The Labour Relations Board
Saskatchewan

PATRICIA BATEMAN, Applicant, Employee v. SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Respondent and EMPIRE INVESTMENTS CORPORATION, carrying on business as NORTHWOODS INN & SUITES, Interested Party

LRB File No. 149-08; March 23, 2009
Vice-Chairperson, Steven Schiefner; Members: Clare Gitzel and Duane Siemens

The Applicant:	Ms. Pat Bateman
For the Respondent Union:	Mr. Larry Kowalchuk
For the Interested Party:	Mr. John Pontes

Decertification – Employer Interference – Employer openly hostile to union presence in the workplace – Employer making views commonly known in the workplace - Board finds Employer improperly influenced rescission application by creating a openly hostile work place for the Union.

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

REASONS FOR DECISION

Background:

[1] **Steven Schiefner, Vice-Chairperson**: Ms. Patricia (Pat) Bateman (the "Applicant") applied for a rescission of the Order of the Board dated February 22, 2000 designating the Saskatchewan Joint Board, Retail, Wholesale and Department Store Union, Local 558 (the "Union") as the bargaining agent for a unit of employees employed by Empire Investments Corporation, carrying on business as Northwoods Inn & Suites (the "Employer") in Saskatoon, Saskatchewan.

[2] The Applicant filed this application for rescission (the "application") with the Saskatchewan Labour Relations Board (the "Board") on May 30, 2008. The effective date of the collective bargaining agreement in force between the Union and the Employer was July 1, 2007. The application was filed during the open period mandated by s. 5(k)(i) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), and was filed together 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.

[3] On June 17, 2008, the Union filed a reply (the "Reply) indicating that the Union was challenging the Order-in-Council appointing the current composition of the Board in the Saskatchewan Court of Queen's Bench and, in so doing, was challenging the jurisdiction of the Board on the basis that it was not properly constituted. By way of background, on March 6, 2008 the Government of Saskatchewan, acting through the Lieutenant Governor in Council, passed Order–in-Council No. 98/2008 terminating and cancelling the appointment of the then Chairperson and two (2) Vice-Chairpersons of the Board and appointing Mr. Ken Love, Q.C., as a member, the new Chairperson and Executive Officer of the Board. At that time, no Vice-Chairpersons were appointed to the Board. On May 14, 2008, the Union filed a Notice of Motion with the Saskatchewan Court of Queen's Bench challenging the validity of the Provincial Government's Order-in-Council and the appointment of Chairperson Love.

[4] The Employer did not file a Reply but did file a Statement of Employment in accordance with the requirements of the *Act*. In accordance with the Board's usual practice, the Employer was advised of the status of proceedings. John Pontes, on behalf of (the "Employer"), stated his objection to any delay in the Board's hearing of the application, a position that he reinforced at the hearing (a matter which will be discussed later in these Reasons for Decision).

[5] Mr. Steven Schiefner was appointed Vice-Chairperson of the Board by Order-in-Council effective August 18, 2008.

[6] The Honourable Mr. Justice Zarzeczny issued judgment on the Union's Notice of Motion to the Saskatchewan Court of Queen's Bench on January 14, 2009, dismissing the Union's applications to that Court and all claims for relief set forth therein.[1]

[7] The within application was heard on February 4, 2009 in Saskatoon before a panel of the Board composed of Vice-Chairperson Schiefner and members Clare Gitzel and Duane Siemens.

Preliminary Proceedings:

[8] At the commencement of the hearing the Employer stated his disappointment and frustration with the delay that had occurred between the time the Applicant filed her application

for rescission with the Board and the date of the hearing of the matter. The Employer made the following statements:

> Mr. Pontes: Mr. Schiefner, so you are the Chair of this meeting here today, right?
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> The Chair: Yes, sir.
>
> Mr. Pontes: Are you? Could you please explain to my people and to me how come these people applied for the rescind of this Union at the end of May, okay? How come it took June, July, August, September, November, December, January and now February, how come it took so long to the great Labour Board, okay, act on this matter? Could somebody answer me that?

[9] The Board reminded the Employer that the application for rescission had been brought by the Applicant and that the Employer's participation in the proceedings was as an interested party. The Board went on to explain to the Employer that the Union had challenged the jurisdiction of the Board to hear the matter because of an alleged defect in the constitution of the Board; the parties having adjourned the matter until this preliminary issue could be resolved. The Board explained further to the Employer that the issue raised by the Union was thereafter considered by Zarzeczny J. of the Saskatchewan Court of Queen's Bench and, with the recent decision of that Court[2], the parties believed the matter could now proceed to hearing.

[10] At the commencement of the hearing, the Union, by way of preliminary objection, disputed the jurisdiction of the Board to hear the application alleging new defects in the constitution of the Board related to the appointments of Chairperson Love and Vice-Chairperson Schiefner.

[11] The Union took the position that the appointments of the Chairperson Love and Vice-Chairperson Schiefner were contrary to law in two (2) respects; firstly, that the government's "at pleasure" appointments to the Board by Order-in-Council (appointments that could be terminated or cancelled prior to expiration at the discretion of Cabinet) were contrary to the *Act* or, in the alternative, if the Act permits "at pleasure" appointments to the Board, then the

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[1] See: *Saskatchewan Federation of Labour, Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Canadian Union of Public Employees v. the Government of Saskatchewan (Attorney General, Department of Advanced Education, Employment and Labour), Saskatchewan Labour Relations Board*, 2009 SKQB 20, Q.B.G No. 683 of 2008.

[2] Judgment issued: January 14, 2009

Act is unconstitutional because it does not provide sufficient security of tenure for a quasi-judicial appointment; and secondly, that the *Act* required that the Chairperson and Vice-Chairperson(s) be selected and appointed so as to be equally representative of employers (nominees from employer representatives) and organized employees (nominees from the labour movement). On this latter point, the Union argued at least one (1) of the permanent members of the Board must be from the labour movement to comply with the *Act* and took the position that both the current Chairperson and Vice-Chairperson were employer representatives (*ie.* not nominated by the labour movement) and, as such, such appointments to the Board were defective. For these reasons, the Union took the position that the Board as constituted was contrary to the *Act* and thus the panel did not have jurisdiction to hear the Applicant's case.

[12] The Board reserved its decision on the Union's preliminary objection.

[13] The Union sought leave to amend its Reply to include the allegation that the application was made, in whole or in part, on the advice of, or as a result of the influence of or interference or intimidation by, the Employer. The Board granted leave to the Union to do so.

Facts:

[14] The Applicant testified concerning her reasons for bringing the application for rescission on behalf of the employees of the Employer, as well as the circumstances of her employment.

[15] The Applicant testified that she commenced employment with the Employer in January of 2003 and that she worked in housekeeping. The Applicant testified that the Union had a duly elected executive and that, while many employees previously attended the regular Union meetings (when the Union was first certified), lately fewer and fewer employees were doing so. The Applicant testified that, after the last regular meeting of the Union (at which only six (6) or seven (7) members attended), some of the members stayed behind for coffee. The Applicant testified that the few members that stayed after the meeting (approximately four (4), including herself) began to discuss the potential of decertifying (*ie.* dissolving) the Union. The Applicant testified that their desire to do so was not as much about disappointment with the Union *per se* or the efforts of their service representative, Mr. Burkhart, but rather the fact that the Union had not "*helped*." The Applicant testified that she would rather keep the "*$60.00 per*

month (she currently pays in union dues) *in her pocket*" if the Union could not help her and the other employees in the workplace.

[16] The Applicant testified that "*it just seemed like nothing was working out for us, the union just couldn't help us."*

[17] In cross-examination by the Union, the Applicant testified that it was common knowledge around the workplace that the Employer did not like the Union and that he wanted the Union gone from the workplace. When asked "Is it common knowledge at the workplace that Mr. Pontes hates the union and wants it gone?", the Applicant answered "*yes*". The Applicant testified that, while she was not intimidated by him, stating "*I just tune him out when he's talking*"; the Applicant testified that Mr. Pontes is "*very vocal*" about his views and "*he voices all opinions loudly" in* the workplace.

[18] In cross-examination, the Applicant also testified that the Employer had fired a number of employees and that others had quit and moved on. When asked if some of the people had left because of how they had been treated by Mr. Pontes, the Applicant answered "*yes*". When asked if the Employer utilized any form of progressive discipline procedure in the workplace, the Applicant answered "*no*" … "*I never saw anybody dismissed.. through that route*."

[19] It should be noted that during the Applicant's testimony, the Employer's representative Mr. Pontes, repeatedly interrupted the Union's counsel and the testimony of the Applicant, with the Board cautioning the Employer on each occasion. Although initially framed as an objection, most of the interruptions were not objections (in the legal or procedural sense) but rather the Employer's objection to counsel for the Union suggesting to the witness that he (the Employer) didn't "want" the Union in the workplace or that the Union was needed in this workplace for the benefit/protection of the employees. Simply put, the Employer did not want counsel for the Union suggesting to the witness that, in his words, "*He's pointing me as a bad man … ooooh, bad man comes from the mountains of Iraq*."

[20] The Employer's interruptions were inappropriate, belittling and, at times, threatening. The Employer referred to the counsel for the Union as an "*asshole*, '*the chubby one from the other side*", "*self-righteous*" and a "*liar*." The Employer referred to the Union's former shop steward as "*corrupt*", "*evil* and "*a vicious dog that bites the hand that feeds her*." During the

hearing, the Employer referred to the Union as the "*evil taking the money from my poor people".* The Employer referred to his workers variously as "*suckers*", "*slaves*", "*poor people*", "*drunks*" and "*drug addicts*." The Board repeatedly cautioned the Employer that his conduct and comments during the hearing were inappropriate.

[21] The impact of the Employer's outburst during the hearing was well described by the Applicant during cross-examination by counsel for the Union:

> *He's very vocal and loud, which is very unfortunate, especially in this situation, because, by the time you ask me a question and its objected to, I can't even remember the question.*

[22] It was also apparent to the Board that the Employer's conduct during the hearing was indicative of his conduct in the workplace. The Applicant stated (when referring to whether or not the Union was representing people in the workplace) that "*it wasn't for a lack of trying, every time that there was an issue, this is what would happen*" (referring to the Employer's outburst during the hearing). The Applicant went on to say (referring to the Union's representative) that "*it's not Gary personally or anything, he did everything I'm sure any sane person could do .. He was available for us and whatnot*."

[23] The Applicant testified on her own behalf and did not call any other witnesses. In closing, the Applicant stated that she was not influenced by the Employer. The Applicant indicated that, in bringing her application for rescission, she had hoped that it would have been straightforward and not become so complicated. The Applicant indicated that she believed the other employees felt the same as she did.

[24] At the close of the Applicant's case, the Board indicated that it did not need to hear evidence from the Union and dismissed the Applicant's application. In so doing, the Board declined to rule on the jurisdictional issue raised as a preliminary objection by the Union but undertook to note the Union's objection as to the constitution of the Board on the record.

[25] The following are the Board's Reasons for Decision.

Relevant Statutory Provisions:

[1] 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;*
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> . . .
>
> *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:

[10] 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*.

[11] 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*."

[12] The Board has 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. 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.*

[26] As noted by the Board in *Shuba v. Gunnar Industries Ltd. and International Union of Operating Engineers, Hoisting, Portable and Stationary, Local 870*, [1997] Sask. L.R.B.R. 829, LRB File No. 127-97, in the application of s. 9 of the *Act*¸ the Board must carefully balance the democratic right of employees to choose to be represented by a trade union (pursuant to s. 3 of the *Act*), against the need to ensure that the Employer has not used coercive power to improperly influence the outcome of that choice.

[27] In *Mandziak v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Remai Investment Co. Ltd*., [1987] Dec. Sask. Labour Rep. 35, LRB File No. 162-87, the Board made a similar point:

> *While the Board generally assumes that all employees are of sufficient intelligence and fortitude to know what is best for them and is reluctant to deprive them of an opportunity to express their views by way of a secret ballot vote, it will not ignore the legislative purpose and intent of Section 9 of The Trade Union Act. Section 9 is clearly meant to be applied when an employer's departure from*

> *reasonable neutrality in the representation question leads to or results in an application for decertification being made to the Board. In the Board's view, this application resulted directly from the employer's influence and indirect participation in the gathering of necessary evidence of employee support.*

[28] In the Board's opinion, the application for rescission must be dismissed. The Employer's conduct during the hearing was inappropriate, belittling and, at times, threatening. The Employer's anti-union attitude was palpable. The Board heard and saw direct evidence, not of subtle anti-union influences, but of open hostility by the Employer toward the Union that had clearly permeated the workplace.

[29] While the Applicant may not have be intimidated or influenced by the conduct of the Employer, the Board has no comfort that the other employees in the workplace (employees whom the Board assumes are of reasonable intelligence and fortitude), would not be intimidated and/or influenced by the Employer's conduct. As such, the Board is not satisfied that a vote would be a reliable indicator of the desires or wishes of the employees at this workplace. As a consequence, the Board has no choice but to temporarily remove the employees' democratic right to determine the representative question by dismissing the application for rescission.

[30] Given this ruling, the Board declines to comment further on the Union's preliminary objection related to the constitution of the Board.

DATED at Regina, Saskatchewan, this **23rd** day of **March, 2009.**

LABOUR RELATIONS BOARD

Steven Schiefner,
Vice-Chairperson