INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 2038, Applicant v. CLEAN HARBORS INDUSTRIAL SERVICES CANADA, INC. and BCT STRUCTURES INC., Respondents

LRB File Nos. 063-14, 071-14, 096-14, 105-14 & 106-14; December 16, 2014
Vice-Chairperson, Steven D. Schiefner; Members: Maurice Werezak and Don Ewart

For the Applicant Union: Mr. Greg D. Fingas
For the Respondent Employers: Mr. Larry F. Seiferling, Q.C. and Scott M. Wickenden

Certification – Employer – Trade union seeks to represent craft unit of electricians – Dispute arises as to identity of employer – Board acknowledges that determining identity of employer in construction sector can be difficult – Board reviews criteria for identification of employer of employees – Board applies pragmatic approach – Board looks to see with whom employees formed their employment relationship.

Construction Industry – Appropriate Bargaining Unit – Trade union disputes eligibility of apprentices registered in other jurisdictions but not registered in Saskatchewan to participate in representational question – Board concludes that apprentices registered in other jurisdictions but working in Saskatchewan fall within scope of bargaining unit – Board concludes that out-of-province apprentices not required to register in Saskatchewan to be eligible to participate in representational question.

Construction Industry – Appropriate Bargaining Unit – Trade union disputes eligibility of employee who expressed intention to become indentured but had yet not registered in an apprentice program – Board concludes that persons working in the trade with the intention of shortly becoming an apprentice fall within scope of bargaining unit even if they have not yet registered with an apprenticeship program provided they have not worked in excess of the prescribed limit.

Unfair Labour Practice – Dismissal for Union Activities – Trade union alleges that decision to dismiss three (3) employees was tainted by anti-union animus – Board concludes that employer had good and sufficient reason for its decision to dismiss all three (3) employees – Board not satisfied that decision to terminate employees was influenced or tainted by anti-union animus on the part of employer.

Unfair Labour Practice – Communication – Trade union alleges that employer improperly communicated with employees during its organizational campaign – Board concludes that new legislation signalled a greater tolerance by the Legislature for capacity of employees to receive information from employers without being interfered with, intimidated or coerced – Board concludes that its historic presumptions as to inherent or inevitable susceptibility of employees to wishes of their employer must give way to new legislation - Board not satisfied that impugned communications were intimidating, threatening or coercive to an employee of reasonable intelligence and fortitude – Board not satisfied that communications would have compromised ability of employees to exercise their rights or their ability to freely decide representational question.

Trade Union Act, ss. 11(1)(a), (e) & (g).
***Saskatchewan Employment Act*, ss. 6-62(1)(a), (g) & (i), (2), (4) & (5).**

REASONS FOR DECISION

Background:

[1] **Steven D. Schiefner, Vice-Chairperson:** These proceedings began on March 31, 2014 with an application[1] by the International Brotherhood of Electrical Workers, Local Union 2038 (the "Union") to represent the employees of Clean Harbors Industrial Services Canada, Inc. ("Clean Harbors Industrial Services"). However, Clean Harbors Industrial Services filed a Reply in those proceedings indicating that it was not the employer of the employees that the Union seeks to represent. Rather, Clean Harbors Industrial Services indicated that the employer of the subject employees was BCT Structures Inc. ("BCT Structures"). The Union, however, held to its position that Clean Harbors Industrial Services was the proper respondent to its certification application. Thus, the first issue in these proceedings was the identity of the employer of the subject employees.

[2] A pre-hearing representational vote was directed by this Board and the appointed agent of the Board elected to conduct that vote by mail-in ballots. The voting began on April 8, 2014 when voting packages were mailed to eight (8) individuals who were identified by the agent as being eligible (or potentially eligible) to participate in the representational question; namely, Mr. Blair Bulani, Mr. Nicolas Richter, Mr. Matthew Zemlak, Mr. Gregory Flichel, Mr. Aaron

[1] Application Bearing LRB File No. 063-14.

Telford, Mr. Christopher Dixon, Mr. Connor Walker and Mr. Zena Feleke. Voting concluded on April 22, 2014, the date on which ballots were required to be returned to the Board for tabulation.

[3] By the time the proceedings came on for hearing, numerous new issues had arisen between the parties; issues requiring determinations by this Board. Because of these issues, the ballots from the representational vote were not tabulated and remain sealed in the ballot box.

[4] On April 8, 2014, the Union filed an application[2] alleging that Clean Harbors Industrial Services had committed two (2) unfair labour practices; the first with respect to the termination of Mr. Greg Flichel; and the second with respect to a meeting of employees in the workplace that occurred on April 3, 2014 and communications by or on behalf of the employer at that meeting that the Union alleges were improper. Both Clean Harbors Industrial Services and BCT Structures (referred to alternatively as the "Employer") take the position that Mr. Flichel's termination was lawful. Furthermore, they argue that, because he was lawfully terminated prior to the conduct of the representational vote (i.e.: on April 3, 2014), Mr. Flichel was not an employee on the day voting began. On May 13, 2014, the Employer filed an objection[3] to the conduct of the vote alleging that Mr. Flichel was ineligible to participate in that vote.

[5] On May 26, 2014, the Union filed a second application[4] alleging that Clean Harbors Industrial Services committed a number of new unfair labour practices, including more communications in the workplace that the Union alleged to be improper and regarding the termination of two (2) more employees; namely Mr. Blair Bulani and Mr. Nicolas Richter. In addition, the Union also filed its own objection[5] to the conduct of the representational vote alleging that Mr. Aaron Telford, Mr. Zena Feleke and Mr. Connor Walker were ineligible to participate in the representational question.

[6] All of the applications were joined for hearing. The Union called Mr. Matthew Zemlak, Mr. Gregory Flichel, Mr. Nicholas Richter and Mr. Blair Bulani. The Union also called Mr. Jeffrey Sweet, the Union's President. The Employer called Mr. Brian McDonald, who was

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2 Application bearing LRB File No. 071-14.
3 Application bearing LRB File No. 096-14.
4 Application bearing LRB File No. 105-14.
5 Application bearing LRB File No. 106-14.

employed by BCT Structures Inc. and who was that company's Vice-President of Manufacturing. The Employer also called Ms. Lindsay Rutherford, who was employed by Clean Harbors Energy & Industrial Services Canada, Inc. and who was that company's Director of Human Resources. The Employer also called Mr. Sean Bennett, the Assistant Superintendent (at the disputed workplace), and Mr. John Milne, the Superintendent (at the disputed workplace). Both of these individuals were employees of BCT Structures Inc. Finally, the Employer called Ms. Loreene Spilsted, the Executive Director of the Saskatchewan Apprenticeship and Trade Certification Commission (the "Commission").

Facts:

[7] These proceedings involve two (2) separate corporations that operate under a common corporate banner; in this case, the "*Clean Harbors*" banner. Clean Harbors is a publicly-trade company based in Norwall, Massachusetts, USA. Various subsidiaries owned by Clean Harbors carry on business in Canada, including in Alberta and Saskatchewan. As a group of companies, Clean Harbors has approximately 14,000 employees in North America; 5,500 of which work in Canada. Both of the companies involved in these proceedings; namely, Clean Harbors Industrial Services and BCT Structures; are owned by and members of the Clean Harbors group of companies.

[8] BCT Structures operates out of Lethbridge, Alberta and is a custom manufacturer of modular building structures. It builds housing units, kitchen facilities, washroom facilities and other customized modular units. These units are built in a large manufacturing plant in Lethbridge, Alberta, and are custom built to the customer's specifications. They are portable and designed to be transported and installed in remote locations. BCT Structures has approximately 225 to 300 employees. These employees both build the modular units and work on the installation of these units at the customer's desired location. The employees are paid a premium for working away from the plant. BCT Structures was acquired by Clean Harbors in 2010 and is now part of the "*Lodging Services*" division of that group of companies.

[9] Clean Harbors Industrial Services is located in Edmonton, Alberta. As the name would imply, Clean Harbors Industrial Services is part of Clean Harbors' "*Industrial Services*" division. Ms. Rutherford testified that Clean Harbors Industrial Services has operated in Saskatchewan and employed a number of employees at various locations, including Regina and Estevan. However, Ms. Rutherford testified that, at all times relevant to these proceedings, the

only electricians employed by any companies operating under the Clean Harbour banner were at the site that is the subject matter of the Union's application.

[10] Mr. McDonald testified that Clean Harbor Energy & Industrial Services Corp (also known as "Clean Harbors Canada") bid on and was awarded the contract for Phase 1 of a large housing complex for K+S Potash Canada ("K+S") near Bethune, Saskatchewan. Clean Harbors Canada is apparently another in the Clean Harbors group of companies and appears to be the parent company of Clean Harbors operations in Canada. Mr. McDonald testified that it was BCT Structures that prepared the bid and made the presentation to K+S. The housing complex that Clean Harbors Canada proposed for K+S was a self-contained camp, with twenty-six (26) interconnected housing modules, together with a full service kitchen and concomitant washroom facilities; all to be built by BCT Structures. In total, the complex was designed to provide housing for up to 700 people. Building modules off-site at the Lethbridge plant was intended to accelerate the construction process because the modules could be built prior to the K+S site being available and, when the site was available, it allowed for construction and installation to occur at the same time. Generally speaking, the housing project was completed as follows:

- Construction of the modules for the housing complex at the Lethbridge plant.
- Site preparation, including installation of high voltage power lines and transformers.
- Transporation, installation and testing of temporary office space and temporary housing, kitchen and washroom facilities.
- Transportation, installation and testing of the modules for the housing complex.
- Commissioning and acceptance testing of all complete works.

[11] The K+S housing complex was scheduled to be completed by April or May of 2014. BCT Structures began building the modules for the housing complex in May of 2013. BCT Structures has approximately 250 employees, most of which are employed on a permanent basis by that company. It was estimated that approximately thirty (30) of BCT Structures' employees work in the electrical trade. However, it should be noted that BCT Structures promotes cross-training and encourages its employees to work in more than one trade. In any event, BCT Structure's employees are involved with both the construction of the modules

company's Lethbridge manufacturing plant and then the installation and commissioning of those modules in the field.

[12] Mr. MacDonald testified that, although earlier access was anticipated, the K+S site was not available until November of 2013. The first employees on the site were all permanent employees of BCT Structures from the Lethbridge plant. Of relevance to these proceedings, the first electricians on the site were Mr. Aaron Telford (first day on the site was in November of 2013), Mr. Zena Feleke (first day on the site was January 1, 2014), Mr. Connor Walker (first day on the site was January 6, 2014) and Christopher Dixon. A number of other employees from BCT Structures were also on the site but these individuals worked in non-electrical trades.

[13] Mr. Bennet and Mr. Milne were the site supervisors. Mr. Milne is a long standing journeyman electrician (Red Seal). As a result, it was agreed that he would oversee the electrical work on the site and that Mr. Bennett, who did not have an electrical background, would oversee other aspects of the Employer's operations at the site. Mr. Milne testified that by January of 2014, it became apparent that more electricians would be required on the K+S site for two (2) reasons; firstly, because of problems in the supply chain, not all of the electrical work was able to be completed in the plant; and secondly, the Employer did not get access to the site as early as originally anticipated and they wanted to make up time to get the project back on schedule. Mr. Milne put in a request for more labour (specifically additional electrical workers). Mr. MacDonald testified that Mr. Milne's request for additional labour was approved. As a result, Ms. Rutherford's department prepared job advertisements for temporary electricians to work at the K+S site. Ms. Rutherford testified that, although she worked for Clean Harbors Canada, her department provided human resource services for a number of Clean Harbors companies, including both Clean Harbors Industrial Services and BCT Structures.

[14] Ms. Rutherford testified that her department contacted the Commission regarding the K+S project. Ms. Rutherford indicated that her department routinely contacts provincial apprenticeship and trade certification commissions regarding projects being done by Clean Harbors companies that involve indentured trades, such as electrical work. Ms. Rutherford testified her department was aware that Saskatchewan had a prescribed maximum number of apprentices for each journeyperson working on a project. In Saskatchewan, the maximum ratio

is 2:1, with no more than two (2) apprentices (or prospective apprentices) for each journeyperson.

[15] In January of 2014, the Union saw that a non-union employer was advertising for electricians for work being done in Saskatchewan. Mr. Sweet testified that the Union operates what he referred to as an aggressive "salting" program. Mr. Flichel testified that he was contacted by the Union and asked to look at this particular advertisement. At that time, Mr. Flichel was looking for work and he agreed to pursue employment with this employer under a "salting" agreement[6] with the Union. Mr. Flichel testified that the advertisement was for a temporary journeyperson electrician at the K+S site with the employer's name identified as "Clean Harbors Canada". Mr. Flichel applied for this position and was interviewed by Mr. Bennett and Mr. Milne. During the interview, Mr. Flichel disclosed that he was an inexperienced journeyman, having only been a journeyman for one (1) year at that time. Mr. Flickel indicated that he had limited experience supervising apprentices and very little experience dealing with fire alarms, which was part of the requirements for the housing complex. Mr. Flickel was informed that Mr. Milne was a journeyman electrician and could provide some assistance in these areas.

[16] It was agreed that Mr. Flichel would be hired and a contract of employment was prepared by the Human Resource Department of Clean Harbors Canada. Mr. Flichel's contract of employment read as follows:

> *Re: Offer of Employment*
>
> *Dear Greg;*
>
> *Clean Harbors Industrial Services Canada Inc. (the "Company") is pleased to offer you the temporary position of* ***Journeyman Electrician****, reporting to the Site Superintendent at Lethbridge, AB (97MZ) location. The offer is conditional pending the clearance of drug and alcohol test, as well as a successful fitness-for-work assessment, if applicable to your position.*
>
> *. . .*
>
> ***Probationary Period****: The first ninety (90) days of your employment with be a probationary period, during which time the Company will assess your performance and your fit. The Company may terminate your employment at any*

[6] Under IBEW's Constitution, members of the Union are prohibited from working for non-unionized employer except with the consent of the Union. A "salting" agreement involves a trade union consenting to one of its members working for a non-unionized employer, provided that member promotes unionization to the non-organized workers on the site and attempts to organize or cooperate in the organization of the employer.

> *time during the probationary period for lack of suitability without notice or payment in lieu of notice.*
>
> *. . .*
>
> *On behalf of all of us Greg, welcome to our team and best wishes for a successful career with Clean Harbors. Please sign a copy, indicating that your have reviewed this offer of employment and accept the provisions as stated. Once the letter is signed, return it by e-mail to HumanResourcesCanada@cleanharbors.com or by fax 780-395-5869 no later than February 3, 2014.*
>
> *If you have any question about this offer of employment or about our company, please feel free to contact the Lethbridge location or John Milne.*
>
> *Sincerely,*
>
> *John Milne*
> *Site Superintendent*

[17] Mr. Flichel began working on January 29, 2014. Soon after he began, Mr. Flichel told Mr. Richter that his employer was looking for electricians at the K+S site and encouraged him to apply. Aware that this particular workplace was not organized, Mr. Richter contacted the Union and got permission to work for this employer under a "salting" agreement. Mr. Richter applied for and was hired on or about February 26, 2014. Mr. Richter's contract of employment was essentially the same as the above. However, Mr. Richter was not a journeyman; rather, he was hired as a temporary apprentice electrician.

[18] Mr. Zemlak and Mr. Bulani came to work at the K+S site in much the same fashion as Mr. Flichel and Mr. Richter. They each got permission to apply for and work at the K+S site under "salting" agreement. Both employees were hired on or about March 17, 2014. Mr. Zemlek was hired as a temporary journeyman electrician and Mr. Bulani was hired as a temporary apprentice electrician. However, it should be noted that the employer in these offer letters was not identified as "Clean Harbors Industrial Services Canada, Inc.". Rather, the employer was identified as "Clean Harbors".

[19] None of these employees disclosed to the Employer that they were members of the Union or that they came to work at the K+S site under the terms of a salting agreement with the Union.

[20] Mr. Flichel, Mr. Richter, Mr. Zemlek and Mr. Bulani each testified that they understood their employer at the K+S site to be "*Clean Harbors Industrial Services Canada, Inc."* Mr. Milne testified that he was a BCT Structures employee and that he was not aware that the identity of the employer was an issue when he interviewed any of the temporary electricians hired from Saskatchewan. Mr. Milne testified that much of the equipment used on the site came from the Lethbridge plant and was labeled with BCT Structures. Mr. Milne indicated that, if he had been asked, he would have indicated that BCT Structures was the employer because that is who he works for. On cross-examination, Mr. Milne admitted that BCT Structures had been purchased by Clean Harbors Canada; that many of the company's policies refer to "Clean Harbors"; and that BCT Structures now identifies itself as a "Clean Harbors Company".

[21] Ms. Rutherford testified that the reference to "*Clean Harbors Industrial Services Canada, Inc."* in the employment contracts given to Mr. Flichel and Mr. Richter was an error. Ms. Rutherford indicated that the request for additional labour at the K+S site came from BCT Structures; that interviews of the employees were conducted by BCT employees; that the employees were paid at rates of pay established by BCT Structures; and that it was BCT Structures that registered with Workers Compensation and paid GST for the housing complex. Ms. Rutherford testified that various codes on the offer letter were codes for BCT Structures not Clean Harbors Industrial Services. In cross-examination, Ms. Rutherford acknowledged that an employee would not know what any of the Employer's codes meant in their offer letter. Finally, in response to a question from the Board, Ms. Rutherford indicated that the personnel files for all the employees working at the K+S site were held by BCT Structures at the Lethbridge plant.

[22] Mr. Feleke, Mr. Telford, Mr. Walker and Mr. Dixon were all permanent employees of BCT Structures who agreed to work on the installation of the housing complex at the K+S site. Each of these employees had worked in the plant on the construction of the modules and, at some point, agreed to work on the installation and commissioning of the modules at the K+S site. There is a premium paid to permanent employees who agree to work at a remote site during the installation and commissioning of modules. All of these employees performed electrical work on the housing project. None of these employees held a certificate as a journeyman electrician. Mr. Dixon was a 3rd year apprentice, Mr. Telford was a 2nd year apprentice, and Mr. Feleke was a 1st year apprentice. However, none of these employees were registered with the Commission while they were working in Saskatchewan. Finally, Mr. Walker was not registered in an electrical apprenticeship program in either Alberta or Saskatchewan

when he was working at the K+S site. However, he spent a significant portion of his time working under the supervisions of a journeyman electrician and he expressed an interest in working in that field. Mr. Walker registered in the electrical apprenticeship program in Alberta in July of 2014.

[23] Mr. Feleke began working at the K+S site on January 1, 2014 and worked through until February 23, 2014, when he left the site and returned to work in the plant. It was Mr. Feleke's desire to return to work in the plant as it was very, very cold in Saskatchewan at that time. Mr. Feleke was a recent immigrant to Canada and he informed Mr. Milne that he was having difficulty working outdoors in the kind of extreme cold that Saskatchewan was experiencing at that time. In early April of 2014, the Employer indicated to its permanent employees at the Lethbridge plant that it needed more electricians at K+S site to finish up the housing project. As it had warmed up considerably in Saskatchewan by that time, Mr. Feleke asked to and did return to the project on April 6, 2014. Thereafter, Mr. Feleke worked at K+S site until the housing project was complete.

[24] Mr. Walker began working at the K+S site in January of 2014 and worked there until April 20, 2014. Mr. Telford began working at the K+S site in November of 2013 and worked there until the project was complete, save for the period of March 2, 2014 to April 20, 2014, when Mr. Telford was attending school for his apprenticeship program. The evidence was not clear when Mr. Dixon began working at the K+S site but all parties agreed that he was present on March 31, 2014 (when the Union filed its certification application) and on April 8, 2014 (when voting packages were mailed to employees).

[25] Mr. Flickel testified that he began talking to other employees (i.e.: the permanent employees from Alberta) about the Union and benefits of unionization in February of 2014. Mr. Flickel testified that, in March of 2014, when the Union filed its certification application he continued to believe that his employer was Clean Harbour Industrial Services. In cross-examination, Mr. Flickel admitted that he was aware that BCT Structures Inc. had been bought by Clean Harbors Canada and was now part of the Clean Harbors Company.

[26] The Union filed its certification application with the Board on March 31, 2014. As is the normal practice for the Board, the Employer was notified that a certification application had been received from the Union. Mr. Bennett and Mr. Milne were notified soon thereafter. During

a lunch break at the site, a number of electrical workers were discussing the certification application in the presence of Mr. Milne. After hearing some of the discussion, Mr. Milne made a comment about the Union's certification application. Mr. Flichel testified that Mr. Milne said words to the effect that "*now that a certification application has been filed, things are going to get interesting*". Mr. Milne denied saying these words. Mr. Milne admitted that he commented on the Union's application to some of the electricians but testified that he said "*I have been through this before and it can carry on for a while*".

[27] On April 3, 2014 (after the Union filed its certification application with the Board), Mr. Bennett and Mr. Milne held a meeting with all of the Employer's employees working at K+S site (i.e.: electricians and other trades). At this meeting, the employees were informed that a certification application had been filed by the Union and that they were seeking to represent the electricians. During this meeting, all employees were reminded of the Employer's non-solicitation policy. Pursuant to this policy, employees are not entitled to solicit each other (discuss unionization) while they are working. The policy did not prohibit employees from discussing unionization during their breaks or after hours; only when they are working. The evidence established that, after this meeting, employees limited their discussion of unionization to their breaks. Although it was not clear how the conversation started, during the April 3, 2014 meeting, Mr. Bennett talked to employees about his personal experience being a member of a trade union. While there was some dispute as to what exactly Mr. Bennett said to the employees, Mr. Bennett testified that his goal was to encourage the electricians to get as much information as they could before they voted.

[28] On April 4, 2014, Mr. Flichel was called to a meeting with Mr. MacDonald, Mr. Bennett, and Mr. Milne. Ms. Rutherford participated in the meeting by telephone. At this meeting, Mr. Flichel was informed that his employment was being terminated. The particulars of Mr. Flichel's termination were set forth in a letter dated April 4, 2014 signed by Mr. MacDonald. Mr. Flichel was informed that the reasons for his termination was incomplete work and work done incorrectly. During the meeting, Mr. Flichel wanted to know if the problem was his work or the work of his apprentices and/or whether the problem was related to the fire alarm system. Mr. Flichel was given examples of work that was done incorrectly or incompletely.

[29] Mr. Milne testified that it was his decision to terminate Mr. Flichel. In February/March of 2014, Mr. Milne began discovering improper or incomplete electrical work at

the K+S site. At first, Mr. Milne did not know who was responsible for the deficiencies. However, as the project progressed, Mr. Milne came to the conclusion that the work being performed by Mr. Flichel and/or his apprentices was the major source of the deficiencies he was observing. Mr. Flichel and his apprentices were moved from one (1) type of work to another. The deficiencies were continuing and, by mid March, Mr. Milne concluded that the cost redoing Mr. Flichel's work (and/or the work performed under his supervision) was going to be a problem. In addition, by this time Mr. MacDonald had observed that the electrical component of the project was behind schedule and wanted to know why. Mr. Milne informed Mr. MacDonald of his conclusion that Mr. Flichel's work was substandard and that the deficiencies from his crew were causing the project to fall behind schedule. Mr. Milne testified that, by the end of March, he had concluded that his only option was to terminate Mr. Flichel's employment. Even though electricians were in short supply at that time, Mr. Milne concluded that keeping Mr. Flichel would only delay the project. Mr. MacDonald agreed with Mr. Milne's recommending and Ms. Rutherford was contacted to prepare the necessary documents.

[30] In cross-examination, Mr. MacDonald and Mr. Bennett both admitted that the Employer had not spent much time coaching Mr. Flichel in an effort to improve his performance nor was the Employer interested in giving him a second chance. Mr. MacDonald indicated that it was not his practice to spend a lot of time doing performance management on probationary employees. As Mr. MacDonald put it, in the construction sector, "*if things don't work out with a probationary employee, we just part company*". Mr. Bennett, who agreed with the decision to terminate Mr. Flichel, indicated that his primary concern was potential liability arising out of the volume and kind of deficiencies seen in Mr. Flichel's work. Mr. Milne testified that the deficiencies involved the kind of errors that even an inexperienced journeyperson should have recognized. It was Mr. Milne's observation that "*it was almost like he [Mr. Flichel] didn't care [about the quality of the work he was doing*]".

[31] There was another electrical contractor working on the K+S site (i.e.: Alliance Energy) doing different electrical work for BCT Structures (high voltage installations). Mr. Milne asked Alliance Energy to review the electrical work that had been done on the housing project and to document any deficiencies they discovered. Mr. Milne testified that his request was not made to justify Mr. Flichel's termination. Rather, Alliance Energy was retained so that he knew the full extent of the deficiencies and because he knew he would need justification for the additional work that would be required to complete the electrical work (i.e.: to redo electrical work

that should have already been completed). The deficiency list was extensive and Alliance Energy concluded that it would take many, many hours of work to redo mistakes that had been made in the electrical work. In cross-examination, Mr. Milne admitted that not all of the deficiencies involved work completed or supervised by Mr. Flichel. However, many items on the list were directly attributable to Mr. Flichel.

[32] After the decision was made to terminate Mr. Flichel, Ms. Rutherford contacted the Commission to discuss the loss of a journeyperson at the K+S site. Ms. Rutherford was informed that the Employer would not be "*out of ratio*" because Mr. Milne was a journeyman electrician and that his presence would keep the Employer in ratio at least until another journeyperson electrician could be found and brought to the site. Neither of the apprentices working with Mr. Flichel were terminated or removed from the site.

[33] On April 12, 2014 (after the voting packages were mailed to employees), Mr. Bennett and Mr. Milne held a meeting with all electricians on the K+S site. During this meeting, Mr. Bennett distributed the following communication to employees:

> *From: Brian MacDonald, VP Manufacturing, BCT Structures Inc.*
>
> *Date: April 12, 2014*
>
> *Subject: Notice to Vote*
>
> *You will be receiving a package in the mail from the Saskatchewan Labour Relations Board that will instruct you on how to complete and send in your ballot. This vote will decide if you want to be represented by the IBEW Local 2038 to determine your wages, hours and working conditions.*
>
> *Today at the K+S site, we communicated to the team that as you are likely aware the IBEW Local 2038 has applied to become the bargaining agent for all Journeyperson Electricians, Electrical Apprentices, Electrical Workers, Electrical Foremen and Electrical General Foremen, employed by Clean Harbors Industrial Services Canada Inc. in the Province of Saskatchewan South of the 51st Parallel. As you are aware, you are not employed by Clean Harbors Industrial Services Canada Inc., BUT BY BCT Structures Inc., who holds a contract to perform work at the site in Saskatchewan. In any event, the Labour Relations Board is conducting a vote to determine if you wish your employer to be unionized.*
>
> *This is an important decision for you and your family. We encourage you to gather as much information as you can during the voting process before you cast your vote. Ask questions to your co-workers, your Manager or Supervisor, Human Resources, the IBEW, and anyone else that can help you in making the best decision for you and your interests.*

Enclosed you will find an Employee Bulletin and the Notice to Vote that was posted on the K=S site on April 11, 2014. Ensure your vote is submitted as quickly as possible as it must be returned to the Saskatchewan Labour Relations Board by April 22, 2014, to be counted and included in the determination of the vote. If you do not receive a ballot by April 14, 2014, please contact Fred Bayer at 306-787-1541 Board Registrar at the Saskatchewan Labour Relations Board.

Employee Bulletin

As you are likely aware, IBEW, Local 2038 ("Local 2038") has applied to become the certified bargaining agent for all Journeyperson Electricians, Electrical Apprentices, Electrical Workers, Electrical Foremen and Electrical General Foremen, employed by Clean Harbors Industrial Services Canada Inc., in the Province of Saskatchewan South of the 51st Parallel.

You will receive a notice and ballot in the mail. The Labour Board has notified us as late as today that mail ballots have been sent to the addresses that the company provided to the Board, instructions will accompany your mail ballot. It is critical to you and your interests that you take the time to understand the implications to you and your family before returning your sealed secret ballot. It is important for you to understand that the outcome of the election will be determined based upon the number of ballots that will be returned to the Labour Board in a timely fashion.

It is important for you to remember that there are changes that occur automatically in the Construction industry in Saskatchewan, if you were unionized. Because Construction Unions operate with hiring halls and because the union contract automatically applies to us, if we are unionized, your opportunities to work for us may be limited. In addition, even if you are working for us now, there may be limited opportunities to work for us in the future because the Union constitution on how you get to work on our projects would apply. In addition, if you are not from Saskatchewan, your rights under the Union constitution may be affected by a unionization. These are things you should determine before you decide how you wish to vote.

The majority of employees who actually vote will determine the outcome. For example, if only 6 employees vote, then 4 employees could determine whether Clean Harbors' employees are represented by a union. All employees in the bargaining unit will be bound by the vote, whether they vote or not. It is crucial that YOU vote, unless you want a small majority of employees to make the decision for you.

It is important for you to remember that there is no such thing as a "trial period" with the union. The union wants to be become your permanent and exclusive bargaining agent. If certified, there are very limited opportunities to have the union removed if employees change their minds.

People often sign up with or vote for a union under pressure from others or based on exaggerated promises by union organizers or supporters without knowing all the facts about how unions operate.

Here are some questions you may with to ask the union representatives/supports when you are considering how you will vote:

<u>EFFECTS:</u>
1. What are my rights if the business becomes unionized?

2. *If I am from another province and work for the company in Saskatchewan, what are my rights and obligations if the business is unionized in Saskatchewan?*
3. *What are my rights to continue working on this project if the business is unionized?*
4. *What are the effects on my wages and benefits?*
5. *What are my rights to work in Alberta if the business is unionized? Will this affect my rights to work in Saskatchewan?*

COSTS:

1. *If I am unable to become a union member and continue to work in Saskatchewan, what are the initiation dues and Union dues I will have to pay?*
2. *What are the yearly union dues you will have to pay?*
3. *How much will employees pay to the union per year?*
4. *When was the last time the union dues were raised?*
5. *When will union dues go up again?*
6. *What special assessments or payments are there?*
7. *Where will your union dues go? Will any of your dues go to the union's head office? Where is the Union's head office located?*
8. *What happens when I go back to Alberta with regard to dues?*
9. *If I am unionized, what happens to my existing terms and conditions of employment including benefits provided by the employer now?*

THE UNION RULES: CONSTITUTION AND BYLAWS

1. *Does the union have a constitution and bylaws? How long is it? Does it apply to me?*
2. *Have you been given a copy of the union's constitution and bylaws?*
3. *Has anyone you know read the union's constitution and bylaws?*
4. *What does the union's constitution and bylaws say about dues, initiation fees and assessments?*
5. *Are the officers and employees of the union paid for their work?*
6. *How many officers and employees are there? Where are they located?*
7. *Do union dues pay union officers? How much are these people paid?*

UNION DISCIPLINE

1. *Can the union discipline or fine you? What for?*
2. *What are union charges, trials and appeals?*
3. *If I am unionized in Saskatchewan and work for this company, can I work for a non-union contractor in another Province? If I do, can I be disciplined? Is there a fine, and what are the limits of the fine? Can I work for a non-union employer in Saskatchewan or Alberta?*

STRIKES

1. *Has the union gone on strike in Saskatchewan?*
2. *If so, how long have some of the strikes lasted?*
3. *What do you have to do if there is a strike? Do you have to picket? What happens if you don't picket? What happens if you cross the picket line?*
4. *What do people on strike get paid? Is it less than their normal wages?*
5. *Can the union force an employer to pay higher wages or benefits if the employer does not agree to pay?*
6. *What happens to my benefits if I were on strike?*

Because unionization creates many changes in the way we have to operate, it is important that you gather all the facts and determine the effects on your

> *employment and the costs to you before you decide what you will vote on the ballot.*

[34] Voting concluded on the representational question on April 22, 2014.

[35] Mr. Zemlak resigned on April 29, 2014. He provided no notice of his decision to resign. He merely concluded his shift on April 29, 2014 and informed Mr. Milne and/or Mr. Bennett that he would not be returning for his next shift.

[36] Following Mr. Zemlak's resignation, a conversation occurred between Mr. MacDonald, Mr. Milne and Ms. Rutherford about the fact that the Employer would be out of ratio. Ms. Rutherford testified that the Employer was already at risk of being out of ratio following the termination of Mr. Flichel and the loss of Mr. Zemlak from the site made it impossible for the Employer to stay in ratio. As a consequence, a decision was made to terminate Mr. Bulani and Mr. Richter. In cross-examination, Mr. MacDonald testified that, although electrical work remained to be done on the housing complex, the Employer decided to keep its permanent employees on the site rather than keep the temporary employees that had been hired from Saskatchewan. Mr. MacDonald testified that there were two (2) reasons for doing so; firstly, Mr. MacDonald felt the permanent employees had more seniority; and secondly, the permanent employees from the plant could be used to do different work at the site when the electrical work was complete.

[37] Finally, Ms. Loreena Spilsted testified on behalf of the Saskatchewan Apprenticeship and Trade Certification Commission. The following aspects of Ms. Spilsted testimony are relevant to these proceedings:

1. There are four (4) compulsory apprenticeship trades in Saskatchewan, one of which is for electricians.
2. Section 38 of *The Saskatchewan Apprenticeship and Trade Certification Act, 1999*, S.S. 1999, c.A-22.2, restricts persons from performing work falling within the scope of a compulsory apprenticeship trade to the following:
   (a) persons holding a journeyperson's certificate in that trade;
   (b) persons with a registered contract of apprenticeship (from the Commission or from another province) for that trade; or

(c) persons that intend to become indentured in that trade but whom have not worked for more than the prescribed limit.

3. Electrical apprentices that are registered in another jurisdiction are not required to register in Saskatchewan if they come to work in this province.
4. Saskatchewan recognizes the hours worked by a Saskatchewan apprentice in another jurisdiction. Other jurisdictions recognize the hours worked by their apprentices in our province.
5. Individuals can work as electrical apprentices in Saskatchewan for up to six (6) months without registering in an apprenticeship program.
6. Staff from the Commission routinely conduct compliance inspections of workplaces in Saskatchewan to ensure that employers are complying with the Commission's regulations.
7. Compliance staff of the Commission record the names of all persons they observe working in the electrical field and contact other jurisdictions to confirm out-of-province apprenticehships.
8. If individuals who have not registered for an apprenticeship program are observed working in the electrical field by the Commission's compliance staff, they are informed that:
   (a) they can only work for six (6) months and then they must register with an apprenticeship program; and
   (b) if they have worked for more than six (6) months, they can be Ordered by the Commission to stop working until they register in an apprenticeship program; and
   (c) if they register for an apprenticeship program, they will not be credited for any hours worked in excess of six (6) months prior to registration.
9. The Commission includes all non-journeypersons, including all apprentices registered with the Commission, apprentices registered in other provinces, and persons who are working in the field but not yet registered in an apprenticeship program, in the apprentice/journeyperson ratio.

The Union's Position:

[38] The Union takes the position that Clean Harbors Industrial Services is the actual and proper employer of the employees that are the subject matter of its certification application. The Union argues that only four (4) employees were employed by that particular employer;

namely, Mr. Gregory Flichel, Mr. Nicholas Richter, Mr. Matthew Zemlak and Mr. Blair Bulani. As a consequence, the Union takes the position that only these employees ought to be eligible to participate in the presentational question. In this regard, the Union takes the position that Mr. Flichel was unlawfully terminated by the employer in contravention of *The Saskatchewan Employment Act* and that his unlawful termination should not disentitle him to vote.

[39] In the event that this Board finds that BCT Structures is the employer of the employee that are the subject matter of its certification applications, the Union seeks to amend its certification application to name that employer. With respect to eligibility, the Union takes the position that only those apprentices who are registered with the Commission in Saskatchewan are members of its bargaining unit and thus eligible to participate in the representational questions. In other words, even though Mr. Christopher Dixon, Mr. Aaron Telford, Mr. Zena Feleke and Mr. Conner Walker were employees of BCT Structures Inc., these individuals would not fall within the scope of the Union's bargaining unit because they were not registered with the Commission when they were working in Saskatchewan.

[40] In the event that this Board finds that apprentices who are registered in another jurisdiction do not need to register with the Commission in Saskatchewan, then the Union takes the position that Mr. Conner Walker remains ineligible to participate in the presentational question because he was not registered in an apprenticeship program in any province at the relevant time. Simply put, the Union argues that, because Mr. Walker was not an apprentice, he was not a member of its proposed bargaining unit. Furthermore the Union takes the position that Mr. Zena Feleke is ineligible to participate in the representational question because he was not working in Saskatchewan at the relevant time.

[41] The Union argues that Mr. Gregory Flichel was unlawfully terminated in contravention of *The Trade Union Act* and that Mr. Nicholas Richter and Mr. Blair Bulani were unlawfully terminated in contravention of *The Saskatchewan Employment Act*. The Union seeks declaratory and monetary relief for all three (3) of these individuals.

[42] Finally, the Union takes the position that the Employer improperly communicated with its employees in an effort to either intimidate or coerce them and/or to discourage them from supporting the Union. In this regard, the Union seeks declaratory relief.

[43] Counsel on behalf of the Union filed written submissions and a Book of Authorities, which we have read and found to be very helpful. The Union's position on each of these issues will be discussed in more detail later in these Reasons for Decisions.

The Employer's Position:

[44] The Employer takes the position that the proper employer of the subject employees is BCT Structures. To which end, the Employer does not object to the Union amending its certification application to name BCT Structures.

[45] The Employer disputes the Union's position that apprentices from another jurisdiction, such as Mr. Christopher Dixon, Mr. Aaron Telford and Mr. Zena Feleke, are not entitled to participate in the representational question. The Employer also disputes the Union position that Mr. Conner Walker is not entitled to participate in the representational question. The Employer takes the position that all of the permanent employees from the Lethbridge plant (namely, Mr. Christopher Dixon, Mr. Aaron Telford, Mr. Zena Feleke, and Mr. Conner Walker) fell within the scope of the standard craft unit for electricians and each have a clear and genuine interest in the outcome of the representational question.

[46] The Employer argues that only three (3) of the temporary employees from Saskatchewan (namely, Mr. Nicholas Richter, Mr. Matthew Zemlak and Mr. Blair Bulani) are eligible to participate in representational question. The Employer takes the position that Mr. Flichel was lawfully terminated and thus he is ineligible to participate it the representational question. Similarly, the Employer also disputes that Mr. Nicholas Richter and Mr. Blair Bulani were unlawfully terminated.

[47] Finally, the Employer denies that any of its communications were improper or that it was attempting to interfere with its employees right to organize or their decision to support the Union.

[48] Counsel on behalf of the Employer filed written argument and book of authorities, which we have read and found to be very helpful. The Employer's position on each of these issues will be discussed in more detail later in these Reasons for Decisions.

Relevant statutory provision:

[49] The following provisions of *The Trade Union Act, R.S.S. 1978, c. C-T-17*, are relevant to these proceedings:

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

[50] In addition, the following provisions of *The Saskatchewan Employment Act*, S.S. 2013, c.S-15.1, are relevant to these proceedings:

> ***6-62****(1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following:*
>
> *(a) subject to subsection (2), to interfere with, restrain, intimidate, threaten, or coerce an employee in the exercise of any right conferred by*

this Part;

. . .

(g) to discriminate with respect to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including termination or suspension or threat of termination 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 a proceeding pursuant to this Part;

. . .

(i) to interfere in the selection of a union;

. . .

(2) Clause (1)(a) does not prohibit an employer from communicating facts and its opinions to its employees.

. . .

(4) For the purposes of clause (1)(g), there is a presumption in favour of an employee that the employee was terminated or suspended contrary to this Part if:

(a) an employer or person acting on behalf of the employer terminates or suspends an employee from employment; and

(b) it is shown to the satisfaction of the board or the court that employees of the employer or any of them had exercised or were exercising or attempting to exercise a right pursuant to this Part.

(5) For the purposes of subsection (4), the burden of proof that the employee was terminated or suspended for good and sufficient reason is on the employer.

Analysis:

[51] These proceedings give rise to the following questions that require determinations by this Board:

1. Who is the employer of the employees that are the subject matter of the Union's certification application?
2. Are employees who are not registered with the Saskatchewan Apprenticeship and Trade Certification Commission members of the Union's bargaining unit and thus eligible to participate in the representational question?
3. Is Mr. Connor Walker a member of the bargaining unit and thus eligible to participate in the representational question?
4. Is Mr. Zena Feleke eligible to participate in the representational question?
5. Was Mr. Gregory Flichel unlawfully terminated? Is Mr. Gregory Flichel eligible to participate in the representational question?

6. Did the Employer commit an unfair labour practice in any of its communications to employees?
7. Did the Employer commit an unfair labour practice in terminating Mr. Nicholas Richter and Mr. Blair Bulani?

Who is the employer of the employees that are the subject matter of the Union's certification application?

[52] The Union argues that Clean Harbors Industrial Services is the employer that is the subject matter of its certification application. The Union acknowledges that BCT Structures may have had employees at the K+S site performing electrical work but takes the position that this was a different employer and, in any event, these employees would not fall within the scope of the Union's bargaining unit because they were not registered as apprentices in Saskatchewan.

[53] The Union relies on this Board's decision in *United Food and Commercial Workers, Local 1400 v. The Canadian Salt Company Limited, et. al.*, (2011) 191 C.L.R.B.R. (2d) 29, 2010 CanLII 65961 (SK LRB), LRB File No. 047-10, as standing for the proposition that identity of the employer of employees is best determined by the party whom they entered into their contract of employment. See also: *International Union of Painters & Allied Trades, Local 739 v. PAFHQ Construction GP Ltd., et. al.*, (2014) 238 C.L.R.B.R. (2d) 57, 2013 CanLII 83873 (SK LRB), LRB File Nos. 108-13 & 125-13. In this regard, the Union notes that the contacts for employment of both Mr. Flichel and Mr. Richter clearly stated the name of the employer was "*Clean Harbors Industrial Services Canada Inc*."

[54] Furthermore, the Union notes that BCT Structures was not registered to do business in Saskatchewan until after March 31, 2014 (the date the Union filed its certification application) and thus it was not entitled to carry on business (or employ employees) in Saskatchewan at the relevant time. Even if BCT Structures was also working on the same site at the same time, the Union argues that this fact should not affect this Board's determination that Clean Harbors Industrial Services was also working on the site and that it was the proper employer of the employees that the Union seeks to represent. Finally, the Union argues that the evidence of the Employer's witnesses as to the identity of the employer should be discredited.

[55] As this Board noted in both the *Canadian Salt* case and in *PAFHQ Construction, supra*, the real issue for the Board in determining the identity of the actual employer is; with whom did the employees enter into and form their contract of employment. As both of these cases illustrate, this determination is often difficult in the construction sector where employers routinely operate through or in partnerships; where there are service sharing agreements between related companies; where related companies are differentiated by sometimes subtle distinctions (not readily apparent to an external observer); and where companies operate under and promote a common corporate brand but nonetheless maintain separate corporate existences. The difficulty of our determination can be exacerbated by the fact that not all corporations register in Saskatchewan before they begin working here. It would appear that both BCT Structures and Clean Harbors Industrial Services began working in this province before they extra-provincial registered in Saskatchewan.

[56] In these circumstances, the identity of the actual employer of disputed employees is often found by piercing the corporate veil and by examining the employment relations that was formed with the employees through a lens that does not place too much significance on labels. In determining with whom the employment relationship was formed, we tend to be very pragmatic in our examination of the employment relationship. See: *PAFHQ Construction, supra*. However, in each case, our goal is the same, to determine the party with whom the employees entered into and formed an employment relationship.

[57] For the reasons that follow, we find that BCT Structures is the actual employer of the employees that the Union seeks to represent. However, it is not surprising that some of the employees were confused as to the identity of their employer. The contracts of employment for both Mr. Flichel and Mr. Richter erroneously named Clean Harbors Industrial Services as their employer and much of the documentation at the workplace used the ambiguous term “Clean Harbors”. However, we are satisfied that the reference to Clean Harbors Industrial Services in these two (2) contracts of employment was an error and that the actual employer of the electrician working at the K+S site was BCT Structures.

[58] In coming to this conclusion, we were not satisfied that the evidence of any of the Employer’s witnesses ought to be discounted. We note, as did the Union, that no documentary evidence (that was in existence prior to the date the Union filed its certification application) was tended by the Employer to clearly establish that BCT Structures was the actual employer.

Nonetheless, this Board heard considerable *viva voce* evidence from the Employer's witnesses as to the Employer's operations in general and the K+S project specifically. We have examined this evidence in terms of consistency with two (2) benchmarks; firstly, known or established facts (corroboration); and secondly, the preponderance of probabilities (common sense).

[59] In examining the evidence, we note that two (2) of the contracts of employment referenced Clean Harbors Industrial Services and two (2) used the ambiguous term of "*Clean Harbors*", as did many of the policy documents and other material used at the workplace, including the daily sign in sheets. As both Clean Harbors Industrial Services and BCT Structures operate under the "*Clean Harbor*" banner, the use of the term "*Clean Harbors*" is not particularly helpful in determining the identity of the actual employer. This Board heard evidence that approximately 5,500 employees in Canada work for companies operating under the "*Clean Harbors*" banner.

[60] While the name contained on an offer of employment is strong evidence as to the identity of the employer, the consistent evidence of all of the Employer's witnesses was that this was a BCT Structures project. It was BCT Structures that prepared the bid for K+S; it was BCT Structures who had the expertise in the housing sector; the modules for the housing project were all built at BCT Structures' plant in Lethbridge, Alberta; and BCT Structure was involved in both the construction of the modules and their installation and commissioning at the K+S site.

[61] It is the Union's position that both Clean Harbors Industrial Services and BCT Structures were working at the K+S site and that it seeks to represent the employees of the former but not the later. We acknowledge that it is possible that Clean Harbors Canada sent or permitted two (2) of its companies to be involved in the housing project at the K+S site. However, with all due respect, it is not clear why Clean Harbors Industrial Services was at the K+S site as alleged by the Union or what function it was performing if it was there. If both companies were present at the K+S site as the Union suggests, they were performing exactly the same work and their respective employees were freely intermingling. Furthermore, all of the temporary electricians that the Union argues were hired by Clean Harbors Industrial Services, were interviewed by management from BCT Structure, were paid rates of pay determined by BCT Structures, and were under the day-to-day direction of management from BCT Structures.

[62] Ms. Rutherford testified that the reference to Clean Harbors Industrial Services in the offers of employment for Mr. Flichel and Mr. Richter was an error. The Union argues that no documentary evidence was in existence prior to March 31, 2014 (the date the Union filed its certification application with the Board) to corroborate the Employer's evidence. Nonetheless, Ms. Rutherford's evidence was consistent with the preponderance of probabilities of how the housing project was being delivered in Saskatchewan. In our opinion, it is more probable that an error occurred in preparing the first two (2) employment contracts than it was that Clean Harbors Industrial Services was used to hire some employees at the K+S site (i.e.: temporary electricians) and BCT Structures hired or employed everyone else. Simply put, other than the two (2) employment contracts, we find little support for the conclusion that Clean Harbors Industrial Services was involved in the housing complex at the K+S site. As we have noted, the references to "*Clean Harbors*" in any of the evidence does not assist the Union in its position as this reference applies equally to both companies In our opinion, it is more probable that the reference to this company in offers of employment given to Mr. Flichel and Mr. Richter was a clerical error and that the actual employer of all of the electricians at the K+S site was in fact BCT Structures.

[63] While it is certainly understandable why Mr. Flichel and Mr. Richter would have been confused as to the identity of their employer, we are satisfied that this was a BCT Structures' project; that it was management from BCT Structures that interviewed the temporary electricians from Saskatchewan; and that all employees were under the day-to-day direction of management from BCT Structures at the K+S site. As a consequence, we find that BCT Structures was the employer of the electrician working at the K+S site and it was this company with whom Mr. Flichel, Mr. Richter, Mr. Zemlak and Mr. Bulani formed their employment relationships. In coming to this conclusion, we are satisfied that the reference to Clean Harbors Industrial Services in the first two (2) contracts of employment was an error.

[64] All of the Union's applications, including LRB File Nos. 063-14, 071-14, 105-14 and 106-14, are amended to identify BCT Structures Inc. as the employer.

Are employees who are not registered with the Saskatchewan Apprenticeship and Trade Certification Commission members of the Union's bargaining unit and thus eligible to participate in the representational question? Is Mr. Connor Walker a member of the bargaining unit and thus eligible to participate in the representational question?

[65] In the present application, the Union is seeking to represent a bargaining unit comprised of "*all journeyperson electricians, electrical apprentices, electrical workers, electrical foreman and electrical general foreman*". This bargaining unit is consistent with a so-called standard *Newbery*[7] bargaining unit for the electrical trade with one (1) exception; being that it includes "*electrical workers*". In *The United Association of Journeyman and Apprentices of Plumbing and Pipe Fitting Industry of the United States and Canada, Local No. 179 v. ICS Western Construction Ltd.*, [1980] May Sask. Labour Rep. 62, LRB File No. 135-79, this Board concluded that the standard *Newbery* bargaining unit for the electrical trade ought to be expanded to include certain persons who are permitted to work without a journeyperson license (i.e.: those that were "*grandfathered*"), as well as persons who have not yet become apprentices (but had expressed an intention of doing so). The Board did so in 1980 by expanding the description of the standard *Newbery* bargaining unit to include "*electrical workers*".

[66] In the present application, the Union takes the position that only those apprentices and electrical workers who have "*registered*" with the Commission in Saskatchewan are members of its bargaining unit and/or eligible to participate in the representational questions. The Employer, on the other hand, takes the position that registration with the Commission is both unnecessary and irrelevant to determining eligibility to vote.

[67] In support of its position, the Union notes that the performance of work under a compulsory apprenticeship trade is governed by *The Apprenticeship and Trade Certification Act, 1999* and its regulations. The Union argues that this legislation defines a process for out-of-province workers to establish their credentials to become eligible to work in Saskatchewan. The Union argues that a component of this process is a requirement for out-of-province apprentices to register in Saskatchewan. The corollary of this conclusion is that out-of-province apprentices, who have not registered with the Commission, are not eligible to work in this province until such time as they register with the Commission.

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[7] See: *Construction and General Workers' Local Union No.890 v. International Erectors and Riggers, A Division of Newbery Energy Ltd.*, [1979] Sept. Sask. Labour Rep. 37, LRB File No. 114-79

[68] The Union relies on this Board's decision in *International Brotherhood of Electrical Workers, Local 2038 v. Prairie Control Services Ltd.*, [2002] Sask. L.R.B.R. 413, LRB File No. 087-02, as standing for the proposition that, for any trade that involves a compulsory apprenticeship, the scope of a standard bargaining unit should mirror the legislative restrictions on who is and who is not permitted to work in that particular trade. If the Union is correct that out-of-province apprentices are not eligible to work in this province until they are registered with the Commission, then the Union takes the position that Mr. Christopher Dixon, Mr. Aaron Telford, Mr. Zena Feleke and Mr. Conner Walker would all be ineligible to participate in the representational vote because they were not registered with the Commission.

[69] Simply put, the Union argues that, if you are not registered with the Commission as an apprentice for a compulsory trade, you are not eligible to work in this province in that trade. If you are not eligible to work in a compulsory trade, you should not be considered as part of the bargaining unit or, at least, you should not be considered eligible to participate in the representational question.

[70] We are not persuaded by the Union's argument on this point. To find in favour of the Union would require this Board to discount the evidence of Ms. Spilsted and/or to conclude that the Commission is improperly interpreting its own legislation. With all due respect, the position of the Union is wholly inconsistent with the evidence presented by the Commission as to how the apprenticeship and trade certification program operates in Saskatchewan. Firstly, the evidence on behalf of the Commission was that out-of-province apprentices are not required to register in Saskatchewan provided they are registered in another province. Secondly, the evidence of the Commission was that individuals can work as helpers or electrical apprentices in Saskatchewan for up to six (6) months without registering in an apprenticeship program.

[71] The Union is asking that we exclude from its bargaining unit the four (4) employees from Alberta (3 apprentices and 1 helper) because they were not registered with the Commission. If we accede to the Union's request (to exclude "unregistered' apprentices from its bargaining unit), we would be either creating an under-inclusive bargaining unit contrary to this Board's long standing jurisprudence for the minimum description for the electrical trade and/or we would be defining eligibility to vote in a fashion that is <u>inconsistent</u> with the legislative restrictions on who is and who is not permitted to work in that particular trade as administered by the Commission. In our opinion, either outcome is unacceptable.

[72] In our opinion, this Board's decision in *Prairie Control Services,* supra, does not advance the Union's argument. We agree that the goal of the Board in initially establishing the scope of the standard bargaining unit for a trade that involves a compulsory apprenticeship is to define the bargaining unit based on the restrictions as to who is eligible to work in that compulsory trade consistent with (i.e.: to mirror) the restrictions set forth in the applicable legislation for that particular trade. However, the *Prairie Control Services* case does not support the proposition that apprentices from other provinces must register in Saskatchewan before they fall within the scope of the standard craft unit. In that decision, this Board was examining the nature of the work being done by the disputed employees; not whether or not they were registered with the Commission. In fact, the Board acknowledged that at least two (2) classes of electricians did not necessarily need to be "registered" with the Commission and yet they would still fall within the scope of the standard craft unit for electricians, including persons who were "*grandfathered*" (and thus not required to hold a journeymen's license to work in the trade); and electrical helpers with the intention of shortly becoming an indentured apprentice. The Board came to the same conclusion in the *ICS Western Construction Ltd.* case. In fact, the potential that these employees could be excluded from the bargaining unit was the reason that the term "*electrical workers*" was added to the description of the standard bargaining unit in the first place.

[73] In the *Prairie Control Services* case, the Board acknowledged that a broader bargaining unit could be appropriate for collective bargaining but was not prepared to require the applicant trade union to organize a unit any broader than the standard craft bargaining unit on an initial certification application. In the *Prairie Control Services* case, the Board was deciding whether or not employees working on low voltage electrical installations ought to fall within the scope of the standard craft unit for electricians and thus must be organized by the applicant trade union along with all the other electricians of the subject employer. The Board concluded that employees working on low voltage installations did not fall within the scope of the standard craft unit because the performance of this particular type of electrical work was not restricted by *The Apprenticeship and Trade Certification Act, 1999*. In other words, because the kind of work being performed by these electricians (referred to as "*restricted electricians*" or "*restricted licenses"*) was not included within the compulsory apprenticeship program in the province, then these employees were not automatically part of the standard craft unit for electricians.

[74] In our opinion, the standard craft bargaining unit for electricians includes out-of-province apprentices who happen to be working in Saskatchewan at that time. Furthermore, these persons are eligible to participate in the representational question irrespective of whether or not they are registered with the Commission in Saskatchewan.

[75] With all due respect, the Union's position on this point is a little self-serving. The Union seeks to disenfranchise all of the permanent employees of the Employer and have the representational question determined, not by the employees of the workplace, but merely by a subset of those employees; all of whom happen to be members of the Union. Certification is an exercise in democracy; it is not an act of expropriation.

[76] With respect to Mr. Connor Walker, we note that he was working at the K+S site as an electrical helper and that he had expressed an intention of becoming an indentured apprentice. In fact, Mr. Walker did become an electrical apprentice at some point in time after leaving the K+S site. Although helpers are not normally included within the scope of a standard *Newbery* bargaining unit for compulsory trades, there is an exception for persons working in the trade with the intention of shortly becoming an indentured apprentice. This exception was specifically recognized by the Board in *ICS Western Construction Ltd., supra*, and in *International Brotherhood of Electrical Workers, Local 2038 v. Tesco Electric Ltd.*, 2002 CanLII 52910 (SK LRB), LRB File No. 135-02. In our opinion, Mr. Walker falls within this exception. He was an electrical worker.

[77] In fact, Mr. Walker's circumstances are very similar to Mr. Jeff Owens in the *Prairie Control Services* case. Mr. Walker expressed his desire to be indentured and he spent a significant portion of his time at the K+S site performing electrical work under the supervision of a journeyperson. The Commission permits persons to work for up to six (6) months in a compulsory trade before being required to register with an apprenticeship program. In our opinion, persons working in the electrical trade with the intention of shortly becoming an apprentice fall within scope of the standard craft unit (even if they have not yet registered with an apprenticeship program) provided they have not worked in excess of the prescribed limit, which in Saskatchewan is six (6) months. Mr. Walker had not worked in Saskatchewan in excess of six (6) month at the relevant time nor was he directed to cease working by the Commission. In our opinion, he is eligible to participate in the representational question.

Is Mr. Zena Feleke eligible to participate in the representational question?

[78] The Union argues that Mr. Zena Feleke was ineligible to participate in the representational question because he was not working in the workplace on the date that it filed its certification application (i.e.: March 31, 2014). The Employer, on the other hand, argues that Mr. Feleke had a real and substantial connection to the workplace and notes that he was one of the first employees on the worksite. The Employer argues that Mr. Feleke has a long-term relationship with the Employer; that he worked for a substantial period of time at the K+S site before the vote (i.e.: from January 1st to February 23rd); that he only left the site because he was having difficulty tolerating extremely cold weather; and that he returned as soon as the weather warmed up (April 6, 2014). The Employer argues that disenfranchising Mr. Feleke (i.e.: not counting his vote) merely because he didn't happen to be present in the workplace on the day the Union filed its certification application would be inconsistent with this Board's jurisprudence; namely, *Saskatchewan Government and General Employees' Union v. Rural Municipality of Paddockwood No 520*, [1999] Sask. L.R.B.R. 470, LRB File Nos. 059-99 & 087-99 to 093-99; *International Association of Bridge, Structural & Ornamental Iron Workers v. Tamtrac Holdings Ltd.*, [1995] 1st Quarter Sask. Labour Rep. 194, LRB File No. 254-94; *United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada v. Comfort Mechanical Ltd.*, [1998] Sask. L.R.B.R. 422, LRB File No. 082-98.

[79] The general rule for determining voter eligibility on the representational question is that, subject to exceptional circumstances, a person must be an employee working within the scope of the subject bargaining unit on the date of the application and must remain an employee until the date of the vote. See: *International Association of Bridge, Structural and Ornamental Iron Workers v. Metal Fabricating Services Ltd.,* 1990 Spring Sask. Labour Rep. 70, LRB File Nos. 166-89, 193-89, 194-89, 195-89, 213-89 & 215-89. See also: *Calvin Ennis v. Con-Force Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 1985, et.al.*, [1992] 2nd Quarter Sask. Labour Report 117, LRB File Nos. 185-92 & 188-92. In determining voter eligibility, this Board is attempting to balance two (2) competing goals; first, the desire to ensure that the representational question is determined by those persons who have a genuine interest in the outcome of that question (i.e.: the "democracy" goal); and second, the desire to provide a reasonably bright line so that employees, trade unions and employers can plan their affairs with a reasonable degree of certainty and predictability (i.e.: the "predictability" goal). As Vice-Chairperson Hobbs noted in the *Con-Force* case, the standard rule is not able to achieve either

perfect democracy or perfect predictability. However, it is generally acknowledged that it achieves a reasonable and desirable compromise in most cases.

[80] A corollary of the democracy goal is the desire to avoid manipulation of the voters list. Generally speaking, adherence to the standard rule for voter eligibility tends to decrease the risk that the list of eligible voters can be manipulated by an employer (by moving employees in or out of the bargaining unit). On the other hand, permitting exceptions to the standard rule tends to limit the potential that the voters list can be manipulated by an applicant (through strategic timing of an application).

[81] Because Mr. Feleke was not present in the workplace on the day the Union filed its certification application, his circumstances must justify an exception to the standard rule for voter eligibility. In the *Con-Force* decision, the Board succinctly described the standard rule and some of the recognized exceptions to that rule as follows:

> *In Saskatchewan, the general standard for determining voter eligibility when a representation vote is ordered, is that a person must be an employee on the date the application is filed and on the date of the vote. In the construction industry, this rule is applied strictly and literally, in recognition of the transitory relationship between employers and employees in that industry. Outside of the construction industry, there has been some softening of this rule. Some of the more common situations where the Board might make an exception to this rule are where an employee is on Workers' Compensation, maternity leave, sick leave, education leave, or on temporary lay-off. It is a factual question in each of these cases whether an employee's circumstances are such as to justify his participation.*

[82] Exceptions to the general rule on voter eligibility was considered in all three (3) of the cases relied upon by the Employer. In the *Tamtrac Holdings* case, Chairperson Bilson articulated the following policy considerations in granting any exceptions to the standard rule regarding voter eligibility:

> *Counsel for the Employer referred the Board to a decision in International Association of Bridge, Structural and Ornamental Iron Workers v. Metal Fabricating Services Ltd., LRB Files No. 166-89, 193-89, 194-89, 195-89, 213-89, 215-89 and 216-89, in which the Board stated the following general principle:*
>
> > *The Board has consistently taken the view that employees who were not employed on the date an application for certification or decertification was filed do not participate in the representation question unless there are exceptional circumstances.*
>
> *The concept of what constitutes being "employed" as contemplated in this statement is, of necessity, a somewhat elastic one. In many situations, an*

> *employee may not be actually at work for a variety of reasons on the date when a certification application is filed, and still be considered an employee for the purposes of deciding whether there is majority support for the application.*
>
> *In the construction industry, the Board has taken a fairly restrictive view of what constitutes a relationship of employment. Many employees in this sector have employment relationships with a number of employers, and some of these, at least, will be tenuous, casual or fleeting. Counsel for the Employer argued that, to determine whether a trade union enjoys the support of the employees of an employer, the Board has generally considered only those employees who were actually working for the employer on the date of the filing of the application for certification. This is overstating the case somewhat, as the Board has also permitted the inclusion of employees who can demonstrate a substantial connection with the employer in the period surrounding the application.*
>
> *The inclusion of employees who are more tenuously connected to the employer, however, increases the risk that the list of employees can be manipulated so that a practical determination of whether the trade union enjoys majority support becomes less and less feasible.*

[83] Mr. Feleke does not fall within any of the recognized exceptions to the standard rule regarding voter eligibility. For example, he was not on medical leave; he was not on paternity leave; he was not on education leave; and he was not on a temporary lay-off; when the Union filed its certification application (i.e.: March 31, 2014). However, the Employer argues that, as a long-term employee, he had a tangible and substantial connection to the Employer's operations in Saskatchewan and, thus, should participate in the representational question.

[84] Having considered the evidence in these proceedings, we were not satisfied that Mr. Feleke's connection to the Employer's operations in Saskatchewan (at the time surrounding the Union's application) was sufficient to justify his participating in the representational question. However, it should be noted that there were a number of factors weighing in both directions. Firstly, we note that Mr. Feleke is a long-term employee with the Employer. There is no doubt that long-term employees have an interest in the representational question that is not easily dissipated. On the other hand, Mr. Feleke's involvement in the Employer's operations in Saskatchewan is a new dimension to his employment relations. Secondly, we note that Mr. Feleke was one of the first permanent electricians from the Lethbridge plant to work at the K+S site. On the other hand, it was his decision to return to the plant and he made that decision approximately five (5) weeks before the Union filed its certification application. Thirdly, Mr. Feleke voluntarily returned to the workplace soon after the weather in Saskatchewan improved. On the other hand, he did not return until after the Union had filed its certification application and he did so in response to an invitation by the Employer.

[85] In weighing the evidence, we were not satisfied that the circumstance in the present application is sufficient to justify an exception to the standard rule on voter eligibility for Mr. Feleke. While we saw no evidence that the Employer attempted to manipulate the list of eligible employees by encouraging Mr. Feleke to return to Saskatchewan, this Board has tended to show caution in permitting exceptions to the standard rule regarding voter eligibility for a variety of reasons, including the potential for manipulation. Successive Boards have acknowledged that the standard rule is not perfect. On the other hand, it provides the best benchmark we have to ensure that representational question is left in the hands of the people who have the greatest interest in the outcome of the question. While exceptions to the standard rule are permitted, in our opinion, the circumstances of the present case are not sufficient to justify an exception for Mr. Feleke.

Was Mr. Gregory Flichel unlawfully terminated? Is Mr. Gregory Flichel eligible to participate in the representational question?

[86] The Union filed its application alleging that the Employer unlawfully terminated Mr. Flichel prior to the enactment of *The Saskatchewan Employment Act*. As such, it has alleged that the Employer violated s. 11(1)(e) of *The Trade Union Act*, R.S.S. 1978, c.T-17 and has not relied upon the provisions of *The Saskatchewan Employment Act* for purposes of its application. We also have relied upon the provisions of *The Trade Union Act* in determining this particular application because that statute was in force at the time the impugned actions of the Employer occurred. However, if we had applied the applicable provisions of *The Saskatchewan Employment Act*, the outcome would have been the same.

[87] Section 11(1)(e) of *The Trade Union Act* represented an important safety net for employees interested in unionization; now s.6-62(1)(g) of *The Saskatchewan Employment Act*. Simply put, these provisions prevent an employer from using coercion or intimidation and/or from discriminating in the treatment of its employees because of their support for a trade union; because of their desire to be unionized; or because they have exercised a protected right.

[88] Both of these provisions are somewhat unique. Not only do they prohibit an employer from discriminating against or coercing its employees (with a view to influencing membership in or activities associated with a trade union), but they also impose a reverse onus on employers if an employee is discharged or suspended during an organizing drive or at a time

when employees are exercising a legislative right. The reverse onus operates by creating a statutory presumption that the subject employee was discharged or suspended contrary to the *Act* unless the employer can demonstrate that it took the actions it did for good and sufficient reason. See: *United Food and Commercial Workers, Local 1400 v. 303567 Saskatchewan Ltd. (Handy Special Events Centre),* [2013] 225 C.L.R.B.R. (2nd) 111, LRB File Nos. 064-12, 075-12 & 081-12. See also: *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Works International Union (United Steelworkers) v. Comfort Cabs Ltd., et. al.*, (2014) 246 C.L.R.B.R. (2d) 1, LRB File Nos. 240-13 to 248-13 & 328-13.

[89] It is noted that this Board has commented in a number of decisions on the purpose of s. 11(1)(e) of *The Trade Union Act* and the tests to be applied in determining whether or not a violation thereof has occurred. For example, a helpful description of the purpose or policy objective that underlies the provision was provided by the Board in *Service Employees' International Union, Local 299 v. LifeLine Ambulance Services Ltd.,* [1993] 4th Quarter Sask. Labour Rep. 171, LRB File Nos. 227-93, 228-93 & 229-93:

> *Section 11(1)(e) of The Trade Union Act is meant to ensure that distinctions are not drawn between employees on the basis of their involvement in trade union activity, and that employees are allowed full scope to pursue their rights under the statute without being penalized for it. It is clear from the wording of the section that the legislature was particularly concerned about the exposure of employees to possible suspension or discharge by an employer who wished to demonstrate the dangers to employees of pursuing their rights under the Act. In the case of these penalties, if it can be shown that an employee was attempting to pursue rights under the statute, there is a presumption that the suspension or discharge was imposed for that reason, and the onus lies on the employer in these circumstances to show that the suspension or discharge was not animated by anti-union sentiment, and that it occurred solely for legitimate reasons.*

[90] By way of further example, this Board summarized the principles and rationale underlying the application of s. 11(1)(e) in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Moose Jaw Exhibition Co. Ltd.,* [1996] Sask. L.R.B.R. 575, LRB File Nos. 131-96, 132-96 & 133-96 as follows:

> *The Board has always attached critical importance to any allegation that the suspension or dismissal of an employee may have been affected by considerations relating to the exercise by that employee or other employees of rights under the Act. In a decision in Saskatchewan Government Employees' Union v. Regina Native Youth and Community Services Inc., [1995] 1st Quarter Sask. Labour Rep. 118, LRB File Nos. 144-94, 159-94 and 160-94, the Board commented on this matter as follows, at 123:*

> *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.*

The Board made further comment on the significance of the reverse onus under Section 11(1)(e) of the Act in The Newspaper Guild v. The Leader-Post, [1994] 1st Quarter Sask. Labour Rep. 242, LRB File Nos. 251-93, 252-93 and 254-93, at 244:

> *The rationale for the shifting to an employer of the burden of proof under Section 11(1)(e) of the Act to show that a decision to terminate or suspend an employee was completely unaffected by any hint of anti-union animus has, in our view, two aspects. The first is that the knowledge of how the decision was made, and any particular information regarding the employment relationship involving that employee, is often a matter available exclusively to that employer. The trade union knows of the termination or suspension, knows of the union activity, and asserts that there is a link between them of anti-union animus. A decision that this link does in fact exist can often only be established on the basis of information provided by the employer. Whether this is described as a legal onus of proof, which is the basis of the challenge made by the Employer to the courts, or whether it is seen as an evidentiary burden, an employer must generally be able to provide some explanation of the coincidence of trade union activity and the suspension or termination in question.*
>
> *The second aspect of the rationale, which is particularly important in a case, such as this one, where union activity with an employer is in its infancy, addresses the relative power of an employer and a trade union. An employer enjoys certain natural advantages over a trade union in terms of the influence it enjoys with employees, and the power it can wield over them, particularly where the power to terminate or discipline is not subject to the constraints of a collective agreement or to scrutiny through the grievance procedure. In these circumstances, the vulnerability of employees, and their anxieties, even if exaggerated, about the position in which they may be put by communicating what they know of the circumstances surrounding the dismissal to trade union representatives, and possibly to this Board, makes it difficult for the trade union to compile a comprehensive evidentiary base from which they may put their application in its fairest light.*

As the Board has pointed out, it is not sufficient to meet the onus of proof under Section 11(1)(e) of the Act for an employer to demonstrate the existence of a defensible business reason for the decision to suspend or terminate an employee. In United Steelworkers of America v. Eisbrenner Pontiac Asüna Buick Cadillac GMC Ltd., [1992] 3rd Quarter Sask. Labour Rep. 135, LRB File Nos. 161-92, 162-92 and 163-92, the Board made the following observation in this connection, at 139:

> *When it is alleged that what purports to be a lay-off 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 - and we are not persuaded that the reasons put forward by Eisbrenner are entirely*

> *convincing -those reasons will only be acceptable as a defence to an unfair labour practice charge under s. 11(1)(e) of the Act if it can be shown that they are not accompanied by anything which indicates that anti-union feeling was a factor in the decision.*

An important element of the task of this Board in assessing a decision which is the subject of an allegation made pursuant to s. 11(1)(e) of the Act is the evaluation of the explanation which is offered by an employer in defence of the decision to dismiss. In this respect, the Board has emphasized that our objective is somewhat different than that of an arbitrator determining whether there is "just cause" for dismissal. In The Leader-Post decision, supra, the Board made this comment, at 248:

> *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. Nor, like a court, are we asked to assess the sufficiency of a cause or of a notice period in the context of common law principles. 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 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 the mind of the Employer.*

As the Board has pointed out on a number of occasions, the fact that trade union activity is taking place does not mean that an employer is prevented altogether from taking serious disciplinary steps against an employee. The onus imposed on an employer by s. 11(1)(e) of the Act is not impossible to satisfy. There is no question, however, that it is difficult to meet. In order to satisfy ourselves that the grounds stated for a decision to dismiss an employee do not disguise sentiments on the part of an employer which run counter to the purposes of the Act, it is necessary for us to evaluate the strength or weakness of the explanation which is given for a dismissal, in the light of other factors, including the kind of trade union activity which is going on, the stage and nature of the collective bargaining relationship, and the possible impact a particular disciplinary action may have on the disciplined employee and other employees.

[91] Simply put, if it can be demonstrated that an employee was discharged or suspended from his/her employment at a time when the employees of that workplace were exercising or attempting to exercise a right under the *Act*, the Board is then called upon to examine the impugned actions of the Employer through two (2) lenses. In the first instance, the Board considers the stated reasons or rationale for the impugned discipline or termination. Although an employer need not demonstrate the kind of justification that an arbitrator would expect (i.e.: "*just cause*"), the onus is on the employer to demonstrate at least "*coherent*" and "*credible*" or "*plausible*" and "*believable*" reasons for the actions it took to rebut the statutory presumption. See: *Patrick Monaghan v. Delta Catalytic Industrial Services Ltd., et. al.*, [1996] Sask. L.R.B.R. 429, LRB File No. 187-95. In the absence of good and sufficient reasons, a violation can be found. See: *Canadian Union of Public Employees, Local 4279 v. Regina*

Friendship Centre, et. al., [2000] Sask. L.R.B.R. 481, LRB File Nos. 112-99, 113-99, 117-99, 119-99, 120-99, 123-99, 144-99 to 161-99, 166-99, 182-99, 241-99 and 242-99. See also: *Canadian Union of Public Employees, Local 342 v. City of Yorkton*, [2001] Sask. L.R.B.R. 19, LRB File Nos. 279-99, 280-99 & 281-99.

[92] However, even if the Board is satisfied that there were valid reasons for the actions that the employer took, the Board may nonetheless still find a violation has occurred if the Board is satisfied that the employer's actions were motivated, even in part, by an anti-union animus. See: *The Newspaper Guild v. The Leader-Post, a Division of Armadale Co. Ltd.*, [1994] 1st Quarter Sask. Labour Rep. 242, LRB File Nos. 251-93, 252-93 & 253-93. Such is the case because there are few signals more intimidating for an employee or can send a more powerful message through the workplace than an indication that your employment relationship may be in jeopardy because of your support for a trade union. Therefore, even if an employer demonstrates a credible explanation for the actions it took, it is nonetheless a violation of the *Act* if we find that a component of the employer's decision-making process involved a desire to punish an employee because of his/her support for a trade union or to signal to other employees that unionization was undesirable. See: *Saskatchewan Government & General Employees' Union v. Valley Hill Youth Treatment Centre Inc.*, (2013) 235 C.L.R.B.R. (2d) 160, LRB File Nos. 004-13, 029-13 to 031-13; and *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Works International Union (United Steelworkers) v. Comfort Cabs Ltd. et.al.*, (2014) 246 C.L.R.B.R. (2d) 1, 2014 CanLII 63998 (SK LRB), LRB File Nos. 240-13 to 248-13 & 328-13.

[93] The Union notes that Mr. Flichel was terminated only a few days after the Union filed its certification application and before Mr. Flichel had an opportunity to participate in the representational question. The Union relies on this Board's decision in *International Brotherhood of Electrical Workers Local Union 2038 v. Magna Electric Corporation*, 2013 CanLII 74458 (SK LRB) as standing for the proposition that the Employer faces a "*stringent requirement*" to establish a credible and coherent explanation for terminating Mr. Flichel at a time when he and the other employees in the workplace were exercising or attempting to exercise their right to organize. The Union argues that the Employer's assertion that Mr. Flichel was terminated for performance reasons does not meet this test and rests entirely upon the evidence of Mr. Milne; evidence which the Union argues should be discredited.

[94] For example, the Union notes that Mr. Flichel disclosed that he was a new journeyman when he was hired and that he had little experience supervising apprentices. Furthermore, the Union argues that the Employer took no steps to coach Mr. Flichel nor was the Employer willing to give him a second change. Finally, the Union notes that no previous disciplinary steps were taken by the Employer prior to termination. The Union argues that this evidence undermines the credibility of the Employer's explanation for terminating Mr. Flichel. The Union argues that this evidence, together with the Employer's unwillingness to consider options short of termination, ought to raise an inference that part of the reason for terminating Mr. Flichel (if not the primary reason) was anti-union animus. In support of this conclusion, the Union asserts that Mr. Milne knew that Mr. Flichel was a member of the Union and that this knowledge was a factor in his decision to terminate Mr. Flichel. In support of its position, the Union relies upon this Board's decision in *International Wood and Allied Workers Canada, Local 1-84 v. Cabtec Manufacturing Inc.*, (2003) 88 C.L.R.B.R. (2d) 133, 2002 CanLII 52895 (SK LRB), LRB File Nos. 042-02 to 044-02.

[95] Simply put, the Union takes the position that, even if the Employer had a reason for terminating Mr. Flichel, there is a sound basis for the inference that an anti-union animus was present in the workplace. The Union argues that the presence of an anti-union animus is sufficient to make the Employer's actions unlawful even if it was only a part of the Employer's decision-making process. For these reasons, the Union argues that Mr. Gregory Flichel was unlawfully terminated in contravention of *The Trade Union Act*.

[96] Having considered the evidence in these proceedings, we were not satisfied that the Employer violated s. 11(1)(e) of *The Trade Union Act* or s. 6-62(1)(g) of *The Saskatchewan Employment Act* in its decision to terminate Mr. Flichel. In an application alleging a violation of either of these provisions, the impugned actions of the subject employer are examined in an attempt to ascertain the motivations for those actions (as difficult as that task may be). In our opinion, the Employer's reason for terminating Mr. Flichel was both plausible and credible. More importantly, we were not persuaded that an anti-union animus was a motivational force behind the Employer's decision to terminate Mr. Flichel or otherwise played a part in its decision-making process.

[97] In coming to this conclusion, certain factors were influential in our determination. Firstly, Mr. Flichel was a probationary employee and he had only worked for the Employer for a

short period prior to his termination. Mr. MacDonald testified that it was not the Employer's practice to spend a lot of time performance managing probationary employees. The Employer's disinterest in coaching or developing temporary employees is not unusual in the construction sector where employment relationships are often transient. Secondly, the evidence established that on several occasions problems were identified in Mr. Flichel's work and he was moved from one area of responsibility to another prior to his termination. While these actions were not disciplinary, this fact corroborates Mr. Milne's evidence that problems were identified in Mr. Flichel's work prior to the Union's organizing efforts. Thirdly, we found the evidence of Mr. Milne to be entirely credible and wholly consistent with other accepted evidence, including the not-insignificant list of deficiency identified by Alliance Energies in the work of electricians at the K+S site. Mr. Flichel may well have been a new journeyman but we accept the evidence of Mr. Milne that many of the mistakes that were made by Mr. Flichel and/or his apprentices were the kind of errors that all journeyperson should have been able to recognize. In our opinion, it is not significant that some of the errors may have been attributable to the work of Mr. Flichel's apprentices. Electrical work is a compulsory trade precisely because of the need for this work to be done under the supervision of a competent journeyperson to adequately protect the public. Absolutely no adverse inference can be drawn because the Employer visited responsibility for errors and omission of Mr. Flichel's apprentices on him. Finally, we accept the evidence of Mr. Milne that he first observed problems in Mr. Flichel's work before the Union's organizing efforts were known in the workplace and that he initiated the process to terminate Mr. Flichel before the Union filed its certification application.

[98] In our opinion, the Employer has satisfied the burden of demonstrating a good and sufficient reason for the actions it took and we saw no evidence from which we could infer that an anti-union animus was a factor in the Employer's decision to terminate Mr. Flichel. For these reasons, we find that Mr. Flichel was lawfully terminated prior to the commencement of the representational vote and thus he is ineligible to participate in the representational question.

Did the Employer commit an unfair labour practice in any of its communications to employees?

[99] In applications bearing LRB File Nos. 071-14 and 105-14, the Union alleges that the Employer unlawfully communicated with employees in the workplace in three (3) different ways: firstly, on April 3, 2014, when the Employer imposed a non-solicitation policy that prevented employees from discussing unionization during working hours; secondly, on April 3,

2014, when Mr. Bennett described his personal experience in a trade union in a fashion which the Union argues was negative; thirdly, on April 12, 2014, when the Employer distributed information to employees about the representational vote. The Union takes the position that each of these actions on the part of the Employer fell outside of the sphere of permissible employer communication. In addition, the Union argues that the effect of these communications (if not their purpose) was to discourage the electricians at the K+S site from joining the Union.

[100] In its applications, the Union asserts that the impugned actions of the Employer represent both unlawful communications in violations of s. 11(1)(a) of *The Trade Union Act* [now s. 6-62(1)(a) of *The Saskatchewan Employment Act*] and an attempt on the part of the Employer to interfere in the selection of a trade union contrary to s. 11(1)(g) of *The Trade Union Act* [now s. 6-62(1)(i) of *The Saskatchewan Employment Act*].

[101] The Employer, on the other hand, denies that any of its communications with its employees were unlawful or that it was attempting to (or did in fact) interfere in the ability of employees to decide the representational question.

[102] The Union filed LRB File No. 071-14 prior to the enactment of *The Saskatchewan Employment Act*. As such, in that application, the Union has alleged violations of ss. 11(1)(a) and (g) of *The Trade Union Act*. However, LRB File No. 105-14 was filed after April 29, 2014 and thus the Union has alleged violations of ss. 6-62(1)(a) and (i) of *The Saskatchewan Employment Act* for purposes of that application. The events that form the basis of both of these allegations occurred prior to the enactment of *The Saskatchewan Employment* Act. Therefore, we have relied upon the provisions of *The Trade Union Act* in evaluating the impugned communications of the Employer. However, if we had applied the applicable provisions of *The Saskatchewan Employment Act*, the outcome would have been the same.

[103] The substantive test for determining whether or not impugned conduct by an employer represents a violation of either s. 11(1)(a) of *The Trade Union Act* or s. 6-62(1)(a) of *The Saskatchewan Employment Act* involves a contextualized analysis of the probable consequences of the employer's conduct on employees of reasonable intelligence and fortitude. In other words, if the Board is satisfied that the probable effect of any of the three (3) impugned communications of the Employer would have been to interfere with, restrain, intimidate, threaten or coerce the Employer's employees at the K+S site, the communications were unlawful and a

violation can be sustained. As noted, this test is an objective one. The Board's approach is to determine the likely or probable effects of the disputed actions of the Employer upon the subject employees.

[104] To begin our analysis, we note that all three (3) of the impugned communications of the Employer occurred during an organizing campaign at a time when the employees were being asked to decide the representational question. In *Service Employees International Union (West) v. Saskatchewan Association of Health Organizations, et.al., supra*, the Board described how the context within which impugned communications occur is important to the Board's analysis of the probable effects. In our opinion, the following comments from that case are relevant to our determination in these proceedings:

> *[**101**] The context in which an impugned communication occurs continues to be fundamental to evaluating the probable effect of that communication in two (2) ways. Firstly, contextualizing an impugned communication helps evaluate the probable effect of that communication on employees of reasonable fortitude. Considering the context within which an impugned communication occurs help the Board determine if an otherwise ambiguous statement may convey a subtle message or have a different meaning in that particular context. Secondly, the circumstances in which an impugned communication occurs also guides the Board in determining the approach it will take to intervention. An analysis of the Board's jurisdiction reveals that communications occurring during an organizing campaign or during a rescission application have generally been subject to a more rigorous review by the Board. During an organizing campaign or at any time when the representational question is before employees, the Board has generally been highly alert to subtle signs of employer interference, intimidation, coercion or threats. For example, communications from an employer about the relative benefits of unionization have been found to convey a subtle message of intimidating or coercive effect when made during an organizing campaign. See: Super Valu, a Division of Westfair Foods v. United Food and Commercial Workers, Local 401, [1981] 3 Can. LR.B.R. 412, LRB File No. 121-81.*

[105] As noted by this Board in the *SEIU-West v. SAHO* case, while the Board may adopt a more *laissez faire* approach to communications that occur at other times in a collective bargaining relationship, when an organizational campaign is active in the workplace or when the representational question is before employees, this Board has both taken a more rigorous examination of impugned communications and/or has historically been more willing to intervene. For example, discussions and conversations in the workplace that may have been normal in other circumstances have been found by the Board to have the potential to improperly interfere in the decisions being made by employees during an organizational campaign. See:

Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Regina Exhibition Association Ltd., [1993] 1st Quarter Sask. Labour Rep. 121, LRB File Nos. 196-92 & 214-92.

[106] Thus, when the representational question has been before employees in the past, this Board has historically been very alert to even subtle signs of employer intimidation, coercion or threats. For example, during an organization campaign, this Board has taken the position that employees are a captive audience for whatever representations an employer may wish to make to them. Furthermore, in the past this Board has assumed both that employees are economically vulnerable and highly susceptible to the views of their employer when dealing with the representational question. See: *Super Valu, a Division of Westfair Foods v. United Food and Commercial Workers, Local 401,* [1981] 3 Can. LR.B.R. 412, LRB File No. 121-81. See also: *United Food and Commercial Workers, Local 1400 v. F.W. Woolworth Company Limited*, [1993] 1st Quarter Sask. Labour Rep 62, LRB File No. 142-92.

[107] Although this Board continued to apply the same objective test, the Board's historic presumptions regarding the vulnerability and susceptibility of employees, tended to limit an employer's right to communicate with its employees during an organizational campaign to very narrow circumstances, such as to counter false union propaganda. Arguably, because of the intense scrutiny to which employer communications could be subjected, many employers in the past instructed their managers to remain silent on any subject that may touch on the subject of unionization.

[108] However, in our opinion, the past jurisprudence of this Board must give way to a different (some may argue, more modern) way of thinking about the fortitude and independence of employees. As this Board noted in *Service Employees International Union (West) v. Saskatchewan Association of Health Organizations, et.al., supra*, the 2008 change[8] to s. 11(1)(a) of *The Trade Union Act "clearly signaled a greater tolerance by the legislature for the capacity of employees to receive information and views from employers without being interfered with, coerced or intimidated*". In the *SEIU-West v. SAHO* case, the Board came to the following conclusions regarding this Board's past jurisprudence regarding the presumed inherent vulnerability and susceptibility of employees:

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[8] See: *The Trade Union Amendment Act, 2008*, S.S. 2008, c.26.

> *[**100**] Furthermore, the historic presumption that all employer communications are inherently and inevitably intimidating or coercing for employees can not stand in face of the 2008 amendment to s. 11(1)(a). It may well be that a power imbalance exists in a particular workplace or that a particular group of employees are vulnerable for one reason or another to the wishes or influences of their employer. However, it is no longer appropriate for this Board to begin its analysis of the impugned employer conduct by presuming that employees are inherently or inevitably susceptible to the expropriation of their free will by an employer. In our opinion, absent evidence of an unusual power imbalance in the workplace, we start from the presumption that employees are capable of receiving a variety of information from their employer; of evaluating that information, even being aided or influenced by that information; without necessarily being improperly influenced, threatened, intimidated or coerced by that information. Absent evidence of a particular vulnerability of employees, we start from the presumption that employees are capable of weighing any information they receive, including information from their employer, and will make rational decisions in response to that information. In blunt words, in evaluating the probable affect of impugned communication by an employer, we do not assume that affected employees are timorous minions cowering in fear of their masters.*

[109] While the above analysis involved *The Trade Union Act*, in our opinion, the same conclusions apply to the new *Saskatchewan Employment Act*.

[110] As a result, while caution must be taken by this Board to ensure that employers remain demonstrably neutral in all their dealings with their employees regarding the representational question, a trade union is not the only permissible source of information for employees regarding their workplace or their rights. See also: *Jessica Williams v. United Food and Commercial Workers, Local 1400 v. Affinity Credit Union (Hague Branch)*, (2014) 243 C.L.R.B.R. (2d) 152, LRB File No. 262-13.

[111] The substantive test for determining whether or not impugned communications during an organization drive are improper or unlawful continues to involve a contextualized analysis of the probable consequences of those communications; but, in doing so, we no longer presume that employees are inherently or inevitably vulnerable to the wishes or influences of their employer. Simply put, absent evidence of an unusual power imbalance in the workplace, we now start from the presumption that the subject employees of reasonable intelligence and fortitude. Although it is important for this Board to continue to approach employer communications during an organizing campaign with caution (maybe even a measure of suspicion), in determining the likely or probable effect of impugned conduct upon the affected employees, we assume the employees are reasonable; that they are intelligent; and that they are possessed of some resilience and fortitude.

[112] We also note that the prohibited effect that the legislation seeks to avoid is higher than mere providing useful and relevant information even if that information may aid or influence employees; the prohibited effect that the legislation seeks to avoid is conduct on the part of an employer that could compromise or expropriate the free will of employees in the exercise of their legislative rights. See: *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. 101109823 Saskatchewan Ltd. (O/A the Howard Johnson Inn – Yorkton)*, (2014) 246 C.L.R.B.R. (2d) 98, 2014 CanLII 22084 (SK LRB), LRB File Nos. 265-13, 317-13, 318-13, 044-14 to 059-14. The difficulty for this Board is determining when actions by an employer fall within the permissible sphere of merely being useful, helpful and/or influential and when those actions stray into the prohibited realm of interference, intimidation and coercion.

[113] Having considered the evidence, we are not satisfied that the Employer's conduct on April 3, 2014 fell outside the sphere of permissible communication. Firstly, we find nothing unusual in the fact that the Employer reminded its employees that it had a non-solicitation policy after receiving notice of the Union's certification application or that it reminded employees that they were required to comply with that policy. Firstly, the communication was factual. The Employer had a non-solicitation policy and that policy appears to have been in existence prior to April 3, 2014. Secondly, the policy was reasonable (in that it only restricted communication when the employees were working) and it appears to have reasonably applied (i.e.: employees were permitted to talk about unionization during their breaks and when they were not working). Thirdly, non-solicitation policies are common with most employers. In our opinion, there was nothing intimidating, threatening or coercing in the actions of the Employer in reminding its employees of the company's non-solicitation policy and in expecting them to comply with that policy. We are not satisfied that doing so conveyed any message to employees other than the Employer's reasonable expectation that its employees would be concentrating on their work when they are working.

[114] We are also not satisfied that the comments made by Mr. Bennett as to his personal experience with another union were improper. The Union argues that Mr. Bennett's comments conveyed a message to employees that they either shouldn't join the Union or that they didn't need a trade union. The Union asserts that Mr. Bennett specifically said that there was "*no benefit to being in a union*". Mr. Bennett denied making these comments but did admit to commenting on his personal experience in being a member of a trade union. Mr. Bennett

denied discouraging employees from joining the Union. Rather, he testified that he informed employees that there would be a vote in the workplace and that he encouraged the employees to get as much information as they could before they voted.

[115] With all due respect to the Union's concerns about Mr. Bennett commenting on his personal experience in another trade union, it is very difficult to conduct a post-mortem on conversations that occur in the workplace. We seldom know exactly what was said and the accuracy of subsequent recollections is often questionable. As a superintendent on the K+S site, Mr. Bennett was a manager and outside the scope of the Union's bargaining unit. As such, his comments could easily have been interpreted as representative of the Employer's position and the Employer is required to maintain a state of detachment and neutrality. See: *Regina Exhibition Association Ltd., supra*. However, having considered the evidence, we are not persuaded that Mr. Bennett was communicating on behalf of the Employer. Rather, we are satisfied that Mr. Bennett qualified his comments as being his own personal experience. Furthermore, although there is limited evidence on what was actually said, we are satisfied that the tenor of Mr Bennett's comments was to encourage employees to get as much information as they could when deciding the representational question. Furthermore, the impugned comments of Mr. Bennett appear to have been confined to the April 3, 2014 meeting and were not repeated. In conclusion, we were not satisfied that the statements made by Mr. Bennett would have been sufficient to compromise the ability of the electricians to make rationale decisions about the exercise of their rights or their ability to freely decide the representational question.

[116] The more interesting question is whether or not the Employer's communication of April 12, 2014 to employees fell outside the sphere of permissible employer communication. The information provided by the Employer, *inter alia*, informed employees that the Union had applied to represent the electricians at the K+S site; that a vote would be conducted to determine the representational question; and that the employees would be receiving a package from the Board with ballots and instructions on how to participate in the representational vote. In this communication, the Employer also informed employees that there was a dispute as to the identity of the employer and indicated its position that BCT Structures was the employer. Finally, the Employer advised employees that "*this is an important decision for you and your family*" and encourage employees "*to gather as much information as you can .. before you cast your vote"*. The Employer then went on to advise employees that trade unions in the construction sector operate through hiring halls and that, in the construction industry, a union contract would

automatically apply, if the Employer were to become unionized. In addition, the Employer also indicated that the Union's constitution could limit the ability of the Employer's permanent employees to work in Saskatchewan if the Employer was unionized. Finally, the Employer enumerated a list of twenty-seven (27) questions that employees should consider asking their union representatives before they vote.

[117] As we have indicated, the Board is cautious (sometimes even suspicious) of communications by an employer that occur during an organizing campaign, particularly so when the subject of such communications is the representational question. However, in analyzing an impugned communication, absent evidence of a particular vulnerability of employees or unusual power imbalance in the workplace, we start from the presumption that employees are capable of receiving a variety of information, including information from their employers; of evaluating that information; and of making rational decisions in response to that information. As was noted in the *SEIU-West v. SAHO* case, the legislative prohibitions is on conduct that interferes with, or restrains, or intimidates, or threatens or coerces an employee in the exercise of their legislative rights or could interfere in their selection of a trade union. The statute does not prohibit an employer from providing accurate and useful information; even if that information aides employees in deciding the representational question.

[118] Have considered the evidence in these proceedings, we are not persuaded that the Employer's communication of April 12, 2014 fell outside of the sphere of permissible communication. However, the Employer may well have come close to the line.

[119] Firstly, we are satisfied that the information provided to employees was factual. The Union did not argue and we saw no evidence that any of the information provided by the Employer was erroneous or incorrect. Secondly, while the Employer identified a number of issues for employees to consider, we are satisfied that each of these issues was relevant to the representational question and should be considered by employees, particular out-of-province employees, when deciding the representational question. Thirdly, in raising these issues with employees, the Employer did not provide its opinions and instead encouraged the employees to seek answers to these questions from the Union.

[120] The Union takes the position that this information conveyed a subtle message against unionization and/or that it send a message that it would not be beneficial for employees if

the workplace became organized. While the Employer gave a lot of information to employees and it identified a lot of issues, we are not satisfied that providing this information or identifying these issues would have conveyed any message other than this was an important decision for employees and there were a number of factors that they ought to take into consideration in making that decision.

[121] As we have indicated, we start from the presumption that employees are intelligent and possessed of some fortitude and resilience. To fall outside the sphere of permissible, the impugned communication must be sufficient to compromise the ability of the electricians to freely decide the representational question. In the alternative, we must be satisfied that the Employer's actions were calculated to convey a subtle message that the Employer did not want its employees to join the Union. As we have indicated, while the Employer gave a lot of information to its employees, we are satisfied that all of the information provided was accurate and that each of the issues raised by the Employer was relevant to the representational question, without being intimidating, threatening or coercive. Furthermore, we were satisfied that each of the issues identified by the Employer was the kind of issues that should be considered by employees before deciding the representational question.

[122] For the foregoing reasons, we find that none of the impugned actions of the Employer were unlawful or otherwise represented a violation of *The Trade Union Act*.

Did the Employer commit an unfair labour practice in terminating Mr. Nicholas Richter and Mr. Blair Bulani?

[123] The final allegation of the Union was that the Employer's decision to terminate Mr. Richter and Mr. Bulani were tainted by an anti-union animus. The argument of the Union on this point was much the same as its argument with respect to Mr. Flichel. Simply put, the Union disputes the Employer's position that it was required to terminate these two (2) employees when Mr. Zemlak resigned and does so for two (2) reasons.

[124] Firstly, the Union argues that the Employer did not terminate any apprentices when Mr. Flichel was terminated. On this point, the Union takes the position that Mr. Milne was not licensed as an electrician in Saskatchewan and, as such, the Employer's argument (that his presence in the workplace permitted the Employer to stay in ratio) is illusory. The Union argues that the Employer's explanation for the actions it took (i.e.: that it was out of ratio) is not credible.

Secondly, the Union argues that the Employer could have returned two (2) of its permanent employees to the plant in Alberta instead of firing Mr. Richter and Mr. Bulani. In other words, the Employer had options other than terminating these two (2) employees; options which it did not consider. Simply put, the Union argues that, even if the Employer had a reason for terminating these two (2) employees, an anti-union animus was present in the workplace and thus the terminations were unlawful.

[125] In our opinion, the Employer had a good and sufficient reason for terminating Mr. Richter and Mr. Bulani; namely, the resignation of Mr. Zemlack. We accept the evidence of the Employer's witnesses that Mr. Milne's presence on the worksite was sufficient to satisfy the Commission's apprentice/journeyperson ratio when Mr. Flichel was terminated. We are also satisfied that the Employer did not have this option when Mr. Zemlack resigned. In light of Mr. Zemlak's abrupt departure from the workplace, the Employer's options would have been very limited indeed. We are also satisfied that the Employer's decision to release the two (2) temporary apprentices early (rather than sending its permanent employees back to Alberta) was both logical and credible. Simply put, the evidence of each of the Employer's witnesses on these points was plausible and believable.

[126] In our opinion, the Employer has satisfied the burden of demonstrating a good and sufficient reason for the actions it took. More importantly, we saw no evidence from which we could infer that an anti-union animus was a factor in the Employer's decision to terminate Mr. Richter and Mr. Bulani.

Conclusions:

[127] We find that BCT Structures is the actual employer of the employees that are the subject matter of the Union's certification application, being LRB File No. 063-14. As a consequence of this finding, the applications of the Union bearing LRB File Nos. 063-14, 071-14, 105-14 and 106-14 are amended to identify BCT Structures Inc. as the named employer.

[128] With respect to the Union's certification application, we find that the following employees are eligible to participate in the representational question; namely, Mr. Blair Bulani, Mr. Nicolas Richter, Mr. Matthew Zemlak, Mr. Aaron Telford, Mr. Christopher Dixon and Mr. Connor Walker. We find that neither Mr. Gregory Flichel nor Mr. Zena Feleke are eligible to participate in the representational question. As a consequence of this finding, we direct that the

ballots of these two (2) individuals be removed from the ballot box and destroyed (unopened). The Union's certification application shall be determined following tabulation of the ballots.

[129] Applications bearing LRB File Nos. 071-14 and 105-14, both filed by the Union, are dismissed. The application bearing LRB File No. 096-14, filed by the Employer, is granted. The application bearing LRB File No. 106-14, filed by the Union, is granted in part.

[130] Board members Maurice Werezak and Don Ewart both concur with these Reasons for Decision.

DATED at Regina, Saskatchewan, this **16th** day of **December, 2014.**

LABOUR RELATIONS BOARD

Steven D. Schiefner,
Vice-Chairperson