duration, the last of which ended on March 31, 2006. By letter dated February 15, 2006, P.D. was offered a three-year term appointment without academic rank to the position of "Head Coach" of the Bison Women's Basketball program.

c) J.B.D., one of the Persons Concerned, commenced employment with the University on January 1, 1997 as a full-time term appointment at the rank of Instructor I with duties that included acting as the Head Coach, Bison Football program. His initial term appointment was for a period of one year and he received subsequent contiguous full-time term appointments of one year in duration, the last of which ended on December 31, 2005. By letter dated December 12, 2005, J.B.D. was offered a three-year term appointment without academic rank to the position of "Head Coach" of the Bison Football program.

d) J.R., one of the Persons Concerned, commenced employment with the University on April 16, 2004 as a full-time term appointment at the rank of Instructor I with duties that included acting as Head Coach, Bison Women's Ice Hockey program. His initial term appointment was for a period of one year and he received a subsequent contiguous full-time term appointment of one year in duration which ended on April 15, 2006. By letter dated February 22, 2006, J.R. was offered a three-year term appointment without academic rank to the position of "Head Coach" of the Bison Women's Ice Hockey program.

e) M.S., one of the Persons Concerned, commenced employment with the University on August 1, 1992 as a full-time term appointment at the rank of Instructor I with duties that included acting as Head Coach, Bison Men's Ice Hockey program. His initial term appointment was for a period of one year and he received subsequent contiguous full-time term appointments of one year in duration the last of which ended on July 31, 2006. By letter dated May 4, 2006, M.S. was offered a three-year appointment without academic rank to the position of "Head Coach" of the Bison Men's Ice Hockey program. The Board heard that M.S. was on leave and that the Men's Ice Hockey Program was being coached by D.M. in his absence.

f) S.P., one of the Persons Concerned, commenced employment with University on or about June 15, 2005 in a full-time term position as the Assistant Coach, Bison Football program. By letter dated March 22, 2006 he was offered a further two-year term position in that role. His initial appointment, as with his latest appointment, was made without academic rank and at no time did the University recognize him as being within the bargaining unit.

g) K.B. is a full-time Instructor II pursuant to a continuing appointment with the University with responsibilities that include acting as Head Coach, Bison Women's Volleyball program. Since commencing his head coaching duties with the University in 1992, and continuing to present, he has been included in the bargaining unit.

h) G.P. is a full-time Senior Instructor pursuant to a continuing appointment with the University with responsibilities that include acting as Head Coach, Bison Men's Volleyball program. Since commencing his head coaching duties with the University in 1981, and continuing to present, he has been included in the bargaining unit.

i) R.S. is a full-time Senior Instructor pursuant to a continuing appointment with the University with responsibilities that include acting as Head Coach, Bison Men's Basketball program. Since commencing his head coaching duties with the University in 1984, and continuing to present, he has been included in the bargaining unit.

Each of the Persons Concerned accepted employment under the new employment model for coaches offered by the University. As will be discussed, they were not permitted to choose a reappointment with academic rank and remain in the bargaining unit represented by UMFA. The only way for the Persons Concerned to preserve their employment was to accept the University's new non-union employment model. With the exception of S.P., each of the Persons Concerned was in the bargaining unit and covered by the collective agreement in force between the University and UMFA prior to conceding to the new employment model imposed by the University. The three individuals having coaching duties who enjoy continuing appointments

with rank remain in the bargaining unit and covered by the collective agreement. Other than the nature of their appointment, there is nothing to materially distinguish the work that they perform from that of the other individuals who act as Head Coaches.

The duties and responsibilities of individuals assigned to coach at the University are multifaceted. Generally speaking, the duties of the various coaches are consistent despite the fact that they coach different sports. Each of the most current letters of offer made to the Persons Concerned who serve as Head Coaches indicate that they are responsible for the "organization and operation" of the varsity sports program to which they have been assigned. The letters go on to particularize some of their responsibilities which include such matters as the recruitment of student athletes, monitoring of academic success of the student athletes, coordination of coaching staff, direction of off-season training programs, building and maintaining the alumni booster club, undergraduate teaching duties as assigned, service on any departmental, faculty and/or University committees to which they are appointed or elected, and community service. The duties of the lone full-time Assistant Coach include assisting the Head Coach with the "organization and operation" of the Football Program, recruiting student athletes, monitoring the academic success of the team, coordination of coaching staff, liaising with alumni for fundraising, assistance with football camps and community service.

There was not unanimity among the witnesses as to whether "teaching", one of the three core academic responsibilities set out in the collective agreement, is an important part of the duties of the individuals who coach at the University. L.H., in particular, said that she does not regard coaching as teaching. During cross-examination, counsel for UMFA provided L.H. with a copy of minutes from a Faculty Council meeting during which the Faculty Dean, D.H., is quoted as saying that "teaching is an important part of the coaches' job description". At the same meeting, K.B., the Head Coach of the Women's Volleyball program, is quoted as saying that he "feels strongly about remaining in UMFA, as teaching is an important component of what coaches do". C.D., the Athletic Director, who has considerable coaching experience, initially denied that teaching was an important function of the coaches; however she agreed in cross-examination that the act of coaching integrally involves the process of teaching. L.G. also views

teaching as an important part of coaching. She noted that the concept of teaching is not restricted to a classroom setting and that UMFA members do instruct students outside of University lecture halls. She also suggested that coaching may be related to another of the core academic duties set out in the collective agreement in that it constitutes "service" to the University.

Apart from the debate on whether or not coaching involves teaching, there is no doubt that the Head Coaches may be assigned to teach undergraduate degree courses in the Faculty of Physical Education and Recreation Studies. A review of the University's 2005-2006 General Course Calendar indicates that C.B., J.R., M.S. and J.B.D. and P.D. each taught courses. Moreover, the responsibility to teach degree courses continued under the new employment model, despite the fact that the University was no longer prepared to appoint the Head Coaches as Instructors with academic rank. While these course offerings were referred to by certain witnesses as being "activity courses", it is accepted that they are nevertheless credit courses which count towards undergraduate degrees granted by the University. In addition to the responsibility to teach courses, all of the Coaches have a responsibility to monitor the academic success of the student athletes whom they coach. As C.D. acknowledged, the win/loss record of a varsity sports program is only one factor in evaluating a coach's success; the academic achievements of the student athletes and the graduation rates of those athletes are obviously critical benchmarks by which coaches' achievements must be measured.

Notwithstanding its decision to deny the Persons Concerned further appointments with academic rank, the University continues to recognize them as "academics". The Board heard that in conjunction with the University's decision to appoint the Persons Concerned without academic rank, it placed them in a "Non-Unionized Employment Group" known as "Other Academic Staff". During his cross-examination, the University's Vice-President (Academic) and Provost conceded that even under the new model, coaches are considered to be academics and they have teaching responsibilities.

D) The New Employment Model for Coaches

R.K., Vice-President (Academic) and Provost, initiated the creation of a new employment model for coaches in December of 2004 in a meeting with T.V., Executive Director, Human Resources. R.K. emphasized during his testimony that he has been involved with coaching for many years, including at the University level in the 1970's. He also testified that during his tenure at Brock University, he was responsible for varsity sports programs including coaches and their remuneration. He noted that the coaches at Brock were full time coaches, rather than academics, and they were not included in the Faculty Association at that University. Clearly, R.K. believed that in light of his experience that he was particularly well qualified to understand the role of the coaches and to initiate the process which produced the new employment model. It is equally clear that R.K. held very strong opinions regarding the coaches and he was dissatisfied with the employment model which accorded coaches academic rank and placed them within a collective agreement regime which, at least in part, tied promotion to their personal academic achievement.

R.K. testified that his involvement in the evaluation and approval of G.P. promotion from Instructor II to Senior Instructor influenced his decision that there was a problem regarding coaches. G.P. promotion application was filed by letter dated October 18, 2004. The Promotion Committee, which included C.D., unanimously recommended G.P's promotion on December 7, 2004. The Committee noted that G.P. is "one of the best volleyball coaches in North America" and that he is an "outstanding member of the University of Manitoba whose performance in each category (teaching, coaching and service) is worthy of promotion". In January 2005, the promotion application was supported by the Department Head and Dean, namely D.H.

R.K. reviewed G.P. promotion application, the recommendations from the Committee, Department Head and Dean and the promotion criteria. He testified that, in his view, G.P. "did not meet the criteria, but he was an excellent coach in high demand". R.K. further stated that the University wants the have the "best coaches possible" and that it needs to pay salaries that adequately reward them. He determined with respect to G.P. that "the only way for him to move to a new salary range was to promote him" and that he felt that he "had to allow the promotion or

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risk that [G.P.] leave". R.K. says that despite the fact that he concluded that G.P. did not meet the established promotion criteria, he "ignored the criteria" and approved the promotion anyway. He said that this decision "made a mockery of the process" and highlighted his concern that he wanted to maintain consistency in relation to academic qualifications at the University. R.K. stated that G.P.'s promotion "highlighted a problem" with respect to coaches and he felt that "there had to be a better solution".

In addition, R.K. testified that he was concerned about certain revisions to the promotion criteria for coaches which were developed by the Tenure and Promotion Committee and endorsed by Faculty Council on February 2, 2004. As was noted above, following the decision of Faculty Council to pass a motion to amend the promotion criteria for coaches, D.H. indicated that he would forward what had been adopted to the Vice-President (Academic) "for information". In substance, the amendments modified the promotion criteria, most notably by stating that promotion of a coach to Instructor II required a Master's degree or Level 3 NCCP certification, and that promotion to a Senior Instructor required a Master's degree and Level 3 NCCP certification or Level 4 NCCP certification. It is very clear that R.K. determined that the revised criteria endorsed by Faculty Council for coaches were "inappropriate". He refused to accept the revised criteria submitted to him by the Dean. He testified that he instead asked the Vice-Provost to work with the Dean and T.V. to see if an alternate model could be found where coaches could be assessed "as coaches for coaching and not on academic criteria". He noted his previous experience with other institutions and felt that there "were models that coaches would prefer".

R.K. testified that academic qualifications are of little relevance to coaches as coaching is focused on a specific sport and "because he might have a Masters in English does not add to coaching". He added that "in that sense, I don't see academic qualifications being relevant". Instead, he said that he viewed national coaching levels as being relevant criteria upon which coaches' qualifications ought to be measured.

With respect to the specific promotion criteria for coaches, R.K. testified that Faculty Council's motion to revise the criteria by referencing NCCP certification was "an attempt to work within the system" but he did not accept that, for example, Level 4 NCCP certification was "the same as a Ph.D". He did not view the revised criteria for the promotion of coaches as acceptable. R.K. believes that he has responsibility regarding the oversight of promotion criteria at the University, despite the fact that the collective agreement is silent as to his office's role and expressly grants the authority to develop promotion criteria to the Dean, having first received the advice of the faculty. R.K. maintained that he is "responsible for the academic mission" of the University and that no appointment can be made without his personal approval. He said that he must ensure that "we hire the best qualified people so that we can produce quality academic programming". He further stated that one of the most important aspects of his job is to oversee and monitor the promotion and tenure processes, in part to ensure that "criteria are consistent across faculties".

On September 22, 2004, there was discussion at Faculty Council of concerns that the University had with the proposed revision to the Staff Handbook. The minutes of the Faculty Council meeting indicate that the Vice-Provost relayed concerns of both a substantive and editorial nature. During the October 28, 2004 Faculty Council meeting, faculty were advised that these concerns "were primarily related to the coaching classification". As such, the proposed changes to the Handbook relating to promotion criteria for coaches were removed and the other changes to the Handbook were accepted and passed. Interestingly, C.D. testified that weeks prior to the September 22, 2004 meeting she was advised by the Dean that the Vice-President (Academic) was concerned about the proposed changes to the promotion criteria for coaches and he wanted to review the positioning of the coaches as Instructors. She testified that her understanding at that point in time was that the Vice-President (Academic) "did not feel that our coaches should be academic coaches with rank". She further understood that if coaches lost their academic rank then they would be out of UMFA. As it turned out, ultimately academic rank was denied to coaches under the new employment model and they were considered by the University to fall outside of the UMFA certificate. R.K. was asked if it was possible that he told the Dean prior to the September 22, 2004 Faculty Council meeting that one option to deal with

the coaches was to remove them from the bargaining unit. He claimed that he had no recollection of doing that but went on to concede that he often referred to his previous experience with coaches not being unionized within a university faculty association.

As a consequence of his concerns regarding G.P.'s promotion and the revised promotion criteria for coaches developed by the Faculty, R.K. ultimately met with T.V. to discuss what he perceived to be a problem. T.V. testified that R.K. "called me into office regarding a difficulty he had with our HR model for coaches". T.V. recalled that R.K. told him that there had been a request to modify promotion criteria for coaches and that the "current model was not working". T.V. added that R.K. said that the present manner of dealing with coaches was based on an "old style model" and that "most Universities were hiring professional coaches". T.V. claimed that R.K. told him that "the University was in danger of losing our coaches". In addition, T.V. said that "we had a concern that we told our coaches that they should get a Masters or Ph.D to get a promotion that they would not use". T.V. said that R.K. asked him to create a new model that was more appropriate for coaches. For his part, R.K. told the Board that he was looking for alternate ways to assess the performance of coaches to reflect what they actually do. He added that "I've been involved in coaching for many years" and that if he was coaching he would want to be evaluated "as a coach" and not on "side things". He emphasized that he wanted to be able to hire the best possible coaches.

T.V. was charged with the task of addressing the problems that R.K. perceived required resolution by way of the development of a new employment model for coaches. He testified that he considered whether the problems identified could be resolved within the context of the UMFA collective agreement. However, he felt that the coaches seemed so different from the other members of the bargaining unit that he determined that it would be difficult to resolve the problems within the collective agreement. During cross-examination he stated that he left the meeting with R.K. thinking that the "radical changes that he described" would not fit within the collective agreement. T.V. said that he reviewed the UMFA certificate and noted the reference to "rank". He said that he concluded that coaches would fall outside the certificate if denied appointments with academic rank. T.V. said that he asked R.K. if academic rank was important

to coaches and he replied that it was not. The basis upon which R.K. drew that conclusion was not clear on the evidence. T.V. added that R.K. felt that the creation of a category of coaches without academic rank outside the collective agreement might deal with the problems he had identified. There is no indication in the evidence that the decision to remove academic rank from coaches was placed before the Board of Governors for consideration.

T.V. testified that he did not approach UMFA about the proposed imposition of a new employment model which would see the coaches continue in their duties but outside of the scope of the UMFA certificate and the collective agreement. He testified that he did not feel that the University would be successful in getting UMFA's agreement, but conceded that he had no way of knowing that in that he did not broach the subject with the union.

As a result of his discussions with R.K. and the conclusions he initially reached, T.V. said that he commenced work on development of the new employment model for coaches – a process that took approximately one year to conclude. During this time, T.V. worked with the Dean, the Vice-President (Academic), the Vice-Provost and the Assistant to the Dean. C.D. was brought into the discussions later in the process in November of 2005. The new employment model saw term coaches who had been appointed as Instructors being henceforth appointed as Coaches without academic rank, and purportedly outside of the scope of the UMFA certificate and the collective agreement. Following their removal from the bargaining unit and the collective agreement, the Coaches were, as noted above, to be placed in a "Non-Unionized Employment Group" known as "Other Academic Staff".

As alluded to above, the new employment model devised by the University does not apply to the three coaches who hold continuing appointments as Instructors with rank. Those individuals, G.P., R.S. and K.B., also coach varsity sports teams and may be assigned to teach undergraduate credit courses in the Faculty. However they remain in the bargaining unit and covered by the collective agreement. They are still accorded academic rank and hold positions within the Instructor series. L.H. testified that continuing appointments only end upon resignation, retirement, termination for just cause or death of the appointee. She added that the

new employment model is not applicable to these coaches as the University did not believe that it had the opportunity to apply it to them given their continuing appointments. In contrast, L.H. indicated that the University decided that the term appointments accorded an opportunity to review and determine whether future appointments should be given academic rank.

At the end of October 2005, T.V. met with L.H. He provided her with the new employment model for coaches and asked her to work with the Dean to finalize it. She testified that she met with the Dean, the Assistant to the Dean and the Athletic Director during the second week of December 2005 to finalize the model. She noted that J.B.D. term was set to expire on December 31, 2005, and that they wished to implement the new model starting with J.B.D.

The new employment model for coaches was described in a document dated December 14, 2005 (Exhibit 14) that was ultimately provided to each of the term coaches. It states, in part, the following:

> **Physical Education and Recreation Studies – Coaches Model**
>
> The nature of university athletics continues to change. The professionalization of coaching in University athletics has been a trend for some years. The days of university professors being asked to coach university athletic teams have disappeared and have been replaced by specific coaching skills applicable to individual athletic disciplines.
>
> In addition, the promotion and tenure criteria applicable for faculty members with academic rank do not represent the competencies of successful university coaches. The coaches of today are specialists and are unlikely to have completed a Ph D. (sic.). Competent coaches are found holding a Bachelor's degree or a Master's degree with considerable coaching experience. The traditional academic year also does not apply for coaches of University athletics. For a university coach the skills of recruiting and developing talent are just as important, if not more important, as the skills of instruction. As a result of this growing professionalization of university coaching, the University of Manitoba needs to recognize the trend across the country to hire and retain professionally trained coaches to prepare student athletes for inter-university athletic competition.
>
> The University's intent, therefore, is to offer appointments without academic rank on a term basis following the completion of existing term appointments. This

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practice would not affect the continuing or tenured appointments of faculty that currently apply in the Faculty of Physical Education and Recreation Studies. The positions would be primarily academic in nature however they will not carry any academic rank. The title of the appointment will be Coach or Assistant Coach. The term appointment may be from one year to as many as three years.

A separate salary range will be created for the position of Coach and for the position of Assistant Coach, if any.

The following is a brief summary of the terms and conditions that will apply to the new Coach and Assistant Coach positions:

Academic Freedom – a per Policy 701

Appointments – renewable term appointments of 1-3 years will be offered to new appointments. The individual will have the ability to terminate a term appointment in progress with appropriate notice. The University will have the ability to terminate a term appointment in progress for cause or with appropriate notice or pay in lieu of notice. The recruitment process for a Coach or Assistant Coach will be consistent with Policy 703. the position of Coach would require a Master's or a Bachelor's degree plus coaching experience and certification as a Coach, as is applicable.

Benefits / Pensions – as per University Benefit / Pension Plans. Same benefits as provided to other academic staff.

Discipline – standard procedures for discipline. Progressive discipline with processes for immediate termination as required. Same discipline processes as for other academic staff.

Duties and Responsibilities Include:

10% teaching duties – 3 credit hours as assigned by the Dean
20% University service – participation in University and Faculty based committees – community outreach / leadership
70% coaching which includes:

- Recruitment of high quality student athletes
- promotion of the sport
- administrative duties such as budgetary management
- selection and development of student athletes
- responsibility for the development of successful teams which have the ability to compete on a national level

Note: There is no requirement to do research or scholarly activity. The Dean will also consider proposals from coaches for alternate assignments including duties

which present professional development opportunities during the months of April – August.

Grievance Procedure – as per University Policy 713 or any updated version of this Policy.

Statutory Holidays – as per University policy and procedure on Holidays for staff (section 600 of Policy Manual)

Leave of Absence With or Without Pay – as per University Policy and Procedures…

Outside Professional Activities – individuals must advise the Dean in advance of undertaking any paid or substantial unpaid professional activity. Activities which may conflict with the individual's obligations to the University will require prior written permission from the Dean.

Parking – as per University parking regulations.

Patents and Copyrights – as per University Policy 225 or any updated version.

Performance Evaluation – use of the evaluation guidelines and process developed by the Athletic Director in consultation with the Dean for the position of Coach or Assistant Coach. The final guidelines and process shall require the Dean's approval.

Personnel Files – as per University Policy and Procedures 605 or any updated version.

Promotions – Not applicable as appointments are without rank.

Professional Development – Research / study leaves are not applicable to a term appointment as coach. However the Dean will consider proposals from coaches for alternate assignments including duties which present professional development opportunities during the months of April – August. These leaves will be funded by the Faculty and require the approval of the Dean.

Salary Range – The salary range for Coach shall be from $40,000 - $85,000 and for Assistant Coaches from $30,000 - $60,000. This range may be adjusted on April 1 of each year in accordance with any across-the-board adjustments that may be in effect for other groups on campus.

> **Salary Adjustments**
>
> **1) Annual "Across-the-Board" Adjustments:** Annual salary adjustments will be effective April 1st. The rate of such adjustments will be determined by the Board of Governors.
>
> **2) Annual Performance Increases:** Depending on performance in the preceding calendar year, coaches will normally be eligible for a performance increase of 3% of their base salary. In addition, the Dean shall have the discretion of recommending to the Vice-President (Academic) and Provost additional salary increases to reflect superior performance.
>
> **Sick Leave** – as per the University's policy and procedures on sick leave.
>
> **Travel Funds and Expenses** – individuals will continue to have access to travel and expense funds as per current practice within the Faculty. For 2006, the amount available to individuals is $1465.
>
> **Tuition Reimbursement** – Tuition reimbursement in accordance with current University policy and procedure for non-union academic staff. Sample attached.
>
> **Vacations** – as per University Policy and Procedure 715 Vacations, which includes 24 days vacation plus 3 days vacation over the Christmas break.

With respect to the University's ability to terminate a term appointment absent cause, L.H. stated that the University determined it could terminate the coaches in that circumstance upon provision of two months' notice or pay in lieu thereof and the coaches were so advised in their letters of offer as to this condition of employment.

There is some suggestion in the text quoted above as to the University's rationale for implementing the new employment model for coaches. In addition, the witnesses called by the University attempted to explain their views as to why the new model was needed. In part, the University says that it wished to recognize the so-called "professionalization of coaching" in University athletics. This term is meant to reflect the fact that coaching has become a specialty and universities no longer simply ask professors to coach teams. Flowing from this change has been the hiring of coaches with Bachelor's or Master's degrees who have considerable experience coaching a specific sport. The University says that the Instructors hired to perform

coaching duties were "stuck" at the entry level of the Instructors series as they did not have the academic qualifications necessary to seek promotion under the established promotion criteria. As a result, the University says that they could not get promoted without radical changes to the promotion criteria which did not require coaches to hold advanced degrees in order to secure promotion to higher ranks. As a result of a failure to achieve promotion, the coaches did not see salaries rising in accordance with the market for their services and, the University and in particular R.K., determined that the University was thereby in danger of losing its coaches. However, R.K. was not prepared to see the promotion criteria compromised by equating national coaching certification levels with advanced university degrees as endorsed by Faculty Council.

Clearly, the University did not feel that the problems which it identified regarding the coaches could be readily solved within the context of a collective bargaining regime and the collective agreement. Discussing the proposed revisions to the promotion criteria for coaches, L.H. remarked that Faculty Council was attempting to find a way to deal with the requirements of coaches but that "they are working within the constraints of the collective agreement which are themselves inappropriate". She added that the coaches had been unhappy for a long time and, in her view, were not well served by the collective agreement. Moreover, the Vice-President (Academic) clearly believed that having coaches within the bargaining unit and subject to the promotion procedure set out in the collective agreement was "not working" and that "it did not make sense to have academic coaches". T.V., as noted above, did not feel that the "radical changes" that R.K. described would fit within the collective agreement. In addition, T.V. testified that he determined that the coaches appeared to be so different from other bargaining unit members that the changes would be difficult to accommodate within the collective agreement. Perhaps most illustrative of the University's view that the coaches could not remain within the collective bargaining regime is that it never raised the issues with UFMA in an effort to seek bilateral solutions to the perceived problems within the context of the present collective agreement or negotiations towards new collective agreement provisions.

UMFA pointed out that the collective agreement provides for flexibility in promotion criteria to deal with unique circumstances and that the faculty has input into the establishment of

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promotion criteria and weightings to reflect such circumstances. It was also noted that specific promotion criteria for coaches which refer to national coaching certification levels have been in place since the 1990's. And furthermore, L.H. in particular acknowledged that there have been promotions of coaches pursuant to those criteria. As such, it is not accurate to maintain that all of the coaches were "stuck" at that Instructor I level. It is also true that it is always open to a coach to carry on with his or her education and achieve advanced degrees. Indeed, Article 7 of the collective agreement provides tuition fee remission for members on certain conditions. Furthermore, in so far as the University felt that it was in danger of losing competent coaches due to their remuneration, it was acknowledged that ESI's may be granted to bargaining unit members in order to provide increases to salary over and above the levels contemplated by the collective agreement. For her part, L.H. felt that using the provisions available in the collective agreement to address the issues identified by the University respecting coaches was "a cumbersome way of dealing with it". R.K. added that he did not see the previous model as fitting with the coaches and that the provision of ESI's to deal with their compensation issues was, in his view, "a stretch".

It is important to note that the new employment model did not thereby affect the duties of the coaches. They each continue to perform essentially the same duties as when they were accorded academic rank and were included in the bargaining unit and covered by the collective agreement. This fact was confirmed in reviewing the last appointment letters provided to the Head Coaches as Instructors accorded rank with the offers provided to them under the new employment model. In addition, L.H. and L.D. each confirmed that the coaches duties did not change under the new model. In fact, L.H. wrote to UMFA on January 30, 2006 and stated, in part, the following:

> Finally, you asked whether the duties of Coach have changed under the new model. I am advised that they have not. They continue to be 70% coaching, 20% service, 10% teaching.

Amongst the duties that the Head Coaches continue to perform under the new employment model is the teaching of undergraduate courses. Furthermore, as noted above the coaches who

were Instructors are still considered "academics" by the University and are classified accordingly.

E) The Meeting with J.B.D.

L.H. was assigned the task of implementing the new employment model for coaches in October of 2005. She met with the Dean, the Assistant to the Dean, and the Athletic Director in December of 2005 to finalize the model. L.H. testified that she noted that J.B.D.'s term expired on December 31, 2005, while the other term coaches had terms which expired in 2006. L.H. told the Board that the University determined that it wanted to implement the new model starting with J.B.D. To that end, she, along with the Dean and L.D., met with J.B.D. on December 14, 2005 in the Dean's office. L.H. admitted to feeling rushed at this stage as the University closes for the Christmas holidays and J.B.D.'s term expired at the end of the year. As such, they needed to meet with him, explain the new employment model, have him agree to it, and complete all of the required paperwork very promptly if he was going to be paid in January on schedule.

There is no indication in the evidence that J.B.D. was advised of the specific details of what was to be discussed at the meeting in advance, nor was there evidence that he was provided with a copy of any documentation or an agenda prior to the meeting. It was not suggested to him at any time that he may wish to bring a representative from UMFA. It was also acknowledged by University witnesses that notwithstanding the fact that B.D. seemingly had rights relating to reappointment pursuant to Article 19.C.5.4 of the collective agreement, he was not advised as regarding these rights at any point in time by University officials. B.D. was a member of UMFA and included in the bargaining unit at the time of the meeting. UMFA was not notified of, or invited to, the meeting by the University.

L.H. described the meeting with J.B.D. in some detail. She stated that she did not take notes at the meeting. She said that J.B.D. was provided with a copy of the document quoted extensively above titled "Physical Education and Recreation Studies – Coaches Model". L.H. testified that she explained the new employment model to J.B.D. She told him that it was created

for coaches "because of the problems that they were having with promotion". She added that "I said that we expected that he would find this model very appealing" and that it would solve the problems. However, she also recollected that she advised J.B.D. that if he had concerns with the model, or if it did not the address problems in his view, then they wanted him to so advise as they would have to "step back" and re-examine the issue in that event.

L.H. indicated that she explained to J.B.D. the history of academic coaches and the movement to the professional coaches model. She advised him that the new employment model provided for coaches to be appointed without academic rank and that there was no further need for the concept of promotion. She said that "promotion is meaningless when you are the Head Coach". She said that she explained that while previous term appointments were only one year in length, under the new employment model the University was prepared to offer three year terms. J.B.D. was further advised that his duties and responsibilities remained identical to that which he performed as an Instructor with academic rank.

L.H. testified that she told J.B.D. that the appointment could be terminated by either party upon provision of two months' notice, noting that the UMFA collective agreement itself provides that Instructors can terminate with two months' notice. This differs materially from the rights held by coaches under the collective agreement. L.H. said that she told J.B.D. that the University might wish to terminate an appointment prior to its conclusion if, for example, the Football program was closed or if he decided he did not wish to coach any longer. She added that, if the program was closed that the University would give more than two months notice in any event. She later recalled that she also told J.B.D. that notice might be given by the University if they perceived significant problems with a coach's performance.

The meeting also touched on the terms and conditions of employment in the new model and a comparison between those terms and those granted to the coaches under the collective agreement. L.H. recalled that she discussed benefits and pensions with J.B.D. and explained to him that they "would be exactly the same" as he was provided under the collective agreement.

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She noted that such areas as vacations, leaves of absence, statutory holidays, parental leaves, performance evaluations, and tuition fee remission would be the same as he previously enjoyed.

L.H. also pointed out to J.B.D. areas, in addition to promotion, where the collective agreement did not, at least in her view, serve the coaches well and where the new employment model for coaches provided superior benefit to them. In particular, she noted that research study leaves had been a problem for the University and coaches. The new employment model proposed something different whereby the Dean could be approached by a coach with a proposal like coaching a national team for the summer. In that event, the Dean, she said, might be prepared to pay the coach if he determined that there was a value in the proposed activity for both the University and the individual.

L.H. said that she also reviewed the salary range for coaches with D.B. She pointed out that coaches were eligible to receive the across the board increases that were "just like in UMFA", plus annual performance increases of 3% of salary, and that the Dean had discretion to recommend a further ESI based on performance. She mentioned to J.B.D. that there could be bonuses for extraordinary performances including winning national championships. L.H. testified that "we mentioned that this differed from the UMFA model". She recollected that she had a copy of the collective agreement and she opened it. She recalled that they looked at the Instructor I salary range and discussed the fact that given that B.D.'s salary was above the maximum in the collective agreement, he would only get the 3% across the board increase if he remained covered by the collective agreement. She testified that under the UMFA collective agreement B.D. would not receive a performance increase "despite being an excellent performer". She explained to the Board that under the collective agreement, J.B.D. was "stuck" unless he received another ESI or a promotion. She said that she indicated to J.B.D. that "he was capped" and explained that his potential remuneration under the new employment model was higher given the possibility of performance increases which were not available to him under the collective agreement.

J.B.D., according to L.H., was then asked if he had any problems with the new employment model. She acknowledged that if he had a problem then the University would have had to rethink its position. However, she testified that J.B.D. did not express any concerns and that he was presented with the actual letter of offer from the University. That letter is dated December 12, 2005, despite the fact that the meeting took place on December 14, 2005. The salary level offered to J.B.D. was identical to that which he was receiving as an Instructor covered by the collective agreement. The final paragraph of the letter of offer instructs J.B.D. that "to accept this offer of appointment, please sign and return the enclosed copy of this letter to D.H. by December 15, 2005". L.H. indicated that while the letter asked for an answer the next day, J.B.D. was advised that he could take longer. However, he was also told that the only problem in taking longer to consider the offer would be in his getting paid promptly given that his present term was set to expire and the University was scheduled to close for the Christmas holidays. As such L.H. advised J.B.D. that she "could not guarantee he would be paid on time" depending upon the timing of his response.

J.B.D. signed his letter of offer on December 21, 2005.

F) The Meeting with the Coaches

L.H. testified that since J.B.D. had expressed no concerns with the new model, the University decided that it would summon all of the Persons Concerned, including J.B.D., to a meeting the following day, December 15, 2005, to discuss the new employment model for coaches. C.D. advised the coaches of the meeting in an email (apparently dated December 13, 2005) which reads:

> Coaches,
> A meeting has been scheduled with Human Resources for this Thursday morning at 9:00 am to discuss the new classification for Coaches and Assistant Coaches. I apologize for the short notice. Please make every effort to be there. The meeting will be in 117 Frank Kennedy.

The email was delivered to all of the Persons Concerned, however, J.B.D. is noted as being "cc'd" on the message. There is no evidence that apart from J.B.D. any of the coaches was

provided with documentation to review in advance of this meeting. Additionally, there was no suggestion that they were invited to have a representative from UMFA present at the meeting and UMFA was not notified.

The meeting was attended by L.H., D.H., C.D. and each of the Persons Concerned. K.B. also came to the meeting. However, when L.H. was informed by the Dean that K.B. held a continuing appointment rather than a term appointment, she expelled him, stating that "since this does not apply to you, we would like you to leave". With the exception of S.P., the Assistant Football Coach, all of the coaches at the meeting were members of UMFA, included in the bargaining unit for which UMFA holds a certificate and covered by the terms of the collective agreement. UMFA at that point in time had no knowledge of S.P. as the University deemed that his position fell outside of the bargaining unit.

L.H. expressed the view that the University did not want the coaches to hear about the new model "in the hallway" and that the meeting was called so that they could provide the coaches with an impression of the new terms and conditions of employment. Furthermore, she stated that "we did not want to negotiate little pieces of the model but if overall there was a big problem, then we wanted to hear about it". She maintained that the University presented the new employment model to coaches in order to hear their views; however, the Board notes that a letter of offer had already been provided to J.B.D. under the University's new employment model for coaches. Nevertheless, L.H. indicated that there was an opportunity given to the coaches to ask questions and receive answers and that there was "quite a lot of discussion".

The document referred to above as "Physical Education and Recreation Studies – Coaches Model" (Exhibit 14) was provided to the coaches at the meeting. L.H. testified that she discussed the rationale for the new employment model as she had with J.B.D. She stated that <u>she covered the same issues as she had with J.B.D. during their meeting the previous day</u>. She told the coaches that "we expected that they would find it very positive" but if not, they wanted to hear the coaches' concerns. L.H. also told the coaches that J.B.D. had just been offered employment

under the new employment model and that he had been provided with a letter of offer on those terms.

As she did the previous day with J.B.D., at the meeting with the coaches L.H. discussed salaries and other matters concerning their compensation. And, once again she referred to the UMFA collective agreement and had copies of the salary page available for information. She also provided the coaches with salary scales for coaches from selected Canadian universities. There was a discussion about compensation under the new employment model and the specific performance bonuses that clearly differed from what the coaches could achieve under the collective agreement. L.H. says that she told the coaches that individualized plans would be developed in relation to targets relating to performance increases. Additionally, she underscored that provisions of the collective agreement relating to administrative study leaves were not useful for coaches and the new employment model proposed something that was more favourable for them.

According to L.H., the issue of UMFA and its involvement came up at the meeting. She testified that her response was that the University makes decisions based on what it feels is necessary for students and staff and that they felt that this was the best model for coaches and sports programs at the University, and if UMFA disagreed then it could "file a grievance". L.H. also testified that the University "does not do things or not do things because we are afraid of getting a grievance".

For his part, T.V. testified that if all of the coaches decided the new model was not acceptable, then it would have been reviewed. He was asked if he would have stopped the new model if the coaches were not happy and he responded that it was not his decision but rather was a decision of the Dean and the Vice-President (Academic). He agreed that if all of the coaches acted together then the administration might have had to think about it. Counsel for UMFA pointed out that such collective action is precisely what unions do, to which T.V. responded that he was informed that the coaches were happy with the new model in any event.

The coaches were not provided with letters of offer at the meeting, as their terms did not expire until various points of time in 2006 (the latest being M.S.'s term which expired in July 2006). L.H. was asked by counsel for UMFA during cross-examination to confirm that the coaches were told that they would be offered appointments under the new employment model but if they chose not to accept the appointment without rank and outside of UMFA then they would be given 3 months notice as required under the collective agreement and they would not receive another appointment. L.H. initially said that she did not believe that she told the coaches that. However, she was then shown the Unfair Labour Practice Application filed by UMFA and the University's Reply thereto which admits that coaches were told that they could choose to accept an appointment under the new model or they would not have an appointment at all. Upon being shown the University's Reply, to which she was the Declarant, she changed her answer and admitted "Yes, I did tell them that".

In the course of time, all of the coaches were offered appointments under the new employment model. There was no evidence led to the effect that the model changed in any way, shape or form from that submitted to B.D. on December 14, 2005 and to the rest of the coaches the following day. Each of the Persons Concerned ultimately accepted letters of offer under the new model and were thereafter deemed by the University to fall outside of the bargaining unit. In light of L.H.'s admission noted above, had they refused to do so, they would not have been given any appointment and would not have retained their positions as coaches at the University.

G) The Decision to Exclude UMFA from Discussions

As has been noted, the University determined that it would not discuss the new employment model with UMFA at the point it was conceived, developed or implemented during the meetings with J.B.D. and the other coaches in December of 2005. As a consequence, the University met with the Head Coaches at a time when they were in the bargaining unit, without advising UMFA of the meetings, scant notice of which was provided to the coaches themselves.

It is fair to say that upon discovering these facts UMFA was immensely displeased by the University's failure to include it in the discussions and meetings. They feel that the University

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acted in violation of the ***Act***. L.G. also testified as to provisions of the collective agreement that specifically address the obligation to consult with the union and to engage in discussions. In this regard, she noted that Article 4 of the collective agreement generally refers to the obligation of the University to confer with UMFA if considering changes to bylaws, policies or procedures which affect the rights, duties and responsibilities of UMFA Members and to receive input regarding those changes. Additionally, she said that Article 5.4 requires that representatives of University and UMFA meet annually or at other times to discuss issues of concern. L.G. added that, in practice, the parties discuss issues of mutual concern much more often than once per year. At no time did the University raise the issue of the coaches and the problems that the University perceived in relation thereto with UMFA according to L.G. The University did not contest this evidence.

It appears that University officials understood that UMFA would be concerned about the new employment model for coaches and that consideration was given as to when or whether the union ought to be contacted. R.K. was asked if he had discussions with anyone about involving UMFA prior to University officials meeting with the coaches. He responded that he knew when the new employment model was advanced that the coaches would not remain in UMFA. He testified that he participated in discussions regarding "at what point would it be appropriate" to discuss the matter with UMFA. He said that the issue of notifying UMFA was "certainly something that was raised amongst ourselves". He testified that he told T.V. that "I would appreciate his judgement and I would take his advice" regarding when to contact the union. R.K. conceded that he is aware that the University may not negotiate terms and conditions of employment directly with members of UMFA. He says that he presumed that there would be contact with UMFA, but that he left it to T.V. as to how the process would unfold and whether UMFA would be contacted or not.

T.V., on the hand, testified that that he did not discuss with R.K. whether UMFA should be notified, but noted that they discussed the fact that if the new appointments were without academic rank then they would be outside of the bargaining unit and that would seemingly be a concern to the union. T.V. further stated that he determined that the University would not be

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successful in getting UMFA's agreement regarding the new employment model for coaches in any event. His view was that the issue could not be successfully bargained. As has been noted above, he conceded that he formed that opinion without actually raising the issue with the bargaining agent. T.V. admitted that "we knew that UMFA would be concerned" but they did not believe that was an issue that had to be dealt with prior to the December 15, 2005 meeting with the coaches. He said that "we did have a plan" to meet with UMFA after the meeting, but that did not happen because of the Christmas break during which the UMFA office was closed. He added that he did not see it as "a burning issue", but admitted that UMFA got in touch with the University prior to the Christmas closure after being informed about the December 15, 2005 meeting.

The reasons for refusing to involve UMFA in the discussions related to the new employment model and / or the meetings with the coaches was somewhat obfuscated by the University's witnesses. There was no evidence that the University ever considered pursuing UMFA's input regarding the coaches' issue or the development of solutions to the problems identified by R.K. or the new employment model. As relates to the decision to not advise UMFA of the meetings with the coaches, T.V. and L.H. maintained that as the new offers were without academic rank, they fell outside of the bargaining unit. T.V. stated that the University was simply notifying the affected individuals of the new employment model that they were creating and that the new appointments were not within the union's jurisdiction.

During direct examination, L.H. was asked why she did not invite UMFA to participate in the meetings with the coaches. She responded that the purpose of the meeting was to gauge the coaches' reactions as to the resolution that the University had devised to address the coaches' long-standing concerns. She said that the University was "somewhat prepared" for a negative response from coaches and that she was not entirely sure that the new model would go ahead. L.H. also said that the University has discussions with UMFA members who are leaving the bargaining unit and joining the Canadian Union of Public Employees as a result of their hours changing from full to part time. She views the present situation as being analogous to that

scenario. During cross-examination, she admitted that another reason for not approaching UMFA was that she was rushed in December due to the timing of J.B.D.'s term.

However, L.H. was also asked by counsel for the University that she "could have guessed that this would not go over well with UMFA?". She responded that they did not want the response of UMFA "to interfere with going forward" with the new model. She said that the University takes actions that it believes are in its "business interest". She indicated that the University expects that UMFA will oppose those actions in some cases and there are processes available to it to object, namely grievances or through labour board applications. L.H. emphasized that the University developed the new employment model and "we wanted to put it into place". Her answers in this regard seemingly contradict the answer that she originally advanced to the effect that the University did not invite UMFA as it was not entirely sure that the new model was going to go ahead. In any event, she admitted, during cross-examination, that it was never the University's intent to discuss the new employment model with UMFA prior to meeting with the coaches.

H) UMFA Responds

Following the meeting with the coaches, one of the Persons Concerned informed UMFA that the meeting had taken place and provided the union with a copy of the "Physical Education and Recreation Studies – Coaches Model" document. L.G. testified that she had never been informed by the University of its concerns relating to coaches as set out in that document. She also critiqued the content of the document in several respects. She took issue with the document's reference to the University's desire to recognise the "trend across the country to hire and retain professionally trained coaches". L.G. pointed out that Brandon University, the University of Winnipeg, and indeed the University of Manitoba, all have coaches within their faculty associations.

> UMFA responded swiftly to the situation. In a letter dated December 21, 2005 addressed to University President E.S., UMFA President J.W. wrote the following:

> The University of Manitoba Faculty Association has become aware that on Thursday, December 15th, six coaches who are Members of the bargaining unit were summoned to meet with the Dean of Physical Education and Recreation Studies and were presented with a document entitled "Physical Education and Recreation Studies – Coaches Model". The essence of the meeting, as we understand it, was an announcement by the University that coaches on term appointments, who are our Members, would be offered future appointments upon the completion of existing term appointments outside of the bargaining unit.
>
> The Administration has made no contact with the Association regarding this matter, nor did you advise us that you would be meeting with our Members to discuss terms and conditions of employment.
>
> It should not be necessary for us to explain to you that UMFA is the certified and exclusive bargaining agent for all Members described in Certificate No. MLB-3998, which Members include coaches employed on term appointments as instructors.
>
> By having this meeting directly with our Members, discussing and proposing new terms and conditions of employment, and indicating an intention to remove those positions from the bargaining unit, the University has violated both the Labour Relations Act and the Collective Agreement.
>
> As to the Labour Relations Act the University has committed Unfair Labour Practices pursuant to Section 5 (every employee has the right to be a member of a union) and Section 6 (interference with the administration of a union or the representation of employees by a union that is the bargaining agent for the employees).
>
> Moreover, the University has violated the Collective Agreement, including Article 2.1 (recognition by the University of the Association as the exclusive bargaining agent for its Members).
>
> UMFA requires the University to forthwith provide copies of all communication and documentation sent, given to, or presented to our members regarding this matter. We require full particulars of all meetings that have been held and the names of all present at those meetings.
>
> Further, and most critically, the Association requires the University to forthwith cease and desist any further action with regard to changing terms and conditions of employment of UMFA member coaches. We expect your undertaking to cease and desist forthwith and in writing.

Thereafter, we will consider what appropriate action to take.

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This letter clearly expressed UMFA's dissatisfaction with the University's actions, advanced a legal challenge to what had transpired and specifically requested the University cease and desist.

E.S. responded the following day. She expressed her regret that the issue caused such concern and indicated that was not the University's intent. She wrote, in part, the following:

> It is my understanding that the Dean of Physical Education and Recreation Studies and the Vice-President (Academic) and Provost have agreed that the University needs to have a different employment model for Coaches which does not include the conferring of academic rank. This is not a model that is uncommon in other Universities in Canada.
>
> The University does indeed intent to offer new employment contracts to coaches with limited-term contracts. Most of the current coaches have full-time appointments with rank, and accordingly these appointments fall within the purview of the UMFA bargaining unit. At the conclusion of these appointments, the University will offer these individuals appointments without rank. If accepted, these appointments will be outside the UMFA bargaining unit because they are without rank, in accordance with the Labour Board Certificate Number 3998.
>
> We did not think it necessary to advise the Association in advance because we are not changing the terms and conditions of employment of current members. Rather, at the conclusion of their existing appointments we intend to offer new appointments with different employment terms. This is not an uncommon event at the University: for example, term academics with rank have subsequently been offered and have accepted appointments without rank as sessional instructors.
>
> We have already offered a new employment contract beginning January 1, 2006 to one individual whose existing term expires December 31, 2005. following this offer, we invited the other coaches on term appointments to an informational meeting to advise them of the new model and the details of the new model. This practice will not affect those individuals who hold continuing appointments with rank.

E.S. added that the University did not view the circumstances as constituting a violation of the ***Act*** or the collective agreement and that "in the new year the Association will be contacted to arrange a meeting to discuss this matter further".

The meeting between UMFA and the University regarding coaches took place on January 26, 2006. L.G. referred to UMFA's typed notes of that meeting. L.H., who was at the meeting, agreed that there were no significant inaccuracies in those notes. The notes indicated that T.V. advised that the University had been "looking into this for quite some time – a year and a half". L.H. was reluctant to agree that had been said as she only knew that discussions regarding a new model for coaches commenced in December 2004. The notes indicate that UMFA was advised that the Vice-President (Academic) was "involved from the outset" and that the "whole idea didn't come up in HR". During the meeting, the University confirmed that it had advised the coaches that offers would only be made under the new model. The notes prepared by UMFA of the meeting indicate that "if the existing coaches chose not to accept – they would be given three months notice as required under our collective agreement" and that there would be "no renewal of current term appointments".

Prior to the meeting, UMFA noted that its request for documentation and particulars had not been satisfied. As such, J.W. wrote again to E.S. on January 17, 2006. J.W. noted that the University failed to comply with the requests for information and he restated the request for information and provided additional particularization in relation thereto. Some documentation was provided by the University by letter dated January 30, 2006. At the meeting on January 26, 2006, the University refused to provide some documents requested by UMFA and indicated that they would "consider" other requests. In particular, the University refused to provide J.B.D.'s letter of offer under the new employment model for coaches and indicated that they understood that this Board might compel them to provide it, but they would not provide it voluntarily.

The University ultimately refused to cease and desist as requested by UMFA. UMFA filed the present Applications and a grievance under the collective agreement, which was held in abeyance until the conclusion of these matters. Given the expiration dates of the coaches' term appointments, it was not possible to implement the new employment model at one particular point in time. J.B.D.'s term expired December 31, 2005 and the last term expired in July of 2006. At the point that UMFA indicated its objection, only J.B.D. had been offered an appointment under the new model. The next term to expire was that of P.D. in March of 2006.

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Nevertheless, the University was determined to proceed, and it did so, above the objections of UMFA.

III. Arguments advanced by the Parties

Counsel for UMFA argued that the University determined that coaches ought to be removed from the bargaining unit given difficulties perceived by the Vice-President (Academic) in relation to having them covered by the collective agreement. In particular, the University was dissatisfied with the promotion procedure established by the agreement and the promotion criteria that was developed in accordance therewith. Counsel suggested that the Vice-President (Academic) was determined, in part due to his previous experience coaching and in dealing with coaches who were outside of a bargaining unit during his tenure with another university, that the University's coaches would be removed from UMFA and engaged on individual contracts of employment. Counsel said that T.V. was "given his marching orders" by the Vice-President to find a way of removing the coaches and implementing a new employment model for them outside of the collective agreement. According to counsel for UMFA, this case is not about "academic rank" or preserving the integrity of the University's academic mission and the sanctity of the promotion process. Rather, counsel argued that the University devised a scheme to remove coaches from the bargaining unit to avoid its obligations under the collective agreement and merely used "academic rank" as a convenient justification to effect this change.

UMFA was also critical of the manner in which the removal of the coaches from the bargaining unit transpired. Counsel noted, and it is not contested, that the University failed to notify the union that it had problems related to coaches that required resolution, that it was devising a new employment model for coaches to address those problems, that the new employment model was predicated upon coaches being henceforth denied academic rank or that the coaches would be viewed by the University as falling outside of the bargaining unit and not

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covered by the provisions of the collective agreement. Counsel for UMFA noted that this decision to remove the coaches from the bargaining unit and to design a new non-unionized employment model was taken over a year prior to being implemented in December 2005 when J.B.D. was offered employment under the new model. Counsel suggested that the evidence of C.D. indicated that the decision to remove the coaches from the bargaining unit was really taken some 15 months in advance of December 2005. Yet, counsel said, the University failed to ever mention this matter or engage the bargaining agent in discussions relating to these positions which had been in the bargaining unit for many years. It was submitted that the decision to conceal this information from UMFA was a deliberate and strategic act of the University taken to ensure that its goal of removing the coaches from the bargaining unit was successfully implemented without interference from the union.

Counsel added that the strategic motive of the University in concealing the new employment model and its consequential effects from UMFA was particularly evident considering the meetings conducted by the University with the individual coaches. These meetings, one with J.B.D. and a second the following day with all of the coaches, did not involve the bargaining agent. UMFA was not given notice of these meetings or asked to participate despite the fact that all of the Head Coaches were members of the union and covered by the provisions of the collective agreement. The reasons given for not involving UMFA, argued counsel, were not compelling. Indeed, it was pointed out that L.H. said that she did not want the union to get in the way of the University implementing the new employment model.

According to UMFA, it does not matter that the coaches did not express concerns at the meeting or that they were "happy" with the new employment model as was indicated by University witnesses. Rather, the important point is that the University was clearly bound and determined to remove the coaches from the bargaining unit. Counsel suggested that a bargaining agent is compromised by an employer conducting these kinds of meetings with employees without union representation. It was submitted that it becomes very difficult for a bargaining agent to promote the protections afforded by the collective agreement to members who have

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been "sold" on a new non-union employment model in private meetings of which the union has not received notice.

In addition, counsel for UMFA pointed out that the University did not merely discuss proposed future terms of agreements forecast to be outside of the bargaining unit with the coaches during the aforementioned meetings. Rather, the University discussed both present rights and benefits under the collective agreement, and it contrasted those with rights and benefits to be provided under the new employment model. Counsel for UMFA noted that the University in effect requested that the coaches voluntarily leave the bargaining unit and the collective agreement and enter into a one-on-one relationships with it. Presented with a "take-it-or-leave-it" offer, the coaches were placed in a vulnerable position and separated from their bargaining agent. It was pointed out that some coaches, most notably J.B.D. and M.S., who had specific rights owing to having held more than six consecutive term appointments, were effectively plied by the University to relinquish their rights under the collective agreement in exchange for a new deal outside of the union and its collective agreement.

It is also significant, argues counsel for UMFA, that the University pressed on with its plans to remove the coaches from the bargaining unit in the face of the clear desire of the union that they cease and desist. Notwithstanding that UMFA advised that it took the view that the University's actions were contrary to the ***Act*** and the collective agreement, the University continued to make offers to coaches under the new employment model. UMFA argued that if the University had simply taken a step back and postponed the provision of offers, meaningful discussion between it and the union could have transpired, perhaps with a view to resolving the issues that the University perceived with respect to coaches.

However, the University elected to press on with the implementation of the new employment model for coaches over and above UMFA's objections. UMFA asserted that the University violated sections 5, 6, 17, and 29 of the ***Act***. UMFA states that the University deprived the Persons Concerned of their rights to be members of a union contrary to section 5 of the ***Act***. Furthermore, UMFA states that the University interfered with the administration of

UMFA and the representation by it of its members contrary to section 6 of the ***Act***. In addition, UMFA submitted that the University violated section 17 of the ***Act*** by "seeking by intimidation, coercion, by threat of dismissal or any other kind of threat…or by a promise, or by a wage increase, or by altering any term and condition of employment" to compel or induce the Persons Concerned to refrain from being in the union. Finally, UMFA notes that by improperly and unlawfully removing the Persons Concerned from the bargaining unit, the University has deprived UMFA of union dues that ought to have been deducted and remitted to it in accordance with the provisions of the collective agreement contrary to section 29 of the ***Act***.

With respect to the Application for Board Ruling, UMFA noted that counsel for the University accepted at the outset of the hearing that the University bears the onus to show that there has been a significant and material change to the status quo justifying the removal of positions from the bargaining unit. Counsel for UMFA argued that the University did not come close to meeting that onus. It was pointed out that the evidence indicates that the duties and responsibilities of the Head Coaches did not change at all under the new employment model. They are performing the same duties and discharging the same responsibilities as they had when they were appointed as Instructors with rank. Indeed, counsel noted that the University still considers the coaches to be "academics" and those who were teaching undergraduate courses in the Faculty continue to do so. In addition, other Head Coaches on continuing appointments remain in the bargaining unit and covered by the collective agreement.

Counsel for UMFA also commented upon the Assistant Coach position. Noting that UMFA had not even been aware of the position when it was first filled in June 2005, counsel argued that the position ought to be in the bargaining unit and was wrongly deemed as falling outside by the University from the outset. In support of this position, counsel pointed out that like the other coaches, the Assistant Coach is primarily involved in coaching varsity sports, the position is full-time, it is considered to fall within the "academic" category of employees at the University, that it requires a university education and NCCP certification and that many of the duties of the Assistant Coach mirror those of the Head Coaches. In addition, the incumbent S.P.

was summoned to the University's meeting with the "coaches" and he was given an offer under the new employment model for coaches like the other Persons Concerned.

In support of its arguments, UMFA submitted the following authorities which shall be reviewed below as necessary:

1. ***Canada Safeway Limited and Retail, Wholesale and Department Store Union, Locals 480, 454, 496,*** [1991] S.L.R.J.B.D. No. 17

2. ***Service Employees International Union, Local 308 and Rural Municipality of Strathclair*** [1984] M.L.J.B.D. No. 6

3. ***Re McMillan Bathurst, Winnipeg Plant,*** [1999] M.L.J.B.D. No. 11

4. ***Re Churchill Regional Health Authority***, [2001] M.L.J.B.D. No.

5. ***Saskatoon City Police Association v. Saskatoon Board of Police Commissioners,*** 94 C.L.L.C. 16,037 (Sask. L.R.B.) application for judicial review dismissed 96 C.L.L.C. 210-012 (Sask. Q.B.)

6. ***Re Bell Canada,*** [2003] C.I.R.J.B.D. No. 1

7. ***Canadian National Railway Co. and S.M.W.*** (1994), 26 CLRBR (2d) 256

8. ***United Food and Commercial Workers Union, Local 832 and Office and Professional Employees International Union, Local 342***, Manitoba Labour Board, January 26, 2005, Case No. 246/04/LRA, unreported

9. ***Retail Clerks Union Local 409 v Dominion Stores Limited***, OLRBR 1983, Dec. 2006

10. ***The City of Regina and Regina Civic Middle Management Association, Canadian Union of Public Employees, Local 21,*** [1990] S.L.R.J.B.D. No. 41

11. ***The City of Winnipeg and Winnipeg Association of Public Service Officers and Canadian Union of Public Employees Local 500,*** [1985] M.L.J.B.D. No. 13

12. Adams, ***Canadian Labour Law,*** (Second Edition), Canada Law Book, October 2006 (Looseleaf series)

13. ***University of Manitoba and International Union of Operating Engineers, Local 827*** [1978] M.L.J.B.D. No. 4

14. ***Manitoba Paramedical Association and St. Boniface General Hospital and Manitoba Food & Commercial Workers, Local 832***, [1986] M.L.J.B.D. No. 11

15. ***University of Manitoba Faculty Association and University of Manitoba***, [1986] M.L.J.B.D. No. 46

16. Palmer, ***Collective Agreement Arbitration in Canada,*** Third Edition, Butterworths Canada Ltd., 1991

17. **Black's Law Dictionary**, Sixth Edition, West Publishing Co., 1990

18. ***University of Manitoba and the University of Manitoba Faculty Association*** [1984] M.J. No. 514, aff'd [1985] M.J. No. 197.

For the University, counsel submitted that the essence of its position may be found in paragraph 1(a) of its Reply. The assertion is that the University introduced the new employment model for coaches in which academic rank is not conferred in response to the growing "professionalization of coaching". According to the University, this was a conscious decision in line with the trend of hiring individuals based on their coaching credentials and whose primary function is to coach, a result of which is that the expectations that arise from an academic appointment with rank do not apply. The University added that this new model differs from the historical model of hiring faculty with rank to coach sports teams who are also engaged in "the full range of academic responsibilities, that is, teaching, research/scholarly work and service/administration".

The Board was reminded that "academic rank" is a prerequisite for inclusion in the UMFA bargaining unit and that such rank is exclusively within the jurisdiction of the Board of Governors of the University to confer. The University insisted that "academic rank" is based upon collegial and academic considerations which are not reviewable by decision-making bodies outside of the University. Counsel added that given the Board of Governors' exclusive authority in this regard, which is codified in ***The University of Manitoba Act*** R.S.M. 1987, c. U60, determinations regarding "academic rank" must be made in good faith, but if so, they are not subject to review by this Board.

Counsel noted that three of the coaches have received continuing appointments with rank from the University and, as such, the new model could not be applied to them. However, with respect to the Persons Concerned who held term appointments with rank, at the end of their terms it was open to the University to decide that they would no longer be accorded academic rank. As such, counsel argued that the University was free to determine that future appointments would be made under a new employment model in which coaches did not receive appointments with academic rank. That decision is critical, argues the University, as without academic rank, the Persons Concerned are not in the bargaining unit and are no longer covered by the collective agreement. The University says that the only issue is whether or not the University exercised its unfettered right to withhold academic rank from the Persons Concerned in good faith. If so, according to counsel for the University, these cases are over and UMFA is simply not entitled to the relief it seeks. Counsel stated that it is entirely within the University's prerogative to effectively decide who is in the bargaining unit and who is out based upon decisions relating to the conferring of academic rank.

Counsel for the University says that the decision to offer the coaches appointments without academic rank was made in good faith. He stated that while the coaches are highly valued and skilled, they are not academic in the sense that their qualifications or accomplishments are measured against academic criteria. Academics are to be evaluated on the basis of their contributions to teaching and scholarly research. Coaches, in contrast, are evaluated on the basis of coaching skill, recruiting, motivating players, and other decidedly non-academic criteria. Given that reality, the University says that it came to the inescapable conclusion that the coaches should not be granted academic rank and that they were misplaced in this bargaining unit of academics.

Counsel for the University submitted that the coaches' peers in the Faculty of Physical Education and Recreation Studies recognized that the coaches could not be measured against academic criteria with respect to promotion. As a result, the Dean upon the advice of the TAP Committee and Faculty Council created specific criteria for the promotion of coaches that were, at least in part, divorced from academic considerations. Counsel suggested that if the coaches

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could not meet the academic standards of the University, perhaps that was the best evidence of all that they should not be given rank. The inability of coaches to seek and attain promotions, according to the University, created a series of practical problems for the coaches and the University. Coaches were not able to rise in the ranks and receive pay increases based upon their achievements and what the market would bear.

Counsel notes that in 2004, Faculty Council attempted to lower the standards for the promotion of coaches and to further separate their evaluation from academic measures applied to others in the bargaining unit. The University states that it was rightly concerned that academic standards be maintained at the University and this attempt to change the promotion criteria was a catalyst for attempting to find a new model for coaches. Counsel submitted that the University addressed the problem and recognized that the coaches simply did not fit within the collective agreement in terms of promotions and the University realized that they should not be given academic rank. In the end, the University says that it wished to treat the coaches fairly and allow them to be evaluated on properly applicable criteria while also preserving the academic standards of the institution. The solution that was deemed appropriate was to offer appointments without academic rank and this decision was based upon legitimate considerations.

In specific answer to the unfair labour practice allegations, counsel for the University indicated that the individuals ceased to be members of UMFA once the decision was made to appoint them without rank. Moreover, he argued that there was no interference with UMFA's ability to represent the coaches. Clearly, UMFA responded to the issue and was perfectly able to act on behalf of the Persons Concerned and in fact did so. Counsel also submitted that the act of speaking to the coaches without notifying UMFA or having them attend the meetings did not affect the union's ability to discuss the matter with its members or to act on their behalf. In addition, the University argued that it did not offer an inducement to leave the bargaining unit. Rather, it indicated that at the end of their present term appointments, they could elect to receive a further appointment without rank and outside of the unit. It was also suggested by counsel in argument that the meetings were not to induce the coaches to leave the bargaining unit but simply to gauge their reaction to the new coaches model proposal. Counsel for the University

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added that it is common practice to meet with individuals privately at the conclusion of their term appointment. This occurs whenever a full-time term instructor is reappointed on a part time basis with the resulting effect being that that individual leaves UMFA and falls within the CUPE sessional lecturers' bargaining unit. It also occurs, more generally, when an employer determines that a person is going to be promoted to a managerial position outside of a bargaining unit. Discussions occur in such circumstances, argues counsel for the University, directly with an employee without the bargaining agent being involved. The University submits that such action does not constitute an unfair labour practice.

In further answer to the allegation that UMFA should have been informed regarding the new employment model or the discussions with the coaches, counsel stated that the University has the right to decide when it will announce decisions and that there was no obligation under the collective agreement or otherwise to discuss this matter with the union. More to the point, counsel submitted that discussions would not have resolved anything or changed the University's decision. UMFA was obviously going to oppose the measure and they did. Counsel for the University submitted that the lack of prior notice did not have the effect of depriving UMFA of the ability to represent its interests and those of the coaches in any event.

With respect to the Applicant's request for a Board Determination, counsel for the University argued that while the Board has applied the significant change test in the past, this case is somewhat different. The University's position is that the Board in this case does not even get to the significant change principle because it is really an issue of whether or not the individuals are within the scope of the bargaining unit. In essence then, the scope issue trumps the significant change issue. And, as was asserted earlier, the University takes the view that the denial of academic rank to the coaches places them squarely outside of the bargaining unit. In the alternative, counsel suggested that the University discharged the onus to prove significant change. That change is the "professionalization of coaching" that has occurred incrementally over a number of years. In addition, the decision to appoint the coaches without academic rank is itself a significant change and this too, argues the University, satisfies the onus that it must

discharge. Seen in this light, the decision to withdraw rank is really the last step in the evolution from academic coaches to professional coaches.

Counsel for the University reviewed and attempted to distinguish the authorities submitted by UMFA. In addition, the University submitted a decision of the New Brunswick Public Service Labour Relations Board entitled ***New Brunswick Professional Educators Association v. New Brunswick (Board of Management)*** [1996] N.B.P.S.L.R.D. No. 1.

In Reply, counsel for UMFA submitted that the issue of academic rank was "as big a red herring as you will ever find". He said that the rights of the University are fettered by the collective agreement and by the obligation to comply with the rights of the union. While the Board of Governors may indeed confer rank, counsel for UMFA pointed out that it was agreed by the parties that Instructors would be in the bargaining unit (see Exhibit 26). Coaches have been considered Instructors and in the unit since the 1980's and it is important to recall that the University is not merely removing individuals from the bargaining unit, it is removing positions. Notably, counsel submitted that the evidence indicated that there were 61 Instructors who were term appointees. Following the University's logic, their rank could simply be removed and they would thereafter do their work outside of the bargaining unit. That, says UMFA, is completely unreasonable. The University is not above the law or insulated from review by this Board. Moreover, while the University indicated that the Board of Governors has the power to remove rank, counsel for UMFA pointed out that there was no evidence that they in fact did so in the case of the coaches.

Counsel for UMFA further replied that it was a stretch for the University to argue that the changes to the promotion criteria for coaches marked a lowering of standards. UMFA points out that the collective agreement permits the changing of promotion criteria to meet departmental needs and that the changes to the promotion criteria for coaches were made pursuant to the provisions of the collective agreement which provide for faculty input. The bottom line, according to UMFA, is that the jurisdiction to change promotion criteria is set out in the collective agreement and if the University is not satisfied with that procedure or the criteria then

they ought to collectively bargain that issue with the union. Counsel reiterated that the Vice-President overstepped his jurisdiction and authority in striking down the revised promotion criteria for coaches which had been developed with the input of Faculty Council.

Counsel for UMFA also seized upon the University's arguments with respect to speaking to individuals who are about to leave a bargaining unit due to their promotion to an out of scope managerial position. UMFA replied that in such scenarios, the individual has a choice as to whether he or she wishes to be promoted out of the unit or not. In the case of the coaches, in contrast, they were given take it or leave it offers which, if not accepted, would have resulted in them not receiving appointments. Counsel added that when someone leaves a bargaining unit position to go to a managerial position, commonly the bargaining unit vacancy is then filled. However, in the present case, the University's action had the effect of removing positions from the unit.

In answer to the University's position with respect to failing to advise UMFA of the creation of the new employment model or of the meetings with the coaches, counsel for the union replied that UMFA is the exclusive bargaining agent for employees in the unit and that "somewhere along the path to the new model, the University of Manitoba forgot that". Counsel assailed the University's argument that the timing of the notice did not matter in any event. Citing T.V.'s evidence that if all of the coaches had said "no" to the new model then the University may have had to re-think its plan, counsel for UMFA noted that the University effectively deprived the coaches of the ability to collectively contest the imposition of the new model at the first instance and with the help of their bargaining agent. The University's actions removed the power of the group to effect change and left the individuals alone to decide whether to accede to the University's new employment model or lose their jobs.

IV. Analysis

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The Board is satisfied that the University imposed the new employment model upon coaches in order to remove them from the bargaining unit and to free itself from the burden of complying with the provisions of the collective agreement. Clearly, the Persons Concerned were denied academic rank by the University as a convenient means to justify excluding them from the bargaining unit. Admittedly, the Board of Governors of the University has broad and exclusive jurisdiction to determine upon whom academic rank is conferred, however the power to confer or refuse academic rank cannot be wielded to remove individuals from the bargaining unit thereby attempting to avoid the provisions of the collective agreement. The University may not exercise its authority respecting academic rank in bad faith or for illegitimate purposes. We have determined that the scheme to deny coaches academic rank and to remove them from the bargaining unit constitutes an unfair labour practice in contravention of sections 5 and 6 of the ***Act***.

There was considerable evidence adduced at the hearing to justify this conclusion. It is clear that the Vice-President (Academic) and Provost, R.K., felt that the then "current model", which placed the coaches in the bargaining unit with terms and conditions of employment set out in the collective agreement, was not working. He was particularly dismayed that the promotion provisions applicable to the coaches were creating problems. He felt that the University was dealing with coaches on the basis on an "old style model" and he sought alternate ways of evaluating the coaches' performance. He was disenchanted with the process that produced the promotion for G.P. and the revision to the specific coaches' promotion criteria proposed in 2004. He vetoed the new promotion criteria forwarded by the Dean which was developed following consultation with Faculty Council and ordered T.V. to develop a new model for coaches. UMFA takes the view that the Vice-President (Academic) has no right to interfere with the setting of promotion criteria as the collective agreement has fettered any discretion that he might otherwise have had to do so. While this is certainly a compelling argument, it is really one to be evaluated by a grievance arbitrator and not by this Board. Moreover, it is certainly not necessary to decide the point for the purpose of resolving the present Applications.

R.K. approached T.V. and explained his view of the problems relating to the coaches. He described what T.V. characterized as "radical changes" required to address the perceived problems. Counsel for UMFA probed both R.K. and T.V. regarding whether or R.K. expressed a desire to remove coaches from the bargaining unit. Both witnesses denied that was the case. However, T.V. went on to testify that he did not believe that the changes desired by R.K. could be accommodated within the context of the collective agreement. T.V. admitted that he seized upon the idea that academic rank could be denied to the coaches and that they would then fall outside of the unit for which UMFA is certified. That decision to deny academic rank was taken to remove the coaches from the union and a collective agreement which the University perceived as impeding its ability to adequately deal with issues including the promotion and compensation of coaches. In the end, it matters not whether R.K. ordered this or whether T.V. ultimately conceived of the plan on his own having considered R.K.'s assessment of the problems. What does matter is that the University was determined to bring coaches outside of the bargaining unit so that it would have essentially unrestricted latitude to determine their terms and conditions of employment without input or interference from the bargaining agent.

It is significant that at no point during the new employment model's year-long gestation period did the University approach UMFA to discuss the problems which had been identified regarding coaches. Neither did the University consult with UMFA regarding its new model. While the failure to include UMFA in these discussions is not necessarily an unfair labour practice, it does suggest that the University seized upon only one solution to the problems, that being the removal of the coaches from the bargaining unit. Had that not been the case, surely bilateral discussions could have been pursued in an effort to address the problems identified by the University. As T.V. indicated during his testimony, he did not believe that discussions with UMFA would be fruitful. No doubt that assessment was correct given that the University apparently fixed upon and committed to a solution that involved removing coaches from UMFA and its collective agreement.

The University claimed, in part, that the decision to deny academic rank to the coaches was simply a reflection of the fact that they are not academics to be judged on the basis of academic

criteria. However, the University's coaches are academics. The coaches on continuing appointments remain Instructors with academic rank in the bargaining unit. The Persons Concerned were placed in a non-unionized group of academics at the University subsequent to accepting offers under the new employment model for coaches. More importantly, they are all teachers and play an important role in the academic lives of the student athletes whom they coach. In addition to discharging a teaching function in their role as coach, they are responsible for monitoring the academic success of their athletes and, with the exception of S.P., they may be assigned to teach undergraduate courses in the Faculty. R.K. somewhat derisively suggested that having a "Master's degree in English" does not add to coaching and that he did not see academic qualifications as being relevant to coaching. It is not abundantly clear why having attained an advanced degree would not be beneficial to a coach and his student athletes. University coaches work with students whose primary objective is to attain a university education. Surely those coaches ought to be reasonably well educated to assist students in that goal. Besides which, the University still demands that coaches, including assistant coaches, possess a University degree. Indeed, the new employment model document itself indicates that "Competent coaches are found holding a Bachelor's degree or a Master's degree with considerable coaching experience". The University is not suggesting that non-university educated individuals can serve as full-time coaches of its varsity sports teams. Nor should it do so.

Another justification advanced by the University for its decision to introduce the new employment model for coaches was that coaches were not able to secure promotions and that the University was in danger of losing these valued individuals. That position is not entirely consistent with the facts. Indeed, coaches within the Instructor series in the collective agreement have been promoted. The collective agreement includes language that refers to "normally" required levels of education or their "equivalent". Promotion criteria are developed within the faculties and schools with the contribution of peers and the collective agreement does not prohibit or circumscribe the creation of specific promotion or hiring criteria to meet departmental requirements. Moreover, the University's stated fear that it was in danger of losing coaches is difficult to understand in the face of a collective agreement regime which permits paying members any amount over the minimums set out in the salary schedule and allows the University

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the virtually unrestricted right to provide extraordinary salary increases to members to a maximum of $250,000.00 per year. It is hard to comprehend how the problems identified by the University leading to the development and implementation of the new employment model for coaches could not have been meaningfully addressed within the context of the collective agreement as it stands or through bilaterally discussions with UMFA in advance of or during collective bargaining. Despite these facts, the University fixed upon one solution, the centerpiece of which was denying academic rank to coaching positions which had been provided with rank for decades at the University, in order to remove coaches from the bargaining unit.

T.V. also remarked that coaches seemed to be so different from other members of the bargaining unit that it would be difficult to resolve the problems submitted by R.K. within the confines of the collective agreement. Notwithstanding the fact that difficulty in operating within a collective bargaining regime is not a sufficient justification for an employer to effectively remove individuals from a bargaining unit unilaterally, this position fails to take into account the inherent flexibility built into the collective agreement to deal with unique circumstances as is noted above. Furthermore, one wonders why the University did not consider approaching UMFA about creating a new category of coaches within the collective agreement if they were indeed so different. Certainly, there are differences between professors, instructors, and academic librarians, yet the parties have managed to address those differences within the collective agreement without the necessity of removing any group from the unit.

For an employer to unfairly deny academic rank and deliberately remove positions from the bargaining unit in these circumstances violates the individuals' rights to be in a union and it constitutes an unreasonable and unjustifiable interference with the administration of the trade union contrary to sections 5 and 6 of the ***Act***. The Board cautioned in *obiter* against employers attempting to remove classifications in ***Rural Municipality of Strathclair*, *supra*.** at page 6 where the following is found:

> The Board is of the opinion that this was a deliberate, albeit, ill advised attempt, to remove individual classifications from the scope of the Collective Agreement and we take this opportunity to indicate to the Employer that had an appropriate application been filed by the Bargaining Agent, the Board may well have found

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> that the Employer contravened Section 6(1) of the Labour Relations Act which may have resulted in a remedial order, pursuant to Section 22(6) being issued by the Board.

The University's actions in imposing the new non-union employment model and denying academic rank based upon improper considerations were deliberate and calculated to effectively deny the Persons Concerned the ability to be UMFA members. Those actions had the effect of profoundly interfering with the administration of the union by eliminating positions from the bargaining unit in order to skirt the provisions of the collective agreement. In addition, in unlawfully seeking to remove the positions from the bargaining unit, the University deprived UMFA of union dues to which it was entitled contrary to section 29 of the ***Act*** which also constitutes an unfair labour practice.

Moreover, the manner in which the University elected to implement its new employment model for coaches violated the ***Act*** and constituted an unfair labour practice. The University's decision to meet individually with coaches, who were all members of the union with the exception again of S.P., as well as the nature of the communications during those meetings transgressed upon the union's monopoly on representation guaranteed by the ***Act*** and seriously interfered with its ability to represent those employees. In addition, the University's communications with the coaches at those meetings violated section 17 of the ***Act***.

A certified bargaining agent is entitled to certain rights, the most fundamental of which is the monopoly on representation of all of the members of the bargaining unit. The concept of exclusive bargaining agency is fundamental to the collective bargaining regime and is critical to the effective functioning of trade unions. This concept is enshrined in section 44 of the ***Act*** which codifies exclusive bargaining authority as an effect of certification:

> **Effect of certification**
> **44** Subject as otherwise provided herein, where a union is certified under this Act as the bargaining agent for the employees in a unit
>
> (a) the union immediately replaces any other bargaining agent for employees in the unit, and has exclusive authority to bargain collectively on behalf of

> employees in the unit and, subject to subsection 69(1), to bind them by a collective agreement until the certification of the union in respect of employees in the unit is cancelled; ...

The principle of union exclusivity has been the subject of a great deal of commentary. Vice-Chairperson Chapman, Q.C. briefly reviewed the early judicial pronouncements in this regard in ***Re Churchill Regional Health Authority, supra.*** at paragraphs 43 to 46. At paragraphs 45 and 46, the following is found:

> 45 The Supreme Court of Canada, in Le Syndicat Catholique des Employés de Magasins de Quebéc Inc. v. Le Compagnie Paquet Ltée, [1959] S.C.R. 206, [1959] R.C.S. 206, (S.C. of C. June 18, 1958; January 27, 1959), confirmed that principle and, at pages 6 and 7 (as reported in Quicklaw), said:
>
> > There is only a legislative recognition and certification of a union as the collective representative of the employees, provided the union comprises the absolute majority of the employees. When this situation arises the employer must negotiate and contract with the collective representative and the collective representative represents all employees, whether union members or not, not because of a contractual relation of mandate between employees and union but because of a status conferred upon the union by the legislation.
>
> 46 In the McGavin Toastmasters Ltd. v. Ainscough et al (1975), 54 D.L.R. (3d) 1, affirming 45 D.L.R. (3d) 687; affirming 36 D.L.R. (3d) 309, (S.C. of Canada, April 22, 1975), case, the Supreme Court of Canada quoted from Le Syndicat Catholique des Employés de Magasins de Quebéc Inc. v. Le Compagnie Paquet Ltée (1959), 18 D.L.R. (2d) 346, 353-4; [1959] S.C.R. 206, 212, on page 4 (as reported in Quicklaw) of its award, the following:
>
> > There is no room left for private negotiation between employer and employee. Certainly to the extent of the matters covered by the collective agreement, freedom of contract between master and individual servant is abrogated. The collective agreement tells the employer on what terms he must in the future conduct his master and servant relations…

See also in this regard the Supreme Court of Canada's decision in ***St. Anne-Nackawic Pulp & Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219*** (1986) 28 D.L.R. (4th) 1.

More recently, the Supreme Court reiterated its position with respect to a union's monopoly on representation of all bargaining unit members in ***Bisaillon v. Concordia University***, [2006] 1 S.C.R. 666. In that matter LeBel J., writing for the majority, indicated the following:

> 23…..The certification of an association of employees produces a variety of legal consequences, both for the association itself and for the employees and the employer.
>
> 24 First, the Labour Code gives certified unions a set of rights, the most important of which is most certainly the monopoly on representation. When it is certified, a union acquires the exclusive power to negotiate conditions of employment with the employer for all members of the bargaining unit with a view to reaching a collective agreement. Once a collective agreement is in place, the union's monopoly on representation also extends to the implementation and application of the agreement. For example, a certified union holds a monopoly with respect to the choice of solutions for the implementation of the collective agreement. "The union's power to control the process includes the power to settle cases or bring cases to a conclusion in the course of the arbitration process, or to work out a solution with the employer, subject to compliance with the parameters of the legal duty of representation" (Noël v. Société d'énergie de la Baie James, [2001] 2 S.C.R. 207, 2001 SCC 39, at para. 45).
>
> 25 Second, the monopoly on representation also has a significant impact on employees' rights. Our system of collective representation proscribes the individual negotiation of conditions of employment. A screen is erected between the employer and the employees in the bargaining unit (Noël, at para. 42). This screen prevents the employer from negotiating directly with its employees and in so doing precludes the employees from negotiating their individual conditions of employment directly with their employer (Syndicat catholique des employés de magasins de Québec Inc. v. Compagnie Paquet Ltée, [1959] S.C.R. 206; Noël; Isidore Garon ltée v. Tremblay, [2006] 1 S.C.R. 27, 2006 SCC 2). Moreover, once a collective agreement is signed, it becomes the regulatory framework governing relations between the union and the employer, as well as the individual relationships between the employer and employees: Hémond v. Coopérative fédérée du Québec, [1989] 2 S.C.R. 962, at p. 975; Noël, at para. 43; Isidore, at para. 14.
>
> 26 The system of collective representation thus takes certain individual rights away from employees. In particular, employees are denied the possibility of negotiating their conditions of employment directly with their employer and also lose control over the application of those conditions. In return, by negotiating with the employer with one voice through their union, employees improve their

> position in the balance of power with the employer (Isidore, at para. 38). Moreover, the individual interests of each member of the bargaining unit are protected in a system of collective representation. For example, in order to be certified to represent employees, a union must obtain the support of a majority of the employees in the bargaining unit (s. 28 L.C.). Furthermore, having regard to the provisions of s. 21 L.C., it follows from the case law that employees must, inter alia, have a certain commonality of interests where labour relations are concerned and that this helps to protect employees' individual interests. Lastly, while the monopoly on representation confers rights upon certified unions, it also imposes upon them a duty to act properly by, for example, taking into account the competing interests of all employees in the bargaining unit: s. 47.2 L.C.; Noël, at paras. 46-55.
>
> 27 Finally, the collective representation system in labour law has a significant impact on the employer. It requires the employer to recognize the certified union and to enter into good-faith collective bargaining exclusively with it. However, the employer also derives various benefits from the collective representation system. In particular, employers acquire the right to industrial peace for the term of the collective agreement and can, in principle, expect that disagreements stemming from the implementation and application of the collective agreement will be negotiated with the union or settled through the grievance arbitration process….
>
> 28 It is worth noting that the monopoly on collective representation is not limited to the context of the collective agreement but extends to all aspects of employee-employer relations (Isidore, at para. 41; Noël, at para. 57). The union's monopoly with respect to collective bargaining is based not only on the existence of a collective agreement, but also on the certification of the union (Isidore, at para. 38; CAIMAW v. Paccar of Canada Ltd., [1989] 2 S.C.R. 983, at pp. 1007-8). For this reason, any negotiations regarding conditions of employment that are not mentioned in the current collective agreement must be conducted by the certified union.

This statement constitutes a broad defence of the principle that unions are entitled to be recognized as the exclusive representative of employees in their bargaining units in relation to their terms and conditions of employment.

Counsel for UMFA suggested during argument that somewhere along the path to the new employment model for coaches, the University forgot that UMFA was the exclusive representative of employees in the unit for which it holds a certificate. It is perhaps more correct to say that the University simply ignored the fact that the coaches were in the bargaining unit and

pressed on with its plan to meet with them and discuss terms and conditions of employment without the union in any event.

The evidence indicated that University officials determined that they would not inform UMFA of the new employment model or their intent to meet with the coaches. UMFA was certainly not invited to the meetings. While L.H. indicated that the meetings were held to gauge the reaction of the coaches, that statement does not tally with the facts. The University worked for a year on developing the new employment model for coaches. It wanted to implement it and it wished to start with J.B.D. Indeed, they rushed to impose the new deal upon him at virtually the last possible moment and, having satisfied themselves that he was content with the plan, they met the following day with the rest of the coaches. These meetings were clearly designed to sell the coaches on the new non-union model. The decision to exclude UMFA from those meetings was clearly deliberate and strategic. Having devoted substantial effort to devising the new model upon the insistence of one of the University's most senior officials, namely R.K, the University did not want the response of UMFA to interfere with going forward as L.H. ultimately conceded. The University certainly did not wish for a full, open, informed debate to commence involving itself and the coaches' exclusive representative, the union.

The University claims that these kinds of discussions occur not infrequently at or near the end of a term appointment where, for example, the position is converting from full-time to part-time. That scenario is simply not analogous to what happened in the present circumstances. Here, <u>positions</u> which had been in the bargaining unit for many years were unilaterally, and without notice to the bargaining agent, removed from the bargaining unit by the University. During the meetings with the coaches, they were encouraged to accept the new employment model by L.H. who pointed out the virtues of the new plan and told the coaches that she expected that they would find the new model very appealing. This differs materially from a situation in which an individual is automatically placed in a different bargaining unit given the wording of the Certificates by virtue of a change in their hours of work from full to part-time.

The University also argued that it only discussed future terms and conditions of employment with the coaches that would apply to them once they fell outside of the bargaining unit on account of the decision to deny them academic rank. However, it is simply inaccurate to suggest that the University merely discussed proposed future terms of employment that might have been offered. Rather, those meetings with coaches involved a critique of the then current model and the collective agreement that sets out the terms and conditions of employment that applied to the coaches under that model. L.H. pointed out problems relating to promotion and study leaves, both concepts set out in the collective agreement. She went so far as to review sections of the current collective agreement at both meetings in an effort, we believe, to convince the coaches that they would be better off financially and otherwise outside of the union and their collective agreement. Far from merely discussing future terms of employment to be applicable after the coaches were removed from the bargaining unit, these meetings included discussions of present terms of employment. For an employer to conduct meetings with members of a bargaining unit without informing the union, during which it is suggested to the employees that they are not well served by their collective agreement and that they would fare better if they entered into private employment agreements directly with the employer, is a blatant unfair labour practice contrary to section 6 of the ***Act***.. That is very clearly what occurred here.

UMFA submitted several cases in support of its position that the University committed an unfair labour practice. In ***Canada Safeway, supra.***, the Saskatchewan Labour Relations Board reviewed a meeting conducted by the employer involving a group of Assistant Store Managers. Of the 64 managers, 18 were included in bargaining units. At the meeting, the employer advised the employees of its plan to revise their duties to made them "partners" with store mangers. In addition, they were advised that they would receive an increase in their bonus and that "all non-union First Assistant Managers would receive a pay increase to accommodate their new job duties". A suggestion was then made to the effect that the new plan applied to the unionized individuals present and if they found themselves "in a situation which is going to make the idea of an equal partnership difficult, we can discuss it to see if we can change or alter your circumstances". The Saskatchewan Board determined that those statements in the circumstances could only be viewed as an invitation to the unionized employees to bargain their terms and

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conditions of employment directly with the employer and that such actions constituted an unfair labour practice. Counsel for UMFA suggested that these circumstances are factually similar to the present case. The Board agrees with that submission.

The case of ***Saskatoon Board of Police Commissioners, supra.*** concerned the decision of the employer to offer an early retirement incentive program. That program was not presented to, or discussed with, the union. As a result, the union filed an unfair labour practice complaint which was upheld by the Saskatchewan Labour Relations Board. Chairperson Bilson at page 14,306 commented that it is vital that the union be viewed as "the channel through which changes in the terms and conditions of employment which affect employees are effected, and that the power of a unionized employer to deal unilaterally with those terms and conditions be placed under limitations which are well-understood and clear". She added at pages 14,306 and 14,307 that an attractive offer to employees remains a significant threat to the union in these kinds of cases:

> In Westar Timber Ltd. v. International Woodworkers of America, No. 58/86, March 5, 1986 (unreported), the British Columbia Labour Relations Board made the following observation:
>
> > While an employer may not intend to affect the trade union's ability to represent the employees, by embarking on the course chosen by this employer [to implement an incentive wage plan], an employer's unilateral implementation of terms and conditions of employment different than those stipulated by a collective agreement strikes directly at the trade union's authority to represent the bargaining unit. In large part, a trade union's support amongst the employees in the unit is fundamentally affected by those employees' perception of the union's ability to control and regulate the conduct of the employer as it affects the terms and conditions of employment of those in the bargaining unit.
>
> In numerous instances, labour relations boards, arbitrators and the courts have emphasized that the advent of a certified trade union brings about an alteration in the legal character of the relationship between an employee and an employer…
>
> As the British Columbia Board pointed out in the Westar case, supra, the fact that the offer made by the Employer might be attractive to the group of employees for whom it is meant does not make it any the less a threat to the bargaining strength

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> of the Union. The offer by the Employer of a benefit which has not been obtained through the efforts of the Union weakens the status of the Union as a representative of employees in a way which may be equally as damaging as the infliction of a penalty which the Union is powerless to prevent. This Board made this point in a decision in Energy and Chemical Workers Union v. Saskatchewan Power Corporation, LRB File No. 022-88.

The Saskatchewan Board concluded that the Employer breached ***The Trade Union Act*** by not bargaining with the union regarding the proposed retirement incentive plan.

Similarly, in ***Re Bell Canada, supra.***, the employer sought to unilaterally implement a voluntary separation program to reduce surplus workers by offering packages to targeted employees to encourage them to leave their positions. The Canada Industrial Relations Board determined that the employer unfairly interfered with the union's right to represent its members contrary to the *Canada Labour Code*. This decision is rooted in a recognition of the principle of bargaining agent exclusivity which, as that Board noted at paragraph 74, is "viewed as a fundamental element of labour relations in all jurisdictions". The Board concluded that the payment of a severance allowance to an employee in exchange for a resignation alters the existing terms and conditions of employment of that employee and thereby unlawfully interferes with the union's representation rights. Counsel for UMFA likened that to the present situation where coaches with vested rights under the collective agreement relating to, in particular, reappointment pursuant to Article 19.C.5.4 had to abandon those rights in exchange for an appointment under the new model. The Board concurs with counsel that the situations are indeed comparable and that the University similarly violated UMFA's representation rights by its actions in the present case.

The meetings with the coaches, particularly the one with J.B.D., were extremely untoward. Beginning with J.B.D.'s meeting, the Board notes that he was a member of UMFA at the time yet it was not notified of the meeting. He was isolated by the University from his bargaining agent as well as his colleagues and presented with a new employment model under which he was to be removed from the bargaining unit. He was advised by the University that it was expected that he would find the new arrangement "very appealing" and it was contrasted with "the UMFA model" under which he was purportedly limited in future increases in salary compared to the

new model. He was not advised of his rights under the collective agreement regarding notice or reappointment. He was told that he could accept the new model or not have any appointment. Given the position of coaches and the considerable work that the Board heard that they invest in recruiting and developing their programs, this was a very serious threat. In effect, J.B.D. and his colleagues were presented with offers they could not refuse. It is not surprising in the least that they all capitulated and accepted the new model under the circumstances. And, in J.B.D.'s case, his letter of offer instructed him to decide by the very next day as to whether he would accept or not. L.H. said that he was told that he could take longer but only at the risk that he would not be paid on time depending upon when his response was received. Similarly, the other coaches were provided with offers on a take it or leave it basis and they too were subjected to their employer encouraging them to accept the non-union model and to thereby abandon their rights under the collective agreement.

Counsel for the University submitted that the decision to not inform UMFA of the new employment model and to meet with the coaches without notice to or representation by the union did not thereby interfere with UMFA's ability to represent its members. The Board does not agree with this submission. The decision to introduce the new employment model and to meet privately with UMFA members without notice to UMFA unreasonably and unjustifiably undermined the union's statutory authority and obligation to represent the employees. Such actions do not encourage healthy or stable bargaining relationships and they clearly undermine and inhibit a union's capacity to engage in meaningful representation of its members. Counsel for UMFA suggested that the union's position was obviously compromised by the University meeting privately with members and selling them on a non-union employment model. This kind of conduct is particularly destructive as members who have bought into the suggestion made by the employer that they will find the new non-union arrangement attractive and appealing may then see the bargaining agent's position as unhelpful and contrary to their individual interests. This potentiality is naturally one of the reasons that employers are not permitted to enter into such discussions directly with represented employees.

The Board is satisfied that in addition to violating the union's rights to represent their members, the actions of the University violated section 17 of the Act which reads, in part, as follows:

> **Unfair labour practice by employer**
> 17 Every employer and every person acting on behalf of an employer
> (b) who seeks by intimidation, by coercion, by threat of dismissal or any other kind of threat, or by the imposition of a pecuniary or other penalty, or by a promise, or by a wage increase, or by altering any other term or condition of employment, or by any other means, to compel or induce any person
>
> > (i) to refrain from becoming, or to cease to be, a member or officer or representative of a union, or
> >
> > (ii) to refrain from exercising any of the person's rights under this Act,…
>
> commits an unfair labour practice.

We agree with the position of UMFA that the University offered incentives and made threats to the coaches continued employment in order to encourage them to cease being members of the union.

Finally, the Board shall examine the issues relating to UMFA's Application for a Board Ruling. At the commencement of the hearing, counsel for the University acknowledged that a party seeking to demonstrate that a position that has been historically included in a bargaining unit should be excluded bears the onus of proving that there have occurred material and significant changes sufficient to sustain that conclusion. The Board ruled that there had not occurred material and significant changes to the positions held by the Persons Concerned to sustain the conclusion that they ought to be excluded from the bargaining unit. Indeed, the facts suggest that the duties of the individuals did not change upon being denied academic rank and placed under the new employment model for coaches. L.H. confirmed this fact in writing to UMFA and the University witnesses agreed that was indeed the case.

The parties submitted a number of decisions relating to this issue which canvassed the jurisprudence which holds that the historical dimension is of vital importance in weighing

whether or not bargaining unit positions ought to be henceforth excluded. In the present case, the Board heard that coaches have been included in the bargaining unit within the Instructors series for many years. The Board had occasion recently to summarize the law in this area in ***Re University of Manitoba and AESES*** [2007] M.L.J.B.D. No. 8. That decision reviews a number of the authorities submitted to the Board in this case. In holding that the union in that case failed to satisfy the onus to prove that there had occurred material and significant changes to the positions at issue, the Board stated the following:

> The law respecting the inclusion in a bargaining unit of heretofore excluded positions is well established. While the evidentiary onus normally rests with the party seeking to exclude an individual from a bargaining unit, there is clearly a distinction to be drawn in situations such as that considered by the Board in the present case. This is not a case in which the Board is asked to consider and determine whether or not individual positions ought to be included or excluded from a new bargaining unit on an Application for Certification. Rather, here the parties have a history which includes Board certificates, collective agreements and the specific settlement in 2000. As the Ontario Labour Relations Board noted in *The Corporation of the City of Thunder Bay*, [1981] OLRB Rep. Aug. 1121 at page 1126, the historical dimension of such relationships cannot be ignored:
>
> > A party which is attempting to alter a status quo which reflected the earlier perceptions of the parties concerning an individual's status, and which has apparently worked adequately for some years must recognize the importance of this historical dimension, and be prepared to adduce clear evidence as to why a change is required to accommodate the interest section 1(3)(b) was designed to protect ...
> >
> > In the case of a party seeking to alter the status quo during the currency of a collective agreement, it will ordinarily be necessary to demonstrate a significant change in duties and responsibilities since the agreement was concluded, so that it is clear that the perception of employee status shared by the parties when the agreement was signed, has now become obsolete.
>
> Accordingly, while a party is not precluded from raising the issue of exclusions or inclusions within a long-standing bargaining unit, a heavy onus of proof rests with that party to adduce evidence to show that there have been significant and material changes to justify the conclusion that the status quo ought to be altered by the Board.

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Clearly, there is a critical policy rationale underpinning the position taken by labour relations boards in this regard. Vice-Chairman Mitchnick explained in *Dominion Stores Limited*, [1983] OLRB Rep. Dec 2006 at page 2007 that giving recognition to a long-standing practice between the parties promotes labour relations "peace and stability":

> This does note mean that a party is precluded from ever raising the issue before the Board; but it does mean that the Board will not fail to take into account the perception of the parties themselves over a number of years and the consequent treatment of an individual as managerial or otherwise, and this factor may be granted certain weight in the Board's forming of its own conclusion, in the absence of compelling evidence to the contrary. This recognition of longstanding practice promotes at least a measure of peace and stability between the parties over an issue long thought to have been put to rest between them. And it is a benefit accruing to both sides of the case: the respondent would, as a practical matter, have to content with the same kind of common-sense onus were it to attempt to suddenly reverse itself on its long-accepted position on the status of department heads, who have always been included in the unit.

The jurisprudence noted above relating to the need to examine and give effect to the historical dimension when determining whether or not the status quo relating to excluded positions should be altered has been expressly adopted by this Board (see, for example, *Re Seven Oaks General Hospital and M.N.U.* [1995] M.L.J.B.D. No. 10). Recently, this Board's approach was succinctly summarized by Chairperson Hamilton in *Re United Food & Commercial Workers, Local 832 and Office and Professional Employees International Union, Local 342*, Case No. 246/04 LRA, wherein he stated the following:

> As this is not an exclusion case of first instance, this case must be assessed in accordance with the principle that, where a position has historically been included in a bargaining unit covered by successive collective agreements negotiated between the parties, the onus of proof rests with an applicant to satisfy the Board that there have been material and significant changes which sustain the conclusion that the included position ought to be henceforth excluded.

One change to the positions asserted by the University concerned its decision to deny academic rank to the head coaches. However, that change, as noted above, was unilaterally imposed by the University in furtherance of its plan to remove the positions from the bargaining

unit and coverage of the collective agreement and constitutes an unfair labour practice. The other change asserted by the University was the so-called "professionalization of coaching". The Board heard that the University has been hiring "professional" as opposed to "academic" coaches for many years. This is in no way a recent change or a circumstance that was unknown to the University prior to negotiation of the most recent collective agreement. Given the evidence marshaled in respect of this trend to hire "professional" coaches and the other evidence respecting alleged changes to the positions, the Board is not satisfied that the University has come close to discharging its onus to prove material and substantial change.

The Board wishes to address the issue of the Assistant Coach position occupied by S.P. As was noted in the recitation of facts, UMFA claimed that it did not know that the position existed when it was created in June of 2005. While his duties vary to a degree from the Head Coaches, the Board is satisfied that he too ought to have been included in the bargaining unit from the commencement of his employment. His responsibilities include coaching duties that inherently involve teaching, monitoring the academic success of student athletes, recruitment and other duties associated with the "organization and operation" of the Bison Football program. Those duties are very similar to the Head Coaches. Also, like the other Persons Concerned, he is a full-time employee of the University. The qualifications for the position include a university education, coaching experience and NCCP certification not unlike for the Head Coaches. It is also significant that the University itself treated S.P. in the same manner as the other Persons Concerned. He was considered a coach and invited to the meeting held to introduce the new employment model for coaches. He was also subsequently offered employment pursuant to the new model and is considered to fall within the non-unionized "academic" group just like the other coaches. The fact that he is not assigned undergraduate course teaching duties gave the Board pause. However, we are satisfied that the evidence in its entirety suggests that the Assistant Coach position belongs in the bargaining unit.

V. Decision

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The Board determined that the University violated sections 5, 6, 17, and 29 of the Act and granted the remedies on account thereof as set out in Order No. 1384. In addition the Board, in Order No. 1385, determined that there had not occurred material or significant changes to the positions sufficient to justify the removal of the Persons Concerned from the bargaining unit. Accordingly, the Board ruled that the Persons Concerned were employed within the Instructors series and included in the bargaining unit for which UMFA is certified.

One of the remedies granted on account of the commission by the University of an unfair labour practice was that the University pay to UMFA "union dues on behalf of the Persons Concerned in such amounts as ought to have been deducted from them and remitted to" UMFA. Counsel for UMFA wrote to the Board subsequent to receiving the Order for clarification as to whether the Board intended that the University pay these monies itself, or deduct these amounts from the salaries of the Persons Concerned, and make the appropriate remittance to UMFA. We should have thought that was clear on the face of the Order, nevertheless we reiterate that the Board intended that the University pay these monies itself. The Board notes that the Persons Concerned were deprived of the right to be members of the bargaining unit and the union by virtue of the University's unfair labour practice and it would be unfair in the extreme for them to now have to pay dues for the period during which they were deemed outside of the unit by the University. Nevertheless, UMFA was also deprived of dues by the University's actions and they are entitled to full compensation from the University for those losses.

DATED at **WINNIPEG,** MANITOBA, this 4th day of October, 2007, and signed on behalf of the Manitoba Labour Board by

"Original signed by"

C. S. Robinson, Vice-Chairperson

"Original signed by"

M. Steele, Board Member

"Original signed by"

B. Atamanchuk, Board Member

CSR:tj/rb-s