Labour Relations Board
Saskatchewan

KEVIN KOSAR, Applicant v. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 2038 and PRAIRIE CONTROL SERVICES LTD., Respondents

LRB File No. 046-04; September 30, 2005
Chairperson, James Seibel; Members: Gloria Cymbalisty and Marshall Hamilton

For the Applicant: Loreley Berra
For the Certified Union: Neil McLeod. Q.C.
For the Employer: No one appearing

> **Decertification – Interference – Applicant's reasons for making application not so implausible that inference can be made that applicant influenced by employer in making application nor can inference be drawn from indirect familial relationship between applicant and employer's principal – Board declines to dismiss application pursuant to s. 9 of *The Trade Union Act*.**
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> **Decertification – Practice and procedure - Where applicant sole employee in bargaining unit at time of application, Board orders rescission without vote.**
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> ***The Trade Union Act*, ss. 5(k) and 9.**

REASONS FOR DECISION

Background:

[1] By a certification Order dated September 26, 2002 (LRB File No. 087-02) International Brotherhood of Electrical Workers, Local 2038 (the "Union") was designated as the bargaining agent for the standard unit of employees in the electrical trade division of the construction industry working for Prairie Control Services Ltd. (the "Employer").

[2] At all material times, the Applicant, Kevin Kosar, was a member of the bargaining unit. Mr. Kosar filed this application for rescission of the certification Order during the appropriate "open period" mandated by s. 5(k)(i) of *The Trade Union Act*, R.S.S. 1978, c. T-17, as amended (the "*Act*").

[3] According to the statement of employment filed by the Employer, Mr. Kosar was the only employee employed on the date the application was filed.

[4] In its reply to the application, the Union alleged there were more employees in the bargaining unit. However, at the start of the hearing by the Board, counsel on behalf of the Union advised the Board that it was no longer contesting the application on that basis. Nonetheless, the Union proceeded with its alternative allegation in its reply that the Employer engaged in conduct by which the application was brought as a result or on the advice or influence of the Employer and should be dismissed pursuant to s. 9 of the *Act*.

Evidence:

[5] Mr. Kosar, a journeyman electrician, has been employed by the Employer for some 9 years. He is the brother of a son-in-law of the Employer's principal, Fred Pellerin. In his application, Mr. Kosar stated the reason that the certification Order ought to be rescinded was that "[he] no longer wish [sic] to be represented by the union."

[6] Mr. Kosar testified that at the time of certification there were 5 employees in the bargaining unit including himself but that when he filed the present application he was the sole employee remaining in the bargaining unit. He maintained that he does not require the medical and dental benefits provided as part of his dues because his spouse has a plan that covers him and that he would rather be responsible for his own pension. He stated that, since certification, he has not received the full amount of bonuses previously paid by the Employer and that the bonus amount is reduced by the amount the Employer pays into the Union's pension plan.

[7] Mr. Kosar stated that he has been against the Union since certification. Although he joined the Union in January 2003, he said he did so because he understood that he would not otherwise be entitled to benefits under the collective agreement. And, he joined and signed the oath of allegiance notwithstanding that he was even then contemplating decertifying the Union.

[8] Apparently this application was Mr. Kosar's third attempt at decertification; the other two were not made within the open period. He stated that he learned about the proper open period from his mistakes and by speaking with the Union's business agent. Although he is the brother of a son-in-law (Darren Kosar, who is also employed by the Employer) of Mr. Pellerin, Mr. Kosar maintained that he spoke with neither of them nor anyone else about making the application. In examination-in-chief, Mr. Kosar claimed he was not aware of the Employer's position regarding unionization; however, in cross-examination, he said he believed that Mr. Pellerin did not like unions in general. He would see Mr. Pellerin a few times a year outside of work at family functions.

[9] Mr. Kosar testified that a discrepancy with respect to the amount of union dues to be deducted and remitted to the Union with respect to himself arose as a result of a misunderstanding: he had spoken with the Union's business agent about whether he was required to pay dues for low-voltage electrical work – work that can be done by "restricted" journeymen who are not members of the Union – as a result of which he believed he was required to pay only a prorated amount for the higher voltage work he performed. He had advised the Employer's office staff to submit prorated dues on his behalf. The error was eventually corrected and his dues were fully paid up since before the hearing. However, in cross-examination, it appeared that this was resolved after the hearing of a grievance regarding the non-payment of full dues by the industry's Joint Conference Committee that ruled in the Union's favour.

[10] Stan Shearer has been the Union's business manager and financial secretary for many years. He confirmed that there were 5 people in the Employer's bargaining unit at the time of certification. However, Mr. Shearer said that, within a month of certification, the Employer sent the Union a letter dated October 16, 2002 advising that four such persons, including Mr. Kosar, were no longer working for the Employer and the fifth had moved into an out-of-scope position. The letter dated October 16, 2002 further stated that the Employer would be subcontracting all of its electrical work. The Union responded by letter dated October 22, 2002 that the Employer would be in violation of the collective agreement if it subcontracted the work to persons or entities that were not signatory to the agreement.

[11] On November 25, 2002 the Union filed a grievance against the Employer alleging failure to remit dues and benefits contributions on behalf of Mr. Kosar and the employee who had purportedly moved to an out-of-scope position. A hearing by the Joint Conference Committee for the electrical trade division on December 19, 2002 resulted in the Joint Conference Committee's unanimous recommendation that the Employer had violated the collective agreement as alleged. The Joint Conference Committee found, *inter alia*, that Mr. Kosar had indeed left the employ of the Employer but had been re-hired as a new employee; as such Mr. Kosar was required to join the Union and maintain membership as a condition of employment.

[12] Mr. Shearer testified that, a few days after the decision of the Joint Conference Committee, Mr. Kosar came to see him and demanded that the Union decertify the Employer. Mr. Shearer stated further that, since then, the Employer had not sought to hire anyone through the Union's hiring hall.

[13] The Union subsequently agreed that the person who had allegedly moved to the out-of-scope position was legitimately out-of scope.

[14] Mr. Shearer testified that the company that handles the trust fund contributions on behalf of the Union and unionized employers advised the Union in September 2003 that it had not received any contributions from the Employer for some three months and that the Employer was short on its remittance for a couple other months. When Mr. Shearer made an inquiry of Mr. Pellerin, he was told that there was nothing further to remit for the amount of higher voltage electrical work that Mr. Kosar was doing, that is, the Employer was only remitting in respect of work that could only be performed by a journeyman electrician. The Union filed a grievance dated September 18, 2003. Following a decision by the Joint Conference Committee on November 17, 2003 finding that the grievance had merit, the Employer paid the amounts owing in full.

[15] In cross-examination Mr. Shearer acknowledged that, prior to certification, in answering questions from a group of the Employer's employees, he told them that they could apply for decertification and referred them to the Board for information.

Relevant Statutory Provisions:

[16] Relevant provisions of the *Act* include s. 9 which provides as follows:

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

Arguments:

[17] Ms. Berra, counsel on behalf of the Applicant, argued that there was no evidence of influence by the Employer in the making of the application. Mr. Kosar had intended to apply for decertification since before the Union was certified and had asked Mr. Shearer how to do it at the meeting of employees. Mr. Kosar's reasons for wanting to rescind the certification Order – the unnecessary payment for benefits he did not require because of his spouse's employment and the desire to handle his own retirement investments – were not implausible in the circumstances. Mr. Kosar joined the Union in January 2003, not as a ruse to enable an application for decertification, but because of the Joint Conference Committee finding and his belief that it was necessary to join the Union to receive benefits.

[18] Counsel maintained that the grievance regarding the non-payment of remittances was as a result of a misunderstanding and not part of any attempt at influence on the part of the Employer. The matter was resolved before the application for rescission was filed.

[19] Counsel argued that there was no evidence that there were any improper discussions at the family gatherings attended by Mr. Kosar and Mr. Pellerin. Mr. Kosar had intended to apply for decertification since before the Union was certified and there is no evidence that he was influenced or assisted by management in making that decision or application.

[20] In support of her arguments, counsel referred to the decisions of the Board in *Chrunik v. National Electric and International Brotherhood of Electrical Workers,*

Local 2038, [1996] Sask. L.R.B.R. 568, LRB File No. 060-96 and *Matychuk v. Hotel employees and Restaurant Employees, Local 41 and El Rancho Food and Hospitality Partnership o/a KFC/Taco Bell*, [2004] Sask. L.R.B.R. 5, LRB File No. 242-03.

[21] Mr. McLeod, counsel on behalf of the Union, argued that, while there was no evidence of direct involvement in the application on the part of the Employer or any evidence that the Employer had any knowledge of the application, it was nonetheless made as a result of influence by the Employer.

[22] Counsel submitted that the Board ought to examine evidence of persistent anti-union conduct by the Employer and the implausibility of Mr. Kosar's reasons for making the application for rescission. On the first submission, counsel pointed out that: the Employer was opposed to certification; all the employees in the bargaining unit left their employment shortly after certification; the Employer made unilateral adjustments to Mr. Kosar's salary and remittances in the months that followed. In general, the Employer acted so as to undermine the Union's credibility and status as an effective bargaining agent. Counsel posited that either Mr. Kosar was influenced by the Employer to make the application or he was acting in the Employer's interests.

[23] Counsel also asserted that it was difficult to believe, and implausible, that Mr. Kosar had no discussions about the Union with Mr. Pellerin, referring to the Board's decision in *Pfefferle v. Ace Masonry Contractors Ltd. And Bricklayers and Masons International Union of America, No. 3*, [1984] Aug. Sask. Labour Rep. 45, LRB File No. 225-84.

[24] In further support of his arguments, counsel referred to the following cases, which we have reviewed: *Swan v. Canadian Union of Public Employees, Local 1975 and Treats at the University of Saskatchewan*, [2000] Sask. L.R.B.R. 448, LRB File No. 258-99; *Huber v. Reinhardt Plumbing, Heating and Air Conditioning Ltd. and Sheet Metal Workers' International Association, Local 296*, [2002] Sask. L.R.B.R. 593, LRB File No. 195-02; *Manyk v. Communications, Energy and Paperworkers Union of Canada and Hollinger Canadian Newspapers, LP, o/a The Saskatoon Star-Phoenix Newspaper*, [2002] Sask. L.R.B.R. 58, LRB File No. 246-01; *McNutt v. Moose Jaw Sash and Door Co. (1963) Ltd. and International Woodworkers of America*, [1980] July Sask. Labour

Rep. 37, LRB File No. 033-80; *Walters v. XPotential Products Inc., o/a Impact Products, and United Steelworkers of America. Local 5917*, [2002] Sask. L.R.B.R. 65, LRB File No. 214-01; *Lasko v. International Union of Painters and Allied Trades, Local 739 and L.C.M. Sandblasting and Painting Ltd.*, [2003] Sask. L.R.B.R. 82, LRB File No. 234-02; *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.

Analysis and Decision:

[25] In our opinion, the Applicant's reasons for making the application do not demonstrate such a degree of implausibility that an inference can be made that he was influenced by the Employer in the making of the application.

[26] Similarly, the fact that the Applicant and the Employer's principal have an indirect familial relationship through marriage and come into contact with each other from time to time outside of work on a social basis does not in and of itself lead to such an inference. The degree of opportunity for or likelihood of discussion regarding matters that could have an improper influence on the making of the application is not at all of the nature or degree that was apparent in *Pfefferle*, *supra*. And the extent of friendship and probability of improper communication with management is not of the degree observed in *Swan*, *supra*.

[27] With respect to the matter raised regarding changes to wages or the failure to make remittances, the situation does not have that apparent element of conferring advantage, let alone actual direct dealing with the employee that was apparent in *Walters*, *supra*. Similarly, the present situation has little in common with *Huber*, *supra*, where the employer neglected or refused to comply with any of the terms of the collective agreement in relation to the payment of union dues, wage rates or benefit plans since the date of certification.

[28] While we do not purport to condone what the Employer did so as to prompt the grievances that were filed and determined against it, we do not, on the whole of the evidence, find that Mr. Kosar was likely influenced by it. He was set against the

Union from day one and was set upon seeking its decertification. While he might have found his aspirations thwarted had there been more employees in the bargaining unit when he filed the application, there is no evidence that the Employer contrived to ensure that the other employees quit or were improperly laid off.

[29] Accordingly, we decline to exercise our discretion to dismiss the application pursuant to s. 9 of the *Act*.

[30] As Mr. Kosar is the applicant and sole employee, a vote will not be ordered and a rescission order will issue.

DATED in Regina, Saskatchewan this **30th** day of September, 2005.

LABOUR RELATIONS BOARD

James Seibel
Chairperson