Labour Relations Board
Saskatchewan

MELISSA MATYCHUK, 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. 242-03; February 25, 2004
Chairperson, James Seibel; Members: Donna Ottenson and Don Bell

The Applicant:	Melissa Matychuk
For the Certified Union:	Angela Zborosky
For the Employer:	Brian Kenny, Q.C.

Decertification – Interference – No evidence that employer tacitly supported or encouraged applicant's rescission campaign – Applicant not agent of employer or identified as manager by employees such that evidence of support tainted – No evidence that wage anomalies more than simple mistake – Events and circumstances noted by union not significant enough to compromise ability of employees to decide representation issue through Board supervised vote.

***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 631 Victoria Avenue East, Regina (the "Employer") by a certification Order dated February 17, 2000 (LRB File No. 310-99). On November 21, 2003, Melissa Matychuk (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 December 11, 2003 and January 29, 2004.

[2] The bargaining unit comprises all employees at the designated store location except the manager, assistant managers and drivers. The first collective agreement between the parties was signed on September 8, 2000 and is for the term December 23, 2000 to December 22, 2003 (the "collective agreement"). The wage grid under the collective agreement covers the classifications of supervisor, food service worker ("FSW") and customer service worker ("CSW"). The latter two classifications have the same wage grid. At the time of the hearing, the Applicant was employed as a full-time supervisor.

[3] The amended statement of employment filed by the Employer on December 10, 2003 lists 13 employees in the bargaining unit. And, although the Applicant was listed on the original statement of employment filed with the Board as a person "whose primary responsibility is to actually exercise authority and actually perform functions that are of a managerial character," which was changed on the amended statement, the composition of the statement of employment was not in issue at the hearing. 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 was first hired by the Employer as a CSW at another of its store locations. She has been employed at the subject location since May, 2001, except for a period of about three months or so from July to September or October, 2002, when she resigned to take another job and then was re-hired. She started work at the subject location as a CSW and was promoted to supervisor at about the end of December, 2001. She was not working at that location during the Union's organizing drive, nor during a brief strike in August, 2000 that led directly to the conclusion of the collective agreement.

[5] The Applicant testified that she found out about the rescission process by speaking to persons at the Board's administrative office and from an internet site that apparently supplied her with a sample form for indicating individual employee support for

her application. She did not seek any legal counsel. A fellow in-scope supervisor, Richard Anderson, assisted her. The Applicant insisted that, although she knows several of the Employer's managers at various levels, she did not ever discuss the matter of rescission of the certification Order with any of them. She once attempted to bring up the matter of the Union with assistant manager, Rhonda Grad, with whom she frequently worked, but Ms. Grad told her that she could not discuss the subject with her. More specifically, she said she asked Ms. Grad "what the Union does for [the employees]," and was told that she should read over the collective agreement. She then did so with her father-in-law.

[6] The Applicant testified that she believed that one of the FSW's (i.e., colloquially, a cook), Tyler Cox, approached a manager, "Maureen" (last name not provided) and asked Maureen what the Union did that was of benefit to the employees -- he was told to consult Ms. Matychuk. The Applicant thought it was because she was familiar with the collective agreement. Mr. Cox asked her whether the employees could get rid of the Union. In all, five or six of the employees came to the Applicant with similar queries.

[7] The Applicant testified that she wanted to rescind the certification Order because "the Union does nothing for [the employees]," and she expressed resentment about having to pay dues to the Union. In cross-examination she agreed with counsel for the Union as to each item in an extensive list of matters covered by the collective agreement that are enhancements beyond labour standards and minimum wage legislation and the common law, including, to name a few, a grievance and arbitration process, certain layoffs according to reverse seniority, the availability of leaves of absence of various kinds, including bereavement leave, paid leave for jury duty, work breaks, minimum shift length, a shoe allowance, an extra annual holiday, provisions regarding harassment, no transfer between stores without employee permission and the standardization of wage rates and regular raises. However, the Applicant expressed the opinion that she did not think that many of these benefits would change "if the Union was gone." She also expressed resentment that employees who were capable of performing multiple functions were paid the same as those with fewer skills. She never attended a regular Union meeting.

[8] The Applicant maintained that all cards filed as evidence of support for the application were obtained by her, with the exception of a few gathered by fellow supervisor, Richard Anderson, from employees while on work breaks or before the start of their shift, and that none were obtained while the employee was working. As a supervisor, she availed herself of her permitted access to a list of employees and contact information on the computer in the manager's office.

[9] Garry Whalen has been the president of the Union (and its predecessor, Hotel Employees and Restaurant Employees Union, Local 206) since 1987. The Union represents the Employer's employees at six locations in Regina, including the subject location, each under a separate certification Order. While there are separate collective agreements for each location, the only difference in terms is the designation of the allowable number of out-of-scope working managers that are allowed at each store and the expiry dates of the collective agreements.

[10] Mr. Whalen provided a detailed description of the history of the bargaining of the present collective agreement, including the various proposals on wages that were traded back and forth and of the short strike that resulted in the conclusion of the agreement. When bargaining commenced, employees were apparently being paid at various and inconsistent rates that seemed to the Union to be arbitrary and not based on a logical structure. Mr. Whalen testified that one of the Union's major accomplishments in bargaining was eventually to get the Employer to abandon the concept of individual rates of pay and agree to a wage structure based on classification and seniority. However, because of the existing variation in individual rates of pay, the parties had to negotiate an "equivalency payment" provision based on periodic bonuses over the first year of the agreement to make up for the fact that some employees would receive little in the way of a wage increase under the standardization of classifications and wages provided for in the new grid.

[11] According to Mr. Whalen, the starting base rate was established at a level that would cover the cost of Union dues and all employees received an initial increase in wages at least sufficient to cover the cost of dues.

[12] A new collective agreement was negotiated just before the end of the year in December, 2003 with a two-tier wage grid for new employees and existing employees, that will provide a starting rate of $8.25 per hour for new hires in the third year of the agreement.

[13] Since the first collective agreement was concluded, the relationship between the parties appears to have been fairly good. According to Mr. Whalen, there have been relatively few problems given the number of employees in the Employer's work force. He cited examples where the Employer had moved with haste to efficiently deal with instances of alleged harassment of employees by managers once the issue was raised by the employee and the Union.

[14] In cross-examination, Mr. Whalen testified to the difficulty in getting an employee to take on the shop steward role at the subject location and that he has had to rely on the employees themselves to bring forward any problems to the Union.

[15] The Applicant was cross-examined extensively as to when she worked for the Employer in various classifications and the wage rates she was paid. She provided some inconsistent answers about the various dates of job and wage changes. However, we draw no adverse inference from the inconsistent testimony, accepting that the Applicant was testifying from memory, without access to the Employer's records, with respect to multiple changes in a fairly short period of time. Mr. Whalen gave fairly extensive evidence in-chief regarding the appropriate wage rates for the classifications the Applicant worked as provided for under the collective agreement at various times. Without recounting all of the evidence each of them gave, we accept that it discloses that for a period of some three months (essentially between November, 2001 and February, 2002, during which time the Applicant switched between training and working as a supervisor and as a CSW for any given shift), the Applicant was sometimes paid a wage rate in excess of that provided for the classification under the collective agreement by between approximately 20¢ and 95¢ per hour. She may also have not been paid the appropriate rate when she returned to work in November, 2002 after a three month hiatus when she again worked sometimes as a supervisor and sometimes as a CSW.

Statutory Provisions:

[16] 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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> . . .
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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:

[17] The Applicant argued that, having filed evidence of majority support, her application ought to be granted.

[18] Ms. Zborosky, counsel for the Union, argued that the application ought to be dismissed pursuant to s. 9 of the *Act* because it was made as a result of influence or interference by the Employer. Counsel asserted that the facts of the present case are similar to those in the decision of the Board in *Susie Mandziak v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Remai Investment Corp.*, [1987], Dec. Sask. Labour Rep. 35, LRB File No. 162-87, at 36, wherein the application was dismissed because it was found that the application had "resulted directly from the employer's influence and indirect participation in the gathering of necessary evidence of employee support." Counsel argued that, in the present case, the Applicant obtained a list of employees and contact information from the manager's office.

[19] Counsel also argued that the Applicant's evidence suggesting that she had acted on her own in making the application was simply not credible. In support of the argument, counsel cited the decisions of the Board in *Cook v. International Woodworkers of America, Local 1-184 and Shelter industries Limited*, [1981] March. Sask. Labour Rep. 34, LRB File No. 368-80, *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 *Rowe v. Canadian Linen and Uniform Service Co. and Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, [2001] Sask. L.R.B.R. 760, LRB File No. 104-01.

[20] In the first case, the Board found that the applicant's lawyer met with employees on the plant premises, the documents in support of the application were circulated and signed on plant premises on company time and the applicant did little work during the month preceding the application for the purpose of working on proceedings against the union. Although the Board found that there was no direct evidence that the employer knew of such activities, it was inferred that it had given tacit approval and encouragement in that the activities were commonly known and could not have escaped the notice of the employer. In *Poberznek*, *supra,* the Board found that, when several discrete conditions were considered together, it could not conclude that

the applicant had acted spontaneously and without influence by the employer in making the application for rescission. In *Rowe*, *supra,* the Board discounted the co-applicants' assertion of independence in making the application for rescission and inferred that there was employer influence noting that the co-applicants had little or no knowledge of the process and gave conflicting testimony about the gathering of the evidence of support.

[21] Counsel for the Union also argued that there was evidence that the Applicant was an agent of the Employer. The basis for this assertion was a written form of warning to an employee for tardiness that was attached to the statement of employment as the specimen signature for one of the employees. The Applicant, a supervisor, had provided the warning form to the employee and signed in the space designated as "manager." Counsel argued that the application and the accompanying evidence of support ought not to be allowed as the Applicant was in a position to influence the terms and conditions of employment of the members of the bargaining unit when speaking to employees about the application and gathering evidence of support. In support of this proposition, counsel referred to the decision of the Board in *Gabriel v. Saskatchewan Science Centre and United Food and Commercial Workers, Local 1400*, [1997] Sask. L.R.B.R. 232, LRB File No. 345-96.

[22] Finally, counsel referred in argument to the decision of the Board 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. In that case, the Board dismissed the application for rescission where there was evidence that the employer directly negotiated wages with the applicant and also paid the applicant significantly more than provided under the terms of collective agreement, holding that, in the circumstances, such conduct constituted influence or interference within the meaning of s. 9 of the *Act*. Counsel submitted that the present application ought to be dismissed because the Applicant had been paid a wage rate exceeding that provided by the collective agreement one or more times during her past year of employment.

Analysis and Decision:

[23] 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.

[24] 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, 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.

[25] 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 the nature and magnitude 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.*

[26] Of course, as noted in *Poberznek*, *supra*, and many other decisions of the Board, evidence of such conduct 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.

[27] In the present case, we are of the opinion that the events and circumstances noted by counsel for the Union, taken together, are not of a nature or significance such 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.

[28] With respect to the assertion of the independence of the Applicant's decision and activities in researching and assembling the application for rescission, we accept the evidence of the Applicant that she received no assistance or tacit encouragement from the Employer. The facts of the present case are far removed from those of the decisions cited by counsel for the Union in support of the proposition that the Employer provided passive assistance and access to allow the Applicant to make the application. While the Applicant admitted to using a list of employees with contact information, which she obtained from the manager's office, to assist her in garnering support for the application, as a supervisor she had legitimate access to the document and information. We also accept the Applicant's evidence that she gathered most of the evidence in support of the application and that she did so on employee breaks or before the start or after the end of employees' shifts. Unlike the cases cited in support of the argument on behalf of the Union, there was no evidence that the Employer was aware that the Applicant had accessed and used the employee contact information, nor any evidence that the Employer must have known that the Applicant was conducting a campaign to garner support for a rescission application, and had necessarily to have provided tacit support and encouragement for the activity. And, unlike the co-applicants in *Rowe*, *supra*, the Applicant was quite well-informed about the process for the application. She demonstrates that, contrary to the common assertion by employers and employers' counsel before the Board that it is not reasonable to expect an employee to initiate a rescission application by him or herself, an employee may indeed make an application without the "assistance" of the employer with reasonable diligence and a modicum of initiative.

[29] 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.

[30] With respect to the fact that the Applicant was paid wages at some times that were in excess of those prescribed under the collective agreement, we accept her evidence that she was not aware of the fact and that it had no influence on her decision to make the present application. Likewise, there is not sufficient evidence from which we are prepared to impute an improper motive to the Employer. In part because of the equivalency payment provided for in the first year of the wage grid in the collective agreement, the wage scheme is somewhat complex. Given a learning curve for all parties to and affected by the agreement, we do not find there is evidence that the wage anomalies were probably more than a simple mistake. Unlike the situation in *Walters*, *supra*, there is no evidence of secret individual negotiation of a wage significantly in excess of that provided for under the collective agreement.

[31] In all of the circumstances and as evidence of majority support for the application has been filed in the open period, 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 **25th** day of **February, 2004.**

LABOUR RELATIONS BOARD

James Seibel,
Chairperson