Labour Relations Board
Saskatchewan

GRAIN SERVICES UNION (ILWU – CANADA), Applicant v. STARTEK CANADA SERVICES LTD., Respondent

LRB File Nos. 115-04, 116-04, 117-04 & 193-04; October 21, 2005
Vice-Chairperson, Angela Zborosky; Members: Leo Lancaster and John McCormick

For the Applicant: Ronni Nordal
For the Respondent: Brian Kenny, Q.C.

Unfair labour practice – Burden of proof – Discharge – Where employer had knowledge that union organizing drive taking place and employee played significant role in drive and union alleges employee terminated for union activity, Board must examine whether employer had good and sufficient reason for terminating employee.

Unfair labour practice – Dismissal for union activity – Jurisdiction of Board – While arbitrator might be critical of form of progressive discipline used by employer, Board must only find that employer had good and sufficient reason to terminate employee uninfluenced by anti-union sentiment.

Unfair labour practice – Dismissal for union activity – Insubordination – Where employee challenged manager's authority and, despite warning about potential consequences, refused to meet with manager without witness of employee's choice, Board concludes that employer had good and sufficient reason to terminate employee.

Unfair labour practice – Anti-union animus – Board accepts evidence of supervisor that employee's union activity played no part in supervisor's decision to terminate employee – Throughout organizing campaign, employer conducted itself in reasonable fashion by obtaining legal advice concerning appropriate behaviour, holding seminar on appropriate behaviour for managers and maintaining consistent approach of not responding to any information union provided to employees – Overall, evidence fails to establish anti-union animus on part of employer that motivated termination of employee.

Unfair labour practice – Interference - Communication – Threat of closure – Where manager sent email to other managers indicating that workplace would close if union certified and email leaked improperly by other manager contrary to employer's instructions, policy and code of ethics, Board concludes that leak not controlled or directed by employer – Board does not find unfair labour practice under circumstances of case.

***The Trade Union Act*, ss. 5(d), 5(e), 5(f), 5(g), 10.1, 11(1)(a), 11(1)(e), 11(1)(g) and 42.**

REASONS FOR DECISION

Background:

[1] StarTek Canada Services Ltd. (the "Employer") operates a call center in Regina, Saskatchewan. Grain Services Union (ILWU – Canada) (the "Union") conducted an organizing campaign of the employees of the Employer from November 2003 until May 28, 2005 when it filed an application for certification (LRB File No. 139-04) with the Board. The application for certification was heard by the Board on June 16, 2004 at which time the Board reserved its decision.

[2] Frank Gribbon was employed with the Employer from May 12, 2003 until May 13, 2004, when his employment was terminated. At the time of his dismissal, Mr. Gribbon was actively involved in the gathering of support for the Union. On May 17, 2004, the Union filed applications pursuant to ss. 5 (d), (e), (f) and (g) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") alleging that, in dismissing Mr. Gribbon, the Employer had committed an unfair labour practice in violation of s. 11(1)(e) of the *Act*, requesting, *inter alia*, reinstatement for Mr. Gribbon and payment of his monetary loss. The Union also requested that the Board make an order granting automatic certification or directing a secret ballot vote pursuant to s. 10.1 of the *Act*. In its reply to this application the Employer took the position that Mr. Gribbon was terminated for good and sufficient reason and not for his union organizing activity and that automatic certification was not appropriate nor did the Board have jurisdiction to order it. Prior to the hearing the Union objected to the consideration of the Employer's reply on the basis that it was filed outside the time limits, however, the Union withdrew this objection at the time of the hearing.

[3] At the same time as this unfair labour practice application was filed, the Union filed an application pursuant to s. 5.3 of the *Act* seeking interim relief, including *inter alia*, the reinstatement of Mr. Gribbon pending the hearing and disposition of the applications proper. The Board heard the application for interim relief on May 21, 2004 and an Order

was granted on May 27, 2004 reinstating Mr. Gribbon to his position with the Employer, ordering payment of his monetary loss and requiring the Employer to post a copy of the Reasons for Decision (reported at *Grain Services Union (ILWU-Canada) v. Startek Canada Services Ltd.*, [2004] Sask. L.R.B.R. 128, LRB File Nos. 115-04, 116-04 & 117-04) in the workplace.

[4] On July 13, 2004, the Union also filed an application seeking orders pursuant to ss. 5 (d) and (e) of the *Act*, alleging that the Employer had committed an unfair labour practice in violation of ss. 11(1)(a) and (g) of the *Act* (LRB File No. 193-04). Specifically, the Union alleged that the Employer interfered with the Union's organizing drive by threatening to close the business should the Union become certified to represent the Employer's employees. In its reply the Employer stated that the communication concerning closure was between management only and therefore could not constitute an unfair labour practice. The Union sought a variety of remedies, should the Board find that the Employer committed an unfair labour practice, including automatic certification and payment to the Union of the costs incurred in its organizing efforts. The Employer took the position that the remedies requested by the Union are not appropriate in the circumstances and are not within the jurisdiction of the Board to order.

[5] At the time of filing the application in LRB File No. 193-04, the Union requested that the certification application (LRB File No. 139-04) be "re-opened" in order to consider its request for automatic certification. The Board Registrar confirmed that the Board would not render a decision on the certification application (LRB File No. 139-04) until the unfair labour practice application in LRB File No. 193-04 was heard and determined in the event that that the disposition of LRB File No. 193-04 might result in s. 10.1 of the *Act* being applied in the context of the certification application. Section 10.1 of the *Act* provides for the ordering of a secret ballot vote where the Board has made findings that an employer has committed an unfair labour practice or violated the *Act* and that the union would have had majority support for its certification application but for the unfair labour practice committed by the employer.

[6] The Union had also filed an unfair labour practice application in February 2004 (LRB File No. 032-04) alleging improper communications by the Employer during the organizing drive. An application for interim relief was heard and dismissed by the

Board in March 2004 (see *Grain Services Union (ILWU-Canada) v. Startek Canada Services Ltd.*, [2004] Sask. L.R.B.R. 15, LRB File No. 032-04). The Union withdrew LRB File No. 032-04 on May 28, 2004, prior to the main application being heard by the Board.

[7] The applications in LRB File Nos. 115-04 to 117-04 and LRB File No. 193-04 were heard consecutively by the same panel of the Board on October 6, 7 and 8, 2004 and will be dealt with together in these Reasons for Decision. A request was granted to have some of the evidence considered in relation to both applications. At the hearing a significant amount of evidence and argument was directed to the issue of appropriate remedies in the event the Board determined that the Employer was guilty of an unfair labour practice or practices. This panel of the Board has determined that some of those issues would more appropriately be dealt with in the context the certification application (LRB File No. 139-04) and will leave those issues to be considered by the panel that heard the certification application, if necessary. Also, since the hearing of these applications the parties have notified the Board that Mr. Gribbon quit his employment with the Employer and that the Board should consider the application for Mr. Gribbon's reinstatement (LRB File No. 116-04) "moot."

Evidence:

LRB File Nos. 115-04, 116-04 & 117-04

[8] LeeAnn Norton testified on behalf of the Employer. Ms. Norton started work with StarTek in Ontario in September 2001. On March 17, 2001 she transferred to the Employer's Regina operation working as a supervisor/trainer and in February 2004 she was promoted to the position of quality assurance supervisor. In that position Ms. Norton is responsible for the supervision of 11 quality assurance specialists ("QAS"), including Mr. Gribbon. Ms. Norton reports directly to Denise Deroche, the training quality manager.

[9] In her testimony Ms. Norton briefly described the work of a QAS. One of the primary duties of a QAS is to monitor four to five teams of employees who make telephone calls to customers. The QAS is required to meet a monthly goal of "monitors," an activity that involves the QAS listening to and evaluating an employee's call to a customer. At the time of Mr. Gribbon's termination, the goal number of monitors was

320 per month, however this goal had recently been raised by the Employer from 260 in March 2004 and prior months. A monitor for a five-minute telephone call takes approximately 15 minutes to complete. In cross-examination it was acknowledged that there were no allowances made to the goals to account for any sick leave taken by the QAS. Ms. Norton also testified that the Employer keeps electronic records of the number of monitors completed by a QAS. A QAS is also responsible to perform two hours of "production phone time" per month, which involves taking telephone calls from customers. This appeared to have commenced in April 2004 and therefore was not as significant an issue as the monitor numbers. Ms. Norton testified that one of her duties includes monthly performance evaluations of the QASs, however, due to her recent placement in the position and because the previous manager had fallen behind in this duty, there had been no performance reviews completed for approximately six months. It is intended that the evaluations act as "report cards" that can be discussed and that the results are not intended to give rise to discipline.

[10] Ms. Norton testified that she met Mr. Gribbon shortly after her promotion to the position of quality assurance supervisor and that her relationship with him was a good one. Prior to May 2004 she had no concerns about his performance or activities at work. Ms. Norton acknowledged in cross-examination that a performance review on Mr. Gribbon prior to her appointment to the position indicated that he performed "above average."

[11] On May 12, 2004 Ms. Norton met with Mr. Gribbon to review his performance evaluations for the months of February through April 2004. While Mr. Gribbon had scored "above goal" or "significantly above goal" in a number of the categories of the evaluation for April 2004, he scored "below goal" concerning the number of monitors and "significantly below goal" for the production phone time for that month. He was also "below goal" overall in the evaluations for February and March 2004. When discussing the evaluation for April 2004, Mr. Gribbon disagreed with the minimum monthly call monitors required for April. Ms. Norton agreed to investigate the matter further and re-run the reports and meet with him again later. The meeting had lasted approximately 10 minutes.

[12] After running the reports again that day and obtaining the same numbers, Ms. Norton met Mr. Gribbon in the hallway at which time Mr. Gribbon stated, in what Ms. Norton felt was a condescending and adversarial manner, that he knew it was not her making the decisions about his evaluation and that they were being made by Ms. Deroche and Peter Wilkie, the director, and that Ms. Norton was a "puppet" of management. Ms. Norton stated that she replied that she was in fact making the decisions as required by her position and that Ms. Deroche and Mr. Wilkie were not involved in the evaluation process. Ms. Norton stated that Mr. Gribbon made her feel uncomfortable and not respected. Ms. Norton told Mr. Gribbon that he should come to work in the morning the next day and they would meet at 9:00 or 10:00 a.m. that morning. Ms. Norton testified that she reviewed the business review journal and her personal calendar and she was convinced that the number of monitors completed by Mr. Gribbon was correct and that Mr. Gribbon knew of the increase in the monitors quota. In this regard, Ms. Norton referred to a meeting held on March 24, 2004 with the employees of the QA department where new plans were discussed including the increase in required monitors to 80 per week. Although Ms. Norton stated that Mr. Gribbon had left that meeting early, she was certain that he was present when the new targets were discussed. In cross-examination, Ms. Norton acknowledged sending an email on April 28, 2004 setting out the various goals a QAS was to meet including the monitors of 320 per month because she was getting some questions regarding the changes.

[13] Ms. Norton also testified that she had concerns about Mr. Gribbon's attendance and being away from his desk, a problem not unique to Mr. Gribbon but an issue that she had intended to review with him as part of the evaluation process. In her testimony Ms. Norton indicated that she had not raised these concerns with Mr. Gribbon at the May 12, 2004 meeting as she had wanted to re-run the numbers concerning the monitors before she finished the review with him on May 13, 2004. Mr. Gribbon had been absent from work the prior week and when he returned May 11, 2004 he had indicated that he intended to work evenings that week in order to catch up on his work. The QASs have flexibility in work hours and days and are required to work 80 hours over a two-week period. Ms. Norton had concerns with the flexibility in hours of work that Mr. Gribbon utilized believing that he should be at work when the team members he monitored were at work, which was during the day. Even though the agents' calls are

tape recorded and Mr. Gribbon could perform his monitors using the tape recorded calls, Ms. Norton felt that he should be available to the agents for team huddles, interaction with the team and with the supervisors to discuss any problems arising during the day. In cross-examination, Ms. Norton acknowledged that, on the evaluation, Mr. Gribbon had been rated “Above Goal” in relation to the “Supervisor’s Survey” and that there were no complaints about Mr. Gibbon’s availability to the supervisors. In re-examination she clarified that it would be helpful if the QAS worked at the same time as the team being monitored in order that the QAS could immediately report to a supervisor if an agent the QAS was monitoring mistreated a customer on the phone. In her testimony Ms. Norton also indicated that she had wanted to discuss with Mr. Gribbon why he was working evenings all that week and why he had been ill the week before. Also on May 12, 2004 Ms. Norton made a note in her calendar to check when Mr. Gribbon swiped his time card because she saw him leave at 8:08 p.m.

[14] On May 13, 2004 Ms. Norton asked Greg Watch, another management employee, to attend at her meeting with Mr. Gribbon, because of her discomfort with Mr. Gribbon’s comments and attitude the evening before. The meeting was sometime between 9:00 and 10:00 a.m. Ms. Norton testified that she advised Mr. Gribbon that Mr. Watch was there as a witness. Mr. Gribbon indicated that he would not go through with the meeting with Mr. Watch present. Ms. Norton testified that, as Mr. Gribbon became aggravated and began to leave the meeting, she asked him to stay, advising him the meeting was only concerning the performance evaluation, and that if he left she would consider it insubordination. Ms. Norton described Mr. Gribbon as animated, loud and adversarial. She stated that Mr. Gribbon then indicated that he would meet if he could bring his own witness but Ms. Norton refused explaining that Mr. Watch was there pursuant to the Employer’s policy to act as a witness at the meeting who is also of the same gender as the employee. Mr. Gribbon refused to participate and left the room. After Mr. Gribbon’s departure, Ms. Norton consulted with Richard Snell who handles human resources issues. Ms. Norton explained that to Mr. Snell that she was attempting to have a discussion with Mr. Gribbon concerning his performance evaluation, that Mr. Watch was present due to Mr. Gribbon’s behaviour the prior evening and that Mr. Gribbon refused to attend the meeting without his own witness. Ms. Norton stated that Mr. Snell recommended that Mr. Gribbon be given a final written warning for insubordination.

[15] After consulting Mr. Snell and completing the corrective action form indicating that Mr. Gribbon was being given a final written warning for insubordination, Ms. Norton again asked Mr. Watch to be her witness at a meeting with Mr. Gribbon. She then asked Mr. Gribbon to meet and, when he asked that it be at a time and place of his choosing with his own witness, Ms. Norton advised that he could have any supervisor, operations manager or human resources employee present. Mr. Gribbon refused. Ms. Norton left to seek further advice from Mr. Snell. Mr. Snell advised her to offer Mr. Gribbon a third opportunity to discuss the issue that day and if Mr. Gribbon refused, she should terminate him. Ms. Norton stated that she asked Mr. Gribbon to join her and Mr. Watch however Mr. Gribbon again refused to have a discussion with her. She stated that he replied, "Do what you have to do." Ms. Norton asked him for his badge and advised him he was terminated for insubordination. Ms. Norton stated that she and Mr. Watch then escorted Mr. Gribbon to his work station to remove his personal belongings and leave the premises. At his desk, Mr. Gribbon said in loud voice that he has just been let go for insubordination but that he would be back. Ms. Norton testified that she did not deliver the final written warning to Mr. Gribbon because he had refused to meet with her. A copy of the corrective action form was entered into evidence and the Board notes that the choices to the supervisor for the "Type of Action" given are the following: verbal warning, first written warning, final written warning, first and final warning and termination of employment.

[16] Ms. Norton testified that Mr. Gribbon's involvement with the Union played no part in her decision to dismiss him. She also indicated that the issue of Mr. Gribbon's role in the Union was not discussed with either Mr. Snell or Mr. Watch during the course of these events. She was aware there was an organizing drive going on but felt that she made it clear that she was "pro-choice."

[17] In relation to the termination for insubordination, Ms. Norton explained in cross-examination that it was for Mr. Gribbon's refusal to talk about the performance issue but acknowledged that Mr. Gribbon would have spoken to her about it if he could have had a witness of his choosing present at the discussion.

[18] In cross-examination Ms. Norton admitted that she had observed Mr. Gribbon in the workplace cafeteria at dinnertime the evening of May 12, 2004 approaching employees to sign union cards.

[19] Richard Snell also testified on behalf of the Employer. Mr. Snell has been the human resources manager for the Employer since November 2003. Mr. Snell has known Mr. Gribbon since that time and testified that, at the time of his termination, Mr. Gribbon had no record of discipline. Mr. Snell was aware of the Union's organizing campaign and soon after it commenced it became obvious to him that Mr. Gribbon was the main employee organizer. In cross-examination he acknowledged he saw Mr. Gribbon approach employees in the workplace and that he noticed Mr. Gribbon's name in the Union's newsletters. He also believed that he was aware that Mr. Gribbon was gathering employees' signatures at the workplace on May 11, 12 and 13, 2004.

[20] Mr. Snell testified that near the beginning of the organizing drive the Employer's legal counsel put on a seminar for managers and supervisors of the Employer concerning appropriate behaviour during the organizing drive, which included the necessity of remaining neutral and not either positively or negatively influencing the employees in their decision whether to sign a union card. During the course of the organizing drive the Union sent out several newsletters and while Mr. Snell viewed some of the information in them as misleading, he did not respond to it.

[21] Mr. Snell testified that on May 13, 2004 he had a brief conversation with Ms. Norton who described to him the difficulties she was having in getting Mr. Gribbon to meet with her to discuss his performance appraisal without a witness of Mr. Gribbon's own choosing present. Mr. Snell stated that, in his business experience of 20 years, he had not encountered such a request by an employee except in one of the unionized workplaces in which he had worked where requesting a witness was commonplace. Mr. Snell felt that the request Ms. Norton was making of Mr. Gribbon was one that Mr. Gribbon could not refuse, although Mr. Snell told Ms. Norton that she could offer Mr. Gribbon the choice of a witness but it had to be a supervisor or an employee from human resources. Mr. Snell stated that it is normal practice to have only management present during a performance appraisal. Mr. Snell told Ms. Norton that Mr. Gribbon's behaviour was bordering on insolence and that if he continued to refuse to meet with her

when she deemed it appropriate, corrective action in the form of a final written warning should be issued. Mr. Snell had also advised Ms. Norton that, if Mr. Gribbon continued to refuse to meet with her, more severe disciplinary action could be taken, including termination. Mr. Snell referred to a progressive disciplinary policy the Employer had and stated that he found Mr. Gribbon's conduct sufficiently grievous to proceed to a final written warning and then termination if necessary. A copy of a page from the disciplinary manual concerning disobedience was entered into evidence. It was Mr. Snell's view that, following this discussion, Ms. Norton had the authority to terminate Mr. Gribbon if he continued to refuse to meet with her. In response to questions from the Board, Mr. Snell clarified that a suspension is not a form of action that is part of its disciplinary process and was not considered in Mr. Gribbon's situation. A suspension is only used for the purposes of conducting an investigation. It is Mr. Snell's view that the Employer proceeds with termination once an employee has been warned there may be more serious consequences.

[22] It was also Mr. Snell's evidence that the fact that Mr. Gribbon was involved in the Union's organizing drive did not enter his discussions with Ms. Norton. In cross-examination Mr. Snell maintained that the only ground for Mr. Gribbon's termination was Mr. Gribbon's refusal to meet with Ms. Norton to discuss his performance appraisal without a witness of his choosing. He did not feel that Mr. Gribbon's request for a witness of his choice had to be met or was a reasonable one.

[23] Mr. Snell also testified that the Employer complied with the interim Order of reinstatement issued by the Board and that Mr. Gribbon did not suffer any monetary loss as a result of the termination.

[24] Mr. Gribbon testified on behalf of the Union. Mr. Gribbon's background includes operating his own consulting business and working as an instructor. Mr. Gribbon was hired by the Employer in May, 2003 as a call centre employee. He was promoted to the position of a QAS in September 2003, a position he held until he was summarily terminated on May 13, 2004. His main duties as a QAS were to monitor and evaluate pre-recorded calls made by four or five teams with 20 call centre employees on each team. He was required to meet certain goals in this regard. Prior to the events leading to Mr. Gribbon's termination, he had no record of discipline.

[25] The Union commenced its organizing drive in November 2003 after being approached by Mr. Gribbon. Mr. Gribbon was actively involved in the organizing effort from its commencement and spent a significant amount of time meeting with the staff of the Union, talking to employees and gathering signatures and creating and distributing literature about the Union. Although other employees were involved in the organizing effort, Mr. Gribbon was the primary employee organizer. He would speak to employees in the early morning before their shift started and at shift change at 2:30 or 3:00 p.m., both at the entrance to the workplace and in its cafeteria. He testified that he was not attempting to keep his involvement a secret as evidenced by his involvement with and comments in the Union's newsletters distributed in the workplace.

[26] In cross-examination Mr. Gribbon acknowledged that the organizing drive was extensive, involved a great amount of his time, cost the Union a significant amount of money and the dispensing of information was widespread and included the use of printed leaflets, newsletters, pamphlets, bill boards and a web page on the internet. Mr. Gribbon participated in those activities and was also engaged in phone campaigns, personal visits and group meetings with the employees, all which led to him being a highly visible part of the organizing drive both to employees and management. Throughout the seven months of the campaign, Mr. Gribbon was not prevented by management from engaging in leafleting and having cards signed at either the entrances or in the cafeteria as long as both he and the employee involved were not on work time. Occasionally management asked him what he was doing but they would not interfere with his activities.

[27] Also in cross-examination Mr. Gribbon acknowledged that he assisted in the writing of and reviewed and approved an article in a Union newsletter dated March 15, 2004 which was widely distributed in the workplace. In the article a picture of Mr. Gribbon appears and he is quoted as saying, "I've been a Startek employee since May 2003. I joined GSU at the first chance and I joined to get respect. I was nervous at first because I thought I'd get fired or management would make things rough for me. I also wondered if StarTek would shut down the Regina call centre and leave me without a job. None of this happened and I don't believe it will."

[28] In his examination in chief, Mr. Gribbon testified that his hours of work were flexible. He understood that the QASs had an agreement with the Employer that they could work flexible hours as long as they worked the total required number of hours. He exercised this flexibility by occasionally working evenings, particularly if he had a lot of work to do. Since the telephone calls by his team of agents were recorded, he was able to complete his monitors during the evenings. The Employer had not previously raised concerns with him about the hours he worked or the time he was away from work. Other incidental work duties performed by a QAS included performing calibrations with team supervisors, discussing matters with supervisors and, if possible, engaging in a weekly half hour team huddle to discuss quality, if he was invited and when the supervisors were not busy with other employees. The "production phone time" duty referred to by Ms. Norton was not performed by the QASs prior to April 2004 because they did not have access to the phone codes necessary to perform this task.

[29] Mr. Gribbon testified about the issue of the monthly goal of monitors he was required to attain. He stated that he recalled a meeting of QA staff in March 2004 where a number of options for the new goal were discussed but, as far as he understood, no decision had yet been reached. He stated that it was not until he received the email memo from Ms. Norton on April 28, 2004 that he became aware that the new goal had been set at 320 per month. It is for this reason that, when Ms. Norton presented him with his performance evaluation on May 12, 2004, he was immediately surprised that the goal for April 2004 was 320 monitors.

[30] Mr. Gribbon testified that the organizing campaign started off well, waned a bit at Christmas time and then the intensity greatly increased again in May 2004. By May 2004 there were a number of cards expiring due to the six-month time limit and the Employer had begun to recruit new employees more extensively. Mr. Gribbon was on an unpaid sick leave from May 3 to May 7, 2004, returning to work on May 11, 2004. Due to his understanding of an agreement with the Employer that a QAS could work flexible hours, he planned to work evenings that week because it was quieter then and his workload had increased as a result of his absence the prior week due to illness. He therefore arrived at approximately 2:40 p.m. that day. During his unpaid meal break that day at approximately 7:00 p.m. he attended the cafeteria and, while not intending to engage in union activity, he noticed a large number of new employees there that he had

not previously contacted. He obtained and distributed union literature in the cafeteria and obtained seven signed union membership cards over the course of approximately 20 minutes. He stated that to get such a large number in a short period of time was unusual. Mr. Gribbon stated that operations managers, Sara Wenaus and Isher Read, stood together in the cafeteria and observed his activities over the course of the 20 minutes. One of them asked what he was doing to which he replied that he was having union cards signed. When he was leaving the cafeteria one of the operations managers asked whether he was on his lunch break. Mr. Gribbon stated that while management would occasionally be in the cafeteria it was not typical and he had never seen Ms. Wenaus or Ms. Reed present there before (although it was established in other evidence that these individuals work evenings while Mr. Gribbon typically works during the day).

[31] On May 12, 2004 Mr. Gribbon again arrived for work in the afternoon. At approximately 5:00 or 6:00 p.m., Ms. Norton advised Mr. Gribbon that she wished to discuss his performance review. His last performance review had been 90 days after first commencing his employment (approximately August 2003) and while he had expected to have been reviewed 90 days after being promoted to a QAS (which would have been in mid-December 2003) this had not occurred and he presumed he had passed his probationary period. In reviewing the evaluation for April 2004 with Ms. Norton, Mr. Gribbon questioned Ms. Norton about the goal of 320 monitors, believing that the goal had just been implemented when he received the email from her at the end of April 2004. It was Mr. Gribbon's belief that the goal of 300 per month implemented by his previous supervisor was still in effect, although he stated that he was never quite sure what the goal would be in a given month nor the factors that would go into setting the goal (for example, an examination of Mr. Gribbon's evaluations for February and March 2004 indicate that the goal was 260 per month although these performance evaluations were never reviewed with Mr. Gribbon at any time). Mr. Gribbon objected to the use of the goal of 320 monitors and it was on this basis that he refused to sign the evaluation. Mr. Gribbon thought that this was important because it was the only measure on which he was "below goal," other than the production phone time category, which he stated was not a duty performed by a QAS at that time. Ms. Norton stated that if he disputed the number of monitors required he would have to speak to her supervisor, Denise Deroche. It was Mr. Gribbon's evidence that Ms. Norton told him that Ms.

Deroche is generally available in the mornings and Mr. Gribbon agreed that he would come in the next morning and they would all meet.

[32] At the meeting to discuss the performance evaluation, Ms. Norton also raised an issue with Mr. Gribbon about the hours he chose to work saying that there was a problem that he was not available to the supervisors during the day. When she advised him that the complaints were about the week prior, Mr. Gribbon reminded Ms. Norton that he was away ill that week. In response to Ms. Norton's concern that he should be at work when the team members he monitors are there, he reminded her of the agreement on flexible hours. Ms. Norton did not show him or discuss with him the February and March evaluation forms. Mr. Gribbon testified that no voices were raised during the meeting on May 12, 2004.

[33] While on a break later in the evening of May 12, 2004, Mr. Gribbon had a brief conversation with Ms. Norton in the cafeteria at which time he volunteered that he was going to attempt to have employees sign union cards. Mr. Gribbon approached other employees about signing union cards and was successful in having 11 employees sign cards. Ms. Norton and Ms. Wenaus were both present in the cafeteria when he was carrying out this union activity. Mr. Gribbon stated that Ms. Norton is rarely in the cafeteria.

[34] Mr. Gribbon did not recall if he spoke to Ms. Norton again on May 12, 2004 but he left work before his shift ended, at approximately 8:00 p.m. He stated that he had trouble concentrating on his work because he felt he had been watched closely by management for the second night in a row. In cross-examination Mr. Gribbon was questioned concerning a comment he allegedly made to Ms. Norton to the effect that he "knew what she was doing" and that she was a "puppet of Denise Deroche and Peter Wilkie" suggesting that she was being manipulated by management. Mr. Gribbon's response differed slightly from that in his earlier testimony; he did not specifically deny that this conversation occurred, stating that he vaguely recalled a conversation with Ms. Norton the evening of May 12, 2004 but does not recall using the word "puppet." Mr. Gribbon stated that he was suspicious of everything at this point because he had been involved in a lengthy and intense union organizing drive and because Ms. Norton was suddenly questioning the hours he chose to work which he felt was related to Ms. Norton

watching him get union cards signed in the cafeteria that evening. Mr. Gribbon acknowledged that the card signing in the cafeteria was not different than what he usually had done but that it was to a greater extent and this would have been observable by management. Mr. Gribbon asked the Board to draw the conclusion that his performance evaluation results were linked to his union activity because this was the first occasion that his hours of work were being questioned and because management had watched his card signing activity the previous two evenings.

[35] On May 13, 2004 shortly after Mr. Gribbon's arrival at work at approximately 8:30 or 9:00 a.m., Ms. Norton asked Mr. Gribbon to meet with her in one of the offices, but did not advise him of the subject of the meeting. When Mr. Gribbon entered the room, Mr. Watch was also present. Mr. Gribbon, not being aware of the nature of the meeting and being worried about the presence of Mr. Watch, asked why Mr. Watch was present. Ms. Norton responded, "he's my witness." Mr. Gribbon, being aware that several managers had followed him or observed his activities for the two previous days and because Ms. Norton questioned him the evening before about his work schedule, then requested to have his own witness present as well. Ms. Norton told him he did not need a witness and that he should sit down. Mr. Gribbon, feeling something awful was about to happen to him, responded that he would not meet unless he had his own witness present. Ms. Norton advised him that if he left, he would be insubordinate. Mr. Gribbon left the meeting. He had been alarmed by the presence of Mr. Watch, stated that the meeting was unexpected because he had only expected to meet with Ms. Deroche that day about the goal number of monitors and felt that, if management needed a witness to his conversation with Ms. Norton, it would not be unreasonable for him to have a witness as well. According to Mr. Gribbon, the discussion was not heated and no voices were raised.

[36] A short time later Mr. Gribbon observed Ms. Norton consulting with Mr. Snell. Approximately 20 minutes after their first conversation on May 13, 2004, Mr. Gribbon stated that he and Ms. Norton "bumped into each other" and she advised Mr. Gribbon that he could have a supervisor, operations manager or someone from the human resources department present as his witness. Mr. Gribbon indicated he needed some time to think about whom to choose as a witness (he wondered if there was a supervisor in the building that he felt comfortable with) and he asked what the witness

would be witnessing. Ms. Norton advised him that she was going to give him his "final written warning for insubordination." Mr. Gribbon stated that he wanted some time to think about his choice of witness and went back to work. A short while later Ms. Norton approached Mr. Gribbon and asked him to accompany her to her office where Mr. Watch was waiting, indicating that she was giving him a "final written warning for insubordination." Mr. Gribbon again asked for a witness to be present but denied that he ever indicated that the meeting would take place at a time and place of his choosing. Ms. Norton advised that the meeting was going to take place right then or he would be terminated. Mr. Gribbon told Ms. Norton to "do what you have to do" and that he was not having the meeting without a witness, at which time Ms. Norton told Mr. Gribbon he was terminated for insubordination. Mr. Gribbon did not receive notice of the termination in writing nor did he receive or see a copy of the final written warning. Mr. Gribbon stated that at no time were voices raised. In cross-examination, Mr. Gribbon acknowledged that when he was terminated and being escorted out he said words to the effect "I've been fired for insubordination. I'll be back soon," but that the only employees who could have heard him were those on either side of his workstation.

[37] In cross-examination Mr. Gribbon was asked why he thought he had a right to have a witness present in the meetings with Ms. Norton and a right to refuse to meet without one. Mr. Gribbon stated that he did not believe he had a right to a witness but that he did not think that his request would be refused and that it would not be a "big deal" for Ms. Norton. When it was made clear to him that Ms. Norton considered it insubordination if he did not meet without a witness of his choosing, he stated that he insisted on having one because he felt the matter had escalated so quickly when he was told, all on May 13, 2004, that he was being given a final written warning, having no prior discipline, and then 45 minutes later he was terminated.

[38] In cross-examination Mr. Gribbon acknowledged that he was aware that if it could be proven that the Employer had committed an unfair labour practice it might assist the Union's organizing drive and entitle the Union to special remedies. When it was suggested to Mr. Gribbon that he was attempting to goad Ms. Norton into disciplining him as a strategic plan to assist in the organizing drive, Mr. Gribbon responded that that was absurd.

[39] In his examination-in-chief Mr. Gribbon testified that he continued to engage in organizing efforts following the termination including handing out union information outside the doors of the workplace. Mr. Gribbon did not believe there was any change in the momentum of the organizing drive immediately following his termination and, in fact, he received a fair degree of support from other employees following his termination. He believed there was some change in momentum at the end of May but did not elaborate on why he felt it had occurred at that time.

[40] Hugh Wagner also testified on behalf of the Union. Mr. Wagner has been employed with the Union for approximately 30 years, 27 of which have been in the position of general secretary, responsible for the day to day administration of the Union, including the supervision of organizing drives. Mr. Wagner testified that in late October or early November he was approached by Mr. Gribbon to discuss the possibility of the Union commencing an organizing drive of the employees of StarTek. The first union membership card was signed November 25, 2003.

[41] Approximately six employees of the Employer including Mr. Gribbon were initially involved in the drive although that number fluctuated between six and twelve throughout the course of the drive. Two temporary full-time organizers were hired by the Union in December 2003 to assist with the drive and they remained employed until May and June 2004 respectively. Mr. Wagner and Mr. Gribbon were also very much involved in the organizing drive. Although the Union was obtaining signed membership cards from the beginning, the initial focus of the drive was to distribute information about the Union and the process of unionization as widely as possible. This included meetings with the employees, leafleting, sending out pamphlets and posting billboards. The Union also distributed t-shirts which a number of the organizers and other employees wore in the workplace. Mr. Wagner testified that the common concerns of the employees at the beginning of the drive were whether they could be fired for union involvement and whether they would lose their jobs should the call centre close.

[42] Mr. Wagner stated that in January 2004 Mr. Gribbon came to him with a concern regarding an interaction he had with Mr. Wilkie about his organizing activities. Mr. Wagner wrote to Mr. Wilkie offering to meet to discuss ground rules for organizing at the workplace because Mr. Wagner believed it was acceptable for Mr. Gribbon to

discuss the Union at the workplace in the cafeteria as long as it did not interfere with production at work. Mr. Wagner stated that he did not receive a reply from Mr. Wilkie but that was not a problem because this type of interaction did not occur again for some time as most of the card signing was being done discreetly and usually on a one to one basis. In cross-examination Mr. Wagner acknowledged that employees reported to him that they were engaged in organizing at the workplace on their own time and did not encounter any problems from management. Also, there were no reports of anyone disciplined or counseled for engaging in union activity during the organizing drive.

[43] In his evidence Mr. Wagner indicated that it was in January 2004 that the focus of the campaign changed from primarily informational to soliciting the signing of cards, although the Union continued to leaflet and provide written information. There was a high turnover of staff so efforts were continuous to provide information and assure employees they would not lose their jobs.

[44] Mr. Wagner indicated that he received a call from Mr. Gribbon in early May advising that he was ill and would be unable to assist in organizing for the first week of May. Upon his intended return to work on May 11, 2004 Mr. Gribbon advised Mr. Wagner that he would be working evenings that week in order to catch up. At this time Mr. Wagner asked Mr. Gribbon to speak to the afternoon and night shift employees on his breaks as the Union had had little prior contact with them and leaving leaflets and newsletters in the lunchroom had not been effective. Mr. Wagner stated that he and Mr. Gribbon once again went over the rules of organizing in the workplace (that both the employee organizer and the employee be on a break and that the employee be willing to talk about the union) because to this point the card signing had been very discreet and not always in the workplace. Mr. Wagner stated that at approximately 11:00 p.m. he received a call from an excited Mr. Gribbon who reported that he had gotten signed support cards from 7 or 8 employees. Mr. Gribbon also reported to Mr. Wagner that Mr. Gribbon had been watched doing this by two operations managers and asked by one of them what he was doing. Mr. Gribbon said he was then watched by management.

[45] Mr. Wagner testified that Mr. Gribbon called him again on the night of May 12, 2004 advising that he had obtained an additional 11 signed support cards but that he had again been watched this time by Ms. Norton and Ms. Wenaus. Mr. Gribbon

also advised Mr. Wagner that he had a meeting the next day and that he had been requested to meet to discuss his work schedule. In cross-examination Mr. Wagner initially stated that Mr. Gribbon told him on the phone that Ms. Norton wanted to meet with him the next morning to discuss his work schedule although he then stated that Mr. Gribbon told him he had a meeting the next morning, that Mr. Wagner was not sure who it was with and that Mr. Gribbon never mentioned that it would just be with Ms. Norton. When questioned as to whether Mr. Gribbon mentioned that Ms. Deroche would be present at this meeting on May 13, 2004 Mr. Wagner indicated that he could not recall. Mr. Wagner stated that Mr. Gribbon thought there was a connection between the number of cards he had obtained on those evenings and the fact that Ms. Norton had an issue with his work schedule. In cross-examination Mr. Wagner acknowledged that Ms. Norton would not necessarily know how many cards had been signed but believed that it would be obvious by watching Mr. Gribbon and that this was the first time that Mr. Gribbon was having cards singed in the cafeteria in the evenings. Mr. Wagner did however acknowledge that other employee organizers got cards signed in the cafeteria.

[46] Mr. Wagner indicated that the Union did not keep a precise running total of the signed support cards and the timing of the same. There had been a fairly steady number of cards being signed through to February 2004 at which time there was a lull. It became apparent that the employees had concerns that the Employer may close its business because of the Union. The Union attempted to reassure the employees of the protections under the *Act* and that the Employer was committed to operating in Regina. Because of the lull and the fact that a number of the cards would begin to become stale dated at the end of May 2004, the Union wanted to step up the campaign and perhaps file the certification application at the end of May 2004. Although Mr. Gribbon's interim order for reinstatement was made on May 27, 2004, because cards were becoming stale dated and employees were not agreeing to sign a support card a second time, the Union filed its application for certification on May 28, 2004. Mr. Wagner stated that the filing of the certification application also coincided with the prospect of the closure of the Employer's business, which is the subject of the unfair labour practice application heard at the same time as this application. Mr. Wagner gave evidence concerning the number of cards signed during the course of the organizing drive, including estimates of the number of cards signed before and after Mr. Gribbon's termination. Subsequent to the hearing, the Employer took exception to that evidence. The Board then reviewed the

union support cards filed with the certification application, including the number of cards signed and their dates. On the basis of all the evidence, the Board concludes that, while there may have been somewhat of a resurgence in card signing in the month of May 2004, there was no noticeable decrease or change in the number of cards signed following Mr. Gribbon's termination.

[47] Mr. Wagner stated his opinion that the appropriate manner in which to remedy the impact of the conduct by the Employer in this case is automatic certification because "when the chill sets in, it's hard to get out." He stated that, if the Board were to order a vote, the Union would require a few months and fair access to the employees to provide information to address their fears, as well as adequate financial redress to essentially start the campaign over. Mr. Wagner also gave evidence concerning the costs of the organizing drive, however, for reasons that follow we need not detail that evidence here.

[48] Ms. Norton was re-called in response to the Union's case. Ms. Norton testified that on May 12, 2004, when Mr. Gribbon initially left the cafeteria, she saw Ms. Wenaus, who was a friend of hers, enter the cafeteria and invited her to sit with her because they work different shifts and do not see each other often. Ms. Norton denied specifically watching Mr. Gribbon. She noticed that he had been walking around when he returned but that others in the cafeteria, which holds approximately 100 people, were also moving around. Ms. Norton stated that neither Ms. Wenaus nor Ms. Reed reported to her that Mr. Gribbon had been engaging in union activity.

[49] In relation to the meeting to be held on May 13, 2004, Ms. Norton stated that she did not tell Mr. Gribbon that Ms. Deroche would be present and in fact Ms. Deroche's name only came up in their conversation when Mr. Gribbon was saying that she was a "puppet" for Ms. Deroche and Mr. Wilkie. Ms. Norton stated that Ms. Deroche has a regular 9:00 a.m. conference call on Thursday mornings and she would never set a meeting up with Ms. Deroche, who is not involved in performance evaluations, without consulting her and particularly at a time when she has other duties to perform. In relation to the issue of Mr. Gribbon's work schedule, Ms. Norton stated that she told him that the problem was that he was off work for a week due to illness and then working nights for a week meant that he would not be in contact with his supervisors and his

team for two weeks. Ms. Norton reiterated that there was no confusion among the QASs at the March meeting that the number of monitors required was 80 per week. In cross-examination, Ms. Norton was reminded of her earlier testimony that she sent out the April 28, 2004 email because there had been a lot of questions about the required number of monitors to which Ms. Norton responded that all the questions had come from Mr. Gribbon. She maintained this answer even when it was posed to her that in her earlier testimony she said that she was getting questions from her QASs.

[50] Ms. Norton also testified that prior to May 2004 she had observed Mr. Gribbon handing out both union literature and cards in the workplace and in the cafeteria. She denied that Mr. Gribbon told her how many cards had been signed.

[51] In relation to Ms. Norton's hours of work the week of May 10, she stated that she found out that day that members of the head office were attending the Regina call centre on May 17, 2004 to perform a spot check of the business review journals. Because she had a commitment Friday evening that week and could only work during the day that day, she had to work extensive hours on May 11 through 13, 2004 to complete the journals, including the performance evaluations.

[52] Regarding Mr. Gribbon's termination, Ms. Norton stated that it was her decision to terminate him and that it had nothing to do with his union activity.

LRB File No. 193-04

[53] In this application the Union alleged that the Employer committed unfair labour practices in violation of ss. 11(1)(a) and (g) of the *Act* in that the Employer interfered with, restrained, intimidated threatened and/or coerced employees in the exercise of their rights under the *Act*, that the Employer interfered with the employees' selection of the Union as their bargaining representative and that the Employer threatened to shut down its operations if the Union were to become certified. The application details a number of grounds, however, prior to the hearing the Union withdrew certain grounds such that we are left only with the allegation that Mr. Wilkie, on behalf of the Employer, delivered an email to the Regina management of the Employer giving notice of a meeting, which also stated that, if the Union were to become certified,

the Employer's business would close and that this email was distributed in the workplace. The Union also referred in its application to an anti-union website that indicated that management would close the business if it became certified. In this application, the Union seeks orders determining that the Employer committed an unfair labour practice, ordering that the Employer refrain from committing unfair labour practices and automatically certifying the Union (without evidence of support or a vote). The latter remedy was sought on the basis that the unfair labour practice, that is, the threatening of closure should the Union become certified, would result in a representation vote that would not reflect the true wishes of the employees. In the alternative to the latter remedy, the Union sought various other forms of relief, including an order that the Employer give notice that it would not close its business should the Union become certified, that the Employer post a bond or provide a guarantee which would be forfeited if the business closed after certification, that the Employer pay the Union's organizing costs to date and that a representation vote be set at a time sufficiently far ahead to allow the Union to carry out a new organizing drive.

[54] In reply to the application the Employer denied that it was guilty of any unfair labour practices on the basis that the Union's allegations did not disclose a violation of the *Act* and because the subject email was sent only to management, that is, to individuals who would not be considered "employees" under the *Act.* The email also directed the recipients not to mention the possibility of closure to the employees. The Employer denied any involvement in the anti-union website mentioned by the Union and denied any knowledge about how the author of the communications on that website obtained a copy of the above referenced email or knowledge of its contents. The Employer denied any attempt by it to dissuade employees from supporting the Union, and denied threatening any employees with the loss of their jobs or the closure of the facility. With regard to the requested remedy of automatic certification, the Employer stated that the Union has offered no reasonable or viable basis for such a remedy and that most of the relief requested by the Union falls outside the jurisdiction of the Board.

[55] The Union led evidence through several witnesses, including Rahil Ahmad, a former employee; Mr. Gribbon, an employee and one of the Union's primary organizers; Benjamin Tataryn, an employee; David Bilec, an employee; and Mr. Wagner,

general secretary for the Union. The Employer responded with the evidence of Mr. Wilkie, call center director for Saskatchewan.

[56] On May 29, 2004, two days following the Board's interim Order of reinstatement of Frank Gribbon and one day following the date the Union filed its application for certification, Mr. Wilkie sent a meeting notice by email which is at the centre of the dispute in this application. Mr. Wilkie's emailed meeting notice was addressed to "Regina management" which includes all operations managers, trainers and supervisors of the Employer, some 60-70 individuals (of the slightly under 1000 employees employed there). It was later determined at the hearing of the application for certification (LRB File No. 139-04) that this group of individuals were outside the scope of the bargaining unit sought by the Union and agreed to by the Employer. The email notice that Mr. Wilkie sent to Regina management indicated that a meeting would take place May 31, 2004 and read as follows:

> *Yesterday was a heck of a day. Started with a fire alarm at 8:45, then we had Frank's re-instatement, then mid afternoon the GSU withdrew their unfair labour practice complaint scheduled to be heard next week. (The one from back at the end of February), and of no surprise at all, in typical GSU fashion, they filed for certification and we got the notice at 5:50 last night. I guess they thought we wouldn't notice until Monday or something.*
>
> *This is not BAD news. This is GOOD news. A number of pople [sic] who had signed cards back in November were not re-signing their cards. The GSU realized that they will never have more signed cards than they do now so they had to do this.*
>
> *As far as I'm concerned the only thing the GSU can promise is Union Dues. Remember that.(good line Randy) We'll talk about other things Monday afternoon. The one thing I would like to make sure that we never mention in discussions with agents is the fact that if the GSU, by some unforeseen, absurd circumstance, were ever to actually be certified, the site would close. That statement, while true, still has significant risk to us.*
>
> *This is the being [sic] of the end of this major disruption and irritation to our lives!!*

[57] The evidence concerning the "leak" of this email is not in dispute. Mr. Ahmad testified for the Union and had held the position of a trainer, who acts as a

supervisor of the QASs. Mr. Ahmad testified that, between approximately June 8 and 10, 2004, after Mr. Gribbon's reinstatement to employment, he spoke to Mr. Gribbon indicating to him that he could show him "what is going on with management" because Mr. Gribbon was a friend of his and because he was unhappy and disagreed with what management was doing. Mr. Gribbon viewed this information, including the subject email, on Mr. Ahmad's computer screen. Later that day, Mr. Gribbon asked Mr. Ahmad for copies of the information he viewed. Mr. Ahmad, who was aware that Mr. Gribbon was one of the Union's main organizers, printed out a number of emails from his computer and provided them to Mr. Gribbon. (Mr. Ahmad's employment was terminated by the Employer effective July 16, 2004, although the evidence was unclear concerning the reasons for the termination). Initially, Mr. Ahmad had not provided Mr. Gribbon with a copy of the subject email referred to above but later, when Mr. Gribbon noticed that this email was missing from those supplied by Mr. Ahmad, he asked Mr. Ahmad for a copy of the same. Mr. Ahmad printed out a copy of this email and gave it to Mr. Gribbon. Mr. Gribbon then provided a copy of this email to Mr. Wagner on June 24, 2004 and, following his departure from employment, Mr. Ahmad gave a better copy of the email to Mr. Wagner. The evidence of Mr. Gribbon and Mr. Wagner confirmed that Mr. Wagner and the Union were not aware of the existence of the email until June 24, 2004, although it was unclear from the evidence when the Union received the copy that showed that Mr. Wilkie was the author of the email, whether it was June 24, 2004 or within one to two weeks later.

[58] Mr. Wilkie testified that the distribution of this email to those outside the Regina management group was not authorized and was contrary to the instructions of management. Mr. Wilkie stated his belief that he could express any opinion on the subject of unionization privately to other management, particularly at the point in time where he understood the Union to have completed its organizing drive, its certification application having been filed the evening prior to his sending of the subject email. In his evidence, Mr. Wagner, for the Union, agreed that Mr. Wilkie could make these types of comments to the management group, although it was his opinion that, because Mr. Wilkie sent the email to a large group, he should have expected it would get out in the workplace. Mr. Wilkie stated that he did not expect that the contents of this email would get out because he had sent a great number of emails to the management group during the course of the organizing drive repeatedly stating that the information discussed was

only to be shared within management and that they were to remain neutral with the employees.

[59] In cross-examination, Mr. Ahmad acknowledged that he had been warned by Mr. Wilkie to maintain a policy of neutrality in relation to the organizing drive. Mr. Ahmad stated that he did not otherwise discuss the closure with any non-management employees, despite being asked a number of times by employees whether the centre was closing. He stated that if he had been asked this question, he replied that he could not comment on that. Mr. Ahmad also acknowledged that providing Mr. Gribbon and the Union with a copy of the subject email was contrary to Mr. Wilkie's instructions and that he did not inform Mr. Wilkie that he had distributed this email outside of management. Mr. Ahmad stated that he was aware of the Employer's code of ethics. A copy of the code of ethics was entered into evidence stating in part as follows:

> *Company Property*
>
> *All directors, officers and other employees should protect the Company's assets and ensure their efficient use. The Company's assets, whether tangible or intangible, are to be used only by authorized employees or their designees and only for the legitimate business purposes of the Company.*
>
> *Employees are not permitted to take or make use of, steal, or knowingly misappropriate assets of the Company … including confidential information of the Company, for the employee's own use, the use of another or for an improper or illegal purpose…*

[60] The code of ethics defines "assets" to include confidential information which is defined as "information generally not known to the public that a company would normally expect to be non-public and that it might be harmful to the Company's competitive position, or harmful to the Company or its customer, if disclosed and includes, but is not limited to: …."

[61] Mr. Ahmad was also cross-examined in connection with an "acknowledgement of confidentiality" he signed during the course of his employment that acknowledged his agreement to not disclose information "that is confidential and proprietary to StarTek's client." "Confidential information" is defined in the code of ethics as above.

[62] In his evidence, Mr. Wilkie stated that he was not aware, until the filing of this application, that the meeting notice email had been leaked outside the management group. He stated that Mr. Wagner had not previously informed him that it had been leaked or that he had a copy of the email.

[63] A copy of the subject email with a copy of this application was posted to the Union's website by the Union on July 12, 2004. Mr. Wagner stated that the email was not prominently displayed so as to immediately draw attention to it and thereby scare the employees. The email and a copy of this unfair labour practice application could be accessed through a link for "Startek employees" on the Union's website. Mr. Wagner testified that the Union decided not to issue a leaflet concerning the subject email or its content concerning closure because the Union did not want to highlight the issue of closure, an issue the Union had been attempting to counter since the beginning of the organizing drive.

[64] Mr. Wilkie testified that his direction in the email to not discuss the possible closure with agents was part of the Employer's overall policy of strict neutrality in relation to any communications with employees about the Union and its organizing drive. He referred to other steps the Employer had taken at the outset of the drive to ensure this policy was followed, including arranging for the Employer's lawyer to present a seminar to the management group concerning proper conduct during an organizing drive and distributing a memo to employees which outlined the effect of signing a union card and confirming that management would not interfere with their right to join or not join the Union. Mr. Wilkie testified that, throughout the course of the drive, repeated warnings were given to management to not communicate with employees in any matters related to the organizing drive. Also in accordance with its policy, the Employer did not correct any inaccuracies in information distributed by the Union and provided examples which included: (i) an inaccurate story in one of the Union's newsletters concerning a wage dispute between the Employer and an employee; and (ii) in other union literature, the assertion that the employees of AT&T in the United States, a customer of the Employer, were unionized.

[65] Mr. Wilkie also relayed certain incidents where it took action to prevent any appearance of anti-union sentiment. One such incident occurred on April 29, 2004 and involved management asking a former employee to cease distribution of anti-union literature just outside the Employer's premises. The employee had been a member of the management group prior to her leaving employment the day prior and therefore the Employer thought it would be improper for her to distribute such literature. As far as Mr. Wilkie was aware the former employee complied with the request to stop.

[66] In the subject email Mr. Wilkie also makes reference to the fact that cards were expiring and that employees were not re-signing cards. He denied having conversations with employees about whether they should re-sign cards stating only that certain employees "volunteered" the information to him that their card had expired but that they were not re-signing. He stated that he made no comment to them. This occurred in the week prior to his sending the subject email.

[67] At the hearing the Union called evidence from a number of employees who were active in distributing literature speaking out against the Union. Ben Tataryn, an employee, gave evidence that he distributed anti-union literature on approximately June 3, 2004 containing the statement: "if GSU was asked to represent the employees of StarTek it would be shut down," however he stated that he based the statement on a rumour he had heard in the workplace and based on his own opinion. He denied that he had ever seen a copy of the subject email. A review of this leaflet, which has Mr. Tataryn's name at the foot of it, stated in the same paragraph as the above referenced quote: "And if you do not believe that, just ask some of the former employees of the Colorado call centre that was shut down because of the union scare." The leaflet, which provided further views on topics besides the possible closure, also stated: "If the GSU did win the vote and lets say that StarTek did not shut down…" and also "What is the point of having a union if you do not have a job." In his cross-examination, Mr. Wilkie indicated that he was quite sure he had seen this leaflet and that by June 4, 2004 he was aware that there was a rumour in the workplace that the centre would close if certified. When asked why he did nothing about it, Mr. Wilkie responded that he took the same approach that he had taken from the outset of the drive – making no comment to any of the employees concerning any of the literature distributed by any of the

employees. He also testified that he told anyone who was handing out literature at the workplace to stop doing so.

[68] Mr. Wilkie also testified being familiar with, although not reading carefully, a document put out by a group called "RMFC" (Your Reasonable Minded Friends and Co-Workers), which was distributed sometime between June 4 and 7, 2004 and stated: "GSU cannot even guarantee you a job because they cannot guarantee that the centre will stay open in the event of certification." The document stated that it was presented by Mr. Tataryn, Glen LaPointe and others. The document also stated that it was a response to Mr. Wagner's written reply of June 4, 2004 (which was a reply to Mr. Tataryn's leaflet of June 3,2004 referred to above). It should be noted that Mr. Wagner's June 4, 2004 leaflet replied that the closure rumour had been around since the organizing campaign began, that the rumour had no basis in fact and that the Union was accepting Mr. Wilkie's word that StarTek was committed to Regina. Mr. Wagner also pointed out the various financial incentives that would keep the company operating in Regina and that in the Union's opinion, "the closure rumour is simply a scare tactic being promoted by those opposed to the union." Mr. Wagner's reply goes on to attempt to correct other misinformation in Mr. Tataryn's June 3, 2004 leaflet.

[69] Several anti-union website printouts were entered into evidence where an email or website address contains the word "voiceout." The Union's witness, David Bilec, also an employee, admitted that he created and ran a website located at www.voiceout.org commencing in November 2003. Mr. Bilec indicated that more than one "voiceout" website exists but he only runs that particular one and does not know the identity of the other individual(s) who uses the "voiceout" name. Mr. Bilec stated that he operated his site independent of the Employer and without its knowledge. Mr. Wilkie knew that Mr. Bilec ran a website because its address was printed on his leaflets but Mr. Wilkie denied have any input or involvement with or knowledge of Mr. Bilec's website activities.

[70] Through the evidence of Mr. Bilec and others it was established that the latest closure rumour was initially posted on a website located at www.reginabridge.com/voiceout/ and specifically in the document entitled "The History

Involved." The document appears to have been posted or printed on June 1, 2004. At this website, the following entry appears, among many others:

> ***May 31, 2004*** *– Startek released a memo within management announcing that if a union was infact* [sic] *established, the Regina facility would close its doors. This memo was confirmed hours later. Check back for updates.*

[71] It was also established in the evidence that the above message no longer appears on the reginabridge.com website but is now on the voiceout.freeservers.com website. Mr. Bilec denied that he is responsible for either of these websites or the entries stated above. Mr. Tataryn also denied responsibility for the content on these websites. There was no evidence led that the Employer had any involvement in these websites, knowledge of the identity of the individuals involved, or how the information contained in Mr. Wilkie's email was obtained by them.

[72] In evidence, witnesses for the Union also referred to a website noATT.com which contains an entry dated June 1, 2004 at 9:58 a.m. by "voiceout.org" that refers to the planned May 31, 2004 meeting the Employer was holding with "all supervisors and operations managers," that the meeting was about the Union and Mr. Gribbon's reinstatement, and stated "All parties agreed that if a union enters StarTek by whatever means, StarTek Regina has agreed to close their doors." Mr. Bilec testified that he had posted messages to the noATT website but that the messages around this time period were not posted by him, but rather must have been posted by another individual referring to him or herself as "voiceout."

[73] Another message posted to the noATT.com website on June 1, 2004 at 1:49, allegedly by "voiceout" (although there is no email address for this entry on the document entered as evidence) indicates that the author developed a website to "voice out" concerns with "the union joining StarTek" as www.reginabridge.com/voiceout/ while another message posted on June 2, 2004 at 6:45 a.m. states that "voiceout.freeservers.com is our new website." Mr. Bilec testified that he is not involved in either of these websites and that this "voiceout" is not him. There was no evidence led that Mr. Wilkie was aware of the noATT website or had any involvement with the same.

[74] Mr. Wagner testified that on June 1, 2004 he exchanged emails with an individual who receives and replies to emails sent to an individual who calls him or herself "voiceout" at voiceout@accesscomm.ca who, by the content of those email exchanges, acknowledges that www.voiceout.freeservers.com is his or her website. Both Mr. Wagner and Mr. Gribbon gave evidence that, when they initially viewed the information about the closure rumour on the voiceout.freeservers.com website, they thought that it was just a continuation of the rumour that had been present since the outset of the organizing drive. The exchange of emails between Mr. Wagner and "voiceout" related to several of the entries from the posted document "The History Involved" referred to above. In his first email response, Mr. Wagner challenged the individual on the May 31, 2004 entry to prove that such a memo was released. The individual responded that he or she stood by the May 31, 2004 entry and stated "however, due to privacy, I would be unable to provide you with a copy of the memo; it is for internal eyes only. However, it was clear and straight to the point." In a continued exchange, Mr. Wagner stated:

> *If you saw [the] memo you claim was circulated within management then you must be a member of management or you are acting on their behalf. However, I don't believe such a memo exists since it would contradict StarTek's public statement's [sic] about being committed to Regina. Furthermore, such a statement as you attribute to StarTek management would be illegal and a violation of Section 11(1)(a) of the Saskatchewan Trade Union Act. If what you say is accurate, perhaps you would like to complete an affidavit and file it with the Labour Relations Board.*

In reply, the individual stated in part:

> *I never actually received a copy of the memo myself, and no, I am not part of management or acting on behalf of management in any way, shape or form. Perhaps we can conclude that the memo was non-existant [sic] and more of a scare tactic than anything.*

[75] The actual text of the subject email sent by Mr. Wilkie did not actually appear on any of the above referenced websites. The whole of the evidence indicated that the most recent closure rumour, with particular reference to a memo or some

communication by management to this effect, appeared in literature and/or websites beginning some time between May 31 and June 4, 2004.

[76] There was nothing in the evidence given by these anti-union employees that suggested they were acting on behalf of the Employer. Mr. Wilkie testified that management had not been involved in the distribution of that literature or information and that any employees handing out literature, whether for the Union or against it, were told to stop. Mr. Wilkie acknowledged that he did nothing to distance the Employer from the anti-union literature or the closure rumour and did not attempt to correct it. At no time did Mr. Wilkie tell the employees that that the centre would not close if it became unionized. He explained that not responding to the closure rumour was in accordance with the policy of neutrality and was consistent with the course of action he had taken throughout the organizing drive, that is, to not comment on any matter to non-management employees regarding issues related to unionization. He indicated that the Employer remained committed to strict impartiality on the issue of union representation and that it enforced a strict "no-solicitation" policy in relation to all pro-union and anti-union literature in the workplace. He provided the examples set out above as well as the examples of the no-solicitation rule being applied outside the context of union matters to include such things as employees soliciting funds for charities.

[77] In cross-examination, Mr. Wilkie was questioned as to how the Employer's policy of neutrality in relation to the representation question factored into his consideration to send the letters he did to employees at the outset of the organizing drive. The letters he distributed on December 1 and 30, 2003 provided information, discussed the effect of signing union cards and advised employees that if they had any questions they should direct those questions to him or Mr. Snell. Mr. Wilkie testified that he distributed these letters to the employees because several managers were being asked many questions by the employees and he did not want the managers to discuss the pros or cons of the Union if the employees continued to ask them questions. By indicating that the employees could contact him or Mr. Snell, they could control what was said to the employees by directing them to the Board or appropriately elsewhere.

[78] The Employer entered into evidence two newspaper articles published in the Regina Leader-Post in November and December 2004. In those articles the Union's

organizing drive was mentioned and reference was made to anti-union literature being distributed that, among other things, implied that the business would close if it became certified. Mr. Wilkie acknowledged in cross-examination that he declined to comment to the Leader-Post in response to the closure rumour when the Leader-Post contacted him. The articles stated that "the company has no comment on any union drive that may be occurring." A review of the article indicated that the Employer stated that it is "deeply committed to Regina," is pleased with the workforce and is committed to being a good corporate citizen. Mr. Wilkie is not identified in the articles as the company's spokesperson. Mr. Wilkie also indicated that he was not aware of who was responsible for the original rumour of a possible closure.

[79] The rumour or fear among the employees that the Employer would close the business if the Union became certified was present during the entire organizing drive. Mr. Gribbon testified that, prior to the certification application being filed by the Union, the issue of a possible closure was raised with him by approximately one in ten employees he talked to but that, after his return to work on June 2, 2004, it became the only issue employees talked to him about. Mr. Wagner confirmed this in his evidence. In response to the rumour, Mr. Gribbon and the Union would often give employees the same reply – that the Employer's operation was profitable and had special arrangements with the City, the government and the landlord and, as such, it would not be easy for it to leave. During the organizing drive, the Union responded to the closure rumour in its leaflets in December 2003 and in January, February, March and June, 2004.

[80] Mr. Wilkie also testified concerning the basis for his claim that the business would close if it became certified, although in this testimony he indicated that there is currently no decision in place to close the centre if it becomes certified. Mr. Wilkie indicated that he felt he had legitimate concerns regarding the cost of unionization. His reading of the Union's literature and the collective agreements for other workplaces represented by the Union, which were distributed during the organizing drive, promised increased pay and benefits, paid sick leave, paid parental leave and a pension plan. Mr. Wilkie also has experience working in unionized workplaces and in call centres and it was his view that labour costs were a major challenge in those workplaces. This led him to believe that certification would have a significant impact on the centre's viability and make closure a possibility. He stated that the business will not

close for the sole reason that the Union becomes certified but that closure would be the "net outcome." Mr. Wilkie testified that it was not his desire to have a unionized call centre and not the desire of the majority of his managers. He stated that his belief that unionization would only have a negative effect on the financial viability of the centre led him to this belief against unionization. Although he acknowledged that he would not know the labour costs and the resulting financial viability until negotiations for a collective agreement were concluded, he stated that he was making an educated guess based on his knowledge and experience. In answer to questions from the Board, Mr. Wilkie indicated that this email was the first occasion where he mentioned in an email to the management group the fact that the business would close if it were certified by the Union. He also indicated that he had on occasion, although rarely, expressed a negative personal opinion about the Union in an email to the management group.

Arguments:

LRB File Nos. 115-04, 116-04 & 117-04

[81] Mr. Kenny, counsel on behalf of the Employer, filed a written brief referring to several cases, all of which the Board has reviewed. Essentially the Employer denies that its decision to dismiss Mr. Gribbon was in any respect motivated by anti-union reasons or that Mr. Gribbon's union activity played any part in the decision to dismiss Mr. Gribbon. The Employer maintains that the decision to dismiss Mr. Gribbon was made by Ms. Norton and related solely to Mr. Gribbon's conduct on May 12 and 13, 2004; his refusals to meet with Ms. Norton to review his performance and discuss his performance appraisal.

[82] The Employer argued that it had good and sufficient reason to terminate Mr. Gribbon. Ms. Norton, as part of the regular duties of her job and in preparation for a visit by senior management, was required to review the performance of a number of employees, including Mr. Gribbon. An initial performance review meeting was held with Mr. Gribbon on May 12, 2004 at which time he questioned the required number of monitors he was to meet. The evaluation was not completed but the meeting was adjourned in order that Ms. Norton could check her information on the issue of monitors. However, during the evening of May 12, 2004, Mr. Gribbon became adversarial with Ms. Norton, accused her of being a "puppet" of management and questioned her motives in

dealing with the results of his performance appraisal. On the morning of May 13, 2004 when Ms. Norton and Mr. Gribbon were to resume their meeting to continue his performance appraisal, it was not reasonable for Mr. Gribbon to believe that something "awful" was about to happen to him. It was not credible, as Mr. Gribbon asserted, that he was having a meeting with Ms. Deroche and, given the adversarial approach he took with Ms. Norton the evening before, he should not have been surprised that Ms. Norton had Mr. Watch present at the May 13, 2004 meeting as a witness. The Employer argued that, in any event, it was not open to Mr. Gribbon to refuse to meet with his supervisor to discuss his performance or to insist that he be permitted to bring his own witness before he would agree to proceed with the meeting. This is a non-union workplace and therefore there is no collective agreement in place, which might provide for the right of a representative/witness for the employee.

[83] In the face of Mr. Gribbon's refusal, Ms. Norton sought the advice of Mr. Snell. Mr. Snell consulted a human resources manual he used and advised Ms. Norton to give Mr. Gribbon a final written warning for insubordination and, if he persisted in his refusal to meet, to terminate his employment. When Ms. Norton attempted to meet with Mr. Gribbon to provide the written warning, again with Mr. Watch present, Mr. Gribbon persisted in his refusal, again requesting the presence of his own witness. Ms. Norton refused to grant his request and verbally provided him with notice of the final written warning and possible termination if he continued to refuse. The Employer argued that this was a clear and unequivocal warning to Mr. Gribbon that, if he persisted to refuse to meet, he would be terminated for insubordination. When Ms. Norton attempted to meet with him again on that day, Mr. Gribbon continued to refuse and Ms. Norton terminated his employment. The Employer argued that Ms. Norton was left with no alternative but to terminate Mr. Gribbon's employment for his persistent refusals to meet with her and his flagrant and challenging conduct toward her.

[84] In support of its argument, the Employer cited *Saskatchewan Joint Board, Retail Wholesale and Department Store Union v. Courtyard Inns Ltd.* [1996] Sask. L.R.B.R. 719, LRB File Nos. 154-96, 155-96 & 156-96 for the proposition that the Employer is required to establish that it had good and sufficient reason to dismiss Mr. Gribbon but that, in making this assessment, the Board is not charged with the responsibility of assessing the sufficiency of just cause. In reference to *The Newspaper*

Guild v. The Leader Post, [1994] 1st Quarter Sask. Labour Rep. 242, LRB File Nos. 251-93, 252-93 & 254-93, the Employer acknowledged that the Employer's reasons for the termination were relevant to the inquiry, but that the Board should not assess those reasons according to the common law standard of just cause. The Board is required to examine whether the reasons hold up in light of the employee's union activity coinciding with the termination.

[85] The Employer analogized the circumstances here with those in *Saskatchewan Government and General Employees' Union v. Saskatoon Food Bank* [1999] Sask. L.R.B.R. 497, LRB File Nos. 225-98, 226-98 & 227-98. In that case the Board denied an application under s. 11(1)(e), stating that, where there was no legal basis for the employee to refuse to meet with her supervisor, the employer had sufficient cause for dismissal.

[86] The Employer maintained that, even if it has not proven that the Employer had just cause to dismiss Mr. Gribbon (in that there may have been other ways to deal with his obstinate and insubordinate conduct), if it had sufficient reasons to terminate him and Mr. Gribbon's union activity played no part in that decision to terminate, the Board must dismiss the application under s. 11(1)(e). The Employer referred to *Butterworth's Practice Manual* regarding the issue of insubordination and insolence as authority for the position that one act of insubordination can justify dismissal but that the employer must act on it quickly. Ms. Norton endured several refusals by Mr. Gribbon to meet and she acted on each one quickly by advising him that he was required to meet, offering him a warning that his continued refusals could result in termination and then immediately terminating him for those continued refusals.

[87] The Employer argued that the evidence indicated that there was no anti-union sentiment on the part of the Employer and that anti-union sentiment did not play a role in the decision to terminate. In fact, the Employer argued, Mr. Gribbon provoked this disciplinary response from management to buttress a deteriorating organizing drive and attempt to obtain special remedies from the Board.

[88] With regard to the issue of remedies, the Employer argued that the only appropriate remedies, should the Board grant the Union's application, are orders of

reinstatement and monetary loss, which were not owed to Mr. Gribbon as a result of the Board's prior interim Orders of reinstatement and monetary loss. The remedy of automatic certification is not within the jurisdiction of the Board to order, either under s. 5 or s. 42. Several amendments to the *Act* in 1994 support this position in that the remedy of automatic certification was rejected in favour of the enactment of s. 10.1, which allows for the ordering of a vote where the Board is satisfied that a union would have obtained majority support but for the commission of an unfair labour practice by an employer. The Employer argued against the application of s. 10.1 in this case, firstly on the basis that it does not apply to an application pursuant to s. 5(d) and (e) and secondly, in the alternative, there was little or no evidence upon which to draw such a conclusion in this case. The only evidence that would provide a basis for such a remedy would be an assessment of the number of cards signed prior to and after May 13, 2004 -- the date of Mr. Gribbon's dismissal. Also, because the Union filed the certification application on May 28, 2004, there was no ability to assess the impact of a possible finding of an unfair labour practice by the Employer on the level of support obtained by the Union. The Employer suggested that in these circumstances it is too difficult for the Board to assess whether the Union would have had majority support for the certification application but was prevented from obtaining such as a result of the termination of Mr. Gribbon. Such an impact would be difficult to presume given that this was an extensive, highly visible organizing campaign lasting seven months, Mr. Gribbon knew he could be reinstated to his position and expressed this to a co-worker at the time of his dismissal and because the totality of the Employer's conduct has been one of neutrality.

[89] Ms. Nordal, counsel on behalf of the Union, asserted that Mr. Gribbon was terminated, at least in part, because of his union activity and that the Employer had violated s. 11(1)(e).

[90] In response to the Employer's reliance on the *Courtyard Inns* case, the Union pointed out that the case also stands for the proposition that the strength or weakness of the Employer's case may be an indication of whether union activity entered the mind of the Employer in its decision to dismiss. The Board must examine the credibility and coherence of the Employer's explanation and whether it holds up in light of the union activity engaged in by the employee and the exercise of rights under the *Act* coincidental with the termination.

[91] The Union urged the Board to accept the evidence of Mr. Gribbon over that of Ms. Norton in relation to the events of May 11 to 13, 2004. In arguing that Ms. Norton's testimony was not credible, the Union made reference to questionable evidence in Ms. Norton's journal as to the timing of the entries it contained and Ms. Norton's evidence about her hours of work the week of May 10, 2004.

[92] The Union submitted that the Board should accept that the Employer's only reason for dismissing Mr. Gribbon was because of his refusal to meet with Ms. Norton without a witness of his choosing. The Union interpreted the Employer's argument to be that Mr. Gribbon was also adversarial and aggressive toward Ms. Norton yet, in its view, the evidence of Mr. Snell indicated that Ms. Norton only told him that Mr. Gribbon was refusing to meet without his own witness present, with no suggestion that he engaged in aggressive/adversarial behavior or that he also required that the meeting be at a place of his own choosing. The Union also pointed to the final written warning document, which indicates only the refusal to meet without a witness of his choosing. The Union also argued that Mr. Gribbon's questioning of the required number of monitors he must meet should not be considered part of the reasons for his dismissal.

[93] The Union argued that the timing of the dismissal, coincidental with a resurgence in card signing the week of May 10, 2004 and the fact that some union cards would be expiring due to their six month time limit, was so suspicious that it warranted an inference that union activity must have played a role in the decision to terminate Mr. Gribbon. The Union argued that the Employer, including Ms. Norton, would have been aware that there was this resurgence in the organizing drive following a period of decreased activity, that cards were due to expire as a result of being stale-dated, and that a new method was being used by the Union to obtained signed union cards, that being solicitation of cards in the cafeteria. The Union asked the Board to draw the inference that the termination was used to put an end to the Union's organizing drive.

[94] The Union attempted to distinguish the cases cited by the Employer and denied that Mr. Gribbon provoked this response by management by being deliberately insubordinate until he was terminated. The Union submitted that the alleged cause for

Mr. Gribbon's dismissal was so weak that the Board ought to find that Mr. Gribbon's union activity must have entered the mind of the Employer in dismissing him.

[95] The Union filed a written brief in relation to the issue of appropriate remedies aside from the usual remedies of reinstatement and monetary loss (the Union conceded that Mr. Gribbon suffered no monetary loss in this case) should the Board determine that the Employer committed an unfair labour practice. The argument appeared to have been made in relation to the facts arising out of both these unfair labour practice applications. The Union argued that, under ss. 5 and 42, the Board has the jurisdiction to order automatic certification without the Union filing evidence of majority support and without a vote, based on the reasoning in *United Food and Commercial Workers, Local 864 v. Polar Foods International Inc.,* [2001] Prince Edward Island Labour Relations Board, File No. 00-006 (June 7, 2001). The Union argued that a vote was inappropriate, when attempting to put the employees in the position they would have been in but for the Employer's violation of the *Act,* because when job security is threatened, a vote cannot truly be "free." The Union maintained that such a remedy would be considered remedial rather than punitive, relying on *Jak Electrical Contractors Ltd. and IBEW, Local 353* (1997), 37 C.L.R.B.R. (2d) 1 (O.L.R.B.) and *Re Cardinal Transportation B.C. Inc.* (1997), 34 C.L.R.B.R. (2d) 1 (B.C.L.R.B). In the alternative, the remedy requested by the Union in its application was a secret ballot vote pursuant to s. 10.1 of the *Act.*

[96] In response to the Union's argument, the Employer submitted that Ms. Norton testified that she observed Mr. Gribbon handing out union cards prior to May 12, 2004 and that she was not aware of whether there had been increase or change in the level of organizing in early May 2004.

[97] The Employer also responded that Mr. Gribbon's refusal to meet with Ms. Norton could be characterized as aggressive and adversarial behaviour. In addition, the comment Mr. Gribbon made about Ms. Norton being a "puppet" of management was adversarial and while this attitude was the reason for Ms. Norton inviting Mr. Watch in as a witness to their meeting, it must also have been in her mind at the time of Mr. Gribbon's termination. The Employer maintained that Mr. Gribbon provoked the

termination as part of a strategy to bring this application and seek extraordinary remedies.

[98] Lastly, the Employer submitted that the *Polar Foods International Inc.*, case, *supra*, if not wrongly decided, is inapplicable to the facts of this case. In the *Polar Foods International Inc.* case, that Board was faced with a hearing which lasted 22 days and the employer was found guilty of numerous unfair labour practices.

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[99] At the close of the evidence the parties requested and were provided with the opportunity to file written arguments, all of which have been reviewed by the Board.

[100] The Union argued that the management group to whom the subject email was directed, despite the fact that they were told by Mr. Wilkie in that email to not disclose the fact that the centre would close if certified, did disclose that fact and, in so doing, acted as an agent or agents of the Employer. Relying on *United Food and Commercial Workers, Local 1400 v. F.W. Woolworth Co. Limited,* [1993] 1st Quarter Sask. Labour Rep. 227, LRB File No. 158-92, for the proposition that there will be little direct evidence of a link between the individual and the employer and therefore an inference must be drawn from the facts, the Union stated that such an inference could be drawn in the circumstances of this case. The Union argued that the Employer knew of the closure rumour (and, by virtue of the subject email, knew that it was more than a rumour), that the rumour had increased as a result of the subject email and that the Employer failed to distance itself from or deny the rumour. The Union submitted that, in fact, one must question how the Employer could have distanced itself given that it was not merely a rumour but was a fact that the centre would close, as evidenced by Mr. Wilkie's email and confirmed by his testimony at the hearing.

[101] In addition, or in the alternative, the Union argued that Mr. Wilkie, having knowledge of the anti-union literature and websites and that they contained information that management indicated it would close its business if it became certified, had an obligation to distance the Employer from this information and correct it if necessary. Mr. Wilkie would have been aware that, in addition to the 60 to 70 managers to whom he

sent the subject email, employees were aware of his position, yet he chose not to comment and he failed to deny that the centre would close if the Union became certified. In any event, by not distancing itself, the Employer led its employees to believe that the sentiments expressed in the websites and literature were also the sentiments of the Employer. The Union referred to Mr. Wilkie's testimony that the financial viability of the centre would be affected by unionization and that it would close and, as such, it was not his desire that the Employer be unionized.

[102] The Union argued that it was simply too coincidental that Mr. Wilkie sent this email immediately following the Board's interim Order of reinstatement of Mr. Gribbon and the Union's filing of its certification application and that this was the first time Mr. Wilkie had expressed in an email any anti-union comments and the fact that the business would close if certified and, as such, Mr. Wilkie must have intended his comments to directly or indirectly influence the employees' support or non-support of the Union. In response to the Employer's argument that Mr. Wilkie did not intend to coerce, restrain or interfere with employees' exercise of their rights and that he could not have foreseen coercion or interference, the Union stated that Mr. Wilkie's intention is not at issue. Rather, Mr. Wilkie's conduct in sending the email saying that closure would occur, his awareness that employees knew that this was the Employer's position and his failure to deny or correct that information led the employees to reasonably believe that the centre would close if certified. Further, the Union argued that, by the wording of the email, Mr. Wilkie had knowledge that union cards were expiring and that he believed that the Union would have no more support than they had at that time and that is why the Union had to file for certification. Having this knowledge, Mr. Wilkie sent the subject email and the email was received by the employees and it had an effect on the employees and their decisions as to whether or not they wished to be represented by a union.

[103] The Union submitted that the circumstances of this case are similar to those in *United Steelworkers of America v. Wal-Mart Canada Inc*. [1997] O.L.R.D. No. 207 (O.L.R.B.) where an employee was permitted by the employer to make an anti-union speech at an employee meeting and union supporters were not permitted to respond. In the circumstances of that case the Ontario Labour Relations Board determined that the employees at the meeting might have reasonably concluded that the views of the

employee were also the views of the employer, which led the Ontario Board to conclude that the employer had intimidated or unduly influenced the employees with regard to their decision on union representation.

[104] Relying on *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Brown Industries (1976) Ltd. et. al.*, [1995] 2nd Quarter Sask. Labour Rep. 71, LRB File Nos. 010-05 & 012-95, where the Board found that the principal of the employer "did what he could to distance himself from these employees" who were distributing anti-union literature, the Union argued that Mr. Wilkie failed to distance himself from the closure rumour after it became apparent that the contents of the subject email were known to the employees.

[105] The Union also relied on *Universal Workers Union, Labourers' International Union of North America Local 183 v. Bradford Sod Ltd.* [2001] O.L.R.D. No. 4611 (O.L.R.B.).

[106] The Union argued that the Employer was not following its policy of strict neutrality on the issue of union representation, referring to the memos sent by Mr. Wilkie to the employees regarding the effect of signing union cards and inviting them to ask questions of him and Mr. Snell. The Union also referred to the conversations Mr. Wilkie had with employees to the effect that their cards were expiring and they were not going to re-sign cards. The Union submitted that the subject email was also not intended to be neutral but instead to influence employees in their decision whether to support the Union.

[107] The Employer argued that the Union had not met its onus of proving that the Employer had breached s.11(1)(a) or s. 11(1)(g) of the *Act.*

[108] The Employer argued that the prohibition in s. 11(1)(a) addresses behavior intended to influence employees in their decision whether to join a union. Relying on *Communications, Energy and Paperworkers' Union of Canada v. Hollinger Canadian Newspapers, LP*, [2001] Sask. L.R.B.R. 689, LRB File No. 331-99, the Employer denied that Mr. Wilkie had intended to coerce or interfere with employees' rights or that he could have foreseen such an effect. The subject email was distributed

only to members of management, that is, those outside the definition of an “employee” under the *Act*. The Employer argued that there was no evidence that Mr. Wilkie intended that the subject email would be disseminated beyond the management group to whom the email was addressed, nor could Mr. Wilkie foresee that a member of the management group would distribute the email outside of that group. The Employer argued that it was not responsible for the original leak of the email or for its ongoing availability to the employees by reason of the email being published on the Union’s website. The Employer submitted that the email was improperly shared with the Union by a member of its management team, Mr. Ahmad, and that, in so doing, Mr. Ahmad acted against the instructions of the Employer, the Employer’s policy of strict neutrality and contrary to the Employer’s code of ethics. Mr. Wilkie testified that at the time he had no knowledge that the email had been distributed outside the management group or that it was Mr. Ahmad who had leaked the email. The Employer argued that there was no evidence from which to draw an inference that Mr. Wilkie did know this. In fact, to the contrary, Mr. Wilkie instructed in the subject email that the matter of closure must never be discussed with employees.

[109] The Employer submitted that it had gone to great lengths to avoid making comments to employees regarding the organizing drive. The Employer referred to its policy of strict neutrality in relation to the representation issue, which included refraining from any comment on either the Union’s literature or the anti-union literature that was circulated. Mr. Wilkie provided examples of action taken by the Employer in this regard and the communication of this message by the Employer and its legal counsel to its management. The Employer suggested that in light of the steps taken to ensure confidentiality, management should be permitted to speak freely about the organizing drive among themselves and that the Employer would not have foreseen the leak of the subject email outside the management group. The only communication the Employer had with the employees was a memo it distributed on two occasions to its employees at the outset of the organizing drive. The Employer argued that the memo was purely factual in nature and that an invitation in the memo to contact Mr. Wilkie or Mr. Snell of human resources was only intended to assert control over the lines of communication. Mr. Wilkie’s taking of a position privately within the management group is not relevant because the communication was intended only for management.

[110] The Employer relied on *Service Employees' International Union, Local 333 v. Calgarian Retirement Group Ltd*., [1998] Sask. L.R.B.R. 241, LRB File No. 006-97 in support of its response to the Union's argument that Mr. Ahmad, in distributing or leaking the subject email, was acting as the Employer's agent. The Employer submitted that such an assertion by the Union flies in the face of all the evidence and specifically referred to evidence to the contrary: Mr. Ahmad admitted that he received the message of neutrality from Mr. Wilkie, that he covertly provided a copy of the subject email to Mr. Gribbon and the Union without Mr. Wilkie's or the Employer's knowledge or consent and that provision of the email at the time was contrary to what Mr. Wilkie would have wanted. The Employer also argued that Mr. Tataryn and Mr. Bilec were not agents of the Employer. They admitted in evidence that in relation to their anti-union activity they acted independent of management, Mr. Tataryn stating that he heard about the closure rumour in the "smoking area" and Mr. Bilec stating that he runs the website www.voiceout.org and had never seen the subject email. The Employer relied on the rationale provided in *Brown Industries, supra*, to support its position that Mr. Wilkie was not responsible for the activities of Mr. Ahmad, Mr. Tataryn and Mr. Bilec.

[111] Further and in the alternative to the above arguments, the Employer submitted that the reference to closure in the subject email was based on valid business considerations, untainted by anti-union animus. The Employer referred to what it characterized as Mr. Wilkie's clear evidence that that the centre would not close solely for the reason that the Union is certified in the future. The Employer relied on *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Western Grocers, A Division of Westfair Foods*, [1992] 4th Quarter Sask. Labour Rep. 83, LRB File No. 168-92 and *EF International Language Schools Inc. v. B.C.G.E.U.*, [1997] B.C.L.R.B.D. No. 203 (QL)(B.C.L.R.B.) in support of its position that the comment on closure of the centre was made as a result of economic considerations based on representations by the Union, in particular, the monetary demands the Union intended to make as evidenced in the literature it distributed to employees. Mr. Wilkie stated in his evidence that based on his knowledge of costs in a unionized environment, the pay and benefits promised by the Union would adversely affect the Employer's competitive position, the net outcome of which could be closure of the centre, a position that he voiced only within the management group. The Employer maintained that the email was

not coercive and the Employer was not motivated by anti-union animus, the email having been intended only for the eyes of management.

[112] In response to the Employer's argument, the Union submitted that the manner in which the Union was provided a copy of the email was not through improper means. Referring to the acknowledgement of confidentiality completed by Mr. Ahmad, the Union took the position that that there was nothing in the exhibits or evidence at the hearing that established that Mr. Ahmad, Mr. Gribbon or Mr. Wagner did anything wrong with respect to the ultimate possession of the email meeting notice by the Union. The Union maintained that Mr. Ahmad took a document addressed to him, not containing any information regarding the Employer's services, products or clients and shared that with the Union, thereby not breaching the acknowledgement of confidentiality. (The Union did not however, specifically address the code of ethics concerning employees' commitments regarding company property). The Union denied, as suggested by the Employer, that Mr. Ahmad took a copy of the email "covertly" but rather "he folded it up and carried it out."

[113] In response to the Employer's argument that the statement in Mr. Wilkie's email that the centre would close if the Union were to be certified was based on legitimate economic concerns, the Union submitted that the evidence does not support this argument. To the contrary Mr. Wilkie stated in his evidence that neither he nor many of the managers wanted to see a union certified. The Union submitted that to allow an employer to threaten to close if a union is certified because the employer believes that unionization will create economic concerns for the employer would be contrary to the purpose and intent of the *Act*.

[114] In relation to possible remedies in the event of a finding of an unfair labour practice application, the Union requested the typical remedies of a determination that an unfair labour practice had been committed and an order requiring the employer to refrain from engaging in any further unfair labour practices. In addition, the Union also requested that the Board order automatic certification of the bargaining unit on the basis of the Board's broad remedial jurisdiction and pursuant to s. 42 of the *Act*, based on the reasoning of the Prince Edward Island Labour Relations Board as expressed in *Polar Foods International Inc.*, *supra*. The Union maintained that where employees' jobs are

threatened it is difficult, if not impossible, for a fair vote to be taken pursuant to s. 10.1 of the *Act*. The Union argued that this is the only remedy that could neutralize the memories of employees affected by the threats of job loss and closure and put the employees in the position they would have been in but for the Employer's conduct. The Union argued that the remedy is remedial, not punitive, and seeks to restore to the Union and employees the right to exercise a free vote under the *Act*.

[115] The Employer responded in argument that the remedies requested by the Union are inappropriate. Regarding automatic certification, the Employer argued on the basis of *United Food and Commercial Workers, Local 1400 v. F.W. Woolworth Co. Limited*, [1993] 1st Quarter Sask. Labour Rep. 220, LRB File No. 141-92 that this remedy is not available pursuant to the Board's express or residual powers under ss. 5 and 42 of the *Act* as a response to employer interference with an organizing drive, even where the Board is satisfied that a union was unable to secure majority support because of that interference. The Employer also argued that the reasoning in the *F.W. Woolworth Co. Limited* case was not affected by the amendments to the *Act* in 1994. Counsel pointed to the fact that, with the introduction of s. 10.1 to the *Act* in 1994, the legislature had implicitly addressed the issue of automatic certification and enacted s. 10.1 instead as a remedial response to situations where the employer has committed an unfair labour practice that has resulted in a union being unable to secure majority support for certification. The Employer also noted that the Prince Edward Island Board in the *Polar Foods* case, *supra*, did not have before it a power similar to our s. 10.1 to address situations where an employer's unfair labour practice prevented a union from obtaining majority support on an application for certification. Lastly, the Employer submitted that the factual circumstances of this case are very different than in any case where automatic certification was granted in that the conduct of the Employer was not so severe, flagrant or continuing in nature so as to justify such an extreme remedy.

[116] In the alternative to an order of remedial certification, the Union requested that the Board order a secret ballot vote in three months time, payment of financial compensation to the Union to finance a new organizing drive prior to the vote and free access to the employees to complete the new organizing drive.

[117] In relation to these particular remedial requests of the Union, the Employer argued that they were not rationally connected to the alleged unfair labour practice. An order that the Employer provide notice that it will not close in the event of certification raises a concern surrounding the weakening of the efficacy of the Board's remedial orders and is premature in the sense that a notice would restrict a lawful closure that might occur in the future should the Employer close the centre following certification on the basis of valid business reasons. Requiring the Employer to post a bond and forfeit it should it close is punitive (and outside the Board's jurisdiction) as it is tantamount to a fine, should the Employer close due to valid financial reasons. Lastly, the Employer submitted that an order to reimburse the Union for its organizing costs is punitive and is not connected to the alleged action by the Employer, in particular, because the email was sent after the Union filed its application for certification and it therefore had no impact on the support the Union had obtained and filed with the Board with its certification application.

Statutory Provisions:

[118] Relevant provisions of the *Act* include the following:

> *5. The board may make orders:*
>
> *(d) determining whether an unfair labour practice or a violation of this Act is being or has been engaged in;*
>
> *(e) requiring any person to do any of the following:*
>
> *(i) refrain from violations of this Act or from engaging in any unfair labour practice;*
>
> *(ii) subject to section 5.1, to do any thing for the purpose of rectifying a violation of this Act, the regulations or a decision of the board;*
>
> *(f) requiring an employer to reinstate any employee discharged under circumstances determined by the board to constitute an unfair labour practice, or otherwise in violation of this Act;*
>
> *(g) fixing and determining the monetary loss suffered by any employee, an employer or a trade union as a result of a violation of this Act, the*

regulations or a decision of the board by one or more persons, and requiring those persons to pay to that employee, employer or trade union the amount of the monetary loss or any portion of the monetary loss that the board considers to be appropriate;

. . .

10.1 On an application pursuant to clause 5(a), (b) or (c), the board shall make an order directing a vote to be taken by secret ballot of all employees eligible to vote, and may make an order pursuant to clause 5(g), where:

(a) the board finds that the employer or the employer's agent has committed an unfair labour practice or has otherwise violated this Act;

(b) there is no evidence before the board that shows that a majority of the employees in the appropriate unit support the application; and

(c) the board finds that evidence of majority support would have been obtained but for the unfair labour practice or violation of the Act.

. . .

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;

(e) to discriminate in regard to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including discharge or suspension or threat of discharge or suspension of an employee, with a view to encouraging or discouraging membership in or activity in or for or selection of a labour organization or participation of any kind in a proceeding under this Act, and if an employer or an employer's agent discharges or suspends an employee from his employment and it is shown to the satisfaction of the board that employees of the employer or any of them had exercised or were exercising or attempting to exercise a right under this Act, there shall

> *be a presumption in favour of the employee that he was discharged or suspended contrary to this Act, and the burden of proof that the employee was discharged or suspended for good and sufficient reason shall be upon the employer; but nothing in this Act precludes an employer from making an agreement with a trade union to require as a condition of employment membership in or maintenance of membership in the trade union or the selection of employees by or with the advice of a trade union or any other condition in regard to employment, if the trade union has been designated or selected by a majority of employees in any such unit as their representative for the purpose of bargaining collectively;*
>
> *(g) to interfere in the selection of a trade union as a representative of employees for the purpose of bargaining collectively;*
>
> *42 The board shall exercise such powers and perform such duties as are conferred or imposed on it by this Act, or as may be incidental to the attainment of the objects of this Act including, without limiting the generality of the foregoing, the making of orders requiring compliance with the provisions of this Act, with any regulations made under this Act or with any decision in respect of any matter before the board.*

Analysis and Decision:

LRB File Nos. 115-04, 116-04 & 117-04

[119] We are of the opinion that the applications should be dismissed.

[120] The Employer appears to have acknowledged that Mr. Gribbon was engaged in union activity in the form of organizing at or around the time of his termination and therefore the onus is upon it to establish that it had good and sufficient reason for terminating Mr. Gribbon, entirely uninfluenced by anti-union sentiment.

[121] The Board has rendered several decisions concerning the application of s. 11(1)(e) of the *Act*. In *Courtyard Inns Ltd., supra,* the Board undertook an extensive review of the authorities and stated in part, at 727:

> *[40] Section 11(1)(e) requires that an employer demonstrate that there was "good and sufficient reason" for a suspension or dismissal, in order to rebut the presumption created by the provision that the dismissal or*

suspension was motivated by trade union activity. The relationship between the notion of "good and sufficient reason," and that of "just cause," which is more common as the standard established under collective agreements, has never been discussed extensively in the jurisprudence of the Board. In the case of Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Versa Services Ltd., [1994] 3rd Quarter Sask. Labour Rep. 176, LRB File Nos. 090-94, 091-94 and 092-94, the Board actually used the term "just cause" to refer to the standard expected under s. 11(1)(e).

[41] The Board has consistently stated the position that, in considering whether an employer has met the onus under s. 11(1)(e), we are not called upon to assess the sufficiency or justness of the cause in the same way as an arbitrator under a collective agreement. In The Leader Post decision, supra, the Board commented as follows, at 248:

> *For our purposes, however, the motivation of the Employer is the central issue, and in this connection the credibility and coherence of the explanation for the dismissal put forward by the employer is, of course, a relevant consideration. We are not required, as an arbitrator is, to decide whether a particular cause for dismissal has been established. Nor, like a court, are we asked to assess the sufficiency of a cause or of a notice period in the context of common law principles. Our task is to consider whether the explanation given by an employer holds up when the dismissal of an employee and some steps taken in the exercise of rights under The Trade Union Act coincide. The strength or weakness of the case an employer offers in defence of the termination is one indicator of whether union activity may also have entered the mind of the Employer.*

[42] The Board made a similar point in a decision in Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Regina Exhibition Association Limited, [1995] 3rd Quarter Sask. Labour Rep. 37, LRB File Nos. 103-95, 104-95 and 105-95, at 62:

> *In making this determination, the Board is not required to arrive at a definitive assessment of whether, in the absence of anti-union motive on the part of the employer, the decision to dismiss would prove invulnerable to a challenge before an arbitrator. The question to which we put our minds is not whether the employer has been able to show that there was just cause for the decision to dismiss.*
>
> *It is something of a cliché to observe that there is rarely an open confession of anti-union motive on the part of the employer. In these circumstances, the reasons which are given for a dismissal become the focus of attention, not*

> *because the Board wishes to determine whether they constitute just cause, but because it is necessary to assess whether they are sufficiently coherent that it is safe to conclude that they do constitute the reason for the dismissal, and are not advanced simply to camouflage the true, anti-union, impulse underlying the termination*.

[122] In several cases the Board has made it clear that the Board is not to act as an arbitrator in making an assessment under s. 11(1)(e). In *United Steelworkers of America, Local 5917 v. Superior Hard Chrome Inc.*, [1992] 2nd Quarter Sask. Labour Rep. 94, LRB File Nos. 057-92, 058-92 & 059-92, the Board stated at 95:

> *Although proportionality between an employee's misconduct and the employer's response is a factor the Board looks at on these applications, the Board's function is not to act as a board of arbitration to determine whether the employee's conduct warranted some lesser discipline. The Act places the onus on the Employer and, in this case, the Employer has satisfied the Board that Mr. Woroschuk's dismissal was unrelated to any attempt by Mr. Woroschuk, or any employee, to exercise their rights conferred on them by The Trade Union Act.*

[123] In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Watergroup Canada Ltd. et al.*, [1993] 2nd Quarter Sask. Labour Rep. 199, LRB File Nos. 107-92, 108-92 & 109-92, the Board also made reference to the view in *United Steelworkers of America v. Conservation Energy Systems Inc.*, [1993] 1st Quarter Sask. Labour Rep. 75, LRB File Nos. 215-92, 216-92 & 217-92 at 78:

> *The Board cannot, however, judge all of the criticisms which might be made of the decision, but only determine, in relation to the allegation made under Section 11(1)(e), whether the lay-off was animated by anti-union sentiment on the part of the employer. We are unable to find that this was the case.*

[124] In *Courtyard Inns*, *supra*, the Board further commented at 729:

> *[48] … In Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Moose Jaw Exhibition Company Limited, [1996] Sask. LRBR 575, LRB File Nos. 131-96, 132-96 and 133-96, the Board commented, at 584-585, on the relationship of the plausibility of the explanation put forward by an employer for a decision to dismiss with the other factors which are relevant to an assessment of any given situation:*

> *As the Board has pointed out on a number of occasions, the fact that trade union activity is taking place does not mean that an employer is prevented altogether from taking serious disciplinary steps against an employee. The onus imposed on an employer by s. 11(1)(e) is not impossible to satisfy. There is no question, however, that it is difficult to meet. In order to satisfy ourselves that the grounds stated for a decision to dismiss an employee do not disguise sentiments on the part of an employer which run counter to the purposes of The Trade Union Act, it is necessary for us to evaluate the strength or weakness of the explanation which is given for the dismissal, in the light and nature of the collective bargaining relationship, and the possible impact a particular disciplinary action may have on the disciplined employee and other employees.*

[125] In accepting that the reverse onus in s. 11(1)(e) requires the employer to establish that it had "good and sufficient" reason for the dismissal of the employee, other cases have made reference to the role of "anti-union" sentiment in making that assessment. In *Watergroup, supra,* a probationary employee was dismissed following the filing of a certification application in the context of what the Board characterized as a hostile and tense relationship between the employer and the union. While the dismissed employee declined to admit she was sympathetic to the union, the Board examined whether there was any anti-union attitude by the employer. At 203, the Board stated:

> *The Board's correct function was stated in Eisbrenner Pontiac Asuna Buick Cadillac GMC Ltd., LRB File No. 161-92, as requiring the Board to determine whether the anti-union feeling was present to the minds of the employer when making the decision to terminate the employee, regardless of whether it was present as the main reason or one of many reasons.*

[126] In *United Food and Commercial Workers, Local 1400 v. PADC Holdings Ltd., operating the Prince Albert Inn*, [1994] 1st Quarter Sask. Labour Rep. 305, LRB File Nos. 290-93, 291-93 & 292-93, at 312, the Board commented on the necessity of assessing whether anti-union sentiment played a part in the decision to dismiss:

> *It is our view that the onus resting on an employer requires that they demonstrate that the decision was not tainted by anti-union sentiment. That in turn will generally require that the reasons given for the decision to dismiss are credible and coherent, and that there is evidence that*

> *corroborates the assertion that the decision was arrived at entirely for legitimate reasons.*
>
> *In a case to which the Board was referred by counsel for the Union, Hotel and Restaurant Employees International Union v. Regina Exhibition Association, LRB Files No. 431-85 and 432-85, the Board proposed considering this issue from the perspective of the question "Would the employer have terminated other employees who acted the same way but were opposed to the union?"*
>
> *This way of framing the issue seems to us to focus on the concept of discrimination on which Section 11(1)(e) is based, and to avoid formulating the issue in such a way that an employer can never arrive at a disciplinary assessment of an employee which has serious consequences without violating Section 11(1)(e).*

[127] In *PADC Holdings, supra,* a bartender in a hotel was dismissed from his employment for failure to follow the directions of his manager. The employee had been involved in an organizing drive in the hotel when, in the early evening of Christmas Eve, the employee wanted to announce last call in order that he could leave work by 8:00 p.m. to attend to his family commitments. It was his understanding that the lounge was to close by that time and he had made plans accordingly. The manager, who was present in the lounge socializing with a group of regular customers and staff, advised that he wished the lounge to continue to remain open. The employee indicated to the manager that he needed to leave work due to family commitments but was concerned about doing so before the lounge closed because part of his duties and responsibilities, according to a workplace policy, included ensuring that there were no cash or liquor shortages while he was on duty or he would be responsible for payment of the shortage. Cash and liquor shortages in the bar had been a recent problem for the employer and, in fact, the employee had previously been disciplined for the same. The manager explained to the employee that he could leave and be relieved from those responsibilities and that the manager and a waitress would continue to serve patrons in the lounge. A heated discussion ensued during which the manager dismissed the employee following repeated instructions to the employee, the employee's refusal to leave and his refusal to obey instructions about refraining from announcing last call. The union alleged that the employer violated s. 11(1)(e) in dismissing the employee from his employment. At 313 and 314, the Board disagreed, offering the following reasons:

> *We have no doubt that Mr. O'Shaughnessy had good personal reasons to leave by eight o'clock on Christmas Eve. If Mr. Todd insisted that Mr. O'Shaughnessy stay, and fired him for his refusal to do that, the circumstances might have taken on a different cast. We accept, however, that Mr. Todd gave Mr. O'Shaughnessy two clear opportunities to leave the bar without any repercussions. Mr. Todd, as General Manager of the hotel, was entitled to make judgments about the effect which keeping the bar open or closing it would have on the patronage provided by the regular customers who were still drinking in the Lions Den, and to direct his employees in accordance with these judgments. He was further entitled, in our view, to draw the conclusion at some point in his conversation with Mr. O'Shaughnessy that the objections raised by this employee constituted willful insubordination, and a threat to his authority. Mr. Todd saw Mr. O'Shaughnessy as attempting to assert his own decisions in contradiction to those of the General Manager of the hotel. Whether a reasonable employer would have acted differently, or whether an arbitrator might decide that the degree of insubordination did not warrant dismissal is not really a persuasive consideration in the circumstances of this case.*
>
> *We are satisfied, to answer the question posed in the Regina Exhibition case, supra, that Mr. Todd would have dismissed any employee who refused his instructions in such a straightforward and persistent way. The approach taken by Mr. Todd to the news of the organizing campaign initiated by the Union showed that he was prepared to permit the open solicitation of support and discussion of the Union on hotel premises within certain legitimate limitations imposed in the interest of the smooth operation of the hotel. He did not allow himself, and he advised others not allow themselves, to be drawn into any communications which might be perceived as intervention in the organizing campaign, a campaign in which he publicly acknowledged the employees had a legal right to take part. His role seems to have been a generous and sensible one, and we would commend the approach taken by Mr. Todd to other employers.*
>
> *For these reasons, we have concluded that the Employer has met the onus which rests on them by virtue of Section 11(1)(e), and will dismiss the unfair labor practice application.*

[128] In *Genert v. Cypress Credit Union Limited*, [2000] Sask. L.R.B.R. 184, LRB File Nos. 003-99, 004-99 & 005-99, an employee was dismissed due to poor work performance and attitude. In response to the employee's work performance problems and the poor attitude she displayed toward management, the employer presented the employee with a performance improvement plan which they discussed and which the manager asked the employee to sign. The employee was not in agreement with the plan and requested a meeting with the manager to discuss it and asked that she be permitted to bring two other employees with her. The manager had sought advice from

a consultant whether this would be appropriate and was advised that he should not discuss the plan with her in the presence of other employees. When the employee arrived at the meeting with the other employees, she questioned how the performance plan had come about. The manager advised her that he could not discuss the plan with the other employees present at which time the employee became angry and loud. The manager advised the employee that it was this type of attitude with which the employer found a problem. The employee responded by leaving the meeting and indicating that the manager would regret this and she would be going to the labour board to go through his books. The employee attended a further meeting with the manager at which time she agreed she needed to improve her performance but wanted to prepare her own plan. The employee returned the following day with a medical certificate and the signed employer's performance improvement plan at which time she indicated that she had signed the plan under duress. Following an approximate two-week leave for illness (during which time the employee did make a complaint to Labour Standards concerning overtime pay alleged to be owing to her), the employee attended another meeting with management and advised of her unwillingness to sign the employer's performance improvement plan. Following this meeting the employer, after obtaining legal advice, offered the employee severance and after her decline of the same, provided her with pay in lieu of notice pursuant to *The Labour Standards Act*, R.S.S. 1978, c. L-1. The employer had decided to terminate the employee when it became apparent that she was not going to agree to the plan. It was acknowledged that performance improvement plans could form a part of the disciplinary process. Another employee experiencing similar problems was also asked to and did sign a performance improvement plan at the same time as the request was being made of this employee. The employee had previously been involved in discussions with a co-worker about the possibility of forming a union but no steps had yet been taken in that regard. The dismissed employee brought an application alleging that the employer violated s. 11(1)(e) in terminating her employment. The Board concluded at 198:

> *Overall, however, the Board finds that the Employer's reasons for terminating the employment of Ms. Genert did not lack the coherence or credibility which would lead the Board to conclude that the termination was intended to discourage further union activity. Although there may have been different or better ways for the Employer to deal with Ms. Genert, the Board finds that the Employer's evidence as to its attempts to address the performance issues relating to Ms. Genert was credible. It also finds that the explanation was coherent and was not seriously*

> *disputed by Ms. Genert. In our view the Employer has established that it had good and sufficient reasons for terminating Ms. Genert's employment. Having come to this conclusion, we do not imply or infer that there was "just cause" for her dismissal but merely that the reasons advanced by the Employer were sufficiently coherent and credible to avoid the conclusion that the Employer dismissed Ms. Genert because of her union activity.*

[129] In the present case the Employer had knowledge that there was a highly organized union drive taking place and that Mr. Gribbon played a significant role in that drive. In light of the allegation by the Union that Mr. Gribbon was dismissed at least in part for his participation in that union activity, the Board must examine whether the Employer had good and sufficient reason for terminating Mr. Gribbon, untainted by any anti-union sentiment.

[130] Counsel for the Union argued that the Employer was sending a message by terminating the most highly visible union organizer -- telling the employees that it was in control of the union organizing drive. While that is possible, the much more likely explanation on the evidence presented is that given by the Employer, that Mr. Gribbon was terminated for his continued refusals to attend meetings with his supervisor to discuss his performance evaluation. While an arbitrator might be critical of the form of progressive discipline used with Mr. Gribbon, it is only necessary that the Board find that the Employer had good and sufficient reason to terminate Mr. Gribbon, uninfluenced by any anti-union sentiment.

[131] The Employer's explanation is compelling. Ms. Norton needed to meet with Mr. Gribbon to conduct a performance evaluation within a short time frame in order to complete the business review journals for inspection by senior management. It was necessary for her to conduct, and she did conduct, performance evaluations with other employees. The Employer was entitled to conduct those performance evaluations on their own terms and it was up to Ms. Norton to determine when the discussion with Mr. Gribbon would take place and who would be present. Having determined this, the Board also accepts the evidence of Ms. Norton over that of Mr. Gribbon that on May 12, 2004 when they briefly met following their initial meeting, Mr. Gribbon acted in a manner that was a challenge to Ms. Norton's authority, by saying that she was a "puppet" of management or words to that effect. Mr. Gribbon did not deny the import of this

conversation other than to say that he did not recall specifically using the word “puppet.” Following this, it was not only the right of the Employer to decide to have a witness at the meeting with Mr. Gribbon, but it was also reasonable for Ms. Norton to do so. It was not open to Mr. Gribbon to refuse to meet with Ms. Norton or insist that a witness of his choosing be present at the meeting.

[132] In the face of Mr. Gribbon’s refusals, Ms. Norton took a reasonable course of action by seeking advice from the Employer’s human resources specialist, who advised her that, if Mr. Gribbon persisted in his refusal to meet, she should issue a final written warning and that his continued failure to meet could result in termination. Ms. Norton followed this advice. Prior to terminating Mr. Gribbon, Ms. Norton gave him an additional opportunity to meet to issue the final written warning and, while she did not give him the document evidencing the warning, we conclude that she was unable to do so because Mr. Gribbon continued to refuse to meet with her without a witness. We are satisfied, however, that Mr. Gribbon was warned verbally and was aware that he could be terminated for his continued refusal to meet. There was some discrepancy in the evidence concerning exactly how many times they “met” or tried to meet and on how many occasions Mr. Gribbon refused to meet. The Board has determined that such discrepancies do not affect the credibility of the witnesses and, in this case, it is sufficient that the Board finds that Mr. Gribbon was asked to meet, he refused to meet and, when warned, he continued to refuse to meet.

[133] The Board finds that the Employer’s reasons for dismissal were credible and coherent. It reasonably appeared to the Employer, after several attempts, that Mr. Gribbon would only meet on his terms, not the Employer’s, which left the Employer with no alternative but to take some disciplinary action and increasingly severe action for a continued refusal to obey. Mr. Gribbon could not expect to refuse a lawful request of the Employer without any consequences for his refusal. Had anything happened at the meeting that was improper or in violation of the *Act*, Mr. Gribbon would have had the opportunity to take some action against the Employer. While an arbitrator or a court might determine that the degree of insubordination was not sufficient to warrant dismissal as the appropriate penalty when a warning did not correct the employee’s behaviour, it is not the Board’s function to assess whether there was just cause for the action taken. Had the Employer not warned Mr. Gribbon that his conduct was

insubordinate and that dismissal could be a consequence, we may have taken a different view, but the warning was sufficient in this case and, in fact, Mr. Gribbon was given a prior opportunity to meet even before the warning was issued. Overall, the reasons of the Employer were not so weak as to permit the inference to be drawn that Mr. Gribbon's union activity must have played a part in the decision to terminate.

[134] The Union argued that the Board should consider the point of view of Mr. Gribbon, his role in the organizing campaign, the fact that membership cards were due to expire and the increase in organizing activity the week of these events as reasons why the Employer must have considered Mr. Gribbon's union activity in its decision to dismiss. Mr. Gribbon stated that he felt the Employer was looking for reasons to dismiss him and that is what prompted the performance evaluation and the difficulty with the results concerning the number of monitors he completed for April 2004. He felt that, with the new type of organizing activity he had been undertaking that week in the cafeteria in the evenings, something awful was about to happen to him and he was justified in having his own witness present. While the Board can appreciate that Mr. Gribbon may have felt some apprehension in this situation, the evidence falls far short of establishing a reasonable basis for this apprehension to the point that he was justified in refusing to meet with Ms. Norton. Firstly, Mr. Gribbon had no problems with the Employer over his organizing activity in the some eight months prior to his dismissal, despite the fact that he was the most visible member of the organizing drive, openly carried out union organizing activities in the workplace and, further, he wrote for and was published in the Union's newsletters indicating he had experienced no negative consequences for being involved in the Union. Also, other evidence established that this was not a new form of organizing at the workplace the week of May 11, 2004. While there may not have been a lot of previous organizing activity in the evenings, organizing in the cafeteria by handing out union cards had previously taken place and, in any event, the Employer had no way of knowing how many employees signed cards in those evenings leading up to Mr. Gribbon's termination.

[135] The Union also suggested that Mr. Gribbon was justified in being suspicious about having to meet with Ms. Norton on May 13, 2004 (instead of Ms. Deroche who he expected to meet with) and because Mr. Watch was present as Ms. Norton's witness. The Board does not accept that Mr. Gribbon expected that he was to

meet with Ms. Deroche the morning of May 13, 2004 instead of Ms. Norton, given other evidence including: (i) the fact that Ms. Norton had not completed the performance review for April 2004 or reviewed the February 2004 or March 2004 evaluations and therefore a continuation of the performance appraisal meeting was necessary; (ii) Ms. Deroche is not normally involved in performance reviews; (iii) Ms. Norton would not schedule a meeting with Ms. Deroche before determining Ms. Deroche's availability and seeking her permission, and Ms. Deroche had a regular weekly conference call at the time of the meeting; and (iv) Mr. Wagner's' evidence, the purport of which appeared to the Board to indicate that, on the evening of May 12, 2004, Mr. Gribbon spoke to Mr. Wagner and told him he had a meeting the next morning with Ms. Norton. Further, even if the Board were to accept that Mr. Gribbon reasonably held this expectation, it does not provide him with a justification to refuse to meet with Ms. Norton and Mr. Watch.

[136] The Union appeared to suggest that, if only the Employer had permitted Mr. Gribbon to have his own witness, first for the performance evaluation meeting and then for the issuance of the discipline, he would have attended the meetings. Absent a collective agreement provision or a practice by an employer to allow an employee to have a witness in these circumstances, it is not open to the Board to find that it is a requirement of the *Act* that an employer must make a witness available to an employee when it requests a meeting with the employee, for disciplinary reasons or otherwise. In the Board's view, Mr. Gribbon was treated as any other employee would have been in these circumstances and the Board has no reason to believe that another employee, who did not support the Union, would have been treated any differently than Mr. Gribbon was treated, including being terminated.

[137] The Employer argued that Mr. Gribbon provoked the Employer into taking disciplinary action, including termination, to boost a failing organizing drive. While there is evidence to suggest that this is what occurred (including Mr. Gribbon's evidence that he was aware that he could bring this application and make an argument for extraordinary remedies such as automatic certification if he were terminated, his comments to other employees at the time he was terminated that he would be back and his persistent refusal to meet and challenging comments made to Ms. Norton), it is not necessary for the Board to make a finding in this regard in order to determine that the Employer had good and sufficient reason to terminate Mr. Gribbon.

[138] As in *Moose Jaw Exhibition, supra,* the Board is asked to consider the plausibility of the Employer's explanation for its decision to dismiss with other factors. The strength or weakness of a case must be examined "in light of the nature of the collective bargaining relationship and the possible impact a particular disciplinary action may have on the disciplined employee and other employees." In this case, while the collective bargaining relationship was clearly immature, the organizing activity was highly visible and had taken place over a significantly long period of time, with no employer interference or other problems. While the union membership cards may have been becoming stale-dated, there was no evidence to establish that the Employer knew that there was an increase in the number of cards being signed just prior to Mr. Gribbon's termination. The evidence established that, while there may have been somewhat of a resurgence in card signing at the outset of May 2004, there were even more cards signed in May 2004 following Mr. Gribbon's termination than prior to his termination. While the impact of the termination would likely have been significant for Mr. Gribbon, on the evidence available to the Board, there was no negative impact on other employees or on the organizing drive itself. In this context, the plausibility of the Employer's explanation for its decision to dismiss Mr. Gribbon is strong.

[139] While the Board finds that the Employer had good and sufficient reason to terminate Mr. Gribbon, it also concludes that there is no evidence upon which to infer that anti-union animus influenced the Employer's decision. The Board accepts the evidence of Ms. Norton that Mr. Gribbon's union activity played no part in her decision to terminate Mr. Gribbon and there is no compelling evidence to contradict this. There is no evidence that Ms. Norton, Mr. Snell, Mr. Watch or any other supervisor discussed the issue of unionization or Mr. Gribbon's role in the organizing drive when the decision to discipline was made. Aside from establishing ground rules, organizing in the workplace was permitted provided those involved were on breaks; there was also no evidence that the Employer did anything to hamper the highly visible and lengthy campaign. There have been no findings that the Employer has committed an unfair labour practice and while one unfair labour practice application was filed prior to this application; the Union withdrew the application prior to it being heard on its merits. Also, the conduct giving rise to the unfair labour practice application heard at the same time as this application postdates Mr. Gribbon's termination and the filing of the certification application. The

evidence established that throughout the campaign the Employer conducted itself in a reasonable fashion by obtaining legal advice concerning appropriate behaviour by an employer during a union organizing drive, holding a seminar for its managers on appropriate behaviour and maintaining a consistent approach of not responding to any of the information the Union provided to the employees. Overall, the evidence fails to establish any anti-union animus on the part of the Employer that would suggest that such an attitude motivated the termination of Mr. Gribbon.

[140] The Board therefore finds that the Employer had good and sufficient reason to terminate Mr. Gribbon, untainted by any anti-union attitude. Accordingly, the applications LRB File No. 115-04, 116-04 and 117-04 are dismissed.

LRB File No. 193-04

[141] The Union argued that Mr. Ahmad and possibly others were acting as the Employer's agents in releasing the subject email and distributing anti-union literature containing reference to the closure. In the *F.W. Woolworth Co. Limited* case, *supra*, an employee with anti-union beliefs was permitted to distribute literature in the workplace and the union alleged that the employee, acting as an agent of the employer, attempted to discourage employees from joining the union or alternatively, that the employee's efforts to discourage employees from supporting the union were in violation of the *Act*. The Board in that case determined that the employee was acting as an agent of the employer based not on direct evidence but on an inference drawn from proven facts which were suspicious. The most significant inference was that the Board found that the employee, during her testimony, concealed her involvement with management representatives.

[142] In C*algarian Retirement Group Ltd.*, *supra*, the Board considered allegations that two employees acted as the employer's agents in attempting to determine which employees had signed union cards and to convince those employees who supported the union to withdraw that support. The Board stated at 259:

> *The Board must be somewhat cautious in reaching a conclusion that employees who conduct campaigns against a trade union during its organizing drive are acting as agents of the Employer. There is no*

> *doubt that frequently the interest of these employees and the employer are the same – that is, they both desire that the workplace remain unorganized. However, the convergence of the interests of the employees who oppose the union and the employer is insufficient evidence from which to draw the conclusion that the employees are acting at the request of and under the authority of the employer. Employees in the workplace are entitled in the course of a union's organizing campaign to express their opposition to the union so long as their conduct does not constitute improper coercion or intimidation. In United Food and Commercial Workers, Local 1400 v. F.W. Woolworth Co. Limited [1992] 3rd Quarter Sask. Labour Rep. 110, LRB File No. 169-92, the Board outlined the evidence that is required to establish that an employee is acting as agent of the employer. The Board commented, at 119-120:*
>
> > *For the Board to find, in essence, that the employer is responsible for distributing the "Straight From Prince George" memorandum, it must be established that Ms. Clavell was acting as its agent. It is not enough to show, as the union has, that her activities fit into and furthered the employer's interest, although that is a factor. In Apollo Machine Products Limited [1982] Aug. Sask. Labour Report, p. 57, the Board ruled that there must be evidence that the agent acts at the request of or under the authority of the employer (see also: Triad Power Ltd. [1985] Oct. Sask. Labour Report, p. 34). In Apollo Machine Products Limited (supra), the board found that the absence of direct evidence of this relationship was fatal. In Triad Power Ltd. (supra), the board merely commented upon the necessity of evidence, thereby suggesting that it is not necessary that this relationship be established by direct evidence. Like any other element in an unfair labour practice, it may be a conclusion drawn from other proven facts.*
> >
> > *The burden of proof lies upon the union…*

[143] In the *Calgarian Retirement Group Ltd.* case, the Board concluded that the union had only established a tenuous link between the anti-union employees and management, those anti-union employees being viewed by other employees as being close to management because they socialized together. As such, the Board concluded that the anti-union employees were not agents of the employer.

[144] The evidence in this case fell far short of establishing a direct or indirect link between the anti-union employees and the Employer to allow us to draw an inference that these employees were acting at the request or under the authority of the

Employer. While their interests in not having the workplace become certified coincided with the Employer's, the evidence failed to establish that the Employer had anything to do with the anti-union websites or the literature. Mr. Ahmad, in improperly leaking the subject email, could not be said to be an agent of the Employer by reason that he was part of the management team to whom the email was sent. Similarly, none of the other employees who expressed anti-union views in literature and on websites relating specific details of the subject email concerning closure were acting as agents of the Employer and there was no evidence concerning a connection between them and the Employer. The Employer is entitled to rely on the steps it took to retain neutrality in the workplace, both by enforcing the policy against the employees and by cautioning its management group not to discuss these issues with the employees. There was also no evidence that the pro-union and anti-union employees were treated any differently with respect to the enforcement of the policy in the workplace.

[145] In the alternative to its argument that the anti-union employees were acting as agents of the Employer, the Union also advanced the argument that the Employer interfered or intimidated employees in the exercise of rights under the *Act* by failing to distance itself from the comments made by the anti-union employees in their literature and on their websites or failing to correct the information, in particular, the rumour concerning the closure of the centre, having become aware that the comments in Mr. Wilkie's email concerning closure appeared to have become common knowledge in the workplace.

[146] In the *Calgarian Retirement Group Ltd.* case, *supra*, the union had also advanced the alternate argument that the employer improperly permitted the anti-union employees to engage in conduct in the workplace not permitted by the pro-union employees or that the anti-union employees' conduct in the workplace was coercive or intimidating to the point that the employer should have disciplined them. The Board commented at 260:

> *In the WaterGroup Canada Ltd. case, supra, the Board dealt with similar allegations and found the Employer in violation of ss. 11(1)(a), (b) and (g) of the Act for permitting the conduct of an anti-union employee to continue over a lengthy course of time. The Board stated, at 197:*
>
> > *The Board has always shown a reluctance to interfere in the debate between employees on whether they*

> *should or should not be represented by a union. The Board's reluctance is grounded on the recognition that great care and restraint must be exercised by the Board or we could stifle the very debate we are attempting to encourage and protect. Nevertheless, the Employer has a duty to provide its employees with a workplace where they can exercise the rights given to them by law without facing coercion and intimidation if they attempt to do so. We are not suggesting that an employer will be responsible for failing to prevent all misconduct by its employees at the workplace. However, where an employer has knowledge, and repeatedly over a lengthy period of time fails to control its employees' misconduct, it can expect to be held responsible for this failure.*
>
> *We are not being asked to find that the Employer was giving direct instructions to Mr. Davidovitch and that Mr. Davidovitch was an Employer's agent. We are satisfied that Mr. Davidovitch and his supporters were independently motivated and capable of engineering this campaign on their own. However, the Employer, through its tacit if not open approval and cooperation, encouraged Mr. Davidovitch and provided the essential ingredient which made it all possible. Mr. Davidovitch was allowed to act as he did only because he was serving the Employer's interests.*

[147] In concluding that the employer did not condone or permit the anti-union employees to engage in conduct that was coercive or intimidating, the Board commented that the anti-union employees "may have been persistent in dealing with the two young employees, and the two employees may have resented the approaches. This discomfort, however, is not sufficient to render the conduct improper. In addition, access to the employees at the workplace was permitted to both sides there being no evidence of discriminatory treatment of Union supporters for engaging in recruiting efforts at work."

[148] The situation in *Brown Industries, supra*, is somewhat similar to that before us. During an organizing drive, two employees circulated a number of anti-union documents and it was alleged that the activities of these two employees would be perceived as emanating from the employer and that the employer had done nothing to prevent their activities, the employer having only told all staff that they could not use office equipment to further the cause of either side of the debate over union representation. The Board held at 91:

> *The Board is always alert to possible connections between vigorous anti-union activity on the part of employees and the covert support or encouragement of an employer. The fact that the stance of such a group and the views of the employer may coincide does not disentitle them to engage in such activity, nor does it necessarily inculpate the employer, though even slight encouragement from an employer may tip the balance in favour of an anti-union faction in a way which the Board would regard as unlawful.*
>
> *In this case we are satisfied that Mr. Brown did what he could to distance himself from these employees, and made it clear he did not want the facilities of the Employer to be used to assist the debate. He could not be expected to monitor the activities of Ms. Brooker and her colleagues all the time, or to ensure that no material about the representation issue was found within the work areas of the plant.*

[149] In *Brown*, the Board concluded at 91 and 92:

> *The testimony of the employees who gave evidence on behalf of the Union indicated that they drew no connection between the employees whose names appeared on the documents referred to earlier and management. In our view, there is no reason, even looking at the evidence objectively, why they would see the documents as emanating from management or carrying the implicit approval of the Employer.*

[150] In *Wal-Mart, supra,* at the outset of an organizing drive by the union, the employer permitted an anti-union employee to make a speech at a regular morning employees' meeting. Following the employee's speech, the employer did not provide an opportunity for any of the pro-union employees to reply. The Ontario Board found the employer guilty of an unfair labour practice and stated at paragraphs 40 and 41:

> *We have two concerns with Ms. Passador's speech on April 30, 1996. First of all, the company, at the end of Ms. Passador's speech did not distance itself from her comments. Neither Mr. Borean nor Mr. Johnston stated that her comments were not reflective of the company's views on unions and the effect that a union would have on the store. Secondly, even though we accept that there were legitimate reasons for ending the meeting at that point, namely that it was time for the store to open to its customers, by not allowing the union supporters to speak, the associates who were present were left only with the views of Ms. Passador. What is crucial in our view, is the effect that Ms. Passador's comments may have had on employees in the store. What message would the average or*

> *reasonable associate hear upon listening to Ms. Passador's speech. … Ms. Passador never said that the store would close if the union was successful in its attempt to organize employees. However, because of what she did say an associate listening to her would have likely concluded that she had concerns for her future job security in the event that the union was successful. We have no doubt that Ms. Passador believed strongly in what she was saying and this was apparent to those associates listening to her. Our concern is not with the fact that Ms. Passador spoke or with what she said. It is that employees listening to her speak might have concluded that her views concerning the effect of unionization was those of the company. The effect of her comments could easily have been to plant a seed of doubt regarding how Wal-Mart might respond to a union in the minds of those other associates listening to her.*
>
> *In the circumstances, it would not be unreasonable for some of the associates to conclude that the views of Ms. Passador were reflective of the views of the company and that the company agreed with her assessment of the situation. In allowing this message to be sent at a meeting which management directs and controls, without distancing itself from her remarks or allowing the union supporters the opportunity to balance her remarks, the company has sought to intimidate or unduly influence employees with regard to their decision on union representation contrary to section 70 of the Act. An employer cannot simply allow an employee to make a speech containing the subtle threats to job security such as those outlined in Ms. Passador's speech, at a meeting run by management, fail to distance itself from the comments and then silence the union's supporters in the manner in which it did. While the company did not make any threats, it allowed threats to be made in circumstances in which they could be attributed to the company.* [emphasis added]

[151] The fact situation in the *Walmart* case, *supra*, is clearly distinguishable from the case under consideration. While the subject email was delivered in a forum controlled by the Employer, the leak of that email by Mr. Ahmad was not controlled by or directed by Mr. Wilkie or the Employer. As such, there was no threat made to employees that could be attributed to the Employer. The Board concludes that Mr. Ahmad's removal of that email and his sharing it with Mr. Gribbon and the Union was improper, was without authorization and was in violation of the instructions of management, the Employer's policy and the code of ethics. Mr. Wilkie had no knowledge that Mr. Ahmad had leaked this email and therefore he could not control this "misconduct" or take disciplinary action against him. The evidence does not illustrate that there had been prior disclosure of this type of information by the management group. In this case, the evidence appears to illustrate that the leak of the subject email went further than from Mr. Ahmad to Mr. Gribbon and Mr. Wagner although there is insufficient evidence from

which to draw a conclusion who was responsible for the leak that led to the widespread rumour. In any event the Union and pro-union employees had the opportunity to respond. One of the responses by the Union was to publish the content of the subject email on its website. The evidence indicates that this is the only location where the actual text of the email appears for view by all employees.

[152] The *Walmart* case, *supra*, is also distinguishable in relation to the employees' anti-union comments in the literature and on the websites. The evidence led by the Union concerning various anti-union websites, their origination and authorship, was confusing and incomplete. At best, the website entries showed that there were a number of employees who had heard about the rumour that the Employer would close its business if the Union was certified. There was nothing in the evidence to suggest that management had any involvement in the creation of these websites or in providing information on those websites, or even that management had knowledge of all the content on those websites. The websites where comments were made about the closure by anti-union employees were also not within the Employer's control or direction. The websites were operated outside the workplace and it did not appear that any of those employees actually had a copy of the subject email (given errors they made in providing information about the plans for closure). It is questionable on the evidence how much knowledge Mr. Wilkie had about the rumour, how widespread it was and exactly when Mr. Wilkie gained such knowledge. In light of these facts, there was no evidence of a link between these activities and the Employer such that it would lead a reasonable person to conclude that the views of Mr. Tataryn and Mr. Bilec and others were reflective of the views of the Employer, or that the views emanated from the Employer. As such, there was nothing for the Employer to distance itself from. The Employer maintained its policy of neutrality by not commenting on the views expressed by employees and it made no attempt to correct inaccurate information provided by the Union or any employees. Neither this case nor others cited by the Union stand for the proposition that an employer is *required* to respond to inaccurate information, whether by the Union, pro-union employees or by anti-union employees. In fact, to suggest that the Employer is even *permitted* to respond to inaccurate information provided by anti-union employees invites the Employer to enter the debate about unionization, which is contrary to the intent of the *Act*. As such, it is also difficult to accept the proposition that management had the responsibility to do something about these websites or the

employees involved, including “correcting” the information that they contained. While an employer is permitted to respond to inaccurate information disseminated by a union, s. 11(1)(a) does not impose a positive obligation on employers to police the debate between its employees on the issue of unionization and attempt to correct any possible misinformation stated by one or the other (the Board notes there were a number of inaccuracies in the anti-union information). As stated in *Brown, supra*, the Employer could not be expected to monitor all the activities of anti-union employees and ensure there was no material concerning representation found in the work area although, in this particular case, the Employer did what it could to prevent the distribution of literature in the workplace but it could not be expected to police that debate outside the workplace.

[153] In addition, a fact that also distinguishes the *Wal-Mart* case from the situation before us, is that the Employer did not attempt to restrict the opportunities of the Union or pro-union employees from responding to the comments on the websites. In fact the Union not only had the opportunity to do so but took advantage of the opportunity by debating the issue on one of the websites, the result of which was to force the writer of the comments to acknowledge never having seen the subject email or meeting notice. In addition, a review of the documentary evidence entered at the hearing suggests that other pro-union supporters also entered the debate and challenged the rumour of a closure.

[154] It is the Board’s view that, in sending the subject email, Mr. Wilkie did not intend to coerce or interfere with the employees’ rights and could not have foreseen that the email would have that effect.

[155] The subject email was intended for the eyes of management only and was delivered following the filing of the certification application when it could not influence whether employees would sign cards. Although it could affect the employees should a vote be ordered on the certification application, its immediate coercive intent was not evident. The Union had been dealing with the closure rumour from the outset of the organizing drive, as evidenced in the Union’s repeated distribution of literature addressing this issue and the lack of a comment made by management in response to questions of the Leader-Post for an article in November and December 2004.

[156] While a number of the comments made by Mr. Wilkie in the email may not have been prudent in terms of their content and how that might impact his stated objective of having management remain neutral with employees concerning the issue of unionization, there is no evidence that he intended his comments about a possible closure to be shared with those outside the management group and, in fact, he stated in his email that this information was not to be given to the agents. In fact many emails had been sent by him to the management group and meetings had been held where the policy of neutrality was discussed and that the group was told that the discussions should not be disclosed to the employees. There is no evidence that prior discussions had been disclosed outside the management group and the only other unfair labour practice application filed by the Union (involving allegations of improper communications by the Employer) was withdrawn following the dismissal of the interim application that accompanied it. The Board has some difficulty with the fact that the email was distributed to a group which Mr. Wilkie believed to be management at the time, luck having it that the composition of that group coincided with what was agreed to with the Union at the certification hearing held subsequent to the delivery of the subject email. Having the fortune of being correct as to where the line was to be drawn between the proposed bargaining unit and management, Mr. Wilkie in fact did not distribute the email to the employees at issue in the application for certification. The Union suggests that Mr. Wilkie made the statement knowing that a closure would mean a loss of jobs to management as well and therefore intended to scare other managers such that they would disclose this information to the agents in an attempt to protect their own jobs. While one might infer that Mr. Wilkie was attempting to “scare” management, the Board does not attribute this degree of foresight and planning to Mr. Wilkie. His statement concerning closure appears more emotional than rational, a frustrated rant based on little other than a personal anti-union sentiment, the stress attendant with a long organizing drive and the legal proceedings had and taken before the Board.

[157] Mr. Wilkie may have had legitimate concerns about the continued financial viability of the business should it become certified, however, the Board does not accept, as proposed by the Employer, that Mr. Wilkie’s reference to closure in the subject email was based on valid business considerations, untainted by anti-union sentiment, such that he was justified in making his beliefs known that the centre would close if certified. In light of the fact that the Board has concluded that Mr. Wilkie’s action

in distributing this email to management employees and the Employer's inaction in not commenting on the closure rumour do not constitute an unfair labour practice, it is not necessary for the Board to make a determination on this issue.

[158] On the basis of the above reasoning, the application in LRB File No. 193-04 is dismissed.

Summary

[159] The Board has determined that the applications in LRB File Nos. 115-04, 116-04, 117-044 and 193-04 are dismissed. As such, it is not necessary for the Board to comment on the availability or appropriateness of the remedies sought.

DATED at Regina, Saskatchewan this **21st** day of **October, 2005.**

LABOUR RELATIONS BOARD

Angela Zborosky, Vice-Chairperson