The Labour Relations Board
Saskatchewan

MICHELLE BRESSERS, Applicant v. UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400 and SOBEYS CAPITAL INC. operating as VARSITY COMMON GARDEN MARKET, Respondents

LRB File No. 227-04, October 25, 2005
Vice-Chairperson, Wally Matkowski; Members: Duane Siemens and Joan White

For the Applicant:	Larry Seiferling, Q.C.
For the Certified Union:	Drew Plaxton
For the Employer:	Kevin Wilson

Vote – Objection to vote – On application for rescission, so long as employer takes consistent approach in relation to union's and applicant's campaigns prior to secret ballot vote, Board will not normally interfere with voting process – Where employer took consistent approach and applicant's campaign did not critically interfere with employees' ability to freely express wishes, Board concludes that union did not establish that conduct of vote improper.

***The Trade Union Act*, ss. 5(k) and 6.**
***Regulations and Forms of the Labour Relations Board*, s. 29.**

REASONS FOR DECISION

Background:

[1] United Food and Commercial Workers, Local 1400, (the "Union") is certified as the bargaining agent for a unit of employees of Sobeys Capital Inc. operating as Varsity Common Garden Market (the "Employer") by an Order of the Board dated November 7, 2003. Michelle Bressers filed an application for rescission of the certification Order (LRB File No. 227-04), pursuant to s. 5(k)(i) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), on September 13, 2004. Following hearings on January 31, 2005, February 1, 2 and 3, 2005 and March 29, 2005 of the rescission application and other related matters between the parties, the Board, in *United Food and Commercial Workers, Local 1400 v. Sobeys Capital Inc. operating as Varsity Common Garden Market; Bressers v. United Food and Commercial Workers, Local 1400 and Sobeys Capital Inc. operating as Varsity Common Garden Market*, [2005] Sask. L.R.B.R. 68, LRB File Nos. 181-04, 227-04, 255-04, 256-04 & 257-04 directed that a vote be conducted among the members of the bargaining unit in the usual manner.

[2] The Union's application for reconsideration of the April 6, 2005 decision was dismissed in *United Food and Commercial Workers, Local 1400 v. Sobeys Capital Inc. operating as Varsity Common Garden Market; Bressers v. United Food and Commercial Workers, Local 1400 and Sobeys Capital Inc. operating as Varsity Common Garden Market*, [2005] Sask. L.R.B.R. ---, LRB File Nos. 181-04 & 227-04 (September 14, 2005 – not yet reported).

[3] On April 20, 2005, the Board's Executive Officer designated April 25, 2005 as the date for the vote to be held, under the direction and control of the Board's Investigating Officer.

[4] The results of the April 25, 2005 vote have remained sealed pending the Board's decisions on the reconsideration application and on the Union's objections to the conduct of the vote.

[5] On April 28, 2005, the Union filed objections to the conduct of the vote pursuant to s. 29 of the *Regulations and Forms of the Labour Relations Board*, S.R. 163/72 (the "Regulations"). Initially, the Union objected to the composition of the voters' list, but these objections were ultimately resolved by the parties. The Union also complained that Ms. Bressers placed a number of posters at the workplace that could only be described as "anti-union." The Union contended that the posters should have been removed and that the Union should have been allowed the opportunity to post its own posters in the lunchroom area at the workplace.

[6] The Union also contended in its objections that the Employer allowed "anti-union" supporters free reign to campaign at the workplace during working hours. However, the Union led no evidence in relation to this allegation and did not argue this point at the hearing.

[7] The hearing of the objections to the conduct of the vote took place in Saskatoon on September 29 and 30, 2005. At the hearing, counsel for the Union argued that Ms. Bressers and the Employer were each required to file a reply to the objections to the conduct of the vote. Counsel for Ms. Bressers and the Employer argued that there was no requirement for them to file replies as it was the Union that was objecting to the conduct of the vote and it was incumbent upon the Union to present evidence showing how and why the vote was not properly conducted. Counsel for Ms. Bressers also contended that, because the Union had not filed an unfair labour

practice application, the Board had no jurisdiction to deal with the Union's objections to the conduct of the vote.

[8] The Board provided the parties with a verbal ruling relating to both preliminary issues. The Board stated that it would follow the logic set out in the decisions *Panasiuk v. Service Employees' International Union, Local 299 and Beautiful Plains Villa Ltd.*, [1989] Summer Sask. Labour Rep. 42, LRB File No. 221-88 and *Reese v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Holiday Inn Ltd.*, [1989] Summer Sask. Labour Rep. 33, LRB File Nos. 207-88 & 003-89. In *Panasiuk, supra*, the Board stated at 44:

> *In the Board's view, an application remains pending until it is either granted or dismissed. Until then, no decision has been made. If the Board chooses to direct that a representation vote be held following an application for certification or decertification to determine whether a trade union represents a majority of the employees in the appropriate unit, the application remains pending before the Board during the time required to hold the vote, determine the results, consider any objections to the vote and make a final Order.*

[9] The Board verbally ruled that, because the rescission application remains pending before the Board, neither Ms. Bressers nor the Employer was required to file a reply to the objections to the conduct of the vote. The Board ruled that the Union was entitled to proceed with its objections to the conduct of the vote and present evidence that would support an allegation that the improper conduct was such that it restricted the freedom of choice of sufficient voters and thus might alter the outcome of the vote.

Facts:

[10] Brandi Tracksell, Justin Ziola, Renee Randall and Jennifer Loring presented evidence on behalf of the Union while Ms. Bressers testified on her own behalf. Their evidence was for the most part consistent and set out the following sequence of events.

[11] The Union began organizing its campaign once it received the Board's decision dated April 6, 2005 authorizing the vote. The Union's goal was to talk to all of its members about the benefits of maintaining a union at the workplace and to ensure that employees had the opportunity to make an informed decision. Ms. Tracksell, a special projects union representative

("SPUR") and two other union representatives spearheaded the campaign and enlisted the help of approximately 8-20 store employees.

[12] The Union mailed informational leaflets to its members and provided its supporters with union pins, buttons and pens. These union materials ultimately found their way into the Employer's workplace and were present at various times in the lunchroom. The Union also ensured that a document listing the union's last contract demands was placed in the lunchroom.

[13] The three union representatives attempted to have "a presence" at the workplace by either shopping at the store and directly talking to employees or by entering the store and handing out business cards with pro-union slogans on the back. Examples of these slogans were "sick pay for all employees including part-time," "all benefits paid for by the company " and "higher wages." The Union's representatives believed that, by handing out these business cards, they would not be interrupting employees at the workplace who could call the representatives after work hours and ask them any potential questions. The Employer was aware of the union representatives' presence at the workplace and did not thwart or impair any of the steps taken by the Union during its campaign. Employees were able to discuss the advantages and disadvantages of the Union during their breaks at the workplace.

[14] On approximately April 21, 2005, Ms. Bressers observed some of the Union's campaign materials in the lunchroom. She contacted her solicitor and was advised that "if the Union is campaigning, you can campaign." On the evening of April 21, 2005, Ms. Bressers posted approximately four or five handwritten orange posters in the lunchroom and surrounding area. The posters were approximately two feet by three feet. It was common knowledge at the workplace that Ms. Bressers prepared the posters and most employees would have seen the posters during their work breaks. Management personnel also took their breaks in the lunchroom. Ms. Bressers prepared no other materials for her campaign other than the posters and she placed them in the lunchroom area because that was where the Union's materials were and because that was where employees congregate and could read her posters.

[15] The only evidence as to what was normally posted in the lunchroom came from Ms. Bressers. She testified that the walls in the lunchroom were used to announce such things as births, barbecues, Christmas parties, concerts and staff appreciation day. When questioned

by the assistant store manager as to whether or not she could post her posters, Ms. Bressers advised him that she had contacted her solicitor and that she was going to post the posters. She testified that she was not disciplined in any way for posting the posters.

[16] The posters took on a life of their own as individuals wrote pro-union corrections on the posters and anti-union comments were added. One of the posters was torn down. Employees read what was on the posters and the "revised" posters. Ms. Tracksell testified that union supporters were "correcting falsehoods" on the posters.

[17] The Union instructed supporters to take photos of the original posters and Greg Eyre, a representative of the Union, faxed a letter to Suzanne Orieux-Koroluk, the Employer's manager of human resources and learning, at 3:35 pm on Friday, April 22, 2005, which stated in part:

> *In order to ensure a fair election process, the Union demands that the anti-union posters be taken down and the union be allowed to put up an equal number of posters the same size for the same period of time advocating the union's position in this vote.*

[18] The Union's counsel also provided correspondence at the same time to the Board and to counsel for the Employer and Ms. Bressers which stated in part:

> *Please be advised that it has come to the union's attention that the employer (Sobeys IGA-Varsity Common) has commenced a course of conduct involving the following: a. the posting of "anti-union" posters in conspicuous places frequented by all employees of Varsity Common IGA…. Also be advised that the union is corresponding to the employer demanding the ceasing of the conduct and requesting equal time and space for union support material and discussions.*

[19] Counsel for the Employer responded to counsel for the Union by fax sent at 8:32 am on April 25, 2005 which stated in part:

> *The Employer has had no involvement whatsoever in the posting of any posters in the Varsity Common Store….The Employer has not interfered in any way in the Board-ordered vote and does not intend to do so.*

[20] Ms. Orieux-Koroluk sent correspondence directly to Mr. Eyre on April 25, 2005, which stated in part:

> *I have now had an opportunity to investigate the allegations made in your letter. It does appear that the applicant has placed posters in the coffee room of the Varsity Common Store. They were not posted by management….The employer has remained neutral and has not participated in the debate and will continue to take that position.*

[21] Ms. Bressers removed her remaining posters on April 24, 2005 and the Union had no complaint about how the vote was conducted on April 25, 2005.

[22] One of Ms. Bressers posters stated "when talking to employees they fail to mention the union dues everyone—full time and part time-will have to pay monthly. They say it will be 5-7% of your wages." Ms. Bressers testified that she was given this information by the Union when she attended a union meeting following the issuance of the certification Order.

[23] Ms. Tracksell was not present at the union meeting following the certification Order, but testified that union dues for a new unit are pro-rated between $5-$9 per week, and that they can change after that. Ms. Tracksell stated that union dues are normally 2% and that Ms. Bressers' numbers were incorrect. During cross-examination, Ms. Tracksell stated that it was possible that union dues at the Employer's store in Yorkton, Saskatchewan amounted to 4%. (The Board had previously been advised by counsel for the Union that the Union was not collecting any union dues until a first collective agreement had been achieved). Ms. Tracksell also testified that the Union's website did not mention some of the Board's recent decisions relating to this workplace.

Relevant Statutory Provisions:

[24] Relevant provisions of the Regulations include the following:

> *s. 29(1) Any trade union or any person directly affected having any objection to the conduct of the vote or to the counting of the vote or to the report shall, within three days after the last date on which such voting took place, file with the secretary a written statement of objection in Form 15 and verified by statutory declaration together with two copies thereof, and no other objections may be argued before the board except by leave of the board.*
>
> *(2) The secretary shall cause all statements of objections and all copies thereof, when filed, to be stamped with the date on which they were received in the office of the board.*

Arguments:

[25] Counsel for the Union argued that Ms. Bressers' posters were inaccurate with respect to union dues and that, because the Union was not given an opportunity to respond to the posters, the employees' "freedom of choice was likely impaired." Counsel argued that the posters were anti-union and were tacitly endorsed by the Employer. Counsel suggested that the Board could set aside the vote and delay ordering a new vote or order a new vote. If a new vote was ordered, counsel suggested, among other things, that the Union should be given an equal opportunity to post posters in the workplace.

[26] Counsel for the Employer argued that there was no evidence that the Employer had interfered in the voting process. Counsel argued that it was not necessary for the Employer to vet the contents of the posters, the Union's newsletter, the Union's business cards or the Union's web site. Counsel argued that the Employer remained neutral in the campaign and did not tell the Union what it could or could not do in relation to anything, including posting posters.

[27] Counsel for Ms. Bressers argued that there was no evidence of any unfairness in the conduct of the vote. Counsel stated that the evidence demonstrated there was a normal campaign conducted at the workplace and that it was obvious where any power imbalance existed. Counsel argued that there was no evidence of improper, coercive or intimidating conduct on the part of his client or the Employer that would justify the Board's interference in the voting process.

Analysis:

[28] Counsel all referenced the *Panasiuk* and *Reese* decisions, *supra*, when arguing as to whether there was anything improper done by either Ms. Bressers or the Employer during the campaign prior to the vote. In *Panasiuk, supra*, the Board found the employer guilty of an unfair labour practice by in effect offering employees an incentive to vote against the union. The Board found that the employer's pre-vote misconduct was likely to critically interfere with the employees' judgment then crafted a remedy so that a second representation vote could be held. In *Reese, supra*, the particulars filed on behalf of the union again indicated a wage hike to employees if the union was unsuccessful.

[29] In *Reese, supra*, the Board stated at 35:

> *It is generally accepted that the results of representation votes will be ignored where either party employs campaign methods and tactics that interfere critically with the ability of employees to express their free wishes. At the same time, labour relations boards do not monitor and evaluate the content of pre-representation vote campaigns designed to persuade eligible voters to exercise their franchise one way or another. Instead, the proponents of varying views are permitted to put forward their most persuasive arguments and the electorate is presumed competent to evaluate and decide.*

[30] As a basic principle, so long as an employer takes a consistent approach in relation to the union's and the applicant's campaign prior to a secret ballot vote, the Board will not normally interfere with the voting process. In this case, there was no evidence that the Employer interfered in the voting process or that the Employer attempted to influence or coerce any employee to not support the Union. Likewise, there was no evidence the Employer was guilty of pre-vote misconduct or that the Employer took an inconsistent approach in relation to the Union's or Ms. Bressers' campaign. The evidence demonstrated that the Employer did not interfere in the Union's campaign or Ms. Bressers' campaign.

[31] If the Union and/or its supporters had posted posters that were removed by the Employer, or the Union and/or its supporters had directly asked the store manager or assistant store manager to post posters and were denied the opportunity, or if supporters of the Union had been threatened or reprimanded by the Employer for defacing or removing Ms. Bressers' posters, or if there was some evidence that Ms. Orieux-Koroluk was aware of the posters and delayed responding to the Union's request until April 25, 2005, the Board would have had some evidence to support the proposition that the Employer was attempting to improperly influence the vote or was not taking a consistent approach. The Board would then have considered if this behavior likely impaired or interfered with the employees' freedom of choice.

[32] The Union did not argue that it was unable to get its message out to its members. Counsel for the Union did, however, in discussions with the Board during his argument, state words to the effect that the "handwritten posters that Ms. Bressers posted at the workplace were massively different than the Union's campaign." Counsel stated that the posters were similar to a big neon sign posted at the top of the building stating "vote no" and that the Employer was attempting to improperly influence the vote by allowing the posters. The Board disagrees that

Ms. Bressers' posters, which were written on (one was ultimately removed), were similar to a big neon sign and thus evidence of interference by the Employer in the campaign process.

[33] The Union also argued that Ms. Bressers' message that members would have to pay 5-7% of their wages as union dues was inaccurate and had a dramatic effect on the employees at the workplace.

[34] Even assuming that Ms. Bressers' comment relating to union dues was incorrect, at least in relation to employees working significant hours per week, the degree of the alleged inaccuracy was never clearly presented to the Board. That being said, was the employees' freedom of choice likely impaired as a result of Ms. Bressers' written comments?

[35] The Board does not believe so. The fact that employees would have to pay some level of union dues should have come as no surprise to most if not all employees. The union dues issue was raised and discussed by Ms. Bressers at a post certification union meeting and the posters themselves fostered a form of discussion as union supporters "corrected falsehoods" on the posters. Considering the fact that this was the third campaign at the workplace over the last two years dealing with the representation issue, the Board presumes that the electorate is competent to evaluate the information it receives relating to union dues. Ms. Bressers' comments did not critically interfere with the ability of employees to express their free wishes.

[36] In conclusion, the Union has failed to establish that the conduct of the vote was improper and, as such, the vote results can be conveyed to the parties.

DATED at Regina, Saskatchewan, this **25th** day of **October**, **2005.**

LABOUR RELATIONS BOARD

Wally Matkowski,
Vice-Chairperson