In the Supreme Court

Before: Smith, C.J., Parnell and Rowe JJ.

Suit No. M 026 of 1978

R. v. The Minister of Labour and Employment
Ex parte The National Workers Union

K.D. St. A. Knight for Applicant

Dennis Edmunds for Respondent

F.M.G. Phipps, Q.C. and Earl DeLisser for Bustamante Industrial Trade Union.

1978. June 19, ~~September~~ October 13

Smith, C.J.

The applicant is a trade union which, since 1975, held bargaining rights in respect of the clerical, technical and supervisory workers employed at the Long Pond estate and sugar factory at Clark's Town, Trelawny. The applicant union (the NWU) was advised by the Ministry of Labour, by letter dated February 24, 1978, that the Bustamante Industrial Trade Union (the BITU) had submitted a claim for bargaining rights in respect of the category of workers for whom the NWU held those rights. Subsequently, by letter dated April 28, 1978, the NWU was advised that the Minister was satisfied that a prima facie case had been made out by the BITU and had decided to cause a ballot to be taken. Arrangements were made for the ballot to be taken on May 5, 1978, and the NWU was so advised. On May 5, 1978, White, J. granted leave to the NWU to apply for an order of certiorari to quash the order and/or direction and/or decision made by the Minister for the taking of the ballot and ordered a stay in the proceedings for the taking of the ballot. / ....

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The Minister's authority is derived from s. 5(1) of the Labour Relations and Industrial Disputes Act (the Act), which provides as follows :

> " If there is any doubt or dispute -
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> (a) as to whether the workers, or a particular category of the workers, in the employment of an employer wish any, and if so which, trade union to have bargaining rights in relation to them; or
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> (b) as to which of two or more trade unions claiming bargaining rights in relation to such workers or category of workers should be recognized as having such bargaining rights,
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> the Minister may cause a ballot of such workers or category of workers to be taken for the purpose of determining the matter. "

As an extension of a worker's constitutional right to belong to a trade union for the protection of his interests, s. 4(1) of the Act provides as follows :

> "Every worker shall, as between himself and his employer, have the right -
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> (a) to be a member of such trade union as he may choose ;
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> (b) to take part, at any appropriate time, in the activities of any trade union of which he is a member. "

Long Pond estate and sugar factory were formerly owned by Trelawny Estates Ltd. Ownership of the factory and estate was transferred to the Long Pond Sugar Company Ltd. (the Company), which became responsible for the employment of the workers from January 13, 1978. The Company is a subsidiary of the National Sugar Company Ltd. A collective agreement, as defined in the Act, between Trelawny Estates Ltd. and the NWU was signed on July 8, 1977 in respect of the category of workers employed by that company at its estate and factory for whom the NWU held bargaining rights.

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The duration of the agreement was stated to be :

> " for a period of one (1) year to the 11th December, 1976. It shall continue thereafter from year to year unless amended by agreement. "

In support of its application for an order of certiorari, the NWU relied on two grounds. The first was that the Minister acted without jurisdiction or power and in breach of the Act in ordering, directing or deciding that a ballot be taken "in that there is and was at all material times in force between the applicant and Trelawny Estates/Long Pond Sugar Co. Ltd. a Collective Labour Agreement containing the terms and conditions of employment of the workers in relation to whom the request for the ballot was made and which remains in force indefinitely or alternatively until the 11th of December, 1978 and under the ..... Act and the Regulations thereunder the Minister ..... is prohibited from causing a ballot to be taken earlier than 90 days before the date on which the Collective Labour Agreement is due to expire, that is to say, the .... Minister .... had no authority to order, direct or decide to take a ballot at any time or alternatively before the 12th day of September, 1978."

The "collective labour agreement" to which reference is made is the collective agreement signed on July 8, 1977. This agreement was exhibited. For purposes of its application, the NWU had to establish that there was, in April and May, 1978, a collective agreement in existence between the Company and itself. This it could not do by relying on the agreement of July 8, 1977 as the Company was not a party to that agreement and there was no evidence of an

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assignment to the Company by Trelawny Estates Ltd. When learned counsel for the NWU ran into difficulties in his argument on this point, the Court suggested that it may be possible to obtain a concession from counsel opposing him. A concession was made, quite properly in the Court's view, which, with the wide terms of the definition of "collective agreement" in the Act, enabled counsel to continue his argument.

Under powers contained in s. 27 of the Act, the Minister made the Labour Relations and Industrial Disputes Regulations, 1975. These regulations prescribed the conditions subject to which ballots under the Act shall be taken and the procedure for the taking of them. Regulation 3(4)(a) provides as follows :

> "If any collective agreement containing the terms and conditions of employment of the workers in relation to whom the request for the ballot has been made is in force -
>
> (a) the Minister shall not cause the ballot to be taken earlier than ninety days before the date on which that collective agreement is due to expire."

The argument for the NWU proceeded on the basis that the duration of the "collective agreement" existing between the Company and the NWU was as stated in the agreement of July 8, 1977. There had been no amendment of the agreement in this respect.

It was submitted that an agreement subsists indefinitely if its duration is stated to be for a year certain and to "continue thereafter from year to year." This submission is supported by reference to the law of landlord and tenant and is clearly right.

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From this, it was contended that the collective agreement between the Company and the NWU had no expiry date, so the Minister had no power to give directions for the ballot to be taken in view of the provisions of regulation 3(4)(a). The effect of this contention is that the Minister has, by the regulations which he made under powers contained in the Act, divested himself of the power vested in him by s. 5(1) of the Act. The contention is clearly untenable.

In s. 5(9) of the Act it is provided that, subject to sub- sections (2), (3) and (4) of the section,"every ballot under (the) Act shall be taken in accordance with such procedure and subject to such conditions as shall be prescribed." The Minister is authorised by s. 27 to prescribe the procedure and conditions by regulations. It is plain that it was contemplated by the legislature that the Minister should be free to regulate the circumstances under which he exercises the authority given to him by s. 5(1). Having regard to the scheme and purpose of the Act, one would expect that the conditions prescribed would be such as were likely to promote and encourage industrial peace. It is, therefore, not unreasonable that a limit should be placed on the frequency of claims for bargaining rights in respect of workers in an industry where there is a collective agreement in force in relation to them. This is what the Minister sought to regulate by the provisions of regulation 3(4)(a). However, the Minister has no authority to prescribe any condition which would have the effect of postponing the exercise of his powers under s. 5(1) indefinitely. Any regulation containing such a

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condition would be clearly ultra vires and would not be binding on the Minister.

Collective agreements with no fixed expiry dates must have been overlooked when the provisions of regulation 3(4)(a) were being drafted. I am informed that, since the decision in this case, the regulation has been appropriately amended. The contention of counsel, that regulation 3(4)(a), in the terms quoted above, deprived the Minister of his power to give directions for the ballot in this case to be taken, is untenable on either of two alternative grounds. Firstly, it can be said that the regulation, in terms, applies only to collective agreements with fixed expiry dates. Alternatively, that insofar as the regulation can be said to postpone the exercise of the Minister's powers under s. 5(1) indefinitely, the regulation is ultra vires. In either case, the Minister was free to act under the section and to give the directions that he gave for the taking of the ballot.

In addition to the workers employed to the Company, the NWU held bargaining rights for the same category of workers employed to Grays Inn Sugar Factory Ltd., St. Elizabeth Sugar Company Ltd. and Jamaica Sugar Manufacturing Company Ltd. These companies, like the Long Pond Sugar Company Ltd., are subsidiaries of the National Sugar Company Ltd. The factories and estates owned by these subsidiary companies, where the workers are employed, are all situate in different parishes. The subsidiary companies are members of the Sugar Producers' Federation of Jamaica (the Federation), which is the negotiating agent for its member companies in industrial relation matters. In November, 1977, the Federation and the NWU

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agreed that all the estates and factories owned by the subsidiary companies of the National Sugar Company Ltd. for which the NWU held bargaining rights, in respect of the category of workers with which we are here concerned, should be treated as one bargaining unit for the purposes of representation and negotiation.

Based on the agreement to which reference has just been made, the NWU contended, as the second ground in support of its application, that the Minister "had no power or jurisdiction and, therefore, acted ultra vires in ordering, directing or deciding that a ballot be taken in that the list of persons for whom the ballot is ordered to be taken is part only of the bargaining unit and the ...... Minister .... failed to settle the dispute in manner provided by section 5 of the ..... Act." The NWU claimed, in a letter to the Minister dated May 1, 1978, that the bargaining unit included the relevant workers of all the subsidiary companies, therefore the list of workers among whom the poll would be taken should not be confined to the employees of the Long Pond Sugar Company Ltd. It was claimed that a dispute existed in respect of the list of workers and that this dispute should be settled as provided in s. 5(3) of the Act before the ballot could be taken.

Learned counsel for the NWU, quite rightly, abandoned his argument in support of this second contention when he referred to the definition of "bargaining unit" in s. 2 of the Act. There was a separate collective agreement in existence in respect of the workers employed to each of the subsidiary companies and it is clear from the

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definition of "bargaining unit" that the workers at each estate and factory was a separate bargaining unit. All that the agreement of November, 1977 between the NWU and the Federation did was to establish a collective bargaining unit.

The application was devoid of merit. It is for the above reasons that I agreed that the application should be refused.

Parnell, J.

On the 19th June, we unanimously dismissed the application with costs to the respondent. The Bustamante Industrial Trade Union was admitted by us to take part in the proceedings as an interested party. We ordered the applicant to pay the costs of the B.I.T.U.

I was not surprised when Mr. Knight capitulated in mid stream. He conceded during his arguments - and these were tested by members of the Court as he went along - that he could not usefully carry his burden any further. In my view, it was a correct concession. The applicant had undertaken an impossible task. And in this case Mr. Knight demonstrated that he is aware of the simple adage of advocacy, namely, that there is a limit to the urging of an untenable argument particularly where its apparent absurdity or illogicality becomes clearer with every passing second.

I have had an opportunity of reading in draft, the reasons of the Chief Justice why the Court refused the application. I entirely agree with his reasoning and would have adopted it as my own. However, as the point raised is a matter of great public importance

particularly in the industrial field of the country. I shall use this opportunity to make a few observations of my own. In doing this, I shall not be detailed in referring to the facts which have given rise to these proceedings. Behind it all is the force of trade union rivalry which for years has been a marked feature of life in Jamaica. It is an exercise which is permissible within certain acceptable limits.

National Workers Union makes claim

Since 1975, the N.W.U. held bargaining rights in respect of certain employees employed to the Trelawny Estates Limited. But that Company no longer exists. Its interest, assets and concern are now under the ownership of Long Pond Sugar Company Limited which was incorporated on June 16, 1977. Long Pond Sugar Company Limited is a subsidiary of National Sugar Company Limited.

The following facts and events are not in dispute:

(1) The N.W.U. was recognized as the bargaining agent of certain workers at Trelawny Estates as a result of a representational rights poll held on November 26, 1975.

(2) Under an award of the Industrial Disputes Tribunal, the recognition was made to be for one year commencing on December 11, 1975.

(3) On the 8th July, 1977, an agreement was executed between the N.W.U. and Trelawny Estates Limited whereby the Union was recognized as the bargaining agent of the workers. There is the following clause in the agreement:

> " This agreement shall be for a period of one (1) year to the 11th December, 1976. It shall continue thereafter from year to year unless amended by agreement."

It is to be observed that on July 8, 1977, the "one year duration" had already expired. What was keeping the contract or agreement alive for approximately 7 months was that part of the duration clause which states:

on a statutory basis. Whatever may have been the understanding before, it has been made very clear in the Act and in the Regulations that a trade union as a bargaining agent is in fact the free choice of the majority of the workers at a plant. And in the capacity of a representative for the workers, that trade union may be changed by the ballot after a reasonable period has elapsed. The trade union cannot manipulate itself in power, indefinitely at a work place. Nor can it resort to a formula in the drafting of any collective agreement so as to defeat the statutory right of the workers to effect a change within the period which the law allows them. And the policing of the right of the workers, the controlling of industrial peace and the restraining of exuberance on the part of the workers and the calming of resolution on the part of the trade union official, have been entrusted to the Minister in charge of labour relations. Wide powers have been conferred on him in the public interest.

Prima facie case made out

On the 28th April, 1978, the Permanent Secretary wrote Vice President Thompson of the N.W.U. and informed him, inter alia, that:

> " The Bustamante Industrial Trade Union has served a claim on Trelawny Estates Limited........ dated 14th November, 1977 and has requested that a ballot be taken of the said categories. The Minister is satisfied that a prima facie case has been made out and has decided to cause a ballot to be taken of the abovementioned categories. Further communication on the matter will be addressed to you."

The "further communication" was made on the 2nd May, 1978, when the Permanent Secretary wrote a lengthy letter to Mr. Thompson. The third paragraph of the letter states as follows:

> " I am to inform you that a ballot in respect of the abovementioned claim will be conducted on the 5th May, 1978, between the hours of 10:30 a.m. and 4 p.m. at Long Pond Sugar Factory Company Limited, Clarks Town, Trelawny."

Two matters should be adverted to at this stage. Firstly, the call of the B.I.T.U. that a poll should be taken to determine representational rights at Long Pond Sugar Factory was nearly six

(6) months old. During this time the delay would have caused a certain amount of tension and fraying of nerves. What is properly called "industrial action" must have been near eruption when the letter was written. Secondly, by virtue of an "open-end" contract clause which was running for nearly 18 months, the N.W.U. was claiming the right to resist the holding of the poll.

Strategic move by applicant

On the 4th May, the applicant filed in the registry of the Supreme Court an ex-parte application seeking leave to apply for an order to quash the decision of the Minister to order a poll. On the morning of May 5, while polling was taking place, White, J granted the application and ordered a stay of all proceedings pursuant to the decision of the Minister that a ballot be taken on the very day the judge made the order.

I make no criticism of the order nisi which was made. But I do say that the learned judge in his anxiety to maintain the original position until a Bench of three judges should decide the issue, gave the applicant an opportunity to do some fishing without any merit. If I had heard the application I have grave doubts whether the applicant would have been allowed to question the determination of the Minister by the avenue of these proceedings.

Grounds on which relief sought

It was urged in the application before White, J and contended before us :

(1) That the collective agreement between the applicant and Trelawny Estates Limited (now Long Pond Sugar Company Limited) was in force indefinitely or alternatively until December 11, 1978;

(2) That the Minister could not call a poll earlier than 90 days before the date of the expiration of the agreement;

(3) That the list of persons for whom the ballot was ordered was only part of the bargaining unit and as this was not settled, no poll could be held to determine representational rights.

Meaning of "year to year" in duration clause

Relying on the Dictionary of English Law by Lord Jowit and a passage in Woodfall's Law of Landlord and Tenant, Mr. Knight submitted that the term "year to year" in the collective agreement means either that the contract subsists continuously and it so continues unless it is amended by agreement to show an expiry date, or the expiry date must be observed on the next anniversary of the agreement, namely, at mid-night of December 10, 1978. He contended that if the alternative meaning is to be preferred in place of the first which has no ending, then ordering a poll for May 5, 1978, would be in conflict with the regulation which states that it should not be held earlier than 90 days before December 11, 1978.

On the face of it, the argument sounds attractive when uttered but it is based, with respect, on fallacious reasoning. An argument based on the analogy of a landlord and tenant agreement, has no place when one is dealing with a labour agreement designed to maintain peace and harmony on the industrial front and to encourage production in a sagging economy. Professor Rupert Cross in his book Precedent in English Law (1961) has this to say at page 216:

> " The danger of reasoning by analogy is that the fact that the case is marginal may be overlooked............ It is fatally easy to adopt some such line of reasoning as the following: the instant case is concerned with the meaning of such and such an expression. That expression was interpreted in such a way in a previous case, therefore that interpretation should be applied in the instant case. It is unnecessary to enlarge upon the evils of such an approach."

Argument ignores a statutory right

It is believed that long before the Labour Relations and Industrial Disputes Act of 1975 came into force, collective agreements of the kind before us were executed by trade unions and employers. It is my opinion that whatever may have been its efficacy before the coming into force of the Act, an agreement with an open expiry date has lost its potency and utility as to duration under the Act itself. If not expressly then impliedly Parliament has legislated against a collective agreement with an

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open expiry date. My reasons for coming to this conclusion are as follows:

(1) The Constitution has entrenched the right of a worker to associate with others to form or belong to a trade union. But the right of a worker to demand his employer to recognise the trade union of his choice is not mentioned in the Constitution.

(2) Under Section 4(1) of the Labour Relations and Industrial Disputes Act every worker is given the right as between himself and his employer to be a member of the trade union of his choice and to take part in the activities of his trade union.

The employer is bound to recognise the trade union selected by the worker. The right is put on a statutory basis for the first time in Jamaica.

(3) Under Section 5(1) of the Act, the Minister may cause a ballot to be taken at a work place if there is any doubt or dispute as to which of two or more trade unions claiming bargaining rights should be recognised as having such rights.

Under this section, Parliament having taken note that trade union rivalry is rampant in the Country, has made specific provision as to the method a dispute or doubt as to rival claims should be settled. And a claimant may be a trade union which holds bargaining rights under an agreement with an open expiry date.

(4) The definition of "collective agreement" in section 2 of the Act presupposes that a definite expiry date should be mentioned or understood between the parties. It is idle to argue that in whatever form the agreement is made, although the statute requires -

> " wholly or in part, the terms and conditions of employment of workers of one or more categories"

should be contained, this requirement is sufficiently fulfilled

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if the duration of the agreement is left wide open. Such a view would ignore the statutory recognition of "rivalry" between trade unions to which I have referred.

(5) Regulation 3(4)(a) of the Labour Relations and Industrial Disputes Regulations states:

> " the Minister shall not cause the ballot to be taken earlier than ninety days before the date on which that collective agreement is due to expire."

I interpret (5) above to mean that a collective agreement made since the Act came into force must have an expiry date. And if the Minister finds in his path the ghost of one with an "open-end", he may pass undeterred and order a poll.

(6) For the purpose of promoting good labour relations, section 3(1) of the Act has authorised the Minister to prepare a labour relations code. The draft code was approved by the House of Representatives on July 20, 1976, and by the Senate on August 6, 1976. It was published in the Jamaica Gazette Supplement on September 30, 1976.

Paragraph 18 of the Code deals with Collective Agreements. A substantive provision which is required to be inserted therein, is the duration of the agreement. And in order that the Minister may be informed as to what is happening, paragraph 18(iv) of the Code states as follows:

> " Collective Agreements should be in writing, and management should send copies of such agreements to the Ministry of Labour and Employment for their records."

A contract with its duration unlimited is bound to cause friction, encourage chaos and to restrict reasonable rivalry among trade unions. In the hands of intractable and frustrated trade union officers, an agreement with its duration unlimited could be used as a weapon of obstruction and defiance to the prejudice of the very workers whom they seek to serve. But at a later date he who was a defiant giant at one time could be a lamb in the face of a rival waving his "open end" contract and barring the entry of the lamb into an area where he is [illegible]

Legal position elsewhere

My research has disclosed that a collective agreement with an open end as to duration, is not common to Jamaica. In Ontario, Canada, legislation has made provision to deal with such an agreement. The Labour Relations Act of Ontario (See 1950, Revised Laws, Vol.2), provides as follows in section 37(1):

> " If a collective agreement made before or after the 1st day of September, 1950, does not provide for its term of operation or for a term less than one year, it shall be deemed to provide for its operation for a term of one year from the date that it commenced to operate."

And a lengthy provision is made in section 40(2) of the said Act to deal with a collective agreement expressed for a term of one year and thereafter to continue to operate for a further term of one year or for successive terms of one year if either party fails to give to the other party notice of termination. In such a case, a rival trade union is permitted to apply for certification as bargaining agent after the agreement has been in operation for ten months or during a two month period at the end of each year that the agreement continues to operate.

Summary of the legal position

(1) It is my view that a collective agreement with no fixed expiry date has no relevance today in the light of the Act and the Regulations.

(2) Where one is found and relied on, the duration is controlled by the Act and the Regulations. The Minister may call a poll after a reasonable time has run and where the Minister is satisfied that at least 40% of the workers are prepared to support another union as their bargaining agent .

(3) No collective agreement should be permitted where it does not show an expiry date.

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(4) No device or strategy should be allowed into a collective agreement which is designed to defeat the right of the workers to change their bargaining agent. The operation of trade unionism must be regarded as part of the democratic process of the country.

Sometime after we delivered our judgment on June 19, with a promise to put our reasons in writing, it was announced that the Minister has decided to put an end to the execution of a collective agreement with no fixed expiry date. I think this is a wise move. It is in accordance with the intention of Parliament and is clearly in the interest of the public and of trade unionists that the obsequies of the "open end" clause should be observed once and for all.

Rowe, J.

I have read the judgment of Smith, C.J. and as I agree with it in its entirety and am of opinion that it covers all the issues raised in the application, I have nothing to add.

> " it shall continue thereafter from year
> to year unless amended by agreement."

Paragraph 3 of the Affidavit of Mr. H. O. Thompson, a Vice President of the applicant union, refers to the duration clause as follows:

> " The said agreement is and has at all material
> times been treated and acted on by the parties
> thereto as an open-end contract to subsist
> until the same is amended by agreement. There
> has been no agreement to amend same."

It seems that the Vice President has taken the view - presumably on advice - that a magical formula having been inserted into the duration clause, and there being no agreement to amend, the collective agreement has the potency to run forever. Like Tennyson's "Brook":

> "men may come and men may go,
> But I go on for ever."

<u>A rival union appears</u>

On the 14th November, 1977, the Bustamante Industrial Trade Union served a claim on the Trelawny Estates Limited and requested that a ballot be taken of the workers to support its claim. In order to make the bid for a ballot to determine representational rights, certain preliminaries are required to be satisfied. These are outlined in Regulation 3 of the Labour Relations and Industrial Disputes Regulations, 1975. Two of the preliminaries are as follows:

(a) At least forty (40) per cent of the work force to be represented must indicate that they wish the rival union to represent them.

(b) If any collective agreement held by another trade union in relation to the workers in question is in force, then no ballot is to be taken earlier than ninety days before the date on which that collective agreement is due to expire.

I call these factors outlined above nothing less than clear evidence that Parliament under the Labour Relations and Industrial Disputes Act and in the Regulations made thereunder has put the

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Mr. Knight faced his obstacles with tenacity. He was not afraid to disclose them in his opening. The points for consideration were outlined by him - as I understand it - as follows:

(1) Was there a collective labour agreement in force between the applicant and Long Pond Sugar Company Limited?

(2) If there was, what was the duration of the agreement?

(3) Was the Minister empowered to cause a ballot to be taken?

(4) Assuming that the Minister was empowered to call a ballot, was the bargaining unit properly identified in the circumstances of the case?

With regard to (4) above, the Chief Justice has dealt with it. I need not repeat in less felicitous language what he has covered so lucidly. In order to give Mr. Knight some freedom to run at the start, Mr. Edmunds for the respondent gave a concession to the effect that:

(a) Some of the workers formerly employed to Trelawny Estates Limited were offered employment by Long Pond Sugar Company Limited on the same terms and conditions previously enjoyed under the former company.

(b) Some of the workers are now covered by the relevant category mentioned in the Collective Agreement of July 8, 1977.

Without this concession, Mr. Knight could not have urged that a collective agreement made between the N.W.U. and the A company could be relied on by the N.W.U. against the B company simpliciter. In effect, therefore, the submissions of Mr. Knight were based on the assumption that subject to the efficacy of the "open-end" clause a good and acceptable collective agreement was in force at all material times when the Minister ordered a poll.

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