INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 2038, Applicant v ACTIVE ELECTRIC LTD., Respondent

LRB File No. 008-18; March 8, 2018

Vice-Chairperson, Graeme G. Mitchell, Q.C.; Members: John McCormick and Steven Seiferling

For the Applicant Union: Crystal Norbeck
For the Respondent Employer: Daniel Sikakane

Interim Application – Unfair Labour Practice – Employer laid-off eight (8) employees during the initial stages of the Union's certification drive – Seven (7) employees were Union members and the eighth was a Union supporter – Employer asserted these employees were laid-off during their probationary period for poor performance.

Interim Application – Arguable Case – Board reviews evidence and concludes the Union demonstrated an arguable case that the Employer committed an unfair labour practice.

Interim Application – Balance of Convenience – Board reviews the case law respecting termination of Union supporters or members during an organizational drive – Board determines that the Employer terminated six (6) employees because of their support of the Union – Board concludes the labour relations harm to the Union outweighs the labour relations harm to the Employee if these employees reinstated. Board concludes the lay-offs of the two (2) other employees was legitimate.

Interim Application – Remedy – Board orders that the lay-offs of six (6) employees be set aside and those employees re-instated.

Interim Application – Practice and Procedure – Employer sought leave to file additional Affidavit material after the hearing concluded – Affidavit related to post-hearing events – Board declined to receive this affidavit – Board determined that it is not appropriate on an interim application to receive further evidence following the conclusion of the hearing.

REASONS FOR DECISION

OVERVIEW

[1] **Graeme G. Mitchell, Q.C., Vice-Chairperson:** On January 8, 2018, 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 Active Electric Ltd. [Employer] committed a series of unfair labour practices during an on-going organizing drive of workers in its employ. This unfair labour practice application is designated as LRB File No. 007-18.

[2] On January 9, 2018, the Union filed this application for interim relief. This application – LRB File No. 008-18 – was supported by nine (9) affidavits: (1) Affidavit of Christopher Unser dated January 5, 2018 [Unser Affidavit]; (2) Affidavit of Jordan Schneider dated January 3, 2018 [Schneider Affidavit]; (3) Affidavit of Calvin Stengler dated January 5, 2018 [Stengler Affidavit]; (4) Affidavit of Nathan Eckert dated January 5, 2018 [Eckert Affidavit]; (5) Affidavit of Colby Graff dated January 5, 2018 [Graff Affidavit]; (6) Affidavit of Lucas Biram dated January 5, 2018 [Biram Affidavit] ; (7) Affidavit of Nathan Labelle dated January 8, 2018 [Labelle Affidavit]; (8) Affidavit of Nicole Bryksa dated January 8, 2018 [Bryska Affidavit], and (9) Affidavit of Colin Stead dated January 5, 2018 [Stead Affidavit].

[3] Succinctly put, the Union asserts that the Employer terminated eight (8) employees between January 2, 2018 and January 4, 2018 because of their involvement in an on-going organization drive either as union members or union supporters. As a result, the Union seeks the reinstatement of these individuals until completion of the project for which they were initially hired or January 31, 2018 whichever occurred first.

[4] In response, the Employer filed one (1) Affidavit: Reply Affidavit of Brad Ross dated January 12, 2018 [Ross Affidavit]. Mr. Ross deposed that in addition to owning Active Electric Ltd, the Employer in this matter, he is the President of Electrical Contractors Regina; a member of the Board of Directors of the Electrical Contractors Association of Saskatchewan, a member of SaskPowers' Tech Committee, and of the Saskatchewan Construction Association. He also acknowledged that he was a former member of the Union.[1]

[1] Ross Affidavit, at para. 2.

[5] The Employer contests the Union's allegations. It asserts that the employees whom the Union alleges were improperly laid off were terminated for legitimate reasons unrelated to their union activities. In its supporting Affidavit, the Employer sets out its rationale for why it laid off the particular employees named in the Union's application. None of these explanations relate to the employee's alleged union activity.

[6] For reasons that follow, the Board concludes that the Union's application for interim relief should be allowed in part.

RELEVANT STATUTORY PROVISIONS

[7] For purposes of the Union's application for interim relief, the following statutory provisions are relevant:

> ***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.*
>
> *(2) No employee shall unreasonably be denied membership in a union.*
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> ***6-5*** *No person shall use coercion or intimidation of any kind that could reasonably have the effect of compelling or inducing a person to become or to refrain from becoming or to continue to be or to cease to be a member of a union.*
>
> ***6-6****(1) No person shall do any of the things mentioned in subsection (2) against another person:*
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> *. . . . . .*
>
> *(c) because the person has made an application, filed a complaint or otherwise exercised a right conferred pursuant to this Part[.]*
>
> *(2) In the circumstances mentioned in subsection (1), no person shall do any of the following:*
> *(a) refuse to employ or refuse to continue to employ a person;*
> *(b) threaten termination of employment or otherwise threaten a person[.]*
>
> ***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:*
> *(a) subject to subsection (2), to interfere with, restrain, intimidate, threaten, or coerce an employee in the exercise of any right conferred by this Part;*
> *(b) subject to subsection (3), to discriminate respecting or interfere with the formation or administration of any labour organization or to contribute financial or other support to it;*
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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[.]

(h) to require as an condition of employment that any person shall abstain from joining or assisting or being active in any union or from exercising any right provided by this Part, except as permitted by this Part;

(i) to interfere in the selection of a union

. . . . .

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

(3) Clause 1(b) does not prohibit an employer from:
(a) permitting representatives of a union to confer with the employer for the purpose of collective bargaining or attending to the business of a union without deductions from wages or loss of time while so occupied; or
(b) agreeing with any union for the use of notice boards and of the employer's premises for the purposes of the union.

(4) For the purposes of clause 1(g), there is a presumption in favour of an employee that the employee was terminated or suspended contrary to this Part if:
(a) an employer or person acting on behalf of the employer terminates or suspends an employee from employment; and
(b) it is shown to the satisfaction of the board or the court that employees of the employer or any of them had exercised or were exercising or attempting to exercise a right pursuant to this Part.

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

. . . . . .

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 on 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:

. . . . .

(d) make an interim order or decision pending the making of a final order or decision.

PRE-CONDITITIONS TO APPLYING FOR INTERIM RELIEF

[8] This Board's jurisprudence is settled, there are two (2) pre-requisites which must be satisfied before the Board will adjudicate an application for interim relief brought pursuant to clause 6-103(2)(d) of the *SEA*. First, the applicant must have filed an underlying application with the Board. In this case, this pre-requisite is met for as already noted, the Union filed an unfair labour practice application on January 8, 2018.

[9] Second, a party seeking interim relief – in this case the Union – must serve and file a formal application for interim relief as well as affidavits supporting the application. The Union has also satisfied this pre-condition by filing the Affidavits identified in paragraph 2 above.

[10] The Employer filed its Reply to the Union's application for interim relief on January 15, 2018. In support of its Reply, as already noted, the Employer filed the Affidavit of Brad Ross, also dated January 15, 2018.

[11] On January 17, 2018, after the conclusion of the hearing, the Employer sought to introduce into evidence a second Affidavit deposed by the Employer's Office Administrator. This Affidavit included information about events that occurred subsequent to the hearing, and most certainly, subsequent to the events forming the basis of the Union's application for interim relief.

[12] The Board reviewed it and, through its Registrar, solicited the views of counsel as to whether it should be admitted. After consideration, we determined that it should not. The objective of an application for interim relief is to obtain a timely ruling from this Board based on the best evidence available at the time of the hearing itself. In the Board's view, it would defeat the purpose of such a procedure were we to allow a party to augment evidence it presented at the hearing, by submitting after-the-fact affidavits attesting to events that occurred following the completion of that hearing.[2]

APPLICATION FOR INTERIM RELIEF

A. Relevant Legal Principles

[13] An excellent summary of the general principles respecting applications for interim relief brought pursuant to clause 6-103(2)(d) of the *SEA* is found in *Saskatchewan Government and General Employees' Union v The Government of Saskatchewan*[3] [*SGEU*] at paragraphs 30 – 32 as follows:

> *[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*

[2] See also: *Unifor v Kennedy House Youth Services Inc.* (2017), 299 CLRBR (2d) 135 (ON LRB) [*Kennedy House Youth Services*], at paras. 38-41.
[3] LRB File No. 189-10, 2010 CanLII 81339 (SK LRB). It is now settled that this Board's jurisprudence under the former *Trade Union Act*, RSS 1978, c T-17 is applicable to the revised provisions found in the *SEA*. See: *Saskatoon (City) v Amalgamated Transit Union*, 2014 CanLII 633994, 251 CLRBR (2d) 57 (SK LRB)

> *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. [Citations omitted.]*

B. Onus

[14] In applications such as this one, the onus rests upon an applicant.[4] As well, it is settled the reverse onus created in subsection 6-62(4) that operates in unfair labour practice applications such as this one is not relevant on an interim relief application.[5]

C. Factual Background

[15] The following summary of the factual background is gleaned from the various Affidavits filed at the hearing of the application for interim relief. It does not purport to be an exhaustive review of all the information contained in those voluminous Affidavits.

[16] In October 2017, the Employer was awarded a contract with SaskPower to assist that company in a project identified as the Metering Inspection Program [Project]. It was anticipated that this project would continue "until approximately the end of January 2018, at the

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[4] *UNIFOR, Local 609 v Health Sciences Association of Saskatchewan*, LRB File No. 189-16, 2016 CarswellSask 597, 2016 CanLII 74279 (SK LRB), at para. 34 [*Health Services*]

[5] See especially: *International Union of Bricklayers and Allied Craftsmen, Local #1 Sask, v Regal Flooring Ltd.*, LRB File No. 175-96, [1996] S.L.R.B.D. No. 61, at para. 21.

latest March 2018"[6]. Mr. Ross deposed that the contract with SaskPower contemplated that he would hire approximately an addition 15 temporary staff members, nine (9) of whom would be Journeyperson electricians, and six (6) Apprentice electricians.

[17] The Employer did hire those 15 electricians on a fixed term basis, and commenced work on the Project on or about October 23, 2017. However, the Employer soon realized that it had underestimated how much work needed to be done, and the number of electricians it required to complete that work. Mr. Ross deposed that as a result of this increased demand, the Employer hired an additional 19 fixed term electricians.

[18] To illustrate the increase in the Employer's work load, and how it attempted to cope with it, Mr. Ross deposed as follows:

> *16. At the end of October, we were billing out approximately 600 hours per week. At the end of December, we were billing out approximately 1300 hours per week, with an active crew of about 35 electricians. During this time, I continued to hire more electricians as the demand continued to increase.*
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> *17. At the height of the [Metering Inspection Program] my company was employing a total of 53 staff, 36 of which were electricians, which also required the purchasing of 15 additional vehicles and the borrowing of two more to accommodate the temporary work crews as well as my full-time employees, all to fulfill the [SaskPower Contract].*[7]

[19] The employees whose terminations lie at the heart of the Union's unfair labour practice application, and its' application for interim relief, are identified below as well as the dates when they commenced work for the Employer:

- Colby Graff – October 26, 2017
- Nicole Bryska – November 6, 2017
- Nathan Labelle – December 4, 2017
- Nathan Eckert – December 11, 2017
- Calvin Stengler – December 18, 2017
- Colin Stead – December 18, 2017
- Jordan Schneider – December 18, 2017
- Lucas Biram – December 18, 2017

[6] Ross Affidavit, at para. 7.
[7] *Ibid*., at paras. 16 -17.

[20] The evidence was undisputed that these individuals, except for Nicole Bryska, were, at all times relevant to this application, Union members in good standing. In addition, at all relevant times to this application, Messrs. Graff, Eckert, Stengler, Stead and Birnam were all Journeyman Electricians. Mr. Labelle was a 4th Level apprentice electrician.

[21] Although Ms. Bryska was not a Union member, she had been identified as an employee interested in the Union, and a supporter of the Union's organizing drive at the Employer's workplace.[8] At all times relevant to this application, Ms. Bryska was also a Journeyman Electrician.

[22] All of these employees deposed that when they were hired there was a considerable amount of work to be performed. They stated that when they all left work on December 21, 2017, for the Christmas hiatus they expected to return to work on January 2, 2018 in order to complete the Employer's portion of the Project. Indeed, the Employer advertised for at least another journeyman electrician in early January 2018.

[23] The Union had fielded questions about unionization from employees shortly after beginning work on the Project. Mr. Unser deposed that he provided these employees with pamphlets prepared by the Union that outlined protections under the *SEA* for workers wishing to unionize.

[24] Subsequently, on or about December 16, 2017, Mr. Unser e-mailed the members of the Union's Local 2038 asking that they attend a meeting on December 21, 2017 at the union-hall. This meeting was scheduled to take place following the completion of the workday.

[25] This meeting took place which some of the employees involved in this application attended. Mr. Unser deposed that the purpose of this meeting "was to bring the newly hired employees up to date on the status of the organizing campaign as well as to provide additional information, answer questions, address concerns, and ensure that the members fulfill the responsibility of representing the IBEW in a positive fashion while employed by a non-signatory contractor".[9]

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[8] Unser Affidavit, at para. 14, and Bryska Affidavit, at paras. 7-9.
[9] Unser Affidavit, at para. 13.

[26] At that meeting, a number of employees voiced concerns about losing their jobs if they chose to unionize. Mr. Unser deposed that he attempted to allay their fears by telling them that "there were laws in place to prevent such a circumstance from occurring".[10]

[27] Prior to this meeting, some of the employees deposed that they had conversations with Mr. Ross about unionization, generally, and the organizing drive that was taking place at the Employer's workplace, particularly. For example, Mr. Eckert deposed to a conversation he had with Mr. Ross on December 18, 2017. He had just been promoted to a team lead and, as a result, was told to go the Employer's shop to pick up a new work truck. Mr. Eckert described what happened next as follows:

> *…Brad was in his office and came out right away to give me the keys. Brad followed me to the back of the shop where he showed me the vehicle and started helping me fill it with some tools and material. Before Brad left he started asking me if the company I was trying to get up and running was a union shop since someone had told him that that was the case. I replied yes that it was, and he asked if I find it hard to bid jobs having to pay union rates. I responded that the union hall has been nothing but helpful and will work with any wages or special request to help me bid jobs. Thinking at first that Brad might be interested in going union because of the question he was asking, I then asked Brad why he was expressing interest in me being a union shop owner. His response was rather harsh and direct. He stated that he's "aware of some union stuff going on and isn't happy about it." Stating further that "he would do what he must for his company, and it would be a shame cause lots of union guys are working (for Active) right now and there aren't a lot of jobs out there." He told me that he "would just close shop and run his business from his holding company if it went union." Feeling very threatened I told him about the meeting coming up (which Brad wasn't surprised by), and I would let him know how that meeting went. Brad said that he expected that and let me leave."*[11] *[Emphasis added.]*

[28] Following his exchange with Mr. Ross, Mr. Eckert communicated with Mr. Unser who advised him that the meeting scheduled for December 21, 2017 was informational only. At the end of his shift on December 18, 2017, Mr. Eckert ran into Mr. Ross again and "told him the intent of the meeting [was informational]. Brad was very pleased by this new information and seemed to be in a much better mood after."[12]

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[10] *Ibid*., at para. 15.
[11] Eckert Affidavit, at para. 9.
[12] *Ibid*., at para. 10.

[29] Mr. Eckert did not advise Mr. Ross about what transpired at the December 21, 2017 meeting because he was unable to attend it "due to a family commitment that evening".[13] He was subsequently terminated on January 2, 2018.

[30] Mr. Graff, also one of the workers terminated on January 2, 2018, also described an encounter he had with Mr. Ross about the Union. He deposed that shortly after he commenced working for the Employer:

> *On October 27th, 2017 I went to the Active Electric shop and loaded up material into the work vans. Brad Ross was present and somehow in the conversation it came up that I was a member of the IBEW. I confirmed this directly in our conversation. Brad responded with telling me about a negative experience he had working for an IBEW contractor at the Co-op Upgrader expansion in Regina.*[14]

[31] Subsequently, on January 2, 2018, the day he and his partner, Jordan Schneider, were laid off, Mr. Graff again raised his union membership with Mr. Ross. Mr. Graff deposed as follows:

> *When my partner Jordon Schneider and I got back to the shop we went inside and Brad Ross said he had bad news. He explained that he had layoffs for both of us and when I asked why he said because he had to. I asked for a reason he responded by saying that since we were on probation he did not have to give us any reason. I asked if our layoff was because of being union members and he denied any connection between the layoff and my affiliation with the IBEW. I responded by defending the work we had done as there had never been any issue raised with the quality or productivity of our work. Brad said that we didn't know what he was doing and could assume what we want…*[15]

[32] All of the employees deposed that they were shocked by the terminations that took place in early January, 2018 as there had been no indication prior to Christmas 2017 that work had diminished or that lay-offs were imminent.

[33] Mr. Ross deposed that just before Christmas 2017, he learned that one (1) of the other companies doing work for SaskPower had begun to lay off its employees. He stated he communicated with SaskPower and was informed that it anticipated the work may be completed earlier than anticipated. To his Affidavit, he attached an e-mail dated January 11, 2018

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[13] *Ibid*., at para. 11.
[14] Graff Affidavit, at para. 6.
[15] *Ibid*., at para. 14.

purportedly from an unidentified source at SaskPower with the subject-line “man power”. It stated as follows:

> *Brad, as per our conversation you can remove 2 electricians from the project for next week and then another two for the following week. We will be in touch early next week if we need to keep the second pair. Thanks again!*[16]

[34] Mr. Ross deposed further that he laid off six (6) employees on January 2, 2018, and an additional two (2) employees on January 4, 2018 because he had decided they were “the least fit to complete the remaining of the Project”.[17]

[35] He also explained why the Employer had advertised for another electrician on January 5, 2018, a day after some of the impugned lay-offs took place. Mr. Ross deposed that one (1) of his permanent employees gave his notice that he would be leaving the Employer effectively immediately. As a result because he was “now one electrician, short of the number that I deemed necessary to meet SaskPower’s demand at that time”, the Employer found it necessary to advertise for a replacement electrician.[18]

[36] Respecting allegations contained in a number of the Affidavits submitted by the Union that he was aware of union activity at the workplace prior to the lay-offs, Mr. Ross denied it. He deposed as follows:

> *I was only <u>formally</u> advised of the “union activity” on January 3, 2018, when I received a letter addressed to me signed by Mr. Jeff Sweet, which indicated the same. Further, Mr. Sweet’s letter was received by me after I had already made the first round of terminations. [Emphasis added.]*[19]

[37] In the balance of his Affidavit, Mr. Ross enumerates reasons for why he laid off the particular employees identified in the Union’s application. Without enumerating them in detail, suffice it to say that Mr. Ross found fault with the work performed by each of these employees.

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[16] Ross Affidavit, Exhibit “E”.
[17] *Ibid*., at paras. 21 and 22.
[18] *Ibid*., at paras. 23-24.
[19] *Ibid*., at para. 30.

D. General Comments Respecting Interim Applications

[38] This Board has consistently held that applications for interim relief are to be decided on a case-by-case basis. For example, in *SGEU*[20] the Board observed as follows:

> *[E]ach application for interim relief involves a matrix of considerations involving the factual circumstances of the application, the general goals of the [SEA], the policy objectives of the particular provision alleged to have been violated, and the nature of the relief being sought.* [21]

[39] It is apparent that the context of the application is a vitally important consideration. The impugned terminations at issue in this matter occurred during the most delicate aspects of an on-going union organizing campaign at the Employer's workplace, namely when union representatives and supporters are seeking to educate fellow employees about the benefits of unionization, and attempting to garner their support for an application seeking certification.[22] As noted above, the Union was in the throes of such a campaign which had commenced sometime in October 2017.[23] At the time of these terminations, and, at the time of the hearing itself, the Union had not yet filed a certification application.

[40] It cannot be denied that the right of employees to organize and to choose their collective bargaining agent without fear of interference from, or intimidation by, their employer is a central precept of the *Wagner* model of industrial relations. This precept now has both a statutory and constitutional source. Very recently in *Workers United Canada Council v Amenity Health Care LP and/or 7169320 Manitoba Ltd. operating as Tim Hortons*[24] [*Amenity Health*], the Board underscored the significance of those sources as follows:

> *[84] [I]t is important to underscore that a central objective of the SEA as set out in subsection 6-4(1) is to ensure that all 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".*
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> *[85] This statutory statement of public policy is reinforced by the constitutional guarantee of freedom of association found in section 2(d) of the Canadian Charter of Rights and Freedoms. In Mounted Police Association of Ontario v Canada (Attorney General), relying on its prior jurisprudence, most notably Health*

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[20] *Supra* n. 3.
[21] *Ibid*., at para. 34.
[22] See generally: *Kennedy House Youth Services Inc.*, *supra*, n. 2, at paras. 58-60.
[23] Unser Affidavit, at paras. 3-16.
[24] LRB File Nos. 128-17, 129-17 & 130-17 (February 5, 2018).

> *Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia, a majority of the Supreme Court of Canada stated:*
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> > *[66] In summary, s. 2(d), viewed purposively, protects three classes of activities: (1) the 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.*
> >
> > *C. The Right to a Meaningful Collective Bargaining Process*
> >
> > *[67] Applying the purposive approach just discussed to the domain of labour relations, we conclude that s. 2(d) guarantees the right of employees to meaningfully associate in the pursuit of collective workplace goals. This guarantee includes a right to collective bargaining. However, that right is one that guarantees a process rather than an outcome or access to a particular model of labour relations. [Emphasis added.]*
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> *[86] These important public and constitutional values must inform this Board's analysis of the issues presented on this application, most notably whether the proposed unit which the Union seeks to have certified under the SEA is an appropriate one for purposes of collective bargaining.*[25]

[41] The Board is of the view that the statutory protection as well as the *Charter* guarantee of freedom of expression hold great significance in circumstances where, as here, there is an on-going organizing drive in an employer's workplace in the course of which clearly identifiable union supporters are terminated, some for reasons that appear to be after-the-fact justifications.

E. Application for Interim Relief

[42] As set out above, this Board's jurisprudence has identified two (2) parts to the test for interim relief under the *SEA*. The first part of this test requires the Board to assess whether the main application, namely the Union's unfair labour practice application demonstrates an arguable case. *SGEU* reminds us that this is not a rigorous standard to meet.[26] Rather, it requires an applicant to demonstrate only that it is more likely than not that the main application raises an arguable case.[27]

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[25] *Ibid*., at paras. 84-86.
[26] *Supra* n. 3.
[27] *Ibid*., at para. 31.

[43] The second part of the test for interim relief asks whether or not the balance of convenience favours the issuance of an interim order. This aspect of the inquiry is analogous to the test for injunctive relief utilized by superior courts in the civil context. In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Aaron's Furniture*[28], for example, the Board explained:

> *[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.*[29]

[44] The Board will analyze the Union's application for interim relief in accordance with this two (2) stage inquiry.

1. Has the Union Demonstrated an Arguable Case?

[45] The Union, in its unfair labour practice application, has invoked a number of provisions of the *SEA*; however, for purposes of this application for interim relief, clause 6-62(1)(g) is the most relevant. This provision prohibits employers from using coercion or intimidation and 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 have exercised a right granted under the *SEA*.[30]

[46] This aspect of the inquiry was not contentious at the hearing. Counsel for the Employer conceded that the Union's factual assertions demonstrated an arguable case has been advanced. Suffice it to say, the Board agrees with counsel's concession.

[47] 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 for interim relief. The Board turns to consider this question now.

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[28] LRB File Nos. 265-15 & 268-15, 2016 CanLII 1307, 282 CLRBR (2d) 281 (SK LRB)
[29] *Ibid*., at para. 26.
[30] *United Steelworkers v Comfort Cabs Ltd.*, 2013 CanLII 62414 (SK LRB), at para. 40.

2. Does the Balance of Convenience Support the Granting of Interim Relief?

[48] As with most applications for interim relief, the success of the Union's application stands or falls on whether it can demonstrate the balance of convenience favours granting the relief it requests.

2.1 The Union's Position

[49] In its helpful Brief of Law, the Union relied upon a number of authorities. Of these, the Board found the following decisions to be the most useful: *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Sakundiak Equipment (WGI Westman Group)*[31] [*Sakundiak Equipment*]; *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service Workers International Union (United Steelworkers) v Evraz Wasco Pipe Protection Corporation*[32] [*Evraz Wasco*]; *SEIU West v Revera Retirement Genpar Inc.*[33] [*Revera Retirement*]; *Industrial Wood and Allied Workers Canada Local 1-184 v Cabtec Manufacturing Inc.*[34] [*Cabtec*]; *Canadian Union of Public Employees, Local 4973 v Welfare Rights Centre*[35] [*Welfare Rights Centre*], and *International Brotherhood of Electrical Workers, Local Union 2038 v Magna Electric Corporation*[36] [*Magna Electric*]

[50] On this aspect of its' application, the Union is principally asserting that the labour relations harm flowing from these terminations is significant because it likely will dissuade other employees from pursuing unionization for fear they may suffer similar reprisals from the Employer.

[51] In particular, the Union cited the following passage from this Board's Decision in *Welfare Rights Centre*[37] at paragraphs 20 and 21:

> *[20] The second part of the test involves a balance between the labour relations harm that may result if the interim relief is not granted. The Union says that the actions of the Employer will seek to destabilize a fragile workplace. The Employer says that if it did not take these actions that the funding for, and by*

[31] 2011 CanLII 75157, 200 CLRBR (2d) 179, LRB File No. 120-11 (SK LRB)
[32] 2016 CanLII 98635, LRB File Nos. 275-16; 277-16 & 278-16 (SK LRB)
[33] 2011 CanLII 75835, LRB File Nos. 080-11, 093-11, 095-11 & 100-11 (SK LRB)
[34] 88 CLRBR (2d) 133, LRB File Nos. 042-02; 043-02 & 044-02 (SK LRB)
[35] 2010 CanLII 42668, LRB File No. 083-10 (SK LRB)
[36] 2013 CanLII 74458, LRB File Nos. 162-13 to 166-13 (SK LRB)
[37] *Supra* n. 34.

> *extension, the existence of, the Centre is place in jeopardy by virtue of its inability to obtain insurance.*
>
> *[21] The key element in this analysis is the review of the labour relations harm. Clearly, the Union is facing labour relations harm, whereas the harm to the Employer is financial and administrative. While the elements of harm are different, they are, nevertheless, of importance, as noted later in the remedy which the Board will grant. However, 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.*

[52] Here the Union acknowledges the inconvenience which the Employer would suffer if its' application for interim relief is granted. However, it maintains that the labour relations harm it will suffer in its efforts to organize, and seek certification for, employees at the workplace outweigh that inconvenience.

2.2 The Employer's Position

[53] Counsel for the Employer did not file a written argument with the Board, however, he did offer extended oral argument which is summarized below.

[54] Counsel advised the Board that Mr. Ross had no anti-union animus. In fact, he was a former union member himself, and understood and respected the important role unions play in protecting and advancing the rights of workers. He also emphasized that the Employer was a small business and would have great difficulty in absorbing the additional cost of compensating these laid off workers were this Board to order their re-instatement.

[55] Mr. Ross learned just prior to Christmas that the Project may be completed sooner than had originally been anticipated. Counsel submitted that when they commenced working for the Employer, all of the workers knew the Project offered only short-term employment and the fact that work was winding down early should not have been a surprise.

[56] Counsel stated that when Mr. Ross hired a number of the workers identified in the Union's application, he was aware that most of them were union members. He knew, as well, that Ms. Bryska was not a union member, and was laid off during her probationary period. Counsel also advised the Board that the replacement electrician Mr. Ross hired after laying off a number of workers in early January 2018, was also an union member.

[57] Turning to the other workers laid off in early January 2018, counsel noted that each of them had different levels of competence and experience. For example, Mr. Ross had hired Mr. Eckert as a favour. Mr. Eckert operated an electrical company that competed with the Employer for contracts. At the time, Mr. Ross hired him, Mr. Eckert's company was experiencing a work shortage. In spite of Mr. Eckert's experience, Mr. Ross stated that among other things:

> *Mr. Eckert failed to display an adequate level of competence within his probationary employment period. In particular Mr. Eckert refused to comply with certain workplace procedures related to end of shift duties and SaskPower's [sic] requested completion time.*[38]

[58] Mr. Ross found similar fault with the other laid-off employees. For example, Messrs. Graff, Stead, and Labelle, and Ms. Bryksa were released because they, too, failed to display the requisite level of competence expected of them. Mr. Schneider was laid-off because he did not hold a driver's licence and depended upon Mr. Graff to drive him to the work-site each day.

[59] Two (2) other employees were released for other reasons in addition to their inadequate work performance. The Employer discovered that Mr. Biram had stolen an article owned by one of his previous employers. Even though Mr. Ross asked him to return that article to its rightful owner, Mr. Biram did not do so. As a consequence, Mr. Ross was concerned about what might happen to the Employer's equipment with Mr. Biram on the work-site.

[60] The other employee, Mr. Stengler, performed work that had to be re-done by other electricians on at least (1) occasion. This incident occurred during his probationary period.[39]

2.2 Analysis and Decision on the Balance of Convenience Issue

2.2.1 Review of Recent Jurisprudence

[61] In *Sankundiak Equipment*[40], this Board referenced its earlier decision in *Saskatchewan Government Employees Union v Regina Native Youth and Community Services Inc.*[41] [*Regina Native Youth*]. There former Chairperson Bilson explained the policy rationale

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[38] Ross Affidavit, at para. 46(b).
[39] Ross Affidavit, at para. 41.
[40] *Supra* n. 30.
[41] [1995] 1st Quarter Sask. Labour Rep. 118, LRB File Nos. 144-94, 159-94 &160-94

underlying then subsection 11(1)(e) of *The Trade Union Act*, RSS 1978, cT-17 [*TUA*] which has now been superceded by clauses 6-62(1)(a), and (g) of the *SEA*. She stated:

> *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.*
>
> *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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> *. . . . .*
>
> *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 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 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.*

[62] This 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.[42] Nevertheless, this reality does not detract from their force.

[63] Issues of employer retaliation against employees exercising their organizational rights have confronted this Board since its inception in 1945. Indeed, the very first decision of this Board involved an application for reinstatement of an employee who had been terminated for union activity. See: *Hotel and Restaurant Employees' and Beverage Dispensers' Union, Local 829 v Stanley Kraft (Empire Hotel, Regina)*[43].

[64] Cases involving these issues continue to arise. A brief survey of recent matters where interim relief was sought in similar circumstances will illustrate how seriously this Board views them. In *Sakundiak Equipment*[44]*,* for example, the Union requested this Board to reinstate an employee who had begun to organize a union in the workplace. The Employer had asserted that this employee had been laid-off due to an unforeseen downturn in its' work. There was conflicting evidence about whether the Employer actually knew about union organizing at the work-site. However, the Board determined there was a least some evidence pointing to the fact that the Employer did possess such knowledge.

[65] The Board determined that the balance of convenience in those circumstances favoured re-instating the terminated employee. The Board explained as follows:

> *[45] With respect to the second branch of the test, the Board has acknowledged in numerous cases that firing an employee closely associated with a trade union's organizing campaign can have a chilling or dampening effect on a trade union's organizing drive…The Board is particularly sensitive to this concern in the period prior to the conduct of a representative vote, the Union's support within the workplace is vulnerable to influence and, if the allegations are founded, the damage to the Union's reputation and the potential coercive effect on the Union's support to the vote could result in irreparable harm to the Union by the time a full hearing on the merits could be conducted by the Board.*

[66] In *Revera Retirement*[45], SEIU West sought the re-instatement of three (3) housekeepers employed by the Employer who had been laid off sometime prior to a representative vote. The Board noted that there was no direct evidence these lay-offs were

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[42] See especially: *International Union of Bricklayers and Allied Craftsmen, Local #1 Sask. v Regal Flooring Ltd.,* LRB File No. 175-96, [1996] SLRBD No. 61, at para. 21.
[43] Decisions of the Saskatchewan Labour Relations Board and Court Cases Arising Therefrom, Volume I, 1945-1954, at pp. 1-3.
[44] *Supra* n. 30.

motivated by anti-union animus; however it did acknowledge that the "timing of the terminations may be co-incidental as argued by the Employer, but that timing, nevertheless raises the suspicion that the terminations may have another motivation."[46] In the end, the Board ordered the immediate re-instatement of these individuals for the following reasons:

> *[31] The labour relations harm to the Union is that the remaining members of the bargaining unit could fear that their support of the Union with respect to the application for certification would result in the same or a similar adverse impact on their employment. Employees should always be free to support or not support a union as their bargaining agent without an implicit threat from their employer or their union concerning that support. Section 3 of [the TUA] clearly places the choice to join or not to join a union in the hands of the employees. Recent amendments to the [TUA] to require representation votes on certification and rescission have enhanced the right of employees to vote their conscience with respect to whether to seek union representation.*

[67] *Aaron's Furniture*[47] is a case where this Board concluded that the balance of convenience favoured the employer and not the union. There, the union – RWDSU – sought as interim relief the immediate re-instatement of two (2) employees who had played central roles in an organizing campaign at the workplace. The employer countered by asserting that these terminations were not motivated by anti-union animus. Although the employer admitted that it knew of the union's organizing drive, it had legitimate reasons for terminating the employees in question. One (1) employee had been a continually disruptive force on the shop floor, while the other did not possess a driver's license which the employer contended jeopardized its' insurance policy because holding a driver's licence was a condition of his employment.

[68] The Board accepted that RWDSU had demonstrated an arguable case. However, it concluded that any labour relations harm which would flow to the employer outweighed the harm suffered by the two (2) employees, and in any event, was not irreparable and could be compensated for in damages.[48]

[69] *Aaron's Furniture* is somewhat out-of-sync with other decisions of this Board in cases with similar factual scenarios. It appears, however, that the Board was motivated to conclude that any labour relations flowing to the union in the context of this particular organizing drive was mitigated because the employer in question through its counsel undertook "to post an

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[45] *Supra* n. 34.
[46] *Ibid.*, at para. 30.
[47] *Supra* n. 27.
[48] *Ibid*., at paras. 27-28.

open letter to employees advising them of their right to organize and to be represented by a union of their choice" and "subject to applicable privacy laws, to provide contact information for its employees to allow the union to contact those employees regarding representation".[49]

[70] *Evraz-Wasco* [50] is the next case of relevance. The union – United Steelworkers – was conducting a certification drive at the Employer's workplace in Regina. One (1) of its employees – Dianne Findlay – who was a lead-hand was also an active and vocal supporter of the union's efforts to unionize the workplace. From the evidence, it appears she was also a difficult employee, and the Employer deposed that she had not been terminated as a result of her union activities, but rather because of her insubordination and breaches of the Employer's safety protocols.

[71] At the time of Ms. Findlay's termination, a representation vote had not been completed. Fearing her termination would have a chilling effect on the conduct of this vote, the union commenced an unfair labour practice application challenging the termination, and concurrently brought an interim application seeking her immediate reinstatement.

[72] The Board concluded that in this instance the balance of convenience favoured the union. It reasoned as follows:

> *[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.*
>
> *[68] The labour relations harm to the Employer should Ms. Findlay be reinstated must be balanced against the potential labour relations harm to the Union in the course of its union drive and subsequent representative vote. That balance, in most cases, should be resolved in favour of the Union so 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 unions and 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.*

[73] Although the Board directed Ms. Findlay be re-hired, it was cognizant of the Employer's "legitimate workplace safety concerns"[51] about her returning to the workplace. As a

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[49] *Ibid*., at para. 29
[50] *Supra* n. 31.
[51] *Ibid*., at para. 69.

consequence, the Board ordered that she "be suspended with pay, pending the outcome of the Union's unfair labour practice application"[52] in that case.

[74] The last Decision to be canvassed here is *International Brotherhood of Electrical Workers, Local 2038 v AECOM Production Services Ltd.*[53] [*AECOM*]. The factual circumstances of this case parallel in some ways the facts on this application. The same union that is the applicant in this matter was conducting a certification drive at AECOM's worksite at the Boundary Dam in southern Saskatchewan. The day after the Employer learned of the Union's certification application to this Board, it laid-off five (5) members of the Union, the only Union members at the work-site. The Employer stated that it had no prior knowledge of an on-going organizing drive at its worksite, and the timing was merely coincidental. In addition, the Employer submitted that all of these employees were probationary employees at the time of their terminations.

[75] The Board ordered the re-instatement of these five (5) workers. It offered a number of reasons for its decision including the fact that only union members were laid off; "the juxtaposition of these lay-offs and the filing of the Union's certification application raise[d] suspicions the Employer had an ulterior motive in terminating these particular workers"[54]; the chilling effect of these terminations on other employees and the labour relations harm of voter suppression were significant, and the project at issue was of a relatively short duration, a fact which "exacerbated[d] the labour relations harm that flow[ed] to the Union"[55] in its organizing efforts.

[76] From this brief overview of recent case law, it is apparent that during the course of an on-going union organizing drive at a workplace this Board, more often than not, scrutinizes carefully the terminations of employees who are central union members or core union supporters. Any such assessment, of necessity, must be forward looking, however, since any relief seeks to prevent irreparable harm from continuing, and is not intended solely to remedy any irreparable harm which may have already occurred. In other words, a union is not required to demonstrate that such harm has already taken place in order to satisfy this aspect of the inquiry.

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[52] *Ibid.*
[53] 2017 CanLII 72970, LRB File Nos. 119-17, 120-17 & 121-17 (SK LRB)
[54] *Ibid*., at para. 44
[55] *Ibid*., at para. 48.

[77] The Board acknowledges that all the employees named in this application were probationary employees at the time of their terminations. It is true that during a worker's probationary period, employers have considerable flexibility to lay-off an employee who proves to be a poor performer or an inadequate worker. At the same time, the probationary period may not serve as a pretext for an employer to discharge individuals for discriminatory or other illegal motivations. For example, that is why clause 6-62(1)(g) of the *SEA* characterizes as an unfair labour practice the termination by an employer of one or more of its employees so as to discourage other employees from pursuing certification. It is significant that this statutory protection is not limited only to those employees who have passed their probationary period.

[78] The Board turns now to an application of those principles to the facts before us.

2.2.2. Application of Principles

[79] 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 matter is warranted. Accordingly, for the following reasons, we grant the Union's application for interim relief in part.

[80] First, seven (7) of the eight (8) workers laid off by the Employer were Union members. From the evidence presented to the Board it is not clear how many other Union members remained on the job after these terminations. However, it cannot be denied that the only employees terminated were either members, or supporters, of the Union. Nor was evidence presented at the hearing to demonstrate that any other employees were laid off.

[81] Second, the juxtaposition of the lay-offs in question and the commencement of the Union's organizing efforts in mid-December 2017 raise suspicion that Mr. Ross harboured anti-union animus which might have motivated the Employer's decision to terminate the workers in question. There was evidence led before us which indicates that Mr. Ross was made aware of organizing efforts by the Union in mid-December 2017. Mr. Eckert deposed that he discussed such efforts with Mr. Ross just prior to an informational meeting on December 21, 2017. In the course of that conversation, Mr. Ross allegedly made some threatening comments about what might happen at the worksite were the employees to pursue unionization.

[82] On the other hand, Mr. Ross deposes that he only "formally" learned about the Union's organizing drive on January 3, 2018 when he received correspondence from Mr. Jeff Sweet, the Union's President.[56] This, it is noted, was the day after the first round of lay-offs but the day before the second round.

[83] This discrepancy between Mr. Eckert's evidence and Mr. Ross's evidence cannot be resolved on an interim application. Rather, it is necessary to hold a full hearing where this evidence can be scrutinized and tested on cross-examination. Yet, the fact remains there is evidence before the Board to indicate that Mr. Ross knew of union organizing at the worksite prior to the end of December 2017 and, most certainly, before the second round of terminations.

[84] Third, the Employer asserts that all of the employees were laid off because of poor or inadequate work performance. However, apart from Mr. Stengler, there was no evidence led to identify the basis for these assessments. In his Affidavit, Mr. Ross offered only vague allegations of unsatisfactory work performance. Furthermore, there was no evidence to indicate that the Employer had taken steps to attempt to correct performance issues with any of these employees or, in the case of Mr. Stengler, to discipline him for actions which required immediate remedial action by other electricians.

[85] Fourth, the Employer's assertions that it anticipated an imminent decrease in workload before Christmas 2017 are questionable. The only direct evidence the Project might be winding down sooner than expected is found in an e-mail from an unidentified SaskPower representative to Mr. Ross dated January 11, 2018[57], one (1) week after the second round of lay-offs. Indeed, Mr. Ross, himself, deposed that the Employer's work-load increased significantly between October and the end of December 2017.[58]

[86] Fifth, the Project involved in this matter is, admittedly, of short duration. It is apparent from the evidence presented at the hearing that it would last only a few months. In the Board's view this reality places considerable time constraints upon the Union's efforts to attempt to organize the Employer's workforce. This fact sets this case apart from matters in which there

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[56] Ross Affidavit, at para. 30.
[57] *Ibid*., at para. 26, and Exhibit "E".
[58] *Ibid*., at paras. 16-17.

was a more stable workplace environment and workforce, and where a failed certification drive would not entirely undermine a union's ability to again attempt to organize at that workplace.[59]

[87] Sixth, the labour relations harm at issue here relates to suppressing the level of employee support for pursuing an application for certification pursuant to section 6-9 of the *SEA*. The initial stages of such a drive are delicate, and a precipitous event such as the termination of known union members or supporters during that time could wholly derail the union's efforts. The Board's concern about the "chilling effect" such an event may have on other employees is not triggered only when the union has filed a formal certification Order. It pertains to the entire organizing process.[60]

[88] Moreover, this is not a case like *Aaron's Furniture*[61] in which the employer undertook to notify its employees of their right to organize, to be represented by a union of their choice, and to provide to the union with employee's contact information. No such undertaking was forthcoming here.

[89] The Board acknowledges that re-instating the terminated employees will create a hardship for the Employer as it will be required to deplete some of its financial resources on unanticipated expenditures. This is a factor which we must take into account when attempting to balance the interests of the Union and the Employer. Yet in this balancing exercise, the Board agrees with the observation in *Welfare Rights Centre*[62] that 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"[63].

[90] Accordingly, these factors have persuaded the Board that the lay-offs of six (6) of the employees – Colby Graff; Nathan Labelle; Nathan Eckert; Colin Stead; Jordan Schneider, and Nicole Bryksa – must be set aside, and these individuals reinstated.

[91] That said, the Board is cognizant of the Employer's legitimate concerns about the other terminated employees. First, the Board accepts as legitimate the Employer's termination

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[59] See *e.g.*: *AECOM*, *supra* n. 53, at para. 48.
[60] See, generally: *Kennedy House Youth Services Inc.*, *supra* n. 2, at paras. 58-60.
[61] *Supra* n. 27
[62] *Supra* n. 34.
[63] *Ibid*., at para. 21.

of Mr. Stengler. There was persuasive evidence presented at the hearing that his work was shoddy and, on at least one (1) occasion, caused the Employer to expend monies to rectify a problem he had created. As a consequence, the Board finds that the Union failed to persuade us that the lay-off of this particular employee was not warranted in the circumstances.

[92] Second, the Board also accepts as legitimate the Employer's termination of Mr. Biram. At the hearing the Employer demonstrated that it discovered that this employee had stolen property from a previous employer and had stored it in one of the Employer's vehicles. Even after Mr. Ross had directed him to return it to its rightful owner, Mr. Biram failed to comply.[64] As a consequence, it is our view that the Employer had legitimate concerns that this employee might also abscond with its property and, because of that, Mr. Biram's termination during his probationary period was warranted.

F. Order of the Board

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

(1) **THAT** within 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: Colby Graff; Nathan Labelle; Nathan Eckert; Colin Stead; Jordan Schneider, and Nicole Bryksa. This Order is intended to cover the time-period between the date of their terminations and January 31, 2018;

(2) **THAT** within 48 hours of receipt of the Board's Reasons for Decision and Order, the Employer shall post a copy of those documents in its workplaces in a location where they 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. 007-18;

(3) **THAT** in all other aspects, the Union's application for interim relief is dismissed, and

[64] Ross Affidavit, at para. 61 and Exhibit "G".

(4) **THAT** this panel of the Board is not seized with respect to LRB File No. 007-18.

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

[95] Member Steven Seiferling dissents.

DATED at Regina, Saskatchewan, this **8th** day of **March**, **2018**.

LABOUR RELATIONS BOARD

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

DISSENT

Background:

[1] **Steven J. Seiferling:** I have had the opportunity to review the reasons of Vice-Chairperson Mitchell, and I respectfully disagree that the present case is an appropriate one for interim relief, for the reasons that follow. I will briefly review the facts, which are largely contested, following which I will provide the analysis on the main issue.

[2] The International Brotherhood of Electrical Workers Local 2038, (the "IBEW" or the "Union") has applied for an interim order, seeking the interim reinstatement and monetary loss for eight (8) employees of Active Electric Inc ("Active" or the "Employer"). The layoffs, or terminations, took place on January 2, 2018 (6 layoffs), and January 4, 2018 (2 layoffs). There has not been an application for certification of Active at the time of this decision.

[3] The IBEW submitted multiple Affidavits as part of the application for interim relief, including Affidavits from the Union, through Mr. Christopher Unser, and Affidavits from the former employees of Active, alleging that the layoffs were due to a union organizing drive that the IBEW was undertaking at Active. The Affidavits allege that there has been a chilling effect on the

organizing drive, and allege that there have been some new hires since some of the layoffs, or terminations, occurred.

[4] Active's reply was in the form of an Affidavit from Mr. Ross, the owner of Active. Mr. Ross' Affidavit alleges that the terminations, or layoffs, were all probationary employees, that the project for which Active had hired the employees was winding down, and provides the Employer's alleged justification for each of the terminations or layoffs.

[5] There is conflicting evidence between the Affidavits put forth by the Union, and the Affidavit provided by the Employer. For example, the Union alleges that four new employees started on January 3, 2018, while the Employer states that two (2) employees, who were hired prior to the Christmas holidays, had start dates on January 3, 2018. The Employer also points out that one of the two (2) new hires is a member of the IBEW.

[6] The Employer states, through Mr. Ross, that there are a number of current members of IBEW working for Active, even after the terminations.

[7] There are a few uncontested points. The Union and the Employer agree that seven (7) of the eight (8) employees who were laid off or terminated in early January 2018 are members of the IBEW. Further, they agree that there are still IBEW members working at Active. Finally, the parties agree that the apparent termination date for the project in which Active is currently engaged (for SaskPower) has a completion date of January 31, 2018.

[8] At the present time, it is important to note that there is no certification application filed. The Affidavits put forth by the Union state that there is an active organizing drive, but no application for certification has been filed, and no vote has been ordered.

[9] With respect to the terminated employees, the Employer notes that each of the terminated employees was in his or her probationary period with Active, and alleges that the terminations were based on performance issues, ranging from failure to report in at the conclusion of a shift, to requiring re-work for some work performed by the terminated employees, to an issue where an employee removed another contractor's property from a work site, and failed to return it. The allegations, and the propriety of the probationary terminations, are more properly tested at a full hearing on the unfair labour practice application filed by the Union.

The Issue

[10] The only issue for the Board to consider in this matter is whether any interim relief should be granted with respect to the eight employees who were terminated, during their probationary periods, on January 2, 2018 and January 4, 2018. The Union did not contest that these employees could be laid off in due course as the job comes to its conclusion on January 31, 2018, but claimed that the terminations in early January were not proper, and interim relief should be granted.

The test for Interim Relief

[11] The Board has confirmed the test for interim relief recently in a number of cases. Vice-Chairperson Mitchell has fully canvassed the jurisprudence on the test. I summarize here for ease of reference. The two-part test, for which the applicant Union bears the onus, can be stated as follows:

> **a.** Has the applicant (in this case the Union) demonstrated an arguable case at the main hearing; and
>
> **b.** Has the applicant demonstrated that the labour relations harm that would be suffered by the applicant outweighs the labour relations harm that would be suffered by the respondent if the relief requested is granted.

[12] The second part of the test – the labour relations harm – incorporates the two common elements seen in jurisprudence throughout Canada with respect to interim relief: (i) has the applicant demonstrated that it would suffer irreparable harm, or harm that cannot be quantified by damages, if the relief is not granted, and (ii) does the balance of convenience favour granting the relief requested or not.

Analysis and Conclusion

[13] At the hearing, the Employer conceded that there is an arguable case. The Board agrees that the first part of the test is met, and focuses its analysis on the second part of the test – the test with respect to labour relations harm, or the test for irreparable harm and the balance of convenience.

[14] This Board recently dealt with a very similar situation to the present case. In the *Aaron's Furniture* case,[65] the Board was confronted with a situation where there was (a) an organizing drive at a workplace, and (b) two employees who had been terminated. The union in that case, the RWDSU, was requesting reinstatement and monetary loss on an interim basis.

[15] The Board in *Aaron's Furniture* reviewed the requirements for granting interim relief, and dismissed the application for interim relief, as follows:

> *[26] The second part of the test is whether or not the balance of convenience favours the issuance of an interim order. While there are other considerations, as noted above, this factor is one which the Board routinely examines to determine if interim relief should be granted. This factor 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.*
>
> *[27] On this criteria, the application must fail. Any labour relations harm that may occur (and which has not been established) is that the Union may not now be able to obtain the necessary support for its certification. That harm is not suffered by the (2) two employees who seek the interim application to be re-instated and to recover monetary loss resultant from their terminations. This harm is not irreparable. In the event that the Union is successful in its underlying application, the employees will be re-instated and they will be compensated for monetary loss suffered from the time of their termination to the time they are re-instated.*
>
> *[28] On the flip side, to order re-instatement of the employees and monetary loss at this stage of the proceedings, complicates the position of the Employer insofar as it is burdened with employees, which it alleges were properly terminated. In the final result, the re-instatement of the employees and the order of monetary loss at this stage of the proceedings would inflict greater harm on the Employer than on the affected employees who will be made whole if they are successful in their application.*

[16] Similar to the *Aaron's Furniture* case, we are confronted with an organizing drive, and terminated employees. In addition, we are dealing with conflicting evidence on the propriety of the terminations. As the Chair stated in the *Aaron's Furniture* case, "That harm is not suffered by the (2) two employees who seek the interim application to be re-instated and to recover monetary loss resultant from their terminations. This harm is not irreparable."

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[65] Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Aaron's Furniture, 2016 CanLII 1307 (SK LRB), <http://canlii.ca/t/gn05d>, retrieved on 2018-01-16

[17] In the present case, there is an additional factor to look at with respect to irreparable harm. As of the date of this decision, the project on which the dismissed employees were working has concluded – the parties agreed that the project would conclude on January 31, 2018. The Supreme Court of Canada, in the *RJR MacDonald* case,[66] which established the test for interim relief in Canada, described irreparable harm as follows:

> *Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.*

[18] In the present case, not only do we have harm that can be quantified in monetary damages (lost wages) – we also have a finite period for which the harm would be payable (January 2 or 4, 2018, depending on the employee, to January 31, 2018). When we are confronted with a situation alleging proper termination during a probationary period, and where there are conflicting facts, interim relief is not proper. The proper determination is left to a full hearing, where the parties can make submissions, present evidence, and cross-examine witnesses.

[19] Based on the Board's established test, the *Aaron's Furniture* case, and Supreme Court of Canada jurisprudence, the harm in this case in not irreparable, in that it can clearly be quantified in damages. Interim relief is not appropriate as the harm is not irreparable.

[20] In addition, in the present case, the balance of convenience favours the Employer's position. First, there is no certification application being considered by the Board. We are not dealing with a situation where employees are alleged to be terminated to prevent them from voting in a certification application, nor are we dealing with a situation where the Union has presented evidence to state that the removal of the dismissed employees prevented the filing of a certification application. The only evidence before the board is that there was a drive underway at the workplace. At the time of the application, the parties agree that the Employer continued to employ members of the Union.

[21] Further, for this Board to reinstate six (6) workers after the conclusion of the project, which the Union agrees concluded at the end of January, leads to the untenable situation where the workers are never actually returned to the workplace, and the only issue is

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[66] *RJR — MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311

compensation from the date of termination to the end of the project (or such other date prior to the end of the project that some or all of the dismissed employees would have been laid off).

[22] As noted above, and in *Aaron's Furniture*, the harm suffered by those workers is not irreparable. In fact, the harm is easily quantifiable, especially if the parties agree that the project concluded at the end of January. The harm suffered is the wages of the employees from the date of termination to the earlier of (a) the date that they would have been laid off, or (b) the end of the project (which the evidence before the Board states to be January 31, 2018). The balance of convenience favours the Employer.

[23] Effectively, both components of the second part of the test for interim relief have not been made out by the Union, and therefore the application for interim relief must be dismissed.

DATED at Regina, Saskatchewan, this **8th** day of **March, 2018**.

Steven J. Seiferling
Member