Labour Relations Board
Saskatchewan

TAMMIE HUTCHINSON, Applicant v. UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1400, Respondent and SOBEYS CAPITAL INC., operating as SOBEYS READY TO SERVE, Moose Jaw, Saskatchewan, Employer

LRB File No. 006-09; February 24, 2009
Chairperson, Kenneth G. Love, Q.C.; Members: Marshall Hamilton and Bruce McDonald

For the Applicant:	Tammie Hutchinson, Teri Romanuk, Andrea Noble and Tracy Galey
For the Certified Union:	Drew Plaxton, Q.C. and Cory Cozart
For the Employer:	Brian Kenny, Q.C.

Decertification – Interference – Union alleges Employer interference and influence in bringing application, but provides no concrete evidence of same – Board allows application and orders vote pursuant to s. 6 of *The Trade Union Act*.

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

REASONS FOR DECISION

Background:

[1] Tammie Hutchinson (the "Applicant") applied for a rescission of the Order of the Board dated April 5, 2006, designating the United Food and Commercial Workers, Local 1400 (the "Union") as the certified bargaining agent for all employees employed by Sobeys Capital Inc. operating as Sobeys Ready to Serve at its location at 769 Thatcher Drive East in Moose Jaw, Saskatchewan (the "Employer") except store manager, assistant store manager, grocery department manager, bakery department manager, produce department manager, deli/al-la-carte department manager, meat/fish department manager and office staff. The effective date of the collective agreement in force between the Union and the Employer was March 1, 2008. The application was filed on January 28, 2009, during the open period mandated by Section 5(k)(i) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), along with evidence of support from more than 45% of the employees in the bargaining unit. In the application, the Applicant stated numerous reasons why she brought the application for decertification.

[2] In response to the application, the Employer filed a Statement of Employment listing 58 individuals in the bargaining unit.

[3] In its Reply to the application, the Union alleged that support for the application was gathered in an inappropriate fashion or otherwise improperly obtained and 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*.

[4] The application was heard on Friday, February 13, 2009.

[5] The Applicant was assisted at the hearing by a number of her co-workers. Their evidence related to a number of situations in the workplace which they felt had not been adequately addressed by their union representatives. In short, however, their evidence was that they did not choose to be represented by the Union for the purpose of bargaining collectively with their Employer. Three (3) of those that testified, Tammie Hutchinson, Andrea Noble and Tracy Galey, had been involved in collecting support for the application, while Ms. Romanuk assisted the others and conducted the hearing before the Board.

[6] The Board appreciates that it takes a good deal of fortitude for employees to take on their Union and to appear without counsel before the Board in a hearing where the Union and the Employer are both represented by experienced and able counsel. While inexperienced, these employees did an excellent job of representing themselves before the Board.

[7] Each of the employees who were present at the hearing testified concerning issues at the workplace which they felt were not adequately addressed by their union representatives. Ms. Romanuk, who was conducting the hearing on behalf of the Applicant, was called by the Union as an adverse witness. Their evidence outlined the process they had gone through to obtain the necessary information to file the application for decertification, how they obtained support for the application, and how that application was submitted to the Board. Their evidence, as noted above, also

detailed various incidents in the workplace where they felt their union representation had been inadequate.

[8] In cross-examination of the Applicant's witnesses, and through a witness called by the Union, John Umpherville, the Board heard testimony about how the Applicants obtained some support signatures at a fundraising event for one of their co-workers, who had recently lost most of their belongings in a house fire. At that event, people who had been previously contacted by the Applicant or her helpers, had gotten persons who attended the fundraising event to sign support cards at that event.

[9] In addition to supporters of the application, the store manager, his wife, and the bakery manager were in attendance at the event. At one point in the evening, the bakery manager approached the Applicant's supporters, who were seated at a booth selling food tickets to talk. At that time, John Umpherville was also seated at the table.

[10] John Umpherville's testimony was that he was asked to sign a support card at that event. Because of Board policy related to confidentiality of those who may have supported the application, no questions which would reveal whether or not Mr. Umperville did or did not sign a support card, were permitted by the Board.

[11] Mr. Umpherville's testimony was supportive of the testimony of the Applicant's witnesses who testified concerning the gathering of support at the fundraising event. He testified that he did not drink at the event. He testified that the bakery manager stopped by the table to chat, that there was no discussion of union matters or the decertification at that time. He also noted that the table at which he and the decertification supporters were seated, was across the room from where the store manager was seated.

[12] Tammy Hutchinson also testified concerning the fundraising event. Her uncontradicted evidence was that the managers present at the fundraising event had no clue as to what was going on. She confirmed that the managers were on the opposite side of the room from where they were seated.

[13] The Union also called Glen Stewart as a witness. Mr. Stewart had been the service representative for the Sobey's employees following their certification, until he handed that responsibility over to Cory Cozart, sometime in the summer of 2008. Mr. Stewart was called in response to some of the allegations concerning how the union representatives had conducted themselves. While he denied allegations concerning his behaviour, the Board accepts the evidence provided by the witnesses for the Applicant concerning these events as being more credible.

[14] Cory Cozart was also called to testify on behalf of the Union. He also denied making some of the comments alleged by the Applicants. Again, the Board accepts the evidence of the Applicants as being more credible concerning these events.

[15] The Union advised the Board that they had another witness which they wished to call, but whom they were having difficulty contacting. Mr. Plaxton advised the Board that he had spoken to the witness the previous day and the witness had agreed to appear. The Union had tried repeatedly to contact the witness, but was unable to do so. The Union requested an adjournment of the hearing to allow them to contact the witness and arrange for the witness to appear to testify.

[16] The Board denied the Union's request for an adjournment for the reasons which follow. The evidence which the Union sought to adduce through this witness was in respect of that witness allegedly had been induced to sign a support card based on a promise from the Applicants that, as a result, that person would get better wages and benefits.

Relevant Statutory Provisions:

[17] Relevant statutory provisions include ss. 3, 5(k), 6 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) Subject to subsections (1.1) and (2), 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 must direct a vote to be taken by secret ballot of all employees eligible to vote to determine the question.

6(1.1) No vote shall be directed pursuant to subsection (1) unless the board is satisfied, on the basis of the evidence submitted in support of the application and the board's investigation in respect of that evidence, that at the time of the application at least 45% of the employees in the appropriate unit support the application.

. . .

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.*

Analysis and Decision:

[18] In *Matychuk v. Hotel Employees and Restaurant Employees Union, Local 206 and El-Rancho Food & Hospitality Partnership o/a KFC/Taco Bell,* [2004] Sask. L.R.B.R. 5, LRB File No. 242-03, 2004 CanLII 65622 (SK L.R.B.), the Board approved of the observation that it must be vigilant with respect to the issue of employer influence as referred to in s. 9 of the *Act*. In *Wells v. Remai Investment Corporation and United Food and Commercial Workers, Local 1400*, [1996] Sask. L.R.B.R. 194, LRB File No. 305-95, at 197, the Board observed that it is alert to any sign that an application for decertification has been initiated, encouraged, assisted or influenced by the actions of the Employer, "as the employer has no legitimate role to play in determining the outcome of the representation question." However, not every suspicious or questionable act or circumstance will necessarily lead to the conclusion that an application has been made as a result of influence, interference, assistance or intimidation by the Employer. As noted in *Leavitt v. Confederation Flag Inn (1989) Limited and United Food and Commercial Workers, Local 1400*, [1990] Winter Sask. Labour Rep. 64, LRB File No. 225-89 at 66, the conduct must be of a nature and significance that it compromises the ability of the employees to make the choice protected by s. 3 of the *Act*:

> *Generally, where the employer's conduct leads to a decertification application being made or, although not responsible for the filing of the application, compromises the ability of the employees to decide whether or not the wish to be represented by a union to the extent that the Board is of the opinion that the employees' wishes can no longer be determined, the Board will temporarily remove the employees' right to determine the representation question by dismissing the application.*

[19] In the present case, there was no substantive evidence for the Board to conclude that there has been any interference such that it compromises the ability of the employees to make the choice protected by s. 3 of the *Act.*

[20] Employees' s. 3 rights have now been buttressed by the Legislature in the recent amendments to the *Act* and require that the Board "must" order a secret vote

when the support threshold of 45% is reached. This threshold applies equally to certification applications and decertification applications.

[21] Therefore, unless the Board is satisfied that s. 9 applies, and the application should be rejected or dismissed because the application "is made in whole or in part on the advise of, or as a result of influence of or interference or intimidation by, the employer or the employer's agent", a vote must be ordered.

[22] In this case, no evidence has been provided to the Board which would satisfy it that s. 9 should be invoked.

[23] Absent other considerations, where s. 9 does not apply, the Board is required to oreder a vote when "the board is satisfied, on the basis of evidence submitted in support of the application, and the board's investigation in respect of that evidence, that at the time of the application at least 45% of the employees in the appropriate unit support the application".

[24] However, the Union argues that the support obtained by the Applicant is tainted by it having been improperly gathered. In their Reply, the Union notes that that support was inappropriately or improperly obtained insofar as it was gathered under the following factual situation:

- *Signing cards while employees were under the influence of alcohol;*
- *Improper promises and/or inaccurate information, including promising an employee full time employment if he or she signed; and*
- *Employees were not properly informed as to what they were signing.*

[25] With respect to the first allegation above, the Union called John Umpherville to testify. His testimony did not support this allegation. He testified that he did not drink at the fundraising event. No evidence was provided to link any potential supporter of the application to excessive consumption of alcohol.

[26] The Union's missing witness was, they argued, supposed to provide evidence with respect to the second item above. However, it would be difficult to believe that the Applicant, or any of her supporters was in any position to either offer or deliver to any Employee anything by way of full time employment. During their cross-examination by Union's counsel, they were consistent in their response to questions concerning what they told employees to induce them to support their application, which was they wanted employees to support them in order to allow the employees to have a secret ballot vote to determine if they wished to continue to be represented by the Union. Having heard the evidence from these employees and having observed their demeanor while testifying, it would be difficult for the Board to conclude that any improper promises or information was provided to employees to gain their support.

[27] The form of support card utilized by the Applicants was tendered into evidence as Exhibit U-1. Ms. Hutchinson testified that this form was obtained by the employees from the Labour Watch website. The support card clearly states on the first line thereof that:

> *[T]his document indicates that I no longer want to be represented by the following union:*
> *United Food & Commercial Workers, Union Local 1400.*

[28] The Union cited a number of decisions of the Board where the Board had invoked s. 9 as a result of the means whereby support had been obtained. In *Susie Mandziak v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Remai Investment Corp.*, [1987] Dec. Sask. Labour Rep. 35, LRB File No. 162-87, the Board concluded that s. 9 should be invoked:

> *When all of this evidence is viewed against a background of the employer's apparent anti-union animus and past unfair labour practices, the Board is left to infer that were it not for the employer's assistance, support and influence, it is improbable that evidence of employee support sufficient to enable this application to be filed would have been gathered.*

[29] In this case, however, there is no such evidence of any involvement by the Employer, and no evidence of anti-union animus, nor past unfair labour practices was provided to the Board.

[30] The Union also cited *Flaman v. Western Automatic Sprinklers (1983) Ltd. et al.,* [1989] Spring Sask. Labour Rep. 45, LRB File No. 045-88, which decision followed the *Mandziak* case, *supra,* above.

[31] Again, there was no evidence presented of any involvement by the Employer, no evidence of anti-union animus, nor past unfair labour practices.

[32] The Union also cited *Wilson v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Remai Investment Co. Ltd.*, [1990] Fall Sask. Labour Rep. 97, LRB File No. 088-90. In that case, the Board also concluded that s. 9 should be applied. However, the Board also discussed the relationship between s. 3 of the *Act* and s. 9. At page 99, the Board says:

> *Whenever the representation issue is before the Board, the Board must look through the bitter divisions between management and union and between employee and employee and keep the fundamental object of the Act in view. That object is the right given to all employees by Section 3 of the Act to decide for themselves whether or not they wish to be represented by a union for the purpose of bargaining collectively with their employer. Section 9 of the Act is a necessary adjunct to that right. In Confederation Flag Inn, Summer 1990, Sask. Labour Rep., p. 61, the Board commented upon the relationship between these sections. At p. 63, the Board stated:*
>
> > *"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 complementary. Sectin 3 declares the employees' right and Section 9 attempts to guard that right against applications that in reality reflect the will of the employer instead of the employees.*
> >
> > *See: Little Borland Ltd., SLR February, 1986, vol. 37, no. 2, p. 55;*

> *Remai Investment Co. Ltd., SLR December, 1987, p. 35;*
>
> *Interprovincial Concrete Construction Company Limited, SLR Spring 1989, p. 30;*
>
> *Western Automatic Sprinklers 1983 Ltd, SLR Spring 1989, p. 45.*

> *Generally, where the employer's conduct leads to a decertification application being made or, although not responsible for 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 Remai Investment Co. Ltd., supra, the Board summarized its policy:*
>
> > *"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 there presentation 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.*
> >
> > *The application is therefore dismissed pursuant to Section 9 of the Act.""*

[33] As noted above, the employees' rights under s. 3 have now been buttressed by a direction to the Board in s. 6(1) that where the necessary threshold has been reached, the Board "must direct a vote to be taken by secret ballot."

[34] Also, as noted in the quote above from *Remai Investment Co. Ltd.*, *supra*, the Board "will generally assume 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." The Legislature has now provided further express direction to the Board that they must, where sufficient support has been provided, order a secret vote.

[35] Also, as noted on page 100 of the *Betty L. Wilson* decision, *supra*, the Board quoted from its decision in *Reese v. Holiday Inn Ltd.,* [1989] Summer Sask. Labour Rep. 84, LRB File Nos. 207-88 & 003-89, wherein the Board stated:

> *When the Board dismisses an application for decertification under Section 9, it generally hears evidence connecting the employer in some way to one or more of the employees who initiate or pursue the application, or to the gathering of evidence of employee support.*

[36] Again, in this case, there has been no such evidence linking the Employer in any way to the gathering of support for the application by the Applicant or her supporters.

[37] Nor are the Boards' decision in *Gabriel v. United Food and Commercial Workers, Local 1400 and Saskatchewan Science Centre*, [1997] Sask. L.R.B.R. 232, LRB File No. 345-96, *Ben Schaeffer and Larry Lang v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Loraas Disposal Services Ltd.,* [1998] Sask. L.R.B.R. 573, LRB File No. 019-98, *Tyler Nadon and 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, also cited by the Union, of any assistance in this case. There is no similarity in the facts of those cases and the present case.

[38] The Union also cited *Walters v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Dimension 3 Hospitality Corporation*, [2005] Sask. L.R.B.R. 139, LRB File No. 238-04. In this case, the Board, having no direct evidence of Employer influence, examined the Applicant's reasons for bringing the rescission application.

[39] In that decision, the Board commented on its usual practice of ordering votes in applications for decertification, except in unusual circumstances (see paras 72 &

73). However, since that decision, the Legislature has made it clear through recent amendments to the *Act* that votes must be ordered in all cases where the statutory threshold for support has been reached.

[40] In that case, the Board also examined the stated reasons for the application to determine if the reasons cited by the applicants were plausible, and if the Board found the reasons not to be plausible to then determine if there were other factors from which the Board could draw and inference that, due to the lack of plausible reasons for the application, that the application had been influenced by the Employer.

[41] However, none of the facts in this case lead the Board to draw any inference that the application was in any way influenced by the Employer. Nor can it be said that the stated reasons for the application were implausible.

[42] As in an application for certification, the overarching reason for wishing to decertify a union is founded in the provisions of s. 3 of the *Act,* and the *Canadian Charter of Rights and Freedoms*, that is, a honestly held desire to either associate with other employees to be represented by a Union for the purpose of collective bargaining, or, the converse of that, in the case of a decertification, the honestly held desire not to associate with other employees for the purpose of collective bargaining. In this case, as testified to by all of the Applicant group, they held an honest desire not to be represented by the Union and enjoyed the support of other members of the bargaining unit in this desire, as noted in the support evidence which they filed with the Board.

[43] The Union also cited the more recent decision of the Board in *Paproski v. International Union of Painters and Allied Trades and Jordan's Asbestos Removal Ltd.*, [2008] Sask. L.R.B.R. 1, LRB File No. 173-06. This case followed the previously considered cases, and was based on and inference that there had been employer influence in the application to the Board. For the reasons noted above, this case is also not applicable to the present case.

[44] Based on the evidence provided by the Union, there is nothing in the employees' reasons for bringing the application, nor is there any suspicious or unusual

circumstances which would allow the Board to draw any inference that there was Employer involvement with the application.

[45] The Board, pursuant to sections 5(k) and 6 of the *Act*, hereby orders that a vote by secret ballot be conducted among all employees, who were employed within the said unit as of January 28, 2009, to determine whether or not the said employees wish to continue to be represented by the Union, for the purpose of bargaining collectively with their Employer.

DATED at Regina, Saskatchewan, this **24th** day of **February, 2009.**

LABOUR RELATIONS BOARD

Kenneth G. Love Q.C.,
Chairperson