The Labour Relations Board
Saskatchewan

VALERIE SUSAN JONES, Applicant v. SASKATCHEWAN GOVERNMENT AND GENERAL EMPLOYEES' UNION and HILL VIEW MANOR, Respondents

LRB File No. 103-07; October 17, 2007
Vice-Chairperson, Catherine Zuck, Q.C.; Members: Marshall Hamilton and Gloria Cymbalisty

The Applicant:	Valerie Jones
For the Certified Union:	Greg Eyre and Susan Saunders
For the Employer:	John Beckman, Q.C.

Decertification – Interference – Employer's behaviour toward union at bargaining table did not influence applicant who had anti-union attitude before observing employer's behaviour – Applicant's view of value for union dues may be naïve, incorrect and/or selfish but view comes from applicant's personal observations and forms credible rationale for application – Only potential evidence of favouritism arose after application filed with majority support – Board not satisfied that application made in whole or in part on advice of, or as a result of influence of or interference or intimidation by employer.

Decertification – Practice and procedure – Application for first collective agreement assistance filed prior to decertification application - In order to counteract possibility that absence of first collective agreement may be factor in outcome of vote on decertification application, Board suspends holding of vote until at least 180 days after implementation of terms of first collective agreement.

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

REASONS FOR DECISION

Background:

[1] By a certification Order of the Board dated October 21, 2005, Saskatchewan Government and General Employees' Union (the "Union") was designated as the certified bargaining agent for a unit of all employees employed by Hill View Manor (the "Employer"), except the owner and three nursing positions.

[2] By application dated August 30, 2006, filed with the Board on September 20, 2006, certain employees of the Employer requested the rescission of the certification Order pursuant to s. 5(k)(ii) of *The Trade Union Act,* R.S.S. 1978, c. T-17 (the "*Act*"). This application

was dismissed with Reasons for Decision dated November 8, 2006 (see *Jones v. Saskatchewan Government and General Employees' Union and Hill View Manor*, [2006] Sask. L.R.B.R. 404, LRB File No. 144-06).

[3] There is no first collective agreement between the Union and the Employer. An application for first collective agreement assistance (LRB File No. 039-07) was filed by the Union on March 30, 2007. On May 7, 2007 the Board appointed an agent to report to it as to whether it should intervene in the making of a first collective agreement. The Board agent appointed on the application for first collective agreement assistance has not, as of the date of these Reasons for Decision, reported to the Board.

[4] This application, made by Valerie Susan Jones (the "Applicant"), again asks for rescission of the certification Order pursuant to s. 5(k)(ii) of the *Act*. The application was filed on August 23, 2007 during the statutory open period.

[5] In the application the Applicant estimates that there are 29 employees in the bargaining unit. The statement of employment filed by the Employer lists 30 employees in the bargaining unit. The Union does not contest the statement of employment. Based on the statement of employment as filed, the application was accompanied by evidence of support from a majority of the employees in the bargaining unit.

[6] The Union filed a reply on August 30, 2007 denying that the majority of employees supported the application for rescission, denying the reasons given for the application and stating that the application was made in whole or in part with the encouragement and support of the Employer and that support for the application was gathered using threats, intimidation or coercion.

[7] The Employer filed a reply on September 6, 2007 denying any interference, advice, support, encouragement, threats, intimidation or coercion with respect to the application.

Facts:

Applicant's Evidence

[8] The first witness for the Applicant was Greg Eyre. Mr. Eyre is the representative of the Union assigned to be the agreement administration advisor for the bargaining unit. The Applicant asked Mr. Eyre why the Union was denying that the morale and environment of the

workplace had deteriorated since representation by the Union, which was one of the Applicant's reasons for the application. Mr. Eyre responded that he was denying that this was the fault of the Union. Another reason given for the application was that the employees had looked at other workplaces and thought that their working conditions were more favourable than those at comparable workplaces. Mr. Eyre said that the Union denied this because he thought the employees were comparing themselves with a smaller unionized nursing home in Ponteix that paid less in wages and was not a comparable facility. He was asked how the Employer had interfered with the application and he replied that the actions of the Employer showed favouritism to the supporters of the application. Mr. Eyre also said that he thought the Applicant was dishonest when obtaining signatures in support of the application. He admitted that the Union had a meeting without advising the Applicant but said that the meeting was with the members of the Union who opposed the application. The Union and Employer waived cross-examination of Mr. Eyre at this point, as he would be testifying for the Union in its response to the application.

[9] The Applicant then testified. She said that she brought the application both on her own behalf and on behalf of other employees who wanted a rescission of the certification Order and asked her to make the application.

[10] Hill View Manor is a 40-bed personal care home under *The Personal Care Homes Act*, S.S. 1989-90, c. P-6.01. It is owned by Heather Haupstein and managed by Eunice Masset, who is a nurse and not a member of the bargaining unit. Ms. Masset is the only management person who works at the facility. The bargaining unit employees work as personal care aides, activity workers, cooks, housekeepers and general workers. The Applicant is a full-time housekeeper/general worker who works Monday to Friday on the day shift. She has been employed by the Employer since it opened which was approximately two years before it was certified.

[11] The Applicant prepared the application and obtained the signatures of employees who were in favour of the application. She did this with information from the Board, both from its staff and its website. She was one of the applicants on the previous application for rescission (LRB File No. 144-06) and therefore also had experience from and the Board's decision on the previous application for rescission. She did get some assistance in the preparation of her reasons for the present application from an Estevan lawyer.

[12] In obtaining the signatures in support of the application, the Applicant telephoned each employee on her own time, with telephone numbers that she obtained from the telephone book and from phone lists at work. She asked each if they wanted to meet and they were free to say yes or no at this point. She met with each employee who agreed to meet at places away from the facility. Most of those who signed said they would sign in support without any discussion. With others, she gave them her point of view before they signed.

[13] The application and the replies filed by the Union and Employer were posted on the staff bulletin board in the washroom of the facility, used by the manager as well as the staff. In reaction to the Union's reply, which alleged that "support for the application was gathered using threats, intimidation or coercion," another employee undertook to have a second document signed by employees, which was posted again on the bulletin board. Each document said that the signor was "not coerced, threatened or intimidated by management and/or Valerie Jones," the decision was made of her "own free will and not influenced by management" and the signor was in agreement with rescission for her "own personal decisions or beliefs." These documents were to be placed in a mailbox that normally was kept in the manager's office but, for this purpose, was moved into the hallway. The Applicant brought the signed documents to file in evidence.

[14] The Union objected to the admission of these documents on the basis that they were signed after the application was filed. The Board was also concerned that their admission would affect the confidentiality of the employees' wishes in this matter. The Union clarified that it was not alleging that the Applicant used coercion, threats or intimidation or any other improper methods to obtain the signatures on the original support documents. As there was therefore no need for the Applicant to disprove these allegations, the Board did not allow the signed documents to be filed as evidence.

[15] The Applicant is on the Union's bargaining committee, along with two other employees. She frankly testified that she has not ever wanted the Union in her workplace and does not want a collective bargaining agreement. When questioned why she was on the bargaining committee with this attitude, her answer was that her co-workers had voted her onto the committee so she is complying with their wishes. She has always done volunteer work and that is why she agreed to be on the bargaining committee. Bargaining has been happening since the beginning of 2007. Ms. Haupstein originally negotiated on behalf of the Employer and,

while the Applicant would not admit that Ms. Haupstein was hostile, she did say that Ms. Haupstein was not cordial. The Applicant agreed that Ms. Haupstein may have accused Mr. Eyre of lying with respect to some dates in a letter to the Board. The Applicant felt that Ms. Haupstein was acting out of concern for her employees in opposing the Union. Negotiations were less antagonistic when the Employer's spokesperson changed to a Mr. Chartrand and Ms. Haupstein was no longer at the bargaining table. This happened in April 2007.

[16] The Applicant gave seven reasons why the certification Order should be rescinded in her application. She testified that some of these reasons were personal to her and others were opinions also held by her co-workers.

[17] Essentially, several of the Applicant's reasons were that "highly favourable terms and conditions of employment" existed before the Union became the bargaining agent and there was no improvement in those conditions that could be attributed to the Union. The Employer had given employees a $l.00 per hour wage increase before they were unionized and recently gave them another raise despite the fact that there is no collective agreement. The Applicant refused to give the Union any credit for ensuring that the second raise was given to everyone. She said that the employees usually got what they asked for before they were unionized. Therefore, there was no improvement with union representation and no reason to pay union dues.

[18] Several of the Applicant's other reasons revolve around the proposed collective agreement. Many terms have been agreed upon as a result of the involvement of the Board agent but there has not been any agreement on monetary issues. The Applicant also has examined the collective agreement at a personal care home in Ponteix, as it provides some information on what was bargained by a different union in a privately owned personal care home, and has examined other collective agreements on the Internet. The Applicant thinks that the proposed collective agreement is not any better than a combination of *The Labour Standards Act*, R.S.S. 1978, c. L-1 and the Employer's existing policies and procedures and it therefore will not improve working conditions and may even harm them.

[19] The Applicant was confronted in cross-examination with numerous examples of agreed upon terms that were improvements, i.e. access to a grievance and arbitration procedure, union assistance with problems, a prohibition against management doing bargaining

unit work, restrictions on discipline, filling vacant positions by seniority and internal applicants, five weeks of vacation leave after twenty years. The Ponteix agreement has paid sick and compassionate leave. The Applicant's response was either that the Employer would do this anyway because it made sense (especially with the current labour shortage) or that employees did not care if they had that benefit. One benefit that the employees did care about was a pension but the Union's bargaining committee dropped that proposal albeit with the Applicant's agreement. Essentially, neither she nor her supporters think that what has been agreed upon in bargaining is an overall benefit to them.

[20] The Applicant's final reason is that she feels there has been a deterioration in the morale and workplace environment due to disagreements about the Union. She gave the example of two employees who she said quit because they were tired of the Union's supporters complaining about management.

[21] In cross-examination, the Applicant was questioned as to why she and her sister, who was the other housekeeper, and a third employee were given the day off for the hearing without finding a replacement to work for them, which is the Employer's policy. Her answer was that it was not favouritism but because the nature of their jobs was such that they could remain undone for a day. In fact, on long weekends, their jobs go undone for three days which was the same length of time taken up by the hearing and the subsequent weekend.

[22] The Applicant asserted that she brought the application of her own free will, that she was neither assisted nor intimidated by the Employer, that she was not being influenced or interfered with by the Employer and that she did not know the Employer's lawyer.

Union's Evidence

[23] Mr. Eyre testified again as the first witness called by the Union. As at the date of the hearing, he had been working with the Union for approximately 18 months and was assigned to this bargaining unit in September 2006 at approximately the same time as the first application for rescission (which was dismissed in November 2006) was made. The status of this file when Mr. Eyre took it on was that it had been assigned to three or four different agreement administration advisors and there had been no bargaining done for a first collective agreement.

[24] Mr. Eyre reviewed the proposals package, added and subtracted proposals from it and had the bargaining unit members revote on it. There was an adequate but "not great" turnout at the revote meeting. Mr. Eyre then tried to obtain dates for bargaining.

[25] The Union's bargaining committee consists of Mr. Eyre, the Applicant, Donna McGillicky and Lori Glowatski. Ms. McGillicky and Ms. Glowatski replaced two employees who left the workplace in the fall of 2006.

[26] The first date agreed upon for bargaining was December 20, 2006. The members of the bargaining committee were not allowed time off from work because they could not find replacements so close to Christmas and the Employer would not change its rule that an employee must replace herself if she wants time off work. Therefore, no meeting occurred on that date.

[27] The Union and Employer met on January 5 and 8, 2007 and the Union presented its proposals. These meetings were with both Ms. Haupstein and Mr. Chartrand who were upset because the Union did not present a specific wage proposal; it just asked for a substantial wage increase. The Union did provide a specific wage proposal by the end of January 8, 2007.

[28] The next bargaining dates were for the end of January, but the Ms Haupstein had to cancel them. She had previously advised the Union, and, in fact, was unavailable for February and March but the Union still offered bargaining dates in those months. The Union then requested a conciliator from the Department of Labour and one was appointed. The Employer refused the assistance of the conciliator.

[29] The next dates agreed upon for meetings were in April 2007 which is also when the Union applied for first collective agreement assistance from the Board. The Board agent was appointed and bargaining occurred with her assistance in April, May, June, July and September 2007. Ms. Haupstein has not been at the bargaining table since the Board agent was appointed. All but five items have been agreed to and the Board agent is currently preparing a report for the Board. The five outstanding items are the term of the agreement, the wage rate, bereavement pay, paid sick days and a night shift premium. The Employer has made no proposal whatsoever with respect to any monetary issues, although the Union has amended its monetary proposals several times.

[30] Mr. Eyre said that, when Ms. Haupstein was at the bargaining table, she berated him that the Union's organizer bullied people into supporting the Union, called him a liar about some dates in a letter he wrote to the Board and talked about the rescission application, implying that if there was another application hearing the Employer would attend it. Bargaining was more respectful when Mr. Chartrand was the only representative of the Employer.

[31] In commenting on the Applicant's reasons for the application for rescission, Mr. Eyre pointed out that the value of the Union flows from a collective agreement. The parties are close to obtaining one and the Union's members should then see the value of the Union.

[32] With respect to the content of the proposed collective agreement, Mr. Eyre feels that there are many improvements over existing terms and conditions of employment. There are improvements such as the ability to access the Union's assistance in cases of discipline, a good grievance procedure, the requirement of just cause for discipline and the ability to purge a personnel file of discipline after a period of time. It was an improvement to use seniority to bid on positions, with facility first preference. The Union and Employer had agreed to novel language to fill vacant positions that met both sides' needs. There was the ability to access the Union's long term disability plan and the right to return to one's position after an absence due to disability. Schedules were to be posted in advance and there was minimum shift language. Employees retained the ability to trade shifts. There was standard overtime language. Employees had the right to bump if laid off. They obtained five weeks of vacation leave after twenty years and the right to rotate summer vacations.

[33] The wages of the employees were all different and this was one of the reasons that there was initial support for the Union. They have now been standardized and the collective agreement should provide for foreseeable raises, instead of individualized raises at the whim of the Employer.

[34] Mr. Eyre agreed that the Union was responsible for the slow start in bargaining but now says that it is the Employer who is causing the delay because of its refusal to make monetary proposals.

[35] Finally, Mr. Eyre attributes the morale problems to the Applicant and others who never wanted a Union and feels that they are doing whatever is necessary to make sure that the Union never succeeds in this facility. However, Mr. Eyre also admitted that he had no first hand knowledge of what was happening at the workplace and agreed that a lack of wage increases can negatively affect morale.

[36] Mr. Eyre said that a pension was an original proposal, along with other benefits, and he thought that this was more than the employees would achieve. It was the committee, by consensus, that decided to focus on the benefit of paid sick pay, at the expense of a pension.

[37] Mr. Eyre said that he has made this bargaining unit one of his priorities. He has never refused an offered bargaining date. He has had one or two meetings with the membership and a third bargaining update should be going to them soon.

[38] Under cross-examination by the Employer's counsel, Mr. Eyre agreed that the employees had the right to decide by majority to have a union and, also, to not have a union. He also agreed that the Employer was hard bargaining and it was permissible for it to do this. Mr. Eyre said that the Union's response was the request for first collective agreement assistance from the Board.

[39] The second witness called by the Union was Ms. McGillicky. She has worked for the Employer for over five years as a personal care aide and has been a member of the bargaining committee since January 2007. She confirmed that the first two days of bargaining, when Ms. Haupstein was present, were heated but the rest of the meetings have been very good and very cordial. During the first two days, the disagreements were between Mr. Eyre and Ms. Haupstein, instigated by Ms. Haupstein. Ms. Haupstein was concerned about wages, had opinions about how the Union organized the workplace and did not sound happy that there was a Union, although she never made any specific statements to this effect.

[40] Ms. McGillicky said that she was questioned by the manager as to whether she had used the photocopier and fax machine for union business. She said no (she had copied the application for rescission document for her personal use). The manager later apologized for making the accusation.

[41] Ms. McGillicky did not think that morale at the workplace had declined. She did think that the employees had initially been in favour of having a union, with the exception of the Applicant and a few others. Now, Ms. McGillicky thinks that there is less support for the Union and she does not know why.

[42] Ms. McGillicky was asked if she was being treated any differently because she is on the bargaining team. The difference that she has noticed is that she is now hearing much more about how much everything costs and she feels this is to reinforce the Employer's lack of any monetary offer at bargaining. She confirmed that it was a consensus decision of the bargaining committee to drop the proposal for a pension and concentrate instead on obtaining paid sick leave and bereavement leave and a night shift premium.

[43] Ms. McGillicky was not asked to sign a document in support of the application for rescission and confirmed that it was the Applicant who was leading the movement for rescission.

[44] At work, after she saw the application for rescission on the bulletin board, Ms. McGillicky asked some co-workers what would happen if the rescission application succeeds and the Employer decides to roll back wages. The response was "that won't happen." The next time she was at work, there was a notice on the bulletin board from the Applicant saying that, if anyone had any questions about this, they should talk to management and that Ms. Haupstein had given them the recent raise, not the Union.

[45] Ms. McGillicky would prefer to have a union because the employees need the structure, the protection of job security and the benefits, which may retain staff, who are sometimes lost to unionized facilities that pay more and have better benefits. She admitted that some staff from unionized facilities left and now work for the Employer.

Relevant statutory provisions:

[46] Sections 5(k) and 9 of the *Act* read:

> *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:*

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

Arguments:

Applicant's Arguments

[47] The Applicant says that she is representing the employees without any assistance or interference from the Employer. Her reason for doing this is that she believes it is in the best interest of her fellow employees. She also relies on the evidence of majority support for the rescission of the certification Order filed with the application.

Union's Arguments

[48] The Union asks the Board to dismiss the application because it is being made as a result of employer interference, in the form of an unconscious intent of this Employer to set up an atmosphere that will encourage a rescission application. The Applicant witnessed the behaviour of Ms. Haupstein at the bargaining table and could tell that Ms. Haupstein was not happy with having a unionized workplace. This behaviour planted the seed that Ms. Haupstein would welcome a rescission application and this led to the Applicant's decision to make the application.

[49] In addition, the Union believes that the reasons that the Applicant wants the certification Order rescinded are incredible and false. The only other collective agreement that was used for a comparison was the Ponteix agreement, which relates to a smaller facility. The Ponteix facility has lower wages than the Employer but they have sick pay and bereavement

pay, so it is wrong to say that its conditions of employment are worse than the Employer's. It is wrong that there were "highly favourable conditions" without the assistance of the Union, because the even application of the most recent wage raise was a result of collective bargaining.

[50] It is regrettable that there is no collective agreement two years after certification but bargaining is a two way street and all of the delay once bargaining started in earnest is due to the Employer's intransigence. Agreements that have been made only happened after Ms. Haupstein left the bargaining table.

[51] The Union also alleges that favouritism is being shown to those in favour of rescission, in the form of the Employer's tacit approval of the use of the mailbox and its questioning of Ms. McGillicky's use of the photocopier and fax machine. This is intimidation, coercion and interference because it shows that the Employer supports the making of the application and the obtaining of the evidence in support of it. The Board should also infer this from the Applicant's notice that any questions about wage rollbacks should be discussed with management.

[52] The Union also argued that the Applicant, who has always been open and honest about not wanting a collective agreement, was using her position on the bargaining committee to frustrate the process so that she could get majority support for her point of view.

[53] The Union filed the Board's Reasons for Decision from the earlier application for rescission, *supra,* to support its request that, if the Board does not dismiss the present application, it should only order a vote 180 days after a first collective agreement is concluded. The Union also relied on *Walters v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Dimension 3 Hospitality Corporation*, [2005] Sask. L.R.B.R. 139, LRB File No. 238-04 for the proposition that, even if there is no direct evidence of Employer interference, the Board can still examine the Applicant's reasons to see if they are credible and plausible to make an inference of employer interference. The Union also referred the Board to *Swan v. Canadian Union of Public Employees, Local 1975 and Treats at the University of Saskatchewan*, [2000] Sask. L.R.B.R. 448, LRB File No. 258-99, *Mayer v. United Food and Commercial Workers, Local 1400 and L.L. Lawson Enterprises Ltd. et al*, [2001] Sask. L.R.B.R. 485, LRB File No. 013-01 and *Evans v. National Automobile, Aerospace, Transportation and*

General Workers Union of Canada (CAW-Canada) and Saskatchewan Indian Gaming Authority Inc., [2002] Sask. L.R.B.R. 313, LRB File No. 258-00.

Employer's Arguments

[54] The Employer argued that the evidence is clear that the Applicant is unhappy with the Union and this is the motivation for the application. This has nothing to do with the Employer. There is no evidence of employer interference, intimidation or influence. The Applicant made the application on her own with assistance from the Board and no help from the Employer. It is clear that the employees are unhappy with the Union and have lost confidence in the Union. The events after the date of the application cannot be used as evidence of employer influence in the *making* of the application because they clearly happened after the application was filed with the support documents from the employees.

Applicant's Arguments in Rebuttal

[55] The Applicant said that no one ever told her that she could or should resign from the bargaining committee because of her attitude.

Union's Arguments in Rebuttal

[56] The Union clarified that it was asking the Board to infer from the events that happened after the filing of the application that the Board should not order a vote because the workplace is tainted with the favouritism that has been shown those who support rescission.

Analysis:

[57] The first task for the Board, as directed by s. 9 of the *Act*, is to determine if it is satisfied 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 its agent.

[58] There is no evidence, nor is it argued, that the application was made on the advice of the Employer or its agent. The advice that the Applicant received in this matter came from the staff and website of the Board. She had her previous experience with making the same application a year earlier and the benefit of the reasons why the Board dismissed that application to ensure that she did not make the same mistakes this time. She had the assistance of a local

lawyer in preparing the reasons listed in her application but there is no indication that that lawyer had any connection with the Employer.

[59] There is no inference of employer influence, interference or intimidation that can be made from the Applicant's method of obtaining support for the rescission application. The Union admitted that the Applicant did not do anything improper. The method that the Applicant used to gather signatures was neutral. If asked, she gave her own opinions but did not pressure anyone. The fact that she posted a notice to contact management if the employees had any questions about a potential wage rollback is not enough to establish a connection between the Applicant and the Employer sufficient to imply that her supporters signed with less than their free will.

[60] In determining whether or not there has been influence, interference or intimidation by the Employer, the Board is mindful that it must consider not only direct evidence but also indirect evidence from which it could infer influence, interference or intimidation by the Employer or its agent. In *Nadon v. United Steelworkers of America and X-Potential Products Inc.*, [2003] Sask. L.R.B.R. 383, LRB File No. 076-03, upheld at (2004) 244 Sask. R. 255 (Sask. Q.B.), the Board stated at 386 and 387:

> *[17] 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. [cite omitted]*
>
> *[18] 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.*

[61] In *Swan, supra, at 455, the Board said:*

> *[22] Employer influence is rarely overt. It is not something that is trumpeted about, but rather, is most often exercised indirectly, obliquely or by inference; it may result from the creation of an atmosphere of tension, fear, frustration, or disillusionment for which the employer has*

> *been responsible…Nonetheless it may be as effective as an express direction.*
>
> *[23] In Loraas Disposal Services Ltd. [cite omitted], the Board accepted the following definition of "influence" as used in s. 9 of the Act:*
>
> > *The act or power of producing an effect without apparent exertion of force or direct exercise of command; the power or capacity of causing an effect in indirect and intangible ways.*

[62] What the Board must examine is whether any influence, interference or intimidation is of such a kind that it "compromises the employees' ability to make an informed, reasoned decision [so] that their basic right to decide should be removed by the Board." (*Mayer, supra* at 485, quoting from *Schan v. Little Borland Ltd. and United Brotherhood of Carpenters and Joiners of America*, [1986] Feb. Sask. Labour Rep. 55, LRB File Nos. 221-85 & 227-85.)

[63] It was clear to the Board that the Applicant was motivated by her own desire to not have the Union represent the employees at the workplace. She was against the original certification application and this is her second attempt to have the certification Order rescinded.

[64] The Applicant had contact with Ms. Haupstein when bargaining started on January 5 and 8, 2007 and on several dates in April 2007 and it would be clear to her that Ms. Haupstein was against the Union. However, there is no evidence that Ms. Haupstein made any overt remarks to influence, interfere with or intimidate the Applicant with respect to the application for rescission. Ms. Haupstein's "less than cordial" behaviour toward the Union does not appear to be what influenced the Applicant in her anti-union attitude; the Applicant had that attitude and had made the first rescission application before any bargaining meetings occurred with Ms. Haupstein.

[65] Ms. Haupstein's behaviour was limited to the bargaining table and therefore was only witnessed by the four members of the Union's bargaining committee. The other employees in the bargaining unit may have been aware of her remarks and would certainly know that she had not agreed yet to a first collective agreement. The Board has found in the past that it is possible for an employer to influence employees in a newly certified bargaining unit to support an application for rescission because the bargaining agent has not yet had an opportunity to show its ability to adequately represent the employees and obtain a first collective agreement. (See,

for example, *Schaeffer v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Loraas Disposal Services Ltd.*, [1998] Sask. L.R.B.R. 573, LRB File No. 019-98.) However, in *Schaeffer* the employer's conduct was described at 592 as being:

> *. . . more serious and of a nature that has created an atmosphere of extreme insecurity among the employees and has driven a wedge between the employees who were unlawfully terminated and those who remain.*

[66] In *Schaeffer, supra, e*mployees had been fired as the employer unilaterally closed parts of its operation. There were at least two unfair labour practice applications and a finding that the employer was guilty of bargaining in bad faith. There was no first collective agreement because of the employer's illegal actions. There was a connection between the applicants and the employer so that there was a real fear that employees who did not support the rescission application would be reported to the employer.

[67] In this case, the Employer's conduct at bargaining does not approach the level of employer behaviour found in *Schaeffer*, *supra*. Once the Union contacted the Employer to commence bargaining, the Employer responded with meeting dates and, while Ms. Haupstein seemed more of a hindrance than a help in reaching a first collective agreement, she eventually did remove herself from the bargaining table. The Union's bargaining committee was able to reach agreement on most terms with Mr. Chartrand and the assistance of the Board agent. While the Employer has not been forthcoming with monetary proposals, this is more in the nature of hard bargaining than an illegal act. The Board does not find that any of the Employer's bargaining conduct is of a nature that would influence, interfere with or intimidate the Applicant and other employees into supporting the application for rescission. There was also no evidence that the Applicant was playing any part in delaying or frustrating the negotiating process.

[68] In addition, the Board has in the past inferred employer influence, interference or intimidation when the reasons given for the rescission application have not been plausible or credible. In *Walters*, *supra,* the Board stated at 167 and 168:

> *[84] The Board has determined that there is no direct evidence of employer involvement, influence or intimidation with this application. The Board must determine, however, whether there is evidence from which it can draw an inference that the Employer has been involved with the application or has interfered with or intimidated or influenced the*

application being made to an extend that the true wishes of the employees cannot be determined by a vote.

[85] In order to determine whether there is such employer involvement, the Board has typically examined a number of circumstances, the significance or importance of which will vary from case to case. One of the factors which is often examined and bears relevance to this case is the applicant's reasons for bringing the application. When those reasons are not plausible or credible, the Board may also go on to examine other suspicious or unusual circumstances including, but not limited to, the circumstances surrounding the applicant's hiring, aspects of the application's relationship with the employer, the timing of the application and how the application was financed. Once the Board has examined the whole of the circumstances it can determine whether it will draw an inference that the employer has intimidated, interfered with or influenced the bringing of the application.

[69] And in *Swan, supra,* the Board said at 458:

[31] The plausibility of an applicant's reasons for applying for rescission of a certification order – that is, the credibility of the rationale – and the bona fides of the applicant's motivation for so doing, are matters for us to consider on an application for rescission.
. . .

[33] However, in Gabriel v. Saskatchewan Science Centre and United Food and Commercial Workers, Local 1400, [cite omitted], the Board emphasized that there are limits to its scrutiny of those reasons:

> *The Board has observed, however, that the requirement of a "credible rationale" does not mean that the Board should scrutinize the reasons given by employees for supporting an application for rescission to determine whether they are well-founded or articulated in a sophisticated way. In the Remai Investment Corporation decision, supra, the Board made this comment, at 198:*
>
> > *In this case, Ms. Wells herself put forward a variety of reasons why she and other employees wished to disengage themselves from a collective bargaining relationship. It is not necessary, in our view, that an applicant demonstrate that their views of the Union were completely accurate or fair, but that they had given the matter sufficient thought that we could be confident that they came up with the idea themselves. Though it was not possible to form a view concerning the motives of the other*

> *employees, who, along with Ms. Wells, spearheaded the campaign to gather support for the application, we are prepared to accept that the applicants advanced a "credible rationale" for the application.*
>
> *[34] Thus, the notion of a "credible rationale" for the application is directly linked to the independence of the applicant from the employer.*
> *. . .*

[70] The Applicant's view that she had "highly favourable terms and conditions of employment" before the arrival of the Union, that no improvements have occurred due to the Union and, therefore, there is no value for her union dues, may be naïve, incorrect and even selfish. However, the Board believes that this view comes from her personal and first hand observations and forms a credible rationale for the application.

[71] The Applicant is in a position to be knowledgeable about the possible terms and conditions of the collective bargaining agreement being bargained by the Union. She knows what has already been agreed upon with the Employer and what will not be pursued by the Union in the first agreement. She testified that she was interested in obtaining the benefit of a pension and not interested in other benefits. She was part of the bargaining committee that decided to pursue benefits other than the pension but it is still plausible to the Board that she could hold the opinion that the other benefits are not what she and the other employees really care about.

[72] Despite the obvious fact that the Employer has already agreed to many terms that are improvements on *The Labour Standards Act* and the Employer's policies, these are mainly terms that the Union would think are of great advantage because of its experience with other workplaces and its goal of ensuring that all members of the bargaining unit are treated equally. It is still credible that the Applicant and her supporters do not care about these kinds of benefits if they do not anticipate needing them, i.e. paid sick and compassionate leave, a grievance procedure and even union assistance with difficulties.

[73] The Board therefore does not find that the reasons given for the application for rescission are implausible or irrational to the extent that an inference should be drawn that the application is being made with interference, influence or intimidation by the Employer.

[74] Finally, the only other incidents argued by the Union to indirectly establish employer interference, influence or intimidation because of favourable treatment occurred after the rescission application was filed with evidence of employee support. The Employer's tacit approval of the use and removal of the mailbox from the manager's office for the second document to be signed by supporters was not that significant. Further, it also shows an attempt to avoid any employer influence, intimidation or interference which could have been alleged if the mailbox had remained in the manager's office. The fact that Ms. McGillicky was questioned about using the photocopier or fax for union business is also not that significant when no discipline was threatened and an apology was given for the false accusation. There were understandable reasons given as to why the bargaining committee (including the Applicant) could not get the day off to bargain on December 20, 2006 but why the Applicant and others could have the day off to attend the hearing of the application.

[75] In conclusion, the Board is not satisfied that the application has been 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.

[76] In determining what order to make, the Board has had regard to the discussion of the impact that an application for first collective agreement assistance has on an application for rescission as discussed in *Mayer, supra,* at 501 through 509. The Board adopts the following position as enunciated in *Mayer* at 501 and 502:

> *[47] In 1995, in Choponis v. Madison Development Group, supra, the Board considered an application for rescission while an application for first contract assistance was pending before the Board. In determining to suspend the conduct of a vote until after the first contract application was disposed of, the Board commented, at 517 and 518:*
>
> > *The interrelated nature of all of these proceedings creates something of a dilemma for the Board in determining what is the best way of ensuring that the improper conduct of the Employer is not a factor which affect [sic] the outcome of any expression of employee wishes with respect to continued representation by the Union.*
> >
> > *On the one hand, we are satisfied that the application for rescission as such was not encouraged or influenced by the Employer. On the other, to the extent that the Employer has had a hand in frustrating the process for reaching a collective agreement, and to the extent that this had added to the*

> *discontent of the employees, we are of the view that the absence of a collective agreement should not be a factor in an expression of employee opinion.*
>
> *In order to counteract the possibility that the absence of a collective agreement might be a factor in the outcome of a vote, we have decided to suspend the holding of a vote until such time as the application for first contract arbitration has been disposed of, and until the Union has had a reasonable opportunity to present the resulting agreement to the employees in the bargaining unit.*

[77] An Order will issue that a vote on the rescission application will be conducted in the usual manner. The vote shall not be conducted until at least 180 days after the implementation of the terms of a first collective agreement. If the parties are unable to agree on the voters' list, any party may apply to the Board to fix same.

DATED at Saskatoon, Saskatchewan, this ____ day of October, 2007.

LABOUR RELATIONS BOARD

_____

Catherine Zuck, Q.C.,
Vice-Chairperson