Labour Relations Board
Saskatchewan

KIM PAPROSKI, Applicant v. INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 739 and JORDAN ASBESTOS REMOVAL LTD., Respondents

LRB File No. 173-06; January 15, 2008
Vice-Chairperson, Angela Zborosky; Members: Leo Lancaster and John McCormick

For the Applicant:	Kim Paproski and Corey Nachtegaele
For the Certified Union:	Bettyann Cox
For the Employer:	No one appearing

Decertification – Interference – Board examines applicant's stated reasons for bringing application – Board's task not to judge whether stated reasons "good" reasons or whether applicant mistaken in opinions or beliefs but to discern whether opinions and beliefs reasonably held by applicant such that they are plausible and credible and represent applicant's true motivation for bringing application – Board dismisses application pursuant to s. 9 of *The Trade Union Act*.

Decertification – Interference – Circumstances surrounding gathering of support and making of application, circumstances of applicant's hiring and applicant's terms and conditions of employment combined with lack of credible rationale for bringing application lead Board to draw inference that employer encouraged or influenced making of application – Board dismisses application pursuant to s. 9 of *The Trade Union Act*.

Decertification – Interference – Apprehension of betrayal – Gathering of support took place during work hours openly in group setting with all affected employees present – Applicant had perceived close relationship with management and received special treatment from employer – Board finds high apprehension of betrayal and dismisses application pursuant to s. 9 of *The Trade Union Act*.

Decertification – Interference – Employees have not had opportunity to work under terms of collective agreement in environment where employer respects relationship employees have with union and honours terms of collective agreement negotiated with union – Employer has not paid proper dues and remittances, has not used union hiring hall and has paid wages to certain employees other that wages provided by collective agreement – Board dismisses application pursuant to s. 9 of *The Trade Union Act.*

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

REASONS FOR DECISION

Background:

[1] Kim Paproski (the "Applicant") applied for rescission of the Order of the Board dated January 9, 1996, designating the International Union of Painters and Allied Trades, Local 739 (the "Union") as the certified bargaining agent for all employees employed by Jordan Asbestos Removal Ltd. (the "Employer") who are "employed in hazardous material abatement." The effective date of the collective agreement in force between the Union and the Employer was January 1, 2005. The application was filed on November 30, 2006, 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. In the application, the Applicant provided a lengthy list of reasons why he brought the application for decertification.

[2] In response to the application, the Employer filed a reply and statement of employment indicating it neither opposed nor supported the application and listing ten individuals in the bargaining unit. The Employer did not appear at the hearing.

[3] In its reply to the application, the Union acknowledged that the effective date of the collective agreement was January 1, 2005. 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 that the application should be dismissed pursuant to s. 9 of the *Act*. The Union stated that it has provided adequate representation to the employees and put in issue the reasons provided by the Applicant for seeking to decertify the Union. The Union also stated that the out-of-scope supervisor of the Employer is a good friend of the Applicant and attended a meeting of employees held for the purposes of discussing the application.

[4] This application was heard on December 18, 2006 and February 20, 2007.

Evidence:

[5] The Applicant testified concerning the reasons why he brought the application on behalf of the employees of the Employer as well as the circumstances of

his employment and the making of the application. The Applicant also called the evidence of a co-worker, Corey Nachtegaele, who assisted the Applicant with the application or, in Mr. Nachtegaele's words, "co-chaired the process." In response, the Union led the evidence of Joseph Simon, its Saskatchewan business representative; Duane Poorman, an employee of the Employer; and John Sedor, the Union's business agent for Saskatchewan and Manitoba.

The Applicant

[6] While little evidence was given concerning the nature of the Employer's business, it is clear that the Employer is engaged in the removal or abatement of asbestos and other hazardous materials, including mold. The Union was first certified to represent employees of the Employer in 1996 and since then the parties have entered into successive collective agreements with the current agreement in effect from January 1, 2005 to December 31, 2007. Jerry Jordan is the owner of the company and Cody Skelicky, the office supervisor, is the only other out-of-scope employee working for the Employer. The Applicant testified that Mr. Skelicky and Mr. Jordan are responsible for hiring employees, while Mr. Skelicky schedules the employees' hours of work.

[7] The Applicant testified concerning his background and how he came to be employed by the Employer. The Applicant commenced his employment in approximately October 2004, having had no prior work experience or training with asbestos or other hazardous material removal. He was employed with Saskatchewan Foster Families for some eleven years prior to becoming employed with the Employer. Just prior to working for the Employer, the Applicant took some courses in first aid, CPR, WHIMIS, transportation of dangerous goods and fire safety. Following his hiring, the Employer provided courses to the Applicant in asbestos awareness, mold and operating a lift. The Applicant also took a safety course through the construction association. The Applicant's starting wage rate was $10.00 per hour and then his wage rate was increased to $12.00 per hour after approximately one month. Thereafter the Applicant's hourly wage rate increased as follows: $14.00, $15.00, $17.00, $19.00 and $22.10 until he reached his current wage rate of $24.00 per hour.

[8] The Applicant acknowledged in cross-examination that, in April or May 2005 after the Applicant had worked for the Employer for approximately seven or eight months, Mr. Skelicky made the Applicant a "lead hand." As such, the Applicant was responsible for on-site supervision of a crew of employees and for completing the necessary paperwork for the job. The number of employees he would supervise on a job would vary and could be as many as 16. When the Applicant first became a lead hand he earned $15.00 or $17.00 per hour, rather than the rate contained in the collective agreement of $22.10 per hour. Upon further questioning by counsel for the Union, the Applicant testified that Mr. Skelicky told him he was to be "in charge, supervising a crew," although the Applicant then acknowledged that that is exactly what a lead hand does. The Applicant stated that he did not question his wage rate even though he was being paid approximately the same as an "asbestos worker 4" and not a lead hand. The Applicant was also asked whether he had the 4000-6000 hours of work to qualify to be paid as an asbestos worker 4, let alone the 6000 hours required to be a lead hand. The Applicant acknowledged that he did not have the hours required by the collective agreement for those wage rates and stated that "Jerry Jordan is very generous and pays all the guys more than what [is contained in the collective agreement]." The Applicant stated that, while he has only told Mr. Nachtegaele his wage rate, many of the employees like to talk about their wage rates and have said they are paid more than the wage scale in the collective agreement. The Applicant also stated that since approximately September 2006 he has been earning more than the lead hand rate in the collective agreement; $24.00 per hour as compared to the collective agreement rate of $22.70. He stated that he did not request the raise – it simply showed up on his pay stub. The Applicant does not know whether he will get the scheduled wage increase of $.60 as he is already making more than the collective agreement rate plus the wage increase. He did not advise the Union that he was making more than provided for in the collective agreement. It is the Applicant's understanding that the other lead hands listed on the statement of employment, Mr. Nachtegaele and Bert Lundie, are paid $23.00 per hour.

[9] The Applicant was questioned on the issue of the fairness of the lead hands having different rates of pay when the collective agreement provides for one set amount for a lead hand. The Applicant stated that he believes Mr. Jordan sets the wages based on knowledge, skills and abilities, although the Applicant acknowledged

that Mr. Lundie, a lead hand who is paid less than the Applicant, has been working in the industry for twenty years. The Applicant also acknowledged that Mr. Poorman, who is not a lead hand but has the required number of hours (6000+) to be a lead hand, has lots of knowledge and experience but the Applicant said that other factors go into the determination of who will be a lead hand, including reliability (i.e. showing up for work, finishing a job, etc.) as well as having a driver's license to drive the crew to a work site (many employees do not have driver's licenses and therefore require a ride).

[10] The Applicant firmly believes that wages are a matter between the employee and the Employer. He stated that, if he was asked by an employee, he would advise how to go about asking Mr. Skelicky or Mr. Jordan for a wage raise or he would sit in on a meeting with them for the purposes of discussing a wage increase. Even though the collective agreement sets employees' wage rates on the basis of hours worked, the Applicant knows that Mr. Jordan pays more than what is contained in the collective agreement and therefore the Applicant has implemented a "tracking system" for the Employer, reporting on employees' attendance and their work in order that the Employer has this information if it is looking at giving the employees wage increases.

[11] The Applicant testified that he has not experienced a lay-off since coming to work for the Employer. He does not refer to himself as a "full-time" employee because the Employer performs its work on a contract basis although he acknowledged that he seldom works less than forty hours per week and that his average number of hours per week over the last year was forty.

[12] The Applicant also testified to a lengthy list of reasons why he brought the application. These reasons are listed in the form of a letter which was attached to the application and which the Applicant also testified was used as the form of support signed by the individual employees supporting the application. It became apparent through the Applicant's cross-examination that the reasons were not all personal to him but represented the concerns of the "collective group," and not necessarily any one particular individual. The Applicant described it as a "joint effort developed through discussions with the employees." It was not clear when the list of reasons was compiled by the Applicant although some of the reasons appear to have been discussed at a meeting at the Employer's shop on November 3, 2006, the details of which meeting will

be set out below. In addition there was little, if any, direct evidence to support the truth of any facts underlying the reasons given, however, we will outline each of the reasons stated in the application and the form letter of support and then any admissible evidence concerning the same.

(i) Training fund has not been realistically implemented, with no notice of training sessions.

[13] As a member of the Union, the Applicant testified that he attended one union meeting in January 2005 at which Terry Parker (the Union's former business representative for Saskatchewan) and Mr. Sedor were present as well as four other employees of the Employer. The Applicant stated that, at this meeting, the $.25 per hour remittance to the Union's training fund by the Employer was discussed. He stated that the employees requested asbestos related training and, at the request of the Union, provided a list of training courses they would like the Union to offer however the Union has not offered such courses. The courses requested included: first aid, asbestos awareness and confined spaces. The Applicant indicated that he feels the bargaining unit's issues are not addressed by the Union and that the Union is a "painter's union" with asbestos workers being an "add-on" group whose issues are put to the end of the list.

(ii) Following the departure of Terry Parker in November 2005, it took eleven months to fill his position and during that time the Regina Union office was vacant. It was difficult to contact the Union because upon trying the Regina office number, the message manager was full, the toll free number for the Winnipeg office did not work, and the employee therefore had to call the Winnipeg office direct at his own expense. Calls there were not returned in a timely fashion if at all.

[14] The Applicant acknowledged that the union representative position was vacant for only six months – from the time Mr. Parker left in November 2005 until the appointment of Mr. Simon in May 2006. The Applicant complained that he was not aware when a replacement was hired and feels the Union should have notified him of that occurrence. In cross-examination he acknowledged having received a union meeting notice for a meeting to be held in June 2006. The notice was entered into evidence and indicated that the topic of the meeting was "New Business Representative/Organizer." The Applicant stated, however, that he likely ignored the

[15] The Applicant had not personally attempted to contact the Union while the union representative position was vacant. His only contact was with respect to a request for medical/dental forms in October 2006 at which time he says that, after playing "phone tag," he and Mr. Simon arranged to meet at the Union's office and Mr. Simon failed to show up for the meeting without explanation. The Applicant left a note under the door for Mr. Simon to mail out the forms to him and Mr. Simon did so.

[16] Although this reason for bringing the application was based primarily on what the Applicant heard other co-workers say, none of whom testified at the hearing, the Applicant feels that the union representative needs to be in the office and returning phone calls. The Applicant stated that he was present on one occasion when a co-worker attempted to contact the Union in approximately April 2006, while the union representative position was vacant. He related that the employee phoned the Regina office number but, because the message manager was full, the employee used the toll free number for the Winnipeg office. After failing to get through using that number, the employee called the Winnipeg direct line at his own cost.

(iii) There is never a guarantee for benefits because the company is contract based and those who have tried to make injury claims were not eligible due to non-consistent working hours.

[17] The Applicant's complaint in this regard centers around the Union's benefit plan, which is administered by a third party on behalf of the Union, and the Applicant's concern that the employees are paying too much in union dues particularly when access to the benefit plan is unreliable. A substantial amount of evidence was led concerning what appears to have given rise to this concern.

[18] The employees are required to pay union dues each month based on a formula of $20.00 per month plus 3% of gross wages. The Applicant testified that, while the Employer remits the 3% on the gross wages earned (including overtime pay and vacation pay) in relation to the asbestos work the employees do, the Employer does not remit 3% on the mold removal work performed by the employees or other personal work

for Mr. Jordan such as helping Mr. Jordan move to a new residence. The Applicant admitted that he has never advised the Union of the Employer's failure to remit dues on all wages earned.

[19] It was the Applicant's understanding that the Employer was also required by the collective agreement to make monthly remittances to the health and welfare benefit plan, which the Applicant believed to be in the range of $112 –118 per month per employee. If an employee has a shortfall in hours worked in a month (and in turn a shortfall of the Employer's premium remittances), the employee may draw on an "hour bank,"[1] if he has hours banked, to continue to be eligible for benefits. If the hour bank is depleted, the employee is sent a notice by the third party insurer to pay the monthly benefit plan premium, an amount which the Applicant says was more for him than it was if the Employer had paid it. If the employee does not pay the premium, he will have no coverage and therefore no access to benefits. As a number of the employees perform mold removal (for which premiums are not remitted and hours are not counted), the Applicant believes this issue affects many individuals. The Applicant stated that this has not been a particular problem for him because he performs only some mold removal. He believes that his hour bank was depleted in November/December 2005 but that, instead of self-paying the benefit premium, he accessed his spouse's benefit plan. While the Applicant believes that mold is a "hazardous waste" covered by the collective agreement, he acknowledged that he never complained to the Union about the failure of the Employer to include in the calculation and payment of the remittances his or others' hours worked with mold. The Applicant acknowledged making $700.00 in claims through the benefit plan in the last year.

[20] The Applicant stated he believes this issue was raised with the Union by another member in January 2005 and that the Union raised this issue with the Employer, but that it had not been resolved after almost a year. At least the Applicant was not aware if it had been resolved, having admitted that he did not follow up on this issue with the Union or attend union meetings to find out if a resolution had been reached. The Applicant was also not aware of whether a grievance had been filed by the Union on the issue. In the Applicant's opinion, the Union should have advised him of the outcome of

[1] The concept of an "hour bank" was explained in the evidence of John Sedor, which follows later in these Reasons for Decision.

its discussions with the Employer by way of correspondence or a newsletter to him and the members.

[21] The Applicant was cross-examined concerning the lack of access to benefits for injury claims as a specific reason for bringing the application. The Applicant stated that this was something other employees talked about but he had no direct knowledge of any such claims being denied and was not aware of anyone having suffered a monetary loss. There was a rumour at the workplace that the family members of a co-worker who had passed away were denied life insurance benefits because of a lack of hours in the employee's hour bank but the Applicant acknowledged that this was a rumour and that he had no knowledge of the circumstances.

[22] The Applicant denied that he had spoken to Mr. Jordan about what would happen with benefit coverage if the Union was decertified but stated that he has looked into alternate benefit plans, including one available through Merit Contractors (available to non-union construction companies), and feels that the employees could do better on their own. He referred to a meeting the employees arranged with Merit in approximately October or November 2004. The Applicant also stated that Blue Cross might be another option for a benefit plan. The Applicant holds a belief that the Employer must, by law, offer a benefit package to its employees if the employees work more than twenty hours per week, although it is not necessarily obligated to pay for it. The Applicant believes that it would be a better deal for the employees if they did not have to pay the 3% monthly union dues. He does not feel he is getting enough "bang for his buck" and feels that he can organize something better for the employees. He stated that, if the Employer does not want to discuss the issue of benefits which is a risk he is willing to take, he is prepared to pay his own premiums for coverage from his savings in dues he would have had to pay to the Union. He stated that he often pays dues in excess of $200 per month (because dues are payable on overtime wages as well), an amount that he feels is excessive.

(iv) The renegotiation process has never been fair to the employees - by not receiving adequate notice, voting has not been democratic.

[23] The Applicant stated that he had no personal knowledge concerning this issue; that other employees told him about it. At the time the last collective agreement

was negotiated, the Applicant was not yet a member of the Union. When it was pointed out to him in cross-examination that the collective agreement requires four months notice of intention to negotiate a renewal collective agreement, the Applicant acknowledged that such notice is fair, if it is followed. At this point in his testimony, the Applicant pointed out an additional reason for his concern that the Union has shown a lack of support and inadequate representation. He referred to an article in the collective agreement that was incomplete and stated that he had pointed this out to the Union a couple of years ago and it still has not been fixed. It is apparent that the article in question, which lists statutory holidays that attract statutory holiday pay, has a line cut off at the bottom of the page (it appears to be a printing or typographical error). The Applicant acknowledged that the missing line has not caused him any problems with receiving proper statutory holiday pay.

(v) The Union has not assigned a shop steward for the past two years so employees have no representative.

[24] The Applicant complained that the Union had not appointed a shop steward as per the collective agreement in the two years that he has worked for the Employer. He felt that the Union's representatives were not really the representatives of the employees because they are not on the job site but work in an office.

(vi) There is no other unionized company in Saskatchewan and therefore there are no benefits in continuing to be in the Union.

[25] This reason was not a personal one to the Applicant; he stated that it was expressed to him by another employee. He testified that he personally is not aware of any other unionized company doing asbestos work and, when it was suggested to him in cross-examination that a company named Fuller Austin was unionized, he had no knowledge of the same. The Applicant stated that he did not see any benefit to "being union" in order to get work in the industry. He stated that, in the past, there was a purpose to "being union" and "that's why the company did unionize because it enabled the company to get government jobs – that was one of the requirements – but reality today is I know who the competition is in Regina, they're not unionized, and they're getting the jobs."

[26] Aside from the reasons stated in the application and referred to above, the Applicant testified further concerning his personal reasons for bringing the application. He testified that this is the first time that he has been in a union and that he was reluctant to join when he became employed with the Employer. In his opinion, the "employees can look after their own needs far better than an outside party can." In cross-examination, he stated that he would be willing to negotiate on behalf of and represent all the employees should the Union be decertified.

[27] As stated, the Applicant testified that he attended only one union meeting which was held in January 2005. He stated that he attended this meeting because he had to sign up to be a member of the Union. The Applicant has otherwise had little contact with the Union. The Applicant acknowledged having received a notice of the Union's annual general meeting but claims that, at the January 2005 meeting he attended, the employees had advised the Union that night and weekend meetings did not work for them because they often worked at that time and that meeting in the afternoons would be more appropriate. The Applicant claimed that he was unaware that the Union holds its regular monthly membership meetings on the third Wednesday of every month.

[28] The Applicant was also cross-examined about the circumstances around the making of the application and his gathering of support for the application. The Applicant stated that there have been discussions about decertification around the workplace ever since he started work there and that he "took it upon himself to put-up or shut-up." He started to work on the application in November 2006 because "of the 30-day time frame on either side of the anniversary date" of the collective agreement. He stated that he phoned the Board to find out about the application and he also consulted with a lawyer in Regina. He decided against using legal counsel after he was advised it would cost about $5000 - $7000.

[29] The Applicant was cross-examined with respect to the commissioner for oaths before whom the Applicant declared the application as the same commissioner was also used by the Employer to declare its reply and statement of employment. The Applicant stated that, although he knew some commissioners who could commission the document, most of them charged a fee for doing so. He therefore consulted what he

referred to as the “construction association” and, after he was advised that an employee there could act as a commissioner for oaths at no cost, the Applicant attended at this office to have them act as his commissioner for the purposes of declaring the application.

[30] The Applicant testified that he held two meetings with the employees for the purposes of discussing the application and gathering support. The first meeting was held on November 3, 2006 in the Employer’s shop at approximately 5:00 p.m. The Applicant brought up the issue of decertification at the end of a meeting that had been set up by management and run by the out-of-scope supervisor, Mr. Skelicky, to discuss a new safety policy. The Applicant testified that he had decided to bring it up then because that was the first opportunity where all the employees were together. He stated that Mr. Skelicky was present for the duration of the meeting even after Mr. Skelicky stated to the group that he probably should not be there for this discussion. The Applicant stated that he told Mr. Skelicky that he could stay although he acknowledged at the hearing that he probably should have had Mr. Skelicky leave. The Applicant stated that Mr. Skelicky had no input into the discussions. The Applicant also stated that Mr. Jordan’s office is located in the shop and that he believed Mr. Jordan was not in there but was not 100% certain.

[31] While there was little evidence of the precise nature of the discussions at this meeting, it is clear that the employees discussed the prospect of a decertification application and discussed at least some of their concerns about the Union. The Applicant denied that he advised employees that Mr. Jordan would contribute to a benefit plan the same amounts he is currently contributing to the Union’s plan, stating that he only told employees he believes Mr. Jordan to be upstanding and could not think of a reason why Mr. Jordan would not make such contributions. He acknowledged that he mentioned Merit Contractors as a possible source of benefits. The Applicant also stated that there was talk of getting a pension plan or RSPs in place if the Union was decertified. The Applicant told the employees that he would check into it with Merit Contractors and that he would talk to Mr. Jordan to see what contributions he would make to the pension plan. The Applicant denied having yet had any discussions with Mr. Jordan concerning this issue.

[32] Also present at the November 3, 2006 meeting were four other employees who were not members of the Union. One of the individuals was a full-time school teacher who works for the Employer on a part-time basis when the Employer is busy (the Applicant did not know why this individual was not a member of the Union). There were also three other non-union individuals present at the meeting who had each been hired in the summer of 2006. The Applicant believed that, because they had worked off and on since the summer, they had not yet completed their probationary period (600 hours of asbestos work) and were therefore not yet required to join the Union.

[33] The second meeting the Applicant held with the employees was on November 29, 2006 at the Seven Oaks Hotel restaurant at lunchtime and lasted approximately two hours. The purpose of the meeting was to talk about what action the employees wanted to take with their concerns. The Applicant testified that he and Mr. Nachtegaele had set up the meeting and phoned the employees (only those belonging to the Union) about one to two days before the meeting. The Applicant indicated that he and Mr. Nachtegaele paid for the employees' lunch and that the employees were promised this if they attended. The Applicant testified that a majority of the employees were not working that day and those that were would not have been paid for the time they spent at the meeting. The Applicant testified that, at the meeting, he stated to the employees numerous times that no one was being forced to support the decertification application. It appears that the support form documents were prepared by the Applicant prior to the meeting because he stated that the employees were asked to sign their support at the meeting. He stated that no one was pressured into signing. The Applicant also testified that they discussed the use of legal counsel and the employees were not prepared to contribute a share of the cost.

[34] The Applicant testified that he and Mr. Skelicky had typed the support document using Mr. Jordan's computer in his office at the shop although they had copies made elsewhere.

[35] The Applicant also testified that it was likely that Mr. Skelicky and Mr. Jordan were aware of the employees' intention to meet on November 29, 2006. The

Applicant testified that the employees were talking about the matter in the shop and on the jobsites in the week before the meeting and therefore “the word probably got out.”

[36] The Applicant was also questioned concerning the explanation he gave to employees about the application and the consequences should the application succeed. The Applicant stated that a number of the employees had input into the letter of support (which was also attached to the application) although it is unclear when that input was obtained, given that the second meeting at the Seven Oaks was when the employees signed the support documents. The Applicant did not explain any of the consequences of decertifying nor did he discuss with the employees any implications of losing the coverage of the collective agreement.

[37] The Applicant denied that he had any contact with representatives of the Employer with respect to the application and said that the Employer had no involvement with the same. He denied that management had been involved in any meetings or discussions with the employees (but for the meeting at which Mr. Skelicky was present as noted above) and that he had always stressed that this was coming from the employees with everyone having a voice.

[38] It was suggested in cross-examination that the Applicant had a prior relationship with Mr. Jordan and/or Mr. Skelicky or that there was too “close” a relationship such that the Board should infer employer influence in relation to the application. The Applicant denied a close relationship with Mr. Jordan or Mr. Skelicky, not socializing with them or any employees outside of work. The Applicant stated that he knew of the owner, Mr. Jordan, through his acquaintance of Mr. Jordan’s father who had lived nearby where the Applicant grew up. The Applicant acknowledged that he had known Mr. Jordan’s current spouse for many years as she had given the Applicant’s daughter piano lessons. The Applicant also acknowledged having been to Mr. Jordan’s house in Lumsden, although the purpose was to help Mr. Jordan move residences over a three-day period in October 2006. The Applicant stated that he and two other employees of the Employer assisted with the move and were paid by the Employer to do so (although he could not recall whether he was paid by the company or Mr. Jordan personally). The Applicant met Mr. Skelicky for the first time upon coming to work for the Employer.

Mr. Nachtegaele

[39] Mr. Nachtegaele testified on behalf of the Applicant. He has worked off and on for the Employer since 1994, his most recent hire date being in January 2006, after two and one half years away from the workplace. He stated that he would come back to work for the Employer when work was available and that in between those times he did various things including working on the rigs, going to school, working as an asbestos consultant and doing carpentry. He stated that he had worked steady with the Employer since his return in January 2006.

[40] Mr. Nachtegaele was required to sign a union membership card on two occasions – once when he first started work in 1994 and again in approximately October 2006. On the latter occasion he says he tried to phone Mr. Simon four times before reaching him and that, when he met with Mr. Simon to sign the union card, he was given a copy of the collective agreement and information about benefits. He stated that Mr. Simon did not advise him of the monthly membership meetings. Mr. Nachtegaele testified that he has never been to a union meeting. He denied receiving notices of union meetings although, when asked if the Union had his address, he said "they do now," presumably as result of his signing of a union membership card in October 2006.

[41] Mr. Nachtegaele testified that he does not feel the Union is taking care of his best interests. He feels that as asbestos workers they are an "add-on" to a painters' union. He stated that he helped the Applicant bring this application because he "got sick of hearing everyone complain." Mr. Nachtegaele stated that he saw no benefit to belonging to the Union and questions how the dues are used. When asked by the Applicant what he hoped to gain out of this process (the decertification application), Mr. Nachtegaele responded that "we were hoping for a win-win situation" – that if the certification order was rescinded the employees could find a way to do things better or, if the order was not rescinded, the employees would "make the Union more accountable." Mr. Nachtegaele stated that the application was their "way of letting everyone know that what's been going on in the past hasn't worked" and that "something has to change." He also added that they really just wanted to implement a better benefit package for the company. Mr. Nachtegaele did not seem concerned about whether the Employer would

negotiate wages and a benefit package with the employees if the Union was decertified, stating that Mr. Jordan has always been fair, that they have to have some faith in him and that he will have their best interests in mind. Mr. Nachtegaele stated that he did not convey this sentiment to the other employees but told them “the employees are all on their own for awhile.”

[42] With respect to the preparation of the application, Mr. Nachtegaele testified that, while there had been rumbling in the shop for some time, he and the Applicant only began discussing the application in October 2006, those discussions taking place over the phone in the evenings and outside of work. Mr. Nachtegaele stated that the Applicant spoke to his crew about the application and Mr. Nachtegaele spoke to his own crew. He insisted that those discussions were not held at work. He acknowledged helping the Applicant type the document (which lists the reasons for decertifying) in Mr. Jordan’s office. Although Mr. Nachtegaele stated that he tried to help the Applicant on an equal basis, it was the Applicant who knew how to make the application. Mr. Nachtegaele denied having had any discussions about the matter with Mr. Jordan or Mr. Skelicky and did not believe they were aware of the plan to bring the application.

[43] Mr. Nachtegaele has not experienced any problems with receiving medical and dental benefits. He relayed only one situation where, many years ago, he inquired about benefits for time off due to an injury and determined that he had no benefits as he was not a member in good standing with the Union at the time. Since then, he has never had a reason to contact the Union. He stated that it was his opinion that mold removal should be covered under the collective agreement although it does not concern him that the hours he has worked removing mold have not counted toward his hour bank or that union dues have not been deducted in relation to that work. This problem only came to his attention when he and the Applicant were preparing the application. He was not aware of any agreement between the Employer and the Union with respect to whether mold is a hazardous material covered by the collective agreement.

[44] At the time of the hearing, Mr. Nachtegaele was working as a lead hand, earning $23.00 per hour. Mr. Nachtegaele testified that his starting wage rate in January

2006 was $19.29 per hour. He also testified concerning the pay raise he received in approximately April or May 2006, four or five months after his return to work with the Employer. At this time, Mr. Jordan and Mr. Skelicky told Mr. Nachtegaele he would be playing a larger role because they knew he was reliable – they were familiar with his work, the fact he has a driver's license and that he is dedicated to his job. As a result of being given this greater responsibility, Mr. Nachtegaele thought it would be appropriate to ask Mr. Jordan and Mr. Skelicky for more money. He was given a raise to $21.00 per hour. In June 2006, he received a wage increase to his current level of $23.00 per hour. At no time did he earn the rate specified for a lead hand in the collective agreement, which was $22.70. Mr. Nachtegaele stated that, when he was first given an increase to $21.00 per hour, he believed he had to prove himself as a capable lead hand yet he agreed that since approximately April or May 2006 he has been performing the duties of a lead hand as specified in the collective agreement and that there is no "qualifying period" provided for in the collective agreement. He acknowledged he probably could have gone to the Union to file a grievance but he is "not a big complainer."

[45] Mr. Nachtegaele stated that he believes that it is acceptable for the lead hands to each earn wages at different rates of pay because the rate depends on different skills: reliability, having a driver's license, the ability to manage a crew and the ability to do paperwork. Mr. Nachtegaele believes that wages should be set on an individual basis and sees nothing wrong with employees directly negotiating their raises with the Employer as he had done so himself. He was not aware that Mr. Lundie was considered a lead hand as indicated on the Employer's statement of employment.

Joe Simon

[46] Joe Simon is the business representative and local organizer for the Union in Saskatchewan. He was hired to this position on May 23, 2006 and, prior to that, did industrial painting out of the Union's hall for 14 –15 years.

[47] Mr. Simon testified that when he took over as business representative he continued to hold regular monthly membership meetings on the third Wednesday of the month commencing in August 2006. He has never seen the Applicant or Mr. Nachtegaele at any of those meetings.

[48] Mr. Simon recalled the instance of the Applicant seeking benefit forms. He stated that he and the Applicant made arrangements for the Applicant to pick up the forms from the office on the day he called when the Applicant was finished work. Mr. Simon stated that he waited in the office until 6:00 p.m. but the Applicant did not show up. Another time was set but it did not work out and when Mr. Simon saw the Applicant's note under the door the next day he called him and then mailed out the forms to him.

[49] The only other contact Mr. Simon had with the Applicant was when he tried to contact the Applicant to have employees sign union membership cards – some were new employees and some were employees whose memberships had gone void. When he was not successful in making arrangements through the Applicant, he contacted Mr. Skelicky, in approximately September or October 2006, and asked him to send certain employees to the Union's office to sign membership cards. One of those employees was Mr. Nachtegaele and this is the only contact Mr. Simon had with him.

[50] Mr. Simon has had some contact with other members of the bargaining unit. An employee, Clifford Wolfe, contacted Mr. Simon on November 27, 2006 to advise that he was being "picked on" and wanted to file a grievance. Mr. Simon testified that Mr. Wolfe came to the Union's office the next day and advised that the foremen (or lead hands) had been talking to employees about decertifying and Mr. Wolfe stated that he liked the union hall. Mr. Simon stated that Mr. Wolfe advised that he would like to file a grievance because he was not being paid a proper wage and was not getting enough hours. Mr. Wolfe felt that he was being mistreated because new hires were being assigned to him to train and once they were trained they surpassed him in wages contrary to the collective agreement. Mr. Wolfe brought his pay stubs which Mr. Simon photocopied. Mr. Simon stated that Mr. Wolfe was to return the next day to sign a grievance but that he did not do so. At the hearing, Mr. Simon produced copies of the pay stubs Mr. Wolfe had him photocopy which show the hours Mr. Wolfe had worked in two pay periods at the end of October/beginning of November 2006. In cross-examination, it was pointed out to Mr. Simon that, on the statement of employment, Mr. Wolfe's occupational classification is listed as an "asbestos worker 3" and Mr. Simon acknowledged that as of January 1, 2006 the asbestos worker 3 wage rate contained in

the collective agreement was $14.40, an amount less than what Mr. Wolfe appears to have been paid, by $1.60 per hour. In cross-examination, Mr. Simon acknowledged that, while Mr. Wolfe had stated that he wanted to file a grievance, he was not certain of the grounds for a grievance and that Mr. Wolfe only said that he was "not being paid adequately."

[51] Since being hired as the business representative in May 2006, Mr. Simon says he has never been contacted by the Employer to dispatch union members to work for the Employer.

[52] In cross-examination, Mr. Simon acknowledged that the Union likely keeps track of employees' hours worked because those hours are stated on the dues remittance sheets that are prepared and sent by the Employer to the Union's Winnipeg office. He agreed with the Applicant that a member of the Union could contact the Union to determine the number of asbestos hours he had worked and there is therefore a means for the Union to determine a members' number of hours. Mr. Simon stated that he does not personally see the numbers but said he could call Mr. Sedor to have him put the hours together. The Union does not contact the Employer to advise when a member/employee should move to a higher classification as the members also have an obligation to keep track of their own hours and ensure they get their raises and, only if there is a problem, to advise him.

[53] With respect to changes to members' addresses and phone numbers, Mr. Simon answered in cross-examination that Mr. Jordan does not give the Union any information about these changes.

[54] Mr. Simon testified that over the years as a member of the Union he has taken several training courses offered by the Union. He stated that, since becoming the business agent, he has held study sessions for those members wishing to become journeymen in the painters trade but that he had not held any other training sessions prior to the date the application was filed. In cross-examination, Mr. Simon denied that the training the Union offers is only in relation to the painting trade. Mr. Simon stated that, when the five or six union members (including Mr. Nachtegaele) came to sign membership cards in September/October 2006, he advised them that the Union was

planning to do respirator training in the near future. Mr. Simon testified that the members are informed of training sessions at the union meetings and he posts notices of the available training sessions on a bulletin board at the union hall. A sign-up sheet is left on the board and once a certain number of employees sign up for training, Mr. Simon sets up the training course and contacts those members who have indicated an interest in the training. In some cases, the Union sends out notices to members of the training courses being held.

[55] Mr. Simon testified that he had no knowledge, prior to the hearing, that employees of the Employer were earning wages at rates higher than provided for in the collective agreement. There is nothing in the collective agreement that permits the employer to pay wages in excess of the collective agreement nor is there any special arrangement with the Employer to do the same. Mr. Simon was also unaware that the Employer was not paying union dues and remittances on the non-asbestos work performed by the employees.

Duane Poorman

[56] Duane Poorman testified on behalf of the Union pursuant to a subpoena. Mr. Poorman has worked for the Employer for three and one half years doing asbestos and mold removal, having done similar work for approximately five years in Vancouver. He was listed on the statement of employment as an “asbestos worker” and pursuant to the collective agreement he fell into the classification of 6001 hours and above, earning a wage of $20.59 per hour.

[57] Mr. Poorman testified that he has worked with the Applicant and with Mr. Nachtegaele but that he thought they were supervisors/foremen and not lead hands, describing the difference he sees between the two positions. He says that a lead hand usually works on the tools in addition to ensuring everyone is working and has the right tools. Supervisors or foremen, on the other hand, usually do not use the tools, being primarily responsible for paperwork and keeping the job on schedule. He stated that a lead hand will usually work in the containment area, whereas the Applicant rarely does that, although he has seen him “suit up” before. He stated that, while Mr. Skelicky schedules his work, the Applicant and Mr. Nachtegaele get to pick who they want to

work with, something that Mr. Poorman did not get to do when he was in charge of a job. At first, he thought that Mr. Nachtegaele was a “worker” but then he knew him to be a friend of Mr. Skelicky’s. He stated that he just met the Applicant one to two years ago and did not know if he was a lead hand but felt that he was obviously a close friend of Mr. Skelicky’s and Mr. Jordan’s. In cross-examination, Mr. Poorman acknowledged that he had heard from others that the Applicant and Mr. Jordan are from the same hometown and just assumed them to be friends.

[58] Mr. Poorman also testified about the meetings the Applicant and Mr. Nachtegaele held with employees to discuss decertifying the Union. With respect to the meeting held at the warehouse, Mr. Poorman testified that the Applicant and Mr. Nachtegaele stated that they wanted to go non-union because something went wrong with their benefits. The Applicant mentioned a problem he had with reimbursement for a dental claim and that he met with Merit Insurance Company to discuss benefits although there was no discussion at the meeting concerning who would pay for the health premiums if the Union was gone. When asked if any management were present at the warehouse meeting, Mr. Poorman responded that he thought the Applicant and Mr. Nachtegaele were management but that otherwise the only non-union person there was Mr. Skelicky, although he believes Mr. Skelicky said he should not be there and walked back to his office.

[59] Mr. Poorman was working on the day the lunch meeting was held at the Seven Oaks but he did attend the meeting. He stated that at the meeting a paper was circulated to sign to “go non-union.” Mr. Poorman stated that he felt pressured into signing and did so as he felt that if he did not sign he would lose his job. He said he is still sorry he signed the document. In cross-examination, Mr. Poorman clarified that he did not feel threatened by the Applicant but stated that he told him at the time that he did not feel comfortable signing but felt he had to in order to “keep everyone off his back.”

[60] Mr. Poorman was shown a blank copy of the form of support listing the reasons for decertifying. He testified that none of these reasons were discussed at the meetings. The only discussion was about health benefits and the Applicant assured the employees that everything would remain the same as when they were unionized. He said there was no discussion about Mr. Parker leaving the job as business agent.

[61] In cross-examination, Mr. Poorman acknowledged that Mr. Jordan has always been fair and honourable in dealing with the employees.

[62] Mr. Poorman answered in cross-examination that he has sought the assistance of the Union in the past with respect to life insurance and the Union assisted him. He has expressed an interest to the Union for certain training courses and the Union did set up the respirator training that he signed up for.

[63] In cross-examination, Mr. Poorman stated that it bothers him and others that the Applicant came to the workplace and after a year has become a foreman. Mr. Poorman stated that he feels he has "paid his dues" and should be moving up even to a lead hand position. Mr. Poorman expressed his unhappiness at the hearing about not having any work when he drives by the shop each day and sees the cars parked there of employees more junior to him, including the Applicant's and Mr. Nachtegaele's. Mr. Poorman indicated that he has repeatedly told Mr. Skelicky that he is ready to return to work.

John Sedor

[64] John Sedor, the business manager for the Union for Manitoba and Saskatchewan, also testified on behalf of the Union. Mr. Sedor works out of the Manitoba office and he has the Regina office of the Union managed by Mr. Simon.

[65] Mr. Sedor stated that, between the time Mr. Parker resigned on November 14, 2005 and when Mr. Simon was hired in mid-May 2006, he oversaw the Regina office. He had the Regina office phone number forwarded to the Winnipeg office, while the 1-800 number had been in place prior to that. Both had voicemail and a full-time secretary works in the Winnipeg office to handle phone calls. Members were sent a notice regarding this arrangement, along with the fax number for the Winnipeg office. Mr. Sedor stated that, while the union representative position was vacant, he came to Saskatchewan, often to Regina, on at least 30 occasions. He also stated that during this time period, the office voicemail was never full, noting that the phone calls that came in from Regina ranged from 0 to 4 calls per day and that he returned any

messages within a day. Also during this time period, there was only one problem with the 1-800 number where it was not working for a period of three days. It was Mr. Sedor's recollection that, during this 3-day time period, he did not receive any calls from the employees of the Employer.

[66] With respect to union meetings, Mr. Sedor stated that a general membership meeting was held in January 2006, during which the Union advised of the vacant position and asked for applications from the floor. All members were sent a notice in the mail of this meeting approximately two weeks in advance. The Union also sent out a notice to the members on June 5, 2006 for a meeting to be held on June 14, 2006 with the topic indicated on the notice as "New Business Representative/Organizer." A further notice was mailed to members July 25, 2006 advising of the August general membership meeting. Once Mr. Simon was hired, the general membership meetings began again to be held on the third Wednesday of each month. Mr. Sedor stated that the Union uses the members' last known address and, if the mail is returned, makes inquiries of the last known employer. Mr. Sedor stated that he does not believe that any of the employees of the Employer attended any of these meetings. He only recalls the attendance of three asbestos workers at one meeting and does not recall any of them asking for afternoon membership meetings.

[67] Mr. Sedor indicated that he and Mr. Parker had negotiated the last collective agreement for the employees of the Employer and, that prior to doing so, they sent a notice to employees of the "asbestos division" to meet to hear the suggestions they might have for revision of the collective agreement. After proposals were made to the Employer and an agreement negotiated, the Union sent a notice to employees of the division for a ratification meeting. For ratification meetings held by the Union, the Union sometimes talks to the employer to schedule the meeting around the employees' work schedules or else the Union holds two meetings. At the ratification meetings, the Union reviews the tentative agreement and a vote is held. Although greater than 50% is required on the vote, Mr. Sedor noted that, in the past, the votes have resulted in a large majority.

[68] Mr. Sedor testified that employees who are laid off may remain members in good standing by paying $20 per month. Only once an employee is six months in

arrears do they lose their membership and notices that they are in arrears are sent out after three months of non-payment.

[69] Mr. Sedor testified about the Employer's obligations and members' qualification for health and welfare benefits. He stated that an employee must initially work 390 hours with a contributing employer in order to qualify for the benefit plan. Those 390 hours become the employee's "hour bank" from which they can draw in periods of lay-off in order to continue to be a member of the plan. To maintain coverage, an employee must work (and have contributions made by the employer on) 130 hours per month – if the employee works in excess of 130 hours in a month, the excess hours are added to the employee's hour bank, to a maximum of 456 hours in the hour bank. If an employee works less than 130 hours in month, the employee may maintain coverage by "using" the necessary number of hours from the hour bank to get the employee to 130 hours for the month.

[70] The Employer is required to pay monthly premiums for the health and welfare benefit plan in the amount of $.85/hour ($.90/hour effective January 1, 2007) for all hours worked by the employee. This amount is remitted to the Union along with union dues and other remittances required by the collective agreement. An employee would not necessarily know the number of hours for which the Employer is remitting premiums (the remittance sheet is only sent to the Union), although a notice is sent from the plan holder when the employee's hour bank is getting low. Mr. Sedor stated that only during the course of the hearing did it become apparent to him that the Employer had not been remitting the premiums for all hours worked by the employees. By the evidence of the Applicant, the Employer had not remitted payments in relation to the hours worked performing mold removal. In addition, Mr. Sedor stated that it appeared that premiums were also not remitted on travel hours. Mr. Sedor stated that this failure to remit premiums is in violation of the parties' understanding of the collective agreement. Mr. Sedor produced a copy of correspondence dated October 26, 2005 from Mr. Parker, on behalf of the Union, to the Employer. The letter reads as follows:

> *This letter is in regards to our conversation of October 14, 2005 and previous discussions during the contract negotiations in the winter of 2005. During the above stated times we were in*

> *agreement that Article 2 in the Province of Saskatchewan Asbestos Abatement Agreement covers the removal of mold.*
>
> *It has been brought to my attention that you could be excluding this particular activity from your remittances.*
>
> *If there has been an oversight on this matter, or you have any questions pertaining to his, please feel free to contact me.*
>
> *I trust that the above mentioned will be given your prompt attention.*

[71] Mr. Sedor testified that Mr. Parker wrote this letter because employees had complained about the lack of hours in their hour banks. Mr. Sedor stated that during collective bargaining they all had a shared understanding that mold was a "hazardous material" and covered by the collective agreement. In cross-examination, he explained that this was not an amendment to the collective agreement and the understanding was documented in the Union's minutes from the meeting. Mr. Sedor also explained in cross-examination that mold is a hazardous material because it requires a certain method of disposal and employees are required to wear respirators because it can cause damage to the lungs and breathing problems. Mr. Sedor stated that the Employer's recent failure to pay the required premiums on mold removal work would run employees out of benefits, although he noted that it might take some time before an employee's hour bank was depleted. Mr. Sedor also stated that, if an employee is not working and the hour bank is depleted, the administrators of the health plan would notify the employee and that the cost for family coverage is $90.00 per month, which is some what less than the overall cost because an employee off work does not make contributions for weekly indemnity benefits. Mr. Sedor introduced into evidence a listing of claims paid out to four employees of the Employer, which claims range from $850.00 to $3,213.85.

[72] Mr. Sedor testified about the dues remittance sheets the Union receives from the Employer. Indicated on these sheets are: (i) total hours worked by each employee including a breakdown of overtime hours worked; (ii) total amount of Employer remittances, including the health and welfare plan premiums, broken down by employee; and (iii) dues deducted and paid for each employee. It became clear through Mr. Sedor's testimony in relation to the remittance sheets and Mr. Wolfe's time sheets, that it would not be possible for the Union to determine an employee's wage rate from the

remittance sheets alone, as the dues and Employer remittances appear to have been calculated using a different number of earned hours or hours paid such that the remittances paid to the Union were, at least most certainly in the case of Mr. Wolfe, calculated on hours worked excluding travel hours earned, although our calculations based on the known wage rates of other employees (as testified to at the hearing) reveal a similar discrepancy with these other employees. Mr. Sedor believes it is possible the Employer has also treated earned hours performing mold removal in the same way – including those hours for the purposes of calculating union dues but not including those hours for calculating Employer remittances, such as those to the health and welfare plan, thereby resulting in the possible denial of such benefits (i.e. this could be a reason for the denial of benefits that led at least some employees to support the application). The only other possible explanation for the difference would be that the employees were being paid an even higher hourly rate than they testified to which in the case of the Applicant and Mr. Nachtegaele would be substantially more than they were entitled to under the collective agreement as the rate they testified to was already more than the rates provided in the collective agreement.

[73] Mr. Sedor testified that he was familiar with the health plan available through Merit Contractors, which the Applicant spoke of in his evidence. Mr. Sedor stated that the Merit Contractors health plan is only available to non-unionized contractors to allow them to supply a benefit package to their employees as it is customarily the unions that provide benefit plans in the construction industry. Mr. Sedor stated that the Merit Contractors plan operates on an hour bank similar to the Union's plan and he believed that the initial qualifying period was 300 hours but that, if an employee was laid off and no longer worked for an employer, the employee would lose the hour bank, unlike the Union's plan which allows the employee to draw off the hour bank during periods of lay-off/unemployment.

[74] Mr. Sedor testified that supervisors and owners may join the health and welfare plan offered by the Union and that Mr. Jordan had recently joined the plan by paying the proper premiums.

[75] Mr. Sedor stated that workers in the trade are dispatched out of the Regina and Winnipeg offices. When a certified employer, including this Employer,

wishes to hire an individual in the trade, the employer is required to contact the Union's hiring hall for dispatch of a member. Mr. Sedor stated that the Employer has not contacted the Union since at least as long ago as November 2005 to request that the Union dispatch an employee to work there yet he pointed to a few individuals who are now working for the Employer who were not dispatched by the Union nor had the Employer made a request of the Union to dispatch an employee there. In cross-examination, Mr. Sedor acknowledged that, if the Union has no one to dispatch upon a request by an employer, the employer is free to hire anyone it wishes, as long as that individual joins the Union. The Union did not dispatch the Applicant but the Union was advised of the Applicant's hire during the parties' negotiations. Mr. Sedor stated that, although he was advised of the Applicant's hire, Mr. Jordan told him that the Applicant was being hired to work in the office because he had experience with paperwork/record-keeping. Although Mr. Sedor felt that the Applicant "walked the line" between being management and in-scope, because the Applicant was expected to do some in-scope work as well it was the Union's understanding that the Applicant would be started as a probationary employee and work his way up from an "asbestos worker 1" to an "asbestos worker 5" through working the required hours set out in the collective agreement. Mr. Sedor stated that, although Mr. Jordan could have started the Applicant at a higher rate of pay if he had a specialized skill set, no such arrangement had been made with the Union and therefore the Employer should not have paid the Applicant rates in excess of that provided for in the collective agreement.

[76] Mr. Sedor also testified concerning the progression through the wage schedule set out in the collective agreement. For the most part, it is self-explanatory in that an employee proceeds from an asbestos worker 1 through 5 based on the number of hours the employee works. Once the employee gets to 6001 hours, he or she becomes an "asbestos worker." The only higher rate of pay in the collective agreement is that of a lead hand. Mr. Sedor stated that, while it is in the Employer's discretion who to designate as a lead hand, the usual practice is to choose a fully experienced "asbestos worker." Mr. Sedor stated that the lead hand should be working in the containment area instructing and helping the employees.

[77] With regard to the wage rates of the Applicant and Mr. Nachtegeale being higher than that provided for in the collective agreement, Mr. Sedor first learned of this

fact during the course of the hearing. He stated that no special arrangement had been made between the Union and the Employer to allow the Employer to pay higher rates to any of the employees of the Employer. He also stated Mr. Jordan had never advised him of the fact that he was paying some employees a higher rate of pay.

[78] Mr. Sedor testified that the last shop steward in the workplace left his employment in October 2004 and, while he was uncertain why another employee had not been appointed by the Union as shop steward, in his view it is the business agent who represents the employees.

[79] Mr. Sedor stated that training is usually offered based on the employers' needs and he was not aware that the Employer had identified any needs.

[80] Mr. Sedor testified that Fuller Austin is a unionized asbestos removal company operating in Regina.

Relevant Statutory Provisions:

[81] 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.*
>
> *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.*

Argument:

The Applicant

[82] The Applicant asked the Board to grant the application and conduct a vote in order to let the members decide whether they wish to be represented by the Union. The Applicant denied there was any employer involvement/influence with the application and stated that he was confident that the Employer would not take advantage of the employees if they became decertified as Mr. Jordan is a fair and trusting individual. The Applicant also denied that there was a close relationship between him and Mr. Jordan or Mr. Skelicky, indicating he had only known Mr. Jordan's father prior to coming to work for the Employer and that now his daughter babysits Mr. Skelicky's children.

The Union

[83] Counsel for the Union submitted that the application should be dismissed pursuant to s. 9 of the *Act* as a result of the Employer's influence or involvement with the application. The Union argued that the Applicant's reasons are not credible or plausible and that, when one considers the other circumstances of the case, the Board should draw an inference of employer involvement/influence. In this regard, the Union pointed to unusual circumstances concerning the preparation of the application and the method the Applicant employed in gathering support. Specifically, that the Applicant and Mr. Nachtegaele utilized the Employer's office to prepare the documents for the application; that the same individual acted as a commissioner for oaths for both the Applicant's application and the Employer's reply; that the supervisor, Mr. Skelicky, was present during a portion of the meeting of employees called by the Applicant at the Employer's warehouse; that the Applicant had employees sign papers indicating their support for the application all together at a meeting of the employees; the evidence that Mr. Poorman felt pressured to sign a support card; and that the only issue the Applicant discussed at the meeting was that of medical benefits and hour banks.

[84] The Union also submitted that the Employer, by not following all of the provisions of the collective agreement, had improperly influenced the views of the employees who filed support for the application. Examples of these violations included the Employer's failure to remit dues on the employees' travel time and their hours of work removing mold (which also had the effect of depleting their hour bank for benefit purposes); paying the Applicant and Mr. Nachtegaele wages higher than provided for in the collective agreement; providing a wage increase to another employee (Mr. Lundie); paying another employee wages in excess of the collective agreement according to the classification the Employer placed this employee in on the statement of employment (Mr. Wolfe); and the Employer's failure to properly hire employees through the Union's hiring hall. The Union argued that the Employer, through its violations of the collective agreement, created an anti-union environment and thereby improperly influenced or interfered with the employees and tainted the support for the application. The Union stated that the Employer has undermined the Union by paying certain employees, including the Applicant, greater wages thereby leading employees to believe they could negotiate better wages without the Union. The Union also pointed out that the problems

experienced by the employees with their hour banks made it appear to be the fault of the Union and a reason for decertifying yet it was the Employer who created the problem.

[85] The Union also referred to the close relationship the Applicant enjoyed with Mr. Jordan and Mr. Skelicky, as perceived by the employees, and submitted that there existed an apprehension of betrayal in this case that would render the support for the application unreliable.

[86] Lastly, the Union argued that, should the Board not dismiss the application through the application of s. 9 of the *Act*, the Board should order a vote.

[87] In support of its arguments, the Union relied on the following cases: *Schuba 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; *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; *James 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; *Raymond Halcro v. Sheet Metal Workers' International Association, Local 296 and Thermal Metals Ltd., also working under the name A.R. Plumbing and Heating Ltd.*, [2006] Sask. L.R.B.R. 92, LRB File No. 232-05; *Clayton Walters v. Xpotential Products Inc. operating as Impact Products and United Steelworkers of America, Local 5917*, [2002] Sask. L.R.B.R. 65, LRB File No. 214-01; and *Martyn Arnold v. United Steelworkers of America, Local 5917 and Westeel Ltd.*, [2005] Sask. L.R.B.R. 5, LRB File No. 275-04.

Analysis and Decision:

[88] The primary 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.

[89] In *Nadon, supra,*[2] 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: Shuba v. Gunnar Industries Ltd., et al., [1997] Sask. L.R.B.R. 829, LRB File No. 127-97.*
>
> *[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. . . .*

[90] Commencing at 832 of the *Shuba* case *supra*, the Board undertook an extensive review of the Board's case law which discussed the factors the Board should consider in addressing the balance between employees' rights in s. 3 and the limitations prescribed by s. 9 of the *Act* when making a determination whether to grant an application for rescission. The Board in *Shuba* quoted extensively from *Wells v. United Food and Commercial Workers, Local 1400 and Remai Investment Corp.*, [1996] Sask. L.R.B.R. 194, excerpts of which (at 197 and 198) read as follows:

> *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 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*

[2] Upheld by the Saskatchewan Court of Queen's Bench on judicial review, reported at (2004), 244 Sask. R. 255.

> *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.*

[91] In the case before us, as is typical, there is no direct evidence of employer involvement, influence or intimidation with the application. Therefore, the Board must determine whether there is evidence from which it can draw an inference that the Employer has been involved with the application or has interfered with, intimidated, influenced or encouraged the application being made to an extent that the true wishes of the employees cannot be determined by a vote. In *James Walters, supra*, the Board outlined the types of circumstances to be examined to make this determination, at 167 and 168:

> *[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 applicant'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.*

[92] With respect to the issue of the plausibility of the applicant's reasons, the Board in *Walters*, *supra*, continued, at 168 through 170:

> *[87] In 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, the Board closely examined the reasons offered by the applicant for bringing the application and stated at 457 through 459:*
>
> > *[29] . . . One of her alleged bases for making the application – dissatisfaction with the Union in its failure to conclude a collective agreement two years after certification – is one that is often cited by applicants for rescission but in this case is not plausible. It was likely suggested to her by someone else. Ms. Swan is not, and never has been, interested in having a collective agreement at the University location. In her opinion, as expressed in her letter to The Sheaf, the employees at the University location that obtained certification in the first place were "being ridiculous." In her opinion, as she stated in argument, the Union "has no valid purpose in the workplace." We do not accept that her alleged frustration with the delay in obtaining a collective agreement has anything to do with her motivation to seek rescission. In her circumstances, it makes no sense. And there was no evidence that such a ground was discussed with or among the employees when she was garnering their support for the application. That ground is specious, and we cannot accept that she reached the conclusion to advance it as a basis for the application on her own. It draws into issue the bona fides of her motivation for the application.*

[30] This leads us to the second ground alleged by Ms. Swan as the basis for applying for rescission: that Union dues for these employees are so onerous that it makes no sense for them to be organized and be bound to pay dues. In her opinion they will be worse off financially, a view that necessarily implies they will not get their money's worth. But again, this is not credible: the employees have paid no dues; Ms. Swan did not know how much they would eventually have to pay, or what the Union would obtain for them as far as a contract is concerned. Dissatisfaction with payment of dues is also a reason that is often advanced by an applicant for rescission, and it may form part of a credible rationale for an application. But in the present case there was no objective basis for Ms. Swan to make the assertion either to the Board or to her fellow employees. The payment of dues could not be an issue because it has not yet been resolved what they will be or what the employees will receive in return under a collective agreement.

[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. In Pfefferle v. Ace Masonry Contractors Ltd. and Bricklayers and Masons International Union of America, [1984] Aug. Sask. Labour Rep. 45, LRB File No. 225-84, in dismissing an application for rescission, former Chairperson Ball stated, 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 the influence of the employer.***
>
> *[88] In Swan, supra, the Board found that the applicant's reasons were not plausible. In finding the applicant had no sufficiently credible rationale for bringing the application, the Board referred to additional circumstances that the Board felt warranted drawing the inference that employer representatives influenced the making of the application. Specifically, the Board found that the applicant had a close relationship with the owner/managers, she had an unusual interest in labour relations at the employer's location where she did not yet work and the applicant transferred to the subject location on the eve of the open period and began to organize the making of the rescission application almost immediately thereafter. On the evidence the Board did not accept that the applicant did this without the advice or influence of management or without having any discussions with management about the labour relations situation. Further unusual circumstances considered by the Board in dismissing the application due to employer influence include that management had provided the applicant with certain employee information and that the employer had created an environment ripe for a rescission application due to its intransigence in collective bargaining.*
>
> [**emphasis added**]

[93] The Union urged us to find that the Applicant's reasons lacked credibility or plausibility and that, combined with several other unusual circumstances, warrants the drawing of an inference that the Employer was involved in or influenced the bringing of this application.

[94] In the present case it is first necessary for the Board to closely examine the Applicant's reasons for bringing the application. It is not our task to judge whether the reasons proffered by the Applicant are "good" reasons to decertify or whether he is mistaken in his opinions or beliefs. It is our task to discern whether those opinions and beliefs are reasonably held by him such that they are plausible or credible and represent his true motivation for bringing the application.

[95] For the following reasons, the Board concludes that the Applicant's reasons for bringing the application are not plausible and that he did not appear to act spontaneously in making the application. Many of the Applicant's stated reasons for bringing the application were not his own and, although he stated that the reasons were as a result of the feeling of the collective group of employees, there was no credible and admissible evidence that the reasons were discussed by the employees at the meetings they held except for the discussion the employees had in relation to their dissatisfaction over the health and welfare benefit plan. That appears to have been the only issue discussed by the Applicant with the employees as a reason for the application and, in Mr. Nachtegaele's view, it was the main reason for bringing the application. The motivation for the application is suspect in these circumstances when few, if any, of the reasons are the Applicant's own and none, but one, of those reasons was discussed at the meetings held with the employees. We question why the Applicant would undertake the application on his own time and with his own funds when he experienced few, if any, problems with the Union.

[96] By the Applicant's own admission, he did not want to join the Union in the first place and, since he was required to, he has taken little or no interest in the affairs of the Union. While he complains over the lack of contact the Union has with the members and suggests that he should receive notices, letters and newsletters from the Union about what is happening and what the Union is doing, the Applicant has not taken any steps to inform himself of the affairs of the Union. He stated that he only attended the meeting in January 2005 because he had to sign a union membership card but since then he has not attended a meeting or had any contact with the Union except to request benefit forms on one occasion which, although the Applicant complained about the process to get the forms, were ultimately delivered to him in a timely fashion. The Applicant's statement that he never attended the union meetings because of a lack of notice and because the employees often work in the evening (which he says he told the Union about at the one meeting he attended) lacks credibility. Notices of union meetings were sent to the Applicant and it appears that he chose to ignore them, likely because of a lack of interest on his part. Even if he ignored the notices because the meetings were held in the evening, one of the notices advised that a new representative was the topic of discussion, a matter about which the Applicant initially complained he had not received notice. The Applicant's concern about the absence of a Saskatchewan union

representative for a period of eleven months following the departure of Mr. Parker also lacks credibility and was presented by him as a far more significant concern than the facts bore out. The business agent's position was, in fact, only vacant for six months and during this time the Union made adequate arrangements to serve the employees through Mr. Sedor's frequent attendance in Saskatchewan and through his availability by telephone. Mr. Sedor stated that, during that six months, while a number of the Union's members had contacted him for assistance, no employees of the Employer had done so. The Applicant did not require the assistance of the Union during that time and the only admissible evidence on this point was in the form of his observation of another employee's attempt to contact Mr. Sedor, which came at a cost to that employee because the Applicant says the voicemail was full and the 1-800 number did not work.

[97] The Applicant also complained that the Union had failed to offer training for him and other employees. In our view, had this been a genuine concern of the Applicant, he would have attended more union meetings or made contact with the Union to determine how training was handled by the Union and to request certain types of training. While he stated that he did request certain training at the only union meeting he attended, the fact that he did not follow up on this request suggests it was not as important to him at that time as he made it out to be at the hearing.

[98] Others reasons proffered by the Applicant also lack credibility. Having not yet been employed by the Employer at the time the last collective agreement was negotiated, he had no direct knowledge to support his complaint that the renegotiation process was unfair, not democratic and carried out without notice to the employees. In fact, the evidence indicated that negotiations for asbestos workers were carried out separately from painters, that prior consultation was made with those employees before negotiations began and that a separate ratification meeting and vote was held on the proposed collective agreement, which votes have, in the past, resulted in a large majority in favour.

[99] The Applicant also offered other trivial complaints about the Union that he was not affected by. For example, the Applicant complained that there was no shop steward appointed by the Union yet he did not indicate that this affected him in any way and, in any event, it was customary for members to take their issues to the business

agent. Similarly, the Applicant complained that he advised the Union on a prior occasion that that there were words missing in an article in the collective agreement dealing with statutory holiday pay and criticized the Union for still using this copy of the collective agreement (entered as evidence at the hearing), however, the evidence indicated that this appeared to be a printing or typographical error where one line of the article was cut off at the bottom of the page and, in any event, the missing line had not caused the Applicant any difficulties with receiving proper statutory holiday pay. A complaint as trivial as this calls into question the motives of the Applicant when, at the same time, he had failed to raise his more legitimate concerns with the Union, such as the absence of a shop steward or the problems the employees seemed to be having with their hour banks and access to benefits.

[100] An additional reason for bringing the application was that there was no advantage to being unionized when there were no other unionized asbestos companies in Regina. At first glance, this appeared to relate to a concern of the employees that there would be no other companies for the Union to dispatch the employees to in periods of lay-off by the Employer, however, the evidence of the Applicant made it clear that his concern related more to the ability of the Employer to secure asbestos work in the industry. In his evidence he stated that he saw no benefit to being unionized in order to get work in the industry. He stated that in the past there was a purpose to being union – that the Employer could not get government jobs with out being unionized so "that's why the company did unionize." Given that the Applicant was not working in the industry at the time the Employer was certified, his words suggest, in addition to a misunderstanding about the role of a union and employee choice, a greater concern for the Employer and its ability to obtain work, including government work, than any concern over his interests (as an employee) or those of his co-workers. His concerns suggest that he is representing the Employer's interests as a motivation to bring the application.

[101] One reason for bringing the application that was actually personal to the Applicant was that he felt that the dues he paid to the Union were too high, particularly given that they are also calculated on pay for overtime hours worked. He stated that his dues were often in excess of $200.00 per month. There are several reasons why this concern is unfounded. Firstly, by our calculations, an employee earning $24.00 per hour (such as the Applicant) would need to work in excess of 40 regular hours of work per

week plus ten overtime hours of work each week, in order to be required to pay dues of over $200.00 per month. That the Applicant often worked this many hours was not borne out by evidence, including the remittance sheets that show hours of work and union dues paid for a period of three months leading up to the filing of the application (October – December 2006). While it is clear that the Applicant works many more hours per month than do any of the other employees,[3] on only one occasion, in November 2006, did the Applicant get close to working 160 regular hours and 40 overtime hours in a month. In these circumstances, it is reasonable for us to conclude that this was the exception more than the rule.

[102] We also note that on the basis of the information contained in the remittance sheet for November 2006, it appears that the Employer deducted and paid a greater amount of dues for the Applicant than it should have. Based on a dues formula of $20.00/month plus 3% of gross wages (including 10% holiday pay), the actual amount of dues that should have been paid was $183.55, yet the remittance sheet indicates that the Employer deducted and remitted to the Union the sum of $202.53 from the Applicant's wages. Therefore, either the Employer made an error in the calculation of dues or one of two other things happened: (i) the Applicant worked additional hours performing mold removal or traveling that the Employer did not include as hours earned on the remittance sheet (see further discussion on this point below); or (ii) the Applicant's wage rate was even higher than $24.00 per hour. In any event, we do not accept the evidence of the Applicant that he often paid dues in excess of $200.00 per month.

[103] Many of the Applicant's complaints, having no basis in fact or not being reasonably held by him, cause us to conclude that he has no plausible or credible reasons for bringing the application. We are not satisfied that he has an honestly held belief (whether unfounded or not) that the Union has failed in its representation in the manner the Applicant set out.

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[3] In October 2006, the Applicant earned pay for the equivalent of 107.25 hours (including 1.5 x pay for overtime hours) while the average of the other employees was 57 hours. In November 2006, the Applicant earned pay for 206.5 hours while the average for all other employees was 101.3 hours. In December, 2006, the Applicant earned pay for 103.5 hours and the average for all other employees was 55.8 hours.

[104] The Applicant also cited as a reason for bringing the application that those employees who tried to make medical claims were ineligible because of non-consistent working hours. While there was no direct evidence about employees who had suffered such a loss, other than the Applicant's testimony that in November or December 2005 he had insufficient hours in his hour bank to make a medical claim (for which he did not complain because he was able to use his spouse's plan), it appears that this problem (if it was a problem for others) was caused directly by the Employer. Specifically, the Employer failed to treat mold as a hazardous material and the work for its removal as within the scope of the collective agreement. As such, the Employer failed to count those hours as hours earned for the purposes of making remittances to the health and welfare plan, which would be a likely explanation for the depletion of the employees' hour banks. Similarly, the Employer failed to include travel time in the employees' hours earned. In the absence of any contrary evidence of the Employer, we accept that the evidence of the remittance sheets, the employees' testimony concerning their hourly rates, as well as the timesheets of Mr. Wolfe, make it very clear that health and welfare plan premiums were based on a different number of hours earned (a lesser number) than were employees' dues. Based on the remittance sheets the Employer provided to the Union, it would be very unlikely that the Union could detect this problem.

[105] The only other possible explanation for the Applicant's complaint is that employees had insufficient working hours because of the contract based nature of their work, however, this cannot be attributed to the Union because the assignment of work is at the discretion of the Employer. The Applicant stated that he wanted to get another plan in place that would be better for the employees. While the Applicant mentioned Blue Cross as a possible plan, he had not checked into it to determine its suitability. The Applicant focused on the plan available through Merit Contractors as a likely alternative, however, the evidence indicated that this plan operates in much the same way as the Union's plan, except that it is possibly less beneficial in terms of its portability and access during periods of lay-off. As such, it is unclear how this might better benefit the employees whether one considers that the problem with eligibility for benefits lies with the Employer's failure to remit premiums based on all hours worked or whether access to the plan is a problem because of the contract basis of the work. If the Applicant knew of these features of the Merit Contractors plan, he failed to share them with the other employees. It is also somewhat suspicious that the Applicant met with a representative

of Merit Contractors, along with other employees, in October/November 2004 which was shortly after the Applicant was hired.

[106] In addition to the suspect nature of this reason for bringing the application because it appears to have been caused by the Employer, the Applicant's prior knowledge of the problem and his failure to report the problem to the Union is cause for concern. Firstly, we question how the Applicant came to know about the fact that the Employer was not remitting premiums on all hours worked? Secondly, if he had this knowledge, why did he not report the matter to the Union in order that the Union could take some action? The Union had taken some action earlier when an employee had complained and had apparently achieved a resolution that mold was a hazardous material and that hours worked removing mold were covered by the collective agreement. That the Employer continued to breach the collective agreement without the knowledge of the Union, particularly when an employee, the Applicant, was aware of the problem yet did not complain, cannot be attributed to the Union. Given the lack of bona fides of the motivation of the Applicant to bring this application, we believe it likely that the Applicant stayed silent to fuel the decertification application.

[107] Given the evidence that the primary focus of the discussions about decertifying was the problem with the benefit plan, one might question the employees' support for the application had they been told of the fact that the Employer was failing to remit the necessary premiums and that that was the cause for their problems. It is also odd that, while Mr. Nachtegaele's primary reason for assisting in the application was because the employees wanted a better benefit package, he was not aware of the problem with the Employer remittances until he and the Applicant were preparing the application.

[108] The Board has found that the Applicant has offered no credible rationale or plausible explanation for bringing the application. In addition, there are other unusual circumstances that lead us to conclude that the Employer influenced the bringing of this application. The circumstances around the making of the application, the gathering of support, the circumstances of the hiring of the Applicant by the Employer, and the Applicant's terms and conditions of employment, combined with the lack of a credible rationale for bringing the application, lead the Board to draw an inference that the

Employer encouraged or influenced the making of the application to an extent that the employees' right to decide the decertification question should be temporarily suspended.

[109] The Applicant's hiring was unusual. While we accept the evidence of the Applicant that he did not personally know Mr. Jordan before he was hired, there are obvious prior connections. The Applicant was acquainted with Mr. Jordan's father and Mr. Jordan's spouse. The Applicant was not dispatched by the Union and while the Union was made aware of the Applicant's hiring the Union was told that the Applicant was being hired for a special role – to complete paperwork and keep records. While it appeared to the Union that the Applicant might be considered a supervisor (out of the scope of the bargaining unit) because the Applicant was also expected to do in-scope work, it was the Union's understanding that he would be treated as an in-scope employee, start as a probationary employee and work his way through the terms of wage progression set out in the collective agreement. The Union's understanding could not have been further from the truth.

[110] The Applicant was hired as a probationary employee; however, he consistently received wage increases according to the discretion of the Employer and not as set out in the collective agreement. After only seven or eight months of employment, the Employer designated the Applicant a lead hand earning in the range of $15.00 - $17.00 per hour. At this point in time, the Applicant, if he had been working a regular 40 hour week, would have worked approximately 1360 hours which would entitle him to a wage rate of $10.35 per hour. While Mr. Sedor of the Union acknowledged that it is in the Employer's discretion who to designate as a lead hand, Mr. Sedor stated that it is usually an employee who has reached the stage of 6001 hours and above, given that a lead hand should have proper training and experience to lead the other employees. Clearly, the Applicant, having worked only about 1360 hours (time which also apparently involved paperwork and recordkeeping) and without prior training and experience in the removal of hazardous materials, would be an unusual choice for lead hand. In addition, while the Applicant was initially paid less than the collective agreement required for a lead hand (a matter about which he did not complain to the Union), by September 2005, some 12 months after he was hired, he was given a wage increase to $24.00 per hour, an amount in excess of what he was entitled to under the collective agreement as a lead hand and nearly double the amount he would have

received working as an employee under the collective agreement (presuming a wage progression based on his having regularly worked 40 hours per week). While the Applicant testified to his belief that wages should be set on the basis of knowledge, skill and ability, when it was pointed out how little he had compared to others, he added that having a driver's license and being reliable would be important considerations. How those considerations would be more important than skill and ability for the job duties of a lead hand is beyond comprehension.

[111] Other special treatment of the Applicant included the fact that he has never been laid off from employment, working an average of 40 hours per week over the year prior to the application. In addition, it is clear and would have been obvious to other employees, that the Applicant worked more hours than did other employees. As previously set out, in the remittance sheets for the three months leading up to the application, the Applicant worked near to or over double the number of hours in each of those months than the average hours of the other employees combined. It follows that because the Applicant received wage increases ahead of schedule according to the collective agreement, he passed other employees' in wage progression and promotion to lead hand, a fact which did not go unnoticed by other employees, including Mr. Poorman who testified that he was unhappy about this.

[112] In many ways, the Applicant acted more like a supervisor, out-of-scope, than he did an employee within the scope of the Union. While the testimony concerning the scope of functions of a lead hand (in-scope) versus a supervisor (out-of-scope) was not entirely clear, the circumstances of the Applicant's position make it questionable whether he is properly within the scope of the Union. In addition to the fact that the Employer did not apply the wage schedule in the collective agreement to the Applicant and the Applicant is paid wages in excess of the collective agreement, the Applicant acted more like a supervisor. He was able to choose which employees he would have work with him, he is not often in the containment area working on the tools and he created and implemented a type of tracking system to report on the employees who work for him in order to give the Employer more information to make decisions concerning those employees' wage increases.

[113] In our view, the Applicant does more than "walk the line" between Union and management. Until the hearing, Mr. Poorman believed that the Applicant and Mr. Nachtegaele were part of management. Certainly the Applicant received special treatment by the Employer. At a minimum, it is our view that they, or at least the Applicant, were reasonably perceived by others to have a very close relationship with management. In addition, but for the fact that the Employer had submitted union dues and other remittances to the Union on behalf of the Applicant, the Employer does not appear to have treated the Applicant as an in-scope employee covered by the collective agreement and it would be highly questionable that, had the issue of his status as an "employee" under the *Act* been before us, we would conclude that he was an "employee" and belonged in the Union. However, it is not necessary for us to conclude that the Applicant should be out-of-scope to find that the Applicant acted as an agent of the Employer in making the application or that, at a minimum, he is so closely aligned with the Employer and the Employer's interests that we must conclude that the Employer was involved in or influenced the making of the application.

[114] The circumstances of the making of the application and the gathering of support causes us to draw an inference of employer involvement. With respect to the making of the application, the Applicant testified that he and Mr. Nachtegaele used the computer in Mr. Jordan's office. We understood this to mean that they typed up the support form on the computer as the application form itself had been completed in handwriting. Either the Applicant had the Employer's permission to do so or was unconcerned that Mr. Jordan might learn of his activities, presumably because they would meet with his approval. It is doubtful that just any employee could walk into Mr. Jordan's office and use his computer without permission.

[115] The Union pointed to the fact that the Applicant and the Employer used the same commissioner for oaths for their documents that were filed with the Board as suggestive that the Employer assisted with the application. The Applicant stated that he called the "construction association" to inquire about the availability of a commissioner for oaths, however, he did not indicate which "construction association" he had called and that was not explored in cross-examination with him. In these circumstances, while it is difficult to draw any conclusion from the fact that the Applicant used a representative or employee of the construction association as a commissioner, the fact that the

Applicant and Employer used the very same person from the construction association is suspicious.

[116] The Applicant testified concerning two meetings he and Mr. Nachtegaele held with employees to discuss the decertification application aside from individual discussions they had with some employees along the way. The Applicant repeatedly stated that the reasons for bringing the application, as articulated in the form of support which was also attached to the application, were the reasons of the group yet there was no clear evidence as to when the reasons were developed or discussed with the employees. The Applicant did not say that the reasons were discussed at the first meeting and, given that the support cards had been prepared prior to the second meeting (as that was when the cards were signed), we conclude that the reasons were not discussed with the employees but rather were put together by the Applicant and possibly Mr. Nachtegaele when they typed the document in Mr. Jordan's office. This conclusion is supported by the evidence of Mr. Poorman who stated that the only issue discussed on the list of reasons on the support card was the problem with the medical benefits which we have concluded was caused by the Employer. We accept the evidence of Mr. Poorman who stated that, at this meeting, the Applicant assured the employees that everything would remain the same if they decertified, an assurance which would not have been given unless the Applicant was also so assured by the Employer.

[117] The first meeting is problematic in that it was held at the Employer's premises following a safety meeting in circumstances where it was unlikely the employees felt they had a choice to remain in attendance, given the position the Applicant held and because Mr. Skelicky was still present. When the Applicant took the floor, he immediately raised the issue of decertification. The Applicant was correct in his testimony that Mr. Skelicky should not have been present for the meeting and his presence there shows that the Applicant either wanted Mr. Jordan to know of their intentions, that Mr. Jordan was already aware of the Applicant's intentions to raise this with the employees or that the Applicant had no idea that the issue of whether to decertify (as with the matter of certification) is a concern of the employees only and that the Employer should have no involvement in that question. In any event, the timing of this meeting and the presence of Mr. Skelicky would cause the employees to believe

they must stay and that the Employer was or would become aware of the decertification effort. Also of some concern was the fact that there were some other employees who were not members of the Union present – while some appeared to be probationary employees who had not yet been required to join the Union (but who also had not been dispatched by the Union), one was an individual who was a full-time teacher who often worked for the Employer when it was busy. The Applicant did not know why this individual was not a member of the Union.

[118] The second meeting the Applicant and Mr. Nachtegaele held with the employees was the lunch meeting at the Seven Oaks. This is the meeting at which the employees were asked to sign support cards, all together present as a group, a matter which causes the Board significant concern.

[119] The Union argued 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 and that a vote would not be appropriate in the circumstances. The Board determined that this was an appropriate factor in *Robert Monahan and Capital Pontiac Buick Cadillac GMC Ltd. And United Steelworkers of America,* [1993] 4th Quarter Sask. Labour Rep. 109, LRB File No. 169-93 and described the apprehension at 116:

> *The Union argued that the relationship between the Applicant and management would cause employees to support the Applicant out of fear that is 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.*

[120] We have determined that the apprehension of betrayal is a relevant factor in this case. It bears some similarity to the situation considered by the Board in *Walters*, *supra*. In that case, the Board concluded there was a high apprehension of betrayal and concluded at 174:

> *[97] The Board has determined that the apprehension of betrayal is high in this case in light of a number of factors. Firstly, the evidence indicates that at the Union's June, 2004 meeting the issue of decertification arose and the Union decided that, in anticipation of a possible rescission application being made, it should have employees sign membership support cards again. The Union undertook such a process in late June and early July, 2004 and filed this evidence with its reply to the application. The Board has reviewed the cards filed in support of the application and those filed by the Union and has determined that some employees signed both. While this may simply indicate that some employees changed their minds between June/July and the beginning of October, the Board has concluded that other evidence points to the apprehension of betrayal being a factor in that change in position. In a small workplace such as this, the Applicant's unusual employment situation (as discussed above) would likely have been apparent to other employees, as would his close relationship with Ms. Squires and possibly the preferential treatment he received in being given a discount for his granddaughter's pool party and in using the Employer's telephone to make frequent personal long distance calls. The Applicant's conduct in soliciting the support of the employees also becomes a relevant factor. The Applicant did not explain the nature of the application to employees nor did he explain that the employees would lose the coverage of the collective agreement. This lack of explanation, along with the special relationship he enjoyed with the Employer and his hiring circumstances lead the Board to conclude that employees may have signed out of fear that, if they did not, this would be made known to management.*

[121] In the present case, we conclude that the apprehension of betrayal is high. One of the factors that we have considered that supports this conclusion is the fact that the gathering of support took place openly in a group setting, with all affected employees present. Even without the evidence of Mr. Poorman that he felt pressured to sign and that he could lose his job if he did not sign, this fact alone would support a finding of an apprehension of betrayal to the Employer such that the support is tainted.

[122] In addition, the following circumstances lead us to conclude that an apprehension of betrayal exists: (i) the circumstances of the Applicant's hiring; (ii) the perceived close relationship between the Applicant and management; (iii) the Applicant's special treatment by the Employer including the circumstances of his promotion to lead hand and his payment of wages in excess of the collective agreement rates; and (iv)

there was no concern about the Applicant holding a meeting in the middle of the work day for the purposes of having employees sign support cards.

[123] On the latter point, we note that the Applicant stated that a majority of employees were not working on the day of their meeting at the Seven Oaks and he also stated that, if they were working, they were not paid for the time period of the two-hour lunch. We do know that Mr. Poorman was working the day of the lunch meeting. Again, we question how the Applicant would know they were not paid for this time period. In addition, the collective agreement provides only for a half-hour unpaid lunch and therefore either those employees had permission to be away from their jobsite for greater than a half hour, the Applicant had such permission for employees to be away or, if they had no such permission, then either the employees or the Applicant knew it would not be a problem for the Employer for them to be away for purposes such as these. Such conclusions suggest that the Applicant had a particularly close relationship with the Employer or that the Employer facilitated the bringing of the application by permitting time off for the purposes of gathering support for the application.

[124] We have determined that, in the circumstances of this case, an inference must be drawn that the Employer influenced the bringing of the application and interfered with the application in a manner and to the extent that the true wishes of the employees cannot be determined with a secret ballot vote. We agree with the comments in the *Walters* case, *supra*, concerning the totality of the circumstances that led us to drawing this inference, where the Board stated at 173:

> *[95] . . . Some of the circumstances outlined above, such as the circumstances of the Applicant's hiring, his reasons for and timing in bringing this application, cannot simply be erased such that the Board could be satisfied that the results of the vote represent the true wishes of the employees.*

[125] In addition to the above circumstances, which have led the Board to infer that the Employer was involved with and influenced the bringing of the application, there is also the issue of the environment that fostered the application. Specifically, we refer to the extent of the Employer's adherence to the collective agreement and its relationship with the Union as it affected the making of the application itself as well as the employees' support for the application. For the reasons that follow, it is our view that

this ground alone would support the dismissal of the application on the basis that the Employer encouraged and influenced the bringing of the application and support for the application to the extent that the right to determine the representation question must be deferred until the employees have had the opportunity to work under the terms of the collective agreement in an environment where the Employer respects the relationship the employees have with the Union and honours the terms of the collective agreement it negotiated with the Union.

[126] In *Marlys Janzen v. Service Employees International Union, Local 336 and Prairie Care Developments Inc.*, [2007] Sask. L.R.B.R. 48, LRB File No. 003-07, the Board found that the employer's repeated violations of the collective agreement, including the failure to provide complete employee information with the remittances of dues and monthly statements required under the collective agreement and the failure to allow a union representative to meet with newly hired employees, created an anti-union environment which had compromised the employees' ability to decide whether to be represented by a union to the extent that the true wishes of informed employees could not be obtained through a secret ballot vote. The Board referred to the relevant case law at 63 and 64:

> *[36] The circumstances of this case are similar to those considered by the Board in a number of recent decisions. In the Huber decision, supra, the Board determined that the application for rescission was improperly influenced by the employer's anti-union attitude in circumstances where the Employer had ignored the certification order and the collective agreement. The Board reasoned as follows, at 594-595:*
>
> > *[6] The Board examined this question in Flaman v. Western Automatic Sprinklers (1983) Ltd. et al., [1989] Spring Sask. Labour Rep. 45, LRB File No. 045-88. In that case, the employer hired employees without regard to the hiring hall provisions contained in the collective agreement. The union took various steps under the terms of the collective agreement to enforce its terms but the employer continued to disregard the terms of the collective agreement. In this environment, the Board held that employees hired "off the street" in violation of the union security provisions could not participate in a representation vote. In addition, the Board found that the employer's conduct in not*

> *abiding by the terms of the collective agreement led the Board to infer that the employer improperly influenced or interfered with employees who brought the application for rescission. In essence, the employer's anti-union conduct, which rendered the unionization efforts meaningless, tainted the employees' support for the union.*
>
> *[7] In the present case, the employees who applied to the Board for rescission of the Union's certification order are not members of the Union as required in the collective agreement. The Employer has not remitted their membership dues to the Union, nor has he complied with any of the terms of the collective agreement including the wage rates, benefit plan remittances and the like. The Employer has made it clear by this conduct that he does not want his employees to participate in the Union or to enjoy the benefits of the collective agreement.*

[37] Similarly, in the Halcro decision, supra, the Board dismissed an application for rescission in circumstances where the employer had not followed the collective agreement since the certification of the union. The Board concluded, at 95 and 96:

> *[21] In the present case, the Employer totally disregarded and failed to apply any of the provisions of the collective agreement including, inter alia, wage rates, benefits, union security and the hiring hall provisions. The employees have never enjoyed the benefits of the certification that occurred in 2003, and, all but one having been hired since certification and not being union members, are likely unaware of the terms and conditions afforded them under the collective agreement. In such a situation we find that it may be inferred that the Employer has created an anti-union environment in which evidence of the wishes of the employees is almost certainly tainted: a representation vote at this time cannot in any way reliably reflect the true wishes of informed employees.*

[38] In the Walters decision, supra, the Board had occasion to consider circumstances where the employee bringing the rescission application had received a wage increase, without the knowledge of the Union, not long before the application was brought before the Board. Upon reviewing the facts of that wage

increase and noting that the employer told the applicant to contact the Board concerning his anti-union beliefs and that as luck would have it the applicant contacted the Board before the open period, the Board concluded, at 71:

> *[20] Even without all of the unusual circumstances listed above, the fact that the Employer negotiated wages directly with Mr. Walters and was paying Mr. Walters a significantly higher rate of pay without the Union's knowledge, clearly had the effect of undermining the Union at the workplace. The evidence confirms the obvious, that other employees wanted to negotiate a higher wage rate directly with the Employer much like Mr. Walters had done. By bargaining directly with Mr. Walters, the Employer undermined the Union and the conclusion that some employees drew was that they did not need the Union, just as Mr. Walters was advising them. The Board has previously determined that such Employer conduct is unacceptable.*
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> *[21] In the decision McNutt v. I.W.A and Moose Jaw Sash and Door (1963) Ltd., [1980] July Sask. Labour Rep. 37, LRB File No. 033-80, the Board notes at 37:*
>
> > *If the Board granted the application, it would sanction the practice of an employer inducing applications for decertification by an employer offering wage increases directly to employees without reference to the Union. Section 9 of the Act was enacted to permit the Board to prevent the success of such tactics.*

[127] The case before us is not unlike those referred to above. While we do not go so far as to say that the Employer has deliberately set out to induce the making of the application, in our view its conduct has had this effect or at least its violations of the collective agreement are so egregious as to taint the support of the employees to the extent that we must temporarily remove the question of union representation by dismissing the application.

[128] With respect to union dues and other remittances, while the Employer has paid some dues and remittances for all employees, the evidence establishes that the amounts that have been paid are not correct. The Applicant testified that the Employer does not calculate and pay dues on the mold work performed by the employees. This has caused employees difficulties with their hour banks for the purposes of their benefits. In our view, the Applicant (and Mr. Nachtegaele) appears to have referred to "dues" in the sense of all payments made to the Union under the collective agreement, which technically includes dues *and* remittances, such as those to the benefit plan (as the "dues" *per se* have no effect on the benefit plan). We have found that the remittance sheets entered into evidence indicate that dues and remittances were each calculated using a different number of hours worked and the Employer excluded from the calculation of remittances mold and travel hours. In our view, the Employer appears to have violated the collective agreement. In addition, the Union's evidence indicates that the issue of the Employer failing to include mold hours was raised with the Employer and that the Union wrote a letter to the Employer to confirm that mold is a hazardous material and is covered by the collective agreement. In the absence of evidence from the Employer on this issue, we conclude that the Employer has repeatedly violated the collective agreement in spite of its apparent agreement with the Union on the interpretation of the collective agreement in this regard. This is particularly problematic in the circumstances of this case where it appears that the primary reason for the application was the problem with employees' eligibility for the benefit plan, a matter which they attributed to the inadequacy of the Union as a representative when the problem was, for the most part, created by the Employer.

[129] The Employer has also acted in violation of the collective agreement with respect to the hiring provisions. A number of employees are working for the Employer who were not dispatched by the Union. These employees were also hired without the Employer first having asked the Union to dispatch an employee. It appears that the Employer has ignored the hiring provision in the year leading up to the making of the application. One of these employees is the Applicant.

[130] Perhaps most egregious is the Employer's failure to pay some of the employees their proper wages under the collective agreement. Employer influence/interference will not only be found where employees are not receiving high

enough wages as required by the collective agreement. In this case, as was the case in *Walters*, *supra*, the Employer has treated some employees, including the Applicant, better than other employees and breached the collective agreement by paying wages to him and some other employees higher than those contained in the collective agreement. The Employer awarded the Applicant wage increases on its whim, without regard for the hour requirements in the collective agreement. Throughout the course of his term of employment, the Applicant was consistently paid more than permitted by the collective agreement. In September 2006, coincidentally on the eve of the open period for filing the application, the Applicant, after less than two years working for the Employer, was designated a lead hand and paid wages in excess of those provided for in the collective agreement. He was and is the most highly paid employee in the workplace yet one of the least experienced perhaps only aside from the probationary employees. Mr. Nachtegaele, who assisted with the application, was also designated a lead hand some time prior to this and, while he did not earn the lead hand rate initially, he was eventually awarded a wage increase in excess of the collective agreement.

[131] The Union was not aware that certain employees were being paid wages in excess of those set out in the collective agreement. If the Employer wishes to pay the employees wages in excess of those set out in the collective agreement, it must negotiate those increases with the Union. Clearly, this payment of excess wages has the effect of undermining the Union in the eyes of the employees. Although the Applicant stated that he did not talk about his wage rate at work, he did tell Mr. Nachtegaele and he also stated that all employees talk about what other employees are earning. There is little doubt that the amount of the Applicant's wage rate "got out" and, in our view, the employees have reasonably been led to believe that they could negotiate higher wages on their own, just as the Applicant and Mr. Nachtegaele had, and would therefore see no need for the Union. In fact, the Applicant made it clear that he would represent employees and help them get wage increases – and why would the employees believe otherwise, given the Applicant's special treatment in the workplace.

[132] In summary, the Employer's failure to observe the terms of the collective agreement have undermined the Union by creating an anti-union environment which had the effect of influencing the views of employees and tainting their support.

[133] For the many reasons stated above, we find, on a balance of probabilities, that the application was made at least in part on the advice of or as a result of influence or interference by the Employer within the meaning of s. 9 of the *Act*. The application is therefore dismissed.

DATED at Regina, Saskatchewan, this **15th** day of **January, 2008**

LABOUR RELATIONS BOARD

Angela Zborosky,
Vice-Chairperson