CHAUFFEURS, TEAMSTERS AND HELPERS UNION, LOCAL 395, Applicant v. INCONVENIENCE PRODUCTIONS INC., REGINA MOTION PICTURE VIDEO & SOUND LTD. o/a MINDS EYE PICTURES, and TRIMARK PICTURES, INC., Respondents, and INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES AND CANADA, LOCAL 295, Intervenor

LRB File No. 144-98; April 9, 2001
Vice-Chairperson, James Seibel; Members: Marianne Hodgson and Gloria Cymbalisty

For the Applicant: Angela Zborosky
For the Respondents: Brian Kenny
For the Intervenor: Tom Waller, Q.C.
For Trimark Pictures: N/A

Bargaining unit – Appropriate bargaining unit – Film industry – Board reviews characteristics of film industry and notes similarities between film industry and construction industry – Board sets guidelines for organizing in film industry.

Bargaining unit – Appropriate bargaining unit – Film industry – Industry has historically been organized under broad craft lines – Board is reluctant to upset this rationalization of industry labour and concludes that to do so would destabilize industry – Board concludes that craft unit composed of technicians and transportation craft unit are both appropriate bargaining units.

Voluntary recognition – Status – Union with voluntary recognition argues that subsequent certification application by second union barred as not made during "open period" - Section 33(5) of *The Trade Union Act* does not constitute bar to certification application relating to unit of employees represented by uncertified bargaining agent.

The Trade Union Act, ss. 2(a), 3, 5(a), 5(b), 5(c) and 33(5)

REASONS FOR DECISION

Background

[1] James Seibel, Vice-Chairperson: The Chauffeurs, Teamsters and Helpers Union, Local 395 ("Teamsters 395") has applied, pursuant to ss. 5(a), (b) and (c) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), to be designated as the certified bargaining agent for a group of employees in the production of a motion picture titled *Inconvenienced*. At the commencement of the hearing before the Board, Teamsters 395 applied to amend the proposed bargaining unit, without objection by the other parties, to include:

"all employees employed by Inconvenience Productions Inc., Minds Eye Pictures, Regina Motion Picture Video and Sound Ltd., and/or Trimark Corporation, in the Province of Saskatchewan, who come within the jurisdiction of the International Brotherhood of Teamsters of America, namely all employees in the transportation department and related services namely boat wranglers, animal trainers and wrangler[1]...."

[2] It was estimated there were 11 employees in the proposed bargaining unit.

[3] International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada, Local 295 ("IATSE 295") filed a notice of intervention to the application which alleged that the unit proposed by Teamsters 395 was not an appropriate unit. IATSE 295 included its own application for certification of a more comprehensive proposed bargaining unit comprising "all theatrical stage employees, moving picture technicians, artists and allied crafts..." with 59 listed job classifications including: transportation co-ordinator, driver captain, and drivers of all license classes. The latter positions are within the description of the unit proposed by Teamsters 395.

[4] IATSE 295 estimated 45 employees in its proposed unit and alleged that they were either existing members of IATSE 295 subject to a voluntary recognition agreement between itself and the production company, Inconvenience Productions Inc., ("Inconvenience"), effective June 1, 1998, or had agreed in writing to be bound by the collective agreement if permitted to work by IATSE 295. However, subsequent to the hearing, the Saskatchewan District Council of the Directors Guild of Canada ("the Directors Guild") contacted the Board Registrar to advise that it desired to intervene in the application. The Directors Guild stated that it too had a voluntary recognition collective agreement with Inconvenience, and that pursuant to an agreement it had with IATSE 295 dated August 1, 1997 ("the IATSE/Directors Guild agreement") it had jurisdiction over three of the classifications that IATSE 295 claimed to represent, namely, production coordinator, production secretary and production assistant. During the hearing, the existence of an agreement designed to minimize jurisdictional conflict between IATSE 295 and the Directors Guild had been referred to

[1] In the film production industry, and in the present case, the term "wrangler" denotes a person who transports, handles or trains livestock, domestic or wild animals.

incidentally, but neither was it tendered in evidence nor was there evidence of its specific contents. The Director's Guild sought to reopen the hearing and present evidence and argument with respect to the issue. The Board Registrar wrote to the parties advising of the position taken by the Directors Guild; the only reply received was from counsel for Teamsters 395 advising of her opinion that it did not affect the application by her client.

[5] The reply filed on behalf of Inconvenience stated that it voluntarily recognized IATSE 295 as the bargaining agent for the employees in the proposed unit described in the notice of intervention, and had a collective agreement with IATSE 295. Inconvenience also reiterated the allegation by IATSE 295 that the unit proposed by Teamsters 395 was not an appropriate unit. The first statement of employment filed on behalf of Inconvenience listed 17 persons in the unit description proposed by Teamsters 395, but alleged that the transportation coordinator and transportation captain should be excluded as they are not employees within the meaning of the *Act*. All of the employees listed are drivers. None are described as animal trainers, wranglers or boat wranglers.

[6] In an amended statement of employment filed in May, 1999, Inconvenience listed 39 employees as being in the unit proposed by Teamsters 395. Inconvenience stated that many persons omitted from the first statement were required to drive a vehicle as an integral part of their job duties[2]. The amended statement lists no exclusions, and includes the transportation coordinator and transportation captain positions for the purpose of determining support. At the hearing before the Board, counsel for Teamsters 395 and Inconvenience agreed that they are properly included in the proposed bargaining unit description. Teamsters 395 has filed evidence of majority support for its application based on the first statement of employment.

[7] The amended statement of employment omitted the names of two persons originally included as drivers on the first statement – Fred Moroz and Ryan Moroz; Teamsters 395 maintained that they should be included in the proposed unit for the purposes of determining support. If the amended

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[2] In addition to employees occupying the classifications of transport co-ordinator (1), transport captain (1), transport captain trainee (1) and driver (12), the amended statement of employment lists employees in the following classifications: third assistant director (2); third assistant director trainee (1); second assistant director (1); director's assistant trainee (1); construction co-ordinator (1); head carpenter (1); carpenter (1); location manager (1); locations production assistant (4); set production assistant (1); camera operator (1); stunt co-ordinator (1); scenic painter (1); best boy electrics (1); head wardrobe (1); art director (1); production designer (1); craft service (1); craft service assistant (1); and, cable puller (1). The number of persons said to be in each classification is in parentheses.

statement of employment were to be taken as accurate, Teamsters 395 would not have majority support for the application.

[8] IATSE 295 filed evidence of majority support for its proposed bargaining unit, whether or not the transportation department classifications are considered, and whether or not the three positions subsequently disputed by the Directors Guild are included.

[9] The issues raised on the application include the following:

1. Is the bargaining unit proposed by Teamsters 395 an appropriate unit?

2. Has Teamsters 395 filed evidence of majority support for the application? What is the composition of the statement of employment for the purposes of determining the level of support?

3. If the unit is appropriate and there is majority support, is the application by Teamsters 395 barred by s. 33(5) of the *Act* because it was not filed in the period defined by that section, given the voluntary recognition arrangement between Inconvenience and IATSE 295?

4. Should the Board exercise its discretion to grant certification to Teamsters 395 given the voluntary recognition arrangement?

5. Is the bargaining unit proposed by IATSE 295 an appropriate unit?

6. Has IATSE 295 filed evidence of majority support for its application?

7. Should a certification order or orders be granted as there are no longer any employees?

8. If a certification order or orders is (are) granted, who is (are) the employer(s)?

Evidence

[10] Kevin DeWalt is a director, a shareholder and president of Regina Motion Picture Video & Sound Ltd. (RMP). According to Mr. DeWalt the production of feature films in Canada may be either "indigenous productions" or "service productions." "Indigenous productions" are owned by a Canadian producer or a Canadian co-producer together with a producer from a country under treaty with Canada. They are commonly financed by groups of investors, federal or provincial government film production industry organizations, or a combination thereof. "Service productions" are owned and financed by a foreign producer, often a major American film production company, through a Canadian subsidiary (e.g., Paramount Pictures Corporation (Canada) Inc.) or a Canadian single-purpose production company incorporated specifically to produce a particular feature film. The production company tries to qualify for federal and provincial film production tax credits to reduce production costs. The tax credits are based substantially on the "Canadian content" in the production of the picture. The production company exists for the purposes of financing the production and the making of the specific picture – generally, investors invest in a specific film project, not an industry producer. The company exists as long as there are expenditures and/or revenues relating to the picture (this may be a period of many years, depending on how long the film is in distribution). Inconvenience is such a single-purpose company, incorporated specifically to produce the picture *Inconvenienced.*

[11] According to Mr. DeWalt, the feature film industry in Saskatchewan is quite small compared to some other provinces, notably British Columbia, Ontario, Quebec and Alberta, but the total value of film production expenditures has increased from approximately nine million dollars in 1992 to a high of some 58 million dollars in 1998. He estimated that this amount would decline to approximately 24 million dollars for 1999. Of this amount, approximately 15 per cent is service production and the balance is indigenous production. Where a film is made may be dependent as much upon the availability of production talent (i.e., experienced technicians and crew) and infrastructure (i.e., sound stage facilities) as upon location geography. While Saskatchewan has some special geography and a pool of technical talent, it has little infrastructure. British Columbia and Ontario, in particular, have sophisticated infrastructure.

[12] Mr. DeWalt testified that the supply of technical expertise and labour for feature film production is mostly according to a "hiring hall" concept for the various "crafts" involved, under

voluntary recognition collective agreements[3]. Producers of individual productions may negotiate changes to, or exemptions from, certain terms of the voluntary agreements by letters of variance. The production manager contacts the industry unions to provide qualified workers or "name hires" according to rules under the voluntary agreements, or engages outside help if union members are not available. The production manager interviews and hires, subject to the veto of the picture's owner, all crew and talent, except "key" production positions and "star" performers, which are usually provided by the picture owner. All persons hired by the production manager are required to sign a "deal memorandum" permitting them to work in accordance with a voluntary agreement. The deal memorandum contains basic information, such as the individual's wage rate, and authorizes the deduction of union dues. Persons who are not union members are required, by use of the deal memorandum, to become "permittees" of the appropriate union in order to work on the production. A majority of feature film and episodic television production (with the exception of smaller-budget projects, which are often made non-union) are carried on under such voluntary agreements. The large amounts of money invested in feature films, and the concentrated work performed in a relatively short time frame (typically, ten to 14 weeks) makes industrial peace imperative and formal union certification generally impractical – production would usually be completed before an application for certification would be heard and determined.

[13] IATSE 295, the Directors Guild and the Alliance of Canadian Cinema, Television and Radio Artists ("ACTRA") have standard basic collective agreements ("standard agreements") for motion picture production in Saskatchewan. Also, the Directors Guild and IATSE 295 apparently have an agreement regarding jurisdiction with respect to certain classifications to minimize conflict between them during production (see the reference to the IATSE/Directors Guild agreement, *supra*).

[14] The Directors Guild standard agreement covers classifications with functions generally described as direction (director, assistant director, trainee), production management (production manager, location manager, unit managers, production clerical, assistants, and trainees), production design (art director, set designer and assistants), production coordination (production coordinator, assistants), and picture and sound editing (editor and assistants), and includes those persons working in "second units[4]." The standard agreement recognizes that jurisdictional disputes may arise and the

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[3] As described, *infra*, however, there are variations among provinces, with British Columbia having a formal system of sectoral bargaining for larger-budget productions.

[4] A "second unit" is a secondary film production unit filming part of the same picture as the primary unit, but at a different location. The second unit has its own crew, including a second unit director.

Directors Guild "agrees to cooperate in good faith with the producer and other organizations in the motion picture industry in resolving jurisdictional disputes."

[15] Under a national agreement recognized by the members of the Canadian Film and Television Production Association ("CFTPA"), ACTRA is the exclusive bargaining agent for all performers in independently produced English language recorded productions in Canada. The national agreement provides for minimum rates and working conditions. RMP is a member of CFTPA and recognizes the national agreement for the purpose of commercial productions only, but not for feature productions, except on a project by project basis by use of an "agreement of adherence" to the national agreement.

[16] The IATSE 295 standard agreement covers the classifications of all "technicians" involved in film production, including classifications in the transportation department as described earlier. Very roughly, it may be said that persons falling under the title of "technician" are those involved in the non-executive, non-artistic, and non-performing aspects of film production, including: set construction and decoration, art department, hair, makeup, wardrobe, continuity, electrical, lighting, sound, rigging, utilities, catering, camera operation, special effects, labourer work and transportation, including assistants and trainees. It overlaps with the Directors Guild standard agreement as to the production coordinator, secretary and assistants, and certain art department positions. It does not purport to cover animal wranglers, catering or security services.

[17] The IATSE 295 standard agreement sets minimum rates of pay for each classification and is often amended through negotiation with the individual production company to enhance the feasibility of the particular project (e.g., minimum crewing exemptions). Individual employees may negotiate a higher rate of pay (up to three times the scale rate), or other more favourable terms and conditions of employment, with the production manager. The negotiated terms are embodied in the individual deal memorandum. The standard agreement provides that any person working as a technician (including those hired on a daily basis ("dailies")) must be a member of IATSE 295 (or a sister local) or have a work permit from the union. Members pay dues of two per cent of gross wages; permit technicians pay work permit fees of five per cent of gross wages, while permit trainees pay two and one half per cent. The producer pays an additional administration fee to IATSE 295 of two per cent of total gross wages monthly. The producer also contributes a sum equal to four per cent of each member's gross pay to the IATSE 295 group RRSP plan. No contribution is made with respect to permit technicians. Under the standard agreement, the producer is required to post a cash bond for wages, benefits and contributions.

Film Production in British Columbia

[18] Evidence regarding the organization of labour in the film production industry in British Columbia was adduced through the testimony of Tom Milne, principal officer of Teamsters 155 in Vancouver and Motion Picture Director for the national Teamsters union, and of James Wood, Vice-President, IATSE International and Director of Canadian Affairs.

[19] Mr. Milne testified that the annual value of film production in British Columbia is nearly one billion dollars, more than 90 per cent of which expenditure is for service production by large American production companies for episodic television series and films, ranging from made-for-television movies (customarily referred to as "movies-of-the-week") with budgets of approximately one and one half million dollars to four million dollars, to feature films with budgets that may exceed 100 million dollars. The American producers are attracted by the favourable rate of the Canadian dollar, and federal and provincial film production credits. The mechanism for service production in British Columbia is similar to that described by Mr. DeWalt for Saskatchewan: the American studios produce series and films through Canadian subsidiaries or through single-purpose companies. Mr. Milne cited several different examples to illustrate the film production structure with respect to episodic television series, movies-of-the-week and feature film production.[5] While a feature film typically takes ten to 14 weeks to produce, a season television series of 22 episodes may take eight or nine months.

[20] Mr. Milne described transportation costs as the major "below-the-line" costs (i.e., labour and material) of film production, accounting for approximately 20 per cent of such costs, versus "above-the-line" costs (i.e., the remuneration of the producer, director, screenwriter and lead cast, and film distribution). The type of transportation that may be required is varied but involves the operation and maintenance of any motorized transport equipment in connection with film production. For example, it includes basic transportation and chauffeuring of people, animals, equipment, materials and goods, daily set-up, shoot, location movement, and dismantling phases of production, auto mechanics and bodywork, operation of animal-drawn vehicles, boom trucks and cranes, mobile camera vehicles ("camera cars"), boats, stunt vehicles, construction equipment, and specialized tractor trailer equipment constructed for wardrobe, make-up, hairdressing, set construction and decoration, water

[5] Production of episodic television series, television mini-series, "pilot" shows and movies-of-the-week commonly utilize single-purpose production companies in the same manner as feature films.

supply, electrical generation, dressing rooms ("star wagons"), living quarters and lavatory facilities ("honeywagons"). Some units are designed as "supertrucks," combining several of these facilities in one vehicle. According to Mr. Milne, several members of Teamsters 155 have invested large sums to acquire and operate their own specialized movie production support units. He also said that some have dangerous goods and hazardous waste handling certifications for the transportation and care of special products used in movie making, including explosives.

[21] Mr. Milne said that Teamsters 155 was chartered in 1988 to represent its members working as drivers and animal wranglers in the motion picture production industry in British Columbia. Prior to the charter of Teamsters 155, the majority of members working in the industry were members of Teamsters 213, which mainly supplied members to the heavy construction and pipeline industries. He said that for many years the industry unions relied upon voluntary recognition of their bargaining agencies, and formed *ad hoc* committees to resolve jurisdictional disputes. However, he referred to several historical instances where the production company failed to voluntarily recognize one or more of the unions and they sometimes obtained certification orders for the single-purpose company, but not the major American studio[6].

[22] With the rapid expansion of the industry this informal structure led to some friction between industry unions, resulting in grievances and disharmony. Mr. Milne said that by the mid-1990's Teamsters 155 had more than 70 voluntary agreements with producers. In 1995, the industry unions in British Columbia[7] applied to the Minister of Labour for a direction that the British Columbia

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[6] In one of the examples, Teamsters 155 obtained a certification order for a bargaining unit comprising "employees, including dependent contractors, in the transportation department and related services, including catering, security (exterior), boat wranglers, animal trainers and wranglers", while the Motion Picture Studio Production Technicians, IATSE Local 891, obtained a certification order regarding the same employer for a bargaining unit comprising "employees and dependent contractors engaged in accounting, art, construction, costume, first-aid/craft service, grips, greens, hair, lighting, make-up, painting, production office, props, publicity, script supervisors, security, set decorating, sound, special effects and video".

[7] I.e., International Photographers Guild of the Motion Picture and Television Industry, IATSE Local 669; Motion Picture Studio Production Technicians, IATSE Local 891; Teamsters Local 155; Union of B.C. Performers; Directors' Guild of Canada, B.C. District Council; Association of Canadian Film Craftspeople; Communications, Energy and Paperworkers Union; and, ACTRA-BC. The producers were represented by two associations, one of Canadian producers and one of American producers, and the Canadian Broadcasting Corporation.

Labour Relations Board consider whether the situation was appropriate for the formation of a bargaining council of trade unions for the industry.[8]

[23] Although the British Columbia Labour Relations Board determined that a council of trade unions in the film industry was an appropriate bargaining agent, it included only the three unions that traditionally provide labour towards the "below the line costs" referred to above – International Photographers Guild of the Motion Picture and Television Industry, IATSE 669; Motion Picture Studio Production Technicians, IATSE 891, and Teamsters 155 ("council members") – as consistent with the existing collective bargaining structure in the industry.[9] The decision had the overall effect of structuring collective bargaining in the industry in general. It provided council members with exclusive jurisdiction in two specific areas of production: feature films with a below-the-line labour cost of at least four million dollars, and one-hour dramatic productions for the three largest American television networks. Productions for other television networks, movies-of-the week, and those with below the line labour costs of four million dollars or less were not included in the area of exclusive jurisdiction. The associations of Canadian and American producers, parties to the application, were directed to negotiate a "master collective agreement" with an enabling clause that would permit individual council members to agree to amend the terms of the master agreement for a specific production. The British Columbia Labour Relations Board described the application of the master agreement to individual producers as follows, at 12:

> *The Council's Master does not bind the producers with whom it is negotiated and ratified: a producer is not an "employer". The Council has been found to be the only appropriate bargaining agent representing the only appropriate bargaining unit within the exclusive jurisdiction for the work of the trades it covers. The Master therefore will apply to all employers undertaking productions in the exclusive jurisdiction. The*

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[8] See, *British Columbia and Yukon Council of Film Unions, et al. v. Alliance of Motion Picture and Television Producers, et al.*, BCLRB No. B448/95, (December 15, 1995). Section 41 of the *Labour Relations Code*, R.S.B.C., provides, in part, that, upon the direction of the Minister, the B.C. Board may certify a council of trade unions as bargaining agent "to secure and maintain industrial peace and promote conditions favourable to settlement of disputes."

[9] In B.C., IATSE 669 is referred to as the "camera local" and IATSE 891 as the "technicians local." In general, IATSE 669 represents camera operators, photographers, photographic co-ordinators, assistants and trainees. IATSE 891 represents production technicians in the areas of art, construction, costume, lighting/electrics, make-up, painting, sound, publicity, editing, first aid, grip, greens, hair, set decoration, special effects, interior security and accounting. Teamsters 155 represents transportation co-ordinators, drivers of vehicles and equipment of all

> *automatic application of the Master to all employers in the exclusive jurisdiction does not automatically bind those employers in subsequent productions in the non-exclusive jurisdictional area. The [Labour] Code otherwise applies in all respects to the non-exclusive jurisdiction.*

[24] The council members were further requested to negotiate a "supplemental master agreement" with the producers for non-exclusive jurisdiction productions, again with an enabling provision for amendment, primarily for cost concessions based on a production's budget.[10] The supplemental master agreement also addressed issues of "minimum crewing" and employees who "cross-over" between two or more jobs on smaller-budget productions (e.g., erecting rigging one day and performing set decoration the next).

[25] Mr. Milne said that the production company signs a "letter of adherence" to the master collective agreement and negotiates any amendments with the individual council members. Under the master collective agreement the production company is allowed hall hires (on a seniority basis) and name hires at a 1:1 ratio, plus free picks for "captains." The master collective agreement provides that the council members provide job descriptions and contains a mechanism for settling jurisdictional issues between council members utilising an umpire appointed by the British Columbia Labour Relations Board.

[26] To Mr. Milne's knowledge, the present application is the first time that Teamsters 395 has applied for certification in the movie production industry in Saskatchewan. Nor has any Teamsters local ever entered into a voluntary agreement with an employer in the industry in Saskatchewan. He said members of Teamsters 155 often work on productions in other provinces, however, their deal memoranda routinely provide for the same wage rates and fringe benefits as would pertain if they were working under Teamsters 155 voluntary agreement. According to Mr. Milne, the Alberta Teamsters local has established a claim to an area of jurisdiction in the movie production industry in that province,

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kinds, stunt drivers, mechanics, autobody repairpersons, animal handlers and trainers, exterior security personnel, and catering personnel.

[10] While most "indigenous" production work would practically be excluded from the master agreement area of exclusive jurisdiction, it would generally be covered by the supplemental agreement. The non-exclusive jurisdiction is open to organizing by other unions. For example, the Association of Canadian Film Craftspeople ("ACFC") holds some certifications for employees in the transportation area in the non-exclusive jurisdiction. Mr. Milne noted that in the one dispute that had arisen in the non-exclusive jurisdiction, between Teamsters 155 and ACFC, the B.C. Board issued a "poly-party" certification. The B.C. Board also oversaw the construction of the Council's constitution and Bylaws, requiring that they provide that Council members would only work with other Council members on work performed in the area of exclusive jurisdiction.

and the Manitoba Teamsters local has worked on a small number of productions there, but the Ontario Teamsters locals have been lax in asserting any consistent claim to work in the industry in Ontario.

[27] Mr. Wood is the highest ranking IATSE official in Canada and, between 1988 and 1998, was a business agent for IATSE 873 in Toronto, which is composed of motion picture technicians. He agreed that Teamsters 362 has exclusive jurisdiction over transportation in the film industry in British Columbia. But IATSE is engaged in transportation in the industry in every other jurisdiction in Canada (albeit, not necessarily exclusively) except Quebec.

Film Production in Alberta

[28] Al Porter, Business Agent for Teamsters 362, was Teamsters 362 dispatcher for the film industry in Alberta. The corporate structure of feature film production in Alberta is similar to that in Saskatchewan and British Columbia in that it is primarily carried on through single-purpose production companies. He estimated the value of film production in Alberta for 1998 at approximately 90 million dollars, but said that it had burgeoned to almost 250 million dollars in 1999, of which he estimated 85 per cent is service production. He said that virtually all productions of any significance (he used a threshold of three million dollars) are made with union labour. In the last five years Teamsters 362 has obtained a voluntary agreement on every production but one. In that case it obtained a certification Order from the Alberta Labour Relations Board. He testified that Teamsters 362 created a motion picture division in 1987 and presently has about 250 members. Approximately 15 members own their own specialized equipment for movie production that they lease to the production company; they then contract their labour through a standard agreement. According to Mr. Porter, no union other than Teamsters 362 provides the heavier transportation services to the industry in Alberta.[11] He said that several members of Teamsters 362 also hold membership in the Directors Guild, ACTRA and/or IATSE 210 (Edmonton) or 212 (Calgary); and at times members also work in transportation outside the film industry.

[11] Mr. Porter referred to an amendment to the standard form collective agreement made between Teamsters 362 and a production company in 1998, for a film made partially in the Calgary area and partially in the Edmonton area, that allowed IATSE 210 members to drive trucks of up to a certain size on the Edmonton phase of production "as per past practice". As well, persons involved in set construction, such as carpenters and electricians, operate their own service vehicles, and other members of the cast and crew may drive themselves to and from the location of filming.

[29] Mr. Porter described the jurisdiction claimed by Teamsters 362 by reference to the scope clause in a voluntary agreement that the union has with Paramount Pictures Corporation (Canada) Inc. This was derived from the agreement that Teamsters 399 had in the United States with the American Motion Picture and Television Association for many years. It includes, among other things, all driving except "in front of the camera situations." He said that concessions to the standard agreement are routinely negotiated for individual productions through "letters of adherence." Employees are paid by the production company, which also pays an amount to the union equal to a percentage of the gross earnings of all employees covered by the agreement for "administration expenses." Wage negotiations by the production company with individual employees are permitted through the use of deal memos.

[30] Mr. Porter described jurisdictional arguments between Teamsters 362 and IATSE 210 and IATSE 212 in the 1980's regarding transportation in film production when Teamsters 362 tried to enforce exclusive jurisdiction on one particular production.

[31] With the intervention of the Alberta Department of Labour, the dispute was resolved by an agreement that had the effect of admitting IATSE 210 and IATSE 212 drivers to Teamsters 362 membership, creating a common seniority list for motion picture driving and freezing the number of drivers on the list as at the date of the agreement ("1988 Agreement"). A letter from the business agents for the three unions to the Deputy Minister of Labour dated February 9, 1988, provided as follows:

> *... as of 18 January, 1988, the jurisdictional debate between the IATSE and the Teamsters regarding motion picture driving in Alberta is settled. Motion picture driving is now handled by the Teamsters. IATSE motion picture drivers are members of the Teamsters Local 362.*

[32] Under the 1988 Agreement, existing IATSE collective agreements with producers were amended to remove any specific mention of exclusive jurisdiction over driving. Teamsters 362 secured jurisdiction over wrangling and catering and IATSE 210 and IATSE 212 secured jurisdiction over security and craft services (on-set snack and refreshment services). However, other arguments between the unions have broken out which have been resolved on a piecemeal basis. According to Mr. Porter,

the general driving function is now split between Teamsters 362 and IATSE 210 and IATSE 212 based on the size of the truck: IATSE 210 and IATSE 212 have jurisdiction for units up to one-ton.[12]

[33] Mr. Porter referred to a series of certification orders issued by the Alberta Labour Relations Board in recent years that reflect the division of representation between Teamsters 362 and IATSE 210 and IATSE 212. For example, Teamsters 362 had applied for a unit of employees of Illusions Entertainment Corporation, the producer of a film titled *Silent Cradle*, described as, "all employees in the wrangling, catering and transportation departments." An investigation by the Alberta Board's officer revealed the following information:

> *The bargaining unit applied for ... appears to affect individuals employed by Illusions Entertainment Corporation as truck drivers, shuttle drivers and transportation coordinators. However, it does not appear that on or around the date of application, the employer employed any employees who were performing any work that could be considered either "wrangling" or "catering." In the first place ... the "Silent Cradle" project does not have any need for animals or livestock of any sort, and as such, no wranglers have been employed. In the second place ... all catering work is being carried out by Elizabethan caterers, of Spruce Grove, Alberta, who simply submit weekly invoices into Illusions Entertainment Corporation for their services.*

[34] The Alberta Labour Relations Board ultimately issued a certification Order to Teamsters 362 for a bargaining unit comprising "all drivers and transportation coordinators."

[35] Mr. Wood testified that the dispute between Teamsters 362 and IATSE 210 and IATSE 212 arose when Teamsters 362 attempted to enforce exclusive jurisdiction over transportation in the film production industry, which had been performed by IATSE 210 and IATSE 212 using Red Deer as the latitudinal divide for work jurisdiction. The dispute eventually involved the senior officials of the Teamsters and IATSE international unions because IATSE had a national agreement in the United States with the American producer making the production in Alberta, and the Teamsters generally represented transportation in the industry in the United States. Discussions between the international unions resulted in IATSE international encouraging IATSE 210 and IATSE 212 to agree to allow

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[12] See, f.n. 11, *supra*.

Teamsters 362 to share the driving function. However, Mr. Wood expressed his personal disagreement with this decision.

[36] Mr. Wood acknowledged that there had been some recent friction between IATSE 210 and IATSE 212 and the Directors Guild as IATSE filed an application to certify members of a production art department, functions historically performed by members of the Directors Guild. The application was subsequently withdrawn. In Saskatchewan, however, the art department functions are generally performed by IATSE 295 because the Directors Guild does not have sufficient qualified members.

Film Production in Ontario

[37] According to Mr. Wood there are separate IATSE locals in Ontario representing camera operators and other film production technicians. Historically, transportation in the Ontario film industry has been represented by IATSE 873. Following the resolution of the dispute in Alberta, the Teamsters in Ontario approached the IATSE international union seeking to represent drivers in the industry. The producers' community apparently objected and no formal changes to the driving jurisdiction resulted. Transportation is still provided to the Ontario industry by IATSE 873. However, the wrangling function is performed non-union or contracted out. He said that IATSE 873 does not encourage its members to perform work in other provinces, although some do.

The Production of *Inconvenienced*

[38] Ray Gergely is CEO and Secretary-Treasurer of Teamsters 395. He described it as a "miscellaneous local," representing transport drivers, and workers at concrete companies, humane societies, courier services, waste disposal companies, armoured car services and pipeline construction, some of whom are office or warehouse workers. Teamsters 395 has approximately 1000 members, the majority of whom are employed fulltime, and approximately 80 of whom are on a pipeline and construction dispatch board. Many members have specialized training and hold certificates for the operation of diverse equipment and the transportation of hazardous materials. He said that it is acceptable for Teamsters 395 members to hold membership in another union. He said that Teamsters 395 has well established health and welfare and pension plans for the benefit of its members.

[39] Mr. Gergely testified that a few years ago he was approached by an officer of IATSE 295 who, because of the continuing expansion of the film production industry in the province, was interested in negotiating a jurisdictional deal similar to that in Alberta, but nothing came of it. However, he said that the bargaining unit description in the application for certification in the present case was specifically modeled on the usual unit obtained by Teamsters 362, so that "no one would get their hackles up." He said that the standard agreement allows for non-Teamsters to perform driving incidental to their primary job functions.

[40] Mr. Porter assisted Mr. Gergely in organizing on the production of *Inconvenienced*. They each testified that while they knew at the time that some of the drivers working on the production were members of IATSE 295, others were members of Teamsters 395, and they did not know that IATSE 295 had a voluntary agreement with Inconvenience. Mr. Gergely said that *Inconvenienced* was the first movie production in Saskatchewan where Teamsters 395 applied to certify a bargaining unit. Teamsters 395 has since created a movie dispatch board.

[41] Mr. Gergely indicated that, with respect to movie production in Saskatchewan in general, and *Inconvenienced* in particular, Teamsters 395 seeks to represent employees whose job duties include the transportation of people or materials and equipment, but not those for whom driving is an incidental part of their job as reflected in the job classifications in the Teamsters 362 standard agreement.[13]

[42] RMP began by producing commercial advertising and promotional films for industrial clients. The shareholders of RMP include Mr. DeWalt, Rob King, Josh Miller, Kenneth Krawczyk, Zack Douglas and Saskatchewan Opportunities Corporation. Each of the individual shareholders is a director of the company.

[43] In 1989, RMP broadened its scope to include production of television programs and feature films, and registered "Minds Eye Pictures" as a business name associated with the service production of feature films. Minds Eye Pictures is still a registered business name. In 1993, Mr. DeWalt and others incorporated Minds Eye Productions Inc. ("Minds Eye") as a film production company to handle

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[13] While the scope clause in the Teamsters 362 standard basic agreement in Alberta includes agreement that "all vehicles...used in pre-production, production and post-production, *for any purpose whatsoever* must be driven by an employee who is subject to [the] agreement", the job classifications covered by the agreement include only transportation co-ordinator, driver captain, co-captain, driver, camera car driver, special equipment driver,

indigenous productions. The company's shareholders are Mr. DeWalt, Mr. King and Mr. Krawczyk; Mr. DeWalt and Mr. Krawczyk are also Minds Eye's directors.

[44] *Inconvenienced* was a service production made in Saskatchewan. With production costs of six million dollars, *Inconvenienced* was one of the largest productions ever undertaken in the province. Financed by Trimark Pictures, Inc. ("Trimark") a California corporation, it was produced by Inconvenience, a single-purpose production company owned by RMP and incorporated on May 28, 1998, concurrent with the effective date of the agreement entered into with Trimark (the "production agreement") to produce the film. The directors of *Inconvenienced* are Mr. DeWalt, Mr. King and Bill Wesley of Los Angeles, California. According to Mr. DeWalt, Minds Eye Pictures has formed 17 such companies for specific productions. With respect to *Inconvenienced*, Trimark hired a contractor to work with the director to search for a location to shoot the picture that would pass for Arizona. A site near Moose Jaw, Saskatchewan was one of the possible locations. It was not until after Mr. DeWalt convinced Trimark that Minds Eye Pictures was capable of producing the film that Inconvenience was incorporated and the production agreement entered into. While Inconvenience was the financing vehicle, it was the credibility lent by the association of Mr. DeWalt and RMP with Inconvenience that secured the contract with Trimark.

[45] Under the production agreement, Trimark financed the production of *Inconvenienced* and owns all rights to and property in the picture. For a fee based on a percentage of the tax credits, Inconvenience agreed to produce the picture so that the production would qualify for tax credits. Minds Eye Pictures guaranteed the performance of Inconvenience insofar as the tax credits were concerned. Inconvenience had a bank line of credit guaranteed by RMP. Inconvenience executed a general security agreement in favour of Trimark. Trimark, which was responsible for all business and creative decision-making in connection with the picture, engaged the "star" performers and a limited number of key production personnel, including the line producer, director, writer, production manager, production designer, director of photography, casting director, first assistant director, construction co-ordinator, editor, sound mixer and costume designer. Inconvenience, as service producer, was responsible for hiring the crew and minor performers necessary to produce and actually make the picture. It agreed that it would comply with the collective agreements of the film industry unions in Saskatchewan. Ms.

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dispatch/office, ramrod, wrangler gang boss, wrangler, licensed mechanic, unlicensed mechanic, bodyman, and painter.

Hyland-Lott, as production manager, handled the negotiations with the unions on behalf of Inconvenience.

[46] Inconvenience and Minds Eye Pictures entered into an agreement effective May 8, 1998, called a "loan-out agreement." For a fee, RMP provided Inconvenience with the services of five executive production, business affairs and accounting personnel. With the exception of Mr. DeWalt, whose services as executive producer were provided to Inconvenience on an exclusive basis under the agreement, the services of these persons were provided on a first-call basis. According to Mr. DeWalt, none of the crew and talent engaged by Inconvenience to make the picture were regular employees of RMP.

[47] The first move by Inconvenience was to hire the production manager, Ms. Hyland-Lott. Mr. DeWalt recommended and Trimark approved her hiring. She is a member of the Directors Guild and was covered by the collective agreement negotiated by its Saskatchewan District Council. It was part of Ms. Hyland-Lott's job to negotiate specific terms to the standard agreements with IATSE 295, the Directors Guild and ACTRA for the production of *Inconvenienced*, and to administer the budget. Another part of her job was to negotiate the deal memoranda for individual technicians and crew members, ensure that they held the appropriate union membership or permit, and recommend their being hired. Through its line producer, Jay Heit, Trimark retained the authority to approve or reject the hiring of any individual employees by Ms. Hyland-Lott. Employees, including Ms. Hyland-Lott and the "loan-out employees," were paid by Inconvenience.

[48] Inconvenience never owned any hard assets and did not use any assets of RMP to produce the picture. It leased or rented the necessary equipment and contracted out some services, such as catering, to independent suppliers.

[49] Set construction and shooting of the film took place from May until August, 1998, near Moose Jaw. During this time, Inconvenience maintained a production office in Moose Jaw to handle the accounting and administration functions associated with production.

[50] According to Ms. Hyland-Lott, she hired the entire crew, including Sheila Richards, Transportation Co-ordinator and member of IATSE 295. She said that together she and Ms. Richards hired everyone else who worked in the transportation department on the production of

Inconvenienced. She said that Mr. Heit only required that he approve the person hired by her as transport captain.

[51] Ms. Hyland-Lott testified about the job functions listed on the amended statement of employment in classifications other than those in the transportation department[14], as they related to the driving function:

- assistant directors – required to drive to scout and assess locations before production was moved there in order to ensure that any problems inherent to the site can be solved;

- director's assistant trainee – assigned a vehicle to chauffeur the director and the star of the film;

- third assistant director – spent as much as 70 per cent of his time driving for the purposes of scouting locations and chauffeuring the first assistant director;

- construction co-ordinator – assigned a light truck in order to courier materials to the sets or attend at the production office;

- head carpenter and carpenter – drove themselves and their tools to the site;

- scenic painter – transported his team to and from the set during pre-production and sometimes picked up materials in Regina and Moose Jaw;

- locations manager – the position involves a significant amount of driving in scouting potential sites, securing lease agreements with property owners and attending meetings with governmental authorities for various approvals;

- camera operator – sometimes chauffeured assistant directors to and from the set;

[14] The amended statement of employment listed the following persons in transportation department classifications: transportation co-ordinator, Sheila Richards; transport captain, Bill Lewis; transport captain trainee, Jason Richards; and drivers, Lorne Kurtz, Rennal Demmans, Wally McDonald, Tom Caldwell, Chuck Scorgie, Kevin McClusky, Danine Schlosser, Kyle Huffman, Heather Stelter, Gerard Demaer, Cathy Ehrlich, and Shanna-Marie Richards.

- set production assistant – would frequently courier documents between the set and the production office;

- stunt co-ordinator – transported the stunt team to and from the set and performed driving on camera;

- locations production assistants – had access to vehicles in order to travel to the points where it was necessary to direct traffic during filming, and for site cleanup and trash removal;

- head of wardrobe, art director, and production designer – these positions necessarily involved a lot of driving directly related to their integral job duties;

- third assistant director trainee – responsible for transporting mobile communications equipment to and from the set each day;

- cable puller – drove a rented truck to move around electrical supplies;

- craft services – shopped for provisions, and transported them to various locations for the supply of snacks and refreshments on the set (as opposed to meal catering which was contracted out).

[52] Ms. Hyland-Lott confirmed that the locations production assistants on the amended statement of employment are covered by the standard agreement with the Directors Guild under the production assistant classification, and that the stunt co-ordinator position was covered by the standard agreement with ACTRA.

[53] Ms. Hyland-Lott testified that the general duties of the employees in the transportation department on the production of *Inconvenienced* included the shuttling of cast and crew to and from the set and other destinations as required, courier services for documents, equipment and supplies, and on- and off-the-set coordination, positioning, parking and maintenance of production vehicles, including on-screen "picture" vehicles, camera cars, motorhomes, and equipment trucks and vans. She maintained that Fred Moroz and Ryan Moroz, who were listed on the first statement of

employment, and appear on the *Inconvenienced* "crew list" for July 10, 1998, as members of the transportation department were omitted from the second statement of employment because their job functions were dissimilar from those of the other members of the department. Fred Moroz owned and operated a hair/wardrobe/makeup/cast quarters supertruck while Ryan Moroz operated a honeywagon. Ms. Hyland-Lott said that once parked on location the bulk of the Moroz's time was spent cleaning, maintaining and managing the power and water requirements of their vehicles, and their only driving responsibilities were in connection with unit re-locations.

[54] Ms. Hyland-Lott confirmed that pursuant to their deal memoranda, Fred Moroz, Ryan Moroz and Chuck Scorgie, all members of Teamsters 155, were paid rates equivalent to those provided in the Teamsters 155 standard agreement in British Columbia, and dues would be remitted to that union on their behalf. She maintained that the balance of their terms and conditions of work were under the standard agreement between Inconvenience and IATSE 295.

[55] Ms. Hyland-Lott confirmed that although the stated occupational classification for Heather Stelter and Cathy Ehrlich on the amended statement of employment is that of "driver," their actual job duties consisted of cleaning motorhomes. Ms. Ehrlich's employment status was that of a "daily" and her payroll start slip indicated that she started work on July 11, 1998. Ms. Stelter's time sheet indicated that her first day of work was July 9, 1998. It appears that both did not commence work until after the application was filed by Teamsters 395 on July 7, 1998.

[56] In cross-examination, Ms. Hyland-Lott confirmed that a member of the transportation department initially brought the craft service vehicle to location and that various members of that department often went to obtain craft services supplies.

[57] Ms. Hyland-Lott agreed that Kyle Huffman should be deleted from the statements of employment because his first day of work was not until after the application was filed. Counsel for Teamsters 395 and Inconvenience agreed.

[58] Ms. Hyland-Lott confirmed that no wrangling, animal training or boat driving services were required in the production of *Inconvenienced* and that catering was subcontracted.

[59] Geoff Yates, business agent for film production with IATSE 295, has worked as a lighting and electronics technician, and in the "grip" department,[15] on over 30 film productions in western Canada. He testified that there are two IATSE locals in Saskatchewan, IATSE 295 in Regina and IATSE 300 in Saskatoon. He described IATSE 295 as a "mixed local" which is committed to organizing any workplace where entertainment is created or occurs, including film production, movie and stage theatres, casinos and amusement parks. According to Mr. Yates, IATSE 295 is divided into a stage and theatre side, and a movie production side, each with separate hiring rosters. The stage side dispatches according to seniority, while the movie side dispatches by name hire only. He indicated that the stage side has approximately 80 members, and the movie side approximately 50 members, of which perhaps six members are employed in transportation on a regular basis. Mr. Yates explained that IATSE movie side permittees may become members after working a minimum of 50 days on at least two different shows.

[60] Mr. Yates said that from 1993 to 1996 technicians in the industry in Saskatchewan were represented by the Association of Canadian Film Craftspeople ("ACFC"). In 1996, the ACFC merged with IATSE 295, the latter union assuming responsibility under extant ACFC agreements with producers. He confirmed that from 1996 until the time of the present application IATSE 295 had obtained the voluntary recognition of all producers on all productions where it sought to represent employees. He said IATSE 295 has represented the standard film production crafts, including transportation, on those productions.

[61] Mr. Yates maintained that prior to the production of *Inconvenienced* Teamsters 395 had no presence whatsoever in movie production in Saskatchewan. Up to that time there had never been more than one major production at a time, but the production of *Inconvenienced* overlapped with another big budget film, *Big Bear*, which stretched film technician resources in the province fairly thin. According to Mr. Yates, this resulted in there being a shortage of technicians in some departments and no IATSE 295 movie side drivers being available when production commenced on *Inconvenienced*. He suggested to Ms. Richards that she look for some technical people from the IATSE 295 stage side to fill the breach. Mr. Yates himself worked on *Inconvenienced* as a daily employee in the props department. He said that according to the July 10, 1998, crew list for

[15] "Grip" work involves anything to do with camera cranes and movement, rigging, and lighting construction and control.

Inconvenienced there were 67 employees in departments covered under the IATSE 295 collective agreement, including 15 in transportation.

[62] Mr. Yates explained that because of the short production time for feature films, it has not been practical for IATSE 295 to apply for certification, and IATSE 295 relied on voluntary recognition. In the case of *Inconvenienced*, Mr. Yates said that he negotiated a standard agreement with the line producer and production manager. The parties to the standard agreement are IATSE 295 and Inconvenience. Although the agreement was signed July 5, 1998, it is for a term from June 1, 1998 to December 31, 1998. Mr. Yates explained that this was so that it would apply to the pre-production, production and post-production phases of the project. The collective agreement is the standard IATSE 295 film production agreement, amended by a letter of amendment dated July 7, 1998.

[63] The collective agreement covers all technicians within specified classifications, including the following transportation department positions within the definition: transportation coordinator, driver captain, driver class 1A, 1, 2, 3, and driver class 4, 5. Under the agreement, Inconvenience agreed to engage only technicians who are members in good standing of IATSE 295, or who obtained a work permit issued by IATSE 295. He confirmed that the Directors Guild customarily represented persons associated with production management, such as the production manager, directors and assistant directors. The letter of amendment to the standard agreement contains a clause aimed at reducing any friction at the interface with the jurisdiction claimed by the Directors Guild as follows:

> *It is agreed by both parties that when the following positions are covered by The Directors Guild of Canada they will be excluded from the IATSE 295 collective agreement: Production Co-ordinator, Production Secretary, Production Assistants, Art Director, Graphic Artist, Assistant Art Director, Art Department Co-ordinator and Draftsperson.*

[64] Under the letter of amendment the producer could also obtain exclusions from the IATSE 295 bargaining unit "to avoid jurisdictional dispute."

[65] Mr. Yates confirmed that IATSE 295 does not presently have an insurance or health plan, but that it collects member contributions dedicated to eventually setting one up.

[66] Shortly after the application by Teamsters 395 was filed, Mr. Yates called a meeting of all IATSE 295 members and permittees then working for Inconvenience in order to garner support for the counter-application by IATSE 295. Members of the transportation department were not invited because Mr. Yates did not want to foster any rivalry. He confirmed that Wally McDonald has not since been called for any film work because he is viewed as a "difficult employee", both by himself and Ms. Richards.

[67] Mr. McDonald, a sound technician and member of IATSE 295, and a driver and member of Teamsters 395, was called to testify on behalf of Teamsters 395. He said that he worked as a sound technician for many years in the theatre and stage end of the production business. He obtained his Class 1A license with an air brake endorsement and has driven trucks and buses. He has a hazardous materials certificate that allows him to haul dangerous goods and explosives.

[68] Mr. McDonald said that he had never obtained any film production driving work through IATSE 295. He said that he had quit long-haul trucking shortly before he heard that drivers were needed for the production of *Inconvenienced*. He contacted Ms. Richards directly, confirmed that he was a member of IATSE 295, and was hired. It was the first movie production that he had worked on as a driver. He said that there were people working in transportation on the production of *Inconvenienced* as permittees of IATSE 295.

[69] Mr. McDonald was employed as a driver on the production for most of July, 1998, then left to work as a sound technician at the Regina Exhibition. During his time with *Inconvenienced* he drove cast and crew members from Regina to location and back in a large passenger van, but also did some minor mechanical repairs, servicing and cleaning of vehicles. He noted that other drivers also cleaned trailers and motorhomes. At one point he was required to drive a semi-trailer from Regina to Calgary and back to pick up equipment. During his tenure on the production there was no location move. He said that when he was not actually driving or servicing vehicles, he was on "standby." He said that while the transport of people requires a higher class of license than the ordinary Class 5, he believed many of the other drivers on the production did not have such a license, but were able to get away with it because they were designated as "personal attendants" for certain people.

[70] Mr. McDonald testified about the job positions listed on the amended statement of employment in the transportation department as he observed them. He essentially confirmed that persons did in fact work as drivers, with the exception of Ms. Stelter and Ms. Ehrlich, whom he did not know, and Shanna-Marie Richards, who cleaned vehicles. To his knowledge, only three of the 17 persons listed in the transportation department on the first statement of employment – himself, Sheila Richards and one other – were members of IATSE 295.

[71] Mr. McDonald said that at one point he was approached by Andrew Gordon, IATSE 295 shop steward, who urged him to sign a document that would have committed him to work only for movie production companies whose employees were represented by IATSE 295, but he refused. He claimed there was much "ballyhoo", as he put it, over his signing a Teamsters 395 card. Mr. Yates engaged him in a heated conversation and was critical of his obtaining membership in Teamsters 395. He said he has not been called by IATSE 295 for any film work since, and surmised that Sheila Richards, who had indicated to him her disagreement with Teamsters 395 representation, has probably refused to name hire him for other work. However, he has continued to work as a sound technician on the stage side of IATSE 295.

[72] Mr. Gordon was called to testify on behalf of IATSE 295. He has been involved in motion picture production in Saskatchewan as a producer, director, grip, and lighting and electronics technician, and was formerly a member of ACFC.

[73] Mr. Gordon said that in his position as best boy electric[16] on the production of *Inconvenienced* he worked all 30 days that the picture was in production. His duties required that he drive his personal vehicle to Moose Jaw or Regina up to several times a week to obtain specialized supplies. He described such task as customary to the best boy position. He agreed that it was his choice to use his own vehicle when no driver was available and that he was not reimbursed for his mileage under the IATSE 295 standard agreement. He said that he has a class 1 license with an airbrake endorsement and has driven many different vehicles on many productions. He also explained that the generator operator drove the electronics truck, the grip drove the grip truck, and the camera trainee, the camera truck.

[16] A "best boy" is the first assistant electrician.

[74] He explained that the IATSE 295 standard agreement rate schedule merely establishes a minimum and that individual employees may negotiate higher rates with the producer through their deal memorandum depending on their status in the industry.

Statutory Provisions

[75] Provisions of the *Act* relevant to this application include the following:

> 2. *In this Act:*
>
> *(a) "appropriate unit" means a unit of employees appropriate for the purpose of bargaining collectively;*
>
> ...
>
> *(g) "employer" means:*
>
> ...
>
> *(iii) in respect of any employees of a contractor who supplies the services of the employees for or on behalf of a principal pursuant to the terms of any contract entered into by the contractor or principal, the contractor or principal as the board may in its discretion determine for the purposes of this Act;*
>
> ...
>
> 3. *Employees have the right to organise in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing; and the trade union designated or selected for the purpose of bargaining collectively by the majority of the employees in a unit appropriate for that purpose shall be the exclusive representative of all employees in that unit for the purpose of bargaining collectively.*
>
> ...

5. The board may make orders:

(a) determining whether the appropriate unit of employees for the purpose of bargaining collectively shall be an employer unit, craft unit, plant unit or a subdivision thereof or some other unit;

(b) determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, but no order under this clause shall be made in respect of an application made within a period of six months from the date of the dismissal of an application for certification by the same trade union in respect of the same or a substantially similar unit of employees, unless the board, on the application of that trade union, considers it advisable to abridge that period;

(c) requiring an employer or a trade union representing the majority of employees in an appropriate unit to bargain collectively;

...

6(1) In determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, in addition to the exercise of any powers conferred upon it by section 18, the board may, in its discretion, subject to subsection (2), direct a vote to be taken by secret ballot of all employees eligible to vote to determine the question.

...

33(5) A trade union claiming to represent a majority of employees in the appropriate unit of employees or any part thereof to which a collective bargaining agreement applies may, not less than 30 days or more than 60 days before the anniversary date of the agreement, apply to the board for an order determining it to be the trade union representing a majority of employees in the appropriate unit of employees to which the agreement applies, or in any part thereof, and if the board

makes such order the employer shall forthwith bargain collectively with that trade union and the former agreement shall be of no force or effect insofar as it applies to any unit of employees in which that trade union has been determined as representing a majority of the employees.

...

37.3(1) If, in the board's opinion, associated or related businesses, undertakings or other activities are carried on by or through more than one corporation, partnership, individual or association, or a combination of them under common control or direction, the board may treat them as constituting one employer for the purposes of this Act and grant any relief, by way of declaration or otherwise, that the board considers appropriate.

37.3(2) Subsection (1) applies only to businesses, undertakings or other activities that become associated or related after the coming into force of this section.

Argument

[76] Each counsel filed written argument on behalf of their respective clients.

[77] Ms. Zborosky, on behalf of Teamsters 395, argued that the bargaining unit proposed by Teamsters 395 is an appropriate unit and that the first statement of employment filed by Inconvenience accurately reflects the employees performing work in the proposed bargaining unit on the date of the filing of the application. As she pointed out, the Board has described bargaining units claimed by Teamsters 395 in several previous certification orders using the phrase, "within the jurisdiction of the Teamsters Union." Many of these orders have been granted in relation to pipeline construction as in *Chauffeurs, Teamsters and Helpers Local Union No. 395 v. Summit Pipeline Services Ltd.*, [1997] Sask. L.R.B.R. 270, LRB File No. 332-96, where the Board agreed that work normally performed on a construction site by employees whose primary job is "the transportation of men, material and tools" to work sites is within the trade jurisdiction of the Teamsters' union.

[78] Ms. Zborosky asserted that both Inconvenience and IATSE 295 sought to have the bargaining unit more broadly defined than requested by Teamsters 395 for the purpose of determining the level of

support, based on the scope clauses in the Alberta and British Columbia standard agreements. But, she pointed out, those clauses were achieved through formal negotiation and bargaining. She said that Teamsters 395 seeks to represent those employees whose primary duties are driving or maintaining vehicles, and not those for whom driving tasks are incidental to the performance of their primary responsibilities. Counsel drew an analogy with the organization by craft in the construction industry where the Board looks at the main focus of an employee's work in order to determine the appropriate trade jurisdiction. She argued that the employees added to the amended statement of employment by Inconvenience performed driving tasks that were incidental to their primary duties (e.g., as assistant director, best boy electric, etc.), even if such tasks consumed a significant portion of their time. In support of her arguments, counsel cited the decisions of the Board in *International Union of Operating Engineers, Local 870 v. K.A.C.R., A Joint Venture,* [1983] Sept. Sask. Labour Rep. 37, LRB File No. 106-83, and *Operative Plasterers and Cement Masons, Local 442 v. Vector Construction Ltd.,* [1992] 2nd Quarter Sask. Labour Rep. 82, LRB File No. 307-91. Counsel noted that none of these persons were paid according to the rates for the transportation department classifications in the IATSE 295 standard agreement. She pointed out that IATSE 295 did not dispute that such incidental driving duties were performed by employees working under the Directors Guild standard agreement, even though the transportation department came within the scope of IATSE 295's standard agreement with Inconvenience.

[79] Ms. Zborosky argued that s. 5(a) of the *Act* permits appropriate units to take the form of "craft" units, but that it has been rare outside of the construction industry. However, she emphasized that the film production industry is a unique business with a long history of labour organization along craft lines. Counsel said that in *K.A.C.R., supra*, the Board recognized the long history of craft certification in the construction industry and refused to deviate from that model despite the employer's claim that its generically described "construction workers" were multi-skilled and performed work that crossed traditional craft lines. Counsel pointed out that the Board's decision in *Construction and General Workers, Local Union No. 890 v. International Erectors and Riggers, a Division of Newbery Energy Ltd.*, [1979] Sept. Sask. Labour Rep. 37, LRB File No. 114-79, where the Board developed standard unit descriptions based on craft lines in the construction industry, was made prior to the enactment of specialized labour legislation in that industry, and withstood the repeal of such legislation in the 1980's.

[80] Ms. Zborosky also referred to the labour organization of the health care and newspaper industries where the Board's decisions dealing with competing bargaining structures have reflected a

policy of selecting the structure that will best promote long-term industrial stability. Counsel referred to the criteria that has been applied by the Board in certifying "under-inclusive" bargaining units. Counsel asserted that because film production, like construction, is often of relatively short duration and dependent upon a diversity of highly specialized skills, it makes sense, both with respect to the historical organization of the industry and in the interests of long-term stability, to allow a craft type of organization. In the United States, she said, labour organization of the industry has been along such lines since the late 1940's. The timelines involved in film production, along with the use of single-purpose production companies, make extended jurisdictional squabbles impractical and formal certification inefficient if employees are going to be represented. In support of her arguments, counsel cited several prior Board decisions including, *Graphic Communications International Union, Local 75M v. Sterling Newspapers Group (a division of Hollinger Inc.)*, [1998] Sask. L.R.B.R. 770, LRB File No. 174-98; *The Newspaper Guild v. Sterling Newspapers Group (a division of Hollinger Inc.)*, [1999] Sask. L.R.B.R. 5, LRB File No. 187-98; *Health Sciences Association of Saskatchewan v. Board of Governors of the South Saskatchewan Hospital Centre (Plains Health Centre) and Canadian Union of Public Employees, Local 1838*, [1987] April Sask. Labour Rep. 48, LRB File Nos. 321-85 & 422-85; and, *Saskatchewan Joint Board, Retail Wholesale and Department Store Union v. Prairie Micro-Tech Inc.*, [1994] 3rd Quarter Sask. Labour Rep. 87, LRB File No. 088-94.

[81] Counsel pointed out that there are no prior certifications in the film production industry in Saskatchewan. She argued that a unit of employees in the "transportation department and related services" is an appropriate "craft" unit. The Teamsters have long demonstrated their ability to represent driving and operating professionals in other industries across Canada, and in film production in the United States, British Columbia and Alberta and can provide other driving work for its members when film production work is not available. Counsel contrasted this with the IATSE 295 movie side procedure where drivers are not dispatched on a name-hire basis rather than by seniority and only for film work. Counsel asserted that the evidence disclosed that only a few of the persons in the transportation department on *Inconvenienced* were IATSE 295 members, and that it was not until Teamsters 395 filed this application that any attempt was made by IATSE 295 to secure their membership. She said the drivers have a special community of interest in that they have specific work issues related to qualifications and training, safety, turnaround and standby time, vehicle maintenance and irregular hours of work that often extend beyond those of the other persons on the production.

[82] Counsel also asserted that it is appropriate to certify a province-wide unit because the geographic scope of a film production may encompass several locations across the province. In support of this contention, counsel referred to the Board's decision in *United Steelworkers of America v. Industrial Welding (1975) Limited*, [1986] Feb. Sask. Labour Rep. 45, LRB File No. 274-85.

[83] Ms. Zborosky took issue with the composition of the amended statement of employment, contending that the first statement was the accurate statement, with the exception of Kyle Huffman, Ms. Ehrlich and Ms. Stelter. Likewise, counsel argued that Gerard Demaer should be deleted from the statement as he worked only intermittently during the production period. And counsel said that Fred Moroz and Ryan Moroz should appear on the statement of employment. According to counsel, there should be 13 names on the statement of employment for the purpose of determining the level of support for the application by Teamsters 395, as follows:

Sheila Richards	Transport Co-ordinator
Bill Lewis	Transport Captain
Lorne Kurtz	Driver
Rennal Demmans	Driver
Jason Richards	Transport Captain Trainee
Wally McDonald	Driver
Tom Caldwell	Driver
Chuck Scorgie	Driver
Kevin McCluskey	Driver
Danne Schlosser	Driver
Shanna Marie Richards	Driver
Fred Moroz	Driver
Ryan Moroz	Driver

[84] With respect to the identification of the employer for the purposes of certification, Ms. Zborosky argued that, pursuant to s. 37.3 or s. 2(g)(iii) of the *Act*, and the Board's treatment of the issue of common employers in its decision in *Amalgamated Transit Union, Local 588 v. City of Regina and Wayne Bus Ltd.*, [1999] Sask. L.R.B.R. 238, LRB File No. 363-97, the corporate and organizational structures of the production of the film in the present case indicate that Inconvenience, Minds Eye

Pictures and Trimark (or some combination of two of the three) are related or common employers and a certification order should bind all the related entities. Counsel also argued that there is a labour relations interest that would be served by a common employer declaration. She said that if only Inconvenience is certified as the employer, given the short time lines in film production, certification of other Minds Eye Pictures or Trimark projects would be practically impossible. Counsel contended that certification promotes industrial stability, in contrast to attempts to secure voluntary recognition and continual jurisdictional arguments between unions.

[85] Finally, with respect to the issue of the effect of the voluntary recognition agreement between IATSE 295 and Inconvenience, Ms. Zborosky argued that it is not necessary to consider their arrangement because the standard agreement was not in force by the time Teamsters 395 had filed the present application, and IATSE 295 did not move to secure support for its own application until after that date. She also argued that IATSE 295 should not be granted status as an intervenor in the present application because it had not filed any evidence of support for its counter-application for certification of its proposed unit until after Teamsters 395 had filed its application.

[86] Ms. Zborosky also criticized the IATSE 295 movie side hiring procedure in its voluntary recognition arrangements, notably the lack of seniority dispatch rules, and the complete concession to name-hiring by employers, as not serving the interests of rank-and-file members and creating an environment that promotes "sweetheart" deals and the potential for a conflict of interest between such members and the working officers of the union. Counsel argued that voluntary recognition is a poor alternative to certification under the *Act*. Voluntary recognition is not expressly recognized by the statute and only certification compels the employer to bargain collectively. The union party to a voluntary recognition arrangement has no statutory status as the exclusive bargaining representative of the employees it seeks to represent. Counsel asserted that in *United Food and Commercial Workers, Local 1400 v. Canada Messenger Transportation Systems Inc.*, [1990] Fall Sask. Labour Rep. 93, LRB File No. 091-90, the Board rejected the contention that either voluntary recognition and/or s. 33(5) of the *Act* created a bar to certification. Counsel referred to *International Union of Operating Engineers v. Aluma Systems Canada Inc.*, [1996] Sask. L.R.B.R. 519, LRB File No. 002-96, as authority for the proposition that the right of employees under s. 3 of the *Act* to select the trade union of their choice to represent them supersedes any voluntary recognition arrangement.

[87] Mr. Waller, on behalf of IATSE 295, argued that the bargaining unit proposed by Teamsters 395 is not an appropriate unit within the meaning of s. 2(a) of the *Act*, and was tailored to fit the shape of its support. Counsel's argument was based upon the Board's general preference for fewer more-inclusive bargaining units. He reviewed the factors enunciated by the Board in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union. v. O. K. Economy Stores Ltd.*, [1990] Fall Sask. Labour Rep. 64, LRB File No. 264-89, which included: (1) the viability of the proposed unit and its effectiveness in a bargaining relationship; (2) the community of interest shared by the employees in the unit; (3) organizational difficulties in particular industries; (4) the promotion of industrial stability; (5) the effect of the bargaining structure on the employer's operation; (6) the historical pattern of organization in the industry; and, (7) the agreement of the parties.

[88] Mr. Waller asserted that: (1) the unit proposed by Teamsters 395 is too small to be viable in the long term, while the larger unit proposed by IATSE 295 does not share this weakness; (2) the entire group of technical employees represented by IATSE 295 in its voluntary recognition by Inconvenience, including the drivers, share a community of interest; (3) the organizational difficulties in the industry, resulting from the short periods of production work, have dictated that voluntary recognition of a single unit of technical employees has made practical sense; (4) the unit proposed by Teamsters 395 has the potential to foment industrial instability and inefficiency in bargaining; (5) a majority of the technical crew employees signed deal memos confirming their desire that IATSE 295 act as their bargaining agent; (6) the fragmentation that would result from the certification of the unit proposed by Teamsters 395 would cause significant difficulties for the employer, and may dissuade other producers from choosing Saskatchewan for their projects; and, (7) the historical pattern of labour organization in the industry in Saskatchewan has been the representation of all technical employees by IATSE 295.

[89] In referring to the principles iterated by the Board in the *Sterling Newspapers* decisions, *supra*, Mr. Waller argued that the present case did not warrant the certification of an under-inclusive bargaining unit. He opined that the granting of a certification order for the unit proposed by Teamsters 395 would cause chaos in the Saskatchewan film production industry, which has functioned well to date without the obtaining of certification orders from the Board. Counsel cautioned that the Board should not disrupt the industry past practice of voluntary recognition.

[90] Mr. Waller argued that an appropriate unit would properly include anyone who drives any vehicle for any purpose, rather than the unit restricted to employees in the transportation department of

Inconvenienced as applied for by Teamsters 395. Many crew members outside the transportation department, he said, perform a significant amount of driving in connection with their job duties.

[91] With respect to the determination of the employer for labour relations purposes, and the issue of related employers, Mr. Waller also relied upon the principles enunciated by the Board in *Wayne Bus Ltd., supra*, but argued that on the evidence adduced they support the assertion that Inconvenience alone is the employer.

[92] Mr. Waller asserted that IATSE 295 has filed evidence of majority support for its application to certify its technicians' unit. He argued that execution of the deal memos by employees should be accepted as evidence of support, because although its language is unconventional that intent is clear on the face of the deal memo. He said further evidence of support in usual form was filed with the notice of intervention. The fact that it was obtained after Teamsters 395 filed its application should not disqualify its admissibility and it might be considered as merely an affirmation of the intention expressed by the employees in their deal memos. Although Mr. Waller acknowledged that the Board's general practice is not to consider evidence of support obtained after the filing of the initial certification application, the circumstances of the present case should lead the Board to conclude that this is an appropriate case in which to make an exception.

[93] In addressing the issue as to whether there is any labour relations purpose in issuing a certification order with respect to Inconvenience, which is unlikely to ever again have any employees, Mr. Waller pointed out that the Board has issued such orders in the context of the construction industry.[17] He said that IATSE 295 conceded that the issue in the present case was moot, but referred to the consideration of the doctrine of mootness discussed by Sopinka, J. in *Borowski v. A.-G. Canada*, [1989] 1 S.C.R. 342 (S.C.C.), as follows, at 353:

> *The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear*

[17] See, for example, *International Brotherhood of Electrical Workers, Local 529 v. Sparrow Electric Corp.*, [1993] 4th Quarter Sask. Labour Rep. 79, LRB File No 270-91, where the employer had been placed in bankruptcy and its assets disposed of after the application for certification was filed, but before it was determined.

the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declined to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

[94] With respect to the issue of voluntary recognition in the film industry in Saskatchewan, Mr. Waller pointed out that the introduction of compulsory collective bargaining legislation did not exclude voluntary recognition or voluntary bargaining, and that the definitions of "collective bargaining agreement" and "bargaining collectively" in the *Act* do not require that the trade union involved be certified as the bargaining agent. While he agreed that the status of a union that holds only voluntary recognition is somewhat tenuous, s. 33(5) of the *Act* affords some measure of protection where the union can demonstrate that the agreement upon which it relies has the support of the majority of employees in an appropriate unit. Mr. Waller urged the Board to give effect to the voluntary arrangement between IATSE 295 and the employer, and dismiss the application by Teamsters 395 as being barred because it was not filed during the period mandated by s. 33(5) of the *Act*.

[95] Mr. Kenny, on behalf of Inconvenience, RMP and Minds Eye Pictures, argued that while Trimark retained ultimate authority over all matters pertaining to this film project, provided the financing and the most senior management representative, each employee signed a deal memorandum clearly identifying Inconvenience as their employer, and Inconvenience exercised direction and control over their day-to-day activities and bore the burden of their remuneration. Counsel asserted that no evidence was adduced that suggests that RMP had any decision-making role in the making of the picture, pointing out that none of the individuals listed on the amended statement of employment have any relationship with RMP. Mr. Kenny pointed out that the overwhelming number of examples of certification orders granted in the industry in British Columbia and Alberta indicate that the respective labour boards of those provinces consider the single-purpose production company to be the employer for labour relations purposes.

[96] Mr. Kenny took issue with the reference to the "jurisdiction of the union" by Teamsters 395 in its description of its proposed bargaining unit, asserting that the phrase encompasses something broader than the transportation department of *Inconvenienced*. Counsel opined that the scope of representation sought by Teamsters 395 included any employee that drives as part of their job function. As such,

counsel argued that the amended statement of employment was the appropriate one for the purpose of the application.

[97] Mr. Kenny further argued that the unit proposed by Teamsters 395 was not an appropriate unit, referring to the Board's policy of preferring larger, more-inclusive bargaining units. He asserted that the present case was not an appropriate on in which to carve out the group proposed by Teamsters 395.

[98] In his argument, Mr. Kenny said there is no reason to make any certification order(s) in the present case because Inconvenience has no employees and will not likely ever have any again, and there would be no sense in ordering the employer to bargain collectively.

Analysis and Decision

[99] The issue was raised as to whether the applications should be considered and determined given that Inconvenience no longer had any employees by the time of the hearing and was unlikely to ever have any again. However, all parties to the applications are interested in the promotion of film production activity in the province. The availability of a pool of skilled technicians and the stability in the industry's labour relations are two of the keys to the attraction of that activity. The applications raise issues that are important to the future of labour relations in the industry. There is no more direct way in which to resolve these issues: it is unlikely that a situation of longer-term continuing employment might present itself in the near future. While the issues may have become "moot" in a strictly immediate sense, the same issues will arise again and again and the controversy will not go away. Accordingly, we have determined to exercise our discretion to decide certain aspects of the case.

[100] The effect of the voluntary recognition arrangement between IATSE 295 and Inconvenience is a threshold issue to the consideration of the certification application by Teamsters 395. IATSE 295 asserts that, pursuant to section 33(5) of the *Act*, the standard agreement constitutes a bar to Teamster 395's application unless it is filed during the "open" period referred to in this section.

[101] Clearly, a collective bargaining relationship and agreement can exist independently of, and do not depend upon, the existence of a Board order[18]. But, the issue raised in this case has been previously

[18] See, *Saskatchewan Government Employees Union v. Saskatchewan Institute of Applied Science and Technology*, [1989] Summer Sask. Labour Rep.51, LRB File No. 131-88.

determined by the Board and approved of in subsequent decisions. In *Canada Messenger Transportation Systems Inc., supra,* United Food and Commercial Workers, Local 1400 (UFCW) applied to be certified as the bargaining agent for the employees of Canada Messenger in Saskatoon. The Canadian Brotherhood of Railway Workers intervened on the grounds that it already represented the employees by virtue of a voluntary collective bargaining agreement with the employer, arguing that the agreement was a bar to the application by UFCW. It was admitted that the application by UFCW was not filed during the "open" period set forth in s. 33(5) of the *Act*. The Board accepted an alternative interpretation that s. 33(5) of the *Act* merely provides a conclusion to s. 6(2) of the *Act* respecting a "raid" application. That is, while s. 6(2) of the *Act* provides that such application by a competing union must be filed during the "open" period and a vote must be held (except in certain circumstances), it is silent on the status of the incumbent union's collective agreement in the event the application by the competing union is successful. Section 33(5) of the *Act* resolves the issue by declaring that the existing agreement is of no force and effect. The Board rejected the argument that s. 33(5) of the *Act* is broad enough to apply to the situation where the incumbent union is not certified. The Board stated, at 95:

> *Where genuine ambiguity exists, as it does here, over the meaning of some portion of The Trade Union Act, the Board's policy has always been to prefer that interpretation which is most in harmony with the objects of the Act. The objects of the Act, or at least one of the fundamental objects of the Act is to place into the hands of employees the right to choose whether or not they wish to be represented by a union and, if so, which union. Numerous provisions of the Act are also designed to prohibit any attempt by the employer to participate in the representation question. It would therefore be completely incongruous with those objects if the board interpreted section 33(5) in a manner that allowed unions and employers to completely bypass the wishes of employees, recognized the participation of the employer's bargaining representative and actually barred employees from exercising their right to bargain collectively through a union of their choice. This is not to suggest that voluntary recognition is prohibited by the Act, but only that much clearer language than is present in Section 33(5) would be necessary before it will be interpreted in the manner suggested by the intervenor.*

[102] The Board came to a similar conclusion in *International Union of Operating Engineers, Hoisting, Portable and Stationary, Local 870 and Construction and General Workers' Union, Local*

890 v. Henuset Pipeline Construction Ltd. and General Workers Union of Canada, Local No. 1, [1991] 4th Quarter Sask. Labour Rep. 64, LRB File Nos. 146-91, 188-91 & 195-91, stating as follows, at 69:

> *Where a union has been certified pursuant to the provisions of the Act, all of the threshold questions with respect to the appropriateness of the unit or employee support are, by definition, answered by the certification order. However, in voluntary recognition situations those questions remain open and, when raised, the Board should not invoke the provisions of The Trade Union Act to provide protection for a voluntarily recognized bargaining relationship which cannot meet the fundamental requirements of Section 3. This does not mean that voluntary agreements that do not meet these standards are ineffectual. Rather, it means that if a union wishes to rely on voluntary recognition, and the consequent collective bargaining agreement, as a Section 33(5) shield to counter the certification application of another union it must, at a minimum, show that the agreement upon which it relies has the support of the "majority of employees" in "the appropriate unit of employees" as referred to in Section 33(5).*
>
> *To interpret the provisions of Section 33(5) otherwise would be inconsistent with the intent of The Trade Union Act and would, in fact, leave the door open for employers and union representatives to bypass the statutory right of employees to be represented by a union of their own choosing in an appropriate unit.*

[103] More recently, in *Grain Services Union (ILWU – Canadian Area) v. Heartland Livestock*, [1996] Sask. L.R.B.R. 161, LRB File No. 287-95 the union sought to invoke union security under s. 36(1) of the *Act* in circumstances where its voluntary recognition collective agreement with the employer did not provide for same, the Board held that the presence of the agreement did not establish the union's representative capacity necessary to invoke union security under the provisions of the *Act*. With respect to the position of a trade union holding such status, the Board stated, at 169:

> *It can be concluded from the cases quoted [including Canada Messenger and Henuset, both supra] that the status of a trade union holding a voluntary recognition agreement is a tenuous one. While some rights in relation to that agreement may be enforceable under the provisions of The Trade Union Act, the right of the trade union to exclusively represent the employees is not statutorily guaranteed under s. 3 of the Act.*

[104] As the cases indicate, to accept that s. 33(5) of the *Act* necessarily constitutes a bar to an application to be certified as the bargaining agent for a unit of employees represented by an uncertified bargaining agent is contrary to the recognition of the fundamental right of employees in an appropriate unit to be represented by the trade union of their choice. For one thing, in the voluntary recognition situation it has not been determined whether the unit of employees represented by the uncertified bargaining agent is an appropriate unit. In the present case the situation has even more serious implications. It is common ground that active production lasted less than one year, and the collective agreement between IATSE 295 and Inconvenience was for a period of less than one year. Under the interpretation urged by counsel for IATSE 295, there would be no open period under s. 33(5) of the *Act* during which a competing union could apply for certification of an appropriate unit. The group of employees represented by Teamsters 395 would be precluded from asserting their statutory rights under the *Act*. While we do not in any way impute any improper motive to IATSE 295 or Inconvenience in agreeing to their arrangement in this case, it is easy to see how an unscrupulous union and employer acting in concert could defeat employees' fundamental statutory right to representation by a certified bargaining agent. Certainly, it was not intended by the legislature that s. 33(5) of the *Act* would result in such a potential source of abuse.

[105] Accordingly, we find that the application for certification by Teamsters 395 is not barred by s. 33(5) of the *Act* and the existence of the voluntary collective agreement between IATSE 295 and Inconvenience.

[106] Pursuant to s. 5(a) of the *Act*, the Board has exclusive jurisdiction to determine whether a proposed unit is appropriate for the purposes of collective bargaining. In referring to the fact that an appropriate unit may be "an employer unit, craft unit, plant unit or a subdivision thereof or some other unit," s. 5(a) of the *Act* recognizes that various types of bargaining units, including ones that may not fit established definitions, may be appropriate for different undertakings for a variety of reasons. Standardized craft units are the norm in the construction industry; modified craft units may pertain in the newspaper and health care industries; manufacturing and industrial plants may have more than one bargaining unit delineated along production and administration lines. Attempts to organize industries that are notoriously difficult to organise, such as the hospitality, retail and banking industries, often result in less than all-employee units or in single-outlet units. Different considerations may apply to initial unit certifications versus subsequent applications for certification.

[107] The fundamental objective in determining an "appropriate unit," as defined in s. 2(a) of the *Act*, is to establish viable and effective collective bargaining. In *Canadian Union of Public Employees and The Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, at 271, the Ontario Labour Relations Board described the purpose of the exercise as follows:

> *Quite simply, it is an effort to inject a public policy component into the initial shaping of the collective bargaining structure, so as to encourage the practice and procedure of collective bargaining and enhance the likelihood of a more viable and harmonious collective bargaining relationship. ...While the requisites for effective collective bargaining cannot always be defined with certainty, may necessitate a balance of competing collective bargaining values, and may, in any event, turn on factors beyond the Board's control, the discretion to frame the "appropriate" bargaining unit during the initial organizing phase provides the Board with an opportunity (albeit perhaps a limited one) to avoid subsequent labour relations problems.*

[108] However, these public policy objectives are numerous and not always easy to reconcile. For example, the objective of encouraging employees to freely choose collective bargaining is often in competition with that of the promotion of industrial stability. Accordingly, while the determination of an appropriate unit is simple in theory, it is complex in execution, and its consequences are potentially fundamental to the tenor of the collective bargaining relationship that follows. The Ontario Labour Relations Board described the challenge of the task as follows, in *International Brotherhood of Electrical Workers, Local 1687, and Kidd Creek Mines Ltd.*, [1984] OLRB Rep. March 481, at 494:

> *...the Board's determination is obviously of immense practical importance, not only for the immediate parties, but for the structure and performance of the collective bargaining system as a whole. The definition of the unit affects the bargaining power of the union and the point of balance it creates with that of the employer. It influences the potential scope and effectiveness of collective bargaining for dealing with different matters, and to some extent, even the substantive issues covered in the collective agreement. And, perhaps most important, the shape of the bargaining unit can*

> *profoundly influence the potential for industrial peace or collective bargaining discord. The more disparate are the interests enclosed within the unit, the more difficult it may be for the union to effectively represent the collectivity. Insufficient attention to these special interests generates internal strife, while too much attention to minorities may make it more difficult for a union to formulate a coherent package of proposals or make necessary concessions. On the other hand there are dangers at the other extreme...*
>
> *The point is that the concept of the appropriate bargaining unit is an instrument of public policy, and in fashioning bargaining units...the Board endeavours to accommodate potentially competing collective bargaining values – including the right to self-organization and the desirability of industrial harmony.*

[109] However, the appropriateness of a bargaining unit cannot be assessed with scientific precision – more than one configuration may be appropriate. The Board is not required to choose the more comprehensive unit, but to choose a unit structure that is appropriate for collective bargaining having particular regard to the facts of the case. IATSE 295 and Inconvenience argued that the unit proposed by Teamsters 395 is not appropriate, and that a more comprehensive unit comprising all "technical" employees is the only appropriate unit for the non-performing and non-management employees on a film production.

[110] In *British Columbia Council of Film Unions, supra*, which created the union council in the film industry in that province, the British Columbia Labour Relations Board referred to the making of films as a "fundamentally unique industry." The British Columbia Board stated, at 16:

> *It is an industry that bears little, if any, similarity to other sectors of the British Columbia economy. It is also an industry which has been having considerable labour relations difficulties in the recent past. Our decision is in the best interest of various parties in the industry itself and the economy of the Province of British Columbia.*

[111] We agree with the sentiment that film production is a singular undertaking. It has developed a unique form of organizing labour and bargaining structures outside the statutory framework of the *Act*.

The film industry shares certain similarities with the construction industry: for instance, employment is of relatively short duration; employees are hired according to their proficiency and experience in a particular craft, coming and going at various times depending on the stage of the production; technical employees are dispatched from a hiring hall; the industry unions have developed some rules for the resolution of jurisdictional disputes; industry unions have standard contracts; and employers seek, and may be granted, concessions to certain clauses in the standard contracts.

[112] In *Henuset Pipeline Construction Ltd., supra*, the Board made the following observation in regard to craft organization in the construction industry, at 67:

> *Employees within a craft unit share a community of interest; they share skills, working conditions, training and union benefit provisions. The character of the employment relationship in construction is dramatically different from that in an industrial setting where all-employee units are typically harboured. In construction, there is no basis for the tenured status which employees enjoy under most collective agreements; there is no basis for the kind of enduring association which a group of employees can form in an all-employee industrial unit. A pipeline construction worker's job is at best fleeting and highly mobile across a wide geographic area; the structure and continuity in his working career necessarily comes from the craft union which represents him.*

[113] The same passage could pertain equally as appropriately to the film production industry. The British Columbia Industrial Relations Council noted the fleeting and highly mobile nature of the industry in *Teamsters Local Union 155, et al. v. Golden Spurs Productions, Limited*, BCIRC No. C145/90 (July 20, 1990):

> *The Teamsters and IATSE agree that the film industry does not lend itself to organizing through the certification process. A typical film shoot is of short duration, even shorter than many construction projects: about six weeks. It is simply impractical to wait until employees are working on the project, sign them up or present their membership cards as evidence of support to a labour relations tribunal, obtain certification, and then attempt to negotiate a collective agreement for the employees. A film production company and its employees have one focus during a film shoot, mainly, making the film; it would be impractical and counterproductive for them to consider a certification*

proceeding as well. Moreover, even of a certification could be granted during the six week shoot, Teamsters and IATSE witnesses testified that it would be impractical to negotiate a collective agreement in the traditional way during that time. The prospect of a work stoppage to obtain desired employment terms and conditions is just not acceptable in the film industry because if that happened, the film would not be made here: the producer would pack up and leave for a more convenient location elsewhere in the world. Moreover, British Columbia's reputation as a film location would sink, hurting Teamster and IATSE members in the long run.

Therefore, voluntary recognition agreements are entered into with a film producer before any employees are actually working on the production. A producer comes to the province, scouts locations, talks to the unions and negotiations begin in that way.

[114] While the Board's general policy prefers more comprehensive bargaining units to those that are less inclusive, the industry has organized itself along broad craft lines into direct, production, art, technical (which, in some jurisdictions, has sub-divided into separate locals representing camera operators and other technicians), and performing categories, in North American jurisdictions. In the United States, British Columbia and Alberta there is also a separate transportation and related services category represented by Teamster locals.[19] The ordinary and usual rules and policies applied by the Board relating to inclusive bargaining units do not fit with the film industry structure and practice, with its craft organization and use of single-purpose corporate vehicles similar to construction joint ventures.

[115] In construction, the impracticality of project-by-project certification, and the instability that the ordinary system entailed, led to sectoral bargaining between the industry unions and representative employers' organizations in Saskatchewan and elsewhere. In *British Columbia Council of Film Unions, supra*, the British Columbia Labour Relations Board found partial sectoral bargaining to be desirable in the film production industry. In Saskatchewan, sectoral bargaining in the construction industry is mandated by *The Construction Industry Labour Relations Act, 1992*, S.S. 1992, c. C-29.11, but there is no such scheme for the film production industry and this Board does not have the jurisdiction to institute such a system.

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[19] In *Golden Spurs Productions, supra,* the British Columbia Industrial Relations Council observed that the Teamsters have represented members in the North American movie industry since the late 1800's and in British Columbia since the early 1960's.

[116] The issue of the appropriateness of the bargaining units sought by Teamsters 395 and IATSE 295 is delicate and has ramifications beyond the immediate interests of the parties that may affect the future configuration of the organization of labour in the industry. Given the process of film production and its customary practice, the general agreement of the stakeholders, and the expectations of employers and workers in the industry, it would be destabilizing to alter the broad craft categories described above. The self-organization of the industry has operated with relative stability with the broad consensus of the parties involved. Accepting that a bargaining unit comprising technicians is appropriate we must decide whether the smaller unit proposed by Teamsters 395 is also an appropriate unit and for labour relations reasons should be certified.

[117] In *Hotel Employees and Restaurant Employees, Local 767 v. Courtyard Inns Ltd.*, [1988] Winter Sask. Labour Rep. 51, LRB File No. 116-88, the Board summarized some of the factors considered in determining whether a unit is appropriate, at 51:

> *...the Board considers a number of factors, including whether the proposed unit would be viable, whether it would contribute to industrial stability, whether groups of employees have a particular community of interest, whether the proposed unit would interfere with lateral mobility among employees, historical patterns of organization in the particular industry, and other concerns of the employees, the union and the employer.*

[118] As described earlier, the effect of the British Columbia Labour Relation Board's decision in *B.C. Council of Film Unions, supra*, was to create a council comprising three trade unions. It based its decision on the fact that other unions that were party to the application did not have a presence in big-budget film production, but it retained jurisdiction to amend the council's structure and the scope of its exclusive jurisdiction, recognizing that future adjustments might be necessary.

[119] The evidence established that Teamsters 155 represents the vehicle and equipment drivers, caterers, outside security, animal trainers and wranglers in B.C. Teamsters 362 represents employees performing the transportation and animal wrangling functions in Alberta. In Saskatchewan, IATSE 295 has represented most, if not all, technical employees including those performing transportation functions, in the south half of the province. It is not clear what the situation is in the north half of the province, or whether IATSE 295 has ever represented animal wranglers.

[120] The evidence also establishes that Teamster 395 has many members that are trained and licensed and have the demonstrated expertise to operate a variety of vehicles and equipment and to transport all manner of goods and materials (including dangerous goods and hazardous materials) and people. The specialization of its members has been recognized in many certification orders granted to Teamsters 395 bargaining units in construction and transportation. It now seeks to represent a unit of transportation employees in the film production industry, plus animal wranglers. Teamsters 395 periodically offers specialty and safety training courses for its members. It maintains a hiring hall and has established benefits programs for its members.

[121] IATSE 295 has represented film production transportation department employees since 1996. Although the evidence does not disclose the actual number of larger budget productions in the province, they appear to be relatively uncommon. When two such productions overlapped, there was a shortage of drivers that were IATSE members. Teamsters 155 members came to work and, although they were permitted by IATSE 295, they were paid British Columbia Teamster standard agreement rates and had their union dues submitted to Teamsters 155.

[122] The transportation department employees have a community of interest quite apart from that which they share with other film technicians, particularly respecting issues like hours of work, standby time, safety, training and the development of a pool of specialized equipment. The certification of similar units in British Columbia and Alberta has not led to "chaos in the industry." It may be argued that the formal rationalization of the technical employee bargaining units by the British Columbia and Alberta Labour Relations Boards has served to resolve jurisdictional issues between the unions and in turn nurtured a more harmonious labour environment attractive to industry producers. The unions have managed to overcome the problems that arise from time to time at their jurisdictional interfaces, just as IATSE and the Directors Guild have apparently done so in Saskatchewan.

[123] The viability of a transportation bargaining unit in the industry has been generally demonstrated by the experience in British Columbia and Alberta. It is not difficult to understand the bargaining power possessed by those employees that control the movement of most of the material and people necessary to a production. A rational and defensible boundary may be drawn around such a unit. To adopt the phrase used by the Board in *Construction and General Workers Union, Local 180 v.*

Saskatchewan Writers Guild, [1998] Sask. L.R.B.R. 107, LRB File No. 361-97, at 111, "the unit applied for is sufficiently appropriate to permit collective bargaining on a rational basis."

[124] We are of the opinion that a bargaining unit composed of transportation department employees on the production of *Inconvenienced* is appropriate for collective bargaining and a rational boundary can be drawn around it – that is, those employees whose primary responsibility is to operate, or to co-ordinate the operation, commissioning, maintenance, assignment and ancillary administration of, vehicles and transportation equipment for the movement and handling of goods, materials and people: transportation co-ordinator; transport captain, transport captain trainee and drivers (all classes). It does not include employees whose job duties are not primarily focused on such activity but who have some measure of driving to perform incidental to their main activity. There were no animal trainers, wranglers or boat wranglers employed on the production, and thus we decline to include those classifications in the unit description.

[125] It is also our opinion that a bargaining unit composed of all film technicians, except those in the transportation department as described above, is also an appropriate unit within the meaning of the *Act*.

[126] In relation to the transportation bargaining unit, we find that the first statement of employment is more accurate with certain exceptions. The parties agreed that Mr. Huffman should be removed. The employment records of Ms. Ehrlich and Ms. Stelter lead us to determine that neither was employed on the date that the application was filed. Their names will be deleted.

[127] Fred Moroz and Ryan Moroz are properly included on the statement of employment. They were listed on the initial statement as "drivers." The primary focus of their responsibilities was the movement and maintenance of their vehicles, and it is the longstanding custom in the industry that such trailer drivers come under the classifications and rates of drivers in the transportation department of a film production.

[128] We do not agree that Mr. Demaer should be removed from the statement of employment. While the time worked by Mr. Demaer was intermittent, he maintained a tangible employment connection with the production across the date the application was filed.

[129] Accordingly, there are 14 names on the statement of employment for the purposes of determining the level of support for the Teamsters 395 application, as follows:

Sheila Richards	Bill Lewis
Lorne Kurtz	Rennal Demmans
Jason Richards	Wally McDonald
Tom Caldwell	Chuck Scorgie
Kevin McCluskey	Danne Schlosser
Shanna Marie Richards	Fred Moroz
Ryan Moroz	Gerard Demaer

[130] Teamsters 395 has filed evidence of the support for its application of a majority of the employees in the appropriate unit.

[131] IATSE 295 filed a notice of intervention claiming that it represented the majority of employees in a proposed unit of film production technicians, including the employees in the bargaining unit proposed by Teamsters 395. At the same time, it filed evidence of support among the employees. While we have determined that a bargaining unit comprising all technicians, with the exception of those in the unit represented by Teamsters 395, is an appropriate unit, an issue has been raised by Teamsters 395 concerning the legitimacy of the evidence of support filed by IATSE 295 on its intervenor application. Another issue was raised by the Directors Guild which claims to represent persons in three of the classifications sought by IATSE 295, namely, production co-ordinator, production secretary and production assistant; while the letter of amendment to the IATSE 295 collective agreement with Inconvenience purports to exclude these positions from the scope of the agreement (see, para. 63, *supra*, and para. 134, *infra*) it did not seek to amend its application for certification to delete them.

[132] The objections to support evidence are made on two grounds: that the evidence of support should not be accepted as it was filed after Teamsters 395 filed its application for certification and in the alternative, that it is not sufficient in the sense that it is not in acceptable form. The first of these objections is rendered essentially inconsequential in that we have determined that the unit applied for by Teamsters 395 is an appropriate unit. However, on the basis of the decisions of the Board in *Construction and General Workers Union and Construction Workers Association (CLAC), Local 151 v. Salem Industries Canada Ltd.*, [1986] June Sask. Labour Rep. 69, LRB File Nos. 033-86 & 044-86;

International Union of Operating Engineers, Local 870 v. Penn-Co Construction Ltd. and Construction Workers Association, Local 151, [1990] Summer Sask. Labour Rep. 39, LRB File No. 187-89, we have determined that any evidence of support for the application by IATSE 295 from among those employees in the Teamsters 395 bargaining unit will not be considered in the determination of the level of support for the application by IATSE 295.

[133] The second ground raised a concern about the sufficiency of IATSE's support evidence. The evidence of support came in three basic forms. One form was for permittees of IATSE 295 and the other two forms were for full members of IATSE 295 or other IATSE locals. The objection was raised in regards to one of the membership forms which provided as follows:

> *I, _____, am a member in good standing with The International Alliance of Theatrical Stage Employees, Motion Picture Technicians, Artists and Allied Crafts of The United States and Canada, Local 295 (IATSE Local 295). And as such I have been a member since (Year)_____, (Month)_____. I hereby recognize IATSE Local 295 to be my only collective bargaining unit for the purpose of motion picture production within the jurisdictional and geographical limits of this local's constitutionally mandated area (Southern Saskatchewan). I hereby authorize IATSE Local 295 to act as my only collective bargaining unit for future employment provided by the following employers: (To include, but not limited by, the parent companies, subsidiary companies, corporate mergers, single-purpose production companies, off-shore service productions where the below listed production companies are the Saskatchewan producers, or any other production entity where the parent company has controlling interests in the said productions.)*
>
> (Follows, a list of companies, including "Mind's Eye Pictures").
>
> *I hereby acknowledge that this document expires July 31, 2000, however if I wish to no longer recognize IATSE Local 295 as my collective bargaining unit I will do so in writing and forward it to the IATSE 295 office by registered mail.*
>
> *"Signed and Dated"*

[134] It is unnecessary for us to determine whether this form is sufficient as evidence of support for the application by IATSE 295. Whether or not we accept any of the cards in this form, IATSE 295 has filed evidence of majority support for a unit of technicians including employees in the following classifications:

Department	Classification
Continuity	Script Supervisor
Construction	Construction Manager Head Carpenter Assistant Head Carpenter Carpenter Assistant Carpenter Construction Buyer Labourer
Craft services	Co-ordinator with First Aid Craft Services Assistant
Electric	Gaffer Best Boy Electric Generator Operator
Grip	Key/Rigging/Dolly Best Boy Grip Company Grip
Hair	Key Hairdresser Hairdresser SFX/Period/Prosthetics
Makeup	Key Makeup Makeup SFX/Period/Prosthetics
Props/Sets	Props Master/Maker Set decorator Lead Props/Buyer Lead Dresser/Buyer Picture Vehicle Co-ordinator Propsperson Set Dresser

Production	Production Co-ordinator Production Secretary Production Assistant (all categories)
Projection	Dailies Projectionist
Scenic Artists	Key Scenic Artist Scenic Artist Sign Painter Painter Assistant Painter
Sound	Production Mixer Boom Operator Cable Puller
Special Effects	Co-ordinator Key Special Effects 1st Assistant 2nd Assistant
Wardrobe	Designer Assistant Designer/Co-ordinator Cutter Set Supervisor Costumer Seamstress Dresser Breakdown Artist/Dyer

[135] In addition, IATSE 295 has filed evidence of majority support for a unit of technicians whether or not the persons in the classifications of production co-ordinator, production secretary and production assistant are considered. In view of the issue raised by the Directors Guild with respect to the representation by IATSE 295 of the persons in these classifications, the certification Order for a bargaining unit represented by IATSE 295 shall be an interim Order and shall not include these classifications. There will be a further hearing with respect to the status of the positions in dispute.

[136] It is common ground that film productions often change locations or shoot in more than one location simultaneously (i.e., second unit production). It is reasonable that the jurisdiction of a certification order should apply to the geographic jurisdiction of the union in Saskatchewan. In the case of Teamsters 395, this covers the whole province. In the case of IATSE 295, it is the area south of the 51st parallel.

[137] The issue of related or common employers in the film industry has not been the subject of a detailed published analysis by a labour board. In *British Columbia Council of Film Unions, supra*, at 12, the British Columbia Labour Relations Board states that while the major industry producers negotiate the master agreements with the council members they are not "employers" for labour relations purposes: the employers are the single-purpose production companies that sign a letter of adherence to the master agreement.

[138] In a case decided a year earlier, *ACTRA B.C. Performers Guild and Union of B.C. Performers v. Are We Having Fun Yet? Productions, Inc.*, [1994] BCLRB No. B227/94, the B.C. Board considered the application to certify three wholly owned British Columbia production shelf company subsidiaries of Republic Pictures Productions Inc., an American industry major producer. While the B.C. Board used the fact of common ownership and control by Republic to find that the subsidiaries were related for labour relations purposes, Republic itself was not included in the declaration. The B.C. Board noted that because Republic had no presence in British Columbia other than through the shelf companies it was not a "provincial employer" and could not be subject to the certification orders of the Board. The B.C. Board further noted that Republic was not an unscrupulous employer trying to defeat bargaining obligations and it does not appear to have been a party to the application in any event. But it is not clear from the decision whether the B.C. Board would have otherwise included Republic as an employer, and the Unions do not appear to have argued the point. Perhaps the lack of apparent issue regarding entities other than the production company vehicle as employers for labour relations purposes is because the industry unions have only been interested in securing work for their members and ensuring that they are paid for their labour. It seems that it is only in those uncommon instances where the major studio has not used the vehicle of a single-purpose production company that such entities directly enter into voluntary collective agreements. The industry unions, other than ACTRA and others representing on-camera performers, do not appear to have taken much of an interest in small budget productions.

[139] The customary system of utilizing a single-purpose production company facilitates productions by the major studios and producers who find the Canadian jurisdictions financially favourable. The more pictures made in Canada, the better for the industry unions and their members. Because of the concentrated effort and sometimes-enormous sums involved in major productions, work stoppage would be disastrous. Major producers are highly motivated to ensure their relationships with the unions are harmonious. The industry majors and the industry unions have a long history of relatively co-operative and mutually beneficial labour relations. There is no evidence that the single-purpose production

company vehicle has been used by the majors (and in the present case, RMP o/a Minds Eye Pictures) as a method to escape collective bargaining obligations. That is not to say that an unscrupulous employer could not attempt to do so, for, as was stated by the B.C. Board in *Are We Having Fun Yet? Productions, Inc., supra*, at 21, "employers do not suffer from a shortfall of imagination when it comes to corporate structures." But there is no evidence of any invidious motive in the present case.

[140] In this case, Inconvenience undertook the production of the film on a unionized basis. Inconvenience, not RMP, Mind's Eye Pictures, nor Trimark, negotiated and signed the collective agreements with IATSE 295, the Directors Guild and ACTRA. Inconvenience negotiated the individual deal memoranda with the employees. Inconvenience was paymaster and remitted the deductions for union dues and benefits plans, and paid the administrative fees and employer's benefit plan contributions. There is no doubt that there is considerable shareholder, director and administrative overlap between Inconvenience and RMP, and there is no doubt that Trimark retained ultimate financial and artistic control of the project. There are a number of factors that might tend to indicate that there is common control for labour relations purposes or that one or more of the companies is related within the meaning of the *Act*.

[141] However, no labour relations purpose was advanced by the unions in the present case for the designation of parties other than Inconvenience as the employer. There are no longer any employees connected with the production of *Inconvenienced*. No evidence was presented of an attempt to garner support from among the employees of RMP or Minds Eye Pictures that were not connected with the production of *Inconvenienced*. Trimark, like Republic Pictures in *Are We Having Fun Yet? Productions, Inc., supra*, is not an employer in Saskatchewan. It may be necessary, important or prudent in some future case to determine that entities other than the direct production vehicle are common or related employers but it is of no practical use in the present circumstances. Accordingly, the certification Order and interim certification Order to issue for the bargaining units represented respectively by Teamsters 395 and IATSE 295 will reflect simply that the employer is Inconvenience. The Board Registrar is directed to schedule a hearing of the issue raised by the Directors Guild regarding jurisdiction in relation to the production co-ordinator, production secretary and production assistant positions, and to arrange a pre-hearing meeting of the parties with respect to same.

[142] We thank counsel for all parties for their professional presentation of the case and the obvious effort devoted to their briefs which assisted us enormously in making our decision.