The Labour Relations Board
Saskatchewan

UNITED FOOD and COMMERICAL WORKERS, LOCAL 1400, Applicant v. CALOKAY HOLDINGS LTD., WHITE SANDS ENTERPRISES LTD., KKCLG HOLDINGS LTD. and GANDKO HOLDINGS LTD., operating as BEST WESTERN SEVEN OAKS INN, Respondent

LRB File Nos. 002-16, 013-16, 029-16, 035-16, 044-16 & 088-16; October 7, 2016
Vice-Chairperson, Graeme G. Mitchell, Q.C.; Members: Michael Wainwright and Bert Ottenson

For the Applicant Union: Dawn McBride and Sachia Longo
For the Respondent Employer: Roger Hofer, Q.C.

Unfair Labour Practice – Strike – Union alleged Employer threatened to fire employees with less than three (3) months service if they went on strike. Board reviewed law respecting credibility of witnesses and determined the evidence presented by Union's witnesses did not meet its burden of proof.

Unfair Labour Practice – Strike – Leafleting – Employer's hotel manager forcibly removed Union members leafleting in the hotel parking lot – Board reviewed constitutional jurisprudence respecting leafleting and concluded the Employer committed an unfair labour practice under section 6-62(1)(a) of *The Saskatchewan Employment Act* by removing the leafleters from the parking lot.

Unfair Labour Practice – Remedy – Union decertified after hearing of these applications. Board declared that Employer committed an unfair labour practice, and pursuant to section 6-111(1)(s) of *The Saskatchewan Employment Act* directed the Employer to post a copy of the Reasons for Decision and the Board's Order in a place where Employer normally posts notices to employees.

REASONS FOR DECISION

OVERVIEW

[1] United Food and Commercial Workers, Local 1400 [the "Union"] brings five (5) applications under section 6-62 (1) of *The Saskatchewan Employment Act*, S.S. 2013, c. S-15.1 (the "*SEA*"): LRB File Nos 002-15, 013-16, 029-16, 035-16 & 044-16. These applications allege that Calokay Holdings Ltd., White Sands Enterprises Ltd., KKCLG Holdings Ltd. and Gandko Holdings Ltd., operating as Best Western Seven Oaks Inn [the "Employer"], committed a series

of unfair labour practices in the course of an extended strike at the Best Western Seven Oaks Inn at Regina, Saskatchewan. The Union is the certified bargaining representative for all employees of the Employer at this hotel.[1]

[2] On March 22, 2016, this Board ordered that a vote be conducted on the Employer's last offer.[2] The vote took place on April 7, 2016. At its conclusion, the ballot box was sealed pending a decision in respect of the Union's application objecting to the vote brought under subsection 23(11) of *The Saskatchewan Employment (Labour Relations Board) Regulations*[3] [the "*Regulations*"], and filed with this Board on April 12, 2016: LRB File No. 088-16.

[3] In chronological order, the Union's five (5) unfair labour practice applications may be summarized as follows:

- ***LRB File No. 002-16 dated January 5, 2016****: Allegations that the Employer breached subsection 6-62(1)(a) of the SEA when in December 2015, its representatives advised two (2) Union members – Megan Schuster and Leah Fuchs – that employees with less than three (3) month's service could be fired if they participated in the strike scheduled commencing on December 28, 2016;*

- ***LRB File No. 013-16 dated February 2, 2016****: Allegations that the Employer breached sections 6-36 and 6-62(1)(m) of the SEA by failing to comply with the Union's requests that the Employer provide information respecting the benefit premiums for striking Union members; repay premiums deducted from striking employees' pay cheques, and reimburse the Union for excess premiums paid on behalf of its' members;*

- ***LRB File No. 029-16 dated February 19, 2016****: Allegations that the Employer breached sections 6-43 and 6-62(1)(r) of the SEA by failing to remit dues and check-offs for November and part of December 2016**;***

- ***LRB File No. 035-16 dated March 2, 2016****: Allegations that the Employer's manager breached subsection 6-62(1)(a) of the SEA by physically and unlawfully removing leafletters from the parking lot of the Employer's hotel, and*

- ***LRB File No. 044-16 dated March 15, 2016****: Allegations that the Employer breached sections 6-6 and 6-62(1)(g) of the SEA when it fired an union member, Felipa Ramirez for joining the picket line after she had worked a number of shifts during the strike*.

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[1] See: LRB File No. 327-99, Certification Order dated February 21, 2000.
[2] See: LRB File Nos. 034-16, 039-16. Reasons for Decision were issued in that matter on April 28, 2016, see: *Calokay Holdings Ltd., White Sands Enterprises Ltd., KKCLG Holdings Ltd. and Gandko Holdings Ltd., operating as Best Western Seven Oaks Inn v United Food and Commercial Workers, Local 1400*, 2016 CanLII 30543 (SK LRB).
[3] R.R.S. c.S-15.1, Reg. 1

[4] The Board commenced its hearing into these various applications on April 21, 2016. This hearing was scheduled to take three (3) days; however, at its opening counsel for the Union, Ms. Dawn McBride announced that the Union was withdrawing two (2) of the unfair practice applications, namely, LRB File Nos. 013-16 & 029-16. The Board then proceeded to hear evidence respecting the remaining three (3) applications.

[5] Following completion of the evidence relating to these applications on April 21, 2016 the matter was adjourned to April 28, 2016 to hear evidence relating to LRB File No. 088-16. This application objected to the conduct of the vote which took place on April 7, 2016 in accordance with the Board's Order dated March 22, 2016.

[6] At the commencement of the hearing on April 28, 2016 counsel for the Union requested an adjournment for the reason that the Employer had failed to comply with its requests for further disclosure relating to the vote which took place on April 7, 2016. The Union had reason to believe that on the day of the vote the Employer had over-staffed the hotel with individuals who would not normally work at that time. Union counsel asked to see paystubs of various employees to ascertain whether the Union's objection was well-found. The Employer declined the Union's request arguing that the paystubs would disclose only the amount earned by an employee for a particular pay period and not the dates or times the employee worked.

[7] After deliberating the Board decided to grant the Union's request for an adjournment. We determined that the documentation for which disclosure was sought may be relevant to the Union's application. As a result the Board exercised its authority under subsection 6-111(1)(b) of the *SEA* and ordered disclosure. As a consequence, the hearing of the Union's application objecting to the vote was adjourned to May 13, 2016.

[8] At the commencement of the hearing on May 13, 2016 counsel for the Union, Mr. Sachia Longo, advised the Board that not only was the Union withdrawing its application objecting to the conduct of the vote on April 7, 2016 it requested that the ballot box be unsealed and the votes counted. Counsel for the Employer, Mr. Roger Hofer, Q.C. agreed. In view of this consensus, the Board issued an Order directing that the ballot box be unsealed and the votes counted. Both parties waived the right to have a scrutineer present for the count. The counting of the votes took place that afternoon. The result was that the Employer's last offer was accepted by a majority of the employees who cast valid ballots.

[9] In light of these developments, these Reasons will address the Union's three (3) extant unfair labour practice applications and explain why this Board grants one (1) of these applications but dismisses the others. More specifically, the Board finds that the Union has demonstrated on a balance of probabilities that the Employer's manager breached subsection 6-62(1)(a) of the *SEA* when on February 12, 2016, he forcibly removed Union members who were leafleting from the hotel's parking lot. In all other aspects, however, the Union's applications are dismissed.

[10] For clarity, these Reasons will be organized according to the particular unfair labour practice application being discussed.

FACTUAL BACKGROUND

A. LRB File No. 002-16

[11] The Union called three (3) witnesses in relation to this unfair labour practice application: Glenn Stewart, Leah Fuchs and Megan Schuster. Three (3) witnesses testified on behalf of the Employer: Tammy Wright, Blaine Dupuis and Glen Weir. It should be noted that Mr. Weir, the manager of the Employer's hotel, testified in respect of all three (3) unfair labour practice applications while Ms. Wright testified in respect of two (2) of them. As a result, their evidence will be organized in relation to each application as it is discussed.

1. Testimony of Glenn Stewart

[12] Mr. Stewart is one of the Union's service representatives in Saskatchewan, and the Employer's hotel is one of the worksites for which Mr. Stewart is responsible. He provided general information about the hotel's operational structure; its history of industrial relations; the demographics of the employees at the hotel who are Union members, and the events leading up to the strike which commenced on December 28, 2015.

[13] He testified that the collective bargaining agreement expired on December 5, 2015. Bargaining towards a new agreement commenced with the parties reaching an impasse on December 22, 2015.

[14] In the interim, the Union held a strike vote on December 14, 2015.

[15] On December 22, 2015, the Employer presented its final offer. That same day, the Union served the Employer with a strike notice while the Employer issued a lock-out notice to the Union.

2. Testimony of Leah Fuchs

[16] Ms. Fuchs has worked at the hotel for approximately four-and-a-half (4 ½) years. For the last two (2) years she has worked as a part-time employee primarily as a server at Ricky's All-Day Grill, a restaurant located in the hotel.

[17] She testified that she came to work at Ricky's on December 27, 2015 at approximately 2:00 p.m. Upon her arrival, she met Tammy Wright, the manager of Ricky's who was just leaving. Ms. Wright inquired whether Ms. Fuchs intended to go on strike the next day. She replied that she did not know what she was going to do.

[18] Ms. Fuchs testified Ms. Wright then told her and the others congregated at the mid-station in the restaurant that anyone who had been employed for less than three (3) months would be fired if they went on strike. She then asked Ms. Wright that if she went on strike would she lose her job. Ms. Wright replied she could not guarantee that Ms. Fuchs' position would be waiting for her after the strike ended. Ms. Fuchs testified further that Ms. Wright then told Blaine Dupuis, the day shift manager, to fire an employee named Jamie Henderson that evening if Ms. Henderson told him she was going on strike the next day.

[19] Ms. Fuchs testified that the next day she spoke to relatives who were familiar with labour law and they advised her she could not be fired if she chose to go on strike. She then telephoned the banquet manager at the hotel to advise that she would not be coming into work. During this call, the banquet manager passed the telephone to Glenn Weir, the manager of the hotel, who encouraged Ms. Fuchs to come into work for 11:00 a.m., and offered to pick her up and drive her to the hotel. Ultimately, she did not go into work on December 28, 2015.

[20] Ms. Fuchs joined the picket line the next day.

3. Testimony of Megan Schuster

[21] Ms. Schuster had worked as a server and hostess at Ricky's All-Day Grill on a casual basis since February 2015. She had previously been employed by the Employer but left sometime in 2010.

[22] She testified that prior to the vote, representatives of management came into the restaurant and told the cooks and servers that the Union wanted unlimited access to the hotel premises and to the employees. She indicated that Glen Weir spoke to two (2) of her colleagues and told them the Union wanted to come and talk to them even when they were serving. This, she believed, was only a scare tactic.

[23] She stated that she had been unable to participate in the strike vote but she did attend the meeting on December 23, 2015 and learned more about it. She expressed the view that management was sending out to the staff a not too subtle message that if employees went on strike they could be fired.

[24] On December 26, 2015 she was in Tammy Wright's office at the close of her shift. Ms. Wright inquired whether she intended to go on strike. She replied that she did not know. Tammy then told her that since Ms. Schuster had been employed for less than two (2) months she would be fired if she went on strike.

[25] On December 27, 2015, Ms. Schuster came to work. She recounted an incident that occurred at the "middle station" of the restaurant towards the end of her shift. Ms. Wright came through the restaurant and told the servers gathered there that if they walked the picket line the next day, they would not be guaranteed a job once the strike was over.

[26] At this point in her testimony, Ms. Schuster explained that she had been confused about the individuals who were at the middle station at that time and witnessed this event. In her affidavit which was dated January 5, 2016 and attached to formal Unfair Labour Practice application, she identified those individuals to be Leah Fuchs, Jessica Parchewsky and Jamie Henderson. However, she admitted that she had been confused about the names of her colleagues. She now knew that their names were Chantel and Brittney.

[27] On December 28, 2015 Ms. Schuster again came to work. She testified that on this day she met Glen Stewart, the Union representative, at the entrance to the hotel. He told her

that she could not be fired if she joined the strike. He advised her that she was protected by law from being terminated by the employer. Once she learned this, she advised her supervisor that she was going on strike.

[28] Not surprisingly, the cross-examination conducted by Mr. Hofer focused on the inconsistencies between her Affidavit and her oral testimony at the hearing. She conceded that the names of the individuals set out her Affidavit were wrong. She stated that she possessed "good memory but just not for names". However, she maintained the substance of her evidence about what transpired at the middle station and her encounter with Ms. Wright was accurate.

[29] Mr. Hofer asked her about the new information which arose during her testimony, most particularly her encounter with Ms. Wright in Ms. Wright's office. In compliance with *Browne v Dunn*[4], he told the witness that Ms. Wright would testify that their encounter in her office did not occur in the way Ms. Schuster described. Again, Ms. Schuster insisted that the encounter took place as she had recounted it.

4. Testimony of Tammy Lynne Wright

[30] Ms. Tammy Wright, a partner and operator of Ricky's All-Day Grill at the Seven Oaks Inn, was the first witness called by the Employer respecting this particular unfair labour practice application.

[31] She testified that in December 2015, Ms. Schuster was a part-time hostess/server at Ricky's.

[32] On December 26, 2015, towards the end of her shift, Ms. Schuster came into Ms. Wright's office to bring in her daily float. She seemed uncertain about whether she would be coming to work on December 27, 2015. Ms. Wright needed to know because she would have to arrange for another worker to cover Ms. Schuster's shift if she did not intend to work the next day.

[33] Ms. Wright testified that she was surprised that Ms. Schuster was considering going on strike as she had not been working at Ricky's for very long. She then went to her computer and discovered that Ms. Schuster had been employed for only six (6) weeks. They did

[4] (1894), 6 R. 67 (H.L.)

not discuss the matter further as Ms. Wright understood from Ms. Schuster's body language that she did not wish to discuss the matter further. She expressly denied that she had told Ms. Schuster that any employee with less than three (3) months service would be terminated if they decided to go on strike.

[34] Ms. Wright testified that on December 27, 2015 Ms. Schuster did come to work and worked a full shift as a hostess from 9:00 a.m. to 2:00 p.m. As Ms. Wright was leaving for the day, she passed through the restaurant. She spoke to some servers who had congregated at the middle station. These included Leah Fuchs, Ashley Hollinger, Brittney Hollinger and Ms. Schuster. Ashley and Brittney are Ms. Wright's nieces. She asked them if they intended to be at work the following weekend to which they replied they would. Leah Fuchs indicated she intended to be at work the following day and was hoping to work an extra banqueting shift that morning.

[35] Ms. Wright also asked about Jamie Henderson's intentions. Ms. Fuchs said she did not know.

[36] Ms. Wright denied that she had told any of her servers that they would be fired if they joined the strike. She also denied that she had told Blaine Dupuis to fire Ms. Henderson if she went on strike. She indicated that Mr. Dupuis was the shift supervisor and did not have any authority to hire or fire employees.

[37] She stated it was only on December 28, 2015 that she discovered both Ms. Fuchs and Ms. Schuster had decided to go on strike. She saw both of them on the picket line. Ms. Wright indicated she was not surprised that Ms. Schuster went on strike; however she did not expect that Ms. Fuchs would join the picket line as she had wanted to increase her shifts at the hotel.

[38] When asked by Mr. Hofer whether Ms. Fuchs or Ms. Schuster were fired because they went on strike, Ms. Wright stated they were not. She also testified that none of the workers in the restaurant who went on strike were subsequently fired.

[39] On cross-examination by Ms. McBride, Ms. Wright indicated that she was surprised Ms. Schuster was thinking about going on strike because in her opinion the Employer had accommodated her university schedule by permitting her to work when she could.

5. Testimony of Blaine Dupuis

[40] Mr. Dupuis had worked for the Employer since 2001 and currently is a shift supervisor at Ricky's All-Day Grill. He testified that he did not work on December 26, 2015; however, he came to work on December 27, 2015 arriving at approximately 2:00 p.m.

[41] He testified that when he arrived he stopped briefly at the middle station. He recollected that Ms. Wright was there speaking with Ms. Fuchs. He overheard Ms. Fuchs say she was giving them a "heads-up" that Jamie Henderson planned to go on strike and would not be reporting for work. He did not remember Ms. Wright telling him to fire Ms. Henderson. Nor did he hear her say that any worker who had been employed for three (3) months or less would be fired if they went on strike.

[42] On cross-examination by Ms. McBride, he stated he could not remember if Ms. Schuster, Ashley Hollinger or Brittney Hollinger were also at the middle station. He said that he only stopped at the middle station briefly. He then proceeded to prepare for his shift and was separated by a partial wall from the others.

[43] He stated that he had not attended any meeting about the strike and had not received any direction from management as to what to say to employees about it.

6. Testimony of Glen Weir

[44] Mr. Weir is the owner and operator of the Employer's hotel, Best Western Seven Oaks in Regina. In relation to LRB File No. 002-16, he stated he had not heard about the allegations until this unfair labour practice application had been filed.

[45] He testified that he was at work on both December 26 and 27, 2015. On those days, he did not have any interactions with Ms. Schuster. He did, however, have a number of conversations with Ms. Fuchs.

[46] On December 27, she came to his office to tell him that she had decided not to go on strike the next day. He testified that she seemed relieved about her decision and he felt that Ms. Fuchs had struggled with it. She had never asked him whether her job would be in jeopardy if she did go on strike. He asked her if she would need a ride the next day and offered to pick her up and drive her to the hotel. She did.

[47] On December 28, 2015 he was in his office early in the morning with one of his co-workers, Joanne, who was responsible for the banqueting issue. The phone rang and Joanne answered. Ms. Fuchs was on the other end. Joanne spoke briefly to her and then passed the receiver to him. Ms. Fuchs told him she had concerns about coming to work that day. He encouraged her to come in.

[48] A few hours later, he received a second telephone call from Ms. Fuchs. She was standing in the hotel lobby and speaking to him on her cell-phone. She told him that her uncle had told her she should join the picket. Mr. Weir told her she would be safe if she reported for work and the union could not punish her for coming to work when the strike was on. However, he told her the decision to come to work was hers alone. At no time during this conversation did she ask him if her job would be in jeopardy.

[49] Subsequently, he learned that Ms. Fuchs had decided to walk the picket line.

B. LRB File No. 035-16

[50] This particular unfair labour practice file pertained to an incident which occurred in the parking lot just outside Ricky's All-Day Grill on February 12, 2016. The Union called Ms. Lucy Figueiredo as its only witness on this application. The Employer called two (2) witnesses: Mr. Glen Weir and Ms. Tammy Wright. In addition to the oral testimony, a video recording of the altercation which formed the basis of this application was introduced into evidence and played during the hearing.

1. Testimony of Lucy Figueiredo

[51] Ms. Figueiredo has been employed by the Union since 2003. Currently, she serves as its Secretary-Treasurer.

[52] On February 12, 2016, she was present on the picket line at the Employer's hotel. The incident occurred around 11:30 a.m. when some of the picketers were leafletting outside of Ricky's All-Day Grill. Mr. Chris Dennis was there with one of the other Union representatives, Ms. Lily Olson. He had a GO PRO camera on his parka. The national Union recommends that picketers carry these cameras with them for protection. It records the events as well as the time

of day on the video. The video of the leafleting that took place on February 12, 2016 was entered into evidence and played during her testimony.

[53] Most of the picketers remained on the picket line which was organized along the perimeter of the Employer's property at Albert Street and 2nd Avenue in Regina. She testified that she came to the incident as it was occurring. At that point, Mr. Weir and Ms. Wright were outside attempting to remove the individuals leafleting from the parking lot. Ms. Olson had fallen to the ground twice. Ms. Figueiredo testified that she witnessed the second fall and could not state with certainty whether Ms. Olson had tripped or had been pushed to the ground.

[54] She stated that there were approximately eight (8) to ten (10) union members walking the picket line that day. They saw this altercation occur and afterwards told her they were fearful about returning to work because of what they had witnessed.

[55] On cross-examination, she testified that this was not the first time they had engaged in informational picketing. They had conducted similar leafleting during strikes in Saskatoon and Prince Albert. Union members believe they have a constitutional right to leaflet by virtue of a decision by the Supreme Court of Canada.[5]

[56] When asked by Mr. Hofer if employees working inside the hotel could see what transpired in the parking lot, Ms. Figueirido replied that where it took place was "one of the most visible areas in the hotel". She testified that, in her opinion, it was "more probable than not that employees in the hotel would have seen the altercation".

2. Testimony of Tammy Wright

[57] Respecting this particular unfair labour practice application, Ms. Wright testified that she was at work on February 12, 2016. She stated that the previous weekend leafleters had been outside Ricky's All-Day Grill. She went to the front desk and had them call the police. The police came and, rather than charging the leafleters with trespassing, they gave them some time to move off hotel property.

[58] On February 12, 2016 she saw the leafleters outside the restaurant. She, again, went to the front desk and said they should contact Glen Weir.

[5] The decision Ms. Figueiredo is referring to is *U.F.C.W., Local 1518 v Kmart Canada Ltd.*, [1999] 2 SCR 1083.

[59] She went outside shortly after. When she got there, there was a woman – Ms. Olson – already laying on the ground. Mr. Weir was ahead of her. Ms. Wright testified that she saw this woman get up and then lay back down on the ground.

[60] She testified that Mr. Weir was escorting one of the male leafleters off hotel property and onto the side walk adjacent to it.

[61] She stated that these events would not have been visible to staff working in the hotel. It may have been visible to employees working in Ricky's if the patio had been opened but it was cold so there was no one out there. She stated that had she not been there herself, she would not have seen the altercation.

[62] On cross-examination by Ms. McBride, Ms. Wright reiterated her testimony that Ms. Olson "placed herself on the ground", she was not pushed.

3. Testimony of Glen Weir

[63] Respecting this particular unfair labour practice application, Mr. Weir testified that on February 12, 2016 he was working in his office after being away for three (3) days. At approximately 11:55 a.m., Ms. Wright alerted him the leafleters were at the front doors of the hotel. He immediately went outside to tell them that they were trespassing on the Employer's property.

[64] He testified that late in January 2016 he had received a telephone call from the front desk manager advising there were picketers outside the hotel handing out leaflets. Mr. Weir told him to call the police. Apparently, the police came but did not know what to do with these individuals, and they left after approximately one (1) hour.

[65] Frustrated by the lack of police assistance, he took matters into his own hands. He told the leafleters to leave the parking lot at least twice. He then decided to physically remove them from the premises. He testified that he had had instruction from the Saskatchewan Hotel Association on how to do this appropriately. He acknowledged that he made contact with Ms. Olson twice and that on the second occasion she fell to the ground. He stated that he did not believe he touched her hard enough to make her fall. He thought she might have tripped over one of the rumble strips in the parking lot.

[66] Mr. Weir testified that he asked Ms. Olson if she was alright and she replied she was “ok”.

[67] Towards the end of the incident, Mr. Weir had an encounter with two male picketers. He told one of them whom he identified as Trevor Morin to leave hotel property. He used his lowered open hands to move him off the premises.

[68] He testified that he now regretted doing this, that he acted in haste and out of frustration because of what he perceived to be police inaction. He also conceded that the video of the incident which had been played was an accurate reflection of what transpired that day.

[69] He explained that most of the episode unfolded in front of Ricky’s All-Day Grill. He explained that it was not possible to see Ricky’s from the hotel’s front entrance. He also testified that it was unlikely that hotel staff may have seen what transpired in the parking lot on February 12, 2016.

[70] After he had removed the leafletters from the parking lot, he testified that he went back to his office and called the City of Regina Police Service. The Service had an open file on the strike at the hotel. He left a lengthy voice mail detailing what had taken place. He was never charged for what had happened.

[71] On cross-examination by Ms. McBride, Mr. Weir was pressed on whether employees working in the hotel could have seen what happened. He maintained it was very unlikely that any of them had witnessed the altercation. He explained that none of the windows in the hotel looked down on that part of the parking lot. The only way an employee could see the area would be if they went to the window at the end of the hallway. He admitted that he took no steps to ascertain if anyone had witnessed the episode in the parking lot. Although, he added, the Union had posted the video on YouTube, so it was widely accessible.

[72] Ms. McBride challenged Mr. Weir’s recollection of the conversation with Ms. Olson after she had fallen. Ms. McBride put it to him that when she was on the ground, Ms. Olson had said: “Now I’m hurt” and he had replied “Good”. Mr. Weir steadfastly denied that this exchange took place as Ms. McBride described it.

4. The Video of the Altercation on February 12, 2016

[73] As referenced earlier, a video of this altercation was played during Ms. Figueiredo's testimony. It generally bears out the testimony heard by the Board. It opens on a bright, crisp February morning with at least a couple of Union members walking into the parking lot of the Employer's hotel. It shows them giving a leaflet to a gentlemen coming out of the building, although it is difficult to ascertain whether it was the hotel or Ricky's Grill which he exited. Shortly after this, Mr. Weir comes out of the hotel, and there is a verbal, and, ultimately, a physical, altercation between Mr. Weir and some of the leafleters. It shows that both Ms. Figueiredo and Ms. Wright attempted to restrain Mr. Weir and one of the Union members.

[74] The audio on the video was not always clear so it was at times difficult to hear clearly the verbal exchanges between Mr. Weir and the Union members. It is an understatement to say the exchanges were sharp with Mr. Weir insisting the Union members were trespassing on private property.

C. LRB File No. 044-16

[75] This particular unfair labour practice application involved allegations by two (2) employees – Ms. Felipa Ramirez and Mr. Juny E. Tiloy – that their employment was terminated because they went on strike. At the hearing, the Union called the two (2) employees named in the application. The Employer called three (3) witnesses: Mr. Bob Corbeil, the maintenance manager at the Employer's hotel; Ms. Sharon Decker, the hotel's housekeeping manager, and Mr. Glen Weir.

[76] During final argument, the Union withdrew the unfair labour practice application brought on behalf of Ms. Ramirez. As a consequence, the Board finds it unnecessary to recount the testimony which related to that particular complaint. Only the testimony relating to the unfair labour practice application brought on behalf of Mr. Tiloy will be reviewed here.

1. Testimony of Juny Tiloy

[77] As Mr. Tiloy's first language is Tagalog, a Filipino tongue, and he is not sufficiently proficient in English, he was permitted to give his testimony with the assistance of an interpreter.

[78] Mr. Tiloy testified that he began his employment at the Employer's hotel on December 1, 2011. He was hired as a maintenance worker.

[79] Prior to the strike vote in December 2015, the employees in the maintenance department met with Mr. Weir and Mr. Bob Corbeil, who was Mr. Tiloy's immediate supervisor. Mr. Tiloy testified that Mr. Weir spoke to them about the upcoming vote and told them to vote "no". He stated that Mr. Weir told them that the Employer had hired an "expensive lawyer".

[80] Following the vote but prior to the commencement of the strike, Mr. Tiloy testified that he met with his supervisor. He stated that Mr. Corbeil advised him there would be consequences if any of the workers in the Maintenance Department went on strike. Mr. Tiloy testified that Mr. Corbeil meant they would be fired.

[81] He testified that this threat scared him and his co-workers. Mr. Tiloy is a permanent resident of Canada but does not understand the law. He stated that he was the only maintenance worker to go on strike. All the rest of his colleagues have worked during the strike.

[82] On cross-examination by Mr. Hofer, Mr. Tiloy conceded that another maintenance worker identified as "Stan" also joined the picket line.

[83] Mr. Hofer asked Mr. Tiloy about his request for a six (6) week vacation leave in order to return to the Philippines. His handwritten note to his supervisor, Mr. Corbeil, requesting this vacation leave was then introduced into evidence. Mr. Corbeil responded to his request by advising Mr. Tiloy that his request for a six (6) week vacation was denied but authorized him vacation leave for three (3) weeks from January 6 to January 27, 2016. Mr. Corbeil's typewritten letter authorizing Mr. Tiloy's vacation leave was subsequently introduced into evidence.

[84] Mr. Tiloy left for vacation on January 6, 2016 as he was authorized to do. However, he failed to return to work on January 27, 2016. Indeed, he did not return until February 3, 2016. He admitted that he did not tell Mr. Corbeil that he would not be back on January 27, 2016.

[85] Mr. Tiloy testified that in the past he had taken vacation leave for more than three (3) weeks. It had not been a problem. Even though he knew he was only authorized to take three (3) weeks' vacation, he chose to take longer. When he returned on February 3, 2016, he decided to join the picket line. However, he admitted that did not do so until March 12, 2016. At

no time did he advise his supervisor or the Employer that he would not be coming back after his vacation leave and, instead, would join the strike.

[86] Mr. Hofer presented Mr. Tiloy with a letter sent to him by Mr. Weir. It was dated February 3, 2016 and Mr. Tiloy acknowledged that the address on this letter was his. In this letter, Mr. Weir asked Mr. Tiloy to contact him about his employment. Mr. Tiloy admitted that he did not reply to this correspondence.

[87] Mr. Hofer then pointed Mr. Tiloy to Article 7.04 of the current Collective Agreement between the Union and the Employer. In particular, Article 7.04(e) states that "[f]ailure to return from leave of absence on the agreed upon date" could result is loss of seniority. Mr. Tiloy admitted he was scared he might lose his job because he did not return to work on January 27, 2016.

2. <u>Testimony of Mr. Bob Corbeil</u>

[88] Mr. Corbeil has been employed as the Employer's maintenance manager for more than twenty (20) years. He testified that Mr. Tiloy had been employed for approximately little over three (3) years.

[89] He testified that Mr. Tiloy had requested vacation leave of six (6) weeks; however because of staff shortage Mr. Corbeil could only authorize three (3) weeks leave. He did not discuss his letter with Mr. Tiloy.

[90] He testified that Mr. Tiloy left on vacation on January 6, 2016 and did not return to work on January 27, 2016. He admitted he had doubts that Mr. Tiloy would return on time. He heard rumours around the hotel that Mr. Tiloy planned to take six (6) weeks of holidays.

[91] When Mr. Tiloy failed to return to work, Mr. Corbeil spoke to Mr. Weir. He testified that Mr. Weir attempted to telephone Mr. Tiloy on a number of occasions on February 2, 2016 but the telephone line was constantly busy. Mr. Weir then sent a letter to Mr. Tiloy asking him to contact the Employer. Mr. Corbeil did not see this letter.

[92] Mr. Corbeil testified that Mr. Tiloy never contacted him and he only learned from other employees that Mr. Tiloy was going on strike.

[93] On cross-examination by Ms. McBride, Mr. Corbeil testified that he did attend one (1) meeting at which Mr. Weir spoke to members of the maintenance department. He does not recollect Mr. Tiloy being at that meeting. He recalls that it took place after the strike had started and Mr. Tiloy had left on vacation.

[94] Mr. Corbeil testified that he is hard of hearing and couldn't hear all that was said at this meeting.

[95] He denied that he ever told Mr. Tiloy he would be fired if he decided to go on strike.

3. Testimony of Mr. Glen Weir

[96] Mr. Weir testified that he did speak at a meeting of the maintenance staff sometime in December 2015 and that Mr. Tiloy was in attendance and asked a question. He stated that he recalled it was a "good question" but was unable to remember what it was about. He told Mr. Tiloy that he was not able to answer it at the time, but he would look into the issue and get back to him with more information. However, he admitted that he never did provide Mr. Tiloy with more information.

[97] He stated that he was not aware of any threats being made to the maintenance staff about losing their jobs if they went on strike.

[98] Mr. Weir stated that prior to Mr. Tiloy's specified date of return to the workplace on January 27, 2016, he learned from Mr. Corbeil that there was a rumour circulating that Mr. Tiloy would not return on that date. In spite of this, Mr. Tiloy was scheduled to work. However, Mr. Tiloy did not show up for his shift.

[99] Mr. Weir testified that on February 2, 2016 he attempted to contact Mr. Tiloy by telephone three (3) or four (4) times between 7:00 a.m. to noon. He received a busy signal each time he telephoned Mr. Tiloy's number.

[100] That same day he wrote the letter to Mr. Tiloy asking him to contact him upon receiving it. Mr. Tiloy never contacted him. Nor did he return to work.

[101] During his testimony, Mr. Weir stated that the Employer had taken no decision respecting Mr. Tiloy's employment status. He emphasized that as of the date of the hearing, Mr. Tiloy had not been terminated.

RELEVANT LEGISLATIVE PROVISIONS

[102] In these three (3) unfair labour practice applications the Union invoked section 6-62(1)(a) of the *SEA*. This and other relevant sections read as follows:

> *6-4(1) Employees have the right to organize in and to form, join or assist unions and to engage in collective bargaining through a union of their own choosing.*
>
> *. . . . . .*
>
> *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, intimate, threaten, or coerce an employee in the exercise of any right conferred by this Part;*
>
> *. . . . . .*
>
> *(r) to contravene an obligation, a prohibition or other provision of [Part VI] imposed on or applicable to an employer.*
>
> *(2) Clause (1)(a) does not prohibit an employer from communicating facts and its opinions to its employees.*

[103] This Board's powers on applications such as these are found in sections 6-103 and 6-104 of the *SEA*. The subsections which the Board finds to be most relevant to the matters before us are:

> *6-103(1) Subject to subsection 6-97(3), the board may exercise those powers that are conferred and shall perform those duties that are imposed upon it by this Act or that are incidental to the attainment of the purposes of this Act.*
>
> *(2) Without limiting the generality of subsection (1), the board may do all or any of the following:*
>
> *(a) conduct any investigation, inquiry or hearing that the board considers appropriate;*
>
> *(b) make orders requiring compliance with:*
>
> *(i) this Part;*
>
> *(ii) any regulations made pursuant to this Part; or*
>
> *(iii) any board decision respecting any matter before the board;*
>
> *(c) make any orders that are ancillary to the relief requested if the board considers that the orders are necessary or appropriate to attain the purposes of this Act [.]*
>
> *. . . . .*
>
> *6-104 (2) In addition to any other powers given to the board pursuant to this Part, the board may make orders:*
>
> *. . . . .*
>
> *(b) determining whether an unfair labour practice or a contravention of this Part, the regulations made pursuant to this Part or an order or decision of the board is being or has been engage in;*

> *(c) requiring any person to do any of the following:*
>
> *(i) to refrain from contravening this Part, the regulations made pursuant to this Part, or an order or decision of the board or from engaging in any unfair labour practice;*
>
> *(ii) to do any thing for the purpose of rectifying a contravention of this Part the regulations made pursuant to this Part or an order or decision of the board[.]*

ANALYSIS

A. Onus

[104] Although it was not a contentious issue between the parties, it is useful to identify at the outset which side bears the onus in unfair labour practice applications, generally.

[105] The Board addressed this question most recently in *Moose Jaw Firefighters' Association Local 553 v Moose Jaw (City)*[6]. Relying on the Supreme Court of Canada's decision in *F.H. v McDougall*[7]*,* the Board concluded:

> *There was no disagreement between the parties that the Association bears the burden to prove the allegations of an unfair labour practice on a balance of probabilities. This means the Association must demonstrate to the Board that it was more likely than not the City failed to negotiate in good faith a resolution of the terminations of these dispatchers. [Emphasis added.]*[8]

[106] In *McDougall*, the Supreme Court emphasized that in order to satisfy the 'balance of probabilities' standard of proof the evidence must be "sufficiently clear, convincing and cogent".

[107] As a consequence, the Union bears the onus in all three (3) unfair labour practice applications before us. It must demonstrate on a balance of probabilities that the Employer breached section 6-62(1)(a) of the *SEA.* The Union must persuade us that it is more likely than not the Employer interfered with, restrained, intimidated, threatened or coerced any employee when exercising his or her rights under Part VI of the *SEA.* More particularly, it is the right to strike which lies at the heart of these complaints. This right is statutorily authorized by section 6-31 through section 6-34 of the *SEA*, as well as constitutionally guaranteed under section 2(*d*) of the *Canadian Charter of Rights and Freedoms*.[9]

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[6] LRB File No. 219-15; 2016 CanLII 36502 (SK LRB)
[7] 2008 SCC 53, [2008] 3 SCR 41, especially at para. 49.
[8] *Supra* n. 6, at para. 82.
[9] See especially: *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, [2015] 1 SCR 245.

B. LRB File No. 002-16

[108] The Union's success on this particular application very much turns on the Board's findings of credibility respecting the various witnesses who testified for each side. No less an authority than the Chief Justice of Canada has acknowledged "assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization"[10]. Prior to turning to the question of assessing these witnesses' credibility, it is useful to revisit the relevant legal principles to be employed when undertaking this task.

1. Relevant Principles For Assessing Credibility

[109] Counsel for both sides strongly urged the Board to apply the analytical framework for assessing credibility issues identified by the British Columbia Court of Appeal in the important case of *Farnya v Chorny*[11]. There the Court of Appeal said where witnesses' testimony deviates significantly "the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions". When we apply this standard to the evidence presented to the Board during this hearing, each counsel asserts, his witnesses are the more credible, and their testimony should be preferred.

[110] *Farnya*, undoubtedly, remains a foundational authority. However the legal principles relating to issues of credibility have evolved. A helpful and oft-quoted summary of the principles which tribunals can utilize to assess credibility in cases where the parties have advanced significantly different versions of events is found in *Bradshaw v Stenner.*[12] In that case, Dillon J. of the British Columbia Supreme Court stated:

> *[186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (Raymond v. Bosanquet (Township) (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems*

[10] *R v REM*, 2008 SCC 51, [2008] 3 SCR 3 at para. 49 *per* McLachlin, C.J.
[11] [1952] 2 DLR 354, [1951] BCJ No. 152 (BCCA)
[12] 2010 BCSC 1398, aff'd 2012 BCCA 295.

> *unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (Wallace v. Davis, [1926] 31 O.W.N. 202 (Ont.H.C.); Farnya v. Chorny, [1952] 2 D.L.R. 152 (B.C.C.A.) [Farnya]; R. v. S.(R.D.), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (Farnya at para. 356).*
>
> *[187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd. (1993), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)). I have found this approach useful.*
>
> *[188] Most helpful in this case has been the documents created at the time of events, particularly the statements of adjustments. These provide the most accurate reflection of what occurred, rather than memories that have aged with the passage of time, hardened through this litigation, or been reconstructed…The inability to produce relevant documents to support one's case is also a relevant factor that negatively affects credibility…*[13]

[111] When assessing a witness' credibility, tribunals have relied on other factors such as:

- the witness' motives;[14]
- the witness' powers of observation[15];
- the witness' relationship, if any, to the parties involved in the dispute[16];
- extent to which witnesses may have an interest in the outcome of the case, or have a self-interest in testifying for one of the parties[17];
- internal consistency of a witness' evidence[18];
- inconsistencies and contradictions within a witness' evidence in relation to the evidence given by other witnesses[19], and

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[13] *Ibid*., at paras. 186-188.
[14] *Brar and others v B.C. Veterinary Medical Association and Osborne (No. 22)*, 2015 BCHRT 151, at para.79.
[15] *Ibid.*
[16] *Shah v. George Brown College*, 2009 HRTO 920, at para. 14.
[17] *Ibid*.
[18] *Supra* n. 14.
[19] *Ibid.*

- the failure by a party to call a witness or produce material evidence if able to do so.[20]

[112] Furthermore, it is important to recall that truthfulness and reliability are not always the same thing. This point was well-made in *Hardychuk v Johnston* [21] where Dickson J. (as she then was) said:

> *The typical starting point in a credibility assessment is to presume truthfulness: [Halteren v Wilhelm, 2000 BCCA 2]. Truthfulness and reliability are not, however, necessarily the same. A witness may sincerely attempt to be truthful but lack the perceptive, recall or narrative capacity to provide reliable testimony. Alternatively, he or she may unconsciously indulge in the human tendency to reconstruct and distort history in a manner that favours a desired outcome. There is, of course, also the possibility that a witness may choose, consciously and deliberately, to lie out of perceived self-interest or for some other reason. Accordingly, when a witness's evidence is demonstrably inaccurate the challenge from an assessment perspective is to identify the likely reason for the inaccuracy in a cautious, balanced and contextually sensitive way. [Emphasis added.]*[22]

[113] With this general framework identified, the Board turns to the application of these principles to the evidence led by the parties respecting this particular unfair labour practice application.

2. Application of Principles

[114] At the outset, the Board notes that generally the various witnesses who testified on this application gave their evidence in a forthright manner. There were certain inconsistencies and flaws in the evidence presented on behalf of both parties, however, in our view these inadequacies did not render the entire evidence of any one witness unbelievable.

[115] At the same time, the Board is entitled to accept all, some or none of the evidence of a witness and we have done so as required. On balance, however, for the reasons that follow, the Board concludes the testimony given by the Union's witnesses does not satisfy the burden on the Union to demonstrate on a balance of probabilities the Employer committed an unfair labour practice on December 27 and 28, 2015.

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[20] In Saskatchewan, see especially: *Murray v Saskatoon (City)*, 1951 CanLII 202; 4 WWR (NS) 234, at 239 (SKCA). See also: *Brar*, *supra* n. 14, and *Shah*, *supra* n. 16

[21] 2012 BCSC 1359

[116] In a case like this it is important, as well, to acknowledge that each witness who testified on this particular application had a special interest in the outcome of this application and, therefore, his or her evidence must be scrutinized with some care. Counsel for the Union argued that even though both witnesses are Union members they do not have a strong interest in the outcome of this application. In particular, he asserted, their interests are not advanced by alleging that the Employer threatened them with job loss if they joined the strike. The Board rejects this argument. Each of the Union witnesses who testified was a complainant and had a vested interest in having their complaint vindicated. On the other hand, the Employers' witnesses have an interest in this application failing. They were, and currently remain, integral members of the Employer's management team. None of them, presumably, desire a finding of unfair labour practice against them. This does not mean these witnesses lacked candour. Rather, it signals to the Board that it must be alive to the various self-interests which might be at play here.

[117] Applying the analytical framework for assessing credibility which was encouraged in *Bradshaw v Stenner*, the Board came to the following conclusions respecting the credibility of the witnesses. First, the testimony of Ms. Schuster is problematic. Although the Union's counsel tried to downplay her confusion about who was at the middle station in Ricky's Grill on the afternoon of December 27, 2015 and the inconsistencies between her formal affidavit submitted shortly following the alleged event and her oral testimony at the hearing, the Board concludes these factors cast doubt on the accuracy of her recollection of what actually transpired.

[118] Second, the Board accepts that an exchange did take place in Ms. Wright's office between Ms. Wright and Ms. Schuster. However, we prefer Ms. Wright's testimony over that of Ms. Schuster. It is more plausible to us that Ms. Wright wanted to know if Ms. Schuster was going on strike in order for her to schedule a replacement for Ms. Schuster's shift if she were absent.

[119] Third, the Board does not accept that Ms. Wright told Mr. Dupuis to fire Jamie Henderson if she went on strike. We accept the testimony of both Ms. Wright and Mr. Dupuis that as a supervisory employee he lacked the authority to hire or fire staff.

[120] Fourth, the Board finds there is insufficient evidence upon which we can find that the threat allegedly uttered by Ms. Wright, namely any employee with less than (3) months service would be terminated if he or she went on strike, was actually made. Both Ms. Schuster

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[22] *Ibid*., at para. 10. On this point counsel for the Employer relied upon *R v JF*, 2003 CanLII 52166 (ONCA), especially

and Ms. Fuchs testified that it was, while Ms. Wright and Mr. Dupuis deny it. We accept that a great deal of tension existed among the employees at the workplace. We also accept that this uncertainty and stress likely was exacerbated by the fact that many, if not the majority, of the employees were foreign or lacked proficiency in English or both. Yet, when these considerations are taken into account, the Board finds the evidence supporting the Union's version of events is equivocal, at best.

[121] Fifth, Union's counsel urged us to conclude that because the Employer failed to call two (2) additional witnesses in relation to this particular episode, this omission further buttressed the testimony of both Ms. Schuster and Ms. Fuchs. On balance, the Board disagrees with this submission. For one thing, these individuals were identified as Ms. Wright's nieces. This fact would necessarily require the Board to assess the witnesses' independence from the Employer and to weigh their testimony accordingly. As well, it would not appear that they were in any special position to provide testimony which the other witnesses failed, or were unable, to give, a factor which would give rise to this inference.[23]

3. Conclusion on LRB File No. 002-16

[122] The unfair labour practice application in LRB File No. 002-16 alleges the Employer breached subsection 6-62(1)(a) of the *SEA* by threatening these two (2) employees. The Board concludes that the evidence led by the Union respecting this application does not satisfy the burden resting upon it. The Board is unable to find that it is more likely than not that the alleged threat occurred. Accordingly, for these reasons LRB File No. 002-16 is dismissed in its entirety.

C. LRB File No. 035-16

[123] Between the video evidence and Mr. Weir's concession that the video fairly represented what took place in the hotel parking lot on February 12, 2016, the Board is left in no doubt that Union members and personnel were engaged in lawful leafleting on this day. The question is did they otherwise engage in conduct which would render their activities illegal? The Employer asserts that they did, they were trespassing on the Employers private property and by failing to exit when asked to do so, the leafleters broke the law. The Union insists that its

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paragraphs 77-81.

[23] See especially: *Murray v Saskatoon (City)*, *supra* n.23, at para. 13ff.

members were only exercising their rights in a manner consistent with the Supreme Court of Canada's directions in *United Food and Commercial Workers, Local 1518 v KMart Canada.*[24]

[124] In *KMart*, the Court concluded that in the context of a strike or lock-out, consumer leafletting was a constitutionally protected form of expression.[25] Cory J. who wrote for the Court distinguished consumer leafleting from picketing as follows at paragraphs 39, 40 and 43:

> *Picketing is an important form of expression in our society and one that is constitutionally protected. In B.C.G.E.U. Dickson C.J. held that picketing is an "essential component of a labour relations regime founded on the right to bargain collectively and to take collective action" (p. 230). Dickson C.J. referred to Harrison v. Carswell, [1976] 2 S.C.R. 200, where a majority of this Court stated at p. 219:*
>
> > *Society has long since acknowledged that a public interest is served by permitting union members to bring economic pressure to bear upon their respective employers through peaceful picketing. . . .*
>
> *There can be no doubt that picketing is an exercise of freedom of expression. Yet its trademark is the picket line, which has been described as a "signal" not to cross. Whatever may be its message, the picket line acts as a barrier. It impeded public access to goods or services, employees' access to their workplace and suppliers' access to the site of deliveries…*
> *. . . . . .*
>
> *Consumer leafleting is very different from a picket line. It seeks to persuade members of the public to take a certain course of action. It does so through informed and rational discourse which is the very essence of freedom of expression. Leafletting does not trigger the "signal" effect inherent in picket lines and it certainly does not have the same coercive component. It does not in any significant manner impeded access to or egress from premises. Although the enterprise which is the subject of the leaflet may experience some loss of revenue, that may very well result from the public being informed and persuaded by the leaflets not to support the enterprise. Consequently, the leafleting activity if properly conducted is not illegal at common law….*

[125] The facts giving rise to *KMart* are analogous to those in this case. There strikers were leafleting at secondary sites, namely KMart outlets owned and operated by the company against which employees were striking. The evidence indicated that the strikers were standing in close proximity to the entrances of those outlets and handing out leaflets outlining the reasons for their dispute with the employer. The Court noted that the "activity was carried out peacefully" and "did not impede public access to the stores"[26].

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[24] [1999] 2 SCR 1083 ["*KMart*"].
[25] *Ibid*., at para. 30 *per* Cory J.
[26] *Ibid*., at para. 4.

[126] Cory J. found that the leafleting at issue in *KMart* "conformed with the following conditions":

> *(i) the message conveyed by the leaflet was accurate, not defamatory or otherwise unlawful and did not entice people to commit unlawful or tortious acts;*
> *(ii) although the leafleting activity was carried out at neutral sites, the leaflet clearly stated that the dispute was with the primary employer only;*
> *(iii) the manner in which the leafleting was conducted was not coercive, intimidating, or otherwise unlawful or tortious;*
> *(iv) the activity did not involve a large number of people so as to create an atmosphere of intimidation;*
> *(v) the activity did not unduly impede access to or egress from the leafleted premises;*
> *(vi) the activity did not prevent employees of neutral sites from working and did not interfere with other contractual relations of suppliers to neutral sites.*[27]

[127] He concluded that such leafleting "constitute[d] a valid exercise of freedom of expression carried out by lawful means"[28]. As a result, it was constitutionally protected activity under section 2(*b*) of the *Canadian Charter of Rights and Freedoms*.

[128] In this case, the Employer asserts the leafleting that took place on February 12, 2016 in its parking lot fell outside this protection because the leafleters were effectively trespassing on its private property. The Board rejects this argument for three (3) reasons.

[129] First, unlike the leafleting at issue in *KMart* which took place at a secondary site, the Unit was leafleting at the Employer's primary place of business. Furthermore, it cannot be disputed that this parking lot was accessible to the general public without qualification. No evidence was lead that would indicate the parking lot was monitored regularly by the Employer and vehicles that the Employer disapproved of forcibly removed. Nor was there any evidence to indicate that individuals who parked their vehicles there were required to pay a fee or a toll to utilize the lot. Indeed, it appears that any member of the public could enter the parking lot at any time.

[130] Second, as the video evidence clearly demonstrates, the leafletting was peaceful. There was no attempt by the leafleters to intimidate or to block patrons from entering the hotel premises. In fact, the video shows that only one (1) patron leaving the hotel was asked if he

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[27] *Ibid*., at para. 58.

wanted a leaflet and, it appears, he declined. As well, there is no evidence that the leafleters in any way limited the Employer's access to or enjoyment of its' own property.[29]

[131] Together, these factors greatly erode the validity, if any, of the Employer's assertions that Union members were unlawfully trespassing onto its private property

[132] Third, and, perhaps, most significantly, it is clear to the Board that the Employer's actions represented a 'content-based' objection to the presence of the leafleters in the parking lot that day, and to the particular message which they wished to communicate to patrons of the Employer. As *KMart* aptly demonstrates, this is not a valid basis for removing leafleters from places accessible to the general public.

[133] As a consequence, the Board concludes that the actions of the Employer's hotel manager physically removing Union members who were lawfully leafleting amounted not only to an unfair labour practice but also a violation of the Union's rights guaranteed by section 2(*b*) of the *Charter*.

D. LRB File No. 044-16

[134] This application involved allegations by two (2) employees – Felipa Ramirez and Juny Tinoy – that they had been fired because they chose to join the picket line and not go to work. As outlined earlier, during final argument, counsel for the Union formally withdrew the unfair labour practice allegations involving Ms. Ramirez. Accordingly, the Board dismisses this particular aspect of LRB File No. 044-16.

[135] As a consequence, only the complaint brought on behalf of Mr. Tinoy was contested by the parties.

[136] The Board begins its assessment of this aspect of LRB File No. 044-16 by reiterating the legal burden borne by the Union. The Union must demonstrate with "sufficiently clear, convincing and cogent" evidence that it is more likely than not the Employer threatened or terminated Mr. Tinoy's employment because he chose to join the picket line.[30]

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[28] *Ibid*.
[29] See especially.: *R.W.D.S.U., Local 588 v Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 SCR 156, at para. 103.
[30] See: *FH v McDougal*, supra n. 7.

[137] After considering the testimony of the witnesses and the documentary evidence submitted at the hearing, the Board concludes that the Union failed to satisfy this standard. The evidence overwhelmingly demonstrates that the reason Mr. Tinoy did not return to work in February was because he over-stayed his vacation leave, and he knew it. It had nothing to do with his support for the strike or his intention to join the picket line which the evidence unequivocally shows he did not do until March 12, 2016, more than a month after he returned to Canada from the Philippines.

[138] Accordingly, for these reasons, the unfair labour practice application identified as LRB File No. 044-16 is dismissed in its entirety.

E. Conclusion on Unfair Labour Practice Applications

[139] For all of these reasons, the Board orders the following dispositions in these unfair labour practice applications:

- **LRB File No. 002-16** – Dismissed
- **LRB File No. 013-16** – Withdrawn
- **LRB File No. 029-16** – Withdrawn
- **LRB File No. 035-16** – Allowed
- **LRB File No. 044-16** – Dismissed.

[140] In addition, the Union withdrew its application objecting to the conduct of the vote on the final offer identified as **LRB File No. 088-16**.

REMEDIAL RELIEF IN LRB FILE NO. 035-16

A. Introduction and Relevant Subsequent Events

[141] The Board has found that the Employer committed an unfair labour practice within the meaning of subsection 6-62(1)(a) of the *SEA* in only one (1) of these applications, namely LRB 035-16. Typically, when crafting remedial relief in such circumstances the objective is to

return the parties, as much as possible, to the *status quo ante*. As the Board recently explained in *Moose Jaw Firefighters' Association Local 522*[31]:

> *It is well-established that when structuring a remedy, the Board's over-arching goal "is generally to place the parties into the position they would have been but for the commission of the unfair labour practice." This means the remedy crafted must seek to achieve "a labour relations purpose, that is, generally speaking, to insure collective bargaining and foster[] a good and long term relationship between the parties to the dispute."*

[142] However, the task of crafting an appropriate remedy in this matter is complicated in light of events which have transpired subsequent to the conclusion of this hearing. In May of this year, an application was commenced pursuant to subsection 6-17(2) of the *SEA* asking that a vote be conducted to cancel the existing certification Order.[32] The Board, in an Order dated May 20, 2016, directed that such a vote be held. Following its completion, the vote was counted and it revealed that a majority of the employees voted to rescind the certification Order. On August 20, 2016, the Board, in accordance with the result of this vote issued an Order rescinding the certification Order.

[143] Prior to crafting the appropriate remedy, the Board sets out relevant statutory provisions which inform the remedial aspect of this matter.

B. Relevant Statutory Provisions

[144] Relevant statutory provisions relating to remedial relief in this matter read as follows:

> ***6-104****(2) In addition to any other powers given to the board pursuant to this Part, the board may make orders:*
> *. . . . .*
> *(b) determining whether an unfair labour practice or a contravention of this Part, the regulations made pursuant to this Part or an order or decision of the board is being or has been engaged in;*
>
> *(c) requiring any person to do any of the following:*
> *(i) to refrain from contravening this Part, the regulations made pursuant to this Part or an order or decision of the board or from engaging in any unfair labour practice;*

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[31] *Supra* n. 6, at para. 140 quoting *City of Swift Current v International Association of Fire Fighters, Local 1318*, LRB File No. 008-14, 255 C.L.R.B. (2d) 32, 2014 CanLII 76050 (SK LRB), at para. 60. To similar effect, see also: *Regina Qu'Appelle Health Region*, *supra* n.18, at para. 107ff and the authorities cited there.

[32] See: *Mayer v United Food and Commercial Workers, Local 1400 and Best Western Seven Oaks Inn*, LRB File No. 102-16. The certification Order was issued on February 21, 2000, see: LRB File No. 327-99.

> *(ii) to do anything for the purpose of rectifying a contravention of this Part, the regulations made pursuant to this Part or an order or decision of the board is being or has been engaged in[.]*
>
> ***6-111****(1) With respect to any matter before it, the board has the power:*
> *. . . . . .*
> *(s) to require any person, union or employer to post and keep posted in a place determined by the board, or to send by any means that the board determines, any notice that the board considers necessary to bring to the attention of any employee.*

C Remedial Discussion and Disposition

[145] In light of the Board's Order rescinding the certification Order between these two (2) parties, there is no possibility that any future collective bargaining could take place between them. Consequently, any order the Board crafts in relation to the unfair labour practice application will be of symbolic value only. Nevertheless, the Board believes it is important to stipulate that on February 12, 2016, the Employer's hotel manager committed an unfair labour practice when he forcibly removed from the hotel's parking lot Union members who were lawfully engaged in leafleting. We, therefore, declare pursuant to subsection 6-104(2)(b) of the *SEA* that the Employer committed an unfair labour practice application.

[146] Further, the Board directs pursuant to subsection 6-111(1)(s) of the *SEA* that upon receipt of these Reasons for Decision, the Employer post a copy for a period of fourteen (14) days in a place in the workplace where the Employer normally posts notices to employees. In view of the recent rescission Order, the Board, nevertheless, is of the view that it is critical employees know that the Union achieved partial success in this matter, and the Board vindicated its members' right to leaflet during the strike. At the very least this will serve an important educational objective for all employees, especially those who supported the Union throughout this lengthy process.

[147] Accordingly, the Board makes the following Orders:

- **THAT** on February 12, 2016 the Employer committed an unfair labour practice in violation of subsection 6-62(1)(a) of the *SEA* when its' hotel manager forcibly removed from the hotel's parking lot Union members who were lawfully leafleting during a strike, and

- **THAT** upon receipt of the Reasons for Decision, the Employer post a copy of the Decision and the Board's Order for a period of fourteen (14) days in a place in the workplace where the Employer normally posts notices to employees.

[148] This is a unanimous decision of the Board.

DATED at Regina, Saskatchewan, this **7th** day of **October, 2016**.

LABOUR RELATIONS BOARD

Graeme G. Mitchell, Q.C.
Vice-Chairperson