ONTARIO LABOUR RELATIONS BOARD

Labour Relations Act, 1995

OLRB Case No: 0979-16-FA
First Agreement Direction

United Food and Commercial Workers Canada, Local 175, Applicant v Park Lane Chevrolet Cadillac Ltd., Responding Party

COVER LETTER

TO THE PARTIES LISTED ON APPENDIX A:

The Board is attaching the following document(s):

Decision - September 28, 2016

DATED: September 28, 2016

Catherine Gilbert
Registrar

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Ontario

ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **0979-16-FA**

United Food and Commercial Workers Canada, Local 175, Applicant v **Park Lane Chevrolet Cadillac Ltd.**, Responding Party

BEFORE: Derek L. Rogers, Vice-Chair

APPEARANCES: Georgina Watts, Sharon Kempf and Ryan Krahn for the applicant; Jamie Knight, Mark Fryer and Heather Pitts for the responding party

DECISION OF THE BOARD: September 28, 2016

1. This is an application under section 43 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"), seeking a direction that a first collective agreement be settled by arbitration.

2. By decision dated August 12, 2016 I granted the application with reasons for the determination to follow. These are those reasons.

Overview

3. The applicant (sometimes "the Union") was certified as the exclusive bargaining agent of employees of the responding party (sometimes "Park Lane") on June 17, 2015. On October 9, 2015 the applicant gave notice to bargain and also requested the appointment of a conciliation officer. The parties met on three days in January 2016 and on two days in February 2016. A conciliation officer met with the parties for the first time on May 12, 2016.

4. That effort did not result in an agreement and on June 2, 2016 the responding party submitted a comprehensive offer through the conciliation officer. The applicant objected to the offer on various grounds including its contention that the responding party was

improperly bargaining to impasse proposed exclusions from the bargaining unit identified in the certificate issued by the Board.

5. On June 17, 2016, the applicant provided the responding party with a detailed catalogue of its objections and other responses to the offer made June 2, 2016. In the interim, Park Lane had requested the Minister to issue a "no board report". That was done on June 23, 2016 without the responding party's having replied to the applicant regarding any of it objections to the June 2nd proposal for settlement.

6. This application was initiated shortly thereafter.

7. Section 43 of the Act provides for first agreement arbitration in the following terms:

> 43.(1) Where the parties are unable to effect a first collective agreement and the Minister has released a notice that it is not considered advisable to appoint a conciliation board or the Minister has released the report of a conciliation board, either party may apply to the Board to direct the settlement of a first collective agreement by arbitration.
> Duty of Board
>
> (2)The Board shall consider and make its decision on an application under subsection (1) within 30 days of receiving the application and it shall direct the settlement of a first collective agreement by arbitration where, irrespective of whether section 17 has been contravened, it appears to the Board that the process of collective bargaining has been unsuccessful because of,
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> (a) the refusal of the employer to recognize the bargaining authority of the trade union;
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> (b) the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;
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> (c) the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; or
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> (d) any other reason the Board considers relevant.

8. The requirements set out in subsection 43(1) of the Act had been met when the Union filed its application.

9. In the earlier decision, I recorded my conclusion that the process of collective bargaining between these parties has been unsuccessful because of the refusal of the responding party to recognize the bargaining authority of the applicant, the uncompromising nature of certain of the bargaining positions adopted by the responding party without reasonable justification, or the failure of the responding party to make reasonable efforts to conclude a collective agreement.

History and Issues

10. Park Lane is an automotive dealership that carries on business in Sarnia Ontario.

11. In its decision dated June 17, 2015, the Board established the bargaining unit as follows:

> 3. Having regard to the agreement of the parties, the Board further finds that the following constitutes a unit of employees of the responding party appropriate for collective bargaining:
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> > all employees at Park Lane Chevrolet Cadillac Ltd. in the City of Sarnia, Ontario, save and except working service manager, those above the rank of working service manager, parts manager, sales staff, office, clerical and administrative staff, including cashiers.

12. The responding party was represented in its negotiations with the Union by counsel, Mr. Mark Fryer, and its Manager of Communications and Operations, Ms. Heather Pitts, together with other employees of the dealership. Mr. Fryer testified that he represents a significant number of automotive dealerships in labour relations matters and that he had negotiated some 50 or more collective agreements for such clients. Ms. Pitts also identified herself in her declaration as being married to Dave Bailey, the "owner/operator of Park Lane" and affirmed that the two "are partners in the business".

13. Ms. Sharon Kempf led the negotiations on behalf of the Union. She had been promoted from the position of Union Representative to Director in January 2016. Ms. Kempf testified that she had negotiated ten or twelve collective agreements prior to her involvement with Park Lane and that she had attempted to follow the processes that had resulted in previous collective agreements.

14. The Union requested the appointment of a conciliation officer contemporaneously with giving notice to bargain in October 2015. At the same time, the Union requested information it considered necessary to its preparation for bargaining. There was no immediate response to the request for information or for meeting dates. Mr. Fryer subsequently identified December 17, 2015 as an available date for bargaining and Ms. Kempf confirmed the date by email dated November 27, 2015; however, Mr. Fryer cancelled that date on December 4, 2015 as he was no longer available due to personal circumstances. On December 8, 2015, the parties agreed to meet on January 15, 20, and 21, 2016.

15. In the interim, both parties had launched unfair labour practice complaints.

16. On January 14, 2016, Park Lane responded in part to the Union's request for information and the parties met as scheduled on the three days in January 2016.

17. In her declaration and her *viva voce* evidence, Ms. Kempf described her process for communicating proposals and recording discussions, responses and agreements reached during the course of her meetings with the responding party. She characterized her notes as having been "detailed" and explained a system that, in essence, colour-coded her notes as a means of capturing the status of negotiated items.

18. At the conclusion of the meeting on January 21, 2016, the parties agreed to meet on February 9 and 10, 2016. In anticipation of the first of those sessions, Mr. Fryer sent Ms. Kempf a document reflecting the then current state of the negotiations. She determined that: "Some of the previously agreed upon items were not accurately reflected in this document". Ms. Kempf's evidence was that she brought those to Mr. Fryer's attention and understood from their discussions that "the identified clerical errors would be corrected in the next pass".

19. The Union's committee also prepared a summary document that Ms. Kempf declared to have been accepted by the responding party without raising concerns.

20. On February 10, 2016 the parties exchanged wage proposals.

21. The Union sought additional meeting dates and agreed to adjourn the processing of an unfair labour practice complaint in that context. On March 1, 2016 Mr. Fryer advised Ms. Kempf that the responding party would not agree to further meeting dates unless the conciliation officer was asked to participate. In the result, the conciliation officer became involved and Park Lane offered to meet on May 12 and 16, 2016. Those dates were confirmed and the parties convened on May 12th.

22. The responding party had discharged a member of the Union's committee on March 31, 2016. That action was the subject, in part, of an unfair labour practice complaint launched by the applicant. The Union proposed to have that individual continue on its committee over the responding party's objection.

23. The Union prepared a summary document outlining what it regarded as "all agreed upon items and all union proposals remaining in dispute". That was submitted to the conciliation officer at the outset of the Union's meeting with her on May 12th. The applicant also provided the officer with a copy of the latest draft collective agreement it had received from Park Lane prior to the meetings on February 9 and 10, 2016. In addition, the Union submitted what Ms. Kempf described as "a document that summarized all agreed upon and outstanding items, whether the proposal came from the Union or the Employer" and a "summary of the parties' respective wage proposals to date".

24. Ms. Kempf declared that she had provided two sets of the documents, with one intended for the responding party, and that Park Lane had raised no concerns regarding their accuracy. The Union's evidence was that it was advised on May 12th that the responding party's monetary proposal "had now changed dramatically".

25. For its part, the responding party asserted that the applicant's documents were not presented to it until their dealings on May 12th had arrived at an unsatisfactory conclusion and, according to

Mr. Fryer, it was determined that there was no point in continuing the negotiations on May 16, 2016.

26. In the result, Mr. Fryer declared, the responding party was not able to raise any concerns regarding the accuracy of the documents submitted by Ms. Kempf. As for Park Lane's wage proposal, Mr. Fryer declared: "Park Lane in no way, shape or form 'changed' its monetary proposals dramatically".

27. The meeting previously scheduled for May 16th did not take place.

28. On May 17, 2016 the parties met for the mediation of the unfair labour practice complaint that related, in part, to the discharge of one of the Union's committee members. The meeting did not resolve that complaint and the matter was set for a hearing in Toronto on June 17, 2016.

29. There were no further communications between the parties until June 2, 2016.

30. Both Mr. Fryer and Ms. Pitts stated in their declarations that "Park Lane spent the balance of May 2016 preparing for the June 17, 2016 ULP hearing and preparing an offer to settle [the terms of the collective agreement]".

31. On June 2nd, the responding party submitted to the conciliation officer a comprehensive offer to settle the collective agreement and the officer forwarded that to Ms. Kempf later the same day. The responding party provided no covering or explanatory communication with the offer and the document did not track or otherwise identify any changes to previously agreed or proposed provisions.

32. In their declarations, Mr. Fryer and Ms. Pitts were critical of the Union for failing to have made any comment on the offer until Ms. Kempf's email to the conciliation officer on June 11, 2016. In addition, they complained that: "at no time prior to the Board hearing date of June 17, 2016, was Park Lane provided with any details of the alleged issues".

33. In its pleading Park Lane added the following at paragraph 44:

> Park Lane asserts that the large majority of the alleged discrepancies put forward by the Applicant on June 17, 2016, [sic] were *semantic changes made by Park Lane to promote greater understanding of the provisions and issues agreed upon by the parties*. Such revisions did not in any way alter the meaning or potential effect of the provisions in question. Further, contrary to the Applicant's allegations, there were only four (4) articles within the June 2, 2016 offer which did not align with what the parties had previously agreed to, all of which were oversights and not intended to deviate from the parties' agreement. *Had the Applicant advised Park Lane of these issues when on June 13, 2016, when [sic] Park Lane first asked for details as to the Applicant's allegations, these issues would have been corrected immediately*. For clarity, those articles with minor discrepancies were:
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> a. Article 3.8;
> b. Article 13.1;
> c. Article 13.10 (Employer 13.11); and
> d. Article 13.16 (my emphasis)

34. As will be seen, none of those were corrected at any time prior to Park Lane's submitting its response to this application and the third and fourth items had not been corrected at any time prior to the hearing of this matter. Moreover, Mr. Fryer's *viva voce* testimony did not justify all of the changes as "semantic changes made by Park Lane to promote greater understanding of the provisions and issues agreed upon by the parties", nor did his evidence confirm the numerical insignificance of the altered provisions.

35. Ms. Kempf declared that the Union concluded from its review of the offer that Park Lane had "attempted to resile from previously agreed upon items in eighteen (18) instances". In addition and by way of summary, the Union maintained:

> - Through this document the Employer made unjustifiable and unreasonable proposals which it knew or reasonably ought to have known would be unacceptable to the Union and would serve to frustrate collective bargaining.
>
> - [T]he Employer proposed across the board wage freezes for all current employees and, in the case of new hires, sought the ability to unilaterally set wages at the Employer's sole discretion. . . .

> - The Employer's June 2, 2016 offer also contained new proposals not, to date, raised by either party and not discussed at bargaining to date.
>
> - The Employer's offer continued to maintain a number of exclusions to the bargaining unit to the point of impasse. At article 1.1 the Employer proposed the exclusion of shop foremen, tower operators, device [sic] advisors and shuttle drivers, all exclusions previously proposed by the Employer at the commencement of collective bargaining back in January 2016 and maintained to date. In addition, in the June 2, 2016 [sic], the Employer added an additional position to the list of proposed exclusions, that of Warranty Administrators.

36. The Union responded to the conciliation officer on June 9 and 11, 2016.

37. As it was, the parties were together at the Board on June 17, 2016 for the hearing of an unfair labour practice complaint brought by the Union. Attention was turned to the collective bargaining issues and the Union prepared a detailed document "that identified the items upon which the parties had previously agreed and that the Employer had then resiled as well as which items remained in dispute". All told, the document set out comments on more than sixty items that featured in the parties' bargaining.

38. The Union's document was provided to the responding party at the Board on June 17th. In addition, the Union attempted that day to schedule meeting dates for further conciliation. According to Ms. Kempf, dates in July were identified and offered to Mr. Fryer; however, he did not respond to Ms. Kempf and the "no board" requested by Park Lane was issued June 23, 2016.

39. In response to this application, Park Lane submitted, as it was required to do, a draft of a collective agreement that it was prepared to sign. The Union noted that, notwithstanding the detailed review it had provided on June 17, 2016, the proposed collective agreement submitted July 28, 2016 continued many of the contentious provisions and exacerbated the difficulties presented by the responding party's problematic conduct.

Park Lane's Alleged Resiling and Refusal to Meet

40. The applicant identified numerous changes made in the June 2nd offer that it regarded as amendments and that it nevertheless agreed to accept. More than a dozen items were resolved on that basis.

41. There were, however, a significant number of provisions with which the Union identified outstanding problems – matters on which it asserted prior agreement from which the responding party had resiled in its latest proposal. Those were identified in the Union's document and can be summarized as follows:

- The introductory "Purpose" provision had been previously agreed, but had been removed from the June 2nd offer.

- Article 1.2 dealing with persons permitted to perform bargaining unit work had been agreed, but the responding party had added "foreman" to the list and, more significantly, had also deleted the exclusionary language: "unless it results in the direct layoff of a bargaining unit member".

- Article 2.4 dealing with harassment, management rights and social interactions had been agreed, but the responding party had reinserted language that the parties had agreed to delete.

- Similarly, the responding party had modified Article 2.5 dealing with harassment and discrimination complaints even though the parties had previously settled the language.

- There had been a typographical error ["the" in place of "there"] in Article 3.6 that required correction; otherwise, the language was settled prior to June 2nd, but the responding party had added new language.

- Article 3.7 dealing with time off for stewards and bargaining committee members had been agreed, but the responding party had altered the text.

- Article 3.8 had been agreed in full, but the responding party had reinserted reference to

bargaining committee persons after having agreed to remove them from the reach of the requirement to punch in and out for Union business and Park Lane's reserved right to limit their time on such business.

- Park Lane had agreed to a probationary period for part-time employees based on 360 hours worked, but had provided for 480 hours in its Article 4.3.

- The parties had settled language providing for the extension of probationary periods on mutual consent in Article 4.4; however, the responding party had substituted language that allowed it to extend the probationary period unilaterally on notice to the Union.

- The parties had agreed the language providing for union security; however, the responding party had altered the mandatory membership language by subordinating that obligation to completion of the probationary period under Article 4.

- Article 13.1 as provided for in the responding party's June 2nd offer addressed the "regular work week" as comprising "up to forty-four (44) hours per week, averaged over a rolling two (2) week period" rather that the previously agreed definition on a weekly basis without averaging.

- Article 13.3, as previously agreed, referred to scheduling of work for certain employees, including service advisors, but the new offer deleted reference to the service advisors.

- Article 13.11 dealt with employees' leaving their work stations or areas with permission of their "direct Manager" and the responding party had removed the previously agreed reference to the alternative of the employees' receiving permission from the manager's designate.

- In keeping with its Article 13.1 proposal, the responding party's offer included in Article 13.15 an overtime definition based on "forty-four (44) hours averaged over a rolling two (2) week period"

contrary to the prior agreement of the parties to maintain the practice of weekly overtime.

- Article 13.16 addressed compensation for employees' travel time when attending "education/training outside of the Sarnia area" and had been agreed to provide for "an additional 1.5 hours" each way in the event that the education or training took place in Toronto or area; however, the responding party's offer concluded with: "In the event that the education/training occurs in Toronto or the General Toronto Area, [sic] the employee shall be paid an additional 1.5 hours".

- The parties had agreed to provide in Article 15.3 that Park Lane would "develop a system to accurately inventory and track the distribution and laundering of the uniforms" furnished to bargaining unit employees; however, that clause was not included in the June 2nd offer.

- The parties had also agreed that employees of Park Lane would not solicit its customers for the performance of work; however, under the caption "Moonlighting", the responding party's offer substituted a detailed and restrictive clause.

42. Park Lane did not respond to the Union's June 17th document.

43. On the evidence, there was no communication to the Union from Mr. Fryer or his client regarding bargaining prior to Park Lane's filing its response in this matter on July 28, 2016.

44. On June 20, 2016, Ms. Kempf wrote to Mr. Fryer confirming a discussion on June 17th and the Union's request for additional dates for collective bargaining. In her letter, Ms. Kempf advised that she and the conciliation officer were "available for continued negotiations on any or all of the following dates: July 21, 25, 26 & 28, 2016".

45. There was no response to that letter; however, on June 21 Mr. Fryer sent Ms. Kempf an email regarding the Board's direction that they confer regarding dates for the hearing of the unfair labour practice complaint previously scheduled for June 17, 2016. Mr. Fryer advised that he and his client were available on 19 days in July, August and September 2016, including two of the four dates that Ms. Kempf had put forward as opportunities to continue negotiations.

46. In his declaration, Mr. Fryer offered the following explanation for the course adopted by Park Lane after learning on June 17th that the applicant was looking for "potential dates for continued conciliation":

> 101. Park Lane carefully considered whether or not to agree to additional conciliation dates. Park Lane could not agree to additional dates because of the following: the Applicant's bargaining team had thus far wasted at least five (5) productive days of bargaining; had chosen to repeatedly discuss entirely redundant issues, often which involved false statements from the Applicant, which Park Lane then had to disprove; had chosen to end negotiations early on numerous occasions; had chosen to report to bargaining completely unprepared on several occasions; had contributed absolutely zero contractual language for either the draft collective agreement or the June 2 offer; and had chosen to completely waste both [the conciliation officer's] and Park Lane's time during conciliation on May 12, 2016.
>
> 102. Ms. Pitts and I were of the same viewpoint that was [sic] no reasonable prospect of the Parties arriving at a collective agreement and that further conciliation would be a waste of valuable time and resources. Park Lane still had to address the four (4) outstanding ULP's, neither of which [sic] had even begun to be heard by the Board.
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> 103. Park Lane was also advised during and at the conclusion of proceedings on June 17th that the Applicant would be filing another ULP in the event that Park Lane did not return to the bargaining table.
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> 104. As a result, on June 22, 2016, Park Lane contacted [the conciliation officer] requesting a "No Board Report".
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> 105. The "No Board Report" was issued on June 23, 2016.

47. In her declaration, Ms. Pitts was more specific than Mr. Fryer had been in his paragraph 103. She stated that the Union had advised Park Lane that it would "file the instant ULP in the event that Park

Lane did not return to the bargaining table". Ms. Pitts also added that, "as a result", the responding party requested a "No Board Report".

48. As noted, the responding party did submit a draft collective agreement with its response to this application; however, the Union pointed out that it did not address all of the discrepancies identified and complained of by the applicant on June 17, 2016.

49. Having regard for the limitations imposed by subsection 43(1) of the Act and time available to the Board to address this matter, I asked the parties to focus their attention on the more contentious aspects of the Union's allegations – those that related to the responding party's alleged resiling and maintenance of scope alterations through impasse. In that context, I heard *viva voce* testimony from Ms. Kempf and Mr. Fryer, and considered all of the material put forward by the declarations filed with the Board.

50. Mr. Fryer testified to address the Union's concerns that Park Lane had resiled from previously achieved resolutions. In doing so, he confirmed that he was responsible for the preparation of the documentation submitted to the Union and the Board on behalf of Park Lane. He also alluded to his having been distracted by unrelated matters and there was a suggestion that some of the documented variations of which the Union complained might have been attributable to that circumstance.

51. Mr. Fryer confirmed that he received the Union's detailed list during the afternoon hours of June 17th and he noted that he and his client had no face-to-face meeting with the Union thereafter.

52. Mr. Fryer acknowledged that the "Purpose" provision of the proposed collective agreement had been settled in the early going and he stated that its omission from the June 2nd offer had been unintentional. Nevertheless, and notwithstanding the documentation of the Union's assessment of the offer on June 17th, the draft collective agreement submitted in response to the application was similarly lacking the "Purpose" provision that had been agreed by the parties. That too was identified as an unintended error.

53. Mr. Fryer also acknowledged that the responding party had added language in Article 1.2 to allow foremen to continue performing bargaining unit work, and he testified that the deletion of previously agreed language that would have precluded a foreman's performance

of bargaining unit work if it resulted in the layoff of a bargaining unit employee was an error. The error was continued in the draft collective agreement submitted with Park Lane's response to the application.

54. Mr. Fryer addressed Article 3.7 and noted that Park Lane's draft submitted with its response to the application had restored the language the Union had identified as having been previously agreed. He did not explain why Park Lane had varied the text in making its last offer before this application was brought.

55. In the June 2nd offer, Park Lane provided that bargaining committee members would be subject to restrictions applicable to stewards, even though it had agreed to delete that reference. That was identified by Mr. Fryer as a clerical error and corrected in the responding party's submission to the Board.

56. Article 13.1 dealt with the "regular work week". Mr. Fryer's evidence was that he had discussed the use of averaging with his client prior to June 2nd and that he had also spoken to the Union on an earlier occasion about the responding party's not using averaging. Nevertheless, the language that clearly provided for averaging as a limitation on the definition of the workweek (and thus on the right to receive overtime pay) was included in Park Lane's offer. The only explanation offered was that Mr. Fryer did not know why he had not taken the language out and he "just failed to take it out". That was corrected in the draft collective agreement submitted with Park Lane's response.

57. Mr. Fryer then spoke to the Union's complaint that Article 13.11 in the June 2nd offer did not carry forward the agreed provision that the manager's designate might permit an employee to leave his or her work station or area. He pointed out that Articles 13.9 and 13.10 referred to the Secretary Treasurer's designate in connection with the process employees were to follow if they were unable to report for work on time; however, his answer regarding Article 13.11 was that the word "designate" had been left out "for some reason" and that there was no intention to leave it out.

58. With reference to Article 13.15 and the criteria for overtime entitlement, Mr. Fryer reiterated that the responding party did not utilize averaging in determining eligibility for overtime compensation and stated: "I forgot to take it out". He added that he was not instructed to propose the limitation and that there was "no intention to

get a material advantage". He also noted that the language had not been revised and that averaging continued to be provided for in the draft collective agreement submitted with Park Lane's response on July 28, 2016 even though Article 13.1 had been corrected in that document.

59. As for Article 13.16 and the additional pay for travel time necessitated to attend for training in or about Toronto, Mr. Fryer acknowledged that the agreement was that the employee was to receive 1.5 hours' pay "each way" and he stated that he was not instructed to limit the compensation to "one way". Nevertheless, he testified that he considered the language presented in the June 2nd offer to be effective to provide for compensation "each way" even though there was no reference in the text to suggest payment of anything more than 1.5 hours' pay. No change was made in the preparation of the draft collective agreement submitted on July 28, 2016.

60. In that context Mr. Fryer was confronted on cross-examination with the proposition that all of the errors that had been made in presenting the responding party's offer and each of the failures to reflect the prior agreements ran in Park Lane's favour or were detrimental to the Union and the bargaining unit. Mr. Fryer expressed his disagreement with that and suggested that the parties had agreed that the payment applied "each way", adding: "it had been the practice".

61. In response to the Union's complaint concerning Article 2.4, Mr. Fryer testified that he did not recall there being an agreement to remove the words objected to by the Union. Ms. Kempf's evidence was that the language had been settled on February 9, 2016 and she had noted the deletion of the words in question then and also in the documentation she provided to the conciliation officer and the responding party on May 12, 2016. If Ms. Kempf had been wrong on the point, Park Lane had not corrected her at or after that conciliation session.

62. As for Article 2.5, Mr. Fryer's evidence was that the word complained of by the Union, "immediately", was not in the original language agreed to by the parties, but he had added the word. He did not recall how the change came about and said that perhaps he had been attempting to clarify the provision.

63. Article 3.6 did have a typographical error in the otherwise agreed upon language and that had been corrected in the June 2nd offer; however, Park Lane's offer added the words: "unless agreed to in writing by the Company". Mr. Fryer said that he did not recall how that had come about.

64. The responding party's offer on June 2nd included language concerning the number of hours to be worked by a part-time employee in order to complete the probationary period. Mr. Fryer maintained that there had never been an agreement to reduce the requirement from 480 hours as proposed by the responding party to 360 hours as recorded by Ms. Kempf in the documentation she submitted to the conciliation officer and the responding party on May 12, 2016.

65. Mr. Fryer pointed out that the responding party had changed the probationary threshold from 480 hours to 360 hours in the draft collective agreement submitted with its response to this application; however, Mr. Fryer commented that he had protected the responding party's interests by adding language to acknowledge Park Lane's right to extend the probationary period on notice to the Union. I note, however, that the June 2nd offer incorporated Park Lane's unilateral right to extend the probationary period of any employee, a matter of which the Union complained in its June 17th review. The responding party did not answer the Union's contention that mutual consent had been the approach agreed.

66. As for the union security language in what would be Article 5.1, Mr. Fryer acknowledged that he had added the reference to the probationary period provisions, Articles 4.2 and 4.3 – which would be subject, in the responding party's proposal, to unilateral extension by Park Lane – to modify a provision that required membership in the Union "within thirty (30) days of hiring". Mr. Fryer testified that he had done so to make the provision "more clear", but he acknowledged that it had not done so. Mr. Fryer added that he had not been instructed to "diminish the position of the Union".

67. In its pleading, Park Lane denied the allegation that it had "wholly ignored many of the Union's proposals to date" and maintained that it had "meticulously, and in great detail, responded to each and every proposal, request for information, or matter of discussion raised by the Applicant's bargaining committee on each and every bargaining date".

68. On cross-examination, Mr. Fryer agreed with counsel for the Union that, in bargaining, there was to be "no resiling once a provision is agreed"; however, when asked to agree that to do so is to undermine collective bargaining and damaging to the process, Mr. Fryer answered that he could not say that he did agree. Similarly, when cross-examined about the June 2nd offer and asked to confirm that it was intended to reflect the collective bargaining position of the responding party and intended to be relied upon, Mr. Fryer answered initially that he was "not prepared to say that", but then agreed that it was a bargaining position "communicated to the other side".

Bargaining Unit Issues and the Proposed Clarity Notes

69. The parties were at odds regarding the responding party's proposals to include in the collective agreement clarity notes to identify the incumbents in certain positions as "excluded from membership in the bargaining unit".

70. I note that the parties had agreed to and maintained a clarity note regarding the exclusion of students.

71. Park Lane had sought to persuade the Union to exclude shop foremen, tower operators, service advisors, and shuttle drivers. The evidence was that all of those, with the exception of a shop foreman, had voted without objection when the Board held the representation vote that resulted in the Union's certification.

72. The foreman's ballot had been segregated, but his vote was not numerically significant and there had been no litigation of his status. In any event, the Union had acknowledged in bargaining that the position was excluded as managerial and the proposed clarity note regarding shop foremen was not an impediment to the conclusion of a collective agreement.

73. Similarly, the responding party had given up on its attempts to exclude the shuttle drivers by the time the responding party submitted its offer on June 2, 2016. Mr. Fryer acknowledged that Park Lane first communicated the change in its position with the submission of that offer.

74. While the Union suggested that Park Lane had expanded its list of exclusions by referring to "warranty administrators", the evidence suggested that tower operators and warranty administrators

were one and the same at this dealership. Indeed, the June 2nd offer made that clear by its reference to "Tower Operators/Warranty Administrators".

75. In the result, the real substance of this aspect of the dispute was the responding party's proposed exclusion of service advisors and the tower operator/warranty administrator. Again, incumbents in those positions had been included on the voters list and Park Lane had not objected to their voting.

76. In these proceedings, the responding party sought to justify its positions on the service advisors on various bases: by contending that those employees should be excluded as "clerical" (because they process invoices giving them a "cashier perspective") and as "sales staff" (since they were compensated, in part, by a commission earned by selling customers on service), and by pleading that its "Service Advisors are essentially customer Service representatives and/or cashiers as opposed to skilled labourers".

77. Park Lane maintained that tower operators should be excluded on the basis that their work – the processing of warranty claim paperwork – was clerical such that they should be regarded as "clerical and administrative staff". The responding party took the position that tower operator/warranty administrator is also engaged in "reviewing work orders to ensure that Service Technicians are entering billing codes on customer invoices appropriately" and, because her position "is designed to act as a 'check' or 'balance' against hours entered by Service Technicians, said position *must be excluded from the bargaining unit*". (my emphasis)

78. Park Lane pleaded that the service advisors and the tower operator/warranty administrator "do not share a community of interest with the Service Technicians, Lube Technicians, Body Shop and Cleanup employees in Park Lane's shop".

79. Mr. Fryer explained that Park Lane's objective in advancing these proposals was to be "up front with the Union that the positions did not fall under the scope of the bargaining unit determined by the Board".

80. On cross-examination, Mr. Fryer conceded that employees in Park Lane's parts department also receive commissions on parts sold and that the responding party had not sought the exclusion of those

workers. On his re-examination, Mr. Fryer suggested, without details, that the sales component was more significant for the service advisors than for the parts department staff.

81. Also on cross-examination, Mr. Fryer was taken to his declaration and confronted with the proposition that there had been no reliance on a "sales function" there to justify the responding party's proposed exclusion of service advisors. The relevant text was as follows:

> 106. . . . Park Lane was very candid and upfront with the Applicant regarding its position that certain individuals who held certain positions were properly excluded from the bargaining unit and that if the Parties could not come to some form of agreement on such issues that it would be an issue for determination before the Board. As such, Park Lane would within its proposals include the language that it did with respect to those individuals and their positions. Park Lane asserts that the "Tower Operator/Warranty Administrator" position falls clearly within the "administrative staff" exclusion within the bargaining unit description set out in the Board's decision dated June 17, 2015. Park Lane similarly states that "Service Advisors" similarly fall under either [sic] the "administrative staff, including cashiers" exclusion. Having made its view on the aforesaid known to the Applicant, [sic] the Applicant did not discuss or debate this issue in any detail accept [sic] to state that it did not agree with Park Lane's view. This issue was not bargained or discussed to impasse.

82. The Union maintained, without objection from Park Lane, that the responding party's proposals regarding the service advisors and the tower operator/warranty administrator, if accepted, would have reduced the number of employees in the bargaining unit by an appreciable number, five of 24 at the time of the hearing.

The Parties' Positions

83. The applicant contended that there were various indicia of the responding party's refusal to recognize the bargaining authority of the Union and it relied in particular on Park Lane's insistence on the exclusion of positions populated by persons who were accepted by it for the purposes of the vote.

84. The Union argued that Park Lane's resiling from prior agreements – making revisions that were uniformly in its favour to matters on which agreement had been reached – demonstrated an uncompromising approach that frustrated the process and undermined collective bargaining.

85. Furthermore, the responding party had failed to make reasonable efforts to achieve a collective agreement. That, it was argued, was most clearly established by Park Lane's failure to correct what it maintained were mistakes in its offer and its failure to address the issues raised by the Union in the June 17th analysis of that offer. Park Lane had ignored all recent efforts to proceed with conciliation or negotiations. Bargaining, in the Union's submission, had "ground to a halt" and the responding party had simply refused to bargain further.

86. Park Lane's position with respect to the proposed exclusions was that the two positions still in issue fell within the ambit of the exclusions in the defined bargaining unit and that it was not bargaining to impasse, but was "offering an opportunity to clarify [the make up of the unit] and have a third party determination" through an application to the Board.

87. As for the Union's complaint regarding the responding party's resiling, Park Lane submitted that the difficulty arose, in part, due to the failure of Ms. Kempf to "set out agreed items" and it observed that the document she had submitted to the conciliation officer on May 12, 2016 was based on the template that Mr. Fryer had provided to the Union in connection with the bargaining earlier in the year.

88. The responding party also maintained that the errors identified by the Union were not "of such consequence that they ought to trigger section 43" and the extraordinary remedy it provides.

89. In that vein, Park Lane identified some of the drafting changes made by Mr. Fryer as "inconsequential" and in the nature of "housekeeping errors". It also argued that the Union should have known, for example, that the provision for averaging over a rolling two-week period was a "clerical error".

90. The deletion of the reference to "designate" in the clause providing for an employee's obtaining permission to leave the work station or area was contrasted to the retention of the reference to the

Secretary-Treasurer's designate as a person to be contacted by an employee who was unable to report to work on time.

91. The failure to specify that the 1.5 hours' pay for travel time associated with education or training in the Toronto area affected a "new item" not covered in the template Mr. Fryer had prepared early in the year. That is to say, the first time it had been recorded as an item in a proposed or draft collective agreement was in the June 2nd offer.

92. In summary, Park Lane argued that it had not refused to recognize the Union, had not taken an uncompromising position, and had not failed to make reasonable efforts to conclude a collective agreement.

93. The Union replied, reiterating that Park Lane had taken scope issues to impasse and had not offered any means to achieve a resolution since a referral to the Board under subsection 114(2) of the Act would not produce a determination of the inclusion or exclusion of the subject positions – the incumbents were known and conceded to be employees.

94. The responding party had refused to meet after June 17, 2016 and there could be no progress made in those circumstances.

95. The Union acknowledged that some of the items it had identified as evidence of the responding party's resiling were "little things"; however, they too had been agreed and the approach taken by Park Lane resulted in negotiations being "in shambles".

Decision

96. On all of the evidence, I am convinced that the responding party's offer of June 2, 2016 effected numerous changes to terms that had been arrived at and settled in earlier bargaining, and that the Union's allegations of Park Lane's having resiled from those agreed positions were well founded.

97. I do not share Mr. Fryer's indecision regarding the effect on bargaining of a party's resiling from its agreement to settle provisions for its collective agreement. The negative consequences of such conduct are obvious; however, those can be mitigated if the changes

complained of are inadvertent, are acknowledged, and are corrected or otherwise resolved to restore the bargained language or concept.

98. Ignoring such unilateral changes after the opposite party's objection cannot be expected to resolve issues. Reiterating the changes or purporting to excuse unilateral alterations by characterizing matters of concern to the other party as being inconsequential all but ensures the impossibility of a resolution.

99. Any uncertainty about the deleterious effect on bargaining caused by such behaviour is resolved, in my view, when, as was the case here, the party that departs from agreed language or concepts inspires the innocent party's conviction that the action is intentional and directed to the avoidance of an agreement by refusing to acknowledge the changes, by failing to explain the bases on which changes were introduced, by declining to respond in any way to the other's detailed identification of the problematic terms, and by spurning requests to meet to deal with those or any other issues.

100. In those circumstances, the party that has introduced the changes to the settled terms has acted to abandon bargaining, has undermined the progress that had been made, and has effectively precluded the achievement of a collective agreement – at least for the time being and until other forces are brought to bear.

101. How could the applicant and the responding party complete a collective agreement when Park Lane, without explanation or excuse, intentionally or inadvertently, alters agreed language and neither corrects its errors, explains its thinking, nor agrees to meet with the Union?

102. The Union, by its June 17th document, advanced the state of the negotiations in that it accepted a substantial number of the proposals and changed positions that the responding party had tabled by its June 2nd offer; however, there was a comparable number of problematic terms – some of far more substantial impact than others – and Park Lane boldly refused to meet to address those.

103. The explanations offered by Park Lane for its refusal to meet with the Union were wholly insufficient to justify its position. Moreover, the responding party kept that analysis to itself. It did not see fit to communicate to the Union that it was unwilling to meet because, in its view, the Union had wasted five of the six days on

which the parties had met, had chosen to discuss what Park Lane considered to be "redundant issues", had ended negotiations early "on numerous occasions", "had chosen to report to bargaining completely unprepared on several occasions", "had contributed absolutely zero contractual language", and "had chosen to completely waste both [the conciliation officer's] and Park Lane's time during conciliation on May 12, 2016".

104. In her declaration, Ms. Pitts specified that the Union's advice was that it would resort to bringing an application under section 43 of the Act if the responding party did not return to the bargaining table. That did not alter Park Lane's course but was seen, perversely in my view, to contribute to the justification for Park Lane's refusal to meet, to explain and to bargain.

105. If the Union's historical failings as alleged by Park Lane might have sufficed to justify and excuse the responding party's refusal to communicate and meet with the Union – and I am adamant in rejecting that notion – on what basis were negotiations to be completed and how were the parties to achieve a collective agreement? Since the responding party declined to voice its concerns to the applicant, how might the Union respond or, if necessary, address its perceived failings?

106. Park Lane, according to Ms. Pitts' declaration, "unsurprisingly felt that there was no reasonable prospect of the Parties arriving at a collective agreement, and that further conciliation would be a waste of valuable time and resources". I reject that entirely. Park Lane's conclusion was not "unsurprising"; it was inappropriate, ill-founded and unwarranted. Simply put, the Union's June 17th document put the ball in Park Lane's court. Regardless of its representatives' previous misgivings, if Park Lane wished to avoid the outcome sought here by the Union, it had an obligation to respond, and the unsupported opinions of Mr. Fryer and Ms. Pitts were insufficient to justify its failure to do so.

107. Park Lane pleaded that the Union was misleading the Board by claiming that the applicant understood that the June 2nd offer to settle was Park Lane's "final offer". The responding party asserted that "Park Lane provided no indication whatsoever that the June 2 offer was a 'take it or leave it' offer" and added: "Had Park Lane truly intended to provide the Applicant with a take it or leave it offer, Park Lane would have sought a vote on the offer pursuant to section 42 of the Act".

The semantics of "final offer" or "take it or leave it" are immaterial in the circumstances; the Union responded to the offer – in some respects positively, in others negatively – and the responding party ignored both the responses and the requests for further bargaining. It thus demonstrated that bargaining was at an end.

108. In all of those circumstances and as the responding party left matters, the only option available to the Union, short of calling for a strike, was to act unilaterally to accept the June 2nd offer regardless of the number and seriousness of the changes introduced by Park Lane and regardless of the many outstanding matters on which no prior agreement had been reached.

109. That, of course, is not the hallmark of collective bargaining. To the contrary, in my view, Park Lane's assumption of the role of the arbiter of collective bargaining best practices substantiated the Union's position that, after June 17, 2016, the responding party was wholly at fault in preventing the continuation of the process.

110. Mr. Fryer's evidence concerning the points raised by the applicant established that agreements had been reached on numerous matters before June 2, 2016. He acknowledged that many of the provisions of the proposed collective agreement were changed from what had been agreed previously.

111. Then the Union responded to the June 2nd offer by indicating its acceptance of a significant number of additional changes.

112. Taken together, those elements of the evidence demonstrated that progress had been made prior to the hearing and that the criticisms expressed by Mr. Fryer and Ms. Pitts in their declarations were unhelpful exaggerations. But again, Park Lane did not have the final word on the utility or the appropriateness of the Union's approach to bargaining, its preparedness, or its efficiency. By setting itself up in that role and purporting to justify its refusal to continue conciliation or bargaining, Park Lane doomed the process to failure and manifestly refused to recognize the bargaining authority of the applicant and the dictates of the Act.

113. It follows that the responding party's refusing to meet with the Union – indeed its failing to respond in any way to the Union's acceptance of many of Park Lane's proposed resolutions included in the June 2nd offer and the applicant's identification of equally

numerous issues that it considered to evidence Park Lane's resiling – established the uncompromising nature of its bargaining position without reasonable justification and its failure after June 2, 2016 to make reasonable, expeditious *or any* efforts to conclude a collective agreement.

114. The responding party's submission that some of the items identified by the Union as detracting from the agreed terms were not themselves substantial or significant in the scheme of things carried little weight in the absence of any response to the Union's June 17th analysis.

115. First, the Union correctly observed that the changes were consistently in the responding party's favour or derogated from the applicant's position in the bargaining or as bargaining agent. That would not lead an objective observer to conclude that all were either accidental errors or steps taken to clarify accepted concepts or terms.

116. Secondly, the number of changes was significant and, in the absence of any explanation for the changes, would reasonably lead the Union and its committee to conclude that they had been made intentionally with a view to disrupting whatever progress had been made in negotiations to June 2, 2016. The cumulative effect of the variations, some of which were noted by the Union and then accepted, was significant and compelling.

117. Thirdly, Mr. Fryer was not a collective bargaining novice and Ms. Pitts had responsibility for Park Lane's communications.

118. Mr. Fryer's experience in labour relations matters was substantial, and he had specific expertise in the labour relations of automobile dealerships. In that context, neither Ms. Kempf nor her colleagues on the Union committee could or should have been expected to assume that the numerous changes were mere "clerical errors" or simply the result of oversight on the part of Mr. Fryer or his client. Experts err, but a tipping point affecting the credibility of an excuse is reached quite quickly and understandably when the expert's errors are not only numerically significant, but also run uniformly in favour of the expert's party or patron.

119. Ms. Pitts was identified as having responsibility for Park Lane's communications with its employees; however, Ms. Pitts offered the Union no explanation for the responding party's decision to ignore the

Union's request to resume conciliation with the assistance of the conciliation officer. By declining to communicate the rationale for its decision, Park Lane denied the Union an opportunity to resolve process or related issues. Given her role and the notional significance of the concerns she relied upon to attempt to justify an exceptional decision, I would have expected Ms. Pitts to see the potential benefit of an explanatory or exploratory communication sent to the Union. In my view, the Union would reasonably interpret the failure of Park Lane to respond in any way as confirmation of its unwillingness to conclude a collective agreement and of its having an objective to avoid that result.

120. Park Lane was critical of the time that the Union had taken to formulate a response to the June 2nd offer. While it maintained that it had been unaware of the Union's communication with the conciliation officer on June 9, 2016 (as indicated in the email of June 11 to which the responding party did not have access prior to its receipt of the application), Park Lane suggested that if the Union had responded more quickly to its invitation to the conciliation officer on June 13th it might have addressed some – but not all – of the issues raised by the Union on June 17th. The fact that Mr. Fryer tendered a complete draft collective agreement of 27 pages with entirely unidentified changes to and other issues affecting no fewer than 35 matters necessarily influenced the Union's response time; however, the responding party's criticism is of no consequence as the delay of three or even four days cannot account for or legitimize Park Lane's subsequent refusal to engage the Union on its response to the offer or to correct all of its admitted errors.

121. The responding party was also critical of Ms. Kempf's documenting practices, commenting negatively about her having failed to have the parties "sign off" settled provisions. While that is a prudent course, it is not one that should have fallen solely to the Union. If Park Lane had a sincere interest in pursuing an expeditious (and smoother) course to a collective agreement, it might have seen the benefit of introducing a more orderly and formal process than the one Ms. Kempf implemented or accepted.

122. Park Lane did not correct Ms. Kempf at or after the May 12th conciliation session for which she had prepared documentation that set out the Union's account of the state of negotiations, including the agreed and the unsettled provisions. Indeed, it is not clear to me that Mr. Fryer or Park Lane had reviewed the documentation the Union

submitted for the conciliation meeting at any time, and particularly not in connection with the preparation of the June 2nd offer.

123. Moreover, it was left to Mr. Fryer to testify to numerous instances of his having erred in the preparation of the June 2nd offer and to his having made changes that he could not explain or for which his explanation was simply untenable.

124. As to the last, Mr. Fryer acknowledged that Article 13.16 was to have reflected the subsisting practice and was to have provided for the compensation of an employee at the rate of 1.5 hours' pay "each way" on an educational or training trip to the Toronto area. Instead of providing for three hours' pay, the clause put forward by Park Lane on June 2nd stated that "the employee shall be paid an additional 1.5 hours" and nothing more. Mr. Fryer's view that the responding party's draft provided for three hours' pay and did not limit an employee to 1.5 hours' pay is one that is contrary to the plain terms of the offer.

125. As for the union security language in what would be Article 5.1, Mr. Fryer acknowledged that he had added the reference to Articles 4.2 and 4.3, the probationary period provisions. In that context, Mr. Fryer testified that he had not been instructed to "diminish the position of the Union", and thereby indirectly attested to the effect of the change his addition would have wrought: mandatory membership would have been delayed until the completion of a probationary period and any extension unilaterally imposed by Park Lane. The alteration to delay the onset of the obligation to take up membership in the Union was material and the explanation offered for it was of no assistance or comfort to the Union, particularly as the offending addition was continued in the draft collective agreement submitted with Park Lane's response to the application.

126. In other instances, Mr. Fryer's evidence was that he did not know why the document Park Lane tendered had incorporated changes identified and complained of by the Union. If Mr. Fryer could not explain or justify the alterations, the responding party could not sensibly suggest that the Union ought to have concluded that the variation from settled terms was unintentional, inconsequential or not indicative of a desire to avoid the achievement of a collective agreement. If such a conclusion was to be shown to have been logical, surely the responding party had the onus of explanation and that burden could never be met by its silence and refusal to respond to the Union.

127. While Park Lane took issue with the accuracy of Ms. Kempf's evidence and her accounting of the provisions agreed to by the parties before the delivery of the June 2nd offer, I have accepted her testimony where it differed from that of Mr. Fryer.

128. Mr. Fryer frankly acknowledged having made numerous errors and he also failed to explain or account for changes that he made in what should have been a singularly important and carefully drawn document. His evidence was that he took advice from the conciliation officer and that the June 2nd offer was intended to re-start negotiations. The errors, inaccuracy and uncertainty surrounding that offer caused me to consider Mr. Fryer's evidence and recollection to have been less reliable than that of Ms. Kempf as her accounts were not challenged – neither during the currency of the parties' bargaining relationship prior to the initiation of this application nor to any effect on cross-examination.

129. In addition, Mr. Fryer suggested that some of the difficulties associated with the drafting of the June 2nd offer might have resulted from his having been distracted by personal matters. He had been obliged to cancel the December 17, 2015 bargaining session because of a personal issue, and he might have been similarly distracted in the interim, during bargaining, with the result that Ms. Kempf's recollection of agreed and outstanding issues might have been the more reliable of the two.

130. There were changes identified in the June 17th document about which Mr. Fryer did not deny the Union's assertion of the parties' having agreed. Instead, he testified that he did not recall the matters having been settled. In those instances, Mr. Fryer's evidence was indefinite and not directly contradictory of Ms. Kempf's testimony.

131. Mr. Fryer accepted that many of the changes raised by the Union were in fact variations that added to or took away from agreed terms. Those were not merely "semantic changes made by Park Lane to promote greater understanding of the provisions and issues agreed upon by the parties" as pleaded by the responding party. That pleading connoted a conscious decision to vary language previously discussed and settled; however, Mr. Fryer's evidence was that many of the changes identified by the Union were errors and there were others for which Mr. Fryer could not offer any rationale.

132. Park Lane pleaded that: "Such revisions did not in any way alter the meaning or potential effect of the provisions in question". That conclusion was simply wrong and without merit in relation to many of the provisions identified by the Union.

133. The Board in *United Food and Commercial Workers International Union* v. *Formula Plastics Inc.*, [1987] OLRB Rep. May 702 had this to say about what is now section 43 of the Act:

> 39. We note particularly that the provisions of 40a(2)(b) are not necessarily predicated on any egregious conduct on the part of an employer. There is no requirement of bad faith or anti-union animus (although these factors may be relevant) and a direction to settle a first contract by arbitration is not a penalty visited upon an employer. Rather, section 40a as a whole represents the identification of a series of situations in which the Legislature has determined that a malfunctioning labour relationship requires a special mechanism to repair or strengthen it. Indeed, it may well be that some of the provisions of section 40a will apply even where the respondent's conduct stems from ignorance, inexperience or ineptitude. Thus a finding that the conditions of section 40a(2)(b) have been met does not necessarily carry with it the same stigma that might attach to a finding that a party has violated the Act, and is not inconsistent with the Board's dismissal of the section 15 [now section 17] complaint in the circumstances of this case.

134. I am of the view that the responding party's conduct in relation to the variations introduced by the June 2nd offer – however those were caused – satisfied all three of the criteria identified in subsection 43(2), especially as the effects of that course of action were exacerbated by Park Lane's subsequent refusal to engage the Union after being apprised of its valid concerns about the disregard for previously settled terms.

135. My conclusion was reinforced by the responding party's continued insistence on the removal of the service advisors and the tower operator or warranty administrator from the bargaining unit notwithstanding its seeking a "no board" and its views that "there was no reasonable prospect of the Parties arriving at a collective agreement, and that further conciliation would be a waste of valuable time and resources".

136. The parties were at an impasse. The incumbents had been permitted to cast ballots in the representation vote. There was no justification offered for Park Lane's accepting the validity of the inclusion of the service advisors and tower operator for the purposes of the vote and then insisting on change in bargaining. There was no evidence that their duties and responsibilities had been altered in any way since the vote or that they no longer shared a community of interest with others included in the bargaining unit. There was no reasonable justification for Park Lane's change in position or for its maintaining these proposals as it did.

137. The Union objected to the responding party's position initially and confirmed its rejection of the proposed changes in its June 17th response to Park Lane's offer. The Union had sensibly accepted that the shop foreman was a member of the managerial staff and not an employee. The responding party had acted equally sensibly in recognizing the need to withdraw its proposal for the exclusion of shuttle drivers.

138. Park Lane might have conditioned its offer of June 2nd with a communication of its intention to reserve the right to arbitrate the dispute as to the status of the incumbents in the two positions that remained in issue; however, it chose to adopt an approach that it knew or ought to have known could not be accepted by the Union and would, therefore, preclude the achievement of a collective agreement.

139. The June 2nd offer included an appendix that set out proposed rates of pay; however, there was no mention there of the positions in issue. That is, the draft collective agreement provided for their exclusion, confirmed by the omission of the positions in the wage table. Moreover, there was no language in or accompanying the responding party's offer to provide for any litigation of the proposed exclusions, and the collective agreement terms proposed by the responding party would have precluded the Union's attempting any litigation to restore the positions to the bargaining unit.

140. Furthermore, I concur with the Union's conclusion that the responding party's suggestion that the applicant might have recourse to the Board under section 114 of the Act would be entirely unfruitful. All concerned had accepted that incumbents in the two positions were employees of Park Lane; the responding party did not argue that they were employed in positions that would preclude their being recognized as employees under the Act. The Board had acted on the agreement

of the parties in its decision fully one year prior to the Union's response to Park Lane on June 17, 2016. The Board could not assist the parties now by determining whether the incumbents in these two positions, recognized to be employees, were within or beyond the scope of the bargaining unit that had been agreed by the parties.

141. The Union's acceptance of the clarity note proposed by the responding party would have eliminated the employees in the two positions from its bargaining unit and thus effected a reduction of more than 20% of the unit's current population.

142. By insisting as it did on the inclusion of the clarity note after the delivery of the "no board", the responding party was making the achievement of a collective agreement conditional upon the Union's acceptance of a significant erosion of the established bargaining unit notwithstanding the applicant's rejection of the proposal over the course of the bargaining to date. In doing so, Park Lane demonstrated its failure to recognize the Union's bargaining authority, the uncompromising nature of a bargaining position it had adopted and maintained without reasonable justification, and its failure to make reasonable efforts to conclude a collective agreement.

DISPOSITION

143. For the forgoing reasons, I granted the application and directed the settlement of the parties' first collective agreement.

"Derek L. Rogers"
for the Board

APPENDIX A

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