Labour Relations Board
Saskatchewan

TYLER NADON, Applicant v. UNITED STEELWORKERS OF AMERICA and X-POTENTIAL PRODUCTS INC. o/a IMPACT PRODUCTS, Respondents

LRB File No. 076-03; September 3, 2003
Vice-Chairperson, James Seibel; Members: Gloria Cymbalisty and Don Bell

For the Applicant: Susan Barber
For the Union: Lily Arvanitis-Ballantyne
For the Employer: No one appearing

Decertification – Interference – Representatives of employer provided active encouragement to applicant by providing key information about process to be followed in making application for rescission – Representatives subsequently indicated to applicant that they could not discuss matter further, but only after providing all information sought – Application was made in part on advice of or as a result of influence by employer – Board dismisses application.

***The Trade Union Act*, ss. 5(k) and 9.**

REASONS FOR DECISION

Background:

[1] Tyler Nadon (the "Applicant") applied for rescission of the Order of the Board dated October 29, 1996, and amended August 8, 2002, designating United Steelworkers of America (the "Union") as the certified bargaining agent for a unit of Employees of X-Potential Products Inc., operating as Impact Products (the "Employer"). The effective date of the collective agreement in force between the Union and the Employer is July 1, 2002. The application was filed on May 7, 2003, during the open period mandated by s. 5(k)(i) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), along with ostensible evidence of support of a majority of employees in the bargaining unit.

[2] In its reply to the application, the Union alleged that the application was made in whole or in part on the advice of, or as a result of influence of or interference or intimidation by, the Employer or Employer's agent, and requested that the application be dismissed pursuant to s. 9 of the *Act*, which provides as follows:

> *9 The board may reject or dismiss any application made to it by an employee or employees where it is satisfied that the application is made in whole or in part on the advice of, or as a result of influence of or interference or intimidation by, the employer or employer's agent.*

Evidence:

[3] The Applicant has been employed with the Employer since April, 2001. The company, which operates in Winnipeg and Regina, manufactures parking curbs and landscape ties from recycled materials. The general manager, Kevin Perry, and the chief executive officer, Jack Lazaruk, both reside in Winnipeg and visit the Regina plant infrequently.

[4] The Applicant is one of three lead-hands operating two crews of six employees, each on one of two daily shifts working between 7:30 a.m. and midnight. The Applicant reports to Clayton Walters, who has been out-of-scope shop foreman since approximately March, 2003. Mr. Walters had made an application for rescission two years previous when he was a member of the bargaining unit. The Applicant had assisted him with that application, testifying at the hearing.

[5] The Applicant testified that he decided to bring the present application for rescission in April, 2003, because he had a strong sense that the employees wanted to decertify the Union. He said that he was not influenced, prompted or assisted by anyone in management to make the application.

[6] Mr. Nadon said he engaged his present counsel, Ms. Barber, to assist him with the application. He obtained the appropriate forms from Ms. Barber. He obtained a list of employees and their home telephone numbers by photocopying a seniority list posted in the office manager’s work area. He called each employee at home on a Sunday evening outside of work time to discuss the matter and advised them that he would have the appropriate support cards with him the next day at work. Some members of his crew signed the support cards before the start of their shift; others did not sign then, but took cards and decided to consider the matter. No one from management was present at the time.

[7] The Applicant said that he was personally responsible for the cost of the application, and had no arrangement to receive any financial assistance from fellow employees or the Employer.

[8] The Applicant described four reasons for making the application. First, he expressed the opinion that the union dues were not justified for what the employees received. Second, he felt that when the Union earlier had filed some grievances it caused a great deal of stress for, and conflict between, employees on the shop floor. The Applicant felt that the issues raised by the grievances could have been resolved in a better way, but he did not elaborate on what that was. Third, he expressed his personal view that people should be paid on the basis of their own merit and productivity and he wanted the opportunity to negotiate his own terms and conditions of employment. Fourth, the Applicant described a situation where the Employer had arranged for a forklift-training course for the employees outside of regular working time at the Employer's cost, but without pay for the participants. When the Union insisted that the attendees be paid overtime rates for the time to attend the course, the Employer cancelled the opportunity to attend. The Applicant was dismayed because, under the present wage grid, an employee requires a forklift operator's certificate to attain the highest pay grade.

[9] In cross-examination, the Applicant admitted that he learned about the "open period" for applying for rescission of the certification Order by asking Mr. Walters about it shortly before it was made public that Mr. Walters was promoted to a position out of the scope of the bargaining unit. However, he said, Mr. Walters advised him that he could not help him with the application for reasons that Mr. Walters indicated he could not disclose.

[10] The Applicant was asked by counsel for the Union how he came to engage Ms. Barber to assist and represent him with respect to the present application. When Mr. Lazuruk came to the plant, the Applicant went to speak to him. He said that when he advised Mr. Lazuruk that he was "fronting" a rescission application, Mr. Lazuruk immediately told him that he could not discuss the matter with him. The Applicant then asked him how he could get a lawyer. Mr. Lazuruk told him about the lawyer referral

service of the Law Society of Saskatchewan, calling the Board, and also gave him Ms. Barber's name.

[11] The Applicant was originally hired as an "operator." He was promoted about a year ago to the lead-hand position. The position was not posted and he was offered the position over more senior employees. A grievance was filed as a result, but the Applicant did not know what became of it. The Applicant felt that he was promoted on merit and noted that the collective agreement allows this rather than as some kind of "reward" for his assistance with the previous application for rescission.

Argument:

The Applicant

[12] Ms. Barber, counsel for the Applicant, asserted that the application for rescission was made during the open period under the *Act*, with evidence of majority support, for sufficient plausible reasons on the part of the Applicant, and not on the advice or influence of the Employer such that it should be dismissed under s. 9 of the *Act*.

[13] Citing the decision of the Board in *Donna Wells v. Remai Investment Corporation, operating as The Imperial 400 Motel, Prince Albert and United Food and Commercial Workers, Local 1400*, [1996] Sask. L.R.B.R. 194, LRB File No. 305-95, counsel argued that it does not matter whether the views of the Applicant are accurate or fair so long as he came to the conclusions on his own.

[14] According to counsel, the evidence showed that the Employer took a detached and neutral stance with respect to the matter and in the absence of any evidence of interference, assistance or encouragement by the Employer, the application ought to be allowed as in *Chrunik, et al. v. National Electric Ltd. and International Brotherhood of Electrical Workers, Local 2038*, [1996] Sask. L.R.B.R. 568, LRB File No. 060-96. Counsel requested that the Board order a vote.

The Union

[15] Ms. Arvanitis-Ballantyne, counsel for the Union, agreed that there was no direct evidence of Employer interference. However, referring to the previous application for rescission of the certification Order in *Walters v. XPotential Products Inc. and United Steelworkers of America, Local 5917*, [2002] Sask. L.R.B.R. 65, LRB File No. 214-01, counsel asserted that Employer interference is rarely overt. In the present case, the Applicant received assistance from two representatives of management: from Mr. Walters regarding the "open period" for the application and from Mr. Lazaruk with respect to a lawyer to be consulted for the specific purposes of making a decertification application.

[16] Counsel suggested that, in all of the circumstances, the Board ought to infer that there was interference on the part of the Employer in the making of the application.

Analysis and Decision:

[17] The issue to be determined is whether the Board ought to order a vote of the employees on the rescission application. In determining whether to grant a rescission vote, the Board must balance the democratic rights of employees to select a trade union of their own choosing (or whether to be represented by a union at all) against the need to ensure that the employer has not used its authoritative position to improperly influence the decision: *Shuba v. Gunnar Industries Ltd., et al.*, [1997] Sask. L.R.B.R. 829, LRB File No. 127-97.

[18] It is necessary to be vigilant regarding the exercise of influence by an employer in such cases, because the cases are legion that such influence is seldom overt but often may be inferred from unusual circumstances and inconsistent events, meetings and conversations not adequately explained by innocent coincidence. For example, in the previous application for rescission of the certification Order made by Mr. Walters, cited *supra*, the Board was moved to deny the application primarily because of the evidence that shortly before the application was made the Employer had negotiated directly with Mr. Walters without the Union's knowledge and was paying him a significantly higher rate of pay than other employees. The Board stated at 71:

> *By bargaining directly with Mr. Walters, the Employer undermined the Union and the conclusion that some employees drew was that they did not need the Union, just as Mr. Walters was advising them.*

[19] The evidence disclosed that the Applicant in the present case assisted Mr. Walters with the previous application and testified on his behalf at the hearing.

[20] In the present case, the Applicant was significantly moved to make the rescission application by his belief that he could negotiate better wages and benefits with the Employer on his own and without the Union. Of course, Mr. Walters had shown this to be possible.

[21] When the Applicant consulted Mr. Walters with respect to making the present application, Mr. Walters, who had already been advised that he was promoted, or was to be promoted, to a management position, did not decline to provide the Applicant with the information he requested so as to be able to make the application – that being the statutory "open period." It was not until after they had discussed what the open period was that Mr. Walters advised the Applicant that he could not assist him with the application for reasons he could not yet disclose.

[22] Similarly, when the Applicant consulted Mr. Lazaruk about a lawyer that could assist him to "front" a rescission application, Mr. Lazaruk did not decline to discuss the matter with the Applicant until after he had provided him with the information he requested, that is, the name of a specific lawyer experienced in labour relations and practice before the Board. If the discussion between Mr. Nadon and Mr. Lazaruk was truly innocent, it is puzzling as to why the Applicant would canvass Mr. Lazaruk of all people for this kind of information, given Mr. Nadon's awareness of and involvement in the previous unsuccessful decertification application in which employer interference played such a fundamental role. Given that Mr. Lazaruk was infrequently at the Regina plant and resided outside of the province it is strange that Mr. Nadon would consult him or expect him to have the kind of information regarding local lawyers that he sought. And it is likewise puzzling, for the same reasons, as to why Mr. Lazaruk would provide any information to the Applicant beyond advising him to consult the Law Society or the Board after being told at the start of the conversation by the Applicant that the reason for

his inquiry was that he was spearheading an application for rescission, let alone being able to provide the name of experienced local counsel regularly practicing in this particular area of the law.

[23] In such circumstances, neither Mr. Walters nor Mr. Lazaruk could be said to have acted with detachment and neutrality – they refused the Applicant nothing that he asked of them. While there is no evidence that the Employer initiated the application for rescission, in all the circumstances of the case the Employer assisted or influenced the making of the application. The immediate provision of the answers to the Applicant's queries – which were either crucial (the open period) or of great assistance (the name of local counsel experienced in the area of practice who he could consult) to the success of his application – was no doubt encouraging to him, and was not cured by the subsequent disingenuous disclaimers by Mr. Walters and Mr. Lazaruk that they could not assist the Applicant or discuss the matter with him after they had already provided all the information he had sought from them knowing what he intended to do with it.

[24] It is difficult to say what the Applicant would have done had Mr. Walters and Mr. Lazaruk exercised true detachment and neutrality in response to the Applicant's inquiries, rather than the active encouragement they provided. They each provided key pieces to the procedural puzzle that he was attempting to solve. This is not to say that an employee is expected to have to stumble his or her way through such a procedure without correct information or competent assistance. Information on the rescission procedure, including the open period, the requirements for valid support evidence, the appropriate forms for application and advice on how to complete them, and information on contacting the Law Society's lawyer referral service, are readily available upon inquiry of Board staff, as Mr. Lazaruk appears to have been aware. The Board also has an informational pamphlet regarding the decertification process available to the public at its offices.

[25] We find, therefore, that the application was made at least in part on the advice of or as a result of influence by the Employer within the meaning of s. 9 of the *Act*.

[26] This application is dismissed.

DATED at Regina, Saskatchewan, this **3rd** day of **September, 2003.**

LABOUR RELATIONS BOARD

James Seibel,
Acting Chairperson