Labour Relations Board
Saskatchewan

GEORGE FLEMMING, Applicant v. UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400 and THE CORPS OF COMMISSIONAIRES, NORTH SASKATCHEWAN DIVISION, Respondents

LRB File No. 196-03; August 23, 2005
Chairperson, James Seibel; Members: Clare Gitzel and Duane Siemens

The Applicant:	George Flemming
For the Certified Union:	Rod Gillies
For the Employer:	Larry Seiferling, Q.C.

Decertification – Interference – Where management personnel planted idea to apply for rescission, reminded applicant of open period and accommodated or facilitated mechanics of application by allowing use of office, out-of-scope clerical assistance and work time in preparing necessary material and garnering support, Board cannot find that application would have been made but for influence of management – Board dismisses application.

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

REASONS FOR DECISION

Background:

[1] By Order of the Board dated April 24, 1991, United Food and Commercial Workers, Local 1400 (the "Union") was designated as the certified bargaining agent for an all-employee unit of employees of Inner-Tec Security Consultants Limited ("Inner-Tec") in the Province of Saskatchewan. Inner-Tec provides security services to numerous contractors at many locations. During the year 2000, one such contractor was the City of Saskatoon (the "City"), which contracted with Inner-Tec to provide security services at certain of its places of business. By Order of the Board dated March 26, 2002, pursuant to s. 37.1 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), The Corps of Commissionaires, North Saskatchewan Division (the "Employer") was deemed to be the successor employer to Inner-Tec at such locations from and after August 21, 2000, and was determined to be bound by the collective agreement between the Union and Inner-Tec with respect to its employees at such locations. The Reasons

for Decision relating to that Order are reported at [2002] Sask. L.R.B.R. 188, LRB File No. 276-00.

[2] In the present application, George Flemming, a member of the bargaining unit seeks to rescind the Order designating the Union as the bargaining agent for the employees at the City's places of business described in the Order.

[3] In its reply to the application, the Union asserts that the application ought not to be granted, *inter alia*, because it purports to be an application for rescission of a successorship order, and such an application is not allowed by the *Act*; and, that it was made as a result of influence by the Employer.

[4] The application was made during the "open period" specified by s. 5(k)(i) of the *Act*, and purports to have the support of a majority of the employees described in the Order, which number eight according to the statement of employment filed by the Employer.

Evidence:

[5] Mr. Flemming testified on his own behalf. He testified that the Employer had held the security services contract with the City for many years. Inner-Tec secured the contract as a result of a tendering process, but held it for only a short time – a period of months – after which the Employer again secured the contract, which it has held since. None of the affected employees was previously employed by Inner-Tec. Mr. Flemming described as his reasons for making the application for rescission that he had no need of union representation and that he could ably represent himself in negotiation with the Employer. He admitted that the Union has not been deducting dues from his pay.

[6] Mr. Flemming had made a prior application for rescission outside the open period and had learned from his mistake when to make the present application. He admitted that either or both of his superiors, Mr. Bolt (phon.) or Mr. Turk, might have reminded him that the open period was looming if he wanted to make the present application and that he kept them apprised of its progress. He also admitted that one of the Employer's non-union clerical employees typed certain of the materials he required

to make the application and that he used the Employer's photocopier to prepare the materials as well. He admitted that he was sure that Mr. Bolt and Mr. Turk knew what was going on, including the fact that he was meeting with other affected employees during work hours to discuss the application and garner their support.

[7] In cross-examination by counsel for the Employer, in response to a question as to whether Mr. Turk or Mr. Bolt had affected his decision whether to make the application, Mr. Flemming admitted that they had. At one point Mr. Turk had called him into his office, referred to the prior decision of the Board resulting in Mr. Flemming being included in the bargaining unit, advised him that he would have to pay union dues, and said to the effect of "do what you want with it." Mr. Flemming said that the comment immediately made him think of taking action to de-certify the Union.

Arguments:

[8] Mr. Flemming stated that he simply did not want to be represented by the Union and that, while the Employer may be the legal successor to Inner-Tec at the subject work sites, it was "fundamentally unfair."

[9] Mr. Gillies, counsel on behalf of the Union, argued that the application ought to be dismissed pursuant to s. 9 of the *Act*, as having been made as a result of employer influence. In support of his argument counsel referred to the following decisions of the Board: *Rowe, et al. v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Canadian Linen and Uniform Service Co*., [2001] Sask. L.R.B.R. 760, LRB File No. 104-01; *Reddekopp v. United Food and Commercial Workers, Local 1400 and Newswest Corp. (Saskatoon Division)*, [2001] Sask. L.R.B.R. 174, LRB File No. 278-00; *Berner v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Loraas Disposal Services Ltd*., [2000] Sask. L.R.B.R. 776, LRB File No. 034-00.

[10] Mr. Seiferling, counsel on behalf of the Employer, argued that there was no evidence of influence by the Employer with respect to the making of the application, and that an employer is not under an obligation to try to discourage an applicant from proceeding if it knows that an application is being made. Counsel asserted that all that

the Employer did in this case was to advise Mr. Flemming that the Union now represented him.

Relevant Statutory Provisions:

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

> *5 The board may make orders:*
>
> *(k) rescinding or amending an order or decision of the board made under clause (a), (b) or (c) where:*
>
> *(i) there is a collective bargaining agreement in existence and an application is made to the board to rescind or amend the order or decision during a period of not less than 30 days or more than 60 days before the anniversary of the effective date of the agreement; or*
>
> *...*
>
> *notwithstanding that a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court.*
>
> *...*
>
> *9 The board may reject or dismiss any application made to it by an employee or employees where it is satisfied that the application is made in whole or in part on the advice of, or as a result of influence of or interference or intimidation by, the employer or employer's agent.*

Analysis and Decision:

[12] In our opinion the application must be dismissed on the basis of employer influence.

[13] Evidence of employer influence is rarely overt and while no individual circumstance or event may be determinative of the issue, a number of circumstances and events considered together may lead to the ineluctable inference that an employer has engaged in conduct which may cause the Board to dismiss an application pursuant

to s. 9 of the *Act*. In *Nadon v. United Steelworkers of America and X-Potential Products Inc. o/a Impact Products*, [2003] Sask. L.R.B.R. 383, LRB File No. 076-03, the Board stated at 386-87:

> *The issue to be determined is whether the Board ought to order a vote of the employees on the rescission application. In determining whether to grant a rescission vote, the Board must balance the democratic rights of employees to select a trade union of their own choosing (or whether to be represented by a union at all) against the need to ensure that the employer has not used its authoritative position to improperly influence the decision: Shuba v. Gunnar Industries Ltd., et al., [1997] Sask. L.R.B.R. 829, LRB File No. 127-97.*
>
> *It is necessary to be vigilant regarding the exercise of influence by an employer in such cases, because the cases are legion that such influence is seldom overt but often may be inferred from unusual circumstances and inconsistent events, meetings and conversations not adequately explained by innocent coincidence.*

[14] In *Leavitt v. Confederation Flag Inn (1989) Limited and United Food and Commercial Workers, Local 1400*, [1990] Summer Sask. Labour Rep. 61, LRB File No. 225-89, the Board observed as follows:

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

[15] To his credit, Mr. Flemming appeared to be forthright and honest in his testimony. He said that either or both of his superiors, Mr. Turk and Mr. Bolt, had engaged him in conversations before he made the application for rescission that immediately caused him to think of applying to decertify the Union, and later, which served to remind him that the application could only be made during a specific open period mandated by the *Act*.

[16] In all of the circumstances of the present case, the Applicant did not act spontaneously and on his own initiative to apply for rescission of the certification Order. The idea was planted by either or both of Mr. Bolt and Mr. Turk, who later served to remind Mr. Flemming of the open period consideration. Management then, at least tacitly, accommodated or facilitated the mechanics of the application by allowing Mr. Flemming the use of office and out-of-scope clerical assistance in preparing the necessary materials, as well as the garnering of support during work time. In all of the circumstances, we cannot find that the application would otherwise have been made but for the influence of management.

[17] The application is dismissed.

[18] Clare Gitzel, Board Member, dissents from these Reasons for Decision.

DATED at Regina, Saskatchewan, this **23rd** day of **August, 2005.**

LABOUR RELATIONS BOARD

James Seibel
Chairperson