INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 2038, Applicant v. MAGNA ELECTRIC CORPORATION, Respondent

LRB File Nos.: 162-13, 163-13, 164-13, 165-13 & 166-13; November 21, 2013
Chairperson, Kenneth G. Love, Q.C.; Members: Allan Parenteau and Bert Ottenson

For the Applicant Union: Ms. Crystal Norbeck
For the Respondent Employer: Mr. Neil Tullock

Unfair Labour Practice – Electricians from New Brunswick come to Saskatchewan to "salt" at worksite where non-union employees of Employer are engaged – During initiation of organizing campaign altercation occurs between New Brunswick employees and employees engaged on another site at the same project – New Brunswick employees terminated on their return to work.

Unfair Labour Practice – Terminated employees allege unfair labour practice under section 11(1)(a) of the Act alleging that their termination communicated a "chilling" message to other employees not to engage their right to form, organize and support a trade union. Board finds that the test to be applied is an objective standard, that is, the demonstrated impact on an employee of average intelligence and fortitude – Board dismisses application absent evidence that any employee was so impacted.

Unfair Labour Practice – Terminated employees allege unfair labour practice under section 11(1)(e) of the Act alleging that their terminations were the result of engaging in activities protected by the Act. – Board examines evidence and employers explanation for terminations – Board finds explanation neither credible nor coherent – Board grants application.

Unfair Labour Practice - Terminated employees allege unfair labour practice under section 11(1)(g) of the Act alleging that the employer interfered with the selection of a trade union to be their bargaining agent – Board reviews test to be applied and finds that there is no evidence to show that an employee of average intelligence and fortitude was impacted by the employer's actions - Board dismisses application absent evidence that any employee was so impacted.

REASONS FOR DECISION

Background:

[1] **Kenneth G. Love, Q.C., Chairperson:** The International Brotherhood of Electrical Workers, Local 2038, (the "Union") made applications to the Board which alleged that Magna Electric Corporation ("Magna" or the "Employer") engaged in an Unfair Labour Practice pursuant to Section 11 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), when it discharged four (4) employees from their employment on May 14, 2013. The Union alleged that it was engaged in an organizing campaign at the Employer's operation at the Heat Rejection Project at Boundary Dam near Estevan, Saskatchewan. This project was a part of the larger Carbon Capture Project at Boundary Dam initiated by the Saskatchewan Power Corporation.

[2] In addition to the Unfair Labour Practice application, the Union applied for monetary loss suffered by each of the four (4) workers involved. At the hearing held on October 16 & 17, 2013, the parties deferred any issues regarding determination of monetary loss pending a decision on the Unfair Labour Practice application. These Reasons deal only with the Unfair Labour Practice application.

Facts:

[3] The Employer had been engaged as an electrical contractor at the Heat Rejection Project at Boundary Dam Power Station near Estevan, Saskatchewan. This project was a part of the larger Carbon Capture Project by SaskPower. The Project began in or around May, 2012 at which time the Employer had fourteen (14) employees engaged in this project. In early 2013, the project began to require more electricians and the Employer began actively recruiting electricians for the project.

[4] At about the same time, the Union had hired a new Membership Development Co-ordinator who was tasked with increasing union membership. To accomplish this, he contacted other union hiring halls in Canada to have them determine if any of their members

would be willing to come to Saskatchewan and “salt” worksites, including the project at Boundary Dam on which the Employer was engaged.

[5] A member of the IBEW Local in Moncton, New Brunswick noticed the advertisement for electricians at Boundary Dam. He contacted the Employer by email and submitted his resume to them. He was hired for the project. When being hired, he was asked if there were any other electricians he might know, who would also like to work on this project. That person, Adam Keith, told his father, who was also an electrician, about the opportunity. He also told two (2) of his other friends. These three (3) persons also contacted the Employer and were hired to work on the project.

[6] At the time of hiring, none of the individuals advised the Employer that they were union members, nor were they asked that question at the time of hire. They did, however, contact both their own Local, and the Regina Local to obtain permission to work on a non-Union project without the imposition of penalties under the IBEW Constitution.

[7] The four (4) employees involved were:

1. Adam Keith (hereinafter referred to as “Adam”),
2. Steven Keith (hereinafter referred to as “Steven”),
3. Jeff Thompson (hereinafter referred to as “Jeff”), and
4. Dan Baird (hereinafter referred to as “Dan”).

[8] All of these employees traveled to Estevan from New Brunswick in Steven’s vehicle. They started work on April 19, 2013. Their first day of work consisted of safety and site training during the morning. After lunch, they started their regular jobs as members of various crews working on the Heat Rejection Project. During the morning briefings, they signed a number of documents (all of which were not explained to them, but described to them as routine documents). One of those documents was an Employment Agreement which provided for them to be employed as temporary employees.

[9] Adam, Steven and Jeff testified at the hearing. Each of them acknowledged that they would not have traveled to Estevan for short term temporary employment. They testified

that it was their understanding that the project would require electricians for at least three (3) months and possibly longer.

[10] During their trip to Estevan from New Brunswick, Adam was in contact with the Union's membership co-ordinator, Jeff Sweet (hereinafter "Sweet"). Adam kept him apprised of their progress in obtaining employment and their progress in traveling to Saskatchewan.

[11] Sweet met with Adam, Jeff and Dan at the Boston Pizza in Estevan on April 22, 2013 to obtain a progress report regarding their employment with Magna. At that time, Sweet advised them to keep a low profile and not advertise that they were union members. Sweet met with these employees again, in Estevan, about two (2) weeks later.

[12] On May 12, 2013, Sweet again traveled to Estevan to meet with Adam and Jeff. Adam testified that when he was entering the Boston Pizza where he was meeting Sweet, there were a number of Magna employees that he recognized in the lounge area of the restaurant. He and Jeff then met Sweet in the restaurant portion of the building.

[13] At that meeting, it was agreed that the four (4) employees would begin to conduct an organizing campaign at the worksite. Sweet testified that he intended to organize a formal meeting for Magna employees the following Sunday. In furtherance of that resolution, at the conclusion of their meeting, Sweet, Adam and Jeff went across to the lounge area of the building to meet with other Magna employees.

[14] During that meeting, Sweet testified that he received a cordial welcome from most of the employees and that he handed out his business card, which clearly identified him as a Union recruiter. He answered questions from the other Magna employees about Union membership and benefits. In addition to several Magna employees, they also encountered a number of Irish electricians, who were working for the Employer, and who had been recruited to come to Saskatchewan to work.

[15] Sweet left after meeting with the other Magna employees to return to Regina. He arrived back in Regina about midnight. On arriving back in Regina, he sent a text to Adam advising that he was required to travel to Saskatoon the following week and could not get back to Estevan until the following Friday or Saturday. He asked Adam to try to determine the number of

employees who might be expected to turn out for the information meeting they were intending to hold.

[16] Shortly after sending that text, he received a text from Adam which said:

> *After you left jeff we have been threatened to have our teeth kicked out and if we don't leave thids job tomorrow we will pay with our lives and to fuck off or we will pay dearly fired do to low production [sic]*

[17] Sweet texted back "For real?" Adam responded:

> *Yup right now said we wont walk out of boston pizza without getting shit kicked out of us tonight [sic]*

[18] Adam identified in his subsequent texts that there were about 6-7 individuals who may have been involved. Sweet recommended that they call a taxi and get out of Boston Pizza as soon as possible. Adam identified the person who was making the threats as Mike Green.

[19] Jeff texted Adam again in the morning of Monday, May 13, 2013 to see if there had been any further developments. Monday was a day off for the four (4) New Brunswick employees. On Tuesday, May 14, 2013, Adam, Dan and Jeff returned to work. Steven did not work that day due to illness. During that day, Adam testified that he was told by one of the foremen, Clint, that he had a target on his back because they had received an email about him in the office. Later that day, during the lunch break, he was asked by another foreman, Joe Driscal, if he was an IBEW member, whether he was "salting" the jobsite and were they hoping to "flip the company", that is, apply to have the company certified to bargain with the IBEW. About 3:00 PM that day, Adam was asked by Henley Croswell, the general foreman on the job, to come to the office with him. Upon his arrival at the office, his employment was terminated. He received a termination letter which stated "During the course of your probationary period, we have determined you are not fit for your position…". Adam texted Sweet that he had been terminated.

[20] Jeff and Dan were also terminated that day. Upon hearing of the terminations, Steven decided that he would resign his position before being fired, which he did by telephone. Later that day, they departed Estevan to return to New Brunswick.

[21] Chris Gingras testified for the Employer. He testified that all employees were on probation for three (3) months. He also testified that the four (4) employees had been terminated for the following reasons:

> *Steven because he was unable to do certain work due to his physical condition and that he was often unavailable due to sickness.*
>
> *Adam, Dan and Jeff because of the "confrontation" issue which arose at Boston Pizza.*

[22] Chris Gingras testified that confrontations such as the one at Boston Pizza could lead to safety issues. He testified that all four (4) employees were terminated to ensure that no remaining member of the group could engage in industrial sabotage on the worksite. He also testified that no discipline had been instituted for Mike Green or any of the other employees at Boston Pizza that night. He testified that Mike Green had been laid off in the usual course in May, when the project wound down.

[23] Stephanie Donais also testified for the Employer. She was the person responsible for recruiting Adam, Steven, Dan and Jeff, along with her administrative support, Heidi Bond. She confirmed the hiring process regarding Adam, Steven, Dan and Jeff. She testified that she was recruiting as many electricians as she could during this period as the project was ramping up. She testified that after May until mid July of 2013, she recruited another 30 – 50 electricians to work on the project. She stopped recruiting in mid July, 2013 when the project started to wind down.

[24] Ms. Donais also testified with regards to the reference to a probationary period in the recruiting materials sent to Adam, for which she was responsible. That reference, she testified, related to the qualifying period for obtaining benefits under the benefit plans administered by the Employer.

Relevant statutory provision:

[25] Relevant statutory provisions are as follows:

> *3. Employees have the right to organize in and to form, join or assist trade unions and to bargain collectively through a trade union of their own choosing; and the trade union designated or selected for the purpose of bargaining collectively by the majority of the employees in a unit appropriate for that purpose*

shall be the exclusive representative of all employees in that unit for the purpose of bargaining collectively.

. . .

5. The board may make orders:

> *(d) determining whether an unfair labour practice or a violation of this Act is being or has been engaged in;*

. . .

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;*
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> *. . .*
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> *(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;*
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> *. . .*
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> *(g) to interfere in the selection of a trade union as a representative of employees for the purpose of bargaining collectively;*

Union's arguments:

[26] The Union argued that the Employer had committed Unfair Labour Practices under Sections 11(1)(a), (e) and (g) of the *Act*. It abandoned any claim pursuant to other provisions of the *Act* which were referenced in its application.

Section 11(1)(a) Arguments

[27] The Union argued that by terminating the four (4) employees, the Employer was attempting to sway the resolve of potential union supporters to not support the union organizing drive. They argued that the actions of the Employer sent a chill through the workplace and a message that if you attempt to organize the workplace you will be fired. In support of their arguments, the Union cited the Board's decision in *Industrial Wood and Allied Workers Canada, Local 1-184 v. Cabtec Manufacturing Inc.*[1]

Section 11(1)(e) Arguments

[28] The Union argued that this provision of the *Act* should be interpreted as meaning that once it is asserted that a termination or layoff is tainted by anti-union animus that the reverse onus contained within this section of the *Act* will require that the Employer provide evidence that will rebut the presumption. In support, the Union cited the Board's decision in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Sakundiak Equipment, a Division of WGI Westman Group*[2] and *Saskatchewan Joint Board Retail, Wholesale and Department Store Union v. Moose Jaw Exhibition Company Ltd.*[3]

[29] The Union argued that by terminating the four (4) employees days after they openly commenced an organizing campaign at the Boston Pizza in Estevan, amounted to a clear violation of the rights of the employees to organize in, form, join or assist a trade union as contained within Section 3 of the *Act*. The terminations, it argued were designed to coerce or intimidate not only these 4 employees, but other employees from the exercise of their rights under the Act, in violation of Section 11(1)(e) of the *Act*.

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[1] [2002] Sask. L.R.B.R. 271, LRB File Nos. 042-02 to 044-02.
[2] [2011] CanLII 72774 (Sk LRB), LRB File Nos. 107-11 to 109-11 & 129-11 to 133-11
[3] [1996] Sask. L.R.B.R. 575, LRB Files No. 131-96, 132-96 and 133-96.

[30] The Union argued that this case was similar to other previous cases determined by the Board. It cited the *Moose Jaw Exhibition Co. (Re:)*[4] and *Canadian Union of Public Employees, Local 4973 v. Welfare Rights Centre.*[5]

[31] The Union also argued that the rationale for the terminations by the Employer did not stand up to scrutiny. The explanations made by the Employer, it argued did not meet the standard required to rebut the reverse onus contained within this Section of the *Act*. The Union also argued that anti-union animus need not be the only reason for termination of an employee. It argued that even a dismissal which was incidental to a determination of anti-union animus would be a breach of this provision. In support, it cited the Board's decision in *United Steelworkers of America v. Eisbrenner Pontiac Asuna Buick Cadillac G.M.C. Ltd., Regina, Saskatchewan.*[6]

Section 11(1)(g) Arguments

[32] The Union argued that by terminating the four (4) employees, the Employer interfered with the employees' right to select a trade union to represent them and other employees in the workplace. The Union argued that it was not necessary to prove that the right of choice was actually interfered with and that the test was an objective one, that is, whether the Employer's conduct is likely to interfere with the selection of a trade union. In support, the Union cited *Cabtec, supra.*[7]

[33] The Union again argued that the terminations would have a chilling effect on the workplace, one which could not be easily measured, but which effect would be that employees would be reluctant to exercise their Section 3 rights to "organize in, join or assist trade unions…".

Employer's arguments:

[34] The Employer denied that it had committed any unfair labour practice as alleged.

Section 11(1)(a) Arguments

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[4] *Supra* Note 3
[5] [2010] 2010 CanLII 42668, LRB File No. 083-10
[6] [1992] 3rd Quarter Sask. Labour Rep. 135, LRB File Nos. 161-92, 162-92 and 163-92

[35] The Employer argued that it did not interfere with, restrain, intimidate, threaten or coerce any of the employees. The Employer argued that Mr. Green was not their agent, nor was he the Employer. As such, any threats made by him could not support any finding of an unfair labour practice under Section 11(1)(a).

Section 11(1)(e) Arguments

[36] The Employer argued that the purpose of this provision was to ensure that employers do not use disciplinary sanctions to discourage employees from exercising their right of association under the *Act*. The Employer also argued that this provision required the Board to adopt a two part test. The first part of the test, it argued, was to determine if the Employer presented a credible, plausible or believable reason for its actions. The second part of the test, it argued, was to determine whether, despite having a credible reason, it can be established that the decision was accompanied by an anti-union animus. In support, the Employer cited *Saskatchewan Government Employees' Union v. Regina Native Youth and Community Services Inc.,*[8] *Patrick Monaghan v. Delta Catalytic Industrial Services Ltd..et. al.*[9] and *The Newspaper Guild v. The Leader Post, a Division of Armadale Co. Ltd.*[10]

[37] The Employer argued that, in order for the reverse onus in Section 11(1)(e) to apply, it is necessary for the Union to show that the employees claiming that an Unfair Labour Practice had occurred were engaged in the exercise of rights granted to them under the *Act.* The Employer argued that the Union had failed to show rights were being engaged.

Section 11(1)(g) Arguments

[38] The Employer argued that its decision to dismiss the employees was determined by factors such as economic and management needs, the objectives of the Employer at the time, and the job performance of the individuals impacted. It argued that there was no evidence of any anti-union animus in the decisions to terminate the four (4) employees.

Analysis & Decision:

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[7] See Note 1.
[8] [1995] 1st Quarter Sask. Labour Rep. 118, LRB Files No. 144-94, 159-94 and 160-94.
[9] [1996] Sask. L.R.B.R. 429, LRB File No. 187-95.
[10] [1994] 1st Quarter Sask. Labour Rep. 242, LRB File Nos. 251-93, 252-93 and 254-93.

[39] There are three (3) principal issues to be determined in this matter. They are:

1. Did the Employer commit an unfair labour practice contrary to Section 11(1)(a) of the *Act*?

2. Did the Employer commit an unfair labour practice contrary to Section 11(1)(e) of the *Act*?

3. Did the Employer commit an unfair labour practice contrary to Section 11(1)(g) of the *Act*?

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

1. No
2. Yes
3. No

Did the Employer commit an unfair labour practice contrary to Section 11(1)(a) of the *Act*?

[41] The Board reviewed its jurisprudence under Section 11(1)(a) in its decision in *Temple Gardens Mineral Spa Inc. and Deb Thorn.*[11] The Board says:

> *[43] 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, supra. 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:*
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> > *. . . 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.*
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> *[44] The Board described a two-part test in the following terms at 37:*
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> > ***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 eliminates insignificant conduct, since trivialities will not likely influence an*

[11] [2007] CANLII 62957, [2007] Sask. L.R.B.R. 87, LRB File No. 162-05

> *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.***
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> *For example, in Super Valu, a division of Westfair Foods Ltd. and Alberta Food and Commercial Workers Union Local 401 (1981) 3 Can LRBR 412 this Board commented on the special susceptibility of most employees to employer comment and conduct during a union organizing campaign.*
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> *The Ontario Labour Relations Board also examines the objective factors of what has occurred and draws reasonable inferences to determine the probable effect of employer conduct upon employees of average intelligence. In Teamsters Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Greb Industries Limited (1979) OLRB, February, 89 at 98 the Board stated:*
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>> *"In evaluating conduct which leads up to the holdings of a representation vote so as to determine whether that vote ought to be set aside, the Board has sought to establish whether the employees were capable of freely expressing their true wishes in that representation vote. The party which seeks to set aside a representation vote is required to establish that the impuned conduct has deprived the employees of the ability to freely express their true wishes . . .* ***The effect of impuned conduct upon the employees is determined by looking at the objective factors of what has occurred and drawing reasonable inferences as to what is a more probable effect of such conduct upon the employees in all these circumstances . . . This is an objective test. The Board's approach is to determine the likely effect of the impuned conduct upon an employee of average intelligence and fortitude****."*
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> *[**emphasis added**]*

[45] The Board went on in Saskatoon Co-operative Association to apply the test to the communications in question, utilizing the objective test and considering the context in which the communications took place. The Board stated at 40:

The Board has considered the circumstances surrounding the communications in this case in an effort to determine their probable effect. All of the communications occurred during the strike and, with the exception of the second and third communications, all of them were received by employees while they were on the picket line. In that situation it cannot be said that the employees were a highly sensitive captive audience for the employers' representations. 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.

[46] In Canadian Linen, supra, the employer held two meetings with employees to discuss its final offer before the union's meeting to vote on the employer's final offer. With regard to the propriety of employer communications generally, the Board stated at 67 and 68:

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 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.

[emphasis added]

. . .

[50] In a more recent case, Yorkton Credit Union, the Board dealt with employer communications during the bargaining of a renewal collective agreement and specifically, with respect to its allegation in s. 11(1) (a), misinformation provided by the employer to the employees. The Board, following the principles of the Canadian Linen case, supra, added at 460 through 462:

. . .

In assessing whether employer communications during or in relation to collective bargaining go beyond the bounds of permitted speech into the realm of prohibited interference, the Board has considered whether they reflect an attempt to explain the position the employer has taken at the bargaining table or, rather, an attempt to disparage the union or its proposals. ***The Board looks at the context, content, accuracy and timing of employer communications in discerning their purpose and effect.*** *Communications made after good faith bargaining has reached an impasse are less suspect than those made during early stages of bargaining, accurate statements are less suspect than inaccurate ones and, in any event, communications of explanations or positions not first fully aired at the bargaining table are highly suspect.*

[emphasis added]

[42] All of the cases noted cited a communication by the Employer which was the subject of the Unfair Labour Practice allegations. Here, there has been no evidence of any

communication by the Employer to its employees. The Union argued that the terminations, in and of themselves, constituted a communication, which communication had a "chilling" effect on the workplace and thereby interfered with the employees' Section 3 rights to form, join or assist trade unions.

[43] However, as noted in the cases cited, the test to be applied is an objective one. That test is to determine the likely effect of the impugned conduct upon an employee of average intelligence and fortitude. Unfortunately, we have no evidence before us that any employee was so impacted. We are, therefore, unable to reach any conclusion based upon objective factors as required by the test under Section 11(1)(a).

[44] The complaint under Section 11(1)(a) is dismissed.

<u>Did the Employer commit an unfair labour practice contrary to Section 11(1)(e) of the *Act*?</u>

[45] The Board also reviewed its jurisprudence with respect to Section 11(1)(e) in *Sakundiak Equipment, supra.*[12] At paragraphs [100] – [103], the Board said:

> *[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.*[13] *That decision referenced the Board's decision in Canadian Union of Public Employees, Local 3990 v. Core Community Group Inc.,*[14] *which decision referenced the Board's decision in Saskatchewan Joint Board, Retail Wholesale and Department Store Union v. Moose Jaw Exhibition Co. Ltd.*[15]
>
> *[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*[16]*. as follows:*
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>> *It is clear from the terms of Section 11(1)(e) of the <u>Act</u> 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*

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[12] See Note 2.
[13] [2004] Sask L.R.B.R. 156, [2004] S.L.R.B.D. No 33, LRB File Nos. 087-04 to 092-04.
[14] [2001] Sask. L.R.B.R. 131, LRB File Nos. 017-00 to 022-00
[15] [1996] Sask. L.R.B.R. 575, LRB File Nos. 131-96, 132-96 & 133-96.
[16] [1995] 1st Quarter Sask. Labour Rep. 118, LRB File Nos. 144-94, 159-94 &160-94.

> *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.[17] *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.*

[103] Also, in The Newspaper Guild v. The Leader-Post, a Division of Armadale Co. Ltd.,[18] *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.*

[46] In *Sakundiak*, *supra*, the Board found that the explanation provided by the Employer as to the reasons for the layoff of the employees and the choice of employees was both coherent and credible.

[47] The same cannot, however, be said of the explanation offered in this case. The Employer testified that it sought only to hire "the best" employees and that the four employees here did not meet that requirement. In defence of its decision to terminate Adam, Jeff and Dan

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[17] [1992] S.L.R.B.D. No. 31, LRB File Nos. 161-92 to 163-92.
[18] [1984] 1st Quarter Sask. Labour Rep. 242 at 248.

and its decision to terminate Steven (although he resigned before the termination could be effected) was defended by their description as a "package" by the Employer and was justified on the basis that the confrontation at Boston Pizza could lead to safety issues with other employees and possible sabatoge one or more of the group left after others were terminated.

[48] The Employer also sought to categorize the four (4) employees as not being good performers. In particular, they pointed at Steven as being "out of shape", and not able to do tasks which should be assigned to journeymen electricians. They also complained that he was not a reliable employee due to his illness.

[49] The Employer filed Daily Manpower Progress Reports[19] as part of its justification. Those reports are quite revealing. The first Report dated May 2, 2013 notes in respect of a team made up of Steven and Ken which was "Ken did most of the work". This, the Employer suggested, was evidence of Steven's performance failure. Absent any additional evidence, we cannot come to that conclusion. Furthermore, since Steven was not terminated, but quit, this evidence is irrelevant to the matters under consideration.

[50] Adam and Dan were also part of teams which were part of this Report. No adverse comments were made concerning either of them or the work they had performed. However, in respect of another member of another team, Dave, it was noted, "Dave lacks experience". It is notable that no such comment appeared with respect to either Steven, Adam or Dan.

[51] Similarly, the sheet of May 9, 2013 contains no adverse comments regarding any of the 4 employees affected.

[52] One of the issues identified with respect to Steven was that he was assigned to make "cable tags", something that a first year apprentice would do. However, on the April 25, 2013 report, it is noted that "Marty was on light duty made cable tags nothing to claim". There was no evidence that this notation lead to Marty being terminated.

[53] The May 5, 2013 report is interesting insofar as it identifies that Adam and Dan did not have aerial platform training or fall arrest training. This lack of training was also cited as

a rationale for their termination. However, that same report also identifies two other employees, Brian who did not have fall arrest training and Ken who also did not have aerial platform training or fall arrest training. The evidence before us was that each site where electricians worked had different training programs. The evidence was that the provision of this training was the Employer's responsibility. The May 6, 2013 report then notes that "Dan had Fall Arrest training…".

[54] There are no adverse comments concerning the performance of any of the 4 employees in the reports which the Employer relied upon.

[55] The Employer's claims regarding safety concerns also does not stand up to scrutiny. The instigator of the confrontation at Boston Pizza, Mike Green did not even work on the Heat Rejection Project. He was employed on the other part of the project, elsewhere on the site.

[56] It is also surprising that no disciplinary action was taken with respect to Mike Green. The uncontradicted evidence was that Mike Green was the instigator of the confrontation at Boston Pizza. However, he was not terminated, or disciplined in any way, and was allowed to continue to work until lay off when the project wound down.

[57] The reverse onus contained within Section 11(1)(e) operates when, as here, employees were exercising or attempting to exercise a right under the *Act*. In this case, it is clear that Adam, Dan and Jeff were engaged in an attempt to organize the employees of the Employer. They had traveled from New Brunswick with that express purpose and had met with the Local union organizer on several occasions. On May 12, 2013, they had determined to make their intentions known to the employees of Magna and they did so when they went to meet with the other employees at Boston Pizza. In doing so, they were engaged in conduct protected by Section 3 of the *Act.*

[58] The reverse onus contained in Section 11(1)(e) requires the Employer 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 Section 11(1)(e) by showing that the decision was not tainted by any element of

[19] Exhibit E-4

anti-union animus which would have the effect of intimidating or coercing employees from the exercise of their rights under the *Act*.

[59] The explanations provided by the Employer do not, in our opinion, meet the stringent requirements necessary to rebut the onus in Section 11(1)(e). The explanation is neither credible nor coherent. Furthermore, was it necessary, we would draw a conclusion from the Employer's conduct that the terminations were the result of an anti-union animus on the part of the Employer.

[60] The application under Section 11(1)(e) is granted.

Did the Employer commit an unfair labour practice contrary to Section 11(1)(g) of the *Act*?

[61] Section 11(1)(g) is directed to conduct which interferes with the selection of a trade union as a representative of employees for the purpose of bargaining collectively. As in the case of complaints made under Section 11(1)(a), the test to determine the impact under this provision is an objective one, that is, what was the effect of the impugned conduct upon an employee of average intelligence and fortitude.

[62] Again, however, we have no objective evidence to show what the effect was on any other employees. The Union argues that the "chilling" effect of the terminations was *ipso facto* sufficient to demonstrate that employees would, in the face of terminations, continue to organize and rely upon their Section 3 rights. While inference could be drawn from the impact on the other employees of average intelligence and fortitude, we decline to do so absent any direct evidence from other employees as to how they were impacted by the terminations.

[63] The application under Section 11(1)(g) is dismissed.

Decision:

[64] The application under Section 11(1)(e) is granted. An appropriate Order will be issued.

[65] At the request of the parties, we will not deal with the issues of monetary loss and the calculation thereof based upon this determination of an Unfair Labour Practice. That matter will be left with the parties to discuss and negotiate. If the parties are unable to agree as to the appropriate amount of compensation, this panel of the Board will remain seized of that matter.

DATED at Regina, Saskatchewan, this **21st** day of **November, 2013.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson