July 7, 2017

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Attention: Mr. Thomas W.R. Ross

Gerrand Rath Johnson LLP
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400 – 1900 Albert Street
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Attention: Ms. Crystal Norbeck

Dear Ms. Norbeck and Mr. Ross:

Re: LRB File Nos. 119-17, 120-17 & 121-17 – International Brotherhood of Electrical Workers, Local 2038 v AECOM Production Services Ltd. – Unfair Labour Practice Application and Applications for Interim Relief

A. Introduction

[1] On June 16, 2017, the International Brotherhood of Electrical Workers, Local 2038 [Union], pursuant to section 6-104 of *The Saskatchewan Employment Act*, SS 2013, cS-15.1 [*SEA*], filed with this Board an application alleging that AECOM Production Services Ltd. [Employer] committed a series of unfair labour practices during an on-going organizing drive taking place at the Employer's worksite at the Boundary Dam Power Station located at, or in close proximity to, Estevan, Saskatchewan. This application is designated LRB File No. 119-17.

[2] Also on June 16, 2017, the Union filed two (2) applications for interim relief. The first application – LRB File No. 120-177 – was supported by the Affidavit of Christopher Unser; the Affidavit of Jamie Harvey, and the Affidavit of Joseph Lamha, all dated June 15, 2017. An Amended Application of Interim Relief was filed on June 20, 2017.

[3] The second application – LRB File No. 121-17 – was supported by the Affidavit of Jarred Mills dated June 16, 2017. An Amended Application for Interim Relief relating to this particular matter was subsequently filed on June 20, 2017.

[4] These two (2) applications for interim relief came before the Board comprised of Members John McCormick, Allan Parenteau and myself, as Vice-Chairperson, on June 29, 2017. The Union was represented by Ms. Crystal Norbeck. The Employer was represented by Mr. Thomas W.R. Ross. At the opening of the hearing, the Employer's Reply dated June 29, 2017 was received together with the supporting affidavit of Grant Doepker also dated June 29, 2017 [Doepker Affidavit]. Mr. Doepker is described in that affidavit as "a Project Coordinator and Acting Superintendent for a construction project on Boundary Dam in Estevan, Saskatchewan"[1]

[5] In the course of the hearing, the Board learned that a certification vote of eligible employees – including the employees whose terminations form the basis of the underlying Unfair Labour Practice application – had been ordered by the Board on June 22, 2017[2] and was still on-going. The Notice of Vote issued in this matter directed that mail-in ballots had to be received by the Board on or before July 7, 2017.

[6] At the conclusion of the formal hearing, the Board reserved its decision. In light of the fact that the certification vote had not yet been completed, and the necessity for a speedy resolution of these interim applications because of the nature of the industry involved, the Board determined that it would issue this letter decision.

[7] Accordingly, for reasons outlined below, the Board concludes that the Union's interim relief applications should be allowed in part.

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[1] Doepker Affidavit, at para. 1.
[2] See: Direction of Vote dated June 22, 2017, LRB File No. 111-17

B. Legal Principles Relevant to Applications for Interim Relief

[8] An oft-quoted and helpful summary of the relevant legal principles relating to applications for interim relief is found in *Saskatchewan Government and General Employee's Union v The Government of Saskatchewan*[3]. There the Board stated:

> *[30] Interim applications are utilized in exigent circumstances where intervention by the Board is thought to be necessary to prevent harm from occurring before an application pending before the Board can be heard. Because of time constraints, interim applications are typically determined on the basis of evidence filed by way of certified declarations and sworn affidavits without the benefit of oral evidence or cross-examination. As such, the Board is not in a position to make determinations based on disputed facts; nor is the Board able to assess the credibility of witnesses or weigh conflicting evidence. Because of these and other limitations inherent in the kind of expedited procedures used to consider interim applications, the Boards utilizes a two-part test to guide in its analysis: (1) whether the main application raises an arguable case of a potential violation under the Act; and (2) whether the balance of convenience favours the granting of interim injunctive relief pending a hearing on the merits of the main application.*
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> *[31] In the first part of the test, the Board is called upon to give consideration to the merits of the main application but, because of the nature of an interim application, we do not place too fine a distinction on the relative strengths or weakness of the applicant's case. Rather, the Board seeks only to assure itself that the main application raises, at least, an "arguable case".*
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> . . . . . .
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> *[32] The second part of the test – balance of convenience – is an adaption of the civil irreparable harm criteria to the labour relations arena….In determining whether or not the Board ought to grant interim relief prior to a full hearing on the merits of an application, we are called upon to consider various factors, including whether or not a sufficient sense of urgency exists to justify the desired remedy.*[4]

[9] At the hearing, counsel for the Employer conceded that the Union's factual assertions demonstrated an arguable case had been advanced. Suffice it to say, the Board agrees with his concession.

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[3] LRB File No. 150-10, 2010 CanLII 36502 (SK LRB)
[4] *Ibid*., at paras. 30, 31 and 32. (Citations omitted.)

[10] As a consequence, the argument at the hearing focused on whether the second part of the test – the balance of convenience – favoured granting the Union's request of interim relief. The Board turns to consider this question now.

C. Does the Balance of Convenience Favour the Issuance of an Interim Relief Order?

1. The Test to Be Applied

[11] The second part of the test for interim relief is analogous to the test for injunctive relief utilized by superior courts in the civil context. Recently, in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Aaron's Furniture*[5] [*Aaron's Furniture*], for example, the Board summarized this inquiry as follows at para. 26:

> *[26] This factor [i.e. balance of convenience] is similar to the requirement that an applicant for interim relief must show that the labour relations harm in not issuing the interim order outweigh the labour relations harm in issuance of the requested order. At common law, this is generally regarded as the requirement to show irreparable harm if the interim order is not made.*

2. Positions of the Parties

2.1 The Union's Position

[12] The Union's principal argument is that it will suffer serious, if not irreparable, labour relations harm if these applications for interim relief are not granted. The basis of the underlying Unfair Labour Practice application is the connection, if any, between the Employer's termination of six (6) employees, and the Union's organizing drive and certification application[6]. Five (5) of the employees – Larry Flett, Yi Ting Liu (also known as "Tom"), Si Yu Liu (also known as "Tony"), Jamie Harvey, and Joseph Lamha – were members of the Union. These employees were the only Union members employed at the Employer's worksite.

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[5] 2016 CanLII 1307, 282 CLRBR (2d) 281 (SK LRB)
[6] The Union's formal application for bargaining rights was filed with this Board on June 12, 2017. See: LRB File No. 111-17.

[13] The sixth employee – Jarred Mills – although not a Union member was an active and vocal supporter of the Union's organizing drive at the worksite.

[14] The Union asserts that the five (5) union members were all laid off on June 13, 2017, the day after the Union's certification application was filed with the Board. Two (2) days later, on June 15, 2017, Mr. Mills was also laid off.

[15] Since those lay-offs occurred, the Employer has not terminated any other employees.

[16] The Union asserts that the termination of its members – the only union members employed at the worksite – together with one of the strongest most active supporters of its organizing drive has had a significant chilling effect on its efforts to unionize the Employer's workforce. To underscore this argument, the Union excerpted a text-message to Mr. Christopher Unser from an unidentified union member[7]. In part, it reads as follows:

> *Hey Chris. I heard they let go of six union guys today. Now your ballots will be down. I'd like to suggest cancelling the whole application asap. Aecom said they are going to lay off another 6 tomorrow. They have a good idea who signed. Everyone who signed did not know that the employer needs three days to give the list. We all knew that we are not past our probation and they can get rid of all of us in less than three days. I'm not sure how anyone thought this thing would even have a chance. But they are going to keep laying guys off till they get voters low enough to win the vote. So if you can cancel and tell them we are no longer voting for unionization, then some of us who were doing this thing for you will still have our jobs.*

[17] The Union accepts it may not be possible to wholly undo the damage which has flowed from the Employer's actions, but it contends that it may yet be possible to staunch it, should this Board grant the interim relief the Union requests. As set out at paragraph 38 of the Union's Brief of Law on Interim Application, it is asking this Board to issue the following remedial orders:

[7] Affidavit of Christopher Unser dated June 16, 2017, Exhibit 'A".

> *a. Reinstatement of the 6 employees laid off and full back pay and any benefits they would have otherwise been entitled to since the date of layoff to the date of return to work;*
> *b. Access to the workplace for a meeting with employees who choose to attend, during a regularly scheduled break, as soon as possible and within 3 days of the date of the Order;*
> *c. That the Order and Reasons given by this Honourable Board be posted in a conspicuous location in the workplace (lunch trailer, for example);*
> *d. Reissuance of the Notice to Vote and Direction to vote to allow those employees who voted already to vote again; and,*
> *e. Such further and other relief as this Honourable Board deems just.*

[18] In support of its position, the Union relies upon a number of decisions from this Board, and other Canadian boards, most especially: *SEIU West v Revera Retirement Genpar Inc*[8]; *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Sakundiak Equipment* [9] [*Sakundiak*]; *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service Workers International Union (United Steelworkers) v Evraz Wasco Pipe Protection Corporation* [10] [*Evraz Wasco*], and *Amalgamated Transit Union, Local 1624 v Coach Canada, c.o.b. Trentway-Wagar Inc.*[11]

2.2 The Employer's Position

[19] The Employer submits that contrary to the Union's assertions the lay-offs were dictated solely by the client's needs at the time. Counsel for the Employer pointed to the Doepker Affidavit. In particular, he refers to paragraphs 37 and 38 which stipulate as follows:

> *27. On Monday June 12, I discussed the layoffs with Chad Stolte, the Project Manager to whom I report. He attended the site on June 13 because he wanted to ensure that he agreed layoffs were warranted. After reviewing the matter, he agreed to the layoff of 5 employees. The last time Chad Stolte had been on site was May 25, not May 10 as stated in paragraph 34 of the Unfair Labour Practice Application.*
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> *28. After the layoffs had been decided and generally communicated to employees on the morning of Monday, June 12, 2017, but before the individual employees were notified of their layoffs, I was contacted by*

[8] 2011 CanLII 75835 (SK LRB)
[9] 2011 CanLII 75157, 200 CLRBR (2d) 179 (SK LRB)
[10] 2016 CanLII 98635 (SK LRB)
[11] 2000 CIRB 57 (CanLII)

> *Fred Bayer of the Saskatchewan Labour Relations Board in the late afternoon of June 12 to inform me of a certification application filed by the IBEW Local 2038. This conversation is confirmed by my notes at Exhibit "B". There was no connection between the decision to layoff and the certification application. I was not aware that any certification application had been or might be filed prior to being contacted by Mr. Bayer.*

[20] The Employer explained that it is currently undertaking two (2) projects at the Boundary Dam site for its client, SaskPower. The first is the Carbon Capture System Instrument Installation. This project involves construction work installing electrical and gas detection in a new building and it is anticipated that this work will last for approximately four (4) months.[12]

[21] The second project is the "Old Plant Side". It involves an emergency generator upgrade, and it is anticipated it will be completed sometime in July. [13]

[22] The Employer emphasized that because the work schedule at these project sites was fluid and the workforce transient, lay-offs were inevitable. Employees could not expect, and were not guaranteed, continuous work during the life of these projects. Moreover, the Employer explained that the projects were two (2) different projects and when a phase of the work was completed on one, the skill sets of those workers were not necessarily transferrable to the other project.

[23] The Employer argued that the six (6) individuals who were laid off were difficult employees for different reasons. Indeed, in his affidavit, Mr. Doepker stipulated that the "crew has been running more effectively since the layoffs occurred"[14]. When questioned by the Board as to the implications of this assertion, counsel for the Employer indicated that the employees had been disruptive, and with their departures work on the two (2) projects was progressing far more smoothly. He went on to emphasize that should the Board order the reinstatement of these employees, it "would negatively impact the Employer".

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[12] Doepker Affidavit, at paras. 4 and 5.
[13] *Ibid*., at para. 6.
[14] *Ibid*., at para. 37.

[24] The Employer explained that two (2) of the laid off employees – Si Yu Liu (also known as Tony), and Yi Ting Liu (also known as Tim) – had difficulties with English, and this reality allegedly created communication problems, not to mention safety concerns, at the worksite. Furthermore, the Employer had issued a reprimand and a Non-Conformance Report had been issued against Tony on May 31, 2017 for leaving an open hole exposed when he went for coffee.[15]

[25] The three (3) other employees who were also Union members – Larry Flett, Joe Lamha, and Jamie Harvie – were released for a variety of unspecified performance and attitudinal issues. However, from the evidence presented at the hearing, it appears the Employer did not issue any reprimand or Non-Conformance Reports to any of these men prior to their layoffs.

[26] Shortly before his termination, the sixth individual – Jared Mills – was moved from the Cabon Capture System project site to the Old Plant Side. The Employer explained Mr. Doepker had moved Mr. Mills to this site to complete some "cable pulling work" because he had experience in that area. However, once this work was completed, Mr. Mill was let go.[16]

[27] The Employer agreed with the Union's position that the timing of events leading up to the layoffs is important for purposes of resolving these interim applications. However, he disagreed with her assessment of what this chronology disclosed. In his submission, it demonstrated that the terminations of these individuals, at least the five (5) Union members, had been decided and took place before Mr. Doepker learned that the Union had filed a certification application with this Board.

[28] Counsel for the Employer pointed to Exhibit "B" of the Doepker Affidavit. This was a copy of Mr. Doepker's personal handwritten notes from his day planner for June 12, 2017. In particular, he drew the Board's attention to an entry purported to have been made at 8:30 a.m. It listed the names of certain employees who were targeted for lay-off

[15] *Ibid*., at para. 22, and Exhibit "C".
[16] *Ibid*., at para. 29.

later that day. At least four (4) of the employees named there – "Tony", "Tim", "Joe" and "Jason" – were subsequently laid off.

[29] Counsel further directed the Board's attention to the following entries for that same day:

- "4:50 – received call from Fred Bayer from Sask Labor Relations – IBEW 2038 submitted application to represent AECOM employees", and
- "5:20 – received email from Fred Bayer re: above – sent to Chad & Kevin"

[30] He submitted that the chronology of these events as revealed in Mr. Deopker's day planner seriously undermined the Union's arguments that these individuals were targeted for layoffs because they were either already Union members or active supporters of the Union's organizing drive.

[31] Moving from a discussion of the facts, the Employer submitted that the Union's request for interim relief should be dismissed principally for three (3) reasons. First, it submitted that the Union had failed to satisfy its burden of proof. Counsel for the Employer urged the Board to accept as accurate the facts as advanced by his client. He submitted they demonstrated these six (6) employees were terminated for legitimate reasons wholly unrelated to their membership in, or active support for, the Union.

[32] Second, the Employer submits that any harm which these individuals, or the Union, may have suffered because of the layoffs is wholly compensable in damages should this Board determine that at the end of the day the layoffs were illegitimate. Yet, an Order directing the Employer to reinstate them now would result in serious unfairness to the Employer and, arguably, to its current employees. For one thing, the Employer asserted it likely would have to lay off six (6) other employees to find places for the reinstated workers. For another, should the Employer be successful in its defence against the Unfair Labour Practice application, it would be unable to recoup the monies paid to these employees in accordance with this Board's interim award.

[33] Third, the Employer submits that should this Board grant the Union the interim relief it is seeking, this would be tantamount to giving the Union most, if not all, of the relief it seeks on the main application. Such a result, the Employer argues, would be contrary to prior Decisions of this Board including *UNIFOR, Local 609 v Health Sciences Association of Saskatchewan* [17] [*Health Sciences*], and *Retail, Wholesale and Department Store Union, Local 455 v Tai Wan Pork Inc.*[18][*Tai Wan Pork*].

[34] In addition to these two authorities, the Employer also relied upon the following authorities in support of its position: *Aaron's Furniture*[19]; *International Brotherhood of Electrical Workers, Local 2038 v JLB Electric Ltd.*[20] [*JLB Electric*], and *Canadian Union of Public Employees v City of Warman*[21] [*Warman (City)*].

3. Analysis and Decision on the Arguable Case Issue

3.1 General Legal Principles

[35] In its Unfair Labour Practice application, the Union invokes a number of provisions of the *SEA*.[22] However, for purposes of these interim applications, subsection 6-62(1)(g) is the most relevant. It reads as follows:

> *6-62(1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer to do the following:*
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> . . . . .
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> *(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 or termination or suspension of an employee, with a view to encouraging or discouraging membership in any activity in or for or selection of a labour organization or participation of any kind in a proceeding pursuant to this Part[.]*

[36] This provision which is the successor to subsection 11(1)(e) of *The Trade Union Act*, RSS 1978, cT-17 [*TUA*], prohibits employers from using coercion or intimidation and

[17] 2016 CanLII 74279; [2016] CarswellSask 597 (SK LRB)
[18] LRB File No. 076-00, [2000] SLRBD No. 21
[19] *Supra* n. 5.
[20] 2015 CanLII 90527 (SK LRB)
[21] LRB File No. 013-17 dated February 15, 2017.
[22] See: LRB File No. 119-17, at para. 4. The sections of the *SEA* invoked there are subsections 6-62(a)(b)(g)(h)(i).

from discriminating in the treatment of its employees because of their support for a union, because of their desire to be unionized or because they are exercising a right granted under the *SEA*.[23]

[37] In *Sakundiak*[24], the Board referenced its earlier decision in *Saskatchewan Government Employees Union v Regina Native Youth and Community Services Inc.*,[25] [*Regina Native Youth*]. In *Regina Native Youth*[26], former Chairperson Bilson explained the policy rationale underlying subsection 11(1)(e) as follows:[27]:

> *It is clear from the terms of Section 11(1)(e) of The Trade Union 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.*
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> *This Board has held employers to a stringent standard in this regard. It is highly unlikely that an employer will confess to anti-union sentiment as one of the grounds for discharge in the first instance, and the Board must look beyond the rationale which provided when the announcement of termination is made.*
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> *. . . . .*
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> *In determining whether an employer is able to meet the difficult test of showing that activity in support of a trade union was not a factor in a decision to terminate the employment of an employee, the Board has considered a wide range of factors, including the involvement of the employee in trade union activity, the knowledge the employer had of the activity, other conduct of the employer which might betray anti-union feeling, the timing of the decision, and various other considerations. In this respect, it is not the task of the Board to decide whether there was just cause for the termination. In The Newspaper Guild v The Leader Post decision [LRB File Nos. 251-93, 252-93 & 253-93] the Board made this point:*
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> > *For our purposes, however, the motivation of the Employer is the central issue, and in this connection the credibility and*

[23] See: *Health Sciences*, *supra* n. 17, at para. 51.
[24] *Supra* n. 9.
[25] [1995] 1st Quarter Sask. Labour Rep. 118,LRB File Nos. 144-94, 159-94 & 160-94.
[26] *Ibid*.
[27] *Ibid*., at 123-24, and 125.

> *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 Trade Union Act coincide. The strength or weakness of the case an employer offers in defence of the termination is one indicator of whether union activity may also have entered the mind of the Employer.*

[38] The Board recognizes that the foregoing comments from *Regina Native Youth* were made in the context of a final decision in an unfair labour practice application, and the reverse onus referenced in this passage does not operate on an application for interim relief. Nevertheless, this statement of the law remains relevant on this application.

[39] Furthermore, as the Board observed in *Evraz Wasco*[28] employer retaliation for union activity triggers the application of the *Canadian Charter of Rights and Freedoms* [*Charter*]. There the Board stated:

> *The statutory protection from employer retaliation for union activity conducted by its employees now has a constitutional dimension. In Mounted Police Association v Canada (Attorney General), [2015] 1 SCR 3, 2015 SCC 1, the Supreme Court of Canada held that union organizing was a constitutionally protected activity under section 2(d) of the Charter which guarantees to everyone the fundamental freedom of association. Speaking for the majority, McLachlin C.J. and LeBel J. stated at paragraph 66:*
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> > *[66] In summary, s.2(d) viewed purposively, protects three classes of activities: (1) right to join with others and form associations; (2) the right to join with others in the pursuit of other constitutional rights; and (3) the right to join with others to meet on more equal terms the power and strength of other groups or entities. [Emphasis added.]*

[28] *Supra* n. 10.

3.2 Application of the Balance of Convenience Test

[40] After reviewing the evidence, and counsels' submissions – both written and oral – which were of great assistance to us, the Board has concluded that its early intervention in this dispute is warranted. Accordingly, for the following reasons, we grant the Union's application for interim relief in part.

[41] It is our considered view that of all the authorities cited to us, the facts of this case most closely parallel those in *Evraz Wasco*[29]. Like *Evraz Wasco*, these applications arise in the context of a workplace in which an organizing drive has taken place and a certification vote is on-going. Indeed, the following comments of the Board in that case are apposite here[30]:

> *[67] The issue in this case does not arise in the context of a unionized workplace where a union has been active over a period of time. Here an organization drive has just concluded and a representative vote is currently underway. It is apparent that the general trend in the Board's jurisprudence is to ensure that such a vote is conducted fairly and where an employee is terminated at such a critical time the Union suffers labour relations harm which interim relief will be needed to staunch.*
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> *[67] The labour relations harm to the Employer should Ms. Findlay [the terminated employee] be reinstated must be balanced against the potential labour relations harm to the Union in the course of its union drive and the subsequent representative vote. That balance, in most cases, should be resolve in favour of the Union as to give full effect to employees' rights under subsection 6-4 of the SEA and section 2(d) of the Charter to "organize in and to form, join, or assist union sand to engage in collective bargaining through a union of their own choosing". In this case, the Board is of the view that this balance of labour relations harm favours the Union and Ms. Findlay.*

[42] Indeed, the Board finds the facts of this case more compelling for the granting of interim relief than *Evraz Wasco*, for the following reasons.

[43] First, five (5) of the six (6) workers laid off by the Employer were Union members. They were the only Union members employed at the Employer's worksite. Moreover,

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[29] *Ibid*.
[30] *Ibid*., at paras. 67-68.

since the lay-offs of these six (6) individuals, the evidence presented at the hearing did not disclose that the Employer had subsequently terminated any other employees.

[44] Second, the juxtaposition of these lay-offs and the filing of the Union's certification application raise suspicions the Employer had an ulterior motive in terminating these particular workers. The Employer took pains to demonstrate that Mr. Doepker had already identified some of the Union members for lay-off prior to learning the Union had filed a certification application with this Board. Yet, the evidence presented at the hearing disclosed that the lay-offs in question took place the following day, after Mr. Doepker learned about the Union's certification application from this Board's Registrar, and after he had alerted his superiors to it. Furthermore, the affected workers included an additional Union member – Larry Flett – who originally had not been identified in the list of workers included in Mr. Doepker's day planner.[31]

[45] Third, it is true that one (1) of the workers – Si Yu Liu ("Tony") – had been reprimanded; however, this reprimand occurred a few weeks before his lay-off. Yet, despite this one (1) incident, the Employer continued to employ Tony at the worksite, apparently without further incident. Furthermore, his misconduct would appear to be far less egregious than the insubordination and serious breach of occupational health and safety standards allegedly committed by the reinstated worker in *Evraz Wasco*.

[46] Fourth, although the Board heard counsel for the Employer identify unsatisfactory work performance as the reason the other workers were terminated, no evidence was presented at the hearing to demonstrate that the Employer had formally complained to, let alone reprimanded, these individuals about performance issues.

[47] Fifth, the labour relations harm about which the Union is most concerned relates to voter suppression. By removing these particular individuals from the worksite, individuals whose allegiance to the Union may be presumed, support for Union would more likely than not fall. Those workers who remained would be understandably wary of supporting unionization, a reality evidenced by the text-message received by Mr. Unser

[31] Doepker Affidavit, Exhibit "B".

the Union's Membership Development Representative.[32] This exemplifies the "chilling effect" which the Union claims the remaining workers experienced as a consequence of these lay-offs.

[48] Sixth, the workplace involved in this matter is of short duration. The evidence presented to the Board indicated that these projects would only last a few months, at most. In the Board's view, the time constraints this reality placed upon the Union's efforts to organize the workforce at this job site exacerbates the labour relations harm that flows to the Union in this matter. This fact distinguishes this matter from cases such as *JBL Electric*[33] and *Warman (City)*[34] that involved stable workplace environments in which a failed certification drive did not entirely undermine a union's ability to again attempt to organize at the workplace.

[49] Seventh, the Board recognizes that if the terminated workers are re-instated the Employer will suffer monetary consequences, a factor that must be taken into account when balancing the interests of the Union and the Employer. However, as the Board concluded in *Canadian Union of Public Employees, Local 4973 v Welfare Rights Centre*[35], although "the harm to the Employer is financial and administrative…on a strict analysis of labour relations harm, the Board is satisfied that the labour relations harm to the Union outweighs the labour relations harm to the Employer."[36]

[50] Accordingly, these considerations have persuaded the Board that the terminations of the five (5) Union members, namely: Larry Flett, Yi Ting Liu (also known as "Tom"), Si Yu Liu (also known as "Tony"), Jamie Harvey, and Joseph Lamha, must be set aside, and these individuals reinstated immediately.

[51] That said, the Board finds that the Union has failed to persuade us that the laying-off of Jared Mills, an active supporter of the Union's organizing drive, was unwarranted. For purposes of these interim applications, the Board accepts the

[32] Unser Affidavit, "Exhibit 'A".
[33] *Supra* n. 20.
[34] *Supra* n. 21.
[35] LRB File No. 083-10, 2010 CanLII42668 (SK LRB)
[36] *Ibid*., at para. 21.

Employer's submissions that work for Mr. Mills had come to an end, and he was laid off because of work shortage, and not his union activities. To be sure, these assertions have not been tested at a full hearing in which the Board would have the opportunity to observe the witnesses testify and to assess their credibility. However, for now the Board declines to order Mr. Mill's reinstatement.

[53] The Union also asked the Board to consider re-issuing the Notice to Vote and the Direction to Vote in this matter. However, and with commendable candour, counsel for the Union indicated she could find no prior precedent where such an Order had been made.

[54] The Board is not prepared to make such an Order on an interim relief application for in our view it would be premature to do so at this time. Barring exceptional circumstances, if an Order like this is appropriate it should only be made following a full hearing on merits of an underlying unfair labour practice application. No such circumstances exist here.

[55] Finally, at the conclusion of the hearing, the Board canvassed with counsel what, if anything, they wished us to do about the vote once the date for the return of the mail in ballots expired. Counsel were agreed that the Board should make no direction about the vote. Accordingly, this matter is reserved to the Board that hears the Unfair Labour Practice application.

D. Conclusion and Order of the Board

[56] For the foregoing reasons, the Board makes the following Interim Orders pursuant to subsections 6-103(2)(d) and 6-111(1)(s) of the *SEA*:

(1) That within forty-eight (48) hours of receipt of the Board's Reasons for Decision and Order, the Employer shall reinstate with back pay and other benefits owing to them the following individuals: Larry Flett, Yi Ting Liu (also known as "Tom"), Si Yu Liu (also known as "Tony"), Jamie Harvey,

and Joseph Lamha. This Order shall remain in effect until either the final determination in LRB File No. 119-17 or the Employer's work at the projects in question is completed whichever occurs first;

(2) That as soon as possible and in event no later than five (5) days from receipt of the Board's Reasons for Decision and Order, the Employer shall provide workplace access to Union representatives to meet with those employees who choose to attend during a regularly scheduled break;

(3) That within forty-eight (48) hours of receipt of the Board's Reasons for Decision and Order, the Employer shall post a copy of the Order and the Reasons for Decision in the workplace in a location where the documents will be visible and can be read by as many employees as possible, such posting to remain until the final determination of the Union's Unfair Labour Practice Application, LRB File No. 119-17;

(4) That in all other aspects, the Union's applications for interim relief are dismissed, and

(5) That with respect to paragraphs 1, 2 and 3 above, this panel of the Board shall remain seized but is not seized with respect to LRB File No. 119-17.

[57] An appropriate Board Order will accompany these Reasons for Decision.

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

Yours very truly,

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