The Labour Relations Board
Saskatchewan

TRENT LASKO, Applicant v. INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 739 and L.C.M. SANDBLASTING AND PAINTING LTD., Respondents

LRB File No. 234-02; February 25, 2003
Chairperson, Gwen Gray, Q.C.; Members: Ray Malinowski and Pat Gallagher

The Applicant:	Trent Lasko
For the Respondent Union:	Angela Zborosky
For the Respondent Employer:	Glen W. Dowling

Decertification – Interference – Employer dealt directly with employees and provided wage increases not conforming to wage schedule of collective agreement – Employer's conduct undermines Union's role as exclusive bargaining agent and constitutes interference or influence within meaning of s. 9 of *The Trade Union Act* – Board exercises discretion pursuant to s. 9 and dismisses rescission application.

Unfair labour practice – Duty to bargain in good faith – Direct bargaining – Employer dealt directly with employees and offered rates of pay not negotiated with union – Board finds employer in violation of s. 11(1)(c) of *The Trade Union Act.*

***The Trade Union Act*, ss. 5(d), 9 and 11(1)(c)**

REASONS FOR DECISION

Background:

[1] Trent Lasko (the "Applicant"), an employee of L.C.M. Sandblasting and Painting Ltd. (the "Employer" or "L.C.M."), applied to rescind the certification Order issued to the International Union of Painters and Allied Trades, Local 739 (the "Union") on November 6, 2001. The rescission application was filed with the Board on November 19, 2002, within the open period of the first collective agreement. The effective date of the first collective agreement was January 1, 2002.

[2] The Employer's statement of employment listed five employees in the bargaining unit at the time of the rescission application. There is no dispute concerning the statement of employment.

[3] The Union filed a Reply on November 29, 2002 alleging, among other things, that the support evidence filed with the application for rescission was tainted by employer involvement. The Union alleged that the Employer paid wages in excess of those contained in the collective agreement between the Union and the Employer without negotiating the increases with the Union. The Union asked the Board to appoint an investigating officer to review employees' wages and benefits.

[4] The Union also filed an unfair labour practice application against the Employer alleging that the Employer paid wages in excess of the collective agreement without negotiating the increases with the Union. The Union alleged that the Employer had thereby breached s. 11(1)(a), (b), (c), (e) and (g) of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the "*Act*").

[5] In its Reply to the unfair labour practice application, the Employer denied the allegations.

[6] The investigating officer reported to the Board on January 13, 2003. Her findings will be discussed in the Facts portion of these Reasons.

Facts:

[7] The Applicant testified that he did not support the Union initially when it was certified and is convinced that he can do as well on his own without the Union. He does not want to pay Union dues and he is critical of the lack of attention the workplace received from the Union representative. The Union organizers had not approached the Applicant when the certification application was made and he was not happy to be left out in the dark about the Union. He testified that he did not receive notices of union meetings and did not attend any union meetings.

[8] In response to questions put to him by counsel for the Union, the Applicant stated that he obtained information about how to apply to rescind the Union initially from a friend of his who is a steelworker. The friend directed him to Mr. Larry LeBlanc, a lawyer with experience in labour law. Mr. LeBlanc helped the Applicant to prepare the cards to be signed by employees for the purpose of the rescission application and to complete the application forms. The Applicant testified that he and his

fellow workers are responsible for paying Mr. LeBlanc's fees. The employees signed the support cards for the application off the Employer's premises.

[9] The Applicant agreed that his salary increased from $12.00/hour when the Union was certified in the fall of 2001 to $14.26/hour after the Union was certified. The Applicant acknowledged that the Union obtained better overtime rates of pay, and health and welfare benefit plans. Nevertheless, he felt that he could do better on his own without paying union dues. He acknowledged that he had not figured out the exact amounts and he also assumed that after the Union is decertified, the Employer would not decrease his hourly rate of pay. The Applicant believes that it would not be lawful for the Employer to reduce his rate of pay once the Union is decertified.

[10] The Applicant acknowledged that his salary increased to $14.82 in October 2002. He explained that he approached Mr. Mosewich, one of L.C.M.'s owners, about receiving his wage increase. The Applicant was aware that the collective agreement provided for increments in pay at the end of each 1,000 hours of work, and he thought that he was due for an increase under the terms of the agreement. According to the Applicant, Mr. Mosewich told him that $14.82 was the next step up on the pay scale. The Applicant did not have a copy of the agreement and did not confirm on his own that the pay was correct.

[11] When counsel for the Union pointed out to the Applicant that the next step up in the pay scale was $15.35/hour, the Applicant said that he thought the Employer could pay him in the range between $14.26 and $15.35 and he figured that he must not be worth $15.35 at this time in Mr. Mosewich's eyes. The Applicant did not have an opportunity to look at the actual agreement between the Employer and the Union until the date of the hearing.

[12] The Applicant thought that the Union should have been on top of the hours and pay rates for each employee in the shop. He complained that Mr. Terry Parker, the Union representative, only attended the shop a few times over the course of the year. He did have one discussion with Mr. Parker about the salary scale and the 1,000-hour rule. However, he did not feel that he needed to contact the Union as he was happy with the wage increase he received from the Employer.

[13] Mr. Terry Parker, Union representative and organizer for Saskatchewan, was involved in organizing the employees at L.C.M. and in negotiating the first collective agreement. Mr. John Beddome, the Union's business agent, was the principle negotiator for the Union. Mr. Parker testified that since the provincial painters' collective agreement was in place, there was really no reason for negotiations between the Union and the Employer. Under *The Construction Industry Labour Relations Act, 1992*, S.S. 1992, c. C-29.11 (the *"CILRA, 1992*"), all construction employers are bound by the collective agreements entered into between the Union and the designated representative employers' organization, which in this trade is the CLR Construction Labour Relations Association of Saskatchewan, Inc.

[14] However, after certification, Mr. Mosewich informed the Union that he would close his doors before he accepted the rates of pay contained in the provincial agreement. As a result, the Union and the Employer negotiated a "shop agreement," in the form of a letter of understanding, similar to the arrangement the Union has with Industrial Corrosion Control Limited, a shop employer in Saskatoon. Mr. Parker testified that negotiations focused on pay rates; that Mr. Mosewich insisted that the rates of pay contained in the provincial agreement would cause him to go out of business. The "shop agreement" permitted the Employer to pay rates of pay less than those contained in the provincial agreement for shop work.

[15] The industrial sector of the provincial painters' agreement provides for a rate of pay of $23.86/hour for journeymen spray and sandblasting employees on the date of signing of the agreement and progresses to $24.83/hour by May 1, 2003. The apprenticeship rates are set as a percentage of the journeyman rates and they are capped at 75% of the journeyman rate of pay ($18.62/hour)

[16] In the shop agreement negotiated between the Union and this Employer, the Journeyman rate was set at $19.77/hour. The agreement provided for seven levels of "Improver" (a person being trained to become a journeyman) category. The wage scale was set out as follows:

Wages	February 1, 2002
Journeyman T.Q.	$19.77
Journeyman Non-T.Q.	18.96
Improver I	18.25
Improver II	16.44
Improver III	15.35
Improver IV	14.26
Improver V	12.97
Improver VI	11.88
Improver VII	9.35

[17] The agreement describes the classifications as follows:

> *Journeyman (T.Q.) – A person who has a valid Saskatchewan Tradesman Qualification Card. Interprovincial Card.*
>
> *Journeyman (Non –T.Q.) – A person who is qualified but does not hold any of the above cards.*
>
> *Improver I, II, III, IV, V, VI, VII – A person who is being trained in the shop in order to become a Journeyman.*

[18] The wage provisions of the shop agreement also contained the following notes concerning the pay schedule:

> *It is understood and agreed that all workmen hired will have an opportunity to advance through progressive stages of work experience embracing all phases of basic work. <u>After one thousand hours an Employee shall move up to the next classification, being that the employee has improved in qualifications and training to move to the next level.</u>*
>
> *It is understood and agreed that any increase to this section shall be increased when negotiations between International Union of Painters and Allied Trades, Local 739 and Industrial Corrosion Control Limited Painting Shop Agreement are completed. The negotiated increase will be adjusted accordingly.*
>
> (emphasis added)

[19] The shop agreement was intended to apply to shop work, not construction work. It provides that "the terms of this Agreement shall be applicable only

to work as defined herein" and "All other terms and conditions shall be as per Saskatchewan Provincial Painters' Agreement."

[20] According to Mr. Parker, there was no capping of apprenticeship rates under the shop letter of understanding at 75% of the journeyman rate, as was the case under the provincial painters' agreement.

[21] On Mr. Parker's interpretation of the collective agreement, the Applicant ought to have been paid $15.35/hour on completing his 1,000 hours of work. Before the hearing, Mr. Parker was not aware that the Applicant was not receiving the correct rate of pay.

[22] Mr. Parker testified that, at the time of signing the collective agreement, the Union and the Employer agreed to place Mr. Don Bonneau and the Applicant on the wage scale at the Improver IV level and to place Mr. Lloyd Isted at the Improver VII level. Mr. Parker said that Mr. Mosewich telephoned him in April 2002 to inform the Union that he had hired Mr. Ken Stannard at $9.35/hour, the Improver VII level. Mr. Mosewich asked Mr. Parker to come and sign Mr. Stannard up into the Union, which Mr. Parker did in June 2002. Later, Mr. Mosewich phoned Mr. Parker to inform the Union that he had hired Mr. Rob Stashko. Mr. Parker recalled that he attended at the shop in September 2002 to sign up Mr. Stashko. He recalled that he met Mr. Stashko in the coffee room and went through the rates of pay, health and welfare plans and the usual information for a new member. Mr. Parker recalled that all the employees were present in the coffee room when he visited Mr. Stashko, including Mr. Mosewich. Mr. Parker had Mr. Stashko's membership card available to him to enable him to confirm that this meeting took place in September 2002.

[23] Mr. Parker denied that he had any other meetings or contact with Mr. Mosewich. In particular, he denied having any discussion with him over wage increases for employees. He also denied receiving a call from Mr. Mosewich concerning any change of duties for employees. In response to questions put to him on cross-examination by counsel for the Employer, Mr. Parker recalled running into Mr. Mosewich outside a restaurant in Regina and exchanging a greeting with him but he denied that there was anything else discussed during that exchange. Mr. Parker indicated that he

believed he would have recalled such phone calls, if they had taken place, because it would be extremely unusual for an employer, particularly one who had resisted the wage rates contained in the provincial painters agreement, to ask for permission to increase wages over and above the wage rates set out in the collective agreement. Mr. Parker testified that employers normally do not want to deviate from the pay scales set out in the agreement and if they did, the Union would ask for a letter of understanding to change the terms of the collective agreement in writing.

[24] After the rescission application was filed, Mr. Parker spoke with Mr. Bonneau and Mr. Stannard about the reasons for the rescission application. He discovered through their conversations that Mr. Bonneau had received a bonus from the Employer. He also learned from Mr. Stannard that he had received two pay increases from Mr. Mosewich. Mr. Stannard informed Mr. Parker that he felt he did not need the Union.

[25] In relation to the bonus paid to Mr. Bonneau, Mr. Mosewich explained that he informed Mr. Parker of the bonus owing to Mr. Bonneau prior to the certification of the Union and had been advised by Mr. Parker that it could not be paid to Mr. Bonneau at the time because of the outstanding certification application and the resulting freeze provisions contained in the *Act.* Mr. Parker did not recall speaking to Mr. Mosewich about the payment of bonuses prior to the certification hearing as Mr. Mosewich alleged, but he said that if he had been asked, he would have informed the Employer that no changes could be made to pay or benefits prior to the hearing of the certification application due to the freeze provisions contained in the *Act.* Mr. Parker denied that the Employer had informed him of the payment of the bonus to Mr. Bonneau.

[26] The investigating officer's report found that Mr. Bonneau received a $500.00 bonus in June 2002. The payroll records identified it as "01 Bonus." Mr. Bonneau explained to the investigating officer that the Employer promised him the bonus for work performed prior to certification, but held onto it at Mr. Bonneau's request until he needed it. Mr. Bonneau is Mr. Mosewich's brother-in-law.

[27] Mr. Bonneau's rate of pay increased from $14.26/hour to $14.82/hour on October 1, 2002. Mr. Mosewich explained that $14.82 is 75% of the top rate of pay for a

journeyman and he understood that the cap of 75% applied to the wage rates in the shop agreement. He testified that he came to this conclusion after asking the Union negotiators about the application of the 75% cap during bargaining. Mr. Parker denied that any such conversation took place and he disputed the Employer's interpretation of the wage schedule in the shop agreement. In the Union's view, there is no cap on Improvers' wages under the shop agreement.

[28] The investigating officer's report indicates that Mr. Stannard was paid $9.35/hour for March and April 2002; $10.00/hour from May to September 2002; and, $10.50/hour from October to December 2002. Mr. Stannard reached his 1,000-hour mark in August 2002.

[29] Mr. Mosewich explained that Mr. Stannard had demonstrated a strong work ethic and talent. He thought he should be rewarded for his work. According to Mr. Mosewich, he approached Mr. Parker to receive the Union's agreement to increase Mr. Stannard's pay. Mr. Mosewich thought that this conversation occurred when Mr. Parker attended the shop to sign up Mr. Stashko. Mr. Parker denies that he received any request from the Employer to increase Mr. Stannard's pay. According to the pay records, Mr. Stannard received his pay increase in May 2002. Mr. Parker testified that he did not attend the shop to sign up Mr. Stashko until September 2002.

[30] With respect to Mr. Stannard's second increase, Mr. Mosewich testified that he saw Mr. Parker briefly in September and told him that he wanted to move Mr. Stannard up. Mr. Mosewich then indicated that he was not sure if he met with Mr. Parker or had a telephone conversation with him. By the time of the second increase, Mr. Stannard had exceeded his 1,000-hour mark and was entitled to an increase to $11.88, not $10.50. Mr. Mosewich explained that he had not kept track of the hours worked by Mr. Stannard but that he was a good employee.

[31] The investigating officer's report found that Mr. Isted was paid $9.35/hour from February to July 2002; and $10.00/hour from August to December 2002. Mr. Mosewich explained that Mr. Isted had improved and he deserved a wage increase. At the time of the increase, Mr. Isted had worked approximately 212 hours.

[32] Similarly, Mr. Stashko received a wage increase from the start rate of $9.35/hour to $10.00/hour on July 1, 2002, after working approximately 435.5 hours. He received a further increase to $11.00/hour on November 1, 2002 after working over 1,000 hours. Mr. Mosewich explained that Mr. Stashko had taken on additional responsibilities and was a good worker. According to Mr. Mosewich, he increased Mr. Stashko's pay to reflect his work improvement. Again, he testified that Mr. Parker consented to the increases; however, he could not recall the date and indicated that he was "beginning to blank out on it." He believed that the conversations took place at the shop or on the cell phone. Mr. Parker denied that he had discussed the matter with Mr. Mosewich and denied that he approved the increases in question.

[33] By November 1, 2002, Mr. Stashko was entitled to a raise to $11.88/hour in accordance with the collective agreement. Mr. Mosewich explained that he had discussed the wage increase with Mr. Parker and they had agreed to set it below the $11.88/hour figure in accordance with the flexible wording of the agreement "being that the employee has improved." At the same time, he maintained that both Mr. Stannard and Mr. Stashko performed quality work.

[34] Mr. Parker also indicated that it was not possible for the Union to determine from the dues remittance sheets when employees had worked 1,000 hours and would be entitled to an increase in pay. The remittance sheets did not break down the hours of work into regular and overtime hours so any such calculation was not possible. Mr. Parker did not dispute that the Employer remitted union dues for Mr. Bonneau with respect to the $500 bonus paid to him.

[35] Mr. Parker disputed the Employer's interpretation of the wage scale in the shop agreement and did not accept that the words "being that the employee has improved in qualification and training to move to the next level" gave the Employer discretion as to the size or amount of the movement. Mr. Parker indicated that if employees were not improving over time, they would normally be terminated.

[36] Mr. Parker acknowledged that none of the employees had complained to the Union that they had not received the proper increases in accordance with the collective agreement. As a result, he had not taken any steps to ensure that the

Employer was complying with the collective agreement. Mr. Parker indicated that he was not able to attend at the workplace as often as he would like, but he had provided employees with the time and place of the monthly union meetings and had provided them with his telephone number. Mr. Parker agreed with counsel for the Employer that there was no shop steward appointed to represent employees in this shop and he explained that this was often the case in small bargaining units.

Relevant Statutory Provisions:

[37] Relevant statutory provisions are 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.*
>
> *. . .*
>
> *11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:*
>
> > *(a) in any manner, including by communication, to interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of any right conferred by this Act;*

Analysis:

Factual findings:

[38] The evidence establishes that the Applicant and Mr. Bonneau were paid $14.82, when the wage scale provided for an increment to $15.35. Mr. Bonneau, in addition, received a bonus payment of $500 in June 2002. Mr. Isted received a wage increase from $9.35/hour to $10.00/hour after 212 hours of work. The wage scale in the collective agreement does not provide for a $10.00/hour rate of pay. Mr. Stannard received a pay raise from $9.35/hour to $10.00/hour after working 344.5 hours and a further raise to $10.50/hour after working over 1,000 hours. Mr. Stashko received an

increase in his pay rate from $9.35/hour to $10.00/hour after working 435.5 hours and a further increase to $11.00/hour after working in excess of 1,000 hours.

[39] With respect to the Applicants' and Mr. Bonneau's rate of pay, Mr. Mosewich indicated that he interpreted the agreement as requiring a capping of the rates of pay at 75% of the top rate. This explains how he arrived at the rate of pay of $14.82/hour. According to him, the Union negotiators, Mr. Beddome and Mr. Parker, confirmed the capping arrangement with him both during and after negotiations.

[40] Mr. Parker denies that there were such discussions and he disputes Mr. Mosewich's interpretation of the collective agreement. For reasons that we outline below, it is not necessary for this Board to determine if the pay rate of $14.82 is the correct rate or not. The matter is one that is best dealt with through the grievance and arbitration procedure.

[41] In relation to Mr. Bonneau's bonus payment in May 2002, we are inclined to accept Mr. Mosewich's evidence. Mr. Parker could not recall a discussion pertaining to bonus payments, but he stated that had there been such a discussion, his advice to Mr. Mosewich would have been that the payment could not be made prior to the certification hearing. This evidence was consistent with the evidence given by Mr. Mosewich and confirms, in our view, Mr. Mosewich's explanation of why the bonus was not paid prior to certification. In addition, Mr. Mosewich went to the trouble of remitting dues to the Union with respect to the bonus payment. Overall, we accept that the bonus payment was for work performed prior to the certification of the Union and that the delay in making the payment was as a result of Mr. Parker's advice to Mr. Mosewich that a bonus payment made pre-certification may violate the freeze provisions contained in the *Act.*

[42] The evidence with respect to the wages paid to Mr. Isted, Mr. Stannard and Mr. Stashko, however, paints a different picture. Unless the Union consented to their wage increases, none of these employees have received wage increases in accordance with the collective agreement. Initially, they received wage increases that were in excess of the wage rates contained in the collective agreement. Subsequently,

Mr. Stannard and Mr. Stashko received wage increases that were below those required by the collective agreement.

[43] Mr. Mosewich's rationale for the wage increases is contradictory. He offered the initial increases because the employees were productive workers and deserved increases. The final increases were below the amounts "permitted" by the collective agreement because the employees apparently did not demonstrate the required improvement in qualifications and training to move to the next level on Mr. Mosewich's interpretation of the phrase "being that the employee has improved in qualifications and training to move to the next level." At the same time, Mr. Mosewich acknowledged that he did not keep track of the hours worked to know when the 1000-hour increases would come into effect.

[44] Mr. Mosewich claimed that Mr. Parker was aware of each increase in pay and that he approved the same. Mr. Parker denied having any conversations with Mr. Mosewich concerning the rates of pay of the employees, with the exception of the initial discussions about where to place employees on the wage grid once the collective agreement was concluded or to be informed of the pay rates offered to Mr. Stannard and Mr. Stashko when they were hired.

[45] When the Board is required to assess contradictory evidence, we apply the principles set out in cases such as *Faryna v. Chorny,* [1952] 2 D.L.R. 354, where the British Columbia Court of Appeal set out the various factors to consider in determining the credibility of contradictory witnesses at 356-357:

> *If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility . . . A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the*

comparatively infrequent cases in which a witness is caught in a clumsy lie.

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. <u>In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in the place and in those conditions.</u> Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to day "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case.

(emphasis added)

[46] Alan W. Mewett, Q.C. in his text <u>Witnesses</u> (1998: Carswell) describes the process of assessing the credibility of witnesses in the following terms:

In <u>Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.</u>, an action involving a joint venture to develop real estate, the plaintiff's principal was the sole witness called by the plaintiff and credibility became one of the main issues. The Court cited with approval what had been set out in the written submissions of counsel for the third party as to credibility:

> *[1] The testimony of any witness, and particularly that of a witness with a direct interest in the outcome of the case, should be considered on a "stand-alone" basis at first instance. In this regard, the testimonial . . . factors should*

> *first be analyzed (e.g. testimonial capacity, firmness of memory, accuracy and evasiveness), followed by an evaluation of whether or not the witness' story is inherently believable;*
>
> *[2] Next, and assuming that the given witness' evidence has survived the foregoing analysis relatively intact, the testimony should then be evaluated on the basis of its consistency (or lack thereof) with that of other witnesses and with documentary evidence. In this regard, the testimony of non-party or otherwise disinterested witnesses might provide a particularly reliable yardstick for comparison purposes;*
>
> *[3] Finally, the Court must determine which version of events, if conflicting versions exist, is the most consistent with "the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions."*

[47] Reference may also be made to the Alberta Labour Relations Board's decision in *Dynamic Furniture Corp.,* [1998] Alta. L.R.B.R. 366 where Vice-Chairperson Howes applied the above test to assess the credibility of contradictory witnesses.

[48] With respect to Mr. Parker's testimony, we note that he has an interest in the outcome of the proceedings, as does Mr. Mosewich. Their evidence can be assessed on the same footing insofar as their interest in the outcome is concerned.

[49] Mr. Parker recalled in some detail the facts of two telephone exchanges with Mr. Mosewich regarding the hiring of Mr. Stannard and Mr. Stashko and the setting of their rates of pay at the entry-level rate of $9.35/hour. Mr. Parker recalled attending on Mr. Stannard in May 2002 and on Mr. Stashko in September 2002 at the shop to sign them up in the Union. Mr. Parker's testimony with respect to the time of signing up Mr. Stashko was confirmed by his reference to Mr. Stashko's union card.

[50] Mr. Parker recalled seeing Mr. Mosewich outside a restaurant in Regina in an exchange with a person known to Mr. Parker. Mr. Parker testified that he greeted Mr. Mosewich but otherwise did not engage in a discussion with him.

[51] Mr. Parker also explained that he would have reason to remember any discussions pertaining to the rates of pay to be paid to Mr. Isted, Mr. Stashko and Mr. Stannard in excess of the collective agreement because it would be an unusual event – that is, it would be outside his normal experience as a union representative to have an employer volunteer to pay rates in excess of those negotiated in a collective agreement. In his mind, such information would have been even more memorable in relation to Mr. Mosewich due to his insistence during collective bargaining that he would need to close his shop if the Union did not agree to lower rates of pay.

[52] On a stand-alone basis, we find Mr. Parker's testimony demonstrates clarity of memory and detail and lack of evasiveness that leads us to conclude that his evidence is credible. In addition, in the context of the negotiation of the first collective agreement, his story is inherently believable – that is, that he would recall if Mr. Mosewich contacted him with respect to the wage increases for Mr. Isted, Mr. Stannard and Mr. Stashko because of the history of the collective bargaining and the unusual nature of the alleged requests. He also indicated that if the Union had agreed to new rates, the parties would have amended the letter of understanding. This latter evidence is significant from the Board's point of view because of the requirement contained in s. 2(b) of the *Act* that collective agreements be set down in writing.

[53] Mr. Parker's testimony must be contrasted with Mr. Mosewich's testimony. Mr. Mosewich's evidence lacks considerable detail when compared to Mr. Parker's evidence. He did not recall details of time, place or manner of discussing the wage increases for Mr. Isted, Mr. Stannard or Mr. Stashko. He thought Mr. Parker visited the shop sometime before May 2002 to sign up Mr. Stashko, but Mr. Parker's evidence on this point was that he attended in September 2002 and his records confirmed this fact.

[54] Mr. Mosewich's story, when evaluated in the context of the negotiation of the collective agreement, is not inherently believable. Offering wage rates to Mr. Isted, Mr. Stannard and Mr. Stashko in excess of the rates provided for in the collective agreement suggests that Mr. Mosewich had originally bargained rates of pay with the Union that were not viable for his business, i.e. they were set too low to attract and retain good employees. If Mr. Mosewich approached Mr. Parker for increases in these rates, it

is unlikely that the Union representative would not recall such discussions and, even more unlikely that the Union would not have acted on the discussions by seeking increases to the rates mid-term and seeking written amendments to the shop agreement.

[55] In addition, we find Mr. Mosewich's testimony to be contradictory in relation to his explanation of the rates of pay paid to Mr. Stannard and Mr. Stashko after they had reached 1,000 hours. Mr. Mosewich justified the first increases offered to these two employees prior to achieving 1,000 hours based on the employees' work performance. However, when they were entitled to a pay raise under the terms of the collective agreement, the Employer paid less than the full increment based on the justification that the employees had not yet demonstrated the necessary improvement in qualifications and training to receive the full increment increase. Without a better explanation, the Board finds it difficult to understand how Mr. Mosewich's assessment of the two employees changed so dramatically over the course of a few months. Mr. Mosewich also explained that he did not keep track of their hours of work.

[56] Comparing Mr. Parker's and Mr. Mosewich's testimony on the key question of whether Mr. Mosewich contacted Mr. Parker to seek his approval for the wage increases for Mr. Isted, Mr. Stannard or Mr. Stashko, we find that Mr. Parker's testimony is more consistent with "the preponderance of probabilities" which we would recognize as reasonable and likely in these circumstances. Simply put, Mr. Parker's story is more believable and more consistent with the overall circumstances. We find, therefore, that Mr. Mosewich did not seek Mr. Parker's approval for the wage increases paid to Mr. Isted, Mr. Stannard or Mr. Stashko.

Unfair Labour Practice Application:

[57] We will deal with the unfair labour practice application first because it will assist in explaining our reasoning on the rescission application.

[58] In the present case, the evidence demonstrates that the Employer paid employees rates of pay both in excess of the collective agreement (first increases for Mr. Isted, Mr. Stannard and Mr. Stashko) and less than the rates set out in the collective

agreement (the Applicant, Mr. Bonneau, Mr. Stannard, Mr. Stashko). Although the rates paid to the Applicant and Mr. Bonneau may be subject to some debate and may require resolution under the grievance and arbitration provisions of the collective agreement, we do not find the rates paid to Mr. Isted, Mr. Stannard or Mr. Stashko are, in any way, justified under any reasonable construction of the collective agreement. After hearing the evidence, the Board was left with the overall impression that Mr. Mosewich determined the salaries of employees without reference to the terms of the collective agreement. This conclusion is reinforced by Mr. Mosewich's admission that he did not keep track of employees' hours of work, which was the determining factor for increases in wages under the terms of the collective agreement.

[59] What was the effect of the Employer's wage setting practice? We have evidence from the Applicant that he was happy with his wage increase. The Applicant is under the impression that he can do better on his own, even though this appears to be an irrational conclusion based on the evidence of the pay increases obtained by the Union. Mr. Parker testified that Mr. Bonneau and Mr. Stannard concluded from their experience in receiving bonuses and pay increases directly from Mr. Mosewich that they did not need the Union to negotiate on their behalf as the Employer was paying them bonuses and giving them raises anyway. Mr. Parker complained that the pay rates in excess of the collective agreement were used to influence the members against the Union.

[60] The Board has come to a similar conclusion in past decisions. In *I.W.A., Local 1-184 v. Moose Jaw Sash and Door Co. (1963) Limited,* [1980] May Sask. Labour Rep. 69, LRB File No. 312-79, the Board found the Employer guilty of an unfair labour practice by paying employees wages in excess of those contained in the collective agreement between the Union and the Employer. At 70, the Board found as follows:

> *As stated previously, the employer, by telling each employee who gave evidence that he would be paid a wage rate in excess of that called for under the collective agreement and by in fact paying that pay rate is dealing with the employee when the certification order of the Board makes the union the exclusive representative of the employees with respect to wages and working conditions. This constitutes a refusal to bargain collectively with the union, an unfair labour practice under Section 11(1)(c) of The Trade Union Act. The Board finds support for its decision in Regina v.*

> *Davidson Rubber Co. Inc., 69 C.L.L.C., Case No. 14190 and Le Syndicat Catholique des Employes de Magasins de Quebec, Inc v. La Compagnie Paquet Ltee, 59 C.L.L.C., Case No. 15409. In the latter case the Supreme Court held that freedom of individual contract was abrogated when a union is certified and that there is no room left for private negotiation between employer and employee.*

[61] In several Board decisions, similar employer conduct has resulted in the rescission applications being dismissed under s. 9 of the *Act.* For instance, in *Flaman v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and Western Automatic Sprinklers (1983) Ltd.,* [1989] Spring Sask. Labour Rep. 45, LRB File No. 045-88 at 54, the Board found, in the context of a rescission application, that the Employer's actions in paying wages in excess of the collective agreement, hiring workers off the street instead of in accordance with the Union security provisions, and refusing to abide by the terms of the collective agreement, constituted conduct that was "calculated to impede and defeat all efforts by the union to bargain collectively."

[62] In two recent cases, the Board has come to a similar conclusion. In *Smith v. Canadian Union of Public Employees, Local 1975 and Four Star Management and Country Classic Fashions Ltd.,* [2002] Sask. L.R.B.R. 1, LRB File No. 256-01, the Board found that the Employers' failure to implement the terms of an imposed first collective agreement and unilaterally changing rates of pay for employees constituted influence, interference or intimidation in the making of an application, as those terms are used in s. 9.

[63] 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, the Board commented on similar Employer conduct as follows at 71:

> *[20] Even without all of the unusual circumstances listed above, the fact that the Employer negotiated wages directly with Mr. Walters and was paying Mr. Walters a significantly higher rate of pay without the Union's knowledge, clearly had the effect of undermining the Union at the workplace. The evidence confirms the obvious, that other employees wanted to negotiate a higher rate directly with the Employer much like Mr. Walters had done. 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. The Board has previously determined that such Employer conduct is unacceptable.*

[64] In the present case, the Employer's conduct in dealing directly with employees and offering wage increases that did not conform to the terms of the collective agreement is rendered more egregious by the tough bargaining stance it took in negotiations for a first collective agreement with the Union. We conclude from the Employer's conduct that it negotiated rates with the Union that are not viable for its business in the sense that the rates are too low to attract and retain employees. If the Employer found itself in the position where the rates were too low to meet its purposes, it was obligated to negotiate different rates of pay with the Union and not to solve the problem by negotiating different rates of pay directly with employees. All of this conduct undermines the role of the Union as the exclusive bargaining agent for employees and renders the Union an impotent advocate for employees.

[65] As a result, the Board finds that the Employer violated s. 11(1)(c) of the *Act* by dealing directly with employees and offering them rates of pay that were not negotiated with the Union.

The Rescission Application:

[66] The main issue to decide on the rescission application is whether the Board should exercise its discretion under s. 9 of the *Act* to dismiss the application without ordering a vote.

[67] As indicated above, there are many similar cases where the Board has found that Employer conduct in negotiating wages directly with employees, without reference to the Union or to the collective agreement, constitutes improper influence or interference by the Employer under s. 9.

[68] In *McNutt v. Moose Jaw Sash and Door Co. (1963) Limited and International Woodworkers of America, Local 1-184,* [1980] July Sask. Labour Rep. 37, LRB File No. 033-80, the Board explained the rationale for its decision to dismiss an application for rescission in similar circumstances as the present case, as follows at 37:

> *If the Board granted the application, it would sanction the practice of an employer inducing applications for decertification by an employer offering wage increases directly to employees without reference to the union. Section 9 of the Act was enacted to permit the Board to prevent the success of such tactics.*

[69] As we set out above, the Employer's conduct has undermined the Union's role. In not respecting the role of the Union or the collective agreement, he Employer has not dealt fairly with the Union or with the employees. Employees would naturally conclude that they do not need the Union to represent them in collective bargaining because the Employer is willing to deal with them directly on the wage issue. This is supported in the evidence by Mr. Parker's report of his discussions with Mr. Stannard and Mr. Bonneau. Although the evidence is hearsay in nature, the Board can and does infer from the evidence overall that the Employer's conduct in undermining the role of the Union led to the bringing of the application for rescission.

[70] For these reasons, the Board dismisses the application as it has been made in whole or in part as a result of improper employer interference or influence, contrary to s. 9 of the *Act.*

Conclusion:

[71] We find the Employer in violation of s. 11(1)(c) of the Act. An Order will issue accordingly.

[72] The Application for rescission is dismissed under s. 9.

DATED at Regina, Saskatchewan this **25th** day of **February, 2003.**

LABOUR RELATIONS BOARD

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Gwen Gray, Q.C.
Chairperson

DISSENT

[73] Mr. Trent Lasko ("Lasko"), representing employees of LCM Sandblasting & Painting Ltd. (the "Employer") has requested decertification from the International Union of Painters & Allied Trades, Local 739 (the "Union").

[74] A majority of employees signed for decertification.

[75] Mr. Lasko should not have to explain their reasons, however, he offered comments that:

- the Union was doing nothing for them that they felt they could do themselves;
- Union dues are a "cost" for which they are not receiving sufficient attention or return;
- the Union has not visited with employees sufficiently to demonstrate an interest in the employees' welfare; and
- the employees feel that the Union simply takes dues from employees and has done nothing for them since signing.

[76] Mr. Lasko stated quite unequivocally that the employees do not want the Union; that a majority of employees have signed requesting the decertification be granted; that no one else but the employees decided on this action; and, that decertification remains their request.

[77] The Union did agree that visitations to the employees were rare, if any, citing how busy they were with only one representative in Saskatchewan. This representative gave reasons why he was busy and couldn't do everything, etc, etc., and that more support, if required, would have to be drawn from the union offices which were located in Winnipeg. The Union also seemed to suggest that they had no obligation to be accountable or to provide service to the employees, but that the employees had the opportunity to request their assistance when needed.

[78] To the employees represented by Mr. Lasko, their request for decertification was simple – we simply want out – and the long dialogues where the Union was making excuses and justifications for not maintaining the support of the employees did nothing to change Mr. Lasko's opinion.

[79] The Union filed an unfair labour practice against the Employer indicating "the Employer had been providing employees greater salary and benefits than that contained in the relevant collective agreement without negotiating the same with the Union." The purpose was to undermine the Lasko application for decertification on the grounds that the Employer was influencing the employees' action.

[80] The Employer defended their action of increases and the one bonus on the basis of his understanding of this first collective agreement and by indicating all of these actions were discussed earlier or at the time with Mr. Terry Parker of the Union.

- Wage increases were small, scattered, based on merit reasons, and did not exceed salary levels in the collective agreement;
- The bonus was explained as "back pay" previously withheld during the Union certification process, with the Union's understanding. It is interesting to note that the recipient was a brother-in-law. Common sense would suggest that it would hardly be required to pay to influence a brother-in-law, if that was the Union implication; and
- All Union dues were paid on increased incomes, where applicable, so no attempt was made to hide or influence someone without the Union's knowledge. (The Union's stated difficulty in reading the wage rates from the forms they were provided is not the Employer's problem.)

[81] The Union did not provide evidence that employees were threatened, intimidated, or paid extra money for the sole purpose of getting or seeking decertification. In fact, the long litany of questions, evidence, etc., suggests that the Union was not paying very much attention to this group of employees and were quite unaware or forgetful about details that prevailed.

- The Union rarely visited employees and the company;

- The Union accepted dues but claims it is not responsible to monitor pay rates. (Just because it is time consuming and the Union didn't do this doesn't mean the Employer was committing an unfair labour practice. One wonders how the Union monitors to protect the employee if the Employer is paying insufficient rates as per the contract.)
- The Union's presentation did not support original submission that the Employer was giving greater salaries to employees that the collective agreement allowed for. (How now does paying less than allowable rates constitute influence?)
- The Union did not directly deny that they were informed about various events and actions. They simply "didn't recall".
- No grievances were filed at the time of Union claim that wrongdoings occurred.

[82] The collective agreement seemed quite difficult to interpret. It is not clear and definitive as was evident when both the Employer and the Union presentations were being explained. The back and forth questions and answers between the Union and the Employer regarding definitions and clarifications of what the collective agreement meant, did nothing to suggest there was a deliberate attempt for the Employer to influence an employee to seek a decertification process.

[83] The Union has not proved that any actions the Employer took in interpreting or managing the collective agreement were done to influence the employees to seek decertification. Accordingly, the unfair labour practice charge should be denied.

[84] The Lasko application for rescission or decertification was properly submitted with a majority support from the employees affected and should be granted.

DATED at Regina, Saskatchewan, this **25th** day of **February, 2003.**

LABOUR RELATIONS BOARD

"Ray S. Malinowski, Board Member"