Labour Relations Board
Saskatchewan

HEIDI ANNE KARLONAS, Employee, Regina, Applicant v. SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Respondent and STARBUCKS COFFEE CANADA, INC., Employer

LRB File No. 169-06; October 31, 2008
Chairperson, James Seibel; Members: Ken Ahl and John McCormick

The Applicant,	Heidi Anne Karlonas
For the Certified Union:	Larry Kowalchuk
For the Employer:	Eileen Libby

Decertification – Interference – No evidence that employer tacitly supported or encouraged applicant's rescission campaign – Applicant is not agent of employer or identified as manager by employees such that evidence of support tainted – Events and circumstances noted by union not significant enough to compromise ability of employees to decide representation issue through Board supervised vote – Parties in negotiations for first collective agreement – Board orders supervised vote no less than 180 days after first collective agreement obtained.

Decertification – Practice and procedure – 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] Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Union") is designated as the certified bargaining agent for a unit of all employees (excepting managers and assistant managers) of Starbucks Coffee Canada, Inc. in the City of Regina (the "Employer") by a certification Order dated January 18, 2006.

[2] On November 22, 2006, Heidi Anne Karlonas (the "Applicant"), a member of the bargaining unit, applied to rescind the certification Order. At the time the

application was filed, the parties were in the negotiations for a first collective agreement. The application was filed during the open period pursuant to Section 5(k)(ii) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act* "). The Union replied 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, and requested that the Board exercise its discretion and dismiss the application pursuant to s. 9 of the *Act.*

[3] The Statement of Employment filed by the Employer lists 22 employees in the bargaining unit.

[4] The present application was heard after the hearing, but before decision, of an application by the Union alleging the Employer committed an unfair labour practice by allegedly discriminating against the Union's members at the Regina location by restricting their transfer to other locations within the Employer's organization. In Reasons for Decision on LRB File No. 138-06 (not yet reported), the Board found the Employer guilty of the unfair labour practice and issued a cease and desist order.

[5] The crux of the basis for the Union's allegations of Employer influence in the present case includes reliance on that unfair labour practice (at that time, allegation) and are summarized from its reply to the application as follows:

> **(a)** *the Employer does not support unionization;*
>
> **(b)** *at the time of certification, on an interim application in a prior unfair labour practice application, the Board reinstated the Union's key organizer who was fired by the Employer during the certification drive;*
>
> **(c)** *the Employer has a policy that discriminates against unionized workers with respect to transfers to stores other than those whose employees are in the same bargaining unit;*[1]
>
> **(d)** *employee support for the rescission application was garnered during such employees' work hours;*

[1] The practical effect on employees at the Employer's Regina location was that they could not apply to transfer anywhere else.

(e) *materials intended to garner support were placed in employees' mailboxes at the workplace;*

(f) *employees were told by organizers of the rescission campaign that they would not lose* benefits if they decertified.

Evidence:

[6] The Applicant commenced work with the Employer in November, 2004. She works between five and fifteen hours per week. She testified that in her opinion unionization was not necessary because the employees had good benefits, working conditions and competitive wages. She was approached by another employee who told her they did not want the Union. She learned of the statutory open period for making a rescission application from this employees, whom she believed got the information from the internet. She also spoke to the shop steward of the Union at her other job. She also contacted the Board for information and forms. She said that she and another employee, Jenna Hitchcock, an in-scope shift supervisor, garnered support for the application from other employees during off hours and breaks. She said they contacted all of the employees for their views to ensure that they were fair.

[7] The Applicant admitted that she obtained the names and contact information of employees from the staff list in the back room, which she photocopied at work. The list is used, *inter alia*, by employees so they can contact colleagues to trade shifts or fill in. She was adamant that she did not talk to any of the employees while they were working because the Employer had made it clear that there was to be no discussion of the Union during work time. She prepared the support cards at home. She agreed that management likely knew that she did not feel that the Union was appropriate for the workplace, and probably knew that she was talking to other employees about certification, but she did not tell anyone in management directly.

[8] With respect to the assertion that she used the employees' mailboxes at work to distribute material related to the application, the Applicant testified that she had left some material in one employee's mailbox at that employee's request.

[9] In relation to the matter in issue in the unfair labour practice in LRB File No. 138-06 (see, *supra*), the Applicant testified that no employees had complained to her

or said they were upset at the (then) alleged loss of transfer rights. Indeed, she said she was not aware of that application until after she had filed the present application.

[10] Trevor Holloway was called to testify on behalf of the Union. He was the Union's key organizer during the certification campaign. The Board reinstated him on an interim application made in a prior unfair labour practice application by the Union. His evidence largely surrounded his contact with the Applicant and her co-organizer, and was mostly neutral. He did testify that at least one employee approached him with a concern regarding the transfer issue, and expressed some anger with the Union about the restriction.

[11] Jenna Hitchcock is a fellow employee who assisted the Applicant with the present application. She testified that she did not attempt to garner the support of any of the employees while they were working. With respect to the Employer's policy on transfers, she said that while the employees were "talking about it in a bad way, they already didn't want the union." She testified that she did not speak to anyone in management about the rescission application. She said that while there were rumours that the Employer was not opening any more stores in Regina because of the certification of this location, no one knew this for sure, and two licensed user outlets had been opened since.

[12] Steve Gialleonardo is the Regina Store Manager. He testified that he only knew that the Applicant and Ms. Hitchcock were working on a decertification application because of rumour in the workplace. Although he said Ms. Karlonas once told him that she wanted to get rid of the Union, he responded that he could not speak to her about it. He testified that he did not know that she and Ms. Hitchcock were meeting with employees on the premises regarding the issue. He said that while employees are not specifically authorized to use the store photocopy machine, he knows that they do use it to copy the schedule and the employee phone list so they can arrange their work times, and he has no problem with that. He was not aware that the Applicant had used it for the purposes of making the present application. While he was aware of the "open period" for applying for rescission from his district manager, he was not told to monitor it – it was made clear to him during his management training that he was never to talk about union matters with employees. Also, Mr. Gialleonardo admitted that only part-time

employees that work a certain minimum number of hours are entitled to receive benefits; he did not know how many of the employees received them.

Statutory Provisions:

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

> *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.*
>
> . . .
>
> *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:

[14] The Applicant submitted that she made the application because she felt that a union was not necessary in this workplace because of the competitive wages and benefits. She also submitted that interference by the Employer was not an issue, and she was not influenced by management in making the application. With respect to garnering support for the application, none of the employees were approached while they were working, and all were allowed to take the support cards home before deciding to sign in private. The only form placed in an employee's mailbox was at that employee's request. She and Ms. Hitchcock approached each of the employees, including Mr. Holloway, because they thought that was fair.

[15] Larry Kowalchuk, counsel on behalf of the Union, argued that management and the employees knew of the rumour that no more stores were being opened in Regina because of the certification of this location, and the municipal geographic nature of the Order. The Employer did nothing to dispel the rumour. Therefore, he submitted, the Board should draw an inference of Employer interference, citing the Board's decision in *Wilson v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Remai Investment Co. Ltd*., [1990] Fall Sask. Labour Rep. 97, LRB File No. 088-90. Counsel also argued that the loss of the right to transfer on unionization of the location was an issue for the employees. These matters taken together would prejudice one's ability to vote freely on the decertification issue.

[16] Citing the decisions of the Board in *Desjarlais v. International Union of Painters and Allied Trades, Local 739 and L.J. Woodley Painting and Decorating Ltd*., [2006] Sask. L.R.B.R. 231, LRB File No. 062-06; and *Walters v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Dimension 3 Hospitality Corporation o/a Days Inn*, [2005] Sask. L.R.B.R. 139, LRB File No. 238-04, counsel argued that the Applicant's alleged reasons for making the application are not credible. Her statement that the Employer provides good benefits for the employees, is belied by the fact that less than one-third of the all-part-time workforce have any benefits.

[17] Eileen Libby, counsel on behalf of the Employer, presented argument only with respect to the issue of alleged Employer interference. She argued that there was no evidence that either the rumour of the moratorium on opening new stores in Regina, or the Employer's policy of restricted transfer for employees of unionized stores, had any effect on a decision by any of the employees to support the application. Even if the Board should find that the Employer committed an unfair labour practice with respect to the latter matter, the decision in *Leavitt v. United Food and Commercial Workers, Local 1400 and Confederation Flag Inn (1989) Ltd.*, [1900] Summer Sask. Labour Rep. 61, LRB File No. 225-89, held that that does not necessarily mean that the employees were subject to interference or coercion. Referring to *Desjarlais*, *supra*, cited by counsel for the Union, Ms. Libby pointed out that, at para. 67, the Board held that some discussion of rescission by employees during their work time without the knowledge of the Employer was not relevant without more. Likewise, the Employer had no knowledge of the use of the employee list and photocopier by the Applicant.

Analysis and Decision:

[18] The issue in the present case is whether the application for rescission 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 an agent of the Employer. Absent such influence, the Applicant has filed evidence that a majority of the employees support the application.

[19] As noted by the Board in *Shuba v. Gunnar Industries Ltd. and International Union of Operating Engineers, Hoisting, Portable and Stationary, Local 870*, [1997] Sask. L.R.B.R. 829, LRB File No. 127-97, at 832, we must balance the democratic right of employees to choose to be represented by a trade union pursuant to s. 3 of the *Act*, against the need to ensure that the employer has not used coercive power to improperly influence the outcome of that choice.

[20] In *Wells v. Remai Investment Corporation and United Food and Commercial Workers, Local 1400*, [1996] Sask. L.R.B.R. 194, LRB File No. 305-95, at 197, the Board observed that it is alert to any sign that an application for decertification 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." However, not every suspicious or questionable act or circumstance will necessarily lead to the conclusion that an application has been made as a result of influence, interference, assistance or intimidation by the Employer. As noted in *Leavitt, supra*, the conduct must be of the nature and magnitude that it compromises the ability of the employees to make the choice protected by s. 3 of the *Act*:

> *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 the 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.*

[21] Of course, as noted in *Poberznek v. United Masonry Construction Ltd. and International Union of Bricklayers and Allied Craftsmen, Local No. 3*, [1984] Oct. Sask. Labour Rep. 35, LRB File No. 245-84, and many other decisions of the Board, evidence of such conduct is rarely direct or overt and the Board will consider whether more "subtle or indirect forms of influence may improperly inject the interests or views of the employer into the decision concerning trade union representation."

[22] In the present case, we are of the opinion that the events and circumstances noted by counsel for the Union, taken together, are not of a nature or significance such that the ability of the employees to decide whether or not they wish to be represented by the Union would be compromised in a vote on the issue supervised by the Board: see, as *Leavitt*, *supra*. Of course, the Board determined in *Retail, Wholesale and Department Store Union v. Starbucks Canada, Inc.*, (LRB File No. 138-06, not yet reported), which was heard, but not decided, immediately prior to the present case, that the Employer had committed an unfair labour practice with respect to the imposition of a purported policy restricting the transfer of employees in unionized stores. However, on the whole of the evidence that we heard in the present case, we cannot conclude that it had any significant influence on the employees with respect to their decision to support the present application such that they cannot make an informed, uncompromised decision on a supervised vote, particularly given the conditions regarding the posting of the reasons and Order in LRB File No. 138-06, and the postponement of the conduct of the vote set out later in these reasons.

[23] With respect to the assertion of the independence of the Applicant's decision and activities in researching and assembling the application for rescission, we accept the evidence of the Applicant that she received no assistance or tacit encouragement from the Employer. The facts of the present case are far removed from those of the decisions cited by counsel for the Union in support of the proposition that the Employer provided passive assistance and access to allow the Applicant to make the application. While the Applicant admitted to using a list of employees with contact information to assist her in garnering support for the application, like any other employee she had legitimate access to the document and information. We also accept the evidence of both the Applicant and Ms. Hitchcock, that they garnered the evidence in support of the application on employee breaks or before the start or after the end of employees' shifts. Unlike the cases cited in support of the argument on behalf of the Union, there was no evidence that the Employer was aware that the Applicant had accessed and used the employee contact information, nor any evidence that the Employer must have known that the Applicant was conducting a campaign to garner support for a rescission application, and provided tacit support and encouragement for the activity. And, unlike the co-applicants in *Rowe v. Canadian Linen and Uniform Service Co. and Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, [2001] Sask. L.R.B.R. 760, LRB File No. 104-01, the Applicant was quite well-informed about the process for the application. She demonstrated that, contrary to the common assertion by Employers and Employers' counsel before the Board that it is not reasonable to expect an employee to initiate a rescission application by him or herself because of the complexity of doing so, an employee may indeed make an application without the "assistance" of the Employer with reasonable diligence and a modicum of initiative.

[24] In all of the circumstances, and as evidence of majority support for the application has been filed in the open period, we order that there shall be a vote with respect to the representation issue. However, there is no first collective agreement in place. The employees have not had the opportunity to experience working with a collective agreement and Union representation under same, and, therefore, their experience of Union representation is far from informed for the purposes of the

representation vote. Accordingly, we further order that such vote shall not be conducted until at least 180 days after the parties have made their first collective agreement.

DATED at Regina, Saskatchewan this **31st** day of **October, 2008.**

LABOUR RELATIONS BOARD

James Seibel,
Chairperson