68. I am seized.

0320-98-R; 4303-97-R United Steelworkers of America, Applicant v. **Maxi,** Responding Party v. The United Food and Commercial Workers of International Union, Local 175, Intervenor; United Steelworkers of America, Applicant v. Maxi & Co., A Division of Provigo Inc., Responding Party v. The United Food and Commercial Workers of International Union, Local 175, Intervenor

Certification - Collective Agreement - Termination - Timeliness - Voluntary Recognition - USWA seeking to represent employees employed at two different retail stores - UFCW claiming pre-existing bargaining rights at the stores through voluntary recognition and asserting that certification applications untimely - UFCW and employer entering into agreement prior to opening of the stores and at time when no employees had yet been hired - Board finding no basis to conclude that UFCW was entitled to represent employees in either bargaining unit at the time that the agreement was entered into - Board terminating UFCW's bargaining rights pursuant to section 66 of the Act - Board permitting UFCW opportunity to make submissions regarding timeliness of USWA applications and why the Board should not take approach suggested by *T.R.S. Food Services* case

BEFORE: *Pamela Chapman,* Vice-Chair.

DECISION OF THE BOARD; August 13, 1998

1. These are applications for certification for units of employees working at two different retail stores operated by Provigo Inc. carrying on business as Maxi or Maxi & Co. ("Provigo").

2. By decisions dated February 25, 1998 and May 1, 1998, the Board directed the taking of representation votes at the two locations, but in each case ordered the ballot box to be sealed. Indeed, the ballots have still not been counted, as there is a dispute as to whether or not the applications by the United Steelworkers of America ("the USWA") are timely. At each location the United Food and Commercial Workers International Union, Local 175 ("the UFCW") claims to have pre-existing bargaining rights by virtue of a voluntary recognition agreement with Provigo. It is not disputed that the instant applications would not be timely should the voluntary recognition agreements be determined to be valid. However, the USWA argues that there is no voluntary recognition agreement within the meaning of the Act, and in the alternative that any agreement found by the Board should be terminated pursuant to section 66 of the *Labour Relations Act, 1995* ("the Act"), or because of employer support contrary to section 15 of the Act.

3. At the hearing of this matter on June 19, 1998 the Board examined the status of the alleged voluntary recognition agreement on the basis of a statement of the UFCW's "best case". Counsel for the UFCW prepared a detailed statement of material facts, and filed a number of documents, in support of its position that it has a voluntary recognition agreement with Provigo applicable to the two stores which are the subject of the instant applications for certification by the USWA. Counsel argued strenuously that the Board ought not to decide whether or not there is a voluntary recognition agreement in place based upon this statement of facts and a review of the documents, but should first hear oral evidence to give the allegations a fuller factual context. However, having regard to the nature of the factual allegations, which are essentially undisputed, I concluded that it was appropriate to consider at the outset whether or not, presuming that the facts asserted by the UFCW are true and provable, the

Board could in that event conclude that there is a voluntary recognition agreement in place which operates as a bar to the applications for certification.

THE FACTS

4. The following facts relating to the issues in these applications are not in dispute.

5. The USWA has applied to be certified as the bargaining agent at two stores operated by Provigo in Ontario: one at 1455 McCowan Road in Scarborough ("the Scarborough store") which is operated under the Maxi & Co. banner, and a second at 114 Hamilton Street North in Waterdown ("the Waterdown store") which is operated as a Maxi store.

6. The UFCW has entered into approximately 150 collective agreements with Provigo in Quebec, at stores operated under the Maxi & Co., Maxi and LINC banners, and at least 45 agreements in Ontario at Loeb stores.

7. At a meeting between senior officials of the UFCW and of Provigo held on December 19, 1996, the parties discussed a framework for standardizing certain terms and provisions of collective agreements between the UFCW and Provigo in Ontario and Quebec, as well as a framework for the recognition by Provigo of the UFCW as the bargaining agent for employees of new stores to be opened by Provigo under the Loeb, Maxi & Co. and Maxi banners.

8. These discussions continued at further meetings between January 7 and August 15, 1997. By letter dated July 25, 1997, the UFCW's Canadian Director, Tom Kukovica, confirmed that at a meeting held on June 17, 1997 Provigo agreed to voluntarily recognize the UFCW at all new Maxi & Co., Maxi and Loeb stores opened, built or converted, except within the jurisdiction of the RWDSU/ UFCW Northern Joint Council where such Council would be recognized.

9. The final agreement concerning these arrangements was incorporated into a written document described as a "Partnering Agreement", which was signed by representatives of Provigo and the UFCW on August 15, 1997. That agreement contains the following provisions which are important in the present case:

> In consideration of the commitments contained herein the following is agreed to:
>
> 1. When new Provigo stores open or are to be opened, Provigo agrees that it will voluntarily enter into a voluntary recognition agreement with the Partner Union. Such agreement will recognize the Union as the exclusive bargaining agent for employees of Provigo at that store and street address in a bargaining unit that will be an "all employee" bargaining unit save and except:
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>   (i) Loeb or Provigo - one Director, one Assistant Director, six Department Managers, office employees, one inventory controller and management trainees;
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>   (ii) Maxi stores - one Director, one Assistant Director, six Department Managers, office employees, one inventory controller and management trainees;
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>   (iii) Maxi & Co. stores - one Director, two Assistant Directors, nine Department Managers, office employees, two inventory controllers and management trainees;
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>   (iv) New banners - consistent with the above.
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> 2. The term "new Provigo stores" as used in this Agreement means stores which are not in existence as of the date hereof but which will be newly constructed and opened for business after the date of this Agreement.

3. In the case of existing Provigo stores that are not presently certified or accredited and for non Provigo stores that will be acquired by Provigo in the future and that are not certified or accredited, the decision of whether or not to join a Union and have it represent them as their bargaining agent is strictly up to the employees of those stores. Provigo undertakes to communicate the message of free choice to employees and management and to inform the management teams of such stores of Provigo's position on this issue. In the event that any of these stores is faced with a Union organizing campaign or application for certification or accreditation by the Partner Union, Provigo undertakes that a clear message of free choice will be communicated to the employees of that store stating, without any ambiguity, that employees are free to join the Union if they wish.

   If the Partner Union becomes accredited, the parties will negotiate and enter into a first Collective Agreement based upon the principles agreed to in this Partnering Agreement.

4. (i) The parties hereto agree that there is to be only one certification and accreditation and one Collective Agreement per site/facility and that the recognition clause shall refer to that site/facility by name and street address.

   (ii) The parties also agree that the expiry dates must be staggered so that not more than one store in any region or sector is vulnerable to strike action at any time.

   (iii) The Union agrees that each of Provigo's stores is a separate Employer from any other related or associated stores, whether carried on by or through more than one corporation, individual, firm, syndicate, association or franchise, or any combination thereof, under common control or direction, and the Union agrees that it will not, at any time, make an application to the Ontario Labour Relations Board pursuant to Section 1(4) of the Ontario *Labour Relations Act*, as amended from time to time, nor will it seek to combine the bargaining unit of one store with any other bargaining unit of Provigo.

10. Prior to the signing of this agreement, the UFCW and Provigo had begun negotiations for standard or model collective agreements for each of the Maxi & Co., Maxi and Loeb stores to be opened. These agreements were finalized by November 1997. Blanks were left in each of these collective agreements for implementation dates, wages, employee benefits and other provisions which were to be separately negotiated for each new store after it opened.

11. The UFCW applied to be certified at two stores opened by Provigo during this time frame, in Mississauga and Oakville. After the taking of representation votes, the UFCW was certified at each location as the bargaining agent for employees. The Mississauga store was opened prior to the execution of the agreement described at paragraph 9 above.

12. The Scarborough Maxi and Co. store to which the application in Board file 4303-97-R relates opened on or about December 10, 1997.

13. On December 18, 1997 a senior official of Provigo wrote to a senior official of the UFCW concerning the Scarborough store, confirming a conversation wherein Provigo advised the UFCW that "consistent with our agreement dated August 15th providing voluntary recognition we are prepared to begin the negotiations for Maxi & Co. Scarborough".

14. On February 5, 1998, the employer included a written announcement regarding the recognition agreement with the UFCW in the pay cheque envelopes of all employees at the Scarborough store. This notice stated that "you will be notified by the Union in the very near future of a Ratification Meeting to implement a proposed Memorandum of Agreement which has been reached between the Company and the UFCW".

15. On or about Tuesday, February 10, 1998, the UFCW posted a notice in the Scarborough store announcing that a ratification vote would be held on Sunday, February 15, 1998 at at hotel near the workplace.

16. On February 11, 1998, the USWA filed an application for certification with respect to the Scarborough store. Membership evidence filed with that application had been signed by employees between December 16 and February 10, 1998.

17. At the ratification vote held on February 15, 1998, the collective agreement proposed by the UFCW was rejected by a vote of ten to five. Representatives of the USWA attended at the hotel where the vote was taken and spoke to employees, and literature concerning the proposed collective agreement was circulated by the USWA prior to the vote. The UFCW asserts that the proposed collective agreement was not ratified by employees on February 15 because of this action by the USWA.

18. A negotiating committee for the bargaining unit at the Scarborough store was struck by the UFCW on February 15, 1998. The UFCW applied for conciliation on February 24, 1998 and conciliation was granted on March 9, 1998. A no-board report was issued on May 22, 1998. A proposed collective agreement between Maxi & Co. and the UFCW for the Scarborough store was ratified by employees on June 7, 1998.

19. The Waterdown store to which the application in Board file 0320-98-R relates opened on or about March 17, 1998.

20. Prior to the opening, on March 4, 1998, the UFCW and Provigo reached a proposed collective agreement and the UFCW posted a notice in the store announcing a ratification vote to be held on March 11, 1998. Of the thirty-eight employees who attended the meeting, nineteen voted for and nineteen against ratification. The USWA also distributed literature among employees prior to this vote, and the UFCW claims that this interfered with the expression of employee wishes.

21. On April 23, 1998, the USWA filed an application for certification with respect to the Waterdown store. Membership evidence filed with that application had been signed by employees between February 16 and March 23, 1998.

22. The UFCW applied for conciliation for the Waterdown store on March 12, 1998 and conciliation was granted on March 25, 1998. A no-board report was issued on May 22, 1998. A proposed collective agreement between Maxi & Co. and the UFCW for the Waterdown store was ratified by employees on June 7, 1998.

23. In order to demonstrate that it was entitled to represent employees at the Waterdown store, the UFCW retained an arbitrator to determine whether the majority of employees were members. The arbitrator met with representatives of the union and the company at the union offices on March 20 and 23, 1998, and reviewed membership cards in the possession of the UFCW. After comparing the signatures on these cards to sample signatures provided by Provigo, and considering the number of employees agreed by these parties to be in the unit, the arbitrator produced a report dated March 25, 1998 which states that "a majority of employees supported the union".

EXISTENCE OF VOLUNTARY RECOGNITION AGREEMENT

24. There is no definition of a voluntary recognition agreement in the Act. However, sections 7(3) and 18(3) clearly contemplate the use of such an instrument to obtain bargaining rights, and, importantly, neither section was altered by Bill 7, which implemented mandatory representation votes

in certification proceedings. Both sections state that such an agreement must be in writing, signed by the parties, and must relate to a defined bargaining unit.

25. The agreement between the UFCW and Provigo dated August 15, 1997 is certainly in writing and signed by the parties. It is not described as a voluntary recognition agreement, and it clearly deals with matters unrelated to the recognition of the UFCW as bargaining agent, including the apparent amendment of existing collective agreements, but neither of these facts prevent its characterization as a voluntary recognition agreement.

26. The USWA argued that the August 15th agreement simply is not, on its face, an agreement to voluntarily recognize the UFCW. Counsel asserted that the only reasonable interpretation of paragraph 1 of the agreement is that it is an agreement between the parties to enter into a voluntary recognition agreement at some later date. This interpretation, it was argued, is supported by reference to the responses to the application filed by Provigo. At paragraphs 4 through 7 of Schedule B to the response, Provigo states that:

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> 4. On August 15, 1997, Provigo Inc. signed an agreement with the United Food and Commercial Worker's Union Local 175/633 (UFCW) ("the agreement"). This agreement included an undertaking from Provigo to recognize the UFCW as the exclusive bargaining agent for any Maxi & Co. store already open or which subsequently opened.
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> 5. The voluntary recognition which Provigo undertook to provide stipulated a defined bargaining unit consisting of all employees at the address at which the store was located, save and except one Director, two Assistant Directors, nine Department Managers, office employees, two inventory controllers and management trainees.
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> 6. On December 10, 1997, the Respondent opened its store at 1455 McCowan Road.
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> 7. After the opening of the store, and pursuant to the agreement, the Respondent recognized the UFCW as exclusive bargaining agent in a defined bargaining unit consisting of all employees of Maxi & Co. at 1455 McCowan Road in the City of Toronto. A general announcement was made to the employees at the store on February 5, 1998 by way of a letter enclosed with employees' paycheques.
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27. This submission was vigorously countered by counsel for the UFCW, who pointed to paragraph 6 of the statement of material facts which states:

> It was specifically understood and agreed by the parties that these agreements constituted voluntary recognition by Provigo of the UFCW for the employees of Maxi & Co., Maxi and Loeb stores which were to be opened in the future in Ontario and the bargaining units were defined in such agreements. Provigo and the UFCW agreed that separate collective agreements would then be negotiated by them for each new Maxi & Co., Maxi and Loeb store as such stores were opened in the future in Ontario.

28. Counsel advised that, if permitted, he would call witnesses involved in the negotiations between the UFCW and Provigo to establish irrefutably that it was the intent of these parties that the August 15, 1997 agreement constitute a voluntary recognition agreement. Given that the Board's ruling at this stage of the proceedings was agreed to be based upon the UFCW's best case, I cannot therefore accept the argument of the USWA that the "Partnering Agreement" was nothing more than an agreement to enter into an agreement at some later date.

29. However, there remains the question as to whether or not the August 15th agreement grants voluntary recognition to the UFCW for a defined bargaining unit, as that term is used in the Act. As set out above, the recognition portion of the agreement states that it applies to all new Provigo stores, with bargaining units to be all employee units, separately for each store at its street address, with certain named exclusions depending on the banner under which the store is opened. This language means that the basic parameters of the proposed bargaining units have been defined, but, by definition, none of the bargaining units actually existed at the time the agreement was entered into and could not, therefore, be defined by location.

30. I have some reservations about concluding that this approach to defining a bargaining unit for the purposes of voluntary recognition is adequate. However, in this case, given my conclusions on the other issues considered below, I have decided not to take what might be an overly technical approach to the statutory reference to a "defined bargaining unit". I have therefore concluded that, should the facts asserted by the UFCW be proven (and virtually all those facts are undisputed), the UFCW and Provigo would be found to have entered into a voluntary recognition agreement on August 15, 1997.

SECTION 66 OF THE ACT

31. Section 66 of the Act provides as follows:

> **66.** (1) Where an employer and a trade union that has not been certified as the bargaining agent for a bargaining unit of employees of the employer enter into a collective agreement, or a recognition agreement as provided for in subsection 18 (3), the Board may, upon the application of any employee in the bargaining unit or of a trade union representing any employee in the bargaining unit, during the first year of the period of time that the first collective agreement between them is in operation or, if no collective agreement has been entered into, within one year from the signing of such recognition agreement, declare that the trade union was not, at the time the agreement was entered into, entitled to represent the employees in the bargaining unit.
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> (2) Before disposing of an application under subsection (1), the Board may make such inquiry, require the production of such evidence and the doing of such things, or hold such representation votes, as it considers appropriate.
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> (3) On an application under subsection (1), the onus of establishing that the trade union was entitled to represent the employees in the bargaining unit at the time the agreement was entered into rests on the parties to the agreement.
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> (4) Upon the Board making a declaration under subsection (1), the trade union forthwith ceases to represent the employees in the defined bargaining unit in the recognition agreement or collective agreement and any collective agreement in operation between the trade union and the employer ceases to operate forthwith in respect of the employees affected by the application.

32. In the present case, the USWA asserts simply that the UFCW cannot establish that they had the support of employees in the bargaining units at the time the voluntary recognition agreement was entered into, *as there were no employees in either bargaining unit on August 15, 1997.* As it is not disputed that neither store was open on that date, and that no employees had yet been hired, the USWA submits that there is no need to hear any evidence on the issue of employee support, or to take into account the report on membership at the Waterdown store prepared by an arbitrator in March, 1998.

33. The Board has considered in several earlier cases whether or not a union and an employer may enter into a voluntary recognition agreement for a unit of employees which does not yet exist. It was not disputed that, generally, the cases stand for the proposition that such an agreement will not be found to be valid.

34. The one notable exception to this rule was articulated by the Board in *Nicholls-Radtke*, [1982] OLRB Rep. July 1028. In that case, a construction company entered into an agreement with a local of the Lumber and Sawmill Workers' Union to apply the terms of an existing collective agreement (with an area contractors' association) to workers hired by it to work at a project which had not yet begun, at a time when there were no employees in the proposed bargaining unit. This agreement was made on the basis that the local union would supply workers from its hiring hall to work on the project when it began.

35. When another union brought an application for certification, the Lumber and Sawmill Workers' Union sought to intervene, arguing that the application should be barred due to its pre-existing agreement with Nicholls-Radtke. The applicant union took the position that the intervenor did not have a valid collective agreement, relying upon numerous Board decisions invalidating alleged voluntary recognition agreements entered into at a time when the employer had no employees, even if only a few days before employees began work. This was the result in *Sunrise Paving and Construction Co. Ltd.*, 72 CLLC 16,060, at page 795, where the Board stated:

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> "15. It is readily apparent that the alleged collective bargaining relationship between the respondent and the intervener arose as a result of an arrangement between them without reference to or consultation with the employees who would be affected by this arrangement. Clearly, the respondent selected the intervener as the bargaining agent for its future employees. Such an arrangement strikes at the very spirit of the *Labour Relations Act* which envisages the selection of a bargaining agent by the employees concerned without the intervention or influence of their employer.

36. In *Nicholls-Radtke, supra*, the Board considered this general approach and made the following comments on what it described as a "very basic policy choice for the Board":

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> 11. In the *Sunrise Paving* case, the Board commented that "the employees of the respondent did not have an opportunity to select their bargaining agent". While in a case where the employer recruits employees who are subsequently forced to join the union, without a previous history of membership that may constitute support for the trade union. The simple fact is that in the construction industry, the unemployed members in a union's hiring hall have in fact selected their bargaining agent as their union, and once they are referred to a job, that selection normally continues. As a consequence, one is faced with a rather difficult problem in interpreting how far the stated policy of the Board in the C. Strauss case should be carried. If an agreement is invalid because it was signed when there were no members in the bargaining unit, does the agreement become valid when, in the same circumstances it is signed after the employees have arrived at the job site. Thus, in the present case, would it really have made any difference concerning the wishes of employees if instead of signing the agreement on October 8, 1975, with an intention to supply at a later date, an agreement to supply had been made between the respondent and the intervener on the 16th of October, when there were two members of the intervener union employed in the bargaining unit? To say that the document is valid then, but not valid if signed on the 8th, in completely similar circumstances, is to propose a distinction without a difference.

37. The Board concluded that the agreement with the Lumber and Sawmill Workers' Union was valid, despite the fact that it was signed at a time when there were no employees in the union. While the argument made by the applicant union in that case, as in many of the other cases, was based upon an allegation that the agreement was tainted by employer support, the Board also considered the relevance of section 60 (now section 66) of the Act, and concluded that its approach was consistent with the goals of that section, noting that it had found that the "collective agreement signed in the circumstances of the present case is not the result of some agreement between employer and the trade union subverting the rights of employees as, for instance, in the Sunrise Paving case" (at paragraph 16).

38. In the present case, there is no claim that the facts are analogous to those in Nicholls-Radtke, supra, and therefore no assertion that the agreement falls within any established exception to the general rule. However, the UFCW points to the Board's decision in Nicholls-Radtke, supra to demonstrate that there is no hard-and-fast rule that a voluntary recognition agreement may not be entered into before employees are hired. The intervenor, and the employer, ask that the Board extend the approach taken in Nicholls-Radtke to the facts in this case.

39. The essence of the decision in Nicholls-Radtke seems to me to be a conclusion, entirely reasonable on the facts of that case, that employee choice was not compromised by the employer and union entering into an agreement in those circumstances. Indeed, the Board determined that the employees who would ultimately be employed by the employer had already expressed their choice of a bargaining agent by becoming members of the union and signing on at the hiring hall, before the union entered into any agreement with the employer. I agree with the conclusion of the Board that the goal of employee choice was met, and the interests of the union and its membership in obtaining work were furthered, by the voluntary recognition agreement in that case.

40. At both the Scarborough and Waterdown stores which are the subject of the present case, I cannot but conclude that employee choice played absolutely no role in the arrangement entered into by the UFCW and Provigo. The "Partnering Agreement" does not involve the UFCW referring members for employment at the new stores when open, and there were no members of the UFCW employed at the stores to be covered by the agreement, given that those stores did not yet exist. Bargaining for proposed collective agreements was carried out by the union and the company with absolutely no input from employees (until after the first attempts to ratify those agreements failed), and many of the terms were settled long before the stores had even opened. At Waterdown, the first ratification meeting was even held before the store opened. In these circumstances, it was clearly the employer, and not the employees, which chose the UFCW as bargaining agent, and significant steps were taken by the parties to implement that choice long before employees were given any opportunity to participate and express their views.

41. It is exactly these kinds of concerns, that employee choice in the selection of a bargaining agent not be negated through voluntary recognition, that section 66 seeks to address. Both the UFCW and the employer argued that the Board should not have such concerns in the present case, given the status of the parties as established and experienced "players" in the world of collective bargaining, with a long-standing relationship between them. With parties like these, it was argued, the Board need have no concern that voluntary recognition means that the union is dominated by the employer, or has been created by it, or that the agreement is part of some collusion between union and employer that is not in the best interests of employees.

42. I cannot agree that the Board should be unconcerned about employees having an opportunity to exercise choice just because an established and reputable trade union claims to represent them. As counsel for the USWA argued, the standard applied under section 66, and the approach taken by the Board to employer support allegations, will be relied upon by a variety of trade unions who may seek to represent employees by way of voluntary recognition, including those which may be vulnerable to employer domination, and the "rules" should be designed with that in mind. In any event, it is not clear that by enshrining employee choice the Act seeks only to avoid coercion by employers; it is also generally the case that choice of bargaining agent permits employees to choose among trade unions which might have quite different attributes and approaches.

43. Counsel for the UFCW also suggested that the requirement to hold ratification votes which was created by the amendments to the Act made in 1995 should influence the Board's assessment of whether or not the existence of a voluntary recognition agreement compromises employee choice. It is

likely that a successful ratification vote, if it is proximate to the time when the voluntary recognition agreement was signed, will be evidence of employee support that the Board will want to consider in the context of section 66. (In some cases, however, as in the present case, there may be allegations that the existence of the voluntary recognition agreement taints the outcome of the ratification vote through employee perception of employer support and therefore negates the expression of employee support.) However, the Act quite clearly references the demonstration of entitlement to represent employees to the time when the agreement was signed, which in the present case was August, 1997. Whatever the employees who ratified the present agreements in June, 1998 were expressing by their votes, and as noted that is in dispute, they cannot be found to have been demonstrating support for the UFCW at the time it purported to be entitled to represent them in August, 1997.

44. Having carefully considered the arguments made by counsel for the UFCW and the employer, I cannot find any basis, having regard to the intervenor's "best case" and presuming all of the facts upon which it relies to be true, upon which the Board could conclude that the UFCW was entitled to represent the employees in either bargaining unit at the time it entered into a voluntary recognition agreement with Provigo.

45. Accordingly, pursuant to section 66 of the Act, the bargaining rights of the UFCW for employees of Provigo at the Scarborough and Waterdown stores are hereby terminated.

TIMELINESS OF THE APPLICATIONS FOR CERTIFICATION

46. Counsel for the USWA argued that, should the Board terminate the bargaining rights of the UFCW pursuant to section 66, there is no bar to the certification applications filed by the USWA for the two bargaining units.

47. The statute is not entirely clear as to the effect of a declaration under section 66 where pre-existing rights acquired by voluntary recognition are asserted as a bar to a later application. This issue was considered by the Board in *T.R.S. Food Services Limited*, [1980] OLRB Rep. March 360 at paragraphs 12 through 14:

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> 12. Counsel for the intervener argued that a declaration under section 52 of the Act does not have a retroactive effect. Instead, in counsel's submission, the declaration only operates to cancel the agreement from the time of the declaration forward. Pursuant to this reasoning, counsel contends that because the voluntary recognition was in existence at the time the application for certification was filed, it would operate as a bar to the applicant's application for certification, notwithstanding the Board's declaration that it is null and void.
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> 13. If that argument obtains, section 52 of the Act becomes unduly technical and cumbersome to apply. It would only bifurcate proceedings to first require a union to launch a separate section 52 application to clear the way for a later application for certification. More importantly, it is contrary to common sense to suggest that if the intervener was not entitled to represent the employees when the recognition agreement was entered into that the agreement could still be raised as a bar to an application for certification by another union. Furthermore, such an interpretation is neither dictated by the words of section 52 nor in keeping with the Board's jurisprudence. In the *Operative Plasterers' and Cement Masons' International Association of the United States and Canada, supra*, the Board, following its declaration that the union was not entitled to represent the employees in the bargaining unit at the time the collective agreement was entered into, stated that the alleged collective agreement never was a collective agreement and emphasized the inherent difficulties of attempting to secure a collective agreement in the construction industry by means of voluntary recognition. In *Trent Metals Limited, supra*, the Board determined at page 830 of its decision that the applicant was not entitled to represent the employees in the bargaining unit at the time the recognition agreement was entered into. The Board affirmed that the agreement could not bar the intervener's application.

> 14. A careful reading of section 5(3) indicates that the bar raised against an application for certification by a voluntary recognition agreement is predicated on the Board not having made a declaration under section 52. In this instance the applicant's application for certification has been deemed by this Board to be an application under section 52 of the Act. The Board has considered the representations of the parties and has declared pursuant to section 52 that the intervener at the time it entered the voluntary recognition agreement with the employer was not entitled to represent the employees in the bargaining unit. Accor- dingly, the Board further declared that the intervener forthwith ceased to represent the employees in the bargaining unit defined in the recognition agreement. Because the Board has made a declaration under section 52, the clear wording of section 5(3) stipulates that the bar that would otherwise be imposed by section 5(3) in the face of the recognition agreement does not apply.

48. I am inclined to accept this reasoning and conclude that there is no bar to the instant applications. However, counsel for the UFCW and Provigo urged me at the hearing on the UFCW's best case not to make any final order in that regard before giving them some further opportunity to make their submissions on what the effect of a declaration under section 66 should be, and to explore any other basis for a bar. Given the basis on which the case was argued, I am prepared to hear from counsel on this issue should they wish to make some argument as to why I should not take the approach suggested by *T.R.S. Food Services Limited, supra*, or to draw to my attention some other cases. Similarly, the UFCW may still wish to assert that the appointment of a conciliator with respect to each of the two bargaining units operates as a bar, even though it seems clear that those appointments were made on the basis of a valid voluntary recognition agreement and must fall with its termination.

49. The UFCW has made certain allegations relating to literature circulated by the USWA which it asserts should impact on the Board's reliance on the membership evidence to find an appearance of forty percent support. It has stated that in the event that the Board intends to proceed with the applications for certification filed by the USWA it will pursue these allegations in an attempt to defeat them.

50. Finally, the USWA has made allegations relating to employer support. There is no need for the Board to consider these allegations as they relate to the validity of the voluntary recognition agreement given my conclusions under section 66 of the Act. However, should the USWA fail to win either representation vote, it may seek to rely upon these allegations in order to obtain some relief from the Board pursuant to section 11 of the Act.

51. Having regard to all of these outstanding issues, the following procedure will be followed at the hearing scheduled to begin on August 19, 1998:

(1) the Board will hear from counsel on the issue of whether or not, having regard to the declaration made under section 66 of the Act, there is any bar to the applications for certification brought by the USWA; and,

(2) if the Board determines that the applications are not barred, I will hear from counsel as to whether or not the ballots should then be counted, or whether there are any other issues which should be resolved prior to the count.

52. The parties should attend at the hearing prepared for a count to be taken that day, should the Board decide to make such a direction during the course of the hearing.