Labour Relations Board
Saskatchewan

DEBRA NEWNHAM, Applicant v. INTERNATIONAL ASSOCIATION OF HEAT & FROST INSULATORS & ASBESTOS WORKERS, LOCAL 119 and EARL'S MECHANICAL INSULATION LTD., Respondents

LRB File No. 014-04; April 14, 2004
Chairperson, James Seibel; Members: Mike Carr and Maurice Werezak

The Applicant:	Debra Newnham
For the Certified Union:	Chuck Rudder
For the Employer:	Earl Newnham

Decertification – Interference – Family relationship between applicant and employer not, in itself, sufficient to lead to inference of employer influence but is, together with degree of consanguinity and closeness of relationship, factor that may be considered – Where applicant related to principal and directors of employer, employer communicated views on union to applicant and applicant consulted employer about whether decertification application should be made, Board finds employer influence and dismisses application.

Decertification – Interference – Employer attempted to negotiate directly with employee, shortly before application made, to circumvent union security obligations, failed to remit some required deductions and contributions to union and failed to comply with collective agreement obligations with respect to hiring and lay-off – Board finds employer influence and dismisses application.

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

REASONS FOR DECISION

Background:

[1] By Order of the Board dated October 21, 1993 (LRB File No. 217-93) International Association of Heat & Frost Insulators & Asbestos Workers, Local 119 (the "Union") was designated as the certified bargaining agent for a standard "Newbery" unit for employees in the insulator trade of the construction industry employed by Earl's Mechanical Insulation Ltd. (the "Employer").

[2] The Employer is a contractor with its office in the town of Dundurn, just outside of Saskatoon, Saskatchewan. The principal and sole shareholder of the

Employer is Earl Newnham. Earl Newnham and his wife, Gloria Newnham, are the registered directors of the Employer. Their daughter, the Applicant, Debra Newnham, ostensibly a member of the bargaining unit, applied to rescind the certification Order pursuant to s. 5(k) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*").

[3] In *Construction and General Workers' Local Union No. 890* v. *International Erectors and Riggers, a Division of Newbery Energy Ltd.*,[1] [1979] Sept. Sask. Labour Rep. 37, LRB File No. 114-79, the Board established standard bargaining units in the construction industry colloquially referred to as "Newbery" units.

[4] The Union requested that the Board exercise its discretion to dismiss the application on two grounds: firstly, on the basis that the Applicant is neither a member of the Union nor was she dispatched to work through its hiring hall as a "permitted" worker, and, secondly, pursuant to s. 9 of the *Act*, on the alleged basis 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. Another issue is whether Gloria Newnham is an "employee" within the meaning of s. 2(f) of the *Act*, being a registered corporate director of the Employer.

[5] The collective agreement for the commercial/institutional sector between the Union and unionized employers in the insulator trade division of the construction industry was effective March 9, 2003 and expires January 31, 2004 – the application was therefore filed within the open period mandated by the *Act*.

[6] The statement of employment filed by the Employer lists three employees affected by the application, Debra Newnham, Gloria Newnham and Ron Hrapchuk, all listed in the occupational classification of "helper." All listed employees had been employed by the Employer for more than thirty days. The Applicant filed what purports to be evidence of support for the application from a majority of the members of the bargaining unit.

[7] The application was heard on February 12, 2004.

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[1] *The Newbery unit for employees in the insulator trade includes "all insulators, insulator apprentices and insulator foremen."*

Evidence:

[8] The Applicant first worked for the Employer doing general labour associated with the insulating trade from 1986 until 1997, when she left for personal reasons. She began working for the Employer again on a part time basis in the early spring of 2003. Her mother, Gloria Newnham, works in the Employer's office and sometimes delivers materials to the jobsite.

[9] The Applicant maintained that the Employer remits union dues to the Union on her behalf, in the amount of approximately twenty-seven dollars per month, despite the fact that she is not a member of the Union, her application for membership having been rejected in approximately 1994 by the then business agent of the Union.

[10] The Applicant explained that she no longer wishes the Union to represent her because she feels it "does nothing for her." She complained that she had yet to see a union representative on a jobsite where she has been working since she returned to work for the Employer in early 2003. She admitted in cross-examination that, over the years, she had heard her father complain about the difficulty in obtaining work as a unionized employer when the company had to compete with non-union contractors. She admitted that, after she had prepared the application for rescission, she asked her father whether the present application would hinder the business and that he told her she "should do what she had to do." She also admitted that she would not do anything to harm the company. She further discussed making the application with her mother, but maintained that it was her decision alone to make the application for decertification and that neither her father nor her mother influenced her decision.

[11] The Applicant was uncertain whether she had been "dispatched" by the Union to work for the Employer when she returned in 2003, but testified that she was once on the Union's "unemployed list" years before.

[12] Earl Newnham, the Employer's principal, attended under subpoena to be cross-examined by the representative of the Union as the declarant of the statement of employment filed on the application. He admitted that, just before the Employer hired one Ian Dyke in early January, 2004, he offered to pay Mr. Dyke directly the amount that otherwise would be remitted to the Union for union dues and to the trustee for the

unionized industry health and welfare, pension and education trust funds, but Mr. Dyke declined to accept. Mr. Newnham, who was forthright in his testimony, admitted that such conduct was probably not a good idea on his part. When Mr. Dyke was laid off some two or three weeks later, Mr. Newnham admitted that he did not follow the terms of the collective agreement in doing so.

[13] Mr. Newnham admitted that, while he had always contacted the Union hiring hall when he required workers, he had become "lax" about doing so in recent years. He maintained that he contacted the Union when he hired both Gloria Newnham and Debra Newnham and that all dues were duly remitted to the Union. In cross-examination, however, on being presented with the Employer's remittance records, he agreed that it appeared that the appropriate remittances were not made at times for some of the employees – including Gloria Newnham and Debra Newnham – to the industry health and welfare, pension and education trust funds and for the "building trades" dues. Mr. Newnham admitted that the Employer had failed to remit certain funds in the past, but it was "straightened out." He admitted that, because of such past experience, the proper procedure should now be known to the office staff, Gloria Newnham.

[14] Mr. Newnham testified that he himself – a journeyman – was the only member of the Union among the persons presently working for the Employer.

[15] Despite the fact that his spouse, Gloria Newnham, is registered as a director of the Employer, Mr. Newnham maintained that she had no involvement in the management of the company. While at one time she was a shareholder of the company, she has divested herself of such interest.

[16] Chuck Rudder has been the business manager and financial secretary of the Union for the past nine months. He was the president of the local Union from 1996 to 1999. Mr. Rudder testified that the Employer has not been remitting appropriate dues and funds on behalf of some of its employees, including Debra Newnham.

[17] According to Mr. Rudder, none of Debra Newnham, Gloria Newnham or Ron Hrapchuk is a member of the Union and none of them was cleared and dispatched to work for the Employer as a "permitted" worker. On January 20, 2003 Ron Hrapchuk

was cleared and dispatched to work for Atlas Insulation Ltd., a company owned by Earl Newnham's son.

Statutory Provisions:

[18] Relevant statutory provisions include ss. 5(k) and 9 of the *Act*, which provide as follows:

> *5 The board may make orders:*
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> *(k) rescinding or amending an order or decision of the board made under clause (a), (b) or (c) where:*
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> *(i) there is a collective bargaining agreement in existence and an application is made to the board to rescind or amend the order or decision during a period of not less than 30 days or more than 60 days before the anniversary of the effective date of the agreement; or*
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> *(ii) there is no agreement and an application is made to the board to rescind or amend the order or decision during a period of not less than 30 days or more than 60 days before the anniversary date of the order to be rescinded or amended;*
>
> *notwithstanding a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;*
>
> . . .
>
> *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.*

Analysis and Decision:

[19] Several issues are raised in the present case:

1) Whether the application for rescission 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 an agent of the Employer;

2) Whether the application, in the context of the construction industry, can legitimately be brought by an employee who has not been hired pursuant to the collective agreement through the designated trade union's hiring hall procedure;

3) Whether employees that have not been hired through the hiring hall procedure ought to be included on the statement of employment for the purposes of determining whether there is majority support for the application; and

4) Whether Gloria Newnham, as a registered director of the Employer, is an "employee" within the meaning of the *Act* for the purposes of determining whether there is majority support for the application.

[20] However, as we are of the opinion that it is clear that the application was made, at least in part, as a result of influence by the Employer and that it is unlikely that a vote among the employees regarding representation by the Union will reflect their true wishes, we have determined to exercise our discretion to dismiss the application on that basis.

[21] As noted by the Board in *Shuba v. Gunnar Industries Ltd. and International Union of Operating Engineers, Hoisting, Portable and Stationary, Local 870*, [1997] Sask. L.R.B.R. 829, LRB File No. 127-97, at 832, and many Board decisions that have followed, we must balance the democratic right of employees to choose to be represented by a trade union pursuant to s. 3 of the *Act*, against the need to ensure that the employer has not used coercive power to improperly influence the outcome of that choice.

[22] Most recently, in *Matychuk v. Hotel Employees and Restaurant Employees Union, Local 206 and El-Rancho Food & Hospitality Partnership o/a KFC/Taco Bell*, [2004] Sask. L.R.B.R.---, LRB File No. 242-03 (not yet reported), the Board approved of the observation that it must be vigilant with respect to the issue of employer influence as referred to in s. 9 of the *Act*. In *Wells v. Remai Investment Corporation and United Food and Commercial Workers, Local 1400*, [1996] Sask. L.R.B.R. 194, LRB File No. 305-95, at 197, the Board observed that it is alert to any sign that an application for decertification has been initiated, encouraged, assisted or influenced by the actions of the employer, "as the employer has no legitimate role to play in determining the outcome of the representation question." However, not every suspicious or questionable act or circumstance will necessarily lead to the conclusion that an application has been made as a result of influence, interference, assistance or intimidation by the employer. As noted in *Leavitt v. Confederation Flag Inn (1989) Limited and United Food and Commercial Workers, Local 1400*, [1990] Winter Sask. Labour Rep. 64, LRB File No. 225-89, at 66, the conduct must be of a nature and significance that it compromises the ability of the employees to make the choice protected by s. 3 of the *Act*:

> *Generally, where the employer's conduct leads to a decertification application being made or, although not responsible for the filing of the application, compromises the ability of the employees to decide whether or not the wish to be represented by a union to the extent that the Board is of the opinion that the employees' wishes can no longer be determined, the Board will temporarily remove the employees' right to determine the representation question by dismissing the application.*

[23] In *Matychuk*, *supra*, the Board also approved of the observation in *Poberznek v. United Masonry Construction Ltd. and International Union of Bricklayers and Allied Craftsmen, Local No. 3,* [1984] Oct. Sask. Labour Rep. 35, LRB File No. 245-84 and many other decisions of the Board, that evidence of undue influence or interference is rarely direct or overt and the Board will consider whether more "subtle or indirect forms of influence may improperly inject the interests or views of the employer into the decision concerning trade union representation": see, *Wells*, *supra*, at 198.

[24] While the presence of relatives among employees may not in itself be sufficient to lead to an inference that an application for rescission of a certification order

is tainted by employer influence, it is a factor that may be considered (see, *Pfefferle v. Ace Masonry Contractors Ltd. and Bricklayers and Masons International Union of America, Local 3*, [1984] Aug. Sask. Labour Rep. 45, LRB File No. 225-84), as may the closeness of the degree of consanguinity and the relationship between the employee and the related member or members of management.

[25] In the present case, we are of the opinion that certain events and circumstances, considered together, are of a nature and significance such that we must infer that the ability of the employees to decide whether or not they wish to be represented by the Union would be compromised in a vote on the issue supervised by the Board. Such considerations include, but are not limited to, the following: the parent and daughter relationship between the Employer's principal and its registered directors and the Applicant; the comments made and views expressed by the Employer's principal to the Applicant regarding the Employer's operation as a unionized employer and complaints about the Union over time; the Applicant seeking the opinion of the Employer's principal as to whether she should make the application; the Employer's attempt to individually negotiate directly with one of the employees shortly before the application was made with respect to circumventing union security obligations and contribution to industry benefit plans; the Employer's failure to remit some required deductions and contributions for industry benefit plans on behalf of the Applicant and others; the Employer's failure to abide by its collective agreement obligations with respect to the use of the Union's hiring hall procedure in the hiring of employees; and the Employer's apparent failure to abide by collective agreement obligations with respect to the layoff of an employee shortly before the application was made.

[26] Accordingly, we exercise our discretion under s. 9 of the *Act* to dismiss the application as it was made, in whole or in part, as a result of influence or interference by the Employer.

DATED at Regina, Saskatchewan this **14th** day of **April, 2004**.

LABOUR RELATIONS BOARD

James Seibel,
Chairperson