The Labour Relations Board
Saskatchewan

SASKATCHEWAN JOINT BOARD, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, Applicant v. SAKUNDIAK EQUIPMENT, a DIVISION OF WGI WESTMAN GROUP, Respondent

LRB File Nos. 107-11, 108-11, 109-11, 128-11, 129-11, 130-11, 131-11, 132-11 & 133-11; November 16, 2011

Chairperson, Kenneth G. Love, Q.C.; Members: Greg Trew and John McCormick

For the Applicant Union: Mr. Larry Kowalchuk
For the Respondent Employer: Mr. Brian Kenny, Q.C. and Ms. Courtney Keith

Practice and Procedure – Union argues that Employer should have called a witness who could have provided valuable testimony on matters in question – Employer argues that it was unnecessary to call witness as all relevant matters testified to by other employees – Union argues Board should draw an adverse inference from fact that witness was not called.

Practice and Procedure – Board reviews principle enunciated by the Courts of Saskatchewan and recent jurisprudence from the Supreme Court of Canada – Board declines to draw adverse inference.

Unfair Labour Practice – Section 11(1)(e) of Act - Union seeks reinstatement of one employee permanently laid off during organizing drive in workplace - Employer argues that lay off unrelated to organizing activities and decision to terminate employee made prior to Employer's knowledge of organizing drive – Board reviews Employer's explanation for lay off of employees.

Unfair Labour Practice – Board reviews jurisprudence respecting reverse onus found in s. 11(1)(e) of Act – Finds explanation of Employer both coherent and credible – Board finds no anti-union animus in Employer actions.

Unfair Labour Practice – Section 11(1)(a) of the Act – Board considers evidence of "tool box" meetings held by Employer with staff subsequent to some of the permanent lay offs and just prior to final two employees being permanently laid off – Considers amendments to s. 11(1)(a).

Board finds that the test to be applied under the amended provision remains an objective test, that is likely effect of communication on an employee of average intelligence and fortitude – Board finds communication with employees satisfied this objective criteria.

The Trade Union Act, ss. 11(1)(a) & (e).

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love, Chairperson:** Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "Union") applied to the Saskatchewan Labour Relations Board (the "Board") on June 30, 2011 alleging that Sakundiak Equipment, a Division of WGI Westman Group, (the "Employer) had contravened sections 11(1)(a) and (e) of *The Trade Union Act*, R.S.S. 1878, c.T-17 (the "*Act*"). The Union also applied on that same date for reinstatement of an employee, Dusty Copeland, as well as monetary loss suffered by Mr. Copeland resultant from his lay off. On August 12, 2011, with leave of the Board, the Union applied for similar relief with respect to two other employees. During the course of the hearing, the Board was advised that reinstatement was no longer sought for Mr. Copeland, or another employee, Mr. Ha Phan, although monetary loss was continuing to be pursued with respect to all three employees.

[2] The Union was granted interim relief with respect to this matter by a decision of the Board dated August 8, 2011, with respect to Mr. Copeland. The Board commenced hearing the application with respect to all of the employees on August 23, 2011 and continued with the hearing on October 12, 2011.

Facts:

[3] The Employer is a farm equipment manufacturer. The Employer manufactures various types of farm equipment including grain bins, grain augers and grain bin accessories at its Regina facility. It sells the equipment it manufactures through a network of dealers, who in turn sell those products to farmers for use in their farming operations.

[4] Mr. Victor Holodryga, the Vice-President and General Manager of the Employer was called to testify on behalf of the Employer. He testified that the Employer had purchased Sakundiak about two and a half years ago and he was named as Vice-President and General Manager. Sakundiak Equipment is a part of the WGI Westman Group which also includes Behlen Manufacturing.

[5] Mr. Holodryga testified that the Employer had other manufacturing plants in Manitoba, Alberta and British Columbia. He testified that of these plants, they operated with a

unionized workforce at their plants in Airdre, Alberta, Langley, British Columbia, Brandon, Manitoba and Winnipeg, Manitoba.

[6] Mr. Holodryga testified that one of his primary functions was to look after the manufacturing of the goods they manufactured in Regina. It was his responsibility to establish the manufacturing budget based on sales projections provided to him by the marketing department, to then look after the production of the goods necessary to fulfill the sales and marketing plan, and to adjust manpower as necessary for that purpose.

[7] He testified that 2010 had been a particularly wet year which resulted in slow sales of equipment during that year. He further testified that they did not achieve the sales which they had forecast for 2010. As a result, the company developed a winter sales incentive program so as to get dealers to commit orders for the coming year so as to allow them to better plan their production and inventory levels.

[8] This winter sales program allowed dealers to order goods at significant discounts if orders were placed prior to February, 2011. It also provided generous financing terms for orders placed during this promotion. Based upon the success of the winter booking program, he testified that the sales projections required that the Employer increase its workforce.

[9] Also during this period, the Employer made improvements to the manufacturing facility and equipment used to manufacture the goods which were manufactured in Regina. Mr. Holodryga testified that when the business was purchased from the previous owners, the business was a “family owned” business. He testified that the equipment was outdated and needed replacement. In particular, he noted that there was a need for a paint facility. The Employer ultimately spent around 14 Million dollars to upgrade the production facility.

[10] In March of 2011, Mr. Holodryga testified that there were good sales from the winter booking program. The finished goods inventory was in line with projections, so, he testified, that they began to hire additional employees to meet the sales projections for 2011. It was during this staffing up period that most of the employees impacted by this application were hired.

[11] To track production, Mr. Holodryga testified that he reviewed actual sales of goods to determine what goods, which had been ordered, still needed to be produced, what goods were currently in inventory (i.e.: not shipped to customers) and what the Employer had for goods on hand for which there were no outstanding orders (the "finished goods inventory"). This finished goods inventory was the primary indicator for him as to whether production was outstripping sales or whether or not additional goods manufacturing was required to meet existing sales.

[12] He testified that the finished goods inventory started to rise in April and did not decline as the year progressed. He further testified that this was unusual in this business, testifying that finished goods inventories normally did not rise until October in a normal year. From figures provided by Mr. Holodryga, the following were the finished goods inventories for January to July of 2011:

Month	***Finished Goods Inventory***
Jan.	*$1,539,427*
Feb.	*$ 156,886*
Mar.	*$ 824,779*
Apr.	*$1,277,615*
May	*$2,180,607*
June	*$3,017,810*
July	*$4,085,635*

[13] He testified that he was concerned when the finished goods inventories rose in April. He testified when the value of the finished goods inventory almost doubled in May, that he knew that the Employer needed to reduce its manufacturing of goods, this meant a reduction in the number of employees employed to produce those goods, principally in the grain auger area as that was the area of weak sales.

[14] Mr. Holodryga testified that a decision was taken to reduce the workforce and thereby reduce manufacturing goods. However, no steps to reduce the workforce were taken at that time, he testified, because the Employer was participating in the Farm Progress Show in Regina from June 15 to 17, 2011. In addition, the Employer had planned, in conjunction with the Farm Progress Show, a Plant Celebration on June 14, 2011 to showcase the improvements made to their manufacturing facility. As a result, it was determined to not make any layoffs until after the completion of the Farm Progress Show and the Plant Opening Celebration.

[15] In addition, there was some hope that the Farm Progress Show would stimulate demand for their goods. Unfortunately, no orders were achieved at the show for grain augers, although there was an order achieved for grain bins.

[16] Mr. Paul Guillet, the Administrative Co-ordinator for the Union testified that Gary Burkart met with Mr. Copeland to discuss a certification drive at the Employer on June 15, 2011. He testified that he had known Mr. Copeland for many years as he had previously been a member of the Union while employed with a different employer. Following that meeting, he testified that he met with a larger group of employees on June 19, 2011 to discuss initiating a certification drive at the Employer's facility in Regina.

[17] It was not clear when the organizing drive at the Employer's facility in Regina commenced. However, Mr. Holodryga testified that on June 21, 2011, three employees approached him when he arrived at the workplace at 6:00 AM, expressing concerns that they had been asked to sign a union card. He testified that he advised these employees that he could not provide them with any direction and it was something that they would have to decide for themselves.

[18] Mr. Holodryga also testified that the Production Manager advised him on June 21, 2011 that a production foreman had also been approached about signing a union card.

[19] He testified that following these incidents, he consulted with the Employer's legal counsel in Manitoba as well as the Employer's Human Resources Department in Winnipeg. Following those conversations, he called a meeting with Ms. Outerbridge and other members of his management team. He testified that the message he delivered to the management team was that there were rumours regarding a possible union organizing campaign. He testified that his instructions were that they were to stay neutral and not interfere, and if approached by employees they were to refer those employees to either himself or to Ms. Outerbridge.

[20] On June 22, 2011, another conference call was held with corporate legal counsel and the Director of Human Resources in Winnipeg and Mr. Sean Lepper, who was the Vice-President and Marketing Director for Sakundiak and Behlen. Mr. Holodryga testified that the purpose of the call was to determine if there were any issues in proceeding with the planned

layoffs in light of the information which they had concerning the organizing efforts which were underway.

[21] Mr. Holodryga testified that the result of that conference call was that they would conduct "business as usual" and proceed with the planned layoffs. He testified as well, that it was left to Ms. Outerbridge and Mr. Riddock, the Plant Superintendent, to determine which specific employees would be subject to layoff. Mr. Holodryga testified that he took no part in determining which employees would be subject to lay off.

[22] Ms. Outerbridge testified that based on production estimates for 2011, the Employer had hired over a dozen new employees in 2011. She testified that she was advised by Mr. Holodryga and Mr. Riddock in May, 2011, that they would have to cut back their work force due to lack of orders for finished goods. She testified that it was communicated to her that following the Farm Progress Show that they would have to initiate lay offs.

[23] She testified that following the Farm Progress Show and the conference call on June 22, 2011, that she and Mr. Riddock reviewed a list of persons hired since January, 2011 to select those who would be laid off. She testified that they discussed each employee individually. She also testified that the only production area impacted was the grain auger manufacturing area. No one was selected for lay off in the grain bin production area of the plant as they had achieved sales at the Farm Progress Show for grain bins.

[24] She identified the six laid off employees as being Robin Kinequon, Ha Phan, Gord Polsom, Nat Dunbar, Dusty Copeland and Charlie Racz. The reasons for selection of these employees was given as follows[1]:

> *Employee "A": He was on his probationary period, he had attendance issues and his department was overstaffed.*
>
> *Employee "B": He had attendance issues; which were magnified the week of June 20 wherein he was absent on the 20th and 21st without notice to his supervisor or the Production Manager, Doug Riddock.*
>
> *Employee "C": He was on his probationary period, showed little motivation while performing tasks and his department was overstaffed. He also refused to work night shifts when asked by his supervisor.*

[1] *To preserve the privacy and anonymity of the impacted employees, we have deleted the names associated with each comment*

> *Employee "D": He was on his probationary period and his department was no longer in need of additional assembly workers.*
>
> *Employee "E": He was a junior operator, so we still had a senior operator with 20 years experience to keep the machine going.*
>
> *Employee "F": He was on his probationary period, and had attendance and performance issues.*

[25] Following the discussion to identify the employees who would be laid off, Ms. Outerbridge testified that she then prepared lay off letters for each of the chosen employees. To prepare these letters she testified she used a standard template. The lay off letters were prepared by her for Mr. Holodryga's signature.

[26] That afternoon (June 22, 2011), four employees were asked to come to Doug Riddock's office where Mr. Riddock and Ms. Outerbridge advised them of their permanent lay off. Only four employees were terminated that day, according to Ms. Outerbridge's testimony because one of the employees who was to be laid off, Mr. Dunbar, was away that afternoon at a dental appointment and as a result, they determined to withhold the lay off of one of the other employees, Mr. Phan, until Mr. Dunbar had returned to work.

[27] Ms. Outerbridge testified that the lay off of Mr. Dunbar and Mr. Phan was to have occurred on June 23, 2011. She testified, however, that Mr. Riddock was in meetings and could not be found by her. As a result, she redid the lay off letters for Mr. Dunbar and Mr. Phan for the following day.

[28] Mr. Lepper visited the Regina plant on June 24, 2011. The evidence disclosed that he was a frequent visitor to the plant, but his visits were not on a regular schedule. During his visit, Ms. Outerbridge testified that Mr. Lepper participated with her in a series of four "tool box" meetings with employees.

[29] The Agenda for those meetings was hand written by Mr. Lepper. She was unable to provide a copy of the agenda which he prepared. However, she did produce Minutes which she took at the meetings.

[30] Ms. Outerbridge testified that the purpose of the meetings was to get feedback from the employees which the Employer could use going forward. She testified that during the meetings her Minutes disclosed some significant issues having been discussed at these tool box meetings.

[31] The first item on her notes deals with “Organizational Structure” accompanied by a note; “Doug is to set up a meeting with the ‘Team Leaders’ and discuss the four supervisor structure we’re moving forward with, as well as explain this decision is not and was not performance based and that they are still go-to people for the supervisors”.

[32] Another note under the heading “Communication” involves an Employee Association which her notes identified as; “will help communicate the everyday issues occurring on the front line”. Similarly under that heading are notes concerning “Conflict Resolution, Respectful Behaviour, Respecting Coffee and Lunch Breaks, Performance Evaluations, and Health and Safety Updates”.

[33] Under the heading “Continuous Improvement” there are notes concerning the administration of overtime “equally without favourites”, implementation of weekly overtime sign-up sheets, overtime being awarded on “seniority and then by skill”. There were notes concerning Physical Improvements, including “clocks, floor mats, more garbage cans, tools, fans, etc…” as well as comments concerning coveralls provided for employees.

[34] Under the heading “Training and Development” there were notes respecting employee product knowledge sessions, cross training of employees based on “their interest and experience” and such items as English classes, cultural programs, etc.

[35] Under the heading “Pay Scale Structure” were notes respecting a need to evaluate “current wages and quantify increases that need to or should happen”, “overhaul the existing structure: by job description, training opportunities, dept.” and “formalizing pre-Employment testing”.

[36] The final note was with respect to the Employee Newsletter which her notes suggested should be “light and family oriented”.

[37] The Board did not have the benefit of Ms. Outerbridge's direct testimony concerning these notes as they were tendered as an Exhibit at the commencement of the Union's case, by agreement of the parties. Ms. Outerbridge did provide some direct testimony with respect to the meetings she attended, which testimony was subject to cross-examination by Union counsel. It was during her cross-examination that it was discovered that she had notes from the meetings which she was asked to produce, which the Employer undertook to do.

[38] During cross-examination of Ms. Outerbridge, she was challenged with respect to the use of the term "permanent lay off" used in the letters to the laid off employees. She explained the term was utilized because the Employer had no reasonable expectation that the employees might be recalled to work. However, she testified that she advised all of the laid off employees to "keep in touch in case the situation changes".

[39] She testified on cross examination that the "tool box' meetings on June 24, 2011 had been suggested by Mr. Lepper on June 23, 2011. She also testified that these meetings were the first such meetings which had ever been held at Sakundiak. She testified that the meetings were "confidential" in that no employee names would be attached to any of the feedback received by the Employer so that employees could speak freely in the meetings.

[40] With respect to the "Employee Association", she testified that this was an idea put forward by Mr. Lepper for discussion. In the proposal, each department would nominate a representative. She likened the proposal to being similar to an Occupational and Health Committee structure, but with a smaller group of people.

[41] In her cross examination, she confirmed that it was she and Mr. Riddock who determined which employees would be laid off and that Mr. Holodryga did not participate in that decision. The decision on lay offs was made only following the conference call on June 22, 2011. She testified that she had no knowledge of any particular employee's union involvement. She advised that only newly hired employees were considered for lay off. She also confirmed the factors that were considered with respect to those employees were (a) the employee's rate of pay, (b) the employee's attendance record and (c) the employee's job performance.

[42] She testified that, while she had no personal knowledge regarding job performance, she was satisfied that Mr. Riddock was qualified, based upon the amount of time he spent on the shop floor, to make that determination.

[43] She testified that she utilized the procedures utilized at their sister operation, Behlen, for lay offs because Sakundiak had not been involved in any lay offs since the Employer had taken over the facility.

[44] She testified that at the meetings on June 24, 2011 there was an acknowledgment that there had been layoffs on June 22, 2011. In particular, she testified that Mr. Dunbar asked a question respecting non-working notice given to those employees who were laid off, which question was answered by Mr. Lepper, stating that it was company policy not to give working notice.

[45] In addition to Mr. Guillet, both Mr. Copeland and Mr. Dunbar testified on behalf of the Union. Mr. Copeland testified that he commenced employment with Sakundiak on February 14, 2011. He was hired as a welder, but loaded trucks for about a month following his hiring. During that time he also assembled grain augers and helped out as needed.

[46] After about a month, he testified that he went to work on the “old flight machine”. This machine was the machine that had been used to manufacture the flighting used within the grain augers and which had been acquired by Sakundiak from the former owners. Shortly after commencing work on the “old flight machine”, Mr. Copeland testified that he began to work on the “new flight machine” which was installed as a part of the upgrades to the production facility by the Employer.

[47] Mr. Copeland testified that he became proficient in the operation of the “new flight machine” and became its primary operator, replacing the operator that had helped train him. He testified that most of his training was on the job and that he received training from the previous operator for one day and then had training from a representative of the company which supplied the “new flight machine” for four and a half days. He then testified that Mr. Holodryga approached him about being the primary operator of the flight machine. In his testimony, Mr. Holodryga denied having made any such comment.

[48] Shortly after Mr. Copeland began operating the “new flight machine”, the Employer scheduled an afternoon shift. The former flight machine operator was transferred to work on the afternoon shift.

[49] Mr. Copeland testified that he met and talked to Gary Burkart of the Union and signed a union card about a week and a half before he was terminated on June 22, 2011. This evidence was supported by the testimony of Mr. Guillet, who testified that the initial meeting occurred on June 15, 2011.

[50] However, Mr. Copeland testified that following that meeting, he decided that he would attempt to assist with the union drive in the workplace. He testified that he made calls to others to see if there was interest in forming a union in the workplace. He testified that he talked to other employees at coffee breaks in the workplace and in the parking lot after work.

[51] This evidence was somewhat at odds with the evidence given by Mr. Guillet insofar as the organizing campaign did not, from his testimony, commence until after the meeting at the Union office on Sunday, June 19, 2011. During his testimony, Mr. Copeland was extremely vague as to the timelines regarding the organization campaign.

[52] Mr. Copeland also testified that while he was talking to an employee in the employee’s car in the parking lot, Mr. Holodryga came out of the building and walked towards the parking lot. He testified that he believed that Mr. Holodryga had seen him obtaining a union support card. Mr. Holodryga denied having seen Mr. Copeland in the parking lot as suggested by him.

[53] He also testified that prior to the day of his lay off, he went to the offices of the Occupational Health and Safety Department of the Ministry of Labour Relations and Workplace Safety to report to them regarding safety issues which he observed in the workplace. Neither Mr. Holodryga nor Ms. Outerbridge had any knowledge of any such contact. This was unusual as Ms. Outerbridge was the Health and Safety Coordinator for the Employer and should have been contacted by the Ministry concerning any such contact.

[54] Mr. Copeland had also filed an Affidavit with respect to the Union’s application for an interim Order for the purpose of restoring himself and others to their positions pending the

hearing of these applications. In several instances during cross examination, he acknowledged that there were mis-statements in his Affidavit.

[55] The Union also called Nat Dunbar to testify. He commenced work with the Employer as a general labourer on April 11, 2011. After orientation, and following about a week where he was assembling tools, he began working on the assembly of grain augers.

[56] He claimed that his direct supervisor, Mr. Mike Mason had told him on the day he was laid off (June 24th) that he would be scheduled for forklift or crane training the following Tuesday. In her testimony, Ms. Outerbridge questioned this insofar as all training was arranged through her and she was not aware of any training being scheduled.

[57] In his testimony, he testified that at the "tool box" meeting he attended, Mr. Lepper made no mention of the formation of an Employee's Association. He also testified that he did not recall any mention of cross-training or wage rates at the "tool box" meeting, but testified that profit sharing was discussed. He also confirmed that he asked a question respecting non-working notice given to those employees who were laid off.

[58] With respect to the organizing campaign, he says he spoke to three employees on Monday and Tuesday (June 20 & 21, 2011), two in the lunchroom and one in the parking lot. He testified that he didn't know if anyone saw him speaking to other employees.

Arguments of the Parties:

Employer's Argument

[59] Counsel for the Employer provided the Board with a written argument and case authorities which we have reviewed and found helpful.

[60] The Employer argued that the purpose of Section 11(1)(e) was to ensure that Employers do not use disciplinary sanctions to discourage employees from the exercise of their right of association under the *Act*.[2] They argued that in the application of the reverse onus provision contained in s. 11(1)(e), the Board has used a two part analysis. In the first part of the test, the Board determines whether the Employer has presented a plausible or coherent and

[2] *SGEU v. Regina Native Youth and Community Services Inc.,* [1995] S.LR.B.D. No 4 at p. 4 (QL)

credible reason for the discipline or lay off. The second part of the test is whether or not, despite having a credible reason, it can be established that the decision was accompanied by an anti-union animus. In support of this position, the Employer cited several cases.[3]

[61] The Employer argued that the Board should not consider if the Employer had "just cause" as that term is understood by arbitrators[4]. They also argued that s. 11(1)(e) does not preclude an employer from terminating or laying off employees who are exercising their rights under the *Act* for economic or business reasons.[5]

[62] The Employer argued that while the onus placed upon the Employer in s. 11(1)(e) was difficult to meet, it was not impossible to meet.[6] With respect to the onus on the Employer in s. 11(1)(e), the Employer acknowledged that in circumstances when the reverse onus applies, it is not always sufficient for the employer to prove that an employee was laid off for lack of work. When there is a choice as to who will be laid off, the employer must go further and explain why it chose to lay off one employee and not another.[7]

[63] The Employer argued that the Board has, in numerous decisions, concluded that a layoff coincidental to an organizing campaign, newly established bargaining relationship or other union activity did not constitute an unfair labour practice.[8]

[64] The Employer argued that it had "good and sufficient" reason for laying off the employees due to economic conditions and sales shortfalls. They argued that there was no evidence of "anti-union" animus. Nor, it submits, was there any evidence to show that the Employer was aware of the support for the union or participation by any of the laid off employees in the organizing drive.

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[3] *RWDSU v. Regina Exhibition Association Limited*, [1995] 3rd Qu. Sask. Labour Rep. 37; *Patrick Monaghan and Delta Catalytic Industrial Services and Saskferco Products Inc.,* [1996] S.L.R.B.D. No. 28.
[4] See *RWDSU v. Regina Exhibition Association Limited*, *supra* at 62
[5] *Elaine Warne et al. v. Regina Exhibition Association Ltd.,* [1996] Sask. L.R.B.R. 5.
[6] See *RWDSU v. Regina Exhibition Association Ltd*., *supra,* Note 2; *C.U.P.E., Local 4973 v. Welfare Rights Centre* [2011] S.L.R.B.D. No. 3
[7] *United Steelworkers of America v. Brandt Industries Ltd.,* [1991] S.L.R.B.D. No. 12
[8] *Patrick Monaghan v. Delta Catalytic Industrial Services and Saskferco Products Inc., supra* Note 2*; C.U.P.E. v. Board of Education of the Kamsack School Division No. 35 of Saskatchewan,* [2001] S.L.R.B.D. No. 43; *Peter Radoja, Sandie Evans and Colleen Thuen v. Develcon Electronics Ltd.,* [1985] October Sask. Labour Rep. 62; *RWDSU v. Off The Wall Productions Ltd.,* [2000] S.L.R.B.D. No. 13; *International Union of Operating Engineers, Hoisting Portable & Stationary and Points North Services Ltd. and Points North Construction Ltd.,* [[1995] S.L.R.B.D. No. 59; and *Shopmen's Local Union No. 838 of the International Association of Bridge, Structural and Ornamental Iron Workers and Metal Fabricating Services Ltd.,* [1990] Spring Sask. Labour Rep. 70.

[65] With respect to the Union's application under s. 11(1)(a), the Employer noted that the provision had recently been amended by the legislation, which amendment, it submitted, was intended to broaden the scope of permissible Employer communication.

[66] The Employer started with the premise that an employer is entitled to communicate with its employees[9]. It then noted that the Board had expressly rejected the argument that an amendment to the section in 1994 was meant to prohibit all communication by an Employer with its employees concerning matters which are the subject of collective bargaining.[10]

[67] The Employer noted that the Board's test under the *Act* prior to the amendment in 2008 was an "objective" test wherein the Board assessed the impact which a particular communication would have on an employee of "reasonable fortitude" or an "employee of average intelligence and fortitude".[11]

[68] The Employer also argued that decisions from other Labour Relations Boards in Canada which had similar provisions in their Trade Union Legislation should be considered by the Board in its analysis of the amended provisions of the *Act*.

[69] The Employer argued that even in the context of an organizing campaign, the "tool box" meetings conducted by Mr. Lepper did not cross the line with respect to communications with employees such that the Employer committed an unfair labour practice. In support of that position, the Employer cited cases from Newfoundland and British Columbia.[12]

[70] The Employer argued that Mr. Holodryga and Ms. Outerbridge went out of their way to stress to the management team that they were to remain neutral in the face of the organizing drive.

[71] On the issue of remedy, the Employer argued that certain remedies sought by the Union were overreaching and were not in accord with the Board's approach to remedies as

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[9] *RWDSU v. Canadian Linen Supply Limited,* [1991] 1st Quarter Sask. Labour Rep. 63.
[10] *RWDSU v. Macdonalds Consolidated,* [1995] S.L.R.B.D. No. 50
[11] *RWDSU v. Saskatchewan Centre of the Arts,* [1996] L.R.B.R. 67; See also *RWDSU v. Dairy Producers Co-operative Limited,* [1990] Winter Sask. Labour Rep. 75.
[12] *Griffiths Guitars International Ltd. (Re)* [2004] N.L.L.R.B.D. No 6; *Ed Klassen Pontiac Buick GMC (1994) Ltd. v. Teamsters Local Union No. 213,* [1995] B.C.L.R.B.D. No. 225.

outlined by the Board in *RWDSU v. Loraas Disposal Services Ltd. et al.*[13] In particular, it argued, that the request by the Union for captive audience meetings was not appropriate and the circumstances of the case do not warrant such a remedy.

[72] It also argued that it would be inappropriate and the circumstances do not warrant an Order that the Employer provide the names, phone numbers and home address of each of its employees to the Union.

Union Argument

[73] The Union argued that the Board should draw a negative inference from the fact that Mr. Lepper, who was available to be called as a witness, was not called by the Employer to testify with respect to his participation in the "tool box" meetings. The Union relied upon the decision in *Murray v. City of Saskatoon (No. 2)*[14] with respect to this argument.

[74] The Union made reference as well to comments contained within the written Brief of the Employer, which the Union argued were presented as facts without any evidentiary basis. These were comments concerning the actions taken by Mr. Lepper in respect to his visit to Regina and the matters discussed at the "tool box" meetings.

[75] The Union argued that absent evidence from Mr. Lepper, the Employer was unable to satisfy the onus of proof required by s. 11(1)(e). The Union also argued that Mr. Lepper was the senior person involved in the lay off decisions and the Board should have heard evidence from him.

[76] The Union further argued that there was no evidence that there was not an anti-union animus with respect to the lay offs. The Union asserted that s. 11(1)(e) cast the onus upon the Employer to prove that there was no anti-union animus, which it had not done.

[77] The Union suggested that the evidence of adverse economic conditions was not believable or that it did not make sense. It argued that the comparable figures for 2010 to the figures provided by Mr. Holodryga for 2011 (see paragraph 12 above) showed a similar

[13] [1998] Sask. L.R.B.R. 556 at 568.
[14] 1951, 4 W.W.R. (N.S.) 234 @ p. 240

production and inventory levels. They argued that there was no evidence of lay offs in 2010 which the Union argued showed similar inventory levels.

[78] The Union argued that the lay off of the employees without working notice was suspicious, insofar as the Employer could have had additional output from these employees during a working notice period. They argued that this showed an eagerness on the part of the Employer to "get them out of the workplace". The Union was suspicious that the Employer didn't want the additional production from these employees and that they were "giving away money".

[79] The Union argued that the layoffs were "sudden", presumably in response to the organizing campaign which the Employer was aware of prior to the lay offs. Furthermore, they argued that the holding of the "tool box" meetings, which it characterized as "captive audience meetings" was to propose to the employees that they form an employee association instead of joining the Union. They argued that this point was highlighted when Mr. Dunbar attended his meeting and the matter of an employee association was, according to the testimony provided by Mr. Dunbar, not discussed.

[80] The Union also questioned why Mr. Mason, who was the direct supervisor of many of the employees, was not called to testify. Nor, they argued, was he involved in the discussion of which employees to lay off. He argued that Mr. Copeland and Mr. Dunbar particularly were excellent employees who should not have been laid off. The Union argued that to lay these employees off went against common sense and logic.

[81] The Union suggested that in its analysis of s. 11(1)(a), the Board should do a thorough analysis of the section in accordance with the rules of statutory interpretation and answer some questions which the Union felt were a problem with the wording of the section. In addition, the Union proposed the Board should use a more subjective test with respect to how the communication might impact employees.

[82] The Union summarized its requested relief as follows:

1. *Reinstatement of Nat Dunbar,*
2. *Monetary relief with respect to Nat Dunbar, Dusty Copeland and Ha Phan,*

3. Order for captive audience meetings as set out in the Application; and

4. An automatic certification of the Union in the workplace, although the Union acknowledged that the Board has previously determined that it had no jurisdiction to make such an Order;

[83] The Union and the Employer agreed that the decision of the Board need not deal with any issue of monetary loss which could be left to the parties to resolve should the Board determine that monetary loss was appropriate.

Relevant Statutory Provisions:

[84] Sections 11(1)(a) and (e) provide as follows:

> *11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:*
>
> > *(a) in any manner, including by communication, to interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of any right conferred by this Act; but nothing in this Act precludes an employer from communicating facts and its opinions to its employees;*
> >
> > *. . .*
> >
> > *(e) to discriminate in regard to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including discharge or suspension or threat of discharge or suspension of an employee, with a view to encouraging or discouraging membership in or activity in or for or selection of a labour organization or participation of any kind in an proceeding under this Act, and if an employer or an employer's agent discharges or suspends an employee from his employment and it is shown to the satisfaction of the board that employees of the employer or any of them had exercised or were exercising or attempting to exercise a right under this Act, there shall be a presumption in favour of the employee that he was discharged or suspended contrary to this Act, and the burden of proof that the employee was discharged or suspended for good and sufficient reasons shall be upon the employer; but nothing in this Act precludes an employer from making an agreement with a trade union to require as a condition of employment membership in or maintenance of membership in the trade union or the selection of employees by or with the advice of a trade union or any other condition in regard to employment, if the trade union has been designated or selected by a majority of employees in any such unit as their representative for the purpose of bargaining collectively;*

Analysis and Decision:

Should the Board draw an inference from the fact that Mr. Lepper was not called to testify?

[85] Counsel for the Union argued that the Board should draw an inference that the evidence of Mr. Lepper would not have supported the Employer's case due to its failure to call him to testify. In his argument, he referred to Mr. Lepper as a "phantom" who was involved in the decisions, but failed to testify as to his role. From that, counsel for the Union invited the Board to invoke the rule in *Murray v. The City of Saskatoon (No. 2)*[15].

[86] The rule in *Murray v. Saskatoon* was stated succinctly by the Saskatchewan Court of Queen's Bench in *Marlowe Smith v. General Recorders Ltd. et al*[16] as follows:

> *… When a witness who could testify to facts in issue is not called, an inference may be drawn that the testimony would be contrary to, or at least would not support, the case of the party making assertions that might best be proved through that witness. Murray v. City of Saskatoon (No. 2) (1951), 4 W.W.R. (N.S.) 234….*

[87] This rule has been established law for some time. The history of the rule was recounted by the Supreme Court of Canada in *R. v. Jolivet*[17]. At paragraph 25 - 28, Mr. Justice Binnie, speaking for the Court says:

> *25 The general rule developed in civil cases respecting adverse inferences from failure to tender a witness goes back at least to Blatch v. Archer (1774), 1 Cowp. 63, 98 E.R. 969, where, at p. 65, Lord Mansfield stated:*
>
> > *It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.*
>
> *26 The principle applies in criminal cases, but with due regard to the division of responsibilities between the Crown and the defence, as explained below. It is subject to many conditions. The party against whom the adverse inference is sought may, for example, give a satisfactory explanation for the failure to call the witness as explained in R. v. R*ooke 1988 CanLII 2947 (BC CA), (1988), 40 C.C.C. (3d) 484 (B.C.C.A.), at p. 513, quoting Wigmore on Evidence (Chadbourn rev. 1979), vol. 2, at § 290:
>
> > *In any event, the party affected by the inference may of course explain it away by showing circumstances which otherwise account*

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[15] *Supra,* Note 13
[16] [1994] 121 S.L.R. 296, CanLII 5152 (QB)
[17] [2000] SCC 29 (CanLII); 185 DLR (4th) 626; 144 CCC (3d) 97; 33 CR (5th) 1

> *for his failure to produce the witness. There should be no limitation upon this right to explain, except that the trial judge is to be satisfied that the circumstances thus offered would, in ordinary logic and experience, furnish a plausible reason for nonproduction. [Italics in original; underlining added.]*
>
> *27 The party in question may have no special access to the potential witness. On the other hand, the "missing proof" may lie in the "peculiar power" of the party against whom the adverse inference is sought to be drawn: Graves v. United States, 150 U.S. 118 (1893), at p. 121. In the latter case there is a stronger basis for an adverse inference.*
>
> *28 One must also be precise about the exact nature of the "adverse inference" sought to be drawn. In J. Sopinka, S. N. Lederman and A. W. Bryant, The Law of Evidence in Canada (2nd ed. 1999), at p. 297, § 6.321, it is pointed out that the failure to call evidence may, depending on the circumstances, amount "to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it" (emphasis added), as stated in the civil case of Murray v. Saskatoon, [1952] 2 D.L.R. 499 (Sask. C.A.), at p. 506. The circumstances in which trial counsel decide not to call a particular witness may restrict the nature of the appropriate "adverse inference". Experienced trial lawyers will often decide against calling an available witness because the point has been adequately covered by another witness, or an honest witness has a poor demeanour, or other factors unrelated to the truth of the testimony. Other jurisdictions also recognize that in many cases the most that can be inferred is that the testimony would not have been helpful to a party, not necessarily that it would have been adverse: United States v. Hines, 470 F.2d 225 (3rd Cir. 1972), at p. 230, certiorari denied, 410 U.S. 968 (1973); and the Australian cases of Duke Group Ltd. (in Liquidation) v. Pilmer & Ors, [1998] A.S.O.U. 6529 (QL), and O'Donnell v. Reichard, [1975] V.R. 916 (S.C.), at p. 929.*

[88] At issue here is the testimony which may have been adduced through Mr. Lepper. Counsel for the Employer argued that there was no need to call Mr. Lepper because the Employer had provided testimony from both Mr. Holodryga and Ms. Outerbridge respecting the matters at issue. Ms. Outerbridge was involved in all of the telephone conferences in which Mr. Lepper participated and provided evidence respecting those calls. Similarly she was present at all of the "tool box" meetings and provided evidence respecting those meetings.

[89] Counsel for the Union did not specify what inference he expected the Board to draw other than a negative inference that Mr. Lepper's evidence would not support or corroborate the evidence provided by Ms. Outerbridge.

[90] In *R. v. Jolivet*, the Supreme Court was considering an appeal of a criminal matter from the Quebec Court of Appeal. At issue was a comment in the opening statement of

the Crown wherein the Crown stated that it intended to call a particular witness to corroborate the testimony of other witnesses. In the final result, the Crown decided not to call that witness.

[91] Defence counsel indicated to the Court at trial that he wished to comment in his jury address on the Crown's failure to call this witness, the trial judge offered the defence the opportunity to call witness "B" and cross-examine him, but that offer was rejected. The trial judge then indicated that if defence counsel commented on the Crown's failure to call "B", he would instruct the jury that "B" could have been called by the defence as well as by the Crown. The Court of Appeal was unanimous in its finding that this ruling in effect prevented defence counsel from commenting on the Crown's failure to call its previously announced witness and that this was an error of law.

[92] The Supreme Court allowed the appeal from the decision of the Quebec Court of Appeal. In doing so, it commented, as noted above, on the inference that may be drawn when a witness is not called.

[93] The Supreme Court ruled that there is no obligation to call a witness it considers unnecessary to the prosecution's case. While the statements made in opening and in the course of trial were consistent only with the Crown's intention at that time to call "B", a statement of intention does not necessarily amount to an undertaking and the trial judge found in favour of the Crown on that point. The Crown's conduct called for an explanation, but Crown counsel explained that he believed "B" would not be a truthful witness. As the trial judge accepted Crown counsel's explanation, there can be no question here of an abuse of process. Crown counsel is entitled to have a trial strategy and to modify it as the trial unfolds, provided that the modification does not result in unfairness to the accused. Where an element of prejudice results (as it did here), remedial action is appropriate.

[94] While this decision dealt with a criminal appeal to the Court, and the facts are not completely in sync with the matter here, nevertheless, it has some precedential value in these circumstances. As noted above, the Supreme Court cautioned against drawing an inference in every case. It noted that it was open to counsel to explain why the witness was not called. Counsel for the Employer advised that he felt it was unnecessary to call Mr. Lepper as Ms. Outerbridge was able to provide all necessary testimony concerning the "tool box" meetings as well as the discussions in the conference calls as she was privy to all of them.

[95] Similarly as noted in the quotation above, the Court cautioned that the circumstances in which trial counsel decide not to call a particular witness may restrict the nature of the appropriate "adverse inference". Experienced trial lawyers will often decide against calling an available witness because the point has been adequately covered by another witness". That was precisely the reason provided by the counsel for the Employer as to why the witness was not called.

[96] Counsel for the Employer, as is counsel for the Union, is an experienced counsel before this tribunal. We find the explanation offered by counsel for the Employer to be reasonable, particularly in light of the Supreme Court's direction in *Jolivet* as noted above. We therefore, decline to draw any inference resultant from Mr. Lepper's failure to testify.

[97] Another point could also be made, and that is that it was open for the Union to have called Mr. Lepper, who could have been declared to be a hostile witness. This option was not explored by counsel for the Union who could have requested a Subpoena to Mr. Lepper for his appearance. However, this option was not explored by either counsel, nor suggested by the Board and accordingly, we decline to rule on this point.

The Issues to be Determined

[98] There are three principal issues to be determined in this matter. They are:

1. Did the Employer commit an unfair labour practice contrary to section 11(1)(e) of the *Act*?
2. Did the Employer commit an unfair labour practice contrary to section 11(1)(a) of the *Act*?
3. If a breach of the *Act* has been found to have occurred, what are the remedies which should be ordered by the Board?

[99] For the reasons that follow, we answer these questions as follows:

1. No
2. No
3. As a result of no breach having been found, no remedy is required.

Has there been a breach of Section 11(1)(e) by the Employer?

[100] The Board has recently outlined its jurisprudence with respect to the application of s. 11(1)(e) of the *Act* in *Canadian Union of Public Employees v. Del Enterprises Ltd. o/s St. Anne's Christian Centre*.[18] That decision referenced the Board's decision in *Canadian Union of Public Employees, Local 3990 v. Core Community Group Inc.,*[19] which decision referenced the Board's decision in *Saskatchewan Joint Board, Retail Wholesale and Department Store Union v. Moose Jaw Exhibition Co. Ltd.*[20]

[101] In the *Moose Jaw Exhibition* case*, supra,* the Board quoted from para. 123 of its decision in *Saskatchewan Government Employees Union v. Regina Native Youth and Community Services Inc*[21]*.* as follows:

> *It is clear from the terms of Section 11(1)(e) of the Act that any decision to dismiss or suspend an employee which is influenced by the presence of trade union activity must be regarded as a very serious matter. If an employer is inclined to discourage activity in support of a trade union, there are few signals which can be sent to employees more powerful than those which suggest that their employment may be in jeopardy. The seriousness with which the legislature regards conduct of this kind is indicated by the fact that the onus rests on the employer to show that trade union activity played no part in the decision to discharge or suspend an employee.*

[102] In *United Steelworkers of America v. Eisbrenner Pontiac Asuna Buick Cadillac GMC Ltd.*[22] the Board made this observation about the significance of the reverse onus found in s. 11(1)(e) of the *Act*. In that decision, the Board outlined two elements that the Board must consider as follows**:**

> *When it is alleged that what purports to be a layoff or dismissal of an employee is tainted by anti-union sentiment on the part of an employer, this Board has consistently held, as have tribunals in other jurisdictions, that it is not sufficient for that employer to show that there is a plausible reason for the decision. Even if the employer is able to establish a coherent and credible reason for dismissing or laying off the employee…those reasons will only be acceptable as a defence to an unfair labour practice charge under Section 11(1)(e) if it can be shown that they are not accompanied by anything that indicates that anti-union feeling was a factor in the decision.*

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[18] [2004] Sask L.R.B.R. 156, [2004] S.L.R.B.D. No 33, LRB File Nos. 087-04 to 092-04.
[19] [2001] Sask. L.R.B.R. 131, LRB File Nos. 017-00 to 022-00

[20] [1996] Sask. L.R.B.R. 575, LRB File Nos. 131-96, 132-96 & 133-96.

[21] [1995] 1st Quarter Sask. Labour Rep. 118, LRB File Nos. 144-94, 159-94 &160-94.
[22] [1992] S.L.R.B.D. No. 31, LRB File Nos. 161-92 to 163-92.

[103] Also, in *The Newspaper Guild v. The Leader-Post, a Division of Armadale Co. Ltd.,*[23] the Board noted that in making its analysis of the decision, it would not enter directly into an evaluation of the merits of the decision**.**

> *For our purposes, however, the motivation of the Employer is the central issue and in this connection the credibility and coherence of the explanation for the dismissal put forward by the Employer is, of course, a relevant consideration. We are not required, as an arbitrator is, to decide whether a particular cause for dismissal has been established. … Our task is to consider whether the explanation given by an employer holds up when the dismissal of an employee and some steps taken in exercise of rights under The Trade Union Act coincide. The strength or weakness of the case an employer offers in defence of the termination is one indicator of whether union activity may also have entered into the mind of the Employer.*

[104] The explanation offered by the Employer in this case was, firstly, that the decision to implement layoffs had been taken prior to commencement of the organizational drive, but had been postponed by the Farm Progress Show and the Plant Opening Celebrations in June of 2011. Secondly, the Employer noted that who was to be laid off was determined solely by Ms. Outerbridge and Mr. Riddock based upon length of service, attendance issues, performance issues and level of remuneration. Thirdly, the layoffs were restricted to the grain auger production employees since there were still outstanding orders for grain bins. Finally, it noted that no new employees had been hired since the layoffs to fill the vacancies created when the six employees were laid off.

[105] Counsel for the Union argued that other choices could have been made with respect to which employees were chosen for lay off. As noted in *The Newspaper Guild v. The Leader-Post, a Division of Armadale Co. Ltd.,* it is not for the Board to determine or second guess the Employer's decision respecting the lay off or termination, unless it can be shown that that decision was, in itself, motivated by some anti-union animus.

[106] In *United Steelworkers of America and Brandt Industries Ltd.*[24], the Board has noted that "where there is a choice of employees to be laid off, the employer must go further and explain why it chose to lay off one employee and not the other." In that respect, Ms. Outerbridge provided a document[25] outlining the criteria utilized by the Employer for those

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[23] [1984] 1st Quarter Sask. Labour Rep. 242 at 248.
[24] *Supra,* Note 6
[25] See Exhibit E-8

employees not selected for lay off. No issue was taken by the Union regarding this listing of employees apart from evidence from Mr. Copeland that he was a better "flight machine operator" than the operator that was kept by the Employer. However, this ignored the fact that the other "flight machine operator" was a long term (20 year) employee of the Employer and was the first criteria adopted by the Employer to determine who should be laid off.

[107] Similarly, Mr. Dunbar began his employment on April 11, 2011. While there were some employees employed after his start date, these employees primarily worked in the bin production area, or worked on the night shift as well as one truck driver who was replacing a long term employee who was then on disability.

[108] Without second guessing the Employer's decisions with respect to the persons chosen for lay off, the explanations given by the Employer as to the choice of persons to be laid off provide an adequate explanation.

[109] Overall, the Board is satisfied that the explanation offered by the Employer was both credible and coherent and that the Employer demonstrated that it had good and sufficient reason for the lay offs. There was a shortage of orders for the products produced at the Employer's facility, particularly grain augers. A decision was made in May of 2011 that production would have to be reduced, which meant lay offs would have to occur. That decision was made by Mr. Holodryga and communicated to Ms. Outerbridge. However, that decision was delayed until after the Farm Progress Show in the hopes that further orders for grain augers would be achieved. Also, the Employer did not want to have the workplace disrupted during its Plant Opening Celebration. It was not until after the decision had been made, that the Union began its organizing drive. That drive coincided with the previously scheduled lay offs.

[110] That leaves the second question to be determined, that is, whether or not any anti-union animus played a part in the decision to lay off these employees, or, in particular, Mr. Copeland, Mr. Dunbar or Mr. Phan.

[111] Union counsel also argued that the reverse onus provision in s. 11(1)(e) of the *Act* required the Employer to prove that there was no anti-union animus in the Employer's decision. With respect, we cannot agree. Under s. 11(1(e), the Employer has the onus to show that its actions were not intended to coerce or intimidate employees from the exercise of their

rights under the *Act*. The Employer must rebut the presumption contained in the reverse onus provided for in s. 11(1)(e) by showing that the decision was not tainted by any element of anti-union animus which would have the effect of intimidating or coercing employees from the exercise of their rights under the *Act*.

[112] Mr. Holodryga testified that many of the other plants operated by the WGI Westman Group were unionized facilities. He also testified that he became aware of the union organizing drive when approached by some employees upon his arrival at the workplace on June 21, 2011. He also testified that the Production Manager advised him on June 21, 2011 that a production foreman had also been approached about signing a union card.

[113] The testimony established that in response to these events, Mr. Holodryga and Ms. Outerbridge called a meeting of the senior staff after he had consulted with the Employer's legal counsel in Manitoba as well as the Employer's Human Resources Department in Winnipeg. Following those conversations, he called a meeting with Ms. Outerbridge and other members of his management team. Mr. Holodryga testified that the message he delivered to the management team was that there were rumours regarding a possible union organizing campaign. He testified that his instructions were that the members of the management team were to stay neutral and not interfere, and if approached by employees they were to refer those employees to either himself or to Ms. Outerbridge. There was no evidence that they were approached by any additional employees following this instruction being given.

[114] There was evidence from Mr. Copeland that he had been seen by Mr. Holodryga in the employee parking lot when he was speaking to other employees about signing a union support card. Mr. Holodryga denied having seen Mr. Copeland. In this respect, the Board believes the evidence of Mr. Holodryga that he did not observe any such incident.

[115] The Board can, therefore, find no evidence that the lay offs were in any way motivated by an anti-union animus. As such, we find that the Employer has satisfied the onus placed upon it pursuant to s. 11(1)(e). The application by the Union under s. 11(1)(e) is therefore dismissed.

Has there been a breach of Section 11(1)(a) by the Employer?

[116] Section 11(1)(a) was amended by the legislature effective May 14, 2008. Prior to its amendment, the section read as follows:

> *11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:*
>
> > *(a) in any manner including by communication, to interfere with, restrain, intimidate, threaten, or coerce an employee in the exercise of any right conferred by this Act;*

[117] The May, 2008 amendment recast the section as follows:

> *11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:*
>
> > *(a) to interfere with, restrain, intimidate, threaten, or coerce an employee in the exercise of any right conferred by this Act, but nothing in this Act precludes an employer from communicating facts and its opinions to its employees;*

[118] In 1991, the Board confirmed that it was settled law in Saskatchewan that an employer is entitled to communicate with its employees. In *Retail, Wholesale and Department Store Union v. Canadian Linen Supply Limited*[26] the Board says:

> *It is settled law in this Province that an employer is entitled to communicate with its employees, even with respect to matters that are the subject matter of collective bargaining negotiations, so long as the communication:*
>
> *(a) does not amount to an attempt to bargain directly with the employees and circumvent the union as the exclusive bargaining agent;*
>
> *(b) does not amount to an attempt to undermine the union's ability to properly represent the employees; and*
>
> *(c) does not interfere with, restrain, intimidate, threaten, or coerce an employee in the exercise of any rights conferred by the Act.*

[119] In the *Canadian Linen* case, the Board determined that the test to be applied by the Board was an objective one. At p. 68, the Board says:

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[26] [1991] 1st Quarter Sask. Labour Rep 63 at 67 & 68.

> *The determination of whether, in the particular circumstances, a communication has interfered with, coerced, intimidated, threatened or restrained an employee in the exercise of a right conferred by the Act* ***is an objective one****. The Board's approach in such cases is to ascertain the likely effect of the communication on an employee of average intelligence and fortitude.* [Emphasis added]

[120] Similarly, in *RWDSU v. Saskatchewan Centre of the Arts*[27], a decision of the Board following the 1993 amendment to the *Act* to bring the wording of the section to the wording immediately prior to the 2008 amendment, the same objective test was determined to be appropriate under that legislation. At p. 73 & 74, the Board says:

> *We have concluded in this case, however, that this communication was worded in bland enough terms that it would not be coercive to what the Board has referred to as "an employee of reasonable fortitude" – even a casual employee of reasonable fortitude.*

[121] Just prior to the amendment of the section in 2008, the Board issued a decision in *RWDSU v. Temple Gardens Mineral Spa Inc. and Deb Thorn*[28]*.* In that case, at pp. 101 *et seq*, the Board said:

> *[31] The first decision of the Board which analyzed the test to be applied under s. 11 (1) (a) was the Saskatoon Co-operative Association case [Saskatchewan United Food and Commercial Workers, Local 1400 v. Saskatoon Co-operative Association Limited, [1983] Sask. Labour Rep. 29, LRB File Nos. 255-83 and 256-83]. In that case, the Board examined the lawfulness of several employer communications during the course of the parties' negotiations for the renewal of a collective agreement. The Board determined that the examination of the communication is not limited to determining whether the subject matter is prohibited or permitted under the Act, and stated at 37:*
>
> > *…but that is not to say that any particular subject is invariably prohibited (or permitted) under the Act. The result is that the Board's inquiry does not end once the subject being discussed is identified and categorized as permitted or prohibited. Instead, it concentrates on whether in the particular circumstances a communication has likely interfered with, coerced, intimidated, threatened or restrained an employee in the exercise of any right conferred by the Act.*
>
> *[32] The Board described a two-part test in the following terms at 37:*
>
> > ***The Board's approach is designed to ascertain the likely effect on an employee of average intelligence and fortitude.*** *That kind of* ***objective approach*** *by its very nature*

[27] *Supra* Note 10
[28] [2007] Sask. L.R.B.R. 87, LRB File No. 162-05

> *eliminates insignificant conduct, since trivialities will not likely influence an average employee's ability to freely express his wishes.* ***It also necessitates an inquiry into the particular circumstances of each case, because it recognizes that the effect of an employer's words and conduct may vary depending upon the situation****.*
>
> . . .
>
> *The employers' communications were directed to the employees as a group and made no effort to isolate them from each other or from their union representatives who had ready access to the picket lines.*
>
> *The Board heard a great deal of evidence regarding alleged inaccuracies in the written communications. It finds that the first and second communications were substantially accurate, and that in the circumstances they did not likely interfere with the average employee's ability to form his own opinion or to reach his own conclusions. Nor were they of the kind that could reasonably support an inference of improper employer motive.*
>
> ***[emphasis added]***

[122] Similarly, the Alberta Labour Relations Board uses an objective test to determine the impact of an employer communication on employees. In *The National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) Local No 1227 and E.D.O. Canada Limited,*[29] the Alberta Board says at p. 13:

> *In evaluating a complaint of this nature, the Board must determine whether the employees were capable of freely expressing their true wishes in a representation vote. The Ontario Board in Greb Industries Limited and Teamsters Local 879 et al., [1979] Can LRBR 56 set out the Ontario Board's approach to determining the effects of the conduct upon employees. The burden of proving the complaint that the conduct has deprived the employees of the ability to freely exercise their true wishes rests upon the party alleging the breach, in this case the CAW. The Board must look at the objective facts of what occurred and draw reasonable inferences as to what is the more probable effect of this conduct upon the employees in all the circumstances.* ***This is an objective test.*** *The Ontario Board's approach is to determine the likely effect of the conduct upon the employee of average intelligence and fortitude. We adopt this approach.*

[123] Also, at page 12 of that decision, the Alberta Board referred to an earlier board decision in *International Brotherhood of Electrical Workers v. Stuve Electric Ltd. et al.*[30] with

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[29] [1992] Alta L.R.B.R. 202
[30] [1989] Alta L.R.B.R. 69 at 75

respect to the section of the Alberta Code which deals with communications between an employer and its employees. There the Alberta Board says:

> *The employer raises section 146(2)(c) in defense of its conduct. Sections 146(1) and 146(2) represent a balancing of interests. The employer's right to free speech is balanced against the employee's right to freely select trade union representation. Employers are not required to sit gagged and bound during an organizing campaign. Employees are not like Burns' "wee timorous beasties" scared off by the slightest expression of employer opposition. However, an employer is in a position of power, particularly in respect to unorganized employees. Free speech must be tempered, as it is in section 146(2)(c), by a recognition that certain conduct emanating from the employer can coerce or unduly influence employees impairing their right to freely select a union.*

[124] In order for the Union to succeed in this application, they have the onus to prove that the communications which they cite (the "tool box" meetings) has interfered with, restrained, intimidated, threatened, or coerced an employee of "reasonable fortitude" against the exercise of any right conferred by this *Act*. The test to be applied by the Board, being an objective test has not changed due to the 2008 amendment. We do not agree with counsel for the Union that the amendment in 2008 converted the test to be utilized to a subjective test.

[125] The test, therefore, remains whether the Union has satisfied the Board on the evidence presented, that an employee of "reasonable fortitude" would be interfered with, restrained, intimidated, threatened, or coerced from the exercise of any right conferred by this *Act*.

[126] The actions of the Employer which are alleged to have violated s. 11(1)(a) was the holding of the four "tool box" meetings. These meetings were held on Friday, June 24, 2011 following the lay off of Mr. Copeland and three other employees on June 22, 2011 and prior to the dismissal of Mr. Dunbar and Mr. Phan later that day.

[127] In this case, there was no suggestion that the "tool box" meetings amounted to an attempt to bargain collectively with the employees and therefore circumvent the Union as the Union had not yet achieved a certification for those employees. Similarly, since there was no certification, there was no argument that the meetings were an attempt to undermine the union's ability to properly represent the employees. At issue was whether or not the meetings interfered with, restrained, intimidated, threatened, or coerced any employee in the exercise of any rights conferred by the *Act*.

[128] The evidence of Mr. Copeland and Mr. Guillet was that the organizational drive was rendered ineffective immediately following the lay offs on Wednesday, June 22, 2011. Mr. Dunbar, who attended one of the "tool box" meetings, testified regarding his attendance at the meeting prior to his lay off. He did not at any time during his testimony suggest that these meetings interfered with, restrained, intimidated, threatened, or coerced him or any other employee in the exercise of any right conferred by the *Act*.

[129] The only evidence regarding these meetings was presented in the form of the notes provided by Ms. Outerbridge. While characterized as notes from the meeting, they read more like a "to do" list for Ms. Outerbridge regarding matters raised at the meeting. We accept her uncontradicted testimony that the reference to an Employee Association was similar to a Health and Safety Committee rather than an Employee Association which might seek certification of the Employer's employees.

[130] Mr. Dunbar's testimony was that the concept of an Employee Association was not discussed at the meeting he attended. Counsel for the Union invited us to draw the conclusion that this was based on the Employer's knowledge that Mr. Dunbar was involved in the Union organizing campaign and it therefore deliberately avoided discussion of this subject when Mr. Dunbar was in attendance. We decline to draw such a conclusion which is not supported by any evidence and therefore amounts to nothing more than pure speculation as to both the Employer's knowledge of who the organizers were, and that the Association was somehow intended to supplant the Union in the workplace.

[131] For the reasons set out above, we conclude that the Union has failed to satisfy the onus upon it to show a violation of s. 11(1)(a) of the *Act*. We are of the view that the "tool box" meetings were legitimate communications with the Employer's employees insofar as an employee of "reasonable fortitude", including Mr. Dunbar would not, in our opinion, have felt pressure to abandon or forgo their rights under the *Act* because of either these meetings being held, or because of the nature of the matters discussed at such meetings.

[132] These meetings, based upon the objective test utilized by the Board both prior to the amendment, and which will continue to be applied following the amendment, leads us to the conclusion that the holding of these meetings, as well as the matters discussed at those

meetings, would have been within the bounds of acceptable communication before that amendment and remain as acceptable communication now.[31]

[133] It is therefore, unnecessary to provide any further interpretation of the amendments to s. 11(1)(a) other than those provided above. Counsel for the Union outlined a number of issues which he found confusing regarding the meaning of the section. I am certain that the Board will have other occasions, based on other factual situations, where further interpretation may be required.

[134] The application under s. 11(1)(a) is accordingly dismissed.

Remedy:

[135] Based upon the failure of the Applicant Union with respect to its applications pursuant to s.11(1)(a) and (e), no remedy need be awarded.

Decision:

[136] The applications are hereby dismissed.

DATED at Regina, Saskatchewan, this **16th** day of **November, 2011.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.,
Chairperson

Dissent by Member, John McCormick

[137] For the reasons set forth below, I dissent from the decision by the majority. I disagree with the majority particularly with respect to their finding that the explanation for the

[31] See also *Cornerstone Credit Union (Re),* [2008] S.L.R.B.D. No. 38, 154 C.L.R.B.R. 135, CanLII 47043, LRB File No. 024-08 at paragraph 39

layoffs given by the Employer was not a credible or coherent reason. I also dissent from the majority's view of the communications by the Employer at the "tool box" meetings.

[138] I believe that the majority has misconstrued the evidence given by both Mr. Holodryga and Ms. Outerbridge that they were unaware of the impacted employees' participation in the organizing drive. Mr. Holodryga testified that he was aware of the organizing drive from reports from both employees who were concerned about being approached by the Union to sign a support card and by a manager who reported that one of the production foremen had been approached to sign a card.

[139] Mr. Holodryga was a long term employee and was familiar with union settings. I find it hard to accept that, given his experience, he was unaware of the persons behind the Union campaign, notwithstanding his testimony to the contrary.

[140] Furthermore, I find it difficult to accept that someone with the experience that Mr. Holodryga possesses, that he would have waited so long (i.e.: until a union organizing drive was in progress) to make the employee layoffs. I do not believe his testimony that he had planned to make lay offs for some time prior to them actually occurring, nor do I accept the excuse given regarding waiting for possible orders at the Farm Progress Show and for the Plant Opening event to occur. If there was indeed a surplus of production, he had the experience from his years at other plants to have made the decision upon knowing of the increasing production and not have wasted additional resources hoping for a change of fortune.

[141] It also seems incongruous to me that the Employer would have laid off Mr. Copeland, someone who had been provided specialized training as a flight operator when they could have retained him by bumping him into another position in the workplace which may have resulted in a reduced salary, but the Employer would have had the benefit of a trained flight operator available as the need arose, to back up the only other flight operator who had been with the Employer for many years.

[142] For these reasons, I do not think that the Employer has satisfied the onus placed upon it by Section 11(1)(e) of the *Act* to justify the lay off of these employees.

[143] In respect of the complaint under Section 11(1)(a), I disagree with the majority view as well. It was clear from the evidence of Ms. Outerbridge that Mr. Lepper was in charge and was leading those meetings. It would have been helpful, in my opinion, to have heard from Mr. Lepper and have his testimony tested through cross-examination by the Union.

[144] I find that it is suspicious that the Employer suddenly began to hold "tool box" meetings for the first time on June 24, 2011, when Mr. Lepper visited from Winnipeg. Ms. Outerbridge testified that these were the first such meetings ever held by the Employer in Regina. These meetings were co-incident with the organizing campaign.

[145] I am also of the view that the Employer crossed the line when it proposed an employee association be established. This, in my view was a direct challenge to the organizing campaign currently ongoing and was intended to dissuade employees from supporting the Union in its drive.

[146] For these reasons, I would have found a breach of s. 11(1)(a) of the *Act* with respect to the captive audience meetings held by the Employer.

Remedy:

[147] By way of remedy, I would have done the following:

1) re-instated Nat Dunbar to his position with the Employer effective as of the date of his layoff; and

2) provide monetary loss, subject to usual mitigation, for Dusty Copeland, Nat Dunbar and Ha Phan, the calculation of which I would leave to the parties to determine, but, in the event they were unable to agree with respect to the quantum to be paid by way of monetary loss, to have that amount determined by the Board.

John McCormick, Board Member