Labour Relations Board
Saskatchewan

MARTYN ARNOLD, Applicant v. UNITED STEELWORKERS OF AMERICA, Local 5917 and WESTEEL LTD., Respondents

LRB File No. 275-04; February 23, 2005
Vice-Chairperson, Angela Zborosky; Members: John McCormick and Ken Ahl

The Applicant:	Martyn Arnold
For the Certified Union:	Neil McLeod, Q.C.
For the Employer:	Larry LeBlanc, Q.C.

Decertification – Interference – Applicant carried out card signing activity in workplace on company time and premises where management could easily observe activity and in violation of employer policy against employees leaving work stations during work hours – Applicant in-scope supervisor charged with duty of keeping employees at work stations - Under circumstances, reasonable for employees to conclude that rescission application had at least tacit approval of employer – Board dismisses application under s. 9 of *The Trade Union Act*.

Decertification – Interference – Because Board had concerns about sufficiency of applicant's reasons for bringing application, son/father relationship between manager and employee assisting applicant becomes significant factor – Employee assisting applicant did not testify at hearing – Board concludes that manager knew of decertification campaign and influenced bringing of application – Board dismisses application under s. 9 of *The Trade Union Act*.

Decertification – Interference – Apprehension of betrayal – Board concludes that apprehension of betrayal high in circumstances of case in light of son/father relationship between manager and employee assisting applicant, fact that employees signed in favour of rescission application without adequate explanation from applicant or employee assisting applicant of consequences of application and need of employees to inform manager of their support for application – Board dismisses application under s. 9 of *The Trade Union Act*.

Decertification – Interference – Board finds as fact that manager in room where in-scope supervisor brought employee to sign support card for rescission application – Presence of manager placed pressure on employee to support rescission application and constituted direct influence and interference – Board dismisses application under s. 9 of *The Trade Union Act*.

Evidence – Credibility – Where conflicting evidence from two witnesses on important point, Board must assess credibility – Board reviews factors to consider in assessing credibility of witnesses.

***The Trade Union Act*, ss. 3, 5(k), 6 and 9.**

REASONS FOR DECISION

Background:

[1] Martyn Arnold (the "Applicant") applied for rescission of the Order of the Board dated December 5, 2001, designating United Steelworkers of America, Local 5917 (the "Union") as the certified bargaining agent for a unit of employees of Westeel Ltd. (the "Employer"). The effective date of the collective agreement in force between the Union and the Employer is January 1, 2002. The application was filed on November 15, 2004, during the open period mandated by s. 5(k)(i) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), along with ostensible evidence of support from a majority of employees in the bargaining unit.

[2] In its reply to the application, the Union alleged that the application was made in whole or in part on the advice of, or as a result of influence of or interference or intimidation by, the Employer or Employer's agent, and in particular that support for the application was obtained at the workplace, during work hours and with the involvement of management. The Union requested that the application be dismissed pursuant to s. 9 of the *Act*, which provides as follows:

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

[3] On November 26, 2004, the Employer wrote to the Union requesting particulars of the Union's allegations that there was employer influence/interference with the application and that support was obtained at the workplace during work hours with the involvement of management. On November 30, 2004, the Union replied by providing further information concerning the circumstances of the soliciting of support by the Applicant and the involvement of a member of management, while reserving the right to cross-examine the Applicant in relation to his reasons for bringing the application, the

method of obtaining support and other circumstances under which the application was made. While this evidence will be further discussed below, the Board finds the Union's reply and its reply to the request for particulars sufficient to raise the issues under consideration in this case.

[4] This application was heard on December 3, 2004.

Evidence:

[5] The Applicant testified that he has been employed with the Employer as a fitter/welder and crew leader and he is listed on the statement of employment as a qualified welding supervisor/maintenance #1. While he works on the tools and with the equipment at the plant, his responsibilities are to ensure that the employees have the necessary tools and supplies and that the shift operates smoothly. The Employer, which operates in Regina, manufactures both in ground and above ground steel tanks for the storage of fuel, primarily for the oil industry. The business operates out of one building with a yard that is approximately one block long.

[6] The Applicant testified concerning the reasons why he brought the application for rescission. He stated that he felt that the Union no longer represented a majority of the employees. The Prairie Metal Employees' Association had represented the employees of the Employer for approximately 40 years prior to the employees voting to become members of the Union in December 2001 and, while the Applicant had never supported the Union, it was his opinion that the Union had not met the expectations of the employees. The fact that it was an international union had not increased the power of the unit of employees, as the Applicant expected. The Applicant also stated that the wage increase obtained by the Union in the last round of negotiations was insufficient to cover the union dues paid by employees. The Applicant felt that it was "his duty as the president of the association" (presumably the former Prairie Metal Employees' Association) to help his members by bringing this application for rescission. The Applicant wanted to have more control over the dues paid by employees, as they had when they were part of the employees' association. In cross-examination, the Applicant acknowledged that he had never attended any meeting of the Union.

[7] In cross-examination, the Applicant testified that he reports to Al Martin, an in-scope supervisor, and that, in Al Martin's occasional absence or when the Employer operates a night shift, the Applicant acts as the temporary supervisor. When the Applicant acts as the supervisor, he directs employees' work and monitors their activities and, while he may speak to employees if they are doing something wrong, he does not have the power to hire or fire. The Applicant further testified that it is a workplace rule that employees must stay in their work area unless permission is first sought from him, as the supervisor (or Al Martin as the supervisor), to leave the work area, even for reasons such as making a telephone call or going to the office. As a supervisor, if the Applicant finds employees away from their work area he advises them to return to work, failing which he would report their insubordination to Darren Martin, who is the out-of-scope production supervisor. Al Martin also follows this procedure as a supervisor. While employees may ask the Applicant for time off or to leave work early, if an employee calls in sick, he reports this to Darren Martin, who is also Al Martin's supervisor and his son. The Applicant stated that Darren Martin enters the plant on a regular basis to survey the floor and that, when the Applicant acts as the supervisor, he receives instruction from Darren Martin regarding the work required to be done by the employees.

[8] The evidence indicated that employees leaving their workstations has been a significant problem for the Employer for several years. This was illustrated by the significance of the Applicant advocating that the employees be allowed to bring water bottles in the extreme heat of the summer in order to cut down on the number of trips to the water fountain. Apparently this was authorized by Murray Hugel, the operations and sales manager (and the most senior manager of the Employer) on the understanding that this should not result in an increased number of trips to use the washroom. The Applicant acknowledged that Darren Martin has spoken to him about taking too long to use the washroom. The collective agreement provides for rest periods which include two 10-minute breaks on an eight-hour shift and three 10-minute breaks on a ten-hour shift, in addition to a scheduled lunch break one half hour in duration.

[9] In cross-examination, the Applicant was questioned concerning a prior application for rescission that he filed in late October or early November, 2004 (in the same open period as the current application). It was his understanding that the Board

rejected the evidence of support because the intent was not sufficiently specific given that there was no reference to the Union on the cards filed in support of the rescission application. The Applicant testified in cross-examination that he was not initially aware that Al Martin was meeting with employees and gathering their signatures in mid-October in support of that application for rescission in which the Applicant was the applicant. The Applicant had previously asked Al Martin for an employee list and when the Applicant gave Al Martin a list of what he wanted Al Martin to do, which included asking employees to sign the cards, the Applicant told Al Martin that the earliest date for filing the application would be November 2, 2004. The Applicant stated that he was aware of when to file the application because he read it in the *Act*, and that he had not obtained any legal assistance with respect to that application. He chose Al Martin to sign up the employees because Al Martin had easy access to the employees at the workplace during work hours whereas the Applicant only had access to the employees after hours. The Applicant also acknowledged that he chose Al Martin to gather the employees' signatures because the employees knew Al Martin better than they knew the Applicant and because Al Martin has more authority than the Applicant does over the employees. Specifically, the Applicant acknowledged that Al Martin "carries a bigger stick" than the Applicant does. In cross-examination by the Employer the Applicant acknowledged that under the collective agreement the duties prescribed for the crew leader provide for the exercise of this authority or "the bigger stick" over other employees, yet crew leaders remain in the scope of the bargaining unit.

[10] Also in cross-examination, the Applicant testified that, while he had never discussed the rescission matter directly with Darren Martin in October (in relation to the first application or the current application), he speculated that Darren Martin knew about the application because "everyone knew what was going on – no big secret." The Applicant also speculated that someone was bound to have said something to Darren Martin about the rescission application and that "maybe Al talked to him." When asked what Darren Martin was doing in the stockroom where Al Martin was having employees sign support cards in October/early November, the Applicant testified that he was not there and he did not know that to be the case. While it was not clear in the evidence exactly when the Applicant learned that Al Martin was signing people up during work hours by calling them into the stockroom, the Applicant was clear that they wanted to get it done at the workplace, in spite of the workplace rule that employees must stay at their

workstations at all times. The Applicant testified that he signed a card at his desk, some time after Al Martin had other employees sign cards. The Applicant testified that he had not considered that Darren Martin might find out that Al Martin was taking employees away from their workstations to sign cards because it would have only taken each employee "two seconds and if they did not want to sign, they did not have to [sign]."

[11] With respect to the current application, the Applicant testified that he and Al Martin sought free legal advice through the law firm for which Al Martin's wife, Annette Martin, works. (It may also be noted that Annette Martin is Darren Martin's mother.) Specifically the Applicant received assistance with developing a new form of support card to be used with the application. The Applicant testified initially that he had the employees sign the support cards on November 15, 2004 between 11:30 a.m. and 2:00 p.m., while Darren Martin was on his lunch break. The Applicant asked Al Martin to coordinate the signing by bringing employees, one by one, into the Applicant's office, which the Applicant referred to as the crew training room (and which others referred to as the crew leaders room) where the Applicant would have them sign the cards. The Applicant acknowledged that the employees were signing cards on work time (their lunch period was from 11:00 a.m. to 11:30 a.m.) again in spite of the rule that employees could not leave their workstations during work time.

[12] The Applicant stated that when the employees came into the office they knew the reason they were there, presuming that Al Martin had told them on their way to the office. He asked each employee if the employee was in favour of getting rid of the Union and going back to the Prairie Metal Employees' Association, although the Applicant acknowledged in his cross-examination that the employees' association had not continued after the Union was successful in a vote in 2001. The Applicant further acknowledged that the employees' association was not officially recognized and would have to be re-certified, although the Applicant felt that "they would continue on" as the association following a vote to decertify the Union. When questioned whether they would apply for certification of the employees' association, the Applicant stated that he believed that the employees would have understood this because, in his first rescission application in late-October/early November, the cards would have indicated to the employees that that application was about getting the employees' association back. The

Applicant felt this was more beneficial for the employees because the association operated locally and employees would be in control of their own money.

[13] When questioned in cross-examination whether he had asked Darren Martin's permission to gather signatures on work time, the Applicant stated that the actual time used to obtain the signatures of the employees was approximately one half hour. When pressed further on the point in cross-examination, the Applicant then acknowledged that all signatures were actually obtained between 11:30 a.m. and 12:00 noon, rather than between 11:30 a.m. and 2:00 p.m. as he had initially stated. The Applicant further acknowledged that Darren Martin and Mr. Hugel take their lunch between 12:00 noon and 1:00 p.m. The Applicant stated that he did not know what Darren Martin would think of him carrying out these activities on work time, although he probably would have been told to do this on his own time. When it was suggested to the Applicant in cross-examination that he must have known that the process of gathering employees' signatures on work time (on both occasions) would have become known to Darren Martin, the Applicant responded "eventually, yes." Mr. Hugel tours the plant approximately one to two times per day (although the Applicant might only see Mr. Hugel one to three times per week) and Mr. Hugel was at lunch with Darren Martin on the day the Applicant and Al Martin collected the employees' signatures for this application. The Applicant testified that he assumes that Mr. Hugel would discipline the Applicant and Al Martin if Mr. Hugel knew they were carrying out these activities on work time and that it is now possible that action could be taken against the Applicant and Al Martin as a result of Mr. Hugel learning of their conduct through the Applicant's testimony at this hearing.

[14] In his cross-examination, the Applicant testified concerning the familial relationship between Al Martin, Annette Martin and Darren Martin and, while not knowing how close the family is, the Applicant speculated that Darren Martin would know about the application for rescission through the involvement of Al Martin and Annette Martin in the application. In cross-examination by the Employer's counsel, the Applicant testified that he does not believe that Darren Martin lives with his parents any longer and he acknowledged that Darren Martin treats his father in a business-like manner at the workplace and does not refer to him there as "dad."

[15] In cross-examination by the Employer's counsel, the Applicant testified that the crew leader has some space in the stockroom in which to do paperwork. Al Martin does some paper work in there on a daily basis related to quality control, inventory and "confined entry sheets" (which appear to be used to track work being done), although the evidence of the Applicant was somewhat unclear as to whether employees come into that room to sign the confined entry sheets or they are signed elsewhere when the employee tracks down the Applicant or Al Martin. Also in cross-examination by the Employer's counsel, the Applicant testified that Darren Martin did not provide the Applicant with any advice or encouragement in relation to this rescission application and, as far as the Applicant is aware, Darren Martin did not do the same with Al Martin.

[16] Garth Fahlman testified on behalf of the Union under a subpoena. Mr. Fahlman is a member of the Union and has been employed with the Employer for approximately 14 months. At the time of his hiring Mr. Fahlman had just completed a welding course at SIAST that qualified him to be an apprentice welder. While Mr. Fahlman was hired as a welder/general helper and performed welding work for approximately 6 –7 months, when the yard employee quit Darren Martin asked Mr. Fahlman to fill in until they could find a replacement yard employee. In cross-examination by the Employer's counsel, Mr. Fahlman stated that he believed he was chosen for the position because he has a background in farming and would be suited to this type of work, although he is not very good with the paperwork aspect of the job. Mr. Fahlman testified that he remains in that position to date but wishes to return to welding duties. As a yard employee, he acts as a shipper/receiver, operating cranes and a forklift to move tanks and equipment and to load and unload trucks. Mr. Fahlman's immediate supervisor is Al Martin and, in Al Martin's absence, the Applicant acts as Mr. Fahlman's supervisor. Mr. Fahlman testified that if he needed to leave work, required time off work, or needed to leave the yard to go to the office, he sought the permission of Al Martin.

[17] Mr. Fahlman testified that at approximately 8:30 a.m. on a day in mid October he was asked by Al Martin to come into the stockroom, where Al Martin has a desk. While Mr. Fahlman was not told the reason why he had to go to the stockroom, he stated that he felt he had to listen to Al Martin as Al Martin was his supervisor. Mr.

Fahlman has a key to the stockroom, as it is necessary for him to go in there to obtain supplies such as bolts from time to time. When Mr. Fahlman entered the stockroom, Al Martin asked him to lock the door behind him. Mr. Fahlman felt that this was unusual because Al Martin had not previously called him in the stockroom and locked the door. Darren Martin was also present in the stockroom, standing approximately five to ten feet away from Mr. Fahlman. Al Martin went to his desk and told Mr. Fahlman to sign a paper saying that if Mr. Fahlman wanted to make more money, they had to get rid of the Union. Mr. Fahlman stated that he had no idea that a drive was ongoing to get rid of the Union. Al Martin never explained why Darren Martin was present and Al Martin did not indicate what he was going to do with the signed papers. During this time, Darren Martin never spoke. Mr. Fahlman testified that he did sign the paper. He felt a lot of pressure to do so otherwise he would be considered the "bad guy" and the Employer would increase his workload and he was already having trouble keeping up. Mr. Fahlman testified that he would not have signed if it had been secret because he wanted the Union to continue to represent him. The meeting lasted a couple of minutes. At no time did anyone question why Mr. Fahlman was in the stockroom signing these papers during work hours.

[18] In cross-examination by the Employer's counsel, Mr. Fahlman acknowledged that he is one of the few employees who have keys to the stockroom (other than Al Martin, Darren Martin and the Applicant) and he attends there a few times per week to obtain supplies. Mr. Fahlman testified that the stockroom door was closed but not locked when they entered it. While acknowledging that the stockroom is always locked, Mr. Fahlman questioned why it would need to be locked when people were inside. Mr. Fahlman maintained throughout cross-examination that Darren Martin was in the stockroom prior to Mr. Fahlman entering and that Darren Martin stayed by the door while Mr. Fahlman and Al Martin were standing by the area where Al Martin has his lunch, which is not far from the doorway. Mr. Fahlman testified that, after he signed the document and left the stockroom, both Al Martin and Darren Martin stayed in the stockroom.

[19] Mr. Fahlman testified that, on a day in November just after his lunch break, Al Martin approached him and told him to go to the crew leaders room, a room smaller than the stockroom, approximately 8' by 10'. In cross-examination he thought

this may have been November 8 or 9, 2004. Mr. Fahlman thought that there was a work related reason for doing so and, in any event, he stated that he always does what Al Martin tells him to do. Mr. Fahlman stated that, when he entered the crew leaders room, he closed the door. The Applicant was present in the room. About 10 seconds later, another employee, Tom Blind, entered the room and Mr. Fahlman believed Mr. Blind left the door open behind him. Mr. Fahlman read the paper that the Applicant handed to him and asked why he had to sign again. The Applicant advised Mr. Fahlman that the first papers that were signed were worded incorrectly but he otherwise did not explain why this was being done or what it was being signed for. Mr. Fahlman signed the paper, again believing that, if he refused, he would face greater pressure at work and an increased workload.

[20] Darren Martin testified on behalf of the Employer. He has been employed by the Employer for approximately 10 years, while his father, Al Martin has been employed there approximately 29 years. Darren Martin testified that there are 24 production employees, five clerical staff in the office and that he and Mr. Hugel are the only management staff. Only the production staff is covered by the collective agreement between the Employer and the Union. Darren Martin described the Employer's facility as having a 17-acre yard and 60-70,000 square feet of production area with an office. He testified that he spends approximately 60% of his time in the office and 40% on the shop floor. He stated that Mr. Hugel is on the shop floor about 1 – 2 times per week, usually on a Friday between 2:30 p.m. and 3:20 p.m.

[21] Darren Martin testified that he became officially aware that a decertification application had been filed when he was sent a copy of the application by the Board by fax, however, he had heard talk before this that an organizing drive for the decertification was going on. Also, there were some employees who were approaching Darren Martin to talk about it but Mr. Hugel told him to remain neutral and express no opinion about the matter. Darren Martin testified that did not express a preference one way or the other and he told employees to "do what [they] needed to do." When questioned in cross-examination as to how he could miss a group of 20 or more employees going back and forth individually from first the stockroom and then the crew leaders room when he spends approximately 40% of his time in the shop, Darren Martin replied to the effect that he likely was not in the shop that day (although he

acknowledged earlier that he was present on the day he entered the stockroom to find Al Martin and Mr. Fahlman there). In cross-examination Darren Martin acknowledged that, since the Union came to represent the employees, there had always been a group of employees opposed to the Union and that this group included Al Martin. Darren Martin stated that he had no knowledge of the decertification drive going on and that it was only a feeling, because he would often hear employees talk when he walked by that they will soon be rid of the Union and that they had "signed those cards, when will the Union be gone?" Other comments included an expression of how expensive union dues were and a question to Darren Martin why the Employer was still taking union dues. Darren Martin stated that it was upon hearing those comments that he knew cards had been signed for the decertification. Darren Martin stated that neither Al Martin nor the Applicant had asked the question about dues being taken, although Al Martin had made some comments to Darren Martin. In his examination in chief, Darren Martin testified that he never saw any employee sign a card in favour of the application and had no knowledge of where or how the cards were signed. Darren Martin maintained that he did not provide any advice to his father, Al Martin, regarding the applications stating that Al Martin is a grown man and can make decisions for himself.

[22] Darren Martin was questioned about the allegation by Mr. Fahlman that he was present in the stockroom when Al Martin was having Mr. Fahlman sign a card, as described in the particulars provided to the Employer's counsel by the Union's counsel in advance of the hearing. Darren Martin testified that he did not know who the employee referred to was in the scenario described by the Union's counsel and it was not until the day prior to the hearing when he received a copy of a subpoena directed to Mr. Fahlman that he began to have an idea of the identity of the employee involved, although he stated that he still was not sure. In response to the evidence given by Mr. Fahlman, Darren Martin testified that he recalled an occasion where he walked into the stockroom and saw a person, who at the hearing he identified to be Mr. Fahlman, standing next to the bolt tray that was next to the desk in a small area that Darren Martin referred to as the "purchasing room" which is inside the stockroom. Darren Martin stated that this person was facing Al Martin. Darren Martin stated that it was an awkward moment and "they just finished a conversation" but he did not think anything of it because it is not uncommon for him to see Mr. Fahlman in the stockroom because he is a shipper/receiver. He said something to the effect "Heh, how's it going?" Darren Martin

maintained that he never saw Mr. Fahlman sign anything and that Darren Martin had no clue why Mr. Fahlman and Al Martin were in there. Darren Martin was not aware the room was being used for the purposes of a decertification drive because it is not unusual for Mr. Fahlman to be there putting inventory away and tending to associated paperwork, putting in work orders and obtaining supplies.

[23] In cross-examination by counsel for the Union, Darren Martin maintained that he was not surprised that the door was locked with Al Martin and Mr. Fahlman inside because he does not want people walking in and out of the stockroom if they do not have keys and also because Al Martin does his paperwork in there and does not want to be bothered. Darren Martin could not recall why he went into the stockroom that day, what day or time of day it was, or how long he remained in there. He stated that his recollection of the whole situation was vague, that he did not know at the time that the employee in the room was Mr. Fahlman, and that the scenario he is relating may not even be the same scenario in the stockroom as that described by Mr. Fahlman; in his words, “it’s the best I can come up with.” Darren Martin then testified that he did not recognize the employee talking to Al Martin because the employee’s back was facing toward him. When questioned whether he did not recognize that the employee was Mr. Fahlman, Darren Martin responded, “at the time I would have, sure but I had no reason for anything to stick in my mind,” and therefore when he learned of the circumstances the Union was alleging concerning his involvement, he spent a lot of time trying to figure out who that employee had been. Basically Darren Martin only remembers that he walked into the stockroom after an employee and Al Martin were already in there and that this employee was standing by the bolt tray, next to Al Martin’s desk. He maintained that he did not see any paper in particular but only that there were papers all over the desk. Darren Martin further maintained that he remained in the room after the employee left but that he did not talk to Al Martin following the employee’s departure. Darren Martin enters the stockroom approximately six times per day and recalled that he had entered the room at this time for a specific reason, although he could not recall that specific reason.

[24] Darren Martin stated that he did not know that Al Martin was in the stockroom for the length of time he described. He further maintained that he does not discuss work issues at home with Al Martin or his family. In cross-examination Darren

Martin was also asked about his reaction to Al Martin's activities during work hours. Darren Martin maintained that Al Martin's behaviour was very improper and that they would be dealing with it. Darren Martin admitted that employees leaving their workstations, even to use the washroom, has been a problem and that on one occasion he asked Al Martin to monitor how long a particular employee was in the washroom because he was using the water fountain every 15 minutes. On another occasion an employee was spoken to because he was filling up his water bottle at the fountain too often. He acknowledged that the crew leaders should know that employees should not be leaving their workstations and that he takes a strict approach to the matter.

Relevant Statutory Provisions:

[25] Relevant statutory provisions include ss. 3, 5(k), 6(1) and 9 of the *Act*, which provide as follows:

> 3 *Employees have the right to organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing; and the trade union designated or selected for the purpose of bargaining collectively by the majority of the employees in a unit appropriate for that purpose shall be the exclusive representative of all employees in that unit for the purpose of bargaining collectively.*
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> *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*
> >
> > *(ii) there is no agreement and an application is made to the board to rescind or amend the order or decision during a period of not less than 30 days or more than 60 days before the anniversary date of the order to be rescinded or amended;*
> >
> > *notwithstanding a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;*

. . .

> *6(1) In determining what trade union, if any, represents a majority of employees in an appropriate unit of employees, in addition to the exercise of any powers conferred upon it by section 18, the board may, in its discretion, subject to subsection (2), direct a vote to be taken by secret ballot of all employees eligible to vote to determine the question.*
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> . . .
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> *9 The board may reject or dismiss any application made to it by an employee or employees where it is satisfied that the application is made in whole or in part on the advice of, or as a result of influence of or interference or intimidation by, the employer or employer's agent.*

Argument:

[26] The Applicant took the position that the application for rescission was properly made during the open period under the *Act* and with evidence of majority support. The Applicant, the former president of the employees' association who represented the employees prior to the Union being certified, had never supported the Union and felt that the Union had not lived up to the employees' expectations. He felt that if the association were reinstated the employees would have greater control over how their dues would be used. The Applicant also took the position that the application was not made on the advice or influence of the Employer or with the Employer's assistance and therefore the employees should be permitted to vote on whether the Union should be decertified.

[27] Mr. McLeod, counsel for the Union, argued that the application should be dismissed pursuant to s. 9 of the *Act* because the application was made in whole or in part on the advice of or with the involvement of or as a result of influence or interference by the Employer. The Union took the position that the application should be dismissed if the Employer influenced the obtaining of support in any way. The Union asked the Board to consider the circumstances, including the failed application attempt in October, 2004. The Union conceded that there was no direct evidence of employer influence or interference, relying on *Cook v. International Woodworkers of America, Local 1-184 and*

Shelter Industries Inc., [1981] Mar. Sask. Labour Rep. 34, LRB File No. 368-80 and *Leavitt v. United Food and Commercial Workers, Local 1400 and Confederation Flag Inn (1989) Ltd.*, [1990] Summer Sask. Labour Rep. 61, LRB File No. 225-89 to support the proposition that employer interference is rarely overt and that it is a fair conclusion that the gathering of support on company time and premises compromised the employees' ability to make a free choice. The involvement of Al Martin, a long time employee, the son of manager Darren Martin and an in-scope supervisor, along with the Applicant, also an in-scope supervisor, would reasonably lead the employees to believe that the Employer supported the application. The Union maintained that this is a small workplace where Darren Martin spends approximately 40% of his time in the plant. The Union maintained that, these circumstances, where the supervisors are ignoring or defying an important workplace rule which they are responsible to enforce and are asking employees to also defy that rule, would lead an ordinary employee to reasonably conclude that this application is supported, or is certainly acquiesced in, by the Employer. Not only were the Applicant and Al Martin openly defying a workplace rule in gathering the support for the decertification but they were doing so in places (the stockroom and crew leaders room) where and at times (approximately 8:30 a.m. on a day in October. 2004 and from 11:30 a.m. to 12:00 noon on November 15, 2004) when they were most likely to be observed by Darren Martin. By this point in time, Darren Martin admitted that he knew that something was going on in relation to a drive as there are "no secrets" in this workplace. In these circumstances the Union also maintained that the decertification drives could not have escaped the notice of the Employer. The Union argued that there was compelling evidence in this case to support the conclusion that the Employer either knew or must have known of the activity and supported or acquiesced in the same, thereby improperly influencing the gathering of support.

[28] The Union also relied on a second set of circumstances to support its position that the application should be dismissed because of employer involvement/influence/interference. The Union asked the Board to accept the evidence of Mr. Fahlman over that of Darren Martin in relation to the circumstances where Al Martin was gathering support for an application in October, 2004 by having employees come individually to the stockroom to sign support cards. The Union alleges that Darren Martin was present in the stockroom when Mr. Fahlman was brought in and remained there while Al Martin solicited Mr. Fahlman's support for the application. Mr. Fahlman

stated that he felt that he must sign in favour of the decertification fearing adverse work circumstances if he did not. Mr. Fahlman also felt the same way upon being asked to sign a second time given these earlier circumstances. Darren Martin stated that he came into the stockroom after Mr. Fahlman had entered and he was not aware of the circumstances under which Mr. Fahlman was there. The Union argues that if Mr. Fahlman's evidence is accepted, the conduct of Darren Martin leads to the reasonable conclusion that the Employer had knowledge of the decertification drive and influenced the gathering of support. The Union proposed that the Board consider the case of *Faryna v. Chorny* (1952), 2 D.L.R. 354 (B.C.C.A.) to assist with a determination as to whose evidence is more credible.

[29] Counsel for the Employer argued that there was no evidence that the Employer influenced the making of the application or was involved in any way. The Employer argued that the circumstances of this case are similar to that in *Matychuk v. Hotel Employees and Restaurant Employees Union, Local 41 and El Rancho Food & Hospitality Partnership*, [2004] Sask. L.R.B.R. 5, File No. 242-03 where there was no evidence the employer was aware or must have known of the rescission drive and the applicant was quite well informed of the application process. The Employer also relied on the cases of *Monahan v. United Steelworkers of American and Capital Pontiac Buick Cadillac GMC Ltd.*, [1993] 4th Quarter Sask. Labour Rep. 109, LRB File No. 169-93 and *Evans v. CAW-Canada and Saskatchewan Indian Gaming Authority Inc.*, [2002] Sask. L.R.B.R. 313, LRB File No. 258-00 and argued that the Board must balance and weigh the facts of each case to determine whether there was conduct by the employer that led to the making of the application which compromised the ability of employees to make a free choice, assuming employees are of sufficient intelligence and fortitude to know what is best for them.

[30] The Employer maintained that management was careful not to become involved in the application once it had knowledge of the drive. Darren Martin received instructions not to comment on the matter and to remain neutral when employees commented on the drive or asked questions. Darren Martin did not see anyone sign a card and had no knowledge where or when the cards were signed. The Employer pointed out that the workplace is very large and there are only two members of management who are seldom present, while the signing took place over a very short

period of time and during a time when the Applicant expected that the management would be away from the workplace.

[31] The Employer, relying on *Monahan*, *supra*, and *Cavanagh v. Canadian Union of Public Employees, Local 1975 and University of Saskatchewan*, [2003] Sask. L.R.B.R. 226, LRB File No. 047-03, argued that the family or friendly relationship between the Applicant, the individual who assisted the Applicant and management does not provide a reasonable basis for concluding that management was influencing or providing advice in relation to the application or was responsible for it.

[32] The Employer also took the position that the fact that the Applicant and Al Martin were breaching a workplace rule in the course of obtaining support does not lead to the conclusion that the Employer was involved in the application because there was no evidence that the Employer had knowledge of these actions. Furthermore, the Union would need to show that the supervisors or crew leaders were acting as the Employer's agents in order to find employer involvement in the application and the Union has not proven this. There was simply no evidence to show that the decertification drive was done with the knowledge or acquiescence of the Employer.

[33] With respect to the first signing where Mr. Fahlman maintains that Darren Martin was present in the stockroom when Al Martin solicited Mr. Fahlman's support, the Employer argues that Mr. Fahlman was simply not credible and his testimony was confusing. It was argued that Darren Martin's evidence should be preferred as he was clear in his testimony that he did not enter the stockroom until after Al Martin and Mr. Fahlman were present, that he did not know what they were doing there and did not witness any signing of cards, and that he did not even know that the employee in the stockroom was Mr. Fahlman until the hearing of the evidence.

Analysis and Decision:

[34] The issue under consideration in this case is whether the application was made in whole or in part on the advice of, or as a result of the influence of or interference or intimidation by the Employer.

[35] 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 and 387:

> *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.*

[36] Commencing at 832 of the *Shuba* case, *supra*, the Board set out the factors to consider when determining whether to grant an application for rescission and order a vote:

> *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, which is enshrined in s. 3 of the Act, against the need to ensure that the employer has not used coercive power to improperly influence the outcome of the democratic choice. In Wells v. United Food and Commercial Workers, Local 1400 and Remai Investment Corp., [1996] Sask. L.R.B.R. 194, the Board described its approach to the balancing task as follows, at 197-198:*
>
> *Section 3 of The Trade Union Act reads as follows:*
>
> 3. *Employees have the right to organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing; and the trade union designated or selected for the purpose of bargaining collectively by the majority of the employees in a unit appropriate for that purpose shall be the exclusive representative of all employees in that unit for the purpose of bargaining collectively.*
>
> *The Board has often commented on the significance of the power which is accorded to employees under this provision to make their*

own choices concerning representation by a trade union. We have also stated that the rights granted under Section 3 include the right to decide against trade union representation as well as the right to undertake activities in support of a trade union. In the decision in United Food and Commercial Workers v. Remai Investment Corporation and Laura Olson, LRB Files No. 171-94 and 177-94, the Board made the following observation:

> *Counsel for the Employer urged the Board to take the same view of Ms. Olson's conduct as we took in Brandt Industries Ltd., LRB File No. 095-91. In Brandt Industries Ltd. the Board recognized the right of employees to debate the representation question vigorously and to campaign against the Union. We still regard this as an important right. In F. W. Woolworth Co. Limited, LRB File No. 158-92, the Board returned to this theme and stated that charges against individual employees of interfering in an organizing drive are particularly serious because of the chilling effect that they can have upon the democratic process which is at the heart of The Trade Union Act.*

Earlier decisions have made it clear, however, that the Board is alert to any sign that an application for certification has been initiated, encouraged, assisted or influenced by the actions of the employer, as the employer has no legitimate role to play in determining the outcome of the representation question. In the Remai Investment Corporation decision from which the above quotation was taken, the Board went on to say:

> *However, there is a distinction between two employees debating the representation question as they work side by side or while they ride to work and what Ms. Olson did. Brandt Industries Ltd. does not stand for the proposition that one of those employees can enlist the coercive power of management in order to gain the support of other employees for his or her position.*

In the case of Kim Leavitt v. Confederation Flag Inn (1989) Limited and United Food and Commercial Workers, LRB File No. 225-89, the Board made the following comment:

> *The Board has frequently commented upon the relationship between Section 3, which enshrines the employees' right to determine whether or not they wish to be represented by a union, and Section 9 of the Act. These sections are not inconsistent but complimentary. Section 3 declares the employees' right and Section 9 attempts to guard that right against applications that in reality reflect the will of the employer instead of the employees.*

The Board proceeded to make the following statement:

> *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.*

In Susie Mandziak v. Remai Investment Corp., LRB File No. 162-87, the Board made a similar point:

> *While the Board generally assumes that all employees are of sufficient intelligence and fortitude to know what is best for them and is reluctant to deprive them of an opportunity to express their views by way of a secret ballot vote, it will not ignore the legislative purpose and intent of Section 9 of The Trade Union Act. Section 9 is clearly meant to be applied when an employer's departure from reasonable neutrality in the representation question leads to or results in an application for decertification being made to the Board. In the Board's view, this application resulted directly from the employer's influence and indirect participation in the gathering of necessary evidence of employee support.*

This statement makes clear that Section 9 is directed at a circumstance in which an employer departs from a posture of detachment and neutrality in connection with the issue of trade union representation. There have been cases where an employer has taken a direct role in initiating or assisting an application for rescission of a certification order, and in these cases, it is fairly easy for the Board to identify the conduct on the part of the employer which constitutes improper interference. On the other hand, as the Board pointed out in Rick Poberznek v. United Masonry Construction Ltd. and International Union of Bricklayers and Allied Craftsmen, LRB File No. 245-84, employer interference is rarely of an overt nature, and the Board must be prepared to consider the possibility that subtle or indirect forms of influence may improperly inject the interests or views of the employer into the decision concerning trade union representation.

[37] None of the parties strenuously argued at the hearing that the Board should not take into account the circumstances surrounding the Applicant's first application for rescission filed at the beginning of November, 2004, which was rejected by the Board because the evidence of support inadequately described the employees'

intentions. The Board wishes to make it clear that it considers those circumstances relevant to the present application filed by the Applicant on November 15, 2004. The circumstances of the initial rescission drive were substantially similar to those underlying the current application. For example, Al Martin was involved in the gathering of support on both occasions (although his role was much greater in relation to the first attempt) and the Applicant was the applicant for both applications. In both situations the evidence of support was gathered in a similar manner. In both attempts, the Applicant and Al Martin wanted to have the certification Order rescinded and they would have proceeded with the first application filed had the support cards properly stated the intention to no longer support the Union and not only attempt to bring back the employees' association. Furthermore, and perhaps most importantly, both applications were filed in the same open period and occurred within weeks of each other. As will be examined in further detail below, the involvement of Darren Martin in relation to the first drive was significant in relation to its effect upon the second attempt. Therefore, in the circumstances of this case the Board finds it appropriate and necessary to consider the whole of the conduct of the parties in relation to what it considers to be one attempt to rescind the certification Order.

[38] The Union relied on *Shelter Industries Inc.*, *supra*, in support of its position. In that case documents in support of the rescission application were circulated and signed on company time and premises and the Board found that, while there was no direct evidence that the employer had knowledge of those activities, it was common knowledge that they were occurring and as such could not have escaped the notice of the employer. Although a lawyer was permitted in the workplace to meet with the employees and the applicant had been at work very little in the month preceding the application, the case is illustrative of a situation where an employer's inaction in relation to conduct that would not have been permitted on the part of the union constituted tacit encouragement or approval of the applicant's activities. In essence the employer interfered in a passive manner.

[39] The Applicant in this case initially testified that he had the employees sign cards between 11:30 a.m. and 2:00 p.m. At first the Applicant's evidence was that he was not sure why he had the cards signed at the time that he did. On further questioning, he suggested he did it in a clandestine manner to avoid the observation of

management, by having employees sign when Mr. Hugel and Darren Martin were away for their lunch. When asked during what time period Mr. Hugel and Darren Martin take their lunch the Applicant responded between 12:00 noon and 1:00 p.m. Later when questioned why he would take such a long period away from his own work to carry out the card signing campaign, he stated that the actual signing of the cards took only a half hour, from 11:30 a.m. to 12:00 noon, which is obviously not during the lunch period of Mr. Hugel and Darren Martin to which he testified. The circumstances suggest that the Applicant carried out the activity without regard for whether he would be observed by management because he either had or knew he would have, their approval for this activity. In the alternative, the Applicant's testimony illustrates that he had no idea until the hearing that the Employer should have no involvement in the application.

[40] There was also no evidence that the campaign in October, 2004 was intended to be carried on without observation by management. Darren Martin testified that he was aware a campaign was ongoing but suggested that he did not know when or how it was being carried out. The Board finds this unlikely given the overall circumstances. The Applicant testified that he chose Al Martin to be involved with the gathering of support because Al Martin had better access to the employees and by virtue of his position, Al Martin "carried a bigger stick." Also, they wanted to carry out the activity at the workplace because that would provide the best access to the employees. In both card-signing campaigns, the proponents were carrying out the signing on company time and premises at times when and places where members of management could easily observe them. Darren Martin by his own admission entered the stockroom on numerous occasions for numerous reasons and he attended at the crew leaders or supervisor's office to deal with paperwork or discuss matters with the supervisors. Al Martin and the Applicant carried on their activity openly without fear of reprisal from management because the Employer knew they were part of a group who wanted to get rid of the Union and that they both have the authority to direct employees to accompany them to the stockroom and the crew leaders office on company time. The Board draws the conclusion that the proponents did not carry out their activities in a clandestine manner and had no intentions of doing so. These circumstances combined to lead employees to believe they must sign in favour of the application.

[41] The Union also relied on *Leavitt*, *supra*. In that case the Board stated that employer influence can be implied where the application results from the indirect participation or influence of the employer in the gathering of support. Where the employer departs from a position of reasonable neutrality, the Board becomes concerned whether the true wishes of the employees are represented by the evidence filed with the Board. The Employer attempted to distinguish this case on the basis that the applicant there was granted generous access to the workplace to conduct the campaign, was allowed to post a notice of a meeting to discuss the decertification, and the employer supplied chairs for the meeting, as well as paying for the legal fees incurred in making the decertification application. Although the circumstances of this case are quite different from those in *Leavitt, supra*, the identity of the individuals involved in this rescission attempt would lead to the reasonable conclusion by the employees that there was at least tacit approval of the Employer because the very people who were charged with the duty of keeping employees at their work stations at all times, were directing them to come to the stockroom and the crew leaders room to conduct non-work related activities.

[42] The Employer argued that the familial relationship between Al Martin, (who led the first decertification drive and was involved with the Applicant in the gathering of support for this application) and his son/manager of the employer, Darren Martin, should not form a basis for the conclusion that there was management influence in the making of the application. In *Cavanagh, supra*, the key organizer of the application was the son of the employer's lawyer. The Board found that there was no evidence that the lawyer had assisted with the application and held that the relationship alone was not in itself sufficient to establish employer influence. In that case the employer provided the applicant with the application form and there was evidence that some of the signing took place in an office used by the manager. These circumstances did not lead to a finding that there was employer influence.

[43] The present case is distinguishable from *Cavanagh*, *supra*, on its facts. In that case the fact that the signing took place in the managers' office was not the end of the inquiry. The student supervisors soliciting support for the application also had keys to this office and the Board found that the managers were rarely on duty at the same time as the student supervisors and therefore there was little or no opportunity for

detection by management. Furthermore, the Board found as a fact that the manager had no knowledge that the card signing was taking place at the workplace and there were no other factors sufficiently significant for the Board to draw an inference that there was management influence. In the present case, the circumstances are such that the Applicant was soliciting the support of the employees at the very time and place when it was quite likely that management would be present or happen upon the employees being asked to sign in favour of the rescission. In fact, if one were to accept the evidence of Darren Martin, that is precisely what occurred when he entered the stockroom and found Al Martin and Mr. Fahlman involved in this activity. Furthermore, here the Applicant was carrying out the activity in violation of an important workplace rule that would signal to employees that these supervisors had the tacit approval of management to carry out this activity. It would have been reasonably apparent to the employees that they need not worry about getting caught away from their workstations and in fact could be observed by Darren Martin, leading to the conclusion that they should sign in favour of the rescission, or face adverse consequences from the Employer.

[44] In *Pfefferle v. Bricklayers and Masons International Union of America, Local 3 and Ace Masonry Contractors Ltd.*, [1984] Aug. Sask. Labour Rep. 45, LRB File No. 225-84, the Board concluded at 46:

> *Although the applicant denies having discussed this application with the co-owners and the members of their family, the Board finds it difficult to accept that denial at face value since all of the employees work fairly closely with one another. Furthermore, the Board is not satisfied that the applicant has an honest belief, well founded or otherwise, that the union has failed to adequately carry out its responsibilities as his bargaining agent. He attempted but failed to advance any credible rationale for applying for rescission, and that, coupled with all of the other circumstances, leads the majority of the Board to conclude that the application has been made in whole or in part as a result of influence of the employer.*

[45] While the Board has some concerns regarding the sufficiency of the reasons the Applicant advanced for bringing the application (he had no specific complaints about the Union other than the failure to obtain wage increases greater than what was needed to cover union dues and the fact that he appeared only to want back the control he had as an executive member of the former employees' association) and because there was little or no proper explanation or information given to employees

when soliciting their support for the application, the familial relationship between Darren Martin and Al Martin itself becomes a significant factor in the circumstances of this case. Firstly, the Board does not believe that Darren Martin and Al Martin have not spoken about the issue of the Union, in light of Al Martin's longstanding service as an employee and member of the employees' association which represented the employees in the workplace for some 40 years until it was recently replaced by the Union; Al Martin's dissatisfaction that the Union came to represent the employees; the knowledge Darren Martin had that Al Martin (and the Applicant) were part of a group that wanted to get rid of the Union; the fact that this is a relatively small workplace and that Darren Martin has a direct supervisory relationship with Al Martin that necessitates significant interaction; and finally the fact that Al Martin sought legal advice in relation to this application from a law office for which his spouse (Darren Martin's mother) works. Without the possible assistance of the testimony of Al Martin regarding these factors and his reasons for assisting with the application, these factors lead the Board to conclude that Darren Martin knew or must have known of the campaign and influenced the bringing of the application.

[46] In addition to the conclusion of the Board that Darren Martin influenced the bringing of this application directly on the basis of his familial relationship with Al Martin, the Board also finds that other circumstances that flow from the familial relationship in the workplace support an inference that there was management influence or tacit assistance with this application. This is a relatively small workplace and one that is not known for keeping secrets. The environment is one where a group of employees, including the Applicant and Al Martin, are openly opposed to the Union and where some employees openly disclosed to management that they had signed cards and asked when the Union would be gone. It is admitted that Darren Martin spends approximately 40% of his time in the plant. In this context, the fact that the supervisors, including Al Martin, were ignoring or defying an important workplace rule which they were responsible to enforce and were asking employees to also defy that rule, would lead an ordinary employee to reasonably conclude that this application was supported, or was certainly acquiesced in, by the Employer. It would be reasonably anticipated by employees that they would not face any disciplinary measures for violating the workplace rule in these circumstances and that it is quite possible that their being asked to sign the cards in the places and at the times that they were, would lead them to

conclude that they would be observed by Darren Martin. This also implies that there is an element of the apprehension of betrayal from which the Board could reasonably conclude that the evidence of support does not represent the true wishes of the employees to such an extent that a vote would not be appropriate in the circumstances. In *Monahan supra*, while the Board acknowledged that it could likely be proven on every application for rescission that there exists a fear among employees that an applicant might betray their position to their employer, the Board held that the apprehension of betrayal was a relevant consideration. The apprehension was explained in this way at 116:

> *The Union argued that the relationship between the Applicant and management would cause employees to support the Applicant out of fear that if they did not, this would be made known to management. We accept this as a legitimate concern not because the evidence indicates that the Applicant did this, but because we accept that some employees might think that he would or might. In these circumstances, some employees might be influenced to support the Applicant by signing a card, not because they wished to give up their right to bargaining collectively, but because they feared being exposed to their Employer if they did not.*

[47] The Board has determined that the apprehension of betrayal is high in this case in light of the evidence noted above concerning the familial relationship (both in and of itself and in the context of the history and operation of the workplace) between Al Martin and Darren Martin as well as Al Martin's relationship with the Applicant and the extent of Al Martin's assistance with the application. The evidence also indicates that employees signed in favour of the application despite the evidence that neither the Applicant nor Al Martin adequately explained to the employees what they were doing and why the employees should sign, other than to tell them that they wanted the employees' association back in place. Evidence of the apprehension is also found in the tendency or the need of several employees, attempting to ensure Darren Martin knew their purported decision on the issue of the rescission, by talking to Darren Martin about the fact that they signed cards and inquiring why they were still paying union dues.

[48] Once Darren Martin became aware that the decertification activity was taking place (admittedly through the employees talking to him about it), it would be expected that the Employer would be alert to it being carried out a second time. Darren

Martin had knowledge that there was a group seeking to decertify and that Al Martin and the Applicant were part of that group. The Applicant did not provide a reason as to why he conducted the campaign in the manner that he did, knowingly and willfully breaking a workplace rule he was mandated to enforce. In these circumstances one can presume that the Employer was aware of the activity, tacitly approved of the process and that the Applicant would not face any repercussions for carrying it out in the manner that he did.

[49] It is reasonable to conclude that in these circumstances the employees' true wishes have not been obtained. The employees were directed by their supervisors, long time employees, one of whom is the manager's father, during work hours (of both the employees and of Darren Martin) to accompany them to the two places in the plant that their manager, Darren Martin might attend or be present, to sign in support of a decertification application. The fact that this was done in violation of an important workplace rule and in light of the significance of the familial relationship between Al Martin and Darren Martin, as well as the high potential for an apprehension of betrayal, leads the Board to conclude that the Employer has interfered with or influenced the bringing of this application. The events and circumstances outlined above are of a nature and significance such that the ability of the employees to decide whether they wish to be represented by the Union would be compromised in a vote on the issue. The Board finds that the conduct is of the nature and magnitude that it compromises the ability of the employees to make the choice protected by s. 3 of the *Act*.

[50] On the evidence as a whole the Board has concluded that the Employer has improperly influenced or interfered with the making of the application in a manner and to an extent that the support filed does not represent the true wishes of the employees. On the basis of the circumstances described above, the Board has determined that there are sufficient grounds to dismiss the application based on s. 9 of the *Act*. In addition to the circumstances described above, evidence and argument were presented concerning a separate occurrence that warrants further analysis by the Board. The Board has also determined that this application should be dismissed based on its conclusion regarding the Union's allegation that Darren Martin was present in the stockroom when Al Martin took Mr. Fahlman in there to solicit Mr. Fahlman's support for the rescission application. The Employer argued that Darren Martin was not initially present in the stockroom when Al Martin and Mr. Fahlman entered but rather he came

into the room after Al Martin and Mr. Fahlman were present and that he had no knowledge of the nature of their activity there. The Board is faced with conflicting evidence of Mr. Fahlman and Darren Martin, given that Al Martin did not testify at the hearing.

[51] The Union proposed that the Board consider the *Faryna* case, *supra*, a decision of the British Columbia Court of Appeal which is often cited by the British Columbia Labour Relations Board as the appropriate test to assess credibility. The Court stated:

> *The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried the conviction of truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the story of a witness in such a case must be in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long a successful experience in combining skillful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken.*

[52] The Union argued that the Board should consider which witness's evidence is consistent with other facts proven in evidence, specifically that Darren Martin's presence in the stockroom when Mr. Fahlman entered is more consistent with the evidence that the supervisors felt that they had to pull employees away from their workstations to sign in support of the application. Further the evidence of Mr. Fahlman that the door was locked after he and Al Martin entered the stockroom with Darren Martin present is more consistent with his version of events than Darren Martin's because it would make little sense that Darren Martin was not surprised by the locked door if he truly entered after Mr. Fahlman and Al Martin. The Union also argued that, in assessing credibility, the witness who asserts a positive fact should be accepted over one who asserts a negative fact. Mr. Fahlman asserts several positive facts about an extraordinarily memorable event, that is, he was taken away from his work by his

supervisor, to enter the stockroom where his manager, Darren Martin was present, with the door locked behind him and he was asked to sign a document in favour of decertifying the Union, whereas Darren Martin's memory is vague and he is not able to recall when he went into the stockroom or for what purpose, only that he was not present when Mr. Fahlman and Al Martin entered the room

[53] The Employer argued that Mr. Fahlman should not be believed because of inconsistent statements he made during his cross-examination regarding whether the door was locked or unlocked when he entered the stockroom and because at one point he appeared to say that only Al Martin was present in the stockroom when he first entered. The Board finds that, at certain points, the cross-examination was delivered in a way that confused Mr. Fahlman and it was very clear to the Board that Mr. Fahlman's testimony was that Darren Martin was present with Al Martin in the stockroom when Mr. Fahlman entered and that the door was locked behind him. The Board accepts Mr. Fahlman's evidence in its entirety and does not accept that Mr. Fahlman would have sufficient knowledge of the law to fabricate a story that Darren Martin was present in the stockroom when he entered, because that evidence would better support the conclusion that there was employer influence than if Darren Martin had entered after Mr. Fahlman and Al Martin did. In the presence of Darren Martin, Mr. Fahlman was simply told by Al Martin that if Mr. Fahlman wanted to make more money, he had to sign to get rid of the Union. The Board accepts that Mr. Fahlman was sincere in his evidence and the feeling that he was pressured to sign in favour of the application or face adverse work circumstances, both during the first drive involving Al Martin taking signatures and during the second drive involving the Applicant and Al Martin obtaining signatures. Mr. Fahlman had nothing to gain by testifying as he did, making these unpopular allegations against his employer.

[54] It was suggested that Darren Martin's testimony was more credible than Mr. Fahlman's. In response to the Union's allegations Darren Martin stated that he could only recall one occasion where he entered the stockroom, saw an employee (who could have been there for any number of reasons) talking to Al Martin, that they had just finished a conversation and that there was paper all over the place. Darren Martin stated he was not aware of the circumstances of the allegation by the Union of his presence in the stockroom until he received the particulars from the Union and heard the evidence at

the hearing. The Board does not accept Darren Martin's evidence on this point. Given the importance in this workplace of the rule that employees must remain at their workstations at all times, it is simply not believable that Darren Martin would come upon an employee in the stockroom and not inquire as to his reason for being away from his workstation. At the same time as Darren Martin said that he had trouble recalling the situation and who the employee was that he came upon in the stockroom, he maintained that Mr. Fahlman would be in there for any number of reasons so Darren Martin would not question Mr. Fahlman's presence there. Even if the Board were to accept that Darren Martin came in to the room last, it may be concluded that he tacitly encouraged the signing by not inquiring into the reason the two individuals were in a locked room having a conversation. The further difficulty the Board has in accepting Darren Martin's testimony is that he admits that the whole situation is very vague and he does not know whether the circumstances he was testifying to were the same to which the Union was referring.

[55] The Employer argued that it was not believable that Al Martin would knowingly prejudice his application by having Darren Martin present in the stockroom. However, there is no evidence before the Board which would suggest that Al Martin knew that management was not to have any involvement in the application. If he had, then arguably he should also have known that it was not helpful to his application to carry out this activity on company time and premises. Furthermore, Al Martin carried out these activities at a time when and place where Darren Martin could have observed him and other employees. The evidence was that this activity occurred on a day in October at approximately 8:00 a.m. in the stockroom which Darren Martin acknowledged he frequents "a million times" and approximately six times per day for any number of reasons. This is also the case with regard to Al Martin's assistance of the Applicant in relation to the second drive which took place between 11:30 a.m. and 12:00 noon in the crew leaders room, an area that Darren Martin also frequents. Unfortunately, Al Martin was not called to testify about these circumstances or regarding his involvement in the second drive with the Applicant and, even though it is not necessary to a final determination of this application, the Board draws an adverse inference from Al Martin's failure to testify.

[56] Having accepted Mr. Fahlman's evidence that Darren Martin was present in the stockroom prior to Al Martin and Mr. Fahlman entering, that Darren Martin was aware of the nature of their activity and his presence placed pressure upon Mr. Fahlman to support the application, the Board finds that the Employer did not act with true detachment and neutrality and thereby improperly influenced and interfered with the application to the extent that the wishes of the employees cannot be properly determined with a vote. Darren Martin's presence constituted direct influence and interference and provided him with knowledge of the circumstances of the application including the fact that it was being done on company time and premises, all of which leads to a finding of a violation of s. 9 of the *Act*.

[57] We find, therefore, that the application was made at least in part on the advice of or as a result of influence by the Employer within the meaning of s. 9 of the *Act*.

[58] The application is therefore dismissed.

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

LABOUR RELATIONS BOARD

Angela Zborosky,
Vice-Chairperson