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CASE NO. 130/09/LRA
C/R Case No. 157/09/LRA

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

BETWEEN:

International Union of Operating Engineers, Local 987,
Applicant/Union,

- and -

LOCKERBIE & HOLE EASTERN INCORPORATED,
Employer,

- and -

The Construction & Specialized Workers' Union, Local 1258,
Intervenor.

BEFORE: **W. Hamilton, Chairperson**

J. Malanowich, Board Member

D. Strutinsky, Board Member

APPEARANCES: **Mr. David Shrom / Mr. Elliot Leven, Counsel for the Union, International Union of Operating Engineers, Local 987**

Ms. Tracey L. Epp, Counsel for the Employer, Lockerbie & Hole Eastern Incorporated

Mr. Keith D. LaBossiere / Mr. Scott J. Hoeppner, Counsel for the Intervenor, The Construction & Specialized Workers' Union, Local 1258

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

REASONS FOR DECISION

These Reasons are being issued contemporaneously with Certificate No. MLB-6756 in which the Manitoba Labour Board (the "Board") certified that the International Union of Operating Engineers, Local 987, as the properly chosen bargaining agent for a bargaining unit described as:

> ***"All labourers employed by Lockerbie & Hole Eastern Incorporated in the Province of Manitoba, save and except those excluded by the Act."***

These Reasons must be read in conjunction with the paragraph in Certificate No. MLB-6756 which provides the background facts relevant to this case. The Recitals identify the three broad issues which were raised by either or both of the Employer, Lockerbie & Hole Eastern Incorporated and/or the Intervenor, The Construction & Specialized Workers' Union, Local 1258, (the "Labourers") as bars to the Application for Certification filed by the Applicant for the craft unit initially applied for, as outlined in paragraph No. 1 of Certificate No. MLB-6756.

The key findings of the Board on the three issues raised by either or both of the Employer and/or the Labourers are distilled in Paragraph 17 of the Certificate. The purpose of these Reasons is to record the material findings of the Board which lead to its conclusions. The shorthand references in these Reasons reflect the shorthand references used in Certificate No. MLB-6756.

The Board will address each of the issues, in turn.

a) <u>*Timeliness – Is there a "collective agreement" bar?*</u>
There is no collective agreement within the meaning of the Act in effect between the Employer and the Labourers and Section 35(2)(d) of the *Act* has no application in this case. The timeliness of the Application is to be determined under Section 34(2) of the *Act* which provides that where no collective agreement in respect of the employees of a unit is in force and no bargaining agent has been certified under the *Act* for employees in the unit then an application for certification as bargaining agent for the employees in the unit may be made at any time. The Application is therefore timely.

b) In so determining, the Board applied the definition of "collective agreement" contained in Section 1 of the *Act*, where a collective agreement is defined to mean:

> "… an agreement *in writing between* an employer or an employer's organization acting on behalf of an employer, on the one hand, and a bargaining agent of the employer's employees on behalf of the employees, on the other hand, containing provisions respecting terms and conditions of employment of employees, including provisions respecting rates of pay and hours of work of employees …"
> (Emphasis added)

On the evidence, there is no collective agreement in writing between the Employer and the Labourers. As the Employer is not a member of the CLRAM, under which it would assign exclusive bargaining rights to the CLRAM (recognized by the Board as an "employers' organization" within the meaning of Section 1 of the *Act*") and under which assignment of rights the Employer would have agreed, in writing, to be assigned to an appropriate trade division of the CLRAM and thereby be bound by terms of the written CLRAM Agreement, for its express term, the Board does not accept that any oral understandings reached between Employer and the Labourers to follow the CLRAM Agreement constitutes a collective agreement *within the meaning of the Act*.

c) While the Board recognizes that a collective agreement need not take any particular written form and that an agreement may be contained in one or more documents and, further, that a collective agreement may be comprised of a written agreement to incorporate by reference the terms of another collective agreement, there must nevertheless be some agreement in writing between the Employer and the Labourers for a term certain to fulfill the definition contained in Section 1 of the *Act*.

The Board further notes that, in the authorities filed with it by the parties, including *Worldwide Flight Services, Inc.* and *International Association of Machinists and Aerospace Workers, Transportation District 140, Local 016* [2005] CIRB No. 330; the *William C. Interiors Ltd.* Case [1989] SLRB No. 51 (Sask LRB) and Sears Canada Inc. case (1986) OLRB Rep. p1159, there was evidence of an agreement in writing for a defined term between the direct parties in those cases from which rulings could be made that a collective agreement in writing existed.

d) In fulfilling its obligations under the *Act*, the Board, when determining whether a collective agreement within the meaning of the *Act* exists, must be satisfied that there is a term certain to a collective agreement because the express term of any collective agreement determines the rights of third parties under the *Act*, including determining when another union may apply for certification during an open period [Section 35(2)]

or determining when an employee or group of employees are entitled to file an application for decertification or termination of bargaining rights [Section 49 of the *Act*]. The Board must be able to define open/closed periods with certainty, given that these statutory defined periods confer rights on parties. Without an agreement in writing between the Employer and the Labourers, (even in the form of a memorandum of understanding) there is no term certain, particularly when the Employer did not join the CLRAM as a member thereby explicitly adopting, in writing, the term of an agreement negotiated through the CLRAM.

e) The Board cannot determine whether there is a term certain to the collective agreement purportedly entered into between the Employer and the Labourers because, on the general evidence before the Board, (a) representative(s) of the Employer's office (not called to testify), did not approach the Labourers until … "sometime in July of 2008" and members of the Labourers were not sought by the Employer through the Labourer's hiring hall until on or about October 20, 2008. The Board does not accept that the term of the purported collective agreement would coincide with the term of the CLRAM Agreement, retroactive to September 26, 2007 (Ex 2) in the absence of the Employer becoming a member of the CLRAM. There must be an express commencement and end date to any collective agreement, expressed in writing between the parties, to enable the Board, if called upon, to determine third party rights under the *Act*.

f) As to the position of the Applicant that there was no ratification by the employees of the Employer pursuant to the mandatory requirements of Sections 69(1) and 69(2) of the Act, the Board's decision does not rest on this particular ground. The Board is satisfied that a ratification of a union hiring hall province-wide collective agreement in the construction industry negotiated by the CLRAM or another *bona fide* recognized employer's organization, on behalf of its members, can be accomplished through a secret ballot vote cast by the members of the union voting thereon, at the time a province-wide agreement is negotiated. Provided the requirements of Sections 69(1) and 69(2) of the Act are met at the time such an agreement is negotiated, this manner of ratification is in accordance with Section 69(1)(b) of the *Act*, as follows:

> "(b) in the case of the construction industry by the members of the union in the craft union."

Where an employer who is party to a hiring hall collective agreement hires employees directly, without going through the hiring hall, then there must be independent evidence before the Board that a separate ratification vote has been conducted under Section 69(1)(a) of the *Act*. See *Re GEC Alstrom Electromechanical Inc [1996] M.L.B.D. No. 16.* In making these observations, the

Board is re-enforcing that its ruling is based on the fact that there was no agreement in writing for a term certain as between the Employer and the Labourers.

g) *Fraud*

As to the Labourers assertion that membership cards were obtained by "fraud" (the allegations of coercion and intimidation being withdrawn at the hearing) the Board finds that the Labourers have failed to establish, on the balance of probabilities, that there was fraud prior to signing the cards in the solicitation of the membership cards filed with the Board, as the term "fraud" has been defined in the authorities. In arriving at this determination, the Board noted that the employees completed, on their own, detailed and relevant information required on the membership cards prior to signing the cards in the presence of a witness and that the wording on the cards is clear in that the cards expressly state that an application for certification is contemplated and that the Applicant would be seeking to bargain collectively on behalf of the employees who signed the cards. While there may have been discussions of a general nature or other discussions relating to other benefits of joining a union at the time membership was solicited, in order to overturn the signing of a membership card, clear on its face, any alleged fraudulent representation, made knowingly, must be a material one and have a direct effect on the meaning of the membership card itself such that the card signed by the individual cannot be said to be, objectively speaking, an application for membership and an authorization to apply for certification and/or bargain collectively with the employee's employer. On the evidence before it, the Board is not satisfied, on the balance of probabilities, that this test has been met. See the principles discussed in *Montgomery Mechanical Ltd.* [2009]) OLRB No. 854 particularly at Paras 31 to 33; and *Intelicom Ltd. t/a Trojan Security Services* and *Manitoba Food and Commercial Workers Local 832* [1991] MLBD No. 15.

h) *Appropriateness*

The Board is satisfied that, in the circumstances of this case, an appropriate unit should be defined as "… all Labourers employed by Lockerbie and Hole Eastern Incorporated in the Province of Manitoba, save and except those excluded by the Act" because this description reflects the actual reality of the Employer's enterprise and is reflective of its manner of its doing business in the construction industry in the Province of Manitoba. The Board notes that the Employer did not, at the time the Application for Certification was filed, nor does it in the normal course, directly employ crane operators and apprentices, heavy equipment operators, mechanics or servicemen.

In the result and in accordance with the determinations made by the Board in Paragraph 18 of the Certificate, the Board ordered certification to issue.

DATED at **WINNIPEG**, Manitoba, this 6th day of November, 2009 and signed on behalf of the Manitoba Labour Board by

"Original signed by"

W.D. Hamilton, Chairperson

"Original signed by"

J. Malanowich, Board Member

"Original signed by"

D. Strutinsky, Board Member

WDH/ar/rb-s