The Labour Relations Board
Saskatchewan

ALAN ANDERSON, Applicant v. INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 739 and ALLAN'S GLASS PRODUCTS LTD., Respondents

LRB File No. 045-09; September 8, 2009
Vice-Chairperson, Steven Schiefner; Members: Michael Wainwright and Hugh Wagner

For the Applicant:	Ms. Susan Barber, Q.C.
For the Respondent Union:	Ms. Bettyann Cox
For the Respondent Employer:	Mr. Brian Kenny, Q.C.

Decertification – Interference – Board concludes that provision of collective agreement to employees by Employer not evidence of interference - Board not satisfied that circumstances warrant exercise of Board's discretion pursuant to s. 9 of *Trade Union Act* to dismiss the application.

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

REASONS FOR DECISION

Background:

[1] **Steven Schiefner, Vice-Chairperson**: Mr. Alan Anderson (the "Applicant") applied for a rescission of the Order of the Saskatchewan Labour Relations Board (the "Board) dated August 5, 1981 designating the International Brotherhood of Painters and Allied Trades as the certified bargaining agent for a unit of employees employed by Allan's Glass Products Ltd (the "Employer"). The International Union of Painters and Allied Trades, Local 739 (the "Union") is the successor to the International Brotherhood of Painters and Allied Trades.

[2] The Applicant filed his application for rescission with the Board, together with evidence of support from employees in the bargaining unit as prescribed by *The Trade Union Act*, R.S.S. 1978. c.T-17 (the "*Act*"), on April 29, 2009. The effective date of the collective bargaining agreement in force between the Union and the Employer was June 1, 2007. As a consequence, the Board is satisfied that the application was filed during the open period mandated by s. 5(k)(i) of the *Act*.

[3] In response to the application (and in accordance with the requirements of the *Act*), the Employer filed a Statement of Employment indicating three (3) employees in the bargaining unit.

[4] In its reply, the Union alleged, *inter alia*, that the Applicant's application was made on the advice of, or as a result of the influence, interference or intimidation of, the Employer and asked the Board to exercise its discretion pursuant to s. 9 of the *Act* to dismiss the application.

[5] The application was heard on July 28, 2009 in Regina. The Applicant testified on his own behalf and the Union called Mr. Sean Tatum, the Union's Business Representative, and Mr. John Sedor, the Business Manager of the Union.

[6] On July 29, 2009, the Board, pursuant to the authority granted by s. 18(v) of the *Act*, issued a direction that a vote be taken among the employees affected by the proceedings and that the ballots so cast be sealed and not counted until further direction of the Board.

Evidence of the Applicant:

[7] The Applicant testified that he was a resident of Winnipeg, Manitoba, and had worked for the Employer since January of 2002. The Applicant was an installer of glass and aluminum frames for the Employer and most of the projects he had worked on were in Manitoba. The Applicant testified that most of the employees of the Employer worked in Manitoba, although, from time to time, the Employer took on projects in other provinces, with certain employees being assigned to work on these projects.

[8] The Applicant testified that the Employer started a large project at the University of Regina in the summer of 2008 and that, although other employees had assisted from time to time (as required), three (3) employees were specifically assigned to this project by the Employer. The Applicant testified that he and two (2) other employees had been assigned to work on the project and that he was the most senior employee of the company on the crew. The Applicant estimated that the project was about seventy-five percent (75%) complete at the time of the hearing and would take a further three (3) or four (4) months to complete; at which time, he anticipated returning to Manitoba to work.

[9] The Applicant testified that the employees of the Employer had been represented by the Union in Manitoba until late 2002 or early 2003 when an application to decertify the Union was filed in that province and granted. The Applicant testified that, since that time, the

employees have been represented by the Allan Glass Employee Association (the “Employee Association”).

[10] The Applicant testified that there were approximately fifteen (15) members of the Employee Association; that he was the secretary; that Mr. Jim Taite was the president; and Mr. Rod McGillivary was the vice-president. The Applicant indicated that, at the time of the hearing, Mr. Taite was working on a project in Edmonton, Alberta, and that Mr. McGillivary was working with him in Regina. The Applicant testified that they each were elected to their respective positions by the membership of the Employee Association. For example, the Applicant indicated that he had been elected to the position of secretary in the summer of 2008 (about the same time as he started the project at the University of Regina).

[11] The Applicant testified that, when his crew first arrived in Saskatchewan to work on the project at the University of Regina, they did not know that the Employer continued to be certified to the Union in Saskatchewan. The Applicant testified that he (and the other employees) had assumed that decertifying the Union in Manitoba would have had the effect of decertifying the Union in Saskatchewan as well. The Applicant testified that the project at the University of Regina was the first project in Saskatchewan that the Employer had undertaken since decertifying the Union in Manitoba. The Applicant understood that it was the first project the company had undertaken in Saskatchewan in many years.

[12] The Applicant testified that he and the other workers were approached when leaving their worksite by someone (that the Applicant later learned was a representative of the Union) sometime before Christmas in 2008 and was asked questions about the work they were doing on the project. The Applicant and the other employees had a second meeting with this same person sometime later; at which time, the person identified himself as being a representative of the Union. The Applicant testified that during this second meeting the person asked a number of questions about the wages and benefits being provided to the employees working on the project.

[13] The Applicant testified that sometime thereafter they were informed by their supervisor, Mr. Kevin Knowles, that the company was still bound by the Union’s certification Order in Saskatchewan and that the employees were required to sign Union cards if they wanted to work in Saskatchewan. The Applicant also testified that the Employer began deducting the

Union's dues, which the Applicant understood to have been calculated based on 3% of the employees gross pay, plus $20.00 per month. The Applicant testified that he (and other employees) was also paying dues to the Employee Association at the rate of $10.00 per pay cheque (*i.e.* every two (2) weeks). He also testified that he continued paying dues to the Employee Association in Manitoba after he started paying dues to the Union. In cross-examination, the Applicant admitted that he could have asked the Employee Association to temporarily suspend his dues while he was working in Saskatchewan, but he did not do that.

[14] The Applicant testified that sometime after he was informed by his supervisor that he was required to join the Union to work in Saskatchewan, he was contacted by Mr. Jim Taite, the Employee Association's president, and that Mr. Taite "nominated" him to bring a decertification application in Saskatchewan. The Applicant testified that the reason he was nominated to bring the application was because he was the most senior employee in Saskatchewan. The Applicant testified that Mr. Taite told him something to the effect that, "if they want to work in Saskatchewan, they must decertify." In cross-examination, the Applicant clarified that he knew that belonging to the Union (*i.e.* being certified) in Saskatchewan did not prevent him (and the other employees) from working in Saskatchewan (on the current project or any other project) but that, if they wanted to be represented by the Employee Association in Saskatchewan, they need to be decertified in Saskatchewan as well.

[15] The Applicant testified that he preferred to be represented by the Employee Association for purposes of collective bargaining in Saskatchewan, stating that he was satisfied with the Employee Association's representation in Manitoba. The Applicant stated that he was not particularly interested in the benefits offered by the Union.

[16] The Applicant testified that someone from the Employee Association asked the Employer for a copy of the Union's Collective Agreement in Saskatchewan, which document the Employer provided. The Applicant stated the reason the Employee Association wanted a copy of the Employer's Collective Agreement with the Union was for the purposes of calculating the open period, which information they required in preparing the application for rescission in Saskatchewan.

[17] The Applicant denied personally receiving any advice, assistance or encouragement from the Employer in preparing the application for rescission or in gathering

support therefore. The Applicant denied discussing the application for rescission with the Employer, stating the only discussion he had with the Employer regarding the Union in Saskatchewan was when his supervisor told him that he was required to sign the Union's membership cards, which he did, based on his supervisor's instruction.

[18] In cross-examination, the Applicant testified that he was a glazier but had not yet achieved the status of journeyman. The Applicant admitted that one of the benefits of staying in the Union would be to complete and obtain his journeyman status but he stated that he wasn't interested in doing so.

[19] The Applicant testified that Mr. Taite instigated the process to decertify the Union in Saskatchewan by "nominating" him to bring an application in Saskatchewan; that Mr. Taite told him to go see the lawyer; and that the Employee Association arranged and paid for legal counsel for the application. The Applicant testified that he only saw the lawyer once (the day he signed the application form); that he went to see the lawyer late in the day (*i.e.* after work); and that he did not provide his counsel with a copy of the collective agreement (his understanding being that this document had been provided to her by the Employee Association and that the Employee Association had received it from the Employer).

[20] In cross-examination regarding wages paid by the Employer, the Applicant testified that, under the Employee Association's collective agreement with the Employer (i.e. in Manitoba), employee wages are based on each employee's experience and classification, with each individual person's wage falling into a range and with individual employees moved up and through their respective range at the discretion of the Employer. The Applicant testified that he had been in the $20.00 to $21.00 per hour range until recently, but that had received a raise earlier in the year (he thought on January 1st) and that he was now making $21.36 per hour.

[21] In cross-examination, the Applicant testified that he was not involved in collective bargaining with the Employer, stating that the Union president, Mr. Taite, was responsible for doing so. The Applicant admitted to having little knowledge of the details of the Employee Association's collective agreement with the Employer. While the Applicant did recall the members voting on the terms of their last collective agreement with the Employer, he could not recall the specific terms of that agreement or the changes that had been made from their previous collective agreement.

[22] In cross-examination, the Applicant indicated that he did not know whether or not the Employee Association had a charter or any bylaws. The Applicant admitted that the Employee Association had not given him any training regarding his duties or regarding administration of the collective agreement or regarding collective bargaining in general.

[23] In cross-examination, the Applicant admitted that, although he and the other members of the executive of the Employee Association (*i.e.* the President, the Vice-president, and the secretary) were elected, there were no fixed dates for elections, nor regular meetings of the Association. The Applicant testified that members of the Employee Association would meet after work if anything needed to be discussed or decided (presumably at the call of the president). The Applicant testified that all members of the executive of the Employee Association (*i.e.* himself, Mr. Taite and Mr. McGillivary) worked with the tools.

[24] In cross-examination, the Applicant testified that, as the company's most senior employee in Saskatchewan, he was the "lead hand" for the project at the University of Regina. However, the Applicant also testified that he did not receive any additional pay and the supervisor of the project was Mr. Knowles, who made all decisions respecting the allocation of manpower for the project.

[25] In cross-examination, the Applicant confirmed that, at the time he filed the application for rescission with the Board (i.e. on April 29, 2009), there were three (3) employees working in Saskatchewan (*i.e.* on the project at the University of Regina); namely, himself, Mr. Cam McGillivary, and Mr. Rod McGillivary (the latter two (2) being brothers). The Applicant testified that other employees of the Employer had worked on the project in the proceeding months but that these employees had only work temporarily (*i.e.* a week at a time) and were not working in Saskatchewan on the day he filed his application. The Applicant testified that the most recent of these other temporary employees was Mr. Andrew Orpin, who had worked the week of April 15, 2009. However, the Applicant confirmed that this person had not been working on the day he filed his application nor was Mr. Orpin anticipated to return to work on the project at the University of Regina.

Evidence of the Union:

[26] Mr. Sean Tatum testified that he was an organizer and business representative for the Union, a position that he had held since March 4, 2009. Mr. Tatum testified that, prior to coming to work for the Union, he had worked on the West coast for the International Union of Painters and Allied Trades, Local 138.

[27] Mr. Tatum testified that one of his first duties upon starting with the Union was to sign up the employees of the Employer working at the University of Regina. Mr. Tatum testified that, to receive permission to enter the worksite to meet with the employees, he was required to complete a two (2) hour orientation/training. Mr. Tatum testified that he did so and that he visited the site on April 8, 2009, at which time he met with Mr. Allan Anderson and Mr. Rod McGillivary, who were the only two (2) employees working that day. Mr. Tatum testified that both Mr. Anderson and Mr. McGillivary signed the Union's membership application forms at that time. Mr. Tatum returned to the worksite on April 15, 2009 at which time, Mr. Cam McGillivary and Mr. Orpin completed membership application forms.

[28] While Mr. Tatum attended to the workplace on other occasions, of relevance was his attendance to the worksite on May 14, 2009; on which day, the employees signed the Statement of Employment required by the Board. On this occasion, the following individuals were present; three (3) employees (Mr. Anderson, Mr. Rod McGillivary, and Mr. Cam McGillivary), Mr. Tatum, representing the Union and Mr. John Borys, representing management. During this visit to the worksite, Mr. Tatum testified that one of the McGillivary brothers noticed Mr. Tatum's vehicle (*i.e.* a new Jeep) and made a critical comment related to where his Union dues were going. Mr. Tatum testified that, while he was explaining the benefits offered by the Union, Mr. McGillivary told Mr. Tatum that he didn't need the benefits offered by the Union because "*we get that from the Federal government*"; a reference which Mr. Tatum assumed was to Mr. McGillivary's First Nations status.

[29] Mr. Tatum testified that, seeing that only three (3) employees were present to sign the Statement of Employment, he asked as to the location of Mr. Orpin, whom he knew to have previously signed a membership application form. Mr. Tatum was informed that Mr. Orpin had only worked at the worksite on a temporary basis; that he was no longer working in Saskatchewan; and that he was not expected to return to that particular project.

[30] Mr. Sedor testified that he was the Business Manager for the Union, a position he had held since November of 2004. Prior to that, Mr. Sedor was the Union's business representative for twelve (12) years.

[31] Mr. Sedor testified that the Union became aware that the Employer was working in the province in July of 2008, which fact he confirmed by attending to the University of Regina and observing work being done falling with the scope of the Union's certification Order; specifically the installation of glass windows. Mr. Sedor stated that, while the Union was certified to the Employer, he had no recollection of the Employer working in the Province since it had been originally certified in 1981.

[32] Mr. Sedor testified that the Union had one (1) collective agreement with all unionized glaziers in Saskatchewan and that the most recent collective agreement was negotiated with AFGD Glass (Saskatchewan), a division of AFG Industries, Inc. on behalf of all unionized employers in the province. Mr. Sedor confirmed that the effective date of this agreement was June 1, 2007 and that it expired on May 31, 2010.

[33] Mr. Sedor testified that the Union was not contacted by the Employer prior to commencing work in Saskatchewan in the summer of 2008 and that, at that time, the Union had members on its out-of-work list; members whom the Union could have dispatched to the worksite had it been contacted by the Employer. As a consequence, when the Union confirmed that the Employer was working in the province, Mr. Sedor wrote to the Employer; advised the Employer that the Union was the sole bargaining agent for the company's employees in Saskatchewan; and asked the Employer to honour the Union's security clause. Mr. Sedor testified that, when the Union did not receive a response to the Union's request, the Union filed an application with the Board on October 22, 2008 alleging the Employer had committed (and was committing) an unfair labour practice.

[34] In response to the application filed by the Union, the parties began discussions and ultimately negotiated a settlement agreement, with the Employer agreeing to pay compensation to the Union for back dues; with the Union agreeing to allow the existing employees of the Employer to apply for and become members of the Union and to continue working on the Employer's project at the University of Regina; and with the Union agreeing to withdraw its unfair labour practice application to the Board. Mr. Sedor testified that the terms of this arrangement were contained in an agreement between the parties dated March 9, 2009 and that the quantum paid by the Employer to the Union for back dues was several thousand dollars. In response to a question from the Board as to why the Union did not insist on dispatching its members to the project at the time the settlement agreement was negotiated, Mr. Sedor testified that, at that point in time, the Union did not have any glaziers on its out-of-work list.

[35] Mr. Sedor testified that he stopped by the head office of the Employer in Winnipeg, Manitoba in March of 2009 to ensure that the Employer was calculating its remittances correctly and, while in the office, Mr. Sedor observed Mr. Knowles, who he understood to be the Employer's superintendent, working in one (1) of the offices located there. Mr. Sedor testified that he understood that Mr. Knowles was a past president of the Employee Association.

[36] Mr. Sedor testified that he was aware the employees of the Employer had decertified in Manitoba and that, when the employees made their application in Manitoba to do so, the Union decided, for its own strategic reasons, not to oppose their application.

[37] Finally, Mr. Sedor testified that, in reviewing the remittances from the Employer, he believed the Employer was not in compliance with the terms of its collective agreement. According to Mr. Sedor's calculations, the wages did not appear to be in line with the wage scales in the collective agreement and that it did not appear that a schedule wage increase for June 1, 2009 had been provided by the Employer to its members. In cross-examination, Mr. Sedor admitted that the Union had not contacted the Employer regarding these matters prior to the date of the hearing.

Argument of the Parties:

[38] 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 the

bargaining unit; that his application was properly filed within the open period required by the *Act*; and that there was no compelling evidence of advice or influence from the Employer as contemplated by s. 9 of the *Act*. The Applicant took the position that the relevant date for determining the composition of the bargaining unit is the date of application and argued that, at the time the Applicant filed his application for rescission, there were only three (3) employees working in Saskatchewan.

[39] In support of his application, the Applicant relied upon the decision of this Board in *Shan v. Little Borland Ltd. and United Brotherhood of Carpenters and Joiners of America*, [1986] Feb. Sask. Labour Rep. 55, L.R.B. File Nos. 221-85 & 227-85; *Sheidt v. Pineland Co-operative Association Ltd. and Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, [1995] 1st Quarter Sask. Labour Rep. 256, L.R.B. File No. 239-94; *Wells v. Remai Investment Corporation o/a Imperial 400 Motel and United Food and Commercial Workers, Local 1400.* [1996] Sask. L.R.B.R. 194, L.R.B. File No. 305-95, *Chrunik, et al. v. International Brotherhood of Electrical Workers, Local 2038 and National Electric Ltd.*, [1996] Sask. L.R.B.R. 568, L.R.B. File No. 060-96, *Patrick Quigley v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Custom Built Ag. Industries Ltd., operating as Trail Tech*, [2000] Sask. L.R.B.R. 128, LRB File No. 220-99; *Mayer v. L.L. Lawson Enterprises Ltd., et al,* [2001] Sask. L.R.B.R. 485, L.R.B. File No. 013-01, *Cavanagh v. C.U.P.E. Local 1975, et. al.,* [2003] Sask. L.R.B.R. 226, L.R.B. File No. 047-03, and *Paproski v. International Union of Painters and Allied Trades, Local 739 and Jordan's Asbestos Ltd., [2008] Sask. LR.B.R. 1, L.R.B. File No. 173-06*.

[40] The Applicant cited *Shan, supra, Scheidt, supra, Quigley, supra*, and *Wells, supra*, as examples of the Board's restraint in the application of s. 9 of the *Act* to circumstances were an employer's conduct (whether such conduct be subtle or overt) represented a marked departure from the expected reasonable neutrality of an employer and created an association (some cases use words such as "influence" or "link") with an impugned rescission application sufficient to raise a doubt in the Board's mind as to the ability of the employees in that unit to make an independent decision on the representative question.

[41] With respect to the fact that the Employer had provided the employees with a copy of the Union's collective agreement and that this documented assisted them in completing their application for rescission in Saskatchewan, the Applicant argued that providing the employees with a copy of the collective agreement, with nothing more, was not a departure from

reasonable neutrality and certainly did not cast a doubt upon the ability of the employees to make an independent decision; both necessary to trigger the application of s. 9 of the *Act*.

[42] The Applicant cited *Chrunik, supra*, *Cananagh, supra, Mayer, supra,* and *Paproski, supra,* as examples of where the Board has examined an applicant employee's stated reasons for bringing a rescission application, not for the purpose of determining whether or not the applicant's reasons were good or thoughtful, but for the purpose of determining whether or not those reason find their origins outside of the *bona fide* wishes of the employees, with their true origin being the wishes of the employer.

[43] The Applicant argued that his reasons for bringing his application to decertify the Union were both plausible and credible (believing that the Union had already been decertified in Saskatchewan, desiring not to pay dues to two (2) representative organizations, and preferring instead to be represented by the Employee Association) and were wholly unrelated to any wishes or desires of the Employer.

[44] The Applicant asked the Board to grant his application and to proceed with the conduct a vote in order that the members of the bargaining unit (*i.e.* the employees working in Saskatchewan for the Employer) could decide whether or not they wished to continue to be represented by the Union in Saskatchewan.

[45] The Union, on the other hand, argued that the application for rescission 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. In this respect, the Union argued that the Employee Association should be viewed by the Board as an agent of the Employer.

[46] The Union cautioned the Board that the evidence of the Employer interference was subtle but, in its opinion, sufficient when viewed as a whole. The Union noted that the idea or initiative to decertify the Union in Saskatchewan did not find its origin in the Applicant; rather, the Applicant was "directed" ("nominated" in the words of the Applicant) to bring the application for rescission by the president of the Employee Association (*i.e.* Mr. Taite). Furthermore, it was the past president of the Employee Association (*i.e.* Mr. Knowles) that directed the Applicant and other employees in Saskatchewan to sign their membership application forms and that this

direction only occurred after the Union settled with the Employer; settlement which the Union noted compelled the Employer to pay a substantial sum in compensation to the Union. Finally, the Employee Association received valuable assistance in bringing the rescission application when the Employer provided them with a copy of the Union's collective agreement in Saskatchewan; information which the Union argued was vital to bringing the within application. Furthermore, the Union asserted that, after being compelled to pay several thousand dollars in back dues to the Union (in settlement of the Union's allegation of an unfair labour practice), the Employer would have been "motivated" to decertify the Union in Saskatchewan.

[47] The Union pointed to these circumstances as examples of the subtle evidence of improper employer influences similar to that found previously by the Board in cases such as *Clayton Walters v. XPotential Products Inc. o/a Impact Products and United Steelworkers of America, Local 5917,* [2002] Sask. L.R.B.R. 65, L.R.B. File No. 214-01; *Tyler Nadon v. United Steelworkers of America, Local and X-Potential Products Inc. o/a Impact Products,* [2003] Sask. L.R.B.R. 383, L.R.B. File No. 076-03; and *Raymond Halcro v. Sheet Metal Workers' International Association, Local 296 and Thermal Metal Ltd.,* [2006] Sask. L.R.B.R. 92, L.R.B. File No. 232-05.

[48] In making these assertions, the Union argued that the Employee Association should be viewed as little more than an agent of management. The Union noted that the Applicant, who stated that he was the Employee Association's secretary, had very little of the knowledge one would expect of a member of the executive of a legitimate trade union, including its authority, or even the terms of its Collective Agreement with the Employer; a fact that the Union argued raised many unresolved issues regarding the independence of the Employee Association. In addition, the Union argued the fact that the president of the Employee Association worked out of the same office building as management, coupled with the fact that the Union believed the Association had settled for lower wages than other trade unions in Manitoba, were indicative that the Association was merely an agent of management.

[49] Finally, the Union argued that, if the Employer had initially complied with the security provisions contained in the Union's Collective Agreement, it would have contacted the Union's hiring hall before it commenced its project at the University of Regina in June of 2008; at which point members of the Union would have been dispatched to this project. If this had taken place, the Union's out-of-work members would have been dispatched to work on this project (and not the Employer's employees from Manitoba). To which end, the Union argued that the

Employer's conduct in not complying with the Union's Collective Agreement (not utilizing the Union's hiring hall) was another example of the subtle influences of the Employer resulting in a tainted application to decertify the Union. In this respect, the Union relied on the decisions of this Board in *Steven Huber, et. al, v. Reinhardt Plumbing, Heating & Air Conditioning Ltd. and Sheet Metal Workers' International Association, Local 296,* [2002] Sask. L.R.B.R. 593, L.R.B. File No. 195-02; *Tyler Nadon, supra*; *Marlys Janzen v. Service Employees International Union, Local 336 and Prairie Care Developments Inc.,* [2007] Sask. L.R.B.R. 48, L.R.B. File No. 004-07; and *Paproski, supra.*

[50] The Union asked the Board to dismiss the Applicant's application. In the event the Board was not prepared to exercise its discretion pursuant to s. 9, the Union argued that Mr. Orpin should have been included on the Statement of Employment as he was working in Saskatchewan on the project less than two (2) weeks before the Applicant filed his application.

Relevant Statutory Provisions:

[51] 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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> . . .
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> *5 The board may make orders:*
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> . . .
>
> *(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:

[52] On consideration of the whole of the evidence, we are satisfied that the Applicant has complied with the 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*.

[53] While the Board concurs with the Union that it must be vigilant in guarding against applications to decertify a trade union that do not reflect the true wishes of the employees and, in doing so, must be alert to any signs, including subtle signs, of employer influences, the Board is not satisfied that the conduct of the Employer in this case has represented a departure from the expected reasonable neutrality in relation to the Applicant's application; nor were we satisfied that the circumstances of the present case created a sufficient nexus between the Employer and the Applicant's application to raise sufficient doubt in the Board's mind as to the ability of the employees in the unit to make an independent decision on the representative question.

[54] With respect to the impugned conduct of the Employer, the Board was not satisfied that the provision of a copy of the Union's collective agreement to the Employee Association in Manitoba was inappropriate or otherwise tainted the Applicant's application. While this document was necessary for the Applicant to complete his application for rescission, it was also a document that the employees were entitled to as a matter of right. Employees that are or may become subject to a collective agreement have a right to that document, irrespective of the use they may ultimately make of it. In this respect, the Board concurs with the position advanced by the Applicant that provision of a copy of the collective agreement, with nothing more, is not indicative of improper conduct on the part of the Employer.

[55] In addition, the Board is not prepared to draw an adverse inference from the Employer's failure to comply with the Union's hiring hall practices, when the Union agreed in its settlement agreement to allow the Employer's employees (*i.e.* the employees that the Employer originally assigned to the project) to continue working on the project. When the Union agreed to allow these employees to continue in the bargaining unit (employees the Union knew had previously decertified in Manitoba), it would have been reasonable for the Union to anticipate that these same employees could bring a decertification application in Saskatchewan if the Union was unsuccessful in promoting the benefits of remaining in the Union. Also, the Board is not prepared to draw an adverse inference from the alleged contraventions of the Union's collective agreement by the Employer, when these alleged contraventions were not raised with the Employer prior to the hearing. As such, in the Board's opinion, the circumstances of the present case are distinguishable from the facts in *Huber, supra, Nadon, supra, Janzen, supra,* and *Paproski, supra*.

[56] With respect to the status of the Employee Association, the Board is not satisfied that the Employee Association was an agent of management. The Board is not prepared to draw an adverse inference, as suggested by the Union, from the fact that the Applicant, who was the Association's secretary, had little knowledge regarding the Employee Association's charter and/or bylaws, nor any training or experience in collective bargaining, when his testimony indicated that he had just been elected to his position at approximately the same time that he started work on the project at the University of Regina; an assignment that involved an extended period of time away from home. Similarly, the Board is not prepared to draw an adverse inference from the fact that, in the Union's opinion, the Employee's Association had settled for wages below that achieved by other trade unions in the sector in Manitoba. To do so, would lead the Board into the task of evaluating the relative strength and/or weakness of trade unions; something the Board is not prepared to do. Furthermore, the Board is not prepared to draw an adverse inference from the fact that the past president of the Employee Association worked out of an office in the Employer's Head Office and it was he who directed the employees in Saskatchewan to sign the Union's membership application forms after the settlement agreement was reached with the Union. After the settlement agreement was negotiated, someone had to advise the employees in Saskatchewan of their requirement to join the Union in Saskatchewan. The fact that this person was their direct supervisor is not evidence of improper employer interference nor is the timing suspect.

[57] While it is reasonable for the Board to assume that the settlement agreement negotiated between the Employer and the Union was a catalytic event for the events that followed (as suggested by the Union), it is not axiomatic that the application to decertify the Union found its genesis in the wishes or conduct of the Employer. It was apparent to the Board that the instigation to decertify the Union in Saskatchewan was external to the Applicant. However, the Board is not satisfied that this instigating factor was the wishes of the Employer. The evidence was that Mr. Taite contacted the Applicant and "nominated" him to bring the within rescission application. The evidence also established that the Employee Association did most of the preliminary investigations and research regarding the requirements of bringing an application in Saskatchewan, including procuring the services of a lawyer. The Applicant was cross-examined regarding his motivations in bringing his application and the Board was satisfied that his stated reasons were both credible and plausible. More importantly for the Board and without judging the quality or thoughtfulness of his reasons, we were satisfied that they represented his true wishes; that being the desire not to pay dues to two (2) employee associations and a preferential desire to not be represented by the Union in Saskatchewan. In coming to this conclusion (and as indicated), the Board is not satisfied, based on the evidence before it, that the Employee Association represented anything other than the wishes of the employees.

[58] As indicated, in coming to these conclusions, we were 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. On the other hand, not every suspicious, questionable or improper act or circumstance will necessarily lead to the conclusion that a rescission application has been made as a result of influence, interference, assistance or intimidation of an employer. See: *Ray Hudon v. Sheet Metal Workers International Association, Local 296 and Inter-City Mechanical Ltd.,* [1984] Aug. Sask. Labour Rep. 32, LRB File No. 105-84.

[59] In an effort to balance these seemingly conflicting observations, it has been the practice 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 this question for themselves because of the employer's conduct. In the present application, the Board has not lost confidence in the capacity of the employees in the bargaining unit to independently decide the representative question.

[60] 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, the Board hereby directs that the ballots arising from the vote conducted in accordance with the direction of the Board dated July 29, 2009 be unsealed, counted and tabulated by the agent appointed by the Board to do so.

[61] With respect to the composition of the Statement of Employment, based on the evidence presented, the Board is not satisfied that Mr. Orpin is eligible to participate in the representative question for two (2) reasons; firstly, he was only working in the unit on a relief basis; and secondly, he was not working on the day the application for rescission was filed with the Board. The Statement of Employment shall constitute the list of eligible voters; only those ballots from employees on the list who were employed on the date of the vote shall be counted.

[62] Board Member, Hugh Wagner, dissents from these Reasons.

DATED at Regina, Saskatchewan, this **8th** day of September**, 2009.**

LABOUR RELATIONS BOARD

Steven Schiefner,
Vice-Chairperson

Dissent

[63] I have reviewed the evidence and citations submitted by the parties and I respectfully disagree with the decision of the majority of the panel. Simply put, I saw the evidence adduced at the hearing somewhat differently. In my view, the application should be dismissed as a result of Employer influence. The Employer's actions might not have been overt, but as the cases observe, they seldom are.

[64] In the case at hand, the Employer avoided and resisted compliance with the collective agreement from August of 2008 to March of 2009. The Employer's displeasure at having to ultimately comply with the collective agreement was known by the affected employees. Furthermore, the application for rescission followed very closely on the heels of the Employer's settlement with the Union.

[65] Even after settlement with the Union, the evidence suggests that the Employer still did not fully comply with the terms of the collective agreement. As noted by the Chairperson, the Union had yet to raise these issues with the Employer, but in my respectful opinion, that oversight goes to the potential for a grievance remedy, as opposed to the influential effect of the Employer's actions.

[66] As stated above, I would exercise the discretion granted pursuant to s. 9 of the *Act* and dismiss this application.

Hugh J. Wagner
Board Member