

Case Name:
National Waste Services Inc.

**National Automobile, Aerospace, Transportation and
General Workers' Union of Canada (Caw-Canada),
Applicant v. National Waste Services Inc, Responding
Party, v. Erie Personnel Corporation, Intervenor**

[2009] O.L.R.D. No. 2075

[2009] OLRB Rep. May/June 415

No. 0939-07-R

Ontario Labour Relations Board

BEFORE: Caroline Rowan, Vice-Chair

Decision: June 8, 2009.

(94 paras.)

Appearances:

Farah Baloo, Peter **Shklanka**, Bob Van Cleef and Murphy Fries appeared for the applicant.

Paul Wearing, Gary Blacktopp, D. Ardellini and Rick Lindsay appeared for the responding party.

Alan Freedman, Glenn P. Christie, Michelle Alton, Marina Butler and Pamela Morin appeared for the intervenor.

DECISION OF THE BOARD

1 This is an application for certification filed under the provisions of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"). The application relates to drivers and pitchmen (hereinafter "pitchers") working out of the Stoney Creek yard who are supplied by the intervenor, Erie Personnel Corporation ("Erie"), to the responding party, National Waste Services Inc. ("National").

2 By decision dated June 14, 2007, the Board (differently constituted) directed that a representation vote be taken in the following bargaining unit proposed in the application for certification:

all employees of National Waste Services Inc. in the City of Hamilton, save and except supervisors, persons above the rank of supervisor, and office, clerical and salaried employees.

The only dispute between the parties concerns the proper identity of the employer given the responding party's contention that it is not the employer of the employees whom the applicant seeks to represent. Both the responding party and the intervenor, Erie Personnel Corporation ("Erie"), contend that Erie is, in fact, the employer of the drivers and pitchers.

3 The vote was held on June 18, 2007. The majority of the ballots were cast in favour of the applicant. The sole outstanding issue that requires determination in this certification application therefore concerns whether National is the employer of the employees whom the applicant seeks to represent.

4 The Board heard evidence from six witnesses in this proceeding. Ms. Judy Rice, National's Operations Manager at National's Stoney Creek yard, Mr. Gary Blacktopp, National's Vice-President of Operations and Maintenance, and Mr. Rick Lindsay, National's Safety and Compliance Manager, testified on behalf of National. The applicant called evidence from Mr. Fred Collette and Mr. Dwayne Anderson, who are both drivers who were supplied by Erie to National and who worked out of National's Stoney Creek yard at or around the date of the application. Ms. Pamela Morin, Erie's General Manager, testified on behalf of the intervenor.

5 The evidence was, for the most part, not in material dispute. In arriving at my findings of fact in this case, I have considered all of the evidence and taken into account such factors as what seems most reasonable and probable in all of the circumstances having regard to the evidence as a whole.

Background Facts

6 National has been operating a waste and recycling business in Ontario since 2000. Its business involves the hauling of commercial and residential solid waste and recycling. It operates out of five separate yards, including a yard at Stoney Creek (the "Stoney Creek yard"), which is the subject of the application for certification. National employs a number administrative staff at its head office and at its yards.

7 In 2006, National was awarded a five year contract by the City of Hamilton ("the City") to remove residential waste from houses, apartments and condominiums located in the City. The term of National's contract with the City (the "Hamilton Contract") is from April, 2006 to April, 2011. In order to fulfill its obligations under the contract, National set up the Stoney Creek yard. It did so by, among other things, entering into a month to month lease for a parcel of land, and setting up office facilities in a modular trailer, obtaining thirty-five waste disposal trucks, and hiring office staff.

8 National also entered into a contract with Erie for the provision of drivers and pitchers. Although National directly employs approximately eighteen drivers, none of them work in the City of Hamilton or out of the Stoney Creek yard. All of the drivers and pitchers working out of that yard are supplied to National by Erie. National also used two other personnel agencies to supply drivers and pitchers for brief periods at around the start of its contract with the City in 2006. It did so because Erie was unable to supply a sufficient number of drivers and pitchers to it at that time.

9 The office facilities at the Stoney Creek yard have two separate entrances: one for National's office staff and the other for drivers and pitchers supplied by Erie. The facilities are also divided

inside into two areas by a counter. There is an office area on one side of the counter and a change room and a lunch room as well as a time clock on the other side used by drivers and pitchers.

10 National's staff, who work out of the Stoney Creek yard, consist of an Operations Manager, a dispatcher, a clerical employee, a salesperson and two route supervisors. At the relevant time, Ms. Crystal Chioini was the dispatcher, Ms. Rice was the Operations Manager and Messrs. Mike Conacher and Glenn King were the route supervisors. All of these individuals were employed by National.

11 Erie operates a staffing agency out of three branches: one in Thorold, one in Fort Erie and one in Stoney Creek. It has over 200 clients and has been in business since the 1990's. It supplies and fills various positions for companies throughout Ontario by conducting an initial screening of candidates against job descriptions, conducting interviews and background checks, providing client specific orientation and ultimately hiring staff for placement. Ms. Morin is responsible for all three branches and staff working at all three locations, including receptionists, payroll, recruiters and sales staff, report to her.

12 National is a client of Erie's Stoney Creek location, which is its smallest location with only approximately seven clients of which National is the largest. Erie also serves other clients in the waste and recycling industry in Smithville and in Niagara. Erie's clients also include companies working in construction, manufacturing and shipping. At the relevant time, Clayton Mohammed and Melanie Storm worked at Erie's Stoney Creek branch as recruiters. They reported to Ms. Morin and were responsible for recruiting drivers and pitchers to supply to National. According to Ms. Morin, there was little overlap between the drivers and pitchers assigned to National and those assigned to Erie's other clients in the waste industry located in Smithville and in Niagara due largely to the distance between their respective operations.

Recruitment and Training Process

13 Prior to the start-up of National's operations in Stoney Creek in 2006, Mr. Lyndsay and Mr. Danny Ardellini, the President of National, had discussions with Ms. Morin concerning National's expectations for screening candidates. During the course of three meetings held in February or March 2006, representatives of National provided representatives of Erie with copies of National's policies and procedures and communicated National's expectation that Erie would meet or exceed its own standards. Ms. Morin later typed up job descriptions for drivers and pitchers based on verbal descriptions given to her by representatives of National. Representatives of Erie and National also discussed the issue of reference checks and the need for drivers to have a clean Commercial Vehicle Operator Record Ontario Driver Abstract ("CVOR abstract"). In particular, they reached agreement prior to the start up that Erie could consider a prospective driver if he or she had two infractions (depending on the type of infraction) and they established a matrix of what constitutes an acceptable driving record for the purposes of meeting National's insurance requirements.

14 Pursuant to the terms of Erie's contract with National, Erie was required to develop orientation packages specifically designed for individuals assigned to National and were to include National's "policies and procedures, expectations and accountability, safety procedures/equipment, work hours, break times, security procedures, parking, etc." as well as an orientation acknowledgement document.

15 Erie consequently developed a safety orientation manual for employees dispatched to National, which manual adopts many of National's own policies and procedures, such as National's mis-

sion statement, some of National's operating procedures and National's policy on bin throwing and on accident reporting. Erie also included in that manual some additional policies and procedures, such as a harassment policy and hiring procedures.

16 Erie recruiters are generally responsible for screening resumes sent to Erie against job descriptions for drivers and pitchers and are also responsible for reviewing the driver's abstracts to ensure they are acceptable. Borderline cases are discussed with representatives of National. An example of this occurred on June 26, 2007 when Ms. Storm e-mailed Ms. Rice the CVOR and abstract for a candidate for a driver loader position and asked Ms. Rice if the individual was eligible for placement at National. Ms. Storm explained in her e-mail that she was doing so "because [the individual] falls under questionable within the matrix". Ms. Rice testified that, in these circumstances, Mr. Lindsay would be consulted regarding a driver's information to determine if accepting the individual would adversely affect National's insurance.

17 National takes a more active role in screening prospective candidates for specialized positions such as that of a front-end driver. Ms. Storm from Erie, for example, e-mailed Ms. Rice resumes of prospective candidates for Ms. Rice's consideration on numerous occasions in May and June 2007. In April 2007, Ms. Rice also communicated to Ms. Morin that she wanted to be involved in interviewing some of the front-end driver candidates.

18 After the initial screening of resumes, prospective candidates are invited to Erie's Stoney Creek office where they are given an orientation, shown some training videos, and are then tested on the content of those videos. The training and testing includes the following:

1. a video on garbage collection and safety followed by a test;
2. a video on safety at the transfer station followed by a test;
3. a video on safety at the landfill followed by a test;
4. a video regarding training the refuse driver followed by a group discussion with Erie recruiters;
5. a video concerning WHIMIS followed by a test;
6. a video regarding back safety and proper lifting procedures followed by a test;
7. a general health and safety test.

National had no involvement in formulating these videos or tests, since they were all purchased by Erie before it entered into its contract with National. Erie provides National with a summary of the test scores for those individuals assigned to National. National has to provide that information to the City to meet its contractual obligations with the City.

19 Erie recruiters also interview prospective candidates by asking them questions which Erie developed for positions in the waste industry and by asking them for up to three references. For reasons of confidentiality, Erie does not disclose details of these reference checks (such as the name of the reference) to National. During the course of their interview with Erie recruiters, prospective candidates are asked to sign and complete an application form, which form asks for information about the individual's prior work experience and education and driver's license qualifications. The application form includes the following acknowledgement:

I understand that I am hired by Erie Personnel on a "term & task" basis and that I am in no way a full time employee of the company. I agree that Erie Personnel be

indemnified & saved harmless, without liability to me for wages or salary except such as may have been earned at the date of termination.

The acknowledgement set out at the bottom of the application form further requires the individual to confirm having been informed of Erie's safety guidelines, regulations, accident reporting procedures and WHMIS orientation and to confirm the individual's obligation to comply with all safety rules and regulations while on temporary work assignments with Erie.

20 During the interview process, prospective candidates are taken through, and asked to sign off on, an orientation checklist consisting of some twenty items. Items reviewed include information concerning Erie's payroll policies, their right to refuse work, the after hour service and the process for cancellations. Erie also provides candidates with its "Industrial & Office Policy Manual", which is provided to all Erie employees and is not tailored to National. It explains such things as Erie's payroll policies and the fact that employees are considered by Erie to be "elect to work employees", meaning that they can choose whether or not to accept a vacancy. Some of the items covered in that manual do not apply to drivers and pitchers, such as the references therein to time slip procedures and to office dress code. Erie also provides candidates with a safety orientation manual, which manual is, as noted, tailored to National. Candidates are also advised of Erie's harassment policy and are asked to sign its extra hours of work agreement and its averaging of overtime agreement for the purposes of employment standards legislation.

21 Following this process, individuals hired by Erie and assigned to work at National as drivers are referred to National's Stoney Creek yard where National's route supervisors give them a road test. When conducting the road test, National's route supervisors complete a road assessment form, which indicates whether the prospective driver has passed or failed various aspects of vehicle operation. Drivers are required to pass that test in order to work for National.

22 Route supervisors also give drivers and pitchers assigned to National by Erie an orientation at the Stoney Creek yard, during which time route supervisors train drivers and pitchers on the day to day requirements of their job, including on the operation of the vehicles, the procedures for picking up waste, the procedures at the transfer station as well as proper circle checks. National's route supervisors who conduct this two hour training go through and complete the training itemized on an Erie document entitled "Rear Load Driver & Helper Training Form". According to the evidence, this training generally takes approximately two hours to complete. Ms. Rice noted that National is required to confirm at its monthly meetings with the City that all licensed drivers working on the contract have been appropriately trained.

23 Individuals referred by Erie to National have in some cases responded to an advertisement for drivers placed by Erie and, in other cases, have been referred to Erie by someone at National, such as by Ms. Rice or Mr. Conacher.

24 The evidence with respect to the hiring of Mr. Colette is that he responded to an advertisement for drivers placed by Erie and then participated in the interview and orientation process conducted by Erie's recruiters described above. He was then offered employment by letter dated March 25, 2006 from Erie "as an Elect to Work/Term & Task Employee". The offer letter notes that he will be dispatched for the position of driver/loader at a specified hourly rate and that the offer is conditional on his ability to satisfy Erie's medical requirements and/or receipt of satisfactory references. He accepted that offer prior to being dispatched to National's Stoney Creek yard where he met with a route supervisor for a driving test and further training.

25 The hiring process followed in respect of Mr. Anderson differed in that Mr. Anderson was contacted by Mike Conacher of National about the opportunity to work as a driver at the Stoney Creek yard immediately after Mr. Anderson was let go by his former employer. Mr. Anderson's evidence suggests that he attended at the Stoney Creek yard and was trained and also worked for National for several days before being directed to Erie's offices to complete an application form and to participate in Erie's training and orientation process. Mr. Anderson, like Mr. Colette, received an offer of employment from Erie and was paid throughout by Erie for the work he performed at National's Stoney Creek yard.

Financial Arrangements between Erie and National

26 Under the terms of the contract between Erie and National, weekly reports of hours worked by those assigned to National are to be formulated by National on an excel spreadsheet and forwarded electronically to Erie. Payroll Entry Sheets prepared by National are in fact regularly forwarded to Erie for payroll purposes. Erie then invoices National bi-weekly based on the hourly rates established for each classification in their contract plus a mark-up. Under the terms of their contract, a 2% penalty is applied to overdue accounts after 30 days.

27 While the hourly rates paid to drivers and pitchers are for the most part established under the contract, pay rates for specialized drivers such as front end or swing drivers are from time to time the subject of negotiation with prospective drivers. Ms. Rice, for example, testified that a driver who drove both front end and swing trucks came to her and asked her for a raise and that she and Mr. Blacktopp then decided to approve his request. Ms. Rice also acknowledged that National could direct that such a raise be given to individuals assigned by Erie, since Erie would simply bill back the amount paid to the driver plus a mark-up. Erie's mark-up takes account of such things as its administration and payroll costs, the cost of WSIB coverage, CPP and EI premiums, as well as its profit.

28 The cost of the health benefits (provided to drivers and pitchers who have worked on National's contract for over 90 days) is not included in the hourly rate negotiated for the different classifications of employees. Instead, Erie administers those benefits and bills back the cost of them to National monthly.

29 The terms of the contract between National and Erie also notably stipulate that "[a]ll bonus and incentives will be incurred by National Waste Services at their sole discretion and who, in turn, will direct Erie Personnel to administer said bonus and incentives to the workers who qualify." Mr. Lindsay testified that National introduced a safety incentive bonus, under which employees could earn up to \$900 per year if no deductions were made throughout the year for safety infractions. The incentive bonus initially only applied to drivers, but the President of National subsequently decided to extend the safety incentive bonus to pitchers as well. The amount of the safety bonus is paid out by Erie to employees at the end of the year and the cost of the bonus is charged back to National as contemplated under their contract.

30 National is also responsible for the cost of monthly recognition awards, the cost of annual appreciation barbeques and the cost of standby employees provided at a rate of three hours minimum per employee. Pursuant to the contract between National and Erie, safety vests and safety gloves are provided by National with no cost to Erie whereas Erie provides workers with CSA approved work boots and National pays a boot allowance of up to \$100 for each employee.

31 In one instance referred to in evidence, an issue concerning responsibility for payments made to three employees arose between representatives of Erie and National at a meeting held on December 7, 2006. The issue concerned whether three employees, who were sent home because they were not scheduled, were going to be paid the minimum three hours reporting pay contemplated under the contract. Ms. Morin testified that she simply advised National that these individuals would receive the minimum three hours reporting pay. According to the minutes of their meeting, Erie was not going to cover the cost of this "sent home pay", since Erie recruiters were not made aware of the line up changes.

Scheduling and Supervision of Drivers and Pitchers

32 National's requirements for drivers and pitchers fluctuate daily. National however generally always requires a group of approximately forty drivers and pitchers (or twenty pairs of workers). Although the turnover in staff assigned to National is high and was estimated by Ms. Morin to be approximately sixty percent, there is also a group of regular drivers and pitchers who work from day to day.

33 Mr. Colette and Mr. Anderson, for example, both worked for National on a full-time schedule of between forty-five (45) and sixty (60) hours per week from Monday to Friday. The evidence further discloses that Ms. Rice wrote a letter dated March 6, 2007 confirming full-time employment on behalf of one such full-time driver at his request, in which she notes that "[h]e works full time and 5 days a week" and that "[t]here is no reason to believe that his position here is in jeopardy of being downsized/eliminated, as long as his attendance and performance do not change".

34 National advises Erie daily of its requirements for drivers and pitchers for the next day. Erie then arranges for the requisite number of drivers and pitchers to go to National's Stoney Creek yard the following morning. Erie is responsible for supplying the requisite number of workers to the yard, but is not involved in placing individuals on specific routes. That is done by National. According to Ms. Rice, National pairs up drivers and pitchers who work well together and National also tries to assign them the same truck from day to day.

35 Typically, National representatives fax to Erie sometime in the afternoon a "drivers daily line up sheet", which sets out National's "wish list" of the specific drivers and pitchers to be assigned to specific routes and trucks for the next day. Erie then faxes back the same form with notations regarding which named drivers are confirmed for the next day. Erie's notations may also include some substitution of individuals requested with other names. The next day, after the drivers and pitchers have reported to work, National faxes back to Erie the same form, which indicates what actually occurred that day and includes notations regarding any cancellations or no-shows.

36 Ms. Morin testified that, in accordance with Erie's normal operating procedure, Erie's recruiters contact all drivers and pitchers on a daily basis in the evening to advise them of their assignments for the next day. Ms. Rice however noted that, at Erie's request, National would often confirm that a driver or pitcher was coming in the next day and then relay that information to Erie. While Ms. Morin acknowledged that, for a period of time, representatives of National contacted workers by two way radio sometime during the day to confirm their assignment for the next day, Ms. Morin maintained that Erie recruiters contacted all drivers and pitchers daily with the exception only of those who had indicated to Erie that they did not wish to have their family life disrupted with daily calls. By contrast, Mr. Colette and Mr. Anderson testified that they simply showed up at National's yard the next day and that no one from Erie called them to confirm their assignment.

There was further no suggestion in their evidence that they had ever requested that Erie not call them daily.

37 The Board accepts the evidence of Mr. Colette and Mr. Anderson that they were not contacted by Erie recruiters on a daily basis. Ms. Morin did not, in any event, have direct knowledge that Erie recruiters made daily phone calls to every single individual assigned to National. As such, while Erie's policies and procedures require that recruiters contact all staff on a daily basis except if a worker has requested otherwise, the evidence before the Board suggests that did not always happen in the case of workers assigned to National.

38 With respect to cancellations, drivers and pitchers are informed during their orientation at Erie's offices that they are expected to call Erie's twenty-four hour service if they are unable to report to an assignment and that Erie has a toll free telephone number for this purpose. Ms. Rice's evidence however indicates that drivers and pitchers would often call National regarding cancellations. Mr. Colette also testified that Crystal Chioni, a dispatcher at National, asked him to call National in the event that he had to cancel his assignment and that he had done so. Ms. Morin similarly acknowledged that there were instances when Erie found out about cancellations from National and noted that Erie had had to re-educate drivers and pitchers about the cancellation policy.

39 The evidence with respect to time off requests made by drivers and pitchers also discloses a mixed practice. Ms. Morin testified that such requests were supposed to be directed to, and approved by, Erie. Erie's Vacation/Day Off Request form, which drivers and pitchers were required to submit when making such requests, notes the requirement pursuant to National's Policies and Procedures, that the individual must provide the completed document setting out their request for time off to Erie within five days prior to the requested day off or no later than thirty days for vacation time. The evidence however discloses numerous instances in which representatives of National e-mailed representatives of Erie notice of vacation or time off requests, which drivers and pitchers had made directly to National. In addition, Mr. Colette testified that, on one occasion, he asked Ms. Rice if he could take a day off to attend his wife's citizenship ceremony and that she had approved his request on the spot. In another instance, however, Ms. Rice advised Melanie Storm of Erie that Mike Vizzarri would not be able to take a requested day off, but Erie approved his request notwithstanding Ms. Rice's concern about not being able to replace him.

40 The e-mail exchanges between representatives of Erie and of National also indicate a degree of confusion and frustration between them concerning whose responsibility it was for receiving and approving vacation and time off requests. For example, by e-mail dated August 3, 2006, Ms. Rice sought to clarify this issue with Ms. Morin, as follows:

My understanding is that Eire (sic) is now controlling booked days off. Darren Busky just called me and informed me that Melanie told him to call me and clear it with me for a day off.

I am very confused ...

By e-mail sent to Ms. Rice the next day, Ms. Morin clarified as follows:

I looked into this, and Melanie was just trying to ensure you would be all right should this fellow book out as he is a front end driver. In the future we will go ahead and deal with these issues on our own.

It is however apparent from Ms. Morin's evidence and her subsequent e-mail exchange with Ms. Rice months later in December, 2006 that the issue of National approving Vacation or Day off Requests, rather than directing them to Erie, was a source of some frustration for her. She testified that she sent the following e-mail to Ms. Rice on December 6, 2006, in which she claims to have been "sarcastic":

Judy

I noticed that National Waste is still using the EPC [Erie] Vacation or Day off Requests, Since we have no authority on time off, our forms should not be utilized for this. Would it be too much to ask to have you generate a NWS for for (sic) these types of requests.

Thanks in advance for your co-operation in this matter.

Ms. Morin testified that she was being sarcastic when she stated that Erie has no authority on time off, because she was frustrated by the fact that Ms. Rice was not adhering to their policy, which requires all employees to contact Erie to request vacation time or other time off. It therefore appears from a totality of the evidence that Erie was supposed to be in charge of granting vacation and time off requests, but that drivers and pitchers frequently asked representatives of National for permission to take time off. Such requests were then either relayed to Erie to deal with or permission was granted by representatives of National and then communicated to Erie.

41 The day to day supervision of the drivers and pitchers assigned by Erie to National is done almost exclusively by route supervisors employed by National, to whom the drivers and pitchers report. On occasion, National will appoint a driver to act as a lead hand in order to fill in for a route supervisor who is away. That, for example, occurred in the case of Mr. Anderson who was appointed to a lead hand position for a period of time. The lead hand position essentially involves performing the functions of a route supervisor, such as monitoring and reporting any problems encountered by drivers and pitchers on their routes and reporting any breaches of National's policies and procedures.

42 When drivers and pitchers arrive at the yard in the morning, they punch in at the office and consult the daily run sheet prepared by National, which sheet is placed on the counter in the office and which assigns workers in pairs to a particular truck and route. National provides them with a route map indicating the route they are expected to follow and any specific pick-up notations. Before going out on their routes and doing their collections, drivers are required to do a circle check of the vehicle and complete a circle check form and pre-trip inspection form. Once they have completed their routes, drivers call dispatch and report any issues encountered on their routes and may be assigned by dispatch to do other work before returning to the yard. At the end of the work day, the drivers return the truck to the yard where they refuel the vehicle, complete a post trip inspection report of the vehicle, and submit the report to the office. They also hand in their daily run sheet, which details the work performed that day, and then they punch out. Drivers generally return the keys for the vehicle to the office before leaving for the day, but sometimes they take the keys home if they are returning to work at National the next day.

43 National's two route supervisors spend much of their workday on the road working along the various routes supervising the work of the drivers and pitchers. They are responsible for ensuring

that National has enough drivers and pitchers and equipment to cover the daily requirements of the Hamilton Contract. Their duties include ensuring that drivers and pitchers are following their routes correctly, conducting spot checks of garbage trucks to ensure the requisite paperwork, first aid kit, and fire extinguisher are in the cab and that the truck is otherwise clean and being operated correctly. They, for example, ensure that drivers are not "rigging", i.e. disarming the safety equipment. The duties of route supervisors also include responding to calls from drivers and pitchers about any problems on their routes and reporting to dispatch if there are any garbage cans left on the street.

44 Route supervisors are also responsible for completing National's Route Observation forms and for attending in the event of an accident or injury involving a driver or pitcher. According to Mr. Lyndsay's evidence, the purpose of this form is to ensure that drivers and pitchers are complying with health and safety legislative requirements and Ministry of Transportation requirements. Route supervisors are also required to complete National's Injury/Illness Investigation Report used to document accidents. Mr. Lyndsay is also involved in conducting accident reviews and investigations in the event of an accident involving a vehicle and otherwise dealing with National's vehicle insurance policy.

45 Management at National further address safety and performance issues during tailgate meetings with drivers and pitchers, which meetings are held periodically at 6 a.m. before drivers and pitchers go out on their routes and generally address health and safety and performance issues. While a recruiter from Erie is also usually present at those meetings, the discussion of the issues raised at those meetings is generally led by National's management personnel. As noted, National also created a bonus incentive package under which deductions are made to the annual safety bonus in the event of a particular safety infraction. According to Ms. Rice, Mr. Blacktopp created the list of items that warranted a deduction from the bonus. Even though the bonus is administered by Erie, the evidence indicates that management of National requests that Erie make specified deductions to an individual driver or pitcher's safety bonus in the event of a safety infraction.

46 Erie is also involved in safety issues relating to drivers and pitchers. In addition to holding its own health and safety meetings every quarter with staff working from its Stoney Creek location, Erie prepares, and provides to National, employee injury packages, which include template letters to the employee's physician and forms for WSIB purposes. Erie is informed by National of any accidents or injuries involving drivers and pitchers and is also responsible for processing and dealing with workers' compensation claims made by drivers and pitchers. This, for example, occurred in the case of Mr. Colette's workers' compensation claim. Under the terms of the contract between National and Erie, they agreed to work together to enforce a return to work program which may include a shared modified work program with the details of the modified duties equally agreed upon by both of them.

47 National has from time to time accommodated drivers and/or pitchers with modified duties, but was unable to do so, or to continue to do so, in the case of two individuals, Mr. Colette and Mr. Robert Buckingham. With respect to Mr. Colette, National initially accommodated his need for modified work by giving him driving duties only. However, when National would not, or could not, do so any longer, Erie eventually offered Mr. Colette a placement with another client. Mr. Colette never did take up that placement because it was subsequently determined not to be suitable modified work. In the case of Mr. Buckingham, he was accommodated with modified duties at Erie's Stoney Creek office for a period of time.

Discipline and Dismissal

48 In the present case, while Ms. Rice and Ms. Morin both testified that National has no authority to discipline drivers or pitchers assigned by Erie, the evidence indicates that management at National, including Ms. Rice and the route supervisors, did so on a number of occasions by issuing worker warning reports directly to drivers and/or pitchers. For example, on or about February 20, 2007, Mr. King, National's route supervisor issued a written warning directly to a driver for commencing his route prior to 7 a.m. The worker warning report issued to the individual by National was then forwarded to Erie. Another example of this occurred on or about March 17, 2007 when Mr. King issued a worker warning report imposing a three day suspension on a driver for the unsafe operation of a vehicle. That suspension was approved by Ms. Rice.

49 In other instances in which discipline was imposed, National advised Erie of an incident that warranted discipline and suggested the amount of discipline that should be imposed, such as a suspension of a specified number of days or a written warning. While Ms. Rice testified that those requests were merely suggestions to Erie regarding the amount of discipline which should be imposed, the evidence indicates that Erie, for the most part, responded to these "suggestions" by issuing a worker warning report to the individual concerned, which imposed the requested discipline. Ms. Morin, who testified on behalf of Erie, was simply copied on those reports and, in many cases, could not recall the incidents in question. There is therefore little evidence before the Board to suggest that Erie exercised much independent authority to discipline drivers and pitchers.

50 The evidence also indicates that management at National from time to time asked Erie not to assign a particular driver or pitcher to National on an indefinite basis and that Erie complied with such requests.

Decision

51 The issue before the Board is whether National is, in fact, the employer of the drivers and pitchers assigned by Erie to National's Stoney Creek yard. The Board has in numerous instances in the past been called upon to determine whether the client to whom employees are assigned by a personnel agency is in fact the true employer of the employees in question for labour relations purposes.

52 The Supreme Court of Canada in *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015 has noted the difficulty of determining the true employer in this type of triangular relationship among the agency, the client and the employee. In that case, the Court was considering whether the Quebec Labour Court had made a patently unreasonable decision when it found that a temporary employee hired by the City through a personnel agency was, in fact, an employee of the City within the meaning of the *Labour Code*. In doing so, it noted that the difficulty of determining who is the true employer in these triangular relationships arises from the fact that both the personnel agency and the client have some of the traditional attributes of an employer and that what is essential is determining which party exercises the greatest control over all aspects of the employees' work. The Supreme Court explained the rationale for the emphasis on greatest control and reviewed the jurisprudence of Canadian administrative agencies on this issue, as follows:

48. ... In my view, in a context of collective relations governed by the *Labour Code*, it is essential that temporary employees be able to bargain with the party that exercises the greatest control over all aspects of their work - and not only over the supervision of their day-to-day work. Moreover, when there is a certain splitting of the employer's identity in the context of a tripartite relationship, the more

comprehensive and more flexible approach has the advantage of allowing for a consideration of which party has the most control over all aspects of the work on the specific facts of each case. Without drawing up an exhaustive list of factors pertaining to the employer-employee relationship, I shall mention the following examples: the selection process, hiring, training, discipline, evaluation, supervision, assignment of duties, remuneration and integration into the business.

(ii) *Canadian Cases*

49. In applying collective labour relations legislation that is similar to that in Quebec, Canadian administrative agencies have also dealt with how to identify the real employer in a tripartite relationship. Most of the decisions of those agencies, and specifically the Ontario Labour Relations Board ("OLRB") and the Canada Labour Relations Board ("CLRB"), have noted that the essential test for identifying an employer-employee relationship in a tripartite context is that of fundamental control over working conditions. The application of the fundamental control test leads to an analysis of which party has control over, *inter alia*, the selection, hiring, remuneration, discipline and working conditions of temporary employees and to a consideration of the factor of integration into the business. In the final analysis, the application of the fundamental control test involves an examination of a series of factors that are similar to those suggested by the comprehensive approach set out in *Vassart* and in the Court of Appeal's decision in the instant case.
50. In applying the fundamental control test, the OLRB and the CLRB have generally concluded that the client is the temporary employee's real employer. See, for example: *Labourers' International Union of North America, Local 183 v. York Condominium Corp.*, [1977] O.L.R.B. Rep. 645; *Hotel and Club Employees' Union, Local 299 v. Sutton Place Hotel*, [1980] O.L.R.B. Rep. 1538; *United Electrical, Radio and Machine Workers of Canada v. Sylvania Lighting Services*, [1985] O.L.R.B. Rep. 1173; *National Automobile, Aerospace and Agricultural Implement Workers Union of North America, Local 607 v. Grant Development Corp.*, [1993] O.L.R.B. Rep. 21; *International Brotherhood of Electrical Workers, Local 586 v. Dare Personnel Inc.*, [1995] O.L.R.B. Rep. 935; *Nationair (Nolisair International Inc.)* (1987), 70 di 44. However, Canadian administrative agencies have not reached this conclusion systematically. In some decisions, the factual situation led the OLRB and the CLRB to find that it was the personnel agency or supplier that actually had the attributes of an employer. See, for example: *United Brotherhood of Carpenters & Joiners of America, Local Union 93 v. Templet Services*, [1974] O.L.R.B. Rep. 606; *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 819 v. Tower Company (1961) Ltd.*, [1979] O.L.R.B. Rep. 583; *Nolisair International Inc. (Nationair Canada)* (1992) 89 di 94.

In determining which entity is the employer for labour relations purposes, the Board's task is therefore generally to determine whether the client or the personnel agency has the greatest control over all aspects of the employees' work so that the employees can bargain with that entity.

53 The factors the Board has applied in determining who is the employer for labour relations purposes are set out in *York Condominium Corporation*, [1977] OLRB Rep. Oct. 645 at para 10, as follows:

1. The party exercising direction and control over the employees performing the work;
2. The party bearing the burden of remuneration;
3. The party imposing the discipline;
4. The party hiring the employees;
5. The party with the authority to dismiss the employees;
6. The party who is perceived to be the employer by the employees;
7. The existence of an intention to create the relationship of employer and employees.

The Board has not found any of these factors to be determinative, but has generally ascribed greater weight to some factors than others. In *533670 Ontario Ltd. (c.o.b. Best Personnel Services)*, [1997] OLRB Rep. September/October 849, the Board described its approach in the following terms:

13. None of these factors is necessarily determinative, and the relative significance of any individual factor will depend on the circumstances of the particular case. Having said that, it is apparent that the object of the exercise is to assess the various factors, both individually and in the context of all the factors, in order to ascertain who has fundamental control over the employment relationship, particularly where the factors point in different directions. In making the assessment and determination, the Board is more concerned with substance than with form; that is, the Board will not permit commercial form to obscure labour relations reality.
14. A natural consequence of this is that the first five factors listed in *York Condominium, supra*, which are indicators of control, have become more important than the last two, which are both more subjective and difficult to gauge. This is consistent with the Board's preference (and the underlying theme of the Act as demonstrated by provisions like subsection 1(4) and section 69) for substance over form and the principle that perception and impression cannot be determinative of a question of law (see, *International Union of Canada and Kent Line Ltd.*, (1972) 27 D.L.R. (3d) 105 (Federal Court of Appeal)).
15. When it comes to a question of fundamental control there is little which is more important than the beginning of the relationship (hiring), regulating it (direction, control and supervision) and ending it (termination). Accordingly, *York Condominium, supra*, factors 1, 4 and 5 have gained primacy. Indeed, even though the Board (and arbitrators) have been careful to say that it will not necessarily be determinative, decisions like *Dare Personnel, supra*, *Sylvania Lighting, supra* and *Royal Ontario Museum, supra*, demonstrate that direction and control is a very significant factor. At the same time, these decisions also demonstrate that the perception of employees, and commercial contracts as indicators of intention often carry little weight.

No one factor is determinative and the weight ascribed to any one of the factors applied in the Board's assessment will further differ with the circumstances of each case. As noted by the Board in

Sutton Place Hotel, [1980] O.L.R.B. Rep. 1538 at para 43, "[t]he significance of each indicator can only be ascertained through an appreciation of how they all fit together within the facts of each case." In assessing whether the responding party is the true employer of the employees in question for labour relations purposes, a significant consideration is who exercises fundamental control over their working lives.

Direction and Control over the employees performing the work

54 The union refers to various provisions in the Hamilton Contract in support of its position that that contract requires National to retain direction and control over the drivers and pitchers supplied by Erie. For example, the union notes that the Hamilton Contract requires that National exercise due care and skill in the collection, transportation and disposal of all waste collected under the contract. The contract also contemplates that liquidated damages could be assessed against National for certain specified infractions such as inappropriate behaviour of staff, improperly replacing containers, the failure of staff to clean up spillage of waste, etc. The union suggests that National must therefore exercise control over the drivers and pitchers since it is liable for the quality of their work.

55 While the responding party and the intervenor do not dispute that the Hamilton Contract requires National to maintain certain standards in respect of work performed by drivers and pitchers, they suggest that these requirements simply form the basis of the level of service that National requires of Erie in their contract for the provision of drivers and pitchers to National. According to counsel for the intervenor, the fact that a client stipulates a certain level of service does not make the client the employer of the employees in question.

56 There is no doubt that National has very specific obligations under the Hamilton Contract in terms of how, when and in what manner, waste is to be collected by the persons National engages to do the collection. Even though the Board appreciates that the extent to which National actually controls and directs the work of the drivers and pitchers assigned to it is likely informed by National's own underlying contractual obligations, what actually occurs in practice is what is most significant.

57 In the present case, virtually all of the day to day supervision of the drivers and pitchers is, in fact, done by route supervisors employed by National. National determines the daily assignment of work for drivers and pitchers, including to which routes they will be assigned, which trucks they will drive and with whom each will work on a given day. National requires them to perform inspections of their vehicles and to complete National's paperwork, including circle check forms, and a daily run sheet detailing the work they performed that day. Once they have finished their routes, they may be assigned other work by National's dispatcher before returning to the yard. After the initial start-up period, Erie recruiters attended at the Stoney Creek yard only occasionally and are not involved in the daily supervision of the work of the drivers and pitchers. While Erie held periodic health and safety meetings for those assigned to work out of its Stoney Creek office, National was responsible for determining whether any deductions would be made to their individual safety bonuses for any infractions noted by National's supervisory staff.

58 National emphasized that Erie controls the assignment of staff to it. However, National determines the number of drivers and pitchers it requires on a daily basis and submits its "wish list" of drivers and pitchers for the next day. Although there is no guarantee that Erie will be able to supply each of the drivers and pitchers requested for the next day's line up, the evidence taken as a whole indicates that Erie sought to do so where possible depending on the availability of the individuals requested. The only evidence to suggest that Erie exercised any independent authority over the as-

signment of work is in the one instance in which Erie approved Mike Vezzari's time off request despite National's desire that he not be permitted to take the time off.

59 Given National's day to day supervision of, and assignment of work to, drivers and pitchers assigned to work at the Stoney Creek yard, the criterion of direction and control, in the Board's view, points overwhelmingly to National as the employer, notwithstanding that Erie has a degree of control over the assignment of staff to National.

The Burden of Remuneration

60 The financial arrangement between Erie and National for the provision by Erie of drivers and pitchers to work at the Stoney Creek yard is essentially a cost plus arrangement, under which pay rates plus a mark-up for specific classifications were negotiated by Erie and National at the start of their contract. The evidence taken as a whole indicates that Erie simply charges back to National virtually all of the cost of the wages and benefits for drivers and pitchers. Even though there were some exceptions, such as the cost of a portion of Mr. Buckingham's wages for modified work performed at Erie's own office and the cost of wages for drivers and pitchers to attend a few health and safety meetings held by Erie, National predominantly bore the burden of the remuneration of the drivers and pitchers assigned to it. National also had considerable say in their rates of pay and the amounts of their bonuses.

61 In all the circumstances, the Board rejects the suggestion that Erie's negotiation of a penalty clause for late payment of invoices in its contract with National reflects the fact that Erie bore the burden of remuneration. Erie is simply a paymaster that requires the amounts invoiced to National to meet its payroll obligations, since almost all of its expenses associated with the drivers and pitchers plus a profit are charged back to National.

62 The Board also disagrees with the suggestion made in argument that the incident in December 2006 when Erie advised National that three employees who were sent home were going to be paid the minimum three hours reporting pay suggests that the arrangement between Erie and National was not simply a cost plus arrangement. In this regard, the Board notes that there is no indication in the evidence that the cost of this minimum three hour reporting pay for the three employees involved was not simply charged back to National in the normal course.

63 In the Board's view, the factor of who bears the burden of remuneration also points to National as the employer.

The Hiring of the Employees

64 Erie is largely responsible for finding, screening and referring individuals to National to work as drivers and/or pitchers. This process includes some general training, orientation and testing. Erie offers employment to drivers and pitchers as term and task employees of Erie prior to assignment to National and also has drivers and pitchers sign its averaging of overtime agreement and its extra hours of work agreement prior to assignment to National. National however dictates to Erie the parameters of an acceptable driving record and also takes a more active role in the selection process for specialized drivers. In addition, once individuals are assigned by Erie to work at the Stoney Creek yard, National is responsible for giving drivers a road test and for giving drivers and pitchers job specific orientation and training. A driver who does not pass National's road test cannot work for National. As such, the final say over hiring of drivers to work out of the Stoney Creek yard rests with National. Responsibility for hiring the employees is therefore shared.

65 In the Board's view, the responsibility for recruitment, hiring, orientation and training of staff is shared as between Erie and National, such that this factor does not point clearly to either Erie or National as employer. This factor is therefore neutral.

The Imposition of Discipline and Authority to Dismiss

66 The Board disagrees with the contention that the party making the original offer of employment to drivers and pitchers is indicative of who has the authority to dismiss that individual. Instead, the evidence of which entity actually exercised the authority to discipline and/or dismiss the drivers and pitchers is, in the Board's view, what is indicative of who is responsible for, or in control of, that aspect of the employment relationship.

67 In the present case, although both Ms. Rice and Ms. Morin testified that National has no authority to discipline drivers and pitchers, the evidence indicates that Ms. Rice as well as National's route supervisors did, in fact, directly discipline drivers and pitchers on a number of occasions by issuing worker warning reports to them. In the other instances in which discipline was imposed, management at National asked Erie to issue a worker warning report specifying a particular penalty (e.g. a three day suspension) and Erie then imposed the requested discipline. Even though Ms. Rice testified that these requests were simply suggestions to Erie concerning discipline, the evidence indicates that Erie recruiters generally responded to these requests by issuing the requested worker warning report to the driver or pitcher in question. Erie also complied with National's requests not to assign a particular worker to National again on an indefinite basis.

68 In the Board's view, the evidence in the present case does not support the suggestion of National that Ms. Rice was simply playing a more active role in managing the Stoney Creek yard than she was authorized to do when she disciplined drivers and pitchers directly. Instead, the evidence indicates that Ms. Rice as well as National's two route supervisors imposed discipline on drivers and/or pitchers from time to time and there is little evidence to suggest that Ms. Rice or the two route supervisors were ever reproached for having done so.

69 The present case is not therefore, in the Board's view, comparable to that in *Nolisair International Inc. (Nationair Canada) et al.*, 89 di 94 (CCRT No. 960), in which some supervisors of the personnel agency's client, Nationair, were found to have played a more active role in supervising the flight attendants supplied to it by the personnel agency, Solair, because of the personality of the individual supervisors concerned. The situation before the Board in *Nolisair International Inc. (Nationair Canada) et al.*, cited above, in which the Board found that Solair was the employer for labour relations purposes is also distinguishable from that before the Board in the present case in that Solair, the entity which supplied the flight attendants to Nationair, unlike Erie, had its own supervisory personnel on site, who were responsible for assigning duties to the individuals assigned to the client. In addition, the evidence in that case, unlike that in the present one, did not establish that discipline during the relevant period was meted out at the request of the client.

70 With respect to the issue of authority to dismiss drivers and pitchers, there is no doubt that National only had the right to decline the assignment of a particular driver or pitcher and could not terminate that individual's contract with Erie. National also correctly points out that the removal of a driver or pitcher from assignment to National altogether or for the period of a suspension does not amount to a termination of his or her employment with Erie, given that Erie can continue to assign those individuals to other clients. However, as term and task employees, those drivers and pitchers are only entitled to be compensated for hours actually worked and therefore they presumably lost

wages if not permitted to work at National for a period of days or indefinitely unless assigned elsewhere. Given the absence of any specific evidence that a particular driver or pitcher actually worked for Erie's other clients and the fact that drivers and pitchers assigned by Erie are only paid for hours worked, National's decisions to suspend, or to refuse the assignment of, a particular driver or pitcher would negatively affect the individuals concerned.

71 In all the circumstances, the Board finds that the factors of authority to dismiss and the imposition of discipline point more strongly to National as the employer.

The Perception of the Employees

72 Mr. Colette and Mr. Anderson were the only two drivers who testified. Mr. Colette indicated that he regarded National as his employer because it was National's yard, because they were to phone National if they were not coming in, because he punched in and out at National every day, because he was supervised by National's supervisors and drove National's trucks, and because all of the paperwork he was required to complete had National's name on it. Mr. Anderson similarly testified that he considered National to be his employer since it was National's yard, because he punched into National's time clock, and because he never really did anything with Erie. Mr. Anderson, like Mr. Colette, spoke to Ms. Rice when he wanted time off.

73 Other indications in the evidence however point to their recognition that Erie purports to be their employer and that Erie is responsible for such things as workers' compensation and payroll issues. For example, Mr. Colette knew that he had to deal with Erie about issues concerning his workers' compensation claim and regarding requests for modified work. As such, while their direct evidence points to their perception of National as their employer, the evidence taken as a whole is equivocal in that regard. In addition, as noted in the Board's jurisprudence, this type of evidence is often self-serving and inherently unreliable.

74 In all the circumstances, the Board finds that this factor, albeit pointing more strongly to National than to Erie as employer, carries little weight in the overall assessment.

The Intention to Create an Employment Relationship

75 There can be no doubt from the evidence that the intention of both National and Erie was that drivers and pitchers assigned to National were to be term and task employees of Erie.

76 This is evident from Erie's employment application form and from the offer of employment letters provided to drivers and pitchers placed at National as well as from the fact that Erie is the one who pays the employees either by direct deposit or by cheque, deducts and remits taxes and other source deductions on their behalf and deals with any workers' compensation ("WSIB") matters that arise. This is also evident from the fact that Erie is the one who asks drivers and pitchers to sign an averaging of overtime agreement and an extra hours of work agreement for employment standards purposes. Erie also conducts health and safety meetings from time to time for drivers and pitchers placed at National. In addition, the terms of the agreement between Erie and National entered into in February 2006 explicitly states that "[t]he employee dispatched to your Company is the employee of Erie Personnel Corporation and matters relating to their employment shall be reported to Erie Personnel Corporation."

77 This factor points to Erie as the employer.

Assessment of Fundamental Control

78 In the present case, the only factor that points to Erie as the employer is the intention to create an employment relationship. However, as noted in *533670 Ontario Ltd. (c.o.b. Best Personnel Services)*, cited above, the consideration of the intention to create an employment relationship is generally accorded less weight than the other factors because of the Board's concern about substance over form. As such, the fact that Erie enters into a written employment agreement with drivers and pitchers as elect to work employees is by no means determinative of the substance of the triangular relationship between the employees, the personnel agency and the client.

79 In the Board's view, the situation in the present case bears significant resemblance to that before the Canada Industrial Relations Board ("CIRB") in *Mackie Moving Systems Corporation*, [2002] CIRB No. 156, in which the CIRB found that the respondent, Mackie, was the employer for labour relations purposes of the drivers supplied to it by various personnel agencies. In *Mackie Moving Systems Corporation*, cited above, the CIRB summarized its findings concerning the relevant factors, as follows:

[160] The Board is of the view that the case *Pointe-Claire (City) v. Quebec (Labour Court)*, *supra*, contrary to the suggestion in argument is analogous to the aspect of the current case that deals with agency drivers, and finds, taking a comprehensive view and considering the relevant factors from a broad perspective, that the employer exercising fundamental control with respect to the agency drivers assigned to it is Mackie. The facts are clear: Mackie *inter alia* has the effective final say in hiring: it determines if an agency driver will be let go or retained; it effectively determines their level of remuneration; importantly Mackie determines and controls all of the day-to-day elements that surround the performance of their work: the number of hours they work, how their work is to be performed, the location for pick-up and delivery and all of the many aspects noted above. Mackie generally owns the equipment used by the drivers to carry out their functions and all communications during the work day are with Mackie. The employment with Mackie is generally indeterminate and the employees identify with Mackie. Taking a balanced view of these and the other relevant factors outlined previously above, the employer exercising fundamental control of the employees in question on a careful consideration of all the circumstances is Mackie.

In that case, like the present one, the personnel agencies paid the drivers but the cost of their wages was borne by the client, Mackie, and the day to day supervision of the drivers was also done by the client. In addition, even though the agencies, like Erie, were responsible for such things as recruitment, screening, initial testing such as ensuring valid commercial drivers' licenses, current drivers' abstracts, testing for general driving knowledge and reference checks, once referred to the client, Mackie, like National, gave the driver a road test and required the new driver to undergo special training. Mackie, like National, therefore had the final say as to whether an agency driver will be accepted or not. The fact that Mackie used several agencies to supply drivers to it did not further affect the CIRB's determination that Mackie exercised fundamental control over the various elements essential in constituting an employer-employee relationship with the agency drivers.

80 The situation in the present case also points more clearly to the client, National, as the true employer than was the case in either *Mackie Moving Systems Corporation*, 2004 CanLII 23808 (ON L.R.B.) or in *Lantic Sugar Ltd.*, [2004] OLRB Rep. January/February 69, in which the Board found

that the client, rather than the personnel agency in question, was the true employer of the drivers supplied to it.

81 In *Mackie Moving Systems Corporation*, cited above at para. 80, the client, Mackie, played no part in the selection or hire of the Lear run drivers assigned to it but, like in the present case, no driver could work for Mackie unless he passed its road test. As such, Mackie, like National, performed a final screening function in the recruitment process. In determining that Mackie was the *de facto* employer, the Board summarized its assessment of the relevant factors, as follows:

88. In summary, Mackie exercised significant, but not exclusive, day-to-day control and direction of the Lear run workforce. Adams played the dominant role in recruitment, but Mackie could screen out drivers who did not satisfy Mackie of their driving skills or their appreciation for safety. For the most part, Adams carried out the function of disciplining and terminating the drivers, but Mackie's contractual leverage *vis-à-vis* Adams (approximately 25 per cent of Adams' total complement of drivers were engaged on the Lear run, and in the neighbourhood of 70 per cent in Mackie's operation overall) meant that it was in a position to influence discipline and discharge decisions where it saw fit. Mackie gained the work in question, which was carried out by the Lear run drivers for Mackie's benefit. There was no evidence that, but for the Lear run, the drivers who served that project would have been otherwise recruited by Adams. Mackie bore the real burden of remunerating the drivers, although the pay cheques, and other typical employment documentation were handled and issued by Adams. Accordingly, notwithstanding that Adams and Mackie intended, and endeavoured to organize their affairs in a manner consistent with, an employment relationship between Adams and the drivers, for purposes of the Act, Mackie was the *de facto* employer.

The circumstances of the present case are similar except that in *Mackie Moving Systems Corporation*, cited above at para. 80, there was a sharing of day-to-day direction and control of the Lear run drivers as between Mackie and Adams. For example, Adams allocated particular driving assignments to the drivers according to driver preferences and both Adams and Mackie played a role in setting standards and correcting performance. In that case, the Board found that Mackie was the *de facto* employer notwithstanding that day-to-day direction and control in that case did not clearly suggest who the employer was, that Adams played a significant role in recruitment, that all of the typical employment documentation was handled by Adams, and that Adams intended to create an employment relationship with the drivers.

82 Similarly, in *Lantic Sugar Ltd.*, cited above, the Board found that the client, rather than the personnel agency, was the true employer of the drivers in question despite evidence of considerably more involvement by Advantage, the personnel agency in that case, in the day-to-day supervision of drivers and also in the recruitment of drivers than there is involvement by Erie in the present case. In that case, Advantage was, like Erie, a well-established temporary personnel supply business. Advantage had been in business for approximately 15 years, had approximately 300 to 325 clients, and operated out of twelve locations in six provinces and also supplied personnel who perform a range of services including clerical, factory labour and driving. However, in that case, Advantage's Safety and Compliance Officer performed many of the same functions, which National's route supervisors perform, such as giving road tests to drivers, doing spot checks, training and disciplining if neces-

sary and doing accident investigations. Even though Advantage was found to be more than a mere paymaster, the Board concluded that Lantic had more say in the day-to-day working lives of the drivers and that Lantic retained the right to discipline them and to have them removed from the contract. Having regard to all of the evidence, the Board concluded that Lantic exercised fundamental control over the drivers for the purposes of the Act and was the drivers' employer.

83 The Board cannot further agree with the suggestion in argument that all of the cases relied upon by the union are distinguishable in that none had evidence of a formal employment relationship having been created between the agency and the worker prior to the assignment of the worker to the client. For example, in *Lantic Sugar Ltd.*, cited above, the evidence was that drivers signed a "contract assignment policy" with Advantage if hired, which document noted that the assignment with the client may be terminated at any time without notice and in that event the driver's employment with Advantage would be changed to available temporary assignments with other clients. The evidence in that case was also that the drivers who were removed from the Lantic account had been assigned by Advantage to other clients whereas in the present case there is little evidence to indicate that specific drivers or pitchers worked for other clients of Erie.

84 Further, in the Board's view, these relatively recent decisions referred to above, which all involve drivers supplied by personnel agencies, bear greater similarity to the circumstances of the present case and better reflect the Board's current approach than do the much older Board decisions in *Templet Services*, [1974] OLRB Rep. Sept. 606 and in *Tower Company (1961) Ltd.*, [1979] OLRB Rep. June 583, which concerned construction and maintenance employees respectively, rather than drivers, supplied by personnel supply agencies.

85 While National argues that the factor of who does the hiring should be accorded more weight in the present case given the high amount of turnover, the Board finds that factor to be neutral given the shared responsibility for hiring done by National and Erie. In all the circumstances, the Board is not persuaded that it should conclude that fundamental control over the drivers and pitchers rests with Erie simply because of Erie's significant, albeit shared, role in recruitment, orientation and training.

86 Finally, the Board's determination that National exercises fundamental control over the working conditions of the drivers and pitchers for the purposes of determining who the true employer is under the Act is not altered by the recent changes made to the *Employment Standards Act, 2000*, S.O. 2000, c.41, as amended (the "ESA") under Bill 139, an Act to amend the Employment Standards Act, 2000 in relation to temporary help agencies and certain other matters. Those changes, which make the temporary help agency the employer of a person assigned to perform work for clients of the agency for the purposes of the ESA, do not come into force until six months after May 6, 2009, the date the Bill received Royal Assent.

87 The issue before the Board in this case concerns whether National is the true employer of the drivers and pitchers to whom the application under the Act relates. That question involves an assessment of which entity affected the most control over all aspects of their work in an effort to ensure that collective bargaining contemplated under the Act will be meaningful. The fact that the recent legislative changes to the ESA will deem the agency to be the employer for an employee's minimum entitlements under the ESA six months from the date of Royal Assent does not alter the Board's overall assessment of who exercised fundamental control over the working lives of the drivers and pitchers at the time the certification application was filed. It is further well-established

that a determination of who is the true employer for labour relations purposes may differ from a determination of who is the true employer under other statutes (e.g. for income tax purposes, etc.).

88 In any event, had the legislature wanted to ensure that collective bargaining is done by the same entity which will have the employment standards obligations for temporary help agency workers, it could have amended the Act at the same time that it introduced changes to the ESA. The legislature however chose not to do so, despite the fact noted by the Supreme Court of Canada in *Pointe-Claire (City) v. Quebec (Labour Court)*, cited above, that the Board in applying the applicable fundamental control test has generally concluded that the client is the temporary employee's real employer. In addition, as recently noted in *PPG Canada Inc.*, [2009] O.L.R.D. No. 1130 and previously adverted to in *Nike Canada Ltd.*, [2006] O.L.R.D. No. 2482 at paragraph 59, there may be occasions where the triangular relationship between employee, client and personnel agency is such that the agency and the client may be found to be a single employer under the Act where an application under section 1(4) of the Act is made.

89 For all these reasons, the Board concludes that National was the employer of the drivers and pitchers who are the subject of this application at the relevant time.

Disposition

90 Having regard to the agreement of the parties and the Board's determination herein, the Board finds that the following constitutes a unit of employees of the responding party appropriate for collective bargaining:

all employees of National Waste Services Inc. in the City of Hamilton, save and except supervisors, persons above the rank of supervisor, and office, clerical and salaried employees.

91 On the taking of the representation vote directed by the Board, more than fifty per cent of the ballots cast by employees in the bargaining unit were cast in favour of the applicant.

92 A certificate will issue to the applicant.

93 The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before then.

94 The responding party is directed to post copies of this decision immediately, adjacent to all copies of the "notice of Vote and of Hearing" posted previously. These copies must remain posted for thirty (30) days.

"Caroline Rowan"
for the Board

cp/e/qlqs/qlhcs

---- End of Request ----

Print Request: Current Document: 27

Time Of Request: Friday, October 02, 2009 00:17:12