Unions and Temporary Help Agency Employment in Canada

Timothy J. Bartkiw, LL.B., Ph.D.
Ryerson University, Toronto, ON

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Part 1 - Introduction

Temporary help agency employment (“THAE”) is a peculiar institutional arrangement and employment form. Limited available data suggests that THAE remains quite small as a fraction of aggregate labour expenditures, there has been growth in THAE and in this proportion over the past two decades in Canada (Vosko, 2000; Bartkiw, 2009), the U.S (Peck and Theodore, 2007) and the EU (Storrie, 2002). This raises concerns of increased labour market precarity, defined in numerous dimensions (Vosko, 2000; Underhill, 2004). A potentially important question in this context is the nature of the relationship between THAE growth and unionization. This paper summarizes the results of a recent exploratory empirical examination of this question.

Some prior studies have examined the relationship between unionization and THAE in limited respects. Houseman (2001) examined the correlation between employer use of agency workers and numerous variables, including pre-existing unionization in the workforce. Others assessed correlation with analogous “legal factors” (Autor, 2003; Mitlacher, 2007). Vosko (2000) explains how prevailing bargaining unit structures created under Canadian labour law restricts unionization of agency workers. Trudeau (2000) examined the difficulty of identifying the “true” employer in THAE and how this remains a tension in Canadian labour law. Notebeart (2006) argued that labour law failed to support unionization amongst agency workers in Quebec, particularly at the agency level. Bartkiw (2009) argued that Canadian law restricts agency workers’ access to unionization at different levels, and erodes access, and bargaining power, of other employees as well.

To date, there has been little examination of the effect of THAE growth on unions and/or the role of union agency within this context. The main exception, Heery (2004) reviewed union strategic responses to agency labour in the UK, identifying four broad categories: exclusion, replacement, engagement, and regulation.² Under exclusion, unions adopt strategies intended to drive agencies and agency workers from the labour market. Replacement means unions accept the existence of agency workers, but seek to have agencies replaced with more acceptable labour market intermediaries. Engagement involves an embrace of both agencies and agency workers, with an attempt to represent agency workers through a “negotiated accommodation” with agencies. Finally, under regulation unions don’t seek to represent agency workers directly, but rather strive to regulate their terms and conditions in some manner to prevent undercutting of their core membership. Although this typology has certain value, it was not employed in the current study. For one reason, there seems to be significant room for overlap between the categories. For example, a strategy of regulation may well result, perhaps intentionally, in significant exclusion of agencies and agency workers from the labour market (the exclusion strategy), or in shifts in the character/practices of agency organizations supplying workers (the replacement strategy). Further, care must be taken not to present different categorical responses as being equally available, or equally (un)constrained choices facing unions. In this vein, the current research sought to obtain greater understanding, in a more general sense, of the underlying effects of THAE growth on unions, while secondly, examining the nature of union responses to this phenomenon in this context.

¹ Temporary help industry revenues (a proxy for the value of labour supplied) in Canada have grown from 1.4 billion in 1993 to 5.6 billion in 2005. The ratio of the temporary help industry revenues to total labour income in Canada was .807% in 2005. See Bartkiw (2009).
² In a subsequent 2009 article, Heery revises this typology slightly into the following four categories: exclusion, subordination, inclusion, and engagement. However, this typology was applied to union strategies on contingent work more broadly defined, and so the earlier typology used in the discussion of agency labour seems most relevant here.
This paper outlines insights from recent qualitative analysis concerned with these two goals. This study involved interviews with representatives of a large number of unions, two union federations (the OFL and the CLC) and the non-profit Workers Action Centre\(^3\) in Toronto, from June 2008 to July 2009, as well as reviews of union documentation and records. The sample of unions was selected partly based on an attempt to maximize the number of industries (and sectors) about which the interviewees would have knowledge. It was also based partly on convenience, and thus due to resource limitations, data gathering was limited to activities in Ontario. Semi-structured interviews sought to probe three main areas of understanding:

i) the nature of THAE usage in the “landscape” occupied by the union (understood as both the union and non-union portions of industries in which they represent workers);
ii) the effects of THAE on the union;
iii) strategic responses of the union, if any.

Appendix A provides a summary of interviews conducted.

### Part 2 - The effects of THAE in union landscapes

Consistent with previous analysis of limited data (Fang and Gunderson, 2005), the presence of THAE in union landscapes varied significantly across industries. Some unions have not observed any significant presence of THAE in their landscapes at all, suggesting it plays a minor role in several industries. While the sample was not necessarily a representative one, industries cited by unions as both being part of their landscape and having a significant presence of THAE include manufacturing, warehousing/distribution, transportation, public administration, health care, and food services, involving a diverse range of occupational categories. THAE also appears relatively more concentrated in urban settings.

Some unions have observed trends in the volume of THAE in their landscapes. Many see THAE being pro-cyclical in nature. For example, with no long term trend observed in agency-supplied nurses, ONA cites a decline in their usage during the recent recession. In public administration, evidence suggests a divergence of trends, with a recent negative trend occurring in the provincial public service from its peak in the fiscal year of 2002-03, contrasted with a significant, positive growth trend in the federal public service (primarily in the National Capital Region), since 1995-96 (see Bartkiw, 2010). As well, unions have observed significant increases in THAE in manufacturing, transportation, and warehousing/distribution, and there was some consensus that this pattern only emerged within the past 5-10 years. Further, within these same industries (and in federal public administration), unions have observed trends in the qualitative nature of THAE usage. Specifically, employers have been increasingly using THAE for lengthier, quasi-permanent arrangements, to carry out regular core work activities, in place of regular employment. Several unions reported extreme, historically unprecedented observations of workforces where close to 100% of the workforce is agency-supplied,\(^4\) through either traditional “3\(^{rd}\) party” agencies, or “in-house” (or “closely-held”) agencies seemingly controlled by the end-user. Another general observation is that, with few exceptions, unions observe a wage/benefit gap between agency workers and regular employees.

\(^3\) The WAC has been highly active in assisting, representing, organizing, and lobbying on behalf of temporary help agency workers in Ontario.

\(^4\) Each of the CAW, USWA, and UNITE-HERE have recently encountered these “near 100\%” arrangements. Others have also encountered repeated situations with extraordinarily high percentages of large workforces supplied through agencies.
Unions cited a range of factors explaining trends observed. Explanations included: genuine short-term flexibility needs; managerial ideology; corporate re-engineering and reduced HR capacities; and bureaucratic controls on employment spending and staffing processes (particularly in the public sector).\(^5\) There was no across-the-board impression amongst unions that THAE growth has been for “illegitimate” purposes. Indeed, many union representatives believe that an end user that sought to use THAE as a large-scale substitute for regular employment would incur certain costs in doing so, which some believe would be prohibitive. There may be a large financial cost due to the agency markup, and operational problems such as high turnover and inferior worker quality. Unions observe that workers are substantially less committed to agency work than traditional employment, and that employers experience disproportionately greater problems with agency worker quality.

Some unions do not feel that the presence of THAE in their landscapes has any significant effect on the union, either because it is not a sufficiently large phenomenon, or because there is no perceptible impact on its capacities. Others see THAE generating effects through various mechanisms, generally understood to be negative, to various degrees. Effects on organizing and representation activities are discussed separately below.

A) Organizing effects

i) Organizing: Regularity of THAE presence in organizing

Some unions observe salient effects on their organizing functions, particularly in the private sector. The highest regularity in the presence of agency workers in organizing targets seems to have been in manufacturing, transportation, and warehousing/distribution. John Aman, the CAW Director of Organizing stated that his union will find at least some portion of target workplaces is agency-supplied approximately 9 times out of 10. Similarly, Qui Van Trieu, a USW organizer, said that 75-90% of the workplaces he visits will include agency workers, with some firms using extremely high levels. Higher regularity and volumes of THAE have been observed in the last 5-6 years. Each of the CAW, USWA, and Teamsters have been involved in one or more organizing campaigns at large workplaces staffed nearly 100% with agency workers. UFCW representatives stated that out of an average of 20-30 organizing campaigns run each year, roughly 5 would involve a significant number of agency workers, and the UFCW has also sought (unsuccessfully) to organize at least one large workplace with an extremely high volume of agency-use. Randy Doner, President of the Teamsters Joint Council 52 stated that about 25% of their target workforces (and certification applications filed) involve agency workers at a level making it a significant issue. Similarly, Wynne Hartviksen of UNITE-HERE stated that agency workers will be present and constitute a matter of some concern in nearly 100% of the distribution centres they visit, and that in one campaign, her union discovered some workers had been working under agency placement for 2 years.

ii) Organizing: Inclusion v. Exclusion,\(^6\) representation vote dynamics, and the peculiar status of agency workers in organizing

The presence of agency workers in organizing targets may create various challenges for unions. First, as discussed in greater detail in a separate article, unions must in each campaign make a strategic decision as to whether to formally include or exclude agency workers from their

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\(^5\) See Bartkiw (2010) for discussion of these arrangements in the federal public service.

\(^6\) The words “inclusion” and “exclusion” from this point onwards refer to whether agency workers are included in newly organized bargaining units, or not, and thus have different meaning than when used in Heery’s (2004, 2009) typologies.
proposed bargaining unit, and similarly take a position as to whether the agency or the end user ought to be held to be the “true” employer in law, and unions face uncertainty over whether the labour relations tribunal will approve of these positions *ex ante* (Bartkiw, 2009). Both the inclusion and exclusion strategies entail risks for the union, and both may be legally challenged by the employer during the certification campaign. The presence of agency workers may increase the likelihood of litigation, as Randy Doner explained: “the minute there is an agency involved in the organizing campaign, there’s going to be a fight at the board… the minute we say ‘excluding temp workers’, the employer jumps and says ‘oh no, they should be in’ and deliberately attempts to screw up the numbers.”

Doner further explained how agency worker inclusion in the bargaining unit may also be problematic because of the application of what is commonly referred to as “the 8.1”, a provision inserted into section 8.1 of the *Labour Relations Act, 1995* by the Progressive Conservative government in 1998. This provision enables employers to challenge the sufficiency of the union’s membership evidence even after a vote has already been held, and which had been ordered based on the *ex ante* review of membership evidence. With section 8.1, employers have an automatic right to raise this by merely “checking this off” in their certification application response form.

Most union representatives felt that generally, agency workers are less likely to vote for unionization or to sign cards, than regular workers. This is sometimes due to their lack of connection with the organization. Most organizers believe agency workers experience relatively greater fear in organizing, and they are more reluctant to speak with organizers. Several interviewees suggested that agency worker fear is compounded by the mandatory vote process, since they feel relatively more vulnerable. One interviewee explained that end users are able to exploit agency worker vulnerability by convincing them that if the union wins, there will be no more agency work allowed, and so they will have to seek reassignment by their agency. Agency workers may also serve as a tool for pressuring regular workers not to unionize, particularly where agency and regular workers do have social connections. For example, Wynne Hartviksen of UNITE stated that her union obtained evidence in one campaign of agency workers being told that they will be gone if the union wins, so “the temps began putting pressure on the permanent workers saying ‘if you do this, I’m going to lose my job’” and suggested that “that has real resonance”.

Even if the end user makes no overt threat, agency workers’ may feel more vulnerable due to the ease in replacing them. Qui Van Trieu of the USW stated that agency workers have expressed fear of being replaced if they go on vacation, and that a greater fear applies to being seen as a “trouble-maker” supporting unionization. As well, he points out that agency workers regularly express the belief they are *not allowed* to participate in organizing: “They say ‘Oh, I don’t work here… I get hired from agency, I don’t think I’m allowed to sign.” Van Trieu says this response is so common amongst agency workers in his landscape that he feels that firms and/or agencies likely communicate this message in advance. This requires attempting to explain the legal issue of the “true employer” to them, which USW and others have tried to incorporate into their organizing materials. Overall, Van Trieu feels that obtaining support amongst the agency workers is a dismal task: “We can’t sign the agency people because they are too afraid… it is almost impossible.”

An interesting exception, John Aman stated that agency workers often *help* organizing drives succeed, since the underlying *potential* is there for these people to be generally more supportive of unionization than regular workers. He feels that this is because agency workers have “more to gain”, but that the challenge lies in effective union communication of this message. He stated “we tell them ‘those jobs are yours’… it all depends on communication.” Some other factors
may make it possible to get support from agency workers. Wynne Hartviksen stated that the longer the placements, the better from the organizing perspective: “you can do it…especially if they have long term relationships…if they’re working there for a couple of weeks it’s really hard, they don’t have an axe to grind. If they’ve been working there for a year or so (a) they feel more stable, and (b) they have more issues with their workplace.” Thus, an employer strategy of using agency workers for extended periods may be more vulnerable to unionization than one with short term placements.

Despite agency workers being potentially more difficult to organize, unions would generally prefer to include them in certification attempts. Some unions stated that they operate under the default assumption that they will be forced to include agency workers. This is a prudent strategy wherever an ex post ruling that they be included seems possible (arguably a greater concern since the recent OLRB decision in the Nike case). Thus, they pursue agency worker votes as much as possible to reduce the risk of their support being “watered down” below a majority, once agency worker ballots are counted.

At times, including agency workers in the organizing effort is unsustainable. First, the union may not have been able to obtain sufficient support amongst them, so it may request their exclusion as a defensive strategy. UFCW explained that this was its rationale for seeking exclusion in its Nike campaign, a strategy thwarted by the OLRB’s ruling that Nike was the “true” employer of the agency workers. Secondly, agency workers may be excluded by an ex post tribunal ruling, despite union preferences, if the Employer challenges the union’s position. When seeking exclusion, the union hopes that their votes will not be necessary, but it will not be certain of this during organizing. The fear of not being able to exclude the agency workers’ ballots in the vote may weigh on the employees, and the employer may be able to exploit this without consequence. As Randy Doner stated:

“And then the voting, you do it in a private room, the officer is there, the company and you are there, and all the members see these guys – the temps - coming in and voting even though we told them their ballots are going to be kicked out or kept in, so they are nervous. …so now when you go into the ballot box it’s intimidating enough and depending on the situation with the employer [they may] get these guys in to vote first because they are under their control. They phone the agency and say ‘instead of sending your guys in at six tomorrow, we want them in at five-thirty’ to make sure they vote…the members come in and see these guys voting and the employer is telling them in the background ‘once these guys vote, you don’t have the numbers…they are going to vote our way because we are paying them over here through the agency…’ so now there is a completely different dynamic when it comes to them casting their own ballot.”

Another key concern under the exclusion strategy is the anticipated effect of agency workers on the union’s future strike power. With agency workers already doing the same work as the proposed bargaining unit, it is easier for the employer to continue to use them to operate during a future strike. As Randy Doner explains: “it intimidates some of the workers that there is someone that can take over their jobs immediately, so they’re more scared of exercising their right to strike.” This concern is up front in the organizing stage:

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7 Some of the union representatives were aware of this case and said that it affected their analysis in this strategic decision making.
8 Here, the bargaining unit description had been agreed upon in advance of litigation, and thus the matter turned upon the question of the true employer.
“When you go in their organizing the first concern of the employees is ‘are we going to lose our jobs?’ with any organizing campaign. But you couple that with temp guys who are in there, ‘well what about this guy and that guy, they don’t work for us, they are doing our jobs but they don’t work for us, how are you going to stop them?’ they ask. You say ‘well, I gotta get certified in order to go in there to stop them, or attempt to stop them anyway.’ So it hurts you there too.”

Similarly, Kevin Corporon, President of UFCW 1000A stated that even if his union had been successful in the *Nike* case, agency workers would have helped make it “an uphill battle to get a contract”, and possibly a “longer strike”, but feels they could have reached a settlement eventually.

iii) Organizing: the agency as employer

The challenges presented by organizing at the agency level seem already widely known. With workers being assigned to various locations, it is extremely difficult for the union to access a sufficiently large group of them. The union is often unable to determine the locations and whereabouts of the workers, and fellow agency employees may be similarly ignorant about their co-employees’ whereabouts. As well, the community of interest amongst the workers is generally much lower than in traditional workplaces, given their dispersion. Further, the future strike power of such a group is highly uncertain, since end-users retain the power to simply switch labour needs to competitor agencies. For these reasons, unionization at the level of the agency is almost non-existent in Canada (Notebaeart, 2006).

The current research examined two cases resembling organizing at the agency level, illustrating significant constraints. The first was a case in which the USWA successfully organized a unit of approximately 50 workers at a logistics/distribution centre. In the certification process, the respondents claimed that the agency was the true employer. Rather than litigate, the union conceded this position and was certified to represent a bargaining unit of agency employees working at this location. This bargaining unit subsequently created a litany of challenges for the union. It has been very difficult maintaining union support amongst the workers, given significant turnover. Perhaps because of this and/or limited union bargaining power, bargaining was extensively delayed and lasted almost 2 years. Bargaining was formally with the agency, but was constrained by the ultimate power of the end-user, which was not formally present in negotiations, but which the union believes was regularly consulted by the agency. After nearly 2 years, both parties agreed to interest arbitration. About one week prior to arbitration, the end-user announced that it was switching its labour supply needs to a new agency, threatening to make the collective bargaining exercise moot. In response, the union wrote to the new agency and advised them that it would attempt to pursue successor rights in litigation that would bind the new agency to the collective agreement, and suggested that the new agency ought to attend the arbitration hearing. Although the union’s ability to enforce this threat was not clear, the end user announced that it would continue using the unionized agency. A first collective agreement was then achieved by interest arbitration.

Although achieving a collective agreement with an agency was an unprecedented victory of sorts, it was partly a pyrrhic one. Even with a collective agreement in place, maintaining an effective union presence in the workplace has been very difficult, as turnover continued and worker commitment required continual reinvention. By the time a collective agreement was reached, only 2 of the people that had originally supported the union in the organizing drive remained in this workplace of approximately 50 people. A USW official candidly admitted that union personnel have discussed whether this bargaining unit is “more trouble than it is worth” to the union.
The second example is the case of unionization in the home health care industry. Here, the agencies that employ personal support workers operate under a structure that is fairly similar (albeit not identical) to the classic temporary help agency. The similarity was pronounced enough that the Ontario government deemed it necessary to clarify in its Bill 139 that this new law would not apply to these firms.\(^9\) Similar to the classic agency scenario, these workers are dispersed to various client locations, and are thus physically isolated from one another, lacking not only a central work location but also even a gathering place. As a result, organizing is highly difficult, particularly amongst the “for-profit” portion of the sector, which operates relatively more closely to the temp agency model, and which unions have been essentially unable to penetrate. Although unions have been able to organize some of the non-profit firms, competition has over time shifted market share towards the “for-profit” (non-union) firms. Similarly, when the SEIU sought last year to lead its membership employed by the Red Cross into a strike, the provincial government (read: end-user) announced immediately beforehand that it would shift all of the work previously assigned to the Red Cross under competitive bidding, to other firms in the market.

\(\text{iv)}\) Organizing: a deterrent effect?

If THAE creates organizing challenges, an important question is whether the presence of THAE might deter unions from attempting to organize that workplace. Most union spokespeople said that a significant presence of agency workers in a workplace would not on its own be a deterrent, and nor would the expected costs of dealing with THAE in the organizing campaign (eg. longer organizing campaign, expected litigation, legal fees etc.). As noted, John Aman of the CAW actually thought that, to the contrary, agency workers may be helpful in organizing. Union calculus seems to focus generally on the likelihood of certification and achieving a worthwhile collective agreement. However, some interviewees stated that significant presence of agency workers may affect this calculus, as a contributing, deterring factor. As Wynne Hartvisken of UNITE-HERE stated: “in some cases when we look at shops, we have to actually walk away from potential organizing campaigns because the issue of temps are so complicated...sometimes the worst thing in the world to do is to have an organizing drive that fails.”

B) Representation (Post-Certification) Effects:

Often, where unions advised of regular presence of THAE in organizing, they explained that this presence did not continue post-certification. Rather, they have often observed that pre-certification THAE usage has often declined or been eliminated, post-certification. This may sometimes simply be the product of a legal ruling that the end-user is the true employer and that the agency workers are included in the bargaining unit, obliging the employer to bargain over their working conditions and apply the collective agreement to them. It may also be the product of the key union response to THAE, namely bargaining strategies aimed at restricting its use, discussed in the next section of the paper. Theoretically, it may also in some cases provide \textit{prima facie} evidence of union avoidance as being a partial motivating factor for using THAE in the first place. Whatever the reason, several unions witness this same pattern: “We don’t hear of the agency any more, that’s it, it’s a done deal.” This pattern held consistently in cases where agency work was used at extremely high levels. In many cases, the agency workers themselves remained with the company, as regular employees.

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\(^9\) See s. 74.2 of \textit{An Act to Amend the Employment Standards Act, 2000 in relation to temporary help agencies and certain other matters}, c.9, S.O. 2009.
However, agency work may sometimes remain or even emerge post-certification, various effects of which are discussed below.

i) Representation: Bargaining power

As noted earlier, the availability of agency workers during a strike may make it easier for an employer to continue to operate, reducing union bargaining power, and build-up of agency worker usage prior to a strike increases this threat.

THAE may also constrain union bargaining power through “undercutting” market pressure, depending on whether there is a cost premium associated with using agency workers. This premium depends on the size of any wage/benefit gap between regular and agency workers, the agency markup, and possibly differences in productivity. Most union representatives claim to observe a wage/benefit gap in favour of regular employees to varying degrees. Agency workers will commonly receive a similar wage, but with fewer or no benefits. Once all benefits provided under the collective agreement are accounted for, the total or “composite” wage of the unionized worker is generally higher.10

Undercutting pressure may also result from under-enforcement of labour standards of various sorts. For example, the Teamsters union has repeatedly requested proof from employers that agency workers are being insured properly under WSIB, to no avail. Wynne Hartviksen of UNITE-HERE also stated that her union repeatedly observes non-compliance with employment standards correlated with agency work at distribution centres.

Undercutting dynamics may also result from inter-firm competition where unionization exists at the agency level. Kelly O’Sullivan of CUPE explained how for-profit health care firms (operating similar to temporary help agencies) maintain a wage and benefit cost advantage over their non-profit rivals. As well, these firms apparently take advantage of certain legal exemptions to employment standards (eg. termination and severance pay) available to them (as firms operating similar to classic temporary help agencies),11 and which standards are often complied with voluntarily by the non-profit firms seemingly taking more of a moral “high road” in their employment relations.

Depending on the magnitude of THAE, erosion of the bargaining unit may also become a concern, since this means a loss (or lost opportunity for expansion) of bargaining unit work. In some cases, such as the federal public sector, THAE growth has occurred alongside employment/membership growth, muting its salience thus far.

ii) Representation: servicing effects

Ongoing presence of agency work may create additional “servicing” challenges. Where the collective agreement provides some form of coverage for agency workers, unions need to monitor their usage. UFCW 1000A representatives explained that it is often difficult to keep track of agency workers’ identities and to maintain their connection with the bargaining unit. UFCW representatives spend a significant amount of time and resources enforcing job/work

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10 In extraordinary occurrences, agency workers may be paid more than unionized employees. For example, during the SARS crisis in Toronto, many agency nurses were receiving an hourly rate of about $100, while ONA members received approximately $35. As time passed, the traditional wage/benefit gap returned.

11 See in particular sections 2(1) (12) and 9(1) (9) exempting home health care workers from entitlements to both termination and severance pay, when their arrangement allows them to “elect to work”. Note also that these exemptions are scheduled to be revoked in Fall of 2012.
assignment provisions under collective agreements, and in dealing with related complaints from members. Issues arise for example as to whether an agency worker’s position was supposed to be “posted” first, whether the job is actually a “vacancy” or not, etc. There is sometimes animosity between employees and agency workers due to work re-organization needed in order to use often lesser skilled agency workers. Further, agency workers may under such arrangements have certain seniority rights, but enforcing them is complicated by turnover and the employer’s failure to terminate agency workers at the end of their assignments:

“If they don’t terminate anybody, at the end of five years they could have 500 people on the seniority list that don’t work for them. It’s those people who aren’t getting their rights under the CA [which we are insisting upon] so the employer doesn’t get sloppy with the rest of the real employees and their rights”.

As well, these arrangements may also affect overtime arrangements and erode overtime opportunities.

iii) Representation: union culture and morale

Morale may be affected by differences in compensation and treatment between employees and agency workers. Many unions cited a major lack of information about THAE usage within workplaces they represent. As well, where agency workers are used on a larger scale, their inclusion within the union presents a challenge to union culture. As Jorge Garcia-Orgales explains:

Probably one of the most interesting part of the conversation is … are we prepared to live with this ideologically as a union? Do we have the culture for this new type of employment that are opening up all over the place? Because historically, we were set to deal with large units of people that stayed there for life…maybe these aspects of our own culture are not necessarily serving our own members. Then around temp agency the whole conversation is: is our culture – our culture, not even the employer - prepared to help us to deal with this situation we are describing, or our culture will tell us ‘fuck it, get it away because it is a pain in the neck, we cannot be the union.’

…We don’t have a model, but we have a way of thinking of how things have to be done. It’s not like we approve by constitution, by law, that this is the way that it have to be. No! It could be any way. But in our own heads, in the way that we are set up to serve locals and to do this and to do that blah, blah, blah, the expectation is that the other side you need have to have something of this particular shape. If it has another shape? …. We are not creative enough on tackling the new working relations that people are having.

iv) Representation: safety issues

Unions reported a mix of experience of who tends to assume the risk of dangerous work, an issue identified in the literature (Storrie, 2002). Some unions observe agency workers being pressured to assume risks arising from lack of training and/or safety measures. As well, some allege a lack of WSIB coverage for agency workers at times, and/or pressure on them not to report injury claims. An opposite effect may occur, where regular employees are required to bear extra risk, if work reorganization redirects more dangerous work to regular workers. For example, ONA representative Dan Anderson noted that during the SARS crisis, it was the regular (unionized) nurses that were required to work in the SARS restricted areas, while the agency nurses worked in the non-SARS areas.
v) Representation: economic adjustment and “action centres”

In the recent crisis, some unions have sought to assist their members’ labour market adjustment through “action centres.” Functioning with union, government, and sometimes employer support, they assist workers seeking reemployment and/or retraining of various forms. Temporary help agencies have significantly affected job placement activities of these centres. Dave Parker, the Coordinator for the USW regional job action centre in Toronto, stated that at any point in time, while they have hundreds of job descriptions posted on their walls, if they removed THAE, there would only be 10-12 jobs left. Aside from this internal “job board” of sorts, job searchers are largely dependent upon websites such as “Job Bank” operated by HRSDC. In Parker’s opinion, approximately 90% of job vacancy advertisements in any medium are from agencies. Parker says that approximately 2 years after opening about 5 years ago, action centre staff contacted three agencies to let them know about the action centre, as an experiment of sorts. These agencies then began to regularly send job descriptions to them, requesting large volumes of resumes for review. For some time, the action centre complied, and repeatedly requested that in exchange the agency advise them of any cases where a member received an interview and/or was successful at getting a job through any of these agency postings. Parker stated that none of the agencies ever complied with this request even once, but rather just kept sending further requests for more resumes. Often, action centre staff found themselves carrying out much of the time-consuming tasks of reviewing and screening workers/resumes on behalf of the agencies, which would then profit financially from the action centre’s work. After some time, the action centre adopted a policy that it would no longer deal directly with temp agencies, and they now counsel their members that if they are looking for permanent full-time work that they should avoid agencies, to the extent possible in the member’s circumstances. Despite this policy, the action centre (and its clients) remain affected by agencies insofar as they control access to the vast majority of relevant vacancies.

Part 3 - Union responses:

i) Collective bargaining

Several unions explained that bargaining strategies are the main, or only, response to THAE in their landscapes. Bargaining responses may be limited in the public sector by legislative restrictions, which tend to limit union influence over staffing. Whether agency workers are included in the bargaining unit or not may have been determined during the certification process, but it may be possible to negotiate their inclusion in bargaining. Where agency workers are included, the union may negotiate terms for their benefit, increasing their security, such as rights to post into permanent positions. Where agency workers are excluded, unions seek to negotiate restrictions on their ability to perform bargaining unit work. For example, they may seek to codify a narrow range of circumstances in which the employer would be entitled to use agency workers. As well, they may seek preferential rights to redeployment for retired or laid-off workers even for short term placements.

Overall, most unions stated they would prefer to include agency workers in the collective agreement, but that often they either lacked sufficient support in the organizing process to include them, or lacked bargaining power to obtain this in negotiations. Inclusion may also at times be achieved through grievance arbitration, depending on the nature of the bargaining unit description (and negotiated scope clause), and on the degree to which the end-user has assumed de facto employer responsibility over the workers. It may be possible to obtain an

12 Governmental financial support is apparently sometimes provided from the Ontario Ministry of Training, Colleges and Universities and/or through the federal Employment Insurance program.
arbitrator’s order that the client end-user firm is actually the true employer of the workers and that it must apply the collective agreement to them. Some unions have experienced some success with this approach, and other unions expressed some interest in this tactic in the future.

Unions may also bargain informational entitlements on agency work. These are not very common, but existed in a few circumstances where unions had negotiated numerical restrictions on agency work, since disclosure was necessary for monitoring compliance with these restrictions.

Another strategy is to bargain alternative forms of labour flexibility. The Teamsters union tries to maintain a pool of retirees, available through the union for short term placements. Randy Doner explained that this arrangement has been used sporadically, but that employers are reluctant to use this as a substitute for agency workers, perhaps out of a desire to limit union involvement in staffing and to preserve employer control.

Although some unions have had discussion internally, or with employers, over the idea of a hiring hall to displace THAE. Unions have generally not been very enthusiastic about this concept. Randy Doner explains that such arrangements create a very difficult co-ordination problem that his union has historically not been fully willing or able to undertake. It is very difficult to keep large numbers of drivers sufficiently available for immediate temporary assignments, while also keeping them sufficiently employed over time to make it worthwhile for drivers to remain in the arrangement. In the provincial public service, the Ontario government previously operated a program called GO Temps, an in-house pool of workers available for temporary placements throughout the public service. This program was phased out of existence by the PC government, which dramatically increased governmental expenditures on temporary help services. Although there was some discussion with certain officials about OPSEU assuming responsibility for the GO Temps program, this interest evaporated quickly. Subsequent discussions over a form of in-house temporary worker program took place between OPSEU and the Liberal government again in 2006, to no avail. OPSEU negotiator Eric Morin explained that in his view, the government’s expectation was to have OPSEU function as a sort of temporary help agency of first choice, but with little difference in the recruitment process or the extent of employer liability. In other words, the union would essentially take over the role of a temp agency, and the government would not assume greater long term obligations towards temporarily assigned workers. Morin also explained that OPSEU staff found it very difficult to conceive of a structure that would somehow increase the job security of these workers within the context of complicated schemes already in place concerning OPSEU member job security and career development plans: “ultimately, it’s the easiest thing to call Kelly’s and put the Kelly person in as the boss’ secretary for 6 months as opposed to figuring out a ‘keep it in the family’ solution that doesn’t cause more problems than it’s worth”. Ultimately, discussion shifted to other priorities.

ii) Organizing and outreach

Some unions felt organizing activities were affected to some extent by THAE, as discussed above, although many felt that organizing agency workers does not call for significant changes

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13 ONA recently negotiated terms like this in a number of collective agreements with large Toronto hospital networks.
in organizing practices. To the extent that messages in organizing are always tailored to the particular issues of any workforce, organizing agency workers may not be particularly unique. UFCW staff stated that strong insiders are essential in order to keep track of agency workers, their contact information, since there is generally additional investigation required here. As noted above, many unions seek agency worker support even where they seek their exclusion, for mathematical protection against their potential inclusion by tribunal order. Others noted that minor changes like revisions to written organizing materials may be required, but that this is a very small adjustment. Some unions have engaged in a form of “salting” by having union representatives apply for work through agencies identified as the recruiter for specific companies, to increase their understanding of working conditions and the agency/client relationship in place.14

Some unions have also done some outreach to agency workers in the community, short of seeking unionization. This has primarily involved offering information about workers’ rights. CUPE has been considering a proposal for an alternative organization with which personal support workers in the home health care industry (analogous to agency workers) might “affiliate”, and which might germinate unionization over the longer run. However, the President of CUPE Local 4308, which represents workers in this industry, stated that so far there has not been sufficient organizational support within CUPE to make this a viable project.

iii) Union Structure, Information, Research

Unions often possess limited information about agency worker utilization within workplaces they represent. Often, if any information is available, it is widely dispersed – in the minds of the individual members who observe agency workers in their workplaces over time – and not recorded. This is true even in the public service where union density is high, partly because staffing activity occurs at lower levels of management and is dispersed throughout the public service. This knowledge gap may be a function of THAE being a relatively low priority issue for the union. However, in a few cases, unions have recently initiated information collection on agency usage. One approach is to bargain for disclosure, as found in certain ONA contracts. Although this requires trust in the employer’s information, OPSEU noted that it has long been dependent on employer disclosure about even its own membership. PSAC also recently lobbied (unsuccessfully) the Public Service Commission (PSC) to add a question to its employee survey indicating whether the respondent was an employee or an agency worker, to help track the volume of agency worker usage and feedback specific to agency workers.

Since many employers are unwilling to disclose relevant information, unions may also try to gather information from its membership. Both of the two largest unions in the federal public service have been trying this approach to some extent, with PSAC creating an internal “tempwatch” program, and PIPSC also surveying their members to try to quantify/qualify work being done by “contractors” more broadly (including agency workers). Some unions have also formally assigned this research task to staff members or consultants. Similarly, OPSEU has hired an internal “inclusions officer” whose task is to monitor work being done by workers not included in the bargaining unit and to seek their inclusion wherever possible, either through negotiation or litigation. They have formally initiated what they call the “bargaining unit integrity project”, and agency work is one of the issues being dealt with from time to time in this project.

14 Wynne Hartviksen of UNITE-HERE explained that one union salt was instructed to wait in a parking lot, where an unmarked van picked him up and took him to a warehouse for a large well known retailer. He then worked for a 12 hour shift with no breaks, was provided no health/safety instruction, and was offered to be paid in cash if wanted.
Both PSAC and PIPSC have also hired consultants\(^\text{15}\) to conduct research on employer use of contract workers broadly, including agency workers. Overall, it seems that this research activity is primarily associated with public sector unions; most other unions did not conduct any research activity of this sort.

iv) Lobbying and Public Relations

Some unions have been involved in lobbying activities concerning temporary help agency employment to varying degrees. One of the primary activities undertaken (by UNITE-HERE, SEIU, and CUPE, and the OFL) was to participate in recent legislative hearings over Bill 161 (which lapsed) and Bill 139\(^\text{16}\). Both Bill 139 and Bill 161 focused on employment standards reform, such as removing certain exemptions available to agencies as employers.\(^\text{17}\) Bill 139 also imposed restrictions on the use of “hiring fees” and other contractual barriers to the hiring of agency workers by clients. Dialogue during the hearings processes was significantly influenced by the agenda established by the government, and participating unions were unable to broaden the agenda. In the case of CUPE and SEIU, their main focus was on the Bill’s specific exclusion of the vast majority of home health care workers, labouring under a variant of THAE, from the new reforms.\(^\text{18}\) Some union representatives commented that their union’s role in these processes was to some extent support and “follow the lead” of the non-profit Workers Action Centre, a Toronto-based activist organization that has pursued law reform around THAE as part of its core agenda for some time.

A small number of unions have engaged in additional lobbying, outside of these employment standards reform processes. Some stated that they continued to support calls for card-based certification, an issue over recent years has still received some limited attention in political discourse, primarily through private members Bills initiated by the NDP, which these unions identified as being their preferred legislative response to concerns about the effects of THAE on organizing. Some also stated that they have lobbied either directly, or through the OFL, for law reform granting unions access to employee lists and contact information. As well, a few unions have engaged in limited forms of “public relations” activities around THAE. In the public sector, unions have at times sought to align concerns about THAE growth with broader concerns around value for money and/or quality public services, subsuming this as part of a larger strategy aimed at reducing various forms of contracting. Union representatives have attended public meetings and/or legislative committee meetings to raise awareness around and to oppose contracting out. Lastly, there are examples of unions helping to raise awareness of the plight of agency workers by speaking to media on these concerns.\(^\text{19}\)

v) Inter-union and union-activist relations

There has been very little inter-union coordinated response to THAE as a matter of concern. Neither the CLC nor the OFL has undertaken any specific campaign about THAE. References to growth in THAE has been included in a small number of resolutions passed. The CLC’s executive Director Michael MacIsaac stated that although it has observed growth in THAE, labour movement reaction overall has to date been limited by the fact that this growth has occurred primarily in the non-union sector, and that bargaining responses, undertaken

\(^{15}\) PIPSC hired an external consultant, while PSAC hired a student.

\(^{16}\) Bill 139 took effect in May 2009.

\(^{17}\) Bill 161 also included a form of joint liability between agencies and clients that was not contained in Bill 139.

\(^{18}\) Supra, note 11.

\(^{19}\) For example, Wynne Hartviksen of UNITE-HERE advised that The Toronto Star interviewed some union representatives, during its coverage of the hearings on Bill 139.
separately by individual affiliates, comprise the bulk of labour movement response to THAE. The CLC has through educational initiatives sought to raise awareness of the issue of temporary help agencies amongst affiliates, largely to encourage them to take defensive measures in collective bargaining. OFL representatives stated that they locate the issue of agency employment as part of a larger public campaign on changing workplaces, law reform and revitalizing unions. The OFL did not submit a brief to the Ministry of Labour consultation process in 2008, stating that inadequate time was provided to do so, however it did make a presentation in the Bill 139 legislative hearings. Former OFL President Wayne Samuelson stated that THAE has entered OFL dialogue primarily because of agency influence on action centres, and there has been some discussion of potential union responses. One idea discussed was a protest event in which action centres would remove all jobs from temporary help agencies from the lists of vacancies for one day, but this never materialized.

The Bill 139 hearings sparked some degree of inter-union dialogue and co-ordination of positions, although there was apparently no clear common front of union priorities established. As well, some unions also affiliate with larger international union associations (eg. UNI, or the International Metalworkers federation) that perform educational and advocacy work on THAE. A few unions have also provided forms of support to the non-profit Workers Action Centre ("WAC"). Although it has from the outset, preserved its independence, WAC maintains a limited “evolving relationship” with the OFL and certain individual unions. In practice, one member of the WAC’s board of directors has been a representative from the OFL. While most of its budget (approx $450K annually) comes from private charitable foundations, the CAW Social Justice Fund donates $20K annually. At the time of interviewing, the WAC had also received a one-time donation of $5K from UFCW and PSAC, and previously received small donations from the Steelworkers Humanities Fund. The OFL provides no financial support to the WAC. Some unions have also provided in kind assistance, such as photocopying or printing services to support a WAC campaign.

vi) Economic Adjustment and Action Centres

The USW job action centre has recently approved a shift in direction that may significantly alter its relationship with agencies, in that it is seeking to position itself as a replacement for them. Dave Parker, described the new approach as engaging in “employer outreach” and explicitly seeking to build relationships with employers in which the centre serves as a reliable recruiter on their behalf. This will involve cold calling employers, seeking to persuade them to give the action centre the first opportunity to fill their vacancies, and matching their needs with one of their members, for free. Parker feels that the action centre will be able to provide superior service than agencies, largely because it won’t face the same pressure to capture profits from quick matches, and that introducing a fee would have risked altering the nature of its activities. Parker has had some early success convincing a few employers he has approached so far, with some managers expressing frustration over poor matching services provided by agencies. Parker stated that this new approach may transform the action centre’s mandate from being dependent upon plant closures to being a more quasi-permanent organization, and it expects support for this approach from MTCU.

20 OFL President Wayne Samuelson made four main arguments on behalf of the OFL: that home care workers ought not to be excluded from the legislation, that the law ought to deliver equal treatment between agency and regular workers, that the bill must ensure agencies may not charge fees to workers, and that contractual barriers to hiring must be eliminated.

21 For example, while CUPE and SEIU were primarily concerned about the exclusion of home health care workers, UNITE-HERE was more concerned about the issue of joint liability.
vii) “Engagement”

There has been extremely little appetite for a strategy of engagement with the temporary help industry. Most unions felt that this strategy made little sense in their contexts, that there was a lack of mutual interests. Some felt the industry would not be receptive to meaningful union proposals since there would be little that unions could offer to them in negotiations, and were skeptical of the notion that unions might be able to offer improved “legitimacy” as a bargaining chip, suggesting that industry would likely favour separate public relations activities instead. As well, some noted that potential for engagement is severely limited by the sheer magnitude of the number of agencies that exist, and by the perception that so many of these are “fly by night” or “low road” operations. Thus, most union representatives felt it made more sense to seek to gradually organize, regulate, or eliminate THAE as much as possible.

Although no large scale engagement has taken place, a few sporadic moments may be noted. In the federal public service, PIPSC observes some potential common front between itself and an organization CABiNet, a group of agencies that have united to jointly lobby against federal government plans to initiate large scale bundling of computing services projects for outsourcing. Members of CABiNet feel that the awarding of such large scale projects to single contractors will reduce their opportunities to supply workers for projects and/or their bargaining power in supplying workers to successful bidders. Engagement here has been primarily communication and information exchange. CUPE Local 4308 has also considered trying to build upon some shared principles/interests between it and the Ontario Community Support Association, a predominantly non-profit employers’ association in home health care. CUPE Local 4308 President Kelly O’Sullivan stated that this proposed engagement was part of a larger program that lacked sufficient support from CUPE overall and didn’t materialize, and that there is little rationale for engagement with the for-profit sector.

Part 4 - Conclusions

Union observation of significant THAE usage is concentrated in specific industries, and it is generally only in these areas that unions report any significant effects or responses. Unions cited effects both organizing and representation effects, with organizing effects being more of a private sector concern. There was near consensus that THAE may create additional challenges in organizing, some of which are a product of the legal regime. There have been almost no attempts to organize at the agency level, and the two examples of analogous activities examined in this paper illustrated the constraints in this situation.

Although most unions do not interpret THAE usage in their landscapes as being the product of “illegitimate” motives (such as union avoidance) or as resulting in undercutting wage competition, given the costs employers would normally incur in using THAE on large scale. However, the research suggested some potential for these dynamics under certain conditions, given the commonly observed wage-benefit gap, and the potential for reducing the agency markup through some observed large-scale and/or in-house agency arrangements.22

Unions also report limited examples of other constraints on representation functions: bargaining unit erosion, resource and coordination requirements due to turnover, effects on morale, safety concerns, and a lack of organizational knowledge around THAE usage.

22 USWA recalled one specific situation he thought provided fairly strong evidence of union avoidance. Here, an employer abruptly embarked on mass layoffs of permanent workers during an organizing drive, and instructed most of them to contact a specific temp agency to re-apply for their same jobs. Most of the workforce was then rehired, through the agency. The organizer felt that these actions weakened employee support in organizing.22
Union responses to THAE have so far focused primarily on maintaining their traditional organizing practices with minor adjustments required where agency workers are observed in target workplaces, and on bargaining strategies in unionized workplaces. Under the latter, unions negotiate forms of collective agreement coverage for agency workers, or if this is not feasible, restrictions on their usage. While some attention has been given to developing alternative forms of flexibility, the degree to which these have worked to displace THAE is not clear, and there has so far been very limited union interest in larger scale arrangements like hiring halls or similar arrangements. In the public sector, certain unions have recently begun to develop programs for information gathering and/or research on THAE in their landscapes.

There has been very little inter-union or union movement wide response to THAE aside from the financial support provided by a few unions to the Workers Action Centre, which has to an extent served in a representational capacity on behalf of the labour movement in educational and lobbying activities. To some extent, labour may have been enabling agencies by acquiescing to agency control over job vacancies and placement. It remains to be seen whether strategic responses such as the USW job action centre’s goal of substituting itself in place of agencies will significantly alter the union-agency nexus in future.

Appendix A – Interviews Conducted

<table>
<thead>
<tr>
<th>Organization</th>
<th>Names, Titles of Representatives Interviewed</th>
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<tbody>
<tr>
<td>Canadian Auto Workers (CAW)</td>
<td>John Aman, Director of Organizing</td>
</tr>
<tr>
<td>United Steelworkers of Canada (USWA)</td>
<td>Jorge Garcia-Orgales, Global Affairs and Workplace Issues Department Qui Van Trieu, Toronto Staff Organizer Denis Dallaire, Staff representative, Organizing Dave Parker, USW Job Action Centre</td>
</tr>
<tr>
<td>UNITE-HERE</td>
<td>Wynne Hartviksen, Special Assistant to the National Directors</td>
</tr>
<tr>
<td>Service Employees International Union (SEIU)</td>
<td>Elliot Anderson, Director of Government Relations, Atlantic, Central and Western Canadian Councils</td>
</tr>
<tr>
<td>Canadian Union of Public Employees (CUPE)</td>
<td>Kelly O’Sullivan, President, Local 4308</td>
</tr>
<tr>
<td>Teamsters Joint Council 52</td>
<td>Randy Doner, President, Teamsters Canada Joint Council No. 52, and President, Local 230.</td>
</tr>
<tr>
<td>Ontario Nurses Association (ONA)</td>
<td>Dan Anderson, Director and Chief Negotiator</td>
</tr>
<tr>
<td>Ontario Public Service Employees Union (OPSEU)</td>
<td>Warren (Smokey) Thomas, President</td>
</tr>
<tr>
<td>Public Service Alliance of Canada (PSAC)</td>
<td>Alain Picher, Organizing Program Officer Loren Crawford, Organizing Program Officer Howie West, Work Reorganization officer Liam McCarthy, Senior Research Officer</td>
</tr>
<tr>
<td>Professional Institute of the Public Service of Canada (PIPSC)</td>
<td>Denise Doherty-Dolorme, Section head of Research</td>
</tr>
<tr>
<td>Ontario Federation of Labour (OFL)</td>
<td>Wayne Samuelson, President</td>
</tr>
<tr>
<td>Alliance Of Canadian Cinema, Television and</td>
<td>Marit Stiles, Director of Research</td>
</tr>
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</table>
Radio Arts (ACTRA)

United Food and Commercial Workers (UFCW), Local 1000A

Kevin Corporon, President, Local 1000A

Workers Action Centre

Deena Ladd, Coordinator

Communications, Energy and Paperworkers Union of Canada (CEP)

David Coles, President

Canadian Labour Congress

Michael MacIsaac, Executive Director

References


