Labour Relations Board
Saskatchewan

LOTUS FERGUSON, Applicant v. HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES UNION, LOCAL 41 and EL RANCHO FOOD & HOSPITALITY PARTNERSHIP o/a KFC/TACO BELL, Respondents

LRB File No. 024-04; March 31, 2004
Vice-Chairperson, Wally Matkowski; Members: John McCormick and Leo Lancaster

The Applicant:	Lotus Ferguson
For the Certified Union:	Garry Whalen
For the Employer:	No one appearing

Decertification – Interference – Board must balance democratic right of employees to choose trade union representation against need to ensure that employer has not used coercive power to improperly influence outcome of employee choice – Applicant did not contact employer about application and no evidence that any employee thought applicant, as supervisor, was agent of employer – Board finds no evidence of employer influence and orders vote to determine representation issue.

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

REASONS FOR DECISION

Background:

[1] Hotel Employees and Restaurant Employees Union, Local 41 (formerly Hotel Employees and Restaurant Employees Union, Local 206 (the "Union")) was designated as the certified bargaining agent for a unit of all employees of El Rancho Food & Hospitality Partnership, operating under the name and style of KFC/Taco Bell at 3998 Albert Street, Regina (the "Employer") by a certification Order dated February 17, 2000 (LRB File No. 315-99). On February 9, 2004, Lotus Ferguson, (the "Applicant"), a member of the bargaining unit, applied to rescind the certification Order during the open period, pursuant to s. 5(k) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act* "). The Union replied 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 and requested that the Board exercise its discretion and dismiss the application pursuant to s. 9 of the *Act.* The application was heard on March 10, 2004.

[2] The bargaining unit comprises all employees at the designated store location except the manager, assistant managers and drivers.

[3] The Applicant filed what purports to be evidence of support for the application from a majority of the members of the bargaining unit.

Evidence:

[4] The Applicant has worked for the Employer for approximately one year. She was unaware of the gains that the Union had achieved for the employees prior to her employment. She was unaware if the Union had gone on strike three years earlier to achieve gains. She had never seen any union representative at the store location and had only read memos with respect to union activities.

[5] In deciding to bring the decertification application, the Applicant consulted with both her husband and Melissa Matychuk, an employee who had brought a decertification application relating to another of the Employer's stores (see: *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). In addition, the Applicant testified that she had reviewed the internet while preparing her application. The Applicant filed the application because she had never seen a union representative at the store, because she paid union dues of approximately $340 per year and because she had seen the union support an employee who she believed had acted inappropriately, thus causing problems on her shift.

[6] Prior to bringing the application forward, the Applicant had discussions with employees as to the pro's and con's of having a union. She obtained signatures in support of her application during off hours and on employee days off.

[7] The Applicant has been a shift supervisor for the last four months and was questioned by Mr. Whalen with respect to her duties as a shift supervisor and the perception employees had of her. The Applicant testified that she is a shift supervisor, which is an in scope position. She works both as a supervisor and as a member of the

crew. The Applicant indicated that she is not part of management, though she could be described as junior management, and she agreed that some crew members could consider her to be part of management. Some of her duties include assigning work to crew members. The Applicant testified that management had nothing to do with her application.

[8] In response to questioning from Mr. Whalen about what the Union had achieved for the employees, the Applicant was aware of a seniority clause, a grievance clause, a shoe allowance and wage increases that the Union had achieved for its members.

[9] The Union called no evidence in response to the Applicant's testimony.

Statutory Provisions:

[10] Relevant statutory provisions include ss. 5(k), 6(1) 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*
>
> *(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;*
>
> . . .

> *6(1) In determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, in addition to the exercise of any powers conferred upon it by section 18, the board may, in its discretion, subject to subsection (2), direct a vote to be taken by secret ballot of all employees eligible to vote to determine the question.*
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> . . .
>
> *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.*

Arguments:

[11] The Applicant argued that, having filed evidence of majority support, her application ought to be granted and that the Board should respect the wishes of the majority of the employees in the bargaining unit.

[12] Mr. Whalen argued that the application ought to be dismissed pursuant to s. 9 of the *Act* because it was made as a result of influence of or interference by the Employer. The main thrust of Mr. Whalen's argument was that the Applicant was perceived as management and that some employees may have had the perception that they had to support the Applicant's application. Mr. Whalen also argued that there were a number of similarities between the Applicant's application and that of Ms. Matychuk in the *Matychuk* case, *supra,* which caused him to be suspicious and suspect employer influence. These similarities included that the same Notary Public was used by each applicant, that both applicants had utilized the internet and that both applicants gave the same reasons as to why they did not want to have the Union represent them any further. Mr. Whalen also thought it odd that the Applicant filed her application on the last possible day.

Analysis and Decision:

[13] The issue in the present case is 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.

[14] 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, the Board 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.

[15] In the case at hand, there was no evidence that the Employer used any powers to improperly influence the employees. It was the uncontroverted evidence of the Applicant that she had no contact with the Employer with respect to the application. Mr. Whalen's only argument relating to employer influence stemmed from the fact that, because the Applicant was an in scope supervisor, some employees may have been under the impression that the Applicant was acting on behalf of management. Mr. Whalen argued that this may have caused the employees to support the Applicant's application.

[16] The argument that the Applicant was somehow an agent of management because she was an in scope shift supervisor has no merit whatsoever. The argument that the Applicant was identified as a manager by the employees such that the evidence of support filed for the application is tainted must also fail. Firstly, there was no evidence that any employee thought that the Applicant was a member of management. It was the evidence of the Applicant that she was a member of the Union and that she talked to fellow employee about the pro's and con's of belonging to the Union. Secondly, this argument was dealt with by the Board in the *Matychuk* decision, *supra,* at ---, as follows:

> *With respect to the argument that the Applicant is an "agent of the employer" because she was shown to have exercised a disciplinary function with respect to one employee, supervisors, sometimes also called "working forepersons" or "lead hands," are often included in a certified bargaining unit, frequently upon the*

> *application of the bargaining agent. Such persons commonly "supervise" employees with whom they work side-by-side doing virtually the same job. However, they may be charged with the duty and authority to carry out functions such as preparing certain paperwork, ensuring that the shift they supervise is appropriately staffed and exercising a minor admonitory function with respect to fellow members of the bargaining unit. In the present case, the only evidence in this regard is that the Applicant provided a verbal warning to an employee for being late for a shift. She was not otherwise cross-examined as to the nature and extent of her authority. We are not of the opinion that the Applicant is an agent of the Employer or identified as a manager by the employees such that the evidence of support filed for the application is tainted.*

[17] The Board accepts the analysis from *Matychuk, supra*, and finds that the Applicant, as an in scope supervisor, is not an agent of the Employer or identified as a manager by the employees such that the evidence of support filed by the Applicant is tainted.

[18] Mr. Whalen argued that, because there were a number of similarities between this application and the *Matychuk* application, *supra*, the Board should infer that these similarities occurred because of employer interference. Even if the Board accepted that there were a number of similarities between the two applications, that does not lead the Board to the conclusion that the Employer had anything to do with those similarities. Mr. Whalen's argument may have had more weight if the Board in the *Matychuk* case, *supra*, had found employer influence, which could have then been linked to this case. However, the Board in *Matychuk, supra*, did not find employer influence and ordered a vote to determine the representation issue.

[19] The Applicant testified that she discussed her application with Ms. Matychuk so it is not inconceivable that she had the same reasons as Ms. Matychuk for not wanting the Union's representation. Likewise, the fact that they used the same Notary Public has nothing whatsoever to do with the issue of employer interference. Something more had to be demonstrated by the Union to support its allegation of employer influence.

[20] As there was no evidence whatsoever of employer influence and given that evidence of majority support for the application has been filed, we order that there

shall be a vote with respect to the representation issue. A Direction for Vote will issue in the usual form.

DATED at Regina, Saskatchewan this **31st** day of **March, 2004.**

LABOUR RELATIONS BOARD

Wally Matkowski,
Vice-Chairperson