The Labour Relations Board
Saskatchewan

RICKY STEPHEN KACHLUBA, Applicant v. INTERNATIONAL UNION OF BRICKLAYERS & ALLIED CRAFTWORKERS, LOCAL 1 SASKATCHEWAN, Respondent and ARTISTIC MASONRY & STUCCO LTD., Employer

LRB File No. 030-09 & 032-09; August 27, 2009
Vice-Chairperson, Steven Schiefner; Members: Donna Ottenson and Kendra Cruson

For the Applicant:	Mr. Larry LeBlanc, Q.C. and Ms. Holli Kuski
For the Respondent Union:	Mr. Rick Engel, Q.C.
For the Employer:	No one appearing

Decertification - Practice and Procedure – Board determines that s. 6 of *The Trade Union Act* does not preclude acceptance of evidence of support dated same day that application is filed with Board.

Decertification – Interference – Board not satisfied that circumstances warrant exercise of Board's discretion pursuant to s. 9 of *The Trade Union Act* to dismiss the application.

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

REASONS FOR DECISION

Background:

[1] **Steven Schiefner, Vice-Chairperson**: Mr. Ricky Stephen Kachluba (the "Applicant") applied for a rescission of the Order of the Saskatchewan Labour Relations Board (the "Board) dated December 12, 1996, designating the International Union of Bricklayers & Allied Craftworkers (the "Union") as the certified bargaining agent for a unit of employees employed by Artistic Masonry & Stucco Ltd. (the "Employer").

[2] In fact, the Applicant filed two (2) applications for rescission with the Board. The Applicant's first application was filed with the Board on March 31, 2009. This application indicated that there was one (1) employee in the bargaining unit. However the application was not filed with separate evidence of support. Rather, the application contained the following statements:

> *As the sole employee in the bargaining unit set forth in the said order, I no longer wish the International Union of Bricklayers & Allied Craftworkers Local 1 Saskatchewan to represent me for the purpose of collective bargaining or for any other purpose.*

> *I am the only unionized employee at Artistic Masonry & Stucco; as a result, there is no further evidence to be provided regarding employee support for this application for rescission.*

[3] The Applicant was advised by Board staff that his application may not be in compliance with the prescribed requirements of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") and, in particular, s. 6 of the *Act* because it was not filed with separate evidence of support. As a consequence, the Applicant filed a second application for rescission with the Board on April 1, 2009, together with evidence of support for that application (comprised of a separate document stating his support for his own application). However, a new issue arose with respect to the second application filed by the Applicant; specifically, that the support evidence for the second application was dated the same day as the second application was filed with the Board.

[4] To the credit of their counsel, the Union waived any objection to the potential defect in the second application, taking the position that if evidence of support must be both "separate" from and "pre-date" the filing of the Applicant's application, the first application could be accepted as evidence of support for the second application. Counsel for the Applicant took the position that his client's first application was compliant with the *Act* and only filed the second application out of an abundance of caution. Neither party argued the point extensively, conceding that any potential defect in the first application was cured with the filing of the second. On this point the Board concurs.

[5] In the Board's opinion, the proper interpretation of the *provisions* respect the filing of evidence of support for an application for rescission (or certification); the construction giving the fair, large and liberal interpretation that best attains the objectives of the *Act*, is that s. 6 defines the period during which evidence of support for an application must be obtained, with that period ending not on the day before, but on the day an application is filed with the Board and, on that day, until the point in time the application is filed with the Board. In other words, the proper interpretation of s. 6 is that the period during which evidence of support for an application for rescission (or certification) must be obtained is the ninety (90) day period ending at the **point in time** that an application is filed with the Board.

[6] Taken in the context of the statutory scheme of the *Act* (with at least one if its primary goals being to permit unrepresented parties to advance their respective claims to the Board without the sometimes draconian pitfalls associated with complex legal proceedings so

that the Board may assist in resolving the real questions in dispute between the parties), it is difficult to conclude that the legislature intended to prohibit the use of evidence of support dated the same day that an application is filed with the Board (provided that evidence of support is tendered before or with the filing of the application). Firstly, such a prohibition is unnecessary and serves no legitimate labour relations purpose. Secondly, it is confusing and potentially the source of frustration for applicants seeking to pursue their legitimate rights under the *Act*. For example, the Applicant filed two (2) applications for rescission, with both applications giving rise to potential defects that would not have been apparent to anyone but the most highly skilled practitioner of proceedings before the Board. Particularly telling was the fact that neither of these potential defects went to the real issues in dispute between the parties outlined later in these Reasons.

[7] In support for this finding, the Board relies on the decision of the Saskatchewan Court of Appeal in the cases of *Regina (City) v. Newell Smelski Ltd,* (1997), 152 Sask. R. 44 (C.A.) and *Wascana Energy Inc. v. Gull Lake (Rural Municipality No. 139),* [1997] 1 W.W.R. 280, 1998 CanLII 12344 (Sk. C.A.), wherein that Court cautioned the Saskatchewan Municipal Board against an overly technical interpretation of statutory time limits that have the effect of unnecessarily restricting the exercise of rights conferred by statute.

[8] With respect to the issue of “separate” evidence of support, without the benefit of a full argument, the Board was not prepared to make a determination as to whether or not “separate” evidence of support is required in the filing of a rescission application in circumstances where a unit is composed of only one (1) member and that sole member of a bargaining unit is the applicant; particularly so where the applicant (as the Applicant did in the within application) unequivocally stated his/her support for the application therein.

[9] With respect to the within application, the effective date of the collective bargaining agreement in force between the Union and the Employer was May 4, 2008. As a consequence, the Board is satisfied that both applications were filed during the open period mandated by subclause 5(k)(i) of *Act*.

[10] As indicated, the application was heard on July 20, 2009 in Regina.

Evidence of the Applicant:

[11] The Applicant testified on his own behalf and the Union called Mr. Clarence Medernach, the President/Secretary/Treasurer of the Union. In addition, Mr. Lionel Perra testified in response to a subpoena obtained by the Union. Mr. Perra was the owner of Artistic Masonry & Stucco Ltd., the Employer.

[12] The Applicant was a bricklayer by trade, having started working in the industry in 1980 progressing from a general masonry labourer to a bricklayer (although not having obtained the status of journeyperson).

[13] The Applicant testified that he originally started working in Saskatchewan during the early 1980's, until he moved out of the province seeking better pay in 1986. During the time the Applicant worked in Saskatchewan, he was a member of the Union. The Applicant returned to Saskatchewan in May of 2006 looking for work in Regina and approached the Employer to see if any work was available at that time. The Applicant was advised by Mr. Perra that, before he could come to work for the Employer, he had to go to the Union and get "signed up". The Applicant testified that he then attended to the Union's office, met with "Clarence" (*i.e.:* Mr. Medernach), signed the requisite forms, and was re-admitted as a member of the Union. The Applicant testified that he then went to work for the Employer for approximately three (3) months, until such time as the Applicant was injured in an accident unrelated to his work. Sometime thereafter, the Applicant left for Alberta.

[14] In February of 2009, the Applicant again moved back to Regina and again approached Mr. Perra looking for work. As before, the Applicant was advised that before he could come back to work, he had to go to the Union office and get "signed up" again. The Applicant testified that he went down to the Union hall in early March, 2009 (*i.e.:* sometime in the first week) and met with Mr. Medernach again. While much of the evidence of the parties was not in dispute, the evidence of the Applicant and the Union with respect to the meeting between the Applicant and Mr. Medernach was inconsistent. Where relevant, those inconsistencies will be set forth herein.

[15] The Applicant testified that he presented his expired Union card to Mr. Medernach for the purpose (expressed or otherwise) of being re-admitted to the Union. The Applicant testified that he was advised by Mr. Medernach that members were now required (a requirement

imposed since the last time he was a member) to take and complete new “safety knowledge” tests and that he made arrangements to take the associated courses, which courses were offered by the Union.

[16] The Applicant testified that he attended to the Union hall on March 6 and 10, 2009, when he took and completed the required safety courses. Although the courses were not offered by Mr. Medernach, he was in and around the Union hall each time the Applicant was present for his training.

[17] While at the Union hall, Mr. Medernach suggested to the Applicant that he contact Gracom Masonry, a Regina company that was working on a large masonry project, because the Union was aware that this company was looking for more bricklayers. The Applicant testified that he advised Mr. Medernach that he was no longer interested in commercial construction; that he now preferred working residential; and that he told Mr. Medernach that, because of his previous experience and the contacts he had made, he knew lots of people (*i.e.:* companies) in the industry with whom he could find employment. The Applicant testified that he started working for the Employer on or about March 9, 2009 but that he did not tell the Union where he was working.

[18] The Applicant testified that, while the Employer had other employees, none were bricklayers or otherwise fell within the scope of the Union’s certification Order. As a consequence, the Applicant testified that he was the only bricklayer working for the Employer at the time he filed his application(s) with the Board.

[19] The Applicant also testified as to his practice of recording his daily hours of work in a small calendar, copies of which were filed with the Board. For each day of the calendar (commencing with the start of this employment), the Applicant would make a note (albeit briefly described) as to the location or project on which he worked that day, as well as the number of hours that he work. The Applicant testified that he then turned in his hours to the Employer and his paycheque was calculated accordingly based on a rate of approximately $31.88 per hour.

[20] The Applicant testified that when he met with Mr. Medernach in early March, he asked for a copy of the wage schedule for bricklayers under the Union’s current collective agreement. The Applicant testified that he received the Union’s wage schedules for both the

Union's old and the new collective agreement (which had just been concluded) and took that information to the Employer and they used that information to determine his compensation.

[21] The Applicant testified that, during his first few weeks of work with the Employer, his hours of work were much less than he had anticipated because of rain and other delays, and, as a result, so was his paycheque. As a consequence, the Applicant approached the Employer and asked for some assistance, stating that he could not afford to live on the income he was receiving. The Applicant testified that the Employer agreed to pay him a wage based on a 40 hour work week (80 hours per pay-period) on the condition that the Applicant make up any missed extra hours when the weather was good. The Applicant testified that the Employer had averaging arrangements with his other non-unionized employees and that his averaging arrangement began in late March and was reflected in his paycheques starting in April of 2009. The Applicant further testified that both he and the Employer had complied with the averaging arrangement, which included him making up for any missed hours by working overtime when necessary and possible.

[22] The Applicant testified that his reasons for bringing the application to decertify the Union was his belief that he could make more money outside of the collective agreement and that he had little interest in the benefits offered by the Union.

[23] The Applicant denied that his application for rescission was made as a result of any influence, intimidation or interference from the Employer and denied talking about the application with the Employer until after it had been filed with the Board.

[24] In cross examination, the Applicant denied that he purposely mislead the Union about working for the Employer, stating that when he first approached the Union he still had not decided if he was going to work for the Employer or someone else and, even after he started working for the Employer, he wanted to keep his options open as to where else he might work.

[25] In cross examination, the Applicant admitted that he did not advise the Union of his averaging arrangements with the Employer and that they were not involved in negotiating this arrangement with the Employer.

[26] Also in cross examination, the Applicant admitted that he did not complete an application form to renew of his membership with the Union, nor had he asked about the

payment of Union dues or his arrears, although he did testify that he thought he had done all he needed to do to renew his membership.

Evidence of the Employer:

[27] As indicated, Mr. Lionel Perra appeared and testified before the Board in response to a subpoena issued by the Board at the request of the Union. In examination by the Union, Mr. Perra admitted that he did not call the Union when he hired the Applicant but stated that his reason for failing to do so was because he was approached by the Applicant looking for work. Mr. Perra testified that, prior to being approached by the Applicant, he was not really interested in hiring bricklayers, preferring instead to subcontract this work out to other companies. Mr. Perra testified that he knew and liked the Applicant's work because he had previously worked for him.

[28] Mr. Perra admitted that he did not discuss with the Union or negotiate his averaging arrangement with the Applicant, stating the reason he did not do so was again because he was approached by the Applicant to have this type of arrangement and that he had similar arrangement with his other employees (albeit non-union employees).

[29] Mr. Perra stated that he did not know whether or not his averaging arrangement was in compliance with the Union's collective agreement and only found out later (*i.e.:* after the commencement of the within proceedings) that it may be inconsistent with the collective agreement and that such arrangements would need to be specifically negotiated with the Union. Furthermore, Mr. Perra also testified that he was not aware that he may have been paying the Applicant in excess of that required by the collective agreement until after the commencement of the within proceedings.[1]

[30] Mr. Perra denied providing any assistance or encouragement to the Applicant in bringing his application to decertify the Union, stating he did not know anything about the application until some time in early April of 2009.

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[1] The Employer was paying the Applicant at a rate at or near that of a journeyman bricklayer. However, the Applicant had not yet achieved the status of journeyman.

[31] Mr. Perra testified that he assumed that the Applicant was a member of the Union because he knew he had previously been a member and because he told the Applicant he had to go to the Union office and get signed up before he could come back to work.

[32] Finally, Mr. Perra testified that his wife, Flo Perra, did the books for the Employer, include the calculation of payroll and deductions for all employees. During Mr. Perra's testimony, the Board received a copy of a facsimile transmission dated March 30, 2009 from "Flo Perra" to the Union on behalf of the Employer containing the following information:

> *Could you enter these hrs on your spreadsheet and fax the info to me for the remittances. These hrs are for March/09. Thanks*
>
> | *Name of Employee* | *Regular Worked* |
> |---|---|
> | *Rick Kachluba* | *123.5* |

[33] The latter information, including the employee's name and hours of work, was contained on a standard Union reporting form.

[34] Mr. Perra acknowledged that the Union dues associated with the Applicant's first several weeks of work were not paid to the Union until sometime in May but he denied any knowledge as to why these payments were delayed other than to state that his wife was responsible for this aspect of the business.

Evidence of the Union:

[35] Mr. Medernach testified that he was a journeyman bricklayer and that he had worked with the Union since 1994, having been elected to the position of President/Treasurer/Secretary in 1996.

[36] Mr. Medernach testified that the Union had approximately 160 members at the time of the hearing, but that the Union's average membership was normally closer to 200. Mr. Medernach testified that the Union had one (1) provincial-wide agreement for all unionized employers in the Province.

[37] Mr. Medernach further testified that, among the other benefits and services provided by it, the Union operated a hiring hall and maintained a current list of available bricklayers (journeyman and otherwise), apprentices, improvers, foreman and helpers.

[38] Mr. Medernach testified that the Union did not receive a call from the Employer indicating that it was seeking employees and the first the Union knew that the Employer was employing any bricklayers (*i.e.:* employees working within the scope of the Union's jurisdiction) was when it received a copy of the Applicant's application for rescission. However, Mr. Medernach confirmed that the information from Ms. Perra (advising the Union that the Employer had hired a bricklayer) actually arrived at the Union office first and that he only saw the copy of the rescission application first because he was out of the office the week that both the facsimile transmission from the Employer and the copy of the Applicant's application arrived.

[39] Mr. Medernach testified that the normal practice for a unionized employer seeking to hire new employees would be for them to contact the hiring hall for the list of available members. By way of example, Mr. Medernach testified that the Employer had contacted the Union in 2005, when it had a project in or around Moose Jaw, and required bricklayers to complete that project. In response, the Union provided a list of available workers appropriate to the Employer's needs at that time. However, Mr. Medernach also testified that employers were permitted to "name hire" (*i.e.:* employers could contact the Union and specifically request certain members without restriction based on that member's relative position on the "out-of-work" list). Furthermore, Mr. Medernach testified that, in the Union's efforts to limit barriers for unionized employers and to assist in growing its membership, the Union also permitted unionized employers to hire non-union members provide such persons attended to the Union office and applied for membership before commencing employment. In cross examination, Mr. Medernach confirmed that the proper procedure for a unionized employer approached by a non-member of the Union seeking employment was to send that person down to the Union to get "signed up" first.

[40] Mr. Medernach testified that in March of 2009 (*i.e.:* the time the Applicant was hired by the Employer) the Union was operating its dispatch board and that there were at least two (2) members available to go to work for the Employer and that the names of these individuals would have been provided to the Employer had the Union been contacted. However, Mr. Medernach did confirm that, if the Employer had contacted the Union and indicated that it wished to hire the Applicant, the Union's hiring hall practices would not have prevented the Applicant from being signed up again and dispatched to the Employer, provided the Applicant applied for membership in the Union, completed the required safety courses, and his outstanding dues were paid.

[41] Mr. Medernach testified that, when he meet with the Applicant in early March, 2009 the Applicant left him with the impression that his visit was more of a "social call" and that, while he may have been looking for work at some point in time, he did not give any indication that intended to go to work immediately or that he had been hired by the Employer or any other unionized employer. For if he had, Mr. Medernach testified that he would have ensured that the Applicant completed a new application form (to renew his membership as he did in 2006) and would have check to see whether or not the Applicant had any outstanding dues or other impediments to approval of his membership application. For example, Mr. Medernach testified that the Applicant was subject to outstanding dues that had arisen after the Applicant quit working in 2006 because the Union kept him on their membership roll for a period of three (3) months thereafter resulting in the accrual of $49.50 in monthly union dues (which were never paid). Mr. Medernach testified that it was not his impression that the Applicant was seeking to be re-admitted to the Union at the time he attended to the Union hall in early March of 2009 because, if he had, he would have responded differently to his visit.

[42] Mr. Medernach testified that he told the Applicant, if he was interested in work, he should contact Gracom Masonry because he know they were hiring bricklayers and he knew that the Applicant knew the people involved with that company. Mr. Medernach testified that the Applicant stated he was going to talk to his "buddy" (*i.e.:* friends in the city) and see what was going on. From this, Mr. Medernach testified that he understood the Applicant was not looking for work as a bricklayer at that particular time. Nonetheless, Mr. Medernach suggested to the Applicant that he complete his safety training courses right away so that he would be able to go to work as soon as he decided what he was doing (*i.e.:* what he wanted to do and where he wanted to work).

[43] Mr. Medernach testified that in March of 2009, when the Applicant commenced working for the Employer, he was not a member of the Union; nor was he a member of the Union on the date(s) his application(s) for rescission was (were) filed with the Board; nor was he a member of the Union at the time of the hearing. On the other hand, Mr. Medernach admitted that the Union's normal response to being advised that a unionized employer had hired a non-member would be to contact that employer and get membership applications from these employees and get them signed up as soon as possible. In response to a hypothetical question from the Board, Mr. Medernach indicated that, but for receiving the application for rescission brought by the Applicant, the probable outcome of receiving the March 30, 2009 facsimile transmission from the Employer would have been for the Union to contact Mr. Perra and tell him that the Applicant had not yet renewed his membership and, if the Applicant had complete his application form and the outstanding dues to have been paid, for the Applicant to have been re-admitted to the Union.

[44] Mr. Medernach testified that he spoke with Mr. Perra regarding the quantum of dues that the Employer should be deducting for the Applicant and that his response to the Employer was that it depended on where the Applicant was being classified (*i.e.:* journeyperson, apprentice, improver, foreman, labourer, etc.). Mr. Medernach testified that this conversation arose with Mr. Perra because the Union had not responded to the Employer's request for information as to the appropriate deductions for union dues. Mr. Medernach testified that, when he advised Mr. Perra that the Applicant was not a member of the Union, Mr. Perra replied "*I thought he was."* When asked why the Union did not respond to the Employer's request for assistance in calculating the dues remittances for the Applicant, Mr. Medernach answered that, "*once the application for rescission was received, everything just kinda stopped*" (*i.e.:* further dealing with the Applicant's membership in the Union).

[45] Mr. Medernach testified that he examined the payroll records provided by the Employer and, in so doing, concluded that the Employer did not appear to be in compliance with the Union's collective agreement in respect of the Applicant's wages, increments and overtime.[2]

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[2] The Employer voluntarily provided copies of its payroll records and other relevant information to the Union (and the Applicant) in advance of the hearing. The Board wished to commend the Employer for its cooperation, which undoubtedly assisted the Union in understanding the events that transpired and all parties in presenting their evidence to the Board.

[46] In cross examination, Mr. Medernach admitted that the Applicant had completed the required safety courses offered by the Union and that the balance of the training required in the collective agreement is provided by the employer.

Argument of the Parties:

[47] The Applicant took the position that his application for rescission was compliant with the *Act* and should be granted. The Applicant argued that he was an employee within bargaining unit; that his application was properly filed within the open period required by the *Act*; and that there was no evidence of advice or influence from the Employer as contemplated by s. 9 of the *Act*.

[48] The Applicant argued that his reasons for bringing the application were reasonable (believing that he could do better economically outside the Union's collective agreement) and wholly unrelated to any wishes or desires of the Employer.

[49] The Applicant took the position that the Union's argument that his application was defective because he was not a member of the Union at the time he filed his application was an extraneous consideration. Firstly, the Applicant argued that there is no requirement that an applicant be a member to have the right to bring an application of rescission, noting for example that, pursuant to s. 36 of the *Act*, employees have thirty (30) days after commencing employment to join the union. In the alternative, if status as a member was required, the Applicant argued that he was "the next best thing" (*i.e.:* as close to being a member as you can be without being a member). The Applicant took the position that he thought he was a member, as did the Employer. Furthermore, but for a communication error between Mr. Medernach and the Applicant, the Applicant would have been a member by the time he filed his Application with the Board. The Applicant also argued that, but for the filing of his rescission application, the Union's usual practices would have been to clear up the defect in his membership and get him enrolled so that he could go to work.

[50] The Applicant argued that his attendance at the Union hall should have made it clear to the Union that he was looking for work and was seeking re-admittance to the Union. Furthermore, the Applicant argued that, other than failing to complete his application form (which the Applicant argued was the result of a misunderstanding between himself and Mr. Medernach), the Applicant did all things within his power to comply with the Union's membership requirements

and requirements in the collective agreement regarding commencing work for a unionized employer.

[51] Finally, the Applicant argued that there was no evidence that the Employer failed to comply with union security clause in the Union's collective agreement. The Applicant argued that the Employer followed the correct procedure when approached by someone seeking work within the scope of the Union's certification Order (*i.e.:* the Applicant); namely, to send him down to the Union hall to get him signed up. The Applicant took the position that the Employer believed that the Applicant was a member at the point in time he commenced employment with the company; that the Employer notified the Union that it hired someone within the bargaining unit in the ordinary course (by submitting the hours of work to the Union on its regular form at the end of the month); and that the Employer remitted dues to the Union for the Applicant in accordance with the requirements of the collective agreement.

[52] The Union, on the other hand, took the position that the application for rescission should be dismissed for two (2) reasons: firstly, on the basis that the Applicant was not a member of the Union or otherwise disqualified himself from the class of persons entitled to bring an application for rescission in accordance with the *Act*; and secondly, that the application should be dismissed pursuant to s. 9 of the *Act* on the basis that it was made in whole or in part on the advice of, or with the involvement of, or as a result of the influence or interference of the Employer.

[53] The Union cautioned the Board that the evidence of Employer interference was subtle but sufficient when viewed as a whole. Firstly, the Union argued that the Applicant was not honest when he attended to the Union hall in early March and met with Mr. Medernach. The Union argued that it would have wanted the Applicant to have been a member if he had given any indication that he intended to return to work with a unionized employer. The Union noted that the Applicant did not complete an application form (as he did in 2006) on any of the occasions when he attended to their office. The Union also pointed to the fact that the Applicant did not tell the Union that he was working for the Employer, coupled with the fact that the Employer did not tell the Union it had hired the Applicant until approximately the same time as the Applicant filed his application for rescission, as an example of subtle but compelling evidence of improper influence within the meaning of s.9 of the *Act*. In taking this position, the Union relied on the decision of the Ontario Labour Relations Board in the case of *L.I.U.N.A Local 506 v. April Waterproofing Ltd.*, [1980] O.L.R.B. Rep. 1577. In that case, the Ontario Board chose to

exclude certain individuals from the constituency of employees permitted to participate in a certification application (in that case a raid) on the basis that those employees had been hired directly by the employer without reference to the Union's hiring hall clause.

[54] The Union also pointed to the Employer's failure to utilize the Union's hiring hall when it hired the Applicant; the Employer's failure to comply with the terms of the collective agreement (the calculation of wage rates, increments and overtime arrangements) and the Employer's failure to involve the Union in its negotiating an averaging arrangement for the Applicant; all as evidence of improper employer influence for the Board in applying the principles set forth in *April Waterproofing, supra*. In support of this position, the Union relied upon the decisions of this Board in *Flaman v. United Association of Journeyman and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and Western Automatic Sprinklers (1983) Ltd.*, [1989] Spring Sask. Labour Rep. 45, LRB File No. 045-88; *Huber v. Reinhardt Plumbing, Heating & Air Conditioning Ltd. and Sheet Metal Workers' International Association, Local 296*, [2002] Sask. L.R.B.R. 593, LRB File No. 195-02; and *Janzen v. Service Employees International Union, Local 336 and Prairie Care Developments Inc.*, [2007] Sask. L.R.B.R. 48, 134 C.L.R.B.R. (2nd) 173, LRB File No. 004-07.

[55] The Union asked the Board to dismiss the Applicant's application.

Relevant Statutory Provisions:

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

> 3 *Employees have the right to organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing; and the trade union designated or selected for the purpose of bargaining collectively by the majority of the employees in a unit appropriate for that purpose shall be the exclusive representative of all employees in that unit for the purpose of bargaining collectively.*
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> . . .
>
> *5 The board may make orders:*
>
> . . .
>
> *(k) rescinding or amending an order or decision of the board made under clause (a), (b) or (c) where:*
>
> *(i) there is a collective bargaining agreement in existence and an application is*

> *made to the board to rescind or amend the order or decision during a period of not less than 30 days or more than 60 days before the anniversary of the effective date of the agreement; or*
>
> *(ii) there is no agreement and an application is made to the board to rescind or amend the order or decision during a period of not less than 30 days or more than 60 days before the anniversary date of the order to be rescinded or amended;*
>
> *notwithstanding a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court;*
>
> *. . .*
>
> *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:

[57] On consideration of the whole of the evidence, we are satisfied that the Applicant has complied with the requisite statutory requirements of the *Act* in bring his application and we are not satisfied that this is an appropriate circumstance for the Board to exercise its discretion pursuant to s. 9 of the *Act*. The Board is also not satisfied that the Applicant has disqualified himself or that he should otherwise be excluded from the class of persons entitled to bring an application for rescission or participate in the representative question.

[58] In coming to this conclusion, the Board notes that the essential facts were not in dispute; the Applicant was working within the scope of the Union's certification Order, but he was not a member of the Union, either at the time he commenced employment with the Employer or at the time he filed his application(s) for rescission. The application for rescission was brought during the open period and was filed with evidence of support, all as prescribed by the *Act*.

[59] The Union asked this Board to apply the principles set forth in *April Waterproofing, supra,* to exclude the Applicant from the class of persons entitled to bring an application for rescission or to otherwise participate in the representative questions and, in so doing, has pointed to the impugned conduct of both the Applicant and the Employer in support of its request.

[60] While this Board has applied *April Waterproofing, supra*, in determining which employees are eligible to participate in a representative vote, it has done so cautiously. As this Board has stated in the past, the rationale for applying *April Waterproofing, supra,* has been to ensure that the fundamental right of employees to join and bargain collectively through a trade union is not rendered meaningless by the actions or conduct of an employer in salting the workplace with employees favourable to or influenced by the employer's desire to undermine or decertify the union. The Board's caution in applying *April Waterproofing, supra,* has arisen because this Board's jurisdiction is confined to enforcing the provisions of the *Act* rather than enforcing the security provisions of collective bargaining agreements. In addition, when applying *April Waterproofing*, *supra,* this Board has primarily focused on the conduct of the employer for purposes of determining whether or not to apply its discretion pursuant to s. 9 of the *Act* and not the conduct of the employees, *per se*. In other words, the issue for the Board in the present case is not to determine whether the conduct of the Applicant takes him out of the class of persons entitled to bring an application for rescission but rather to determine whether or not the conduct of the Applicant is indicative of the improper influences of the Employer sufficient to trigger the Board's discretion pursuant to s. 9 of the *Act*.

[61] In the Board's opinion, the circumstances of the present case are distinguishable from the facts in *April Waterproofing*, *supra*, in *Flaman, supra*, in *Janzen, supra*, and in *Huber, supra*. In reviewing the evidence, the Board is satisfied that the Employer appropriately respected the Union's certification Order and substantively complied with the procedure set forth in its collective agreement with the Union. Firstly, when approached by an individual seeking employment, the Employer advised that employee to first go to the Union hall and get signed up. Mr. Medernach confirmed this was the correct procedure when a unionized employer was approached by someone "off the street" seeking employment.

[62] Secondly, the Employer notified the Union in due course that it had engaged the services of someone that it believed was a member of the Union and the Employer remitted dues on behalf of that employee. The Board is not prepared to draw an adverse inference from the fact that the Employer waited until the end of the month to send its remittance information to the Union or the fact that there was a delay in the payment of the required remittances. The Employer is a small, family-run business, with the owner's wife being responsible for payroll deductions and processing. The Employer had not hired a member of the Union in a number of years and, as evident by Ms. Perra's request for assistance from the Union in calculating the dues, it is more reasonable to assume that the Employer was struggling with how to complete

the necessary paperwork than it would be to assume that the Employer's conduct was indicative of an anti-union animus, as was the case in *Huber, supra,* or otherwise an attempt to undermine the Union's security clause, as was the case in *Flaman, supra*.

[63] Thirdly, the Board accepts the evidence of Mr. Perra that the Employer believed that the Applicant was a member of the Union. While the Union pointed to a number of areas where it alleged the Employer was in contravention of the collective agreement, the Board is also not prepared to accept this as evidence of an anti-union animus or otherwise an attempt by the Employer to undermine the Union where it appears that most of alleged contraventions of the collective agreement arose in response to requests by the Applicant (such as the averaging arrangement) and/or did not come to the Employer's attention until after the within proceedings had been commenced. The Board accepts the evidence of Mr. Perra that he was not considering hiring any bricklayers until he was approached by the Applicant. The Board also accepts the evidence of the Applicant that it was his decision to return to Saskatchewan; his desire to return to work for the Employer; and his desire to have an averaging arrangement with the Employer. In considering the whole of the evidence, the Board is satisfied that the Applicant no longer wished to be represented by the Union and that this desire was unrelated to any conduct or influenced on the part of the Employer.

[64] In coming to this conclusion, we are mindful of the caution expressed by this Board 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, that the Board must be alert to any sign that an application for decertification has been initiated, encouraged, assisted or influenced by the actions of the Employer. Similarly, 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 endorsed the observation that it must be "*vigilant*" in guarding against applications to decertify a union that in reality reflect the will of the employer instead of the wishes of employees of the workplace.

[65] On the other hand, the Board has also noted in the past that 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. In *Shuba v. Gunnar Industries Ltd. and International Union of Operating Engineers, Hoisting, Portable and Stationary, Local 870*, [1997] Sask. L.R.B.R. 829, LRB File No. 127-97, that Board

concluded that, in considering the exercise of the discretion granted to it pursuant to s. 9 of the *Act*¸ the Board must carefully balance the democratic right of employees to choose whether or not to be represented by a trade union (as defined and protected by s. 3 of the *Act*), against the need to ensure that an employer has not used its coercive power to improperly influence the outcome of that choice. As a consequence, it has been the policy of the Board to respect the right of employees to decide the representative question in rescission applications and to only withhold that right in circumstances where the Board has lost confidence in the capacity of the employees to independently decide the representative question because of the employer's conduct.

[66] Having been satisfied that the Applicant has met the statutory requirements of the *Act* and that this is not an appropriate case for the Board to exercise its discretion pursuant to s. 9, an Order will issue that a vote be conducted in the usual manner to determine the representative question.

DATED at Regina, Saskatchewan, this **27th** day of August**, 2009.**

LABOUR RELATIONS BOARD

Steven Schiefner,
Vice-Chairperson