RELIANCE GREGG'S HOME SERVICES, a DIVISION OF RELIANCE COMFORT LIMITED PARTNERSHIP, Applicant v. UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES of the PLUMBING & PIPEFITTING INDUSTRY of the UNITED STATES and CANADA, LOCAL 179 and Andrew McGee, Respondents

LRB File No. 254-17, December 31, 2018

Vice-Chairperson, Kenneth G. Love Q.C.; Members: Jim Holmes and Allan Parenteau

For the Applicant:	Eileen v. Libby, Q.C
For the Respondent:	Greg Fingas

Unfair Labour Practice – Section 6-63(1) & (2) – Employer alleges that Union committed Unfair Labour Practice when employee, allegedly as agent for the union, sent inflammatory text messages to other employees which contained some inaccurate statements and which sought support for the union's organizing campaign. Board reviews facts and finds that neither the union nor the employee committed and unfair labour practice.

REASONS FOR DECISION

Background:

[1] The United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 179 ("U.A. 179" or the "Union") brought 4 applications involving Reliance Gregg's Home Services, a Division of Reliance Comfort Limited Partnership (Gregg's"). 3 of those were applications[1] to be certified as the

[1] LRB File Nos. 234- 236-17

bargaining agent for various groups of employees of Gregg's. The fourth[2] was an Unfair Labour Practice Application. Gregg's also filed an Unfair Labour Practice application[3] against U.A. 179.

[2] All of the files were dealt with in a single hearing by the Board. The hearing commenced with Vice-chairperson Mitchell acting as the Chairperson of the hearing panel. However, between the time the evidence had been heard, but before final argument was made by the parties, he was appointed as a Justice of the Court of Queen's Bench. By the agreement of the parties, Kenneth G. Love Q.C., the former Chairperson of the Board, and newly appointed as the Vice-chairperson of the Board, to assist with the transition of matters such as this, undertook to review the Board's recordings of the proceedings, to hear final argument and to replace now Justice Mitchell in the decision with respect to each of the 5 matters under consideration by the Board.

[3] The 5 matters before the Board can be neatly placed into 3 overall categories. The first is the certification applications by U.A. 179 (3), the second is the Unfair Labour Practice application by U.A. 179, and the last is the Unfair Labour Practice application by Gregg's. The facts and Board's jurisprudence with respect to these 3 categories is somewhat different and for that reason, the Board has determined to provide 3 separate decisions with respect to each of the 3 overall categories. These reasons are with respect to the Unfair Labour Practice application by Gregg's.

[4] This application is an Unfair Labour Practice Application filed by Gregg's against U.A. 179 alleging that Andrew McGhee, a Gregg's employee and one of the inside organizers for the Union sent coercive and intimidating group text messages to other employees of Gregg's with a view to encouraging them to vote in favour of the certification applications filed by I.A. 179 in LRB File Nos. 234-236-17, contrary to section 6-63(1)(a) of the *SEA*.

Facts:

[5] The following is an outline of the facts heard from the Applicant and Union witnesses and numerous documents filed by the parties. Other material facts will be referred to as necessary during the analysis portion of these reasons.

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[2] LRB File No. 250-17
[3] LRB File No. 254-17

[6] This application arose from two text messages sent by Andrew McGhee, an employee of Gregg's. One test message was to a group of other Gregg's employees (the "group text message"), the second was to Joel Paul, another Gregg's employee.

[7] Additionally, Gregg's alleged that Mr. McGhee engaged with another employee, Seth Bakos, in an attempt to persuade him to support the Union's drive. It was alleged that the Union representative present at that meeting picked up the tab for Mr. McGhee's drinks consumed at the meeting.

[8] Gregg's alleged in their application that employees who received the text messages found them to be intimidating, coercive, and that they were unduly influenced by them. Gregg's also alleged that Mr. McGhee was acting as an agent of the Union in sending the text messages and in arranging the meeting with Mr. Bakos.

Statutory Provision:

Unfair labour practices – unions, employees

> ***6-63****(1) It is an unfair labour practice for an employee, union or any other person to do any of the following:*
>
> *(a) subject to subsection (2), to interfere with, restrain, intimidate, threaten or coerce an employee with a view to encouraging or discouraging membership in or activity in or for a labour organization;*
>
> *(2) If a certification order has been issued, nothing in this Part precludes a person acting on behalf of the union from attempting to persuade an employer to make an agreement with the union that requires as a condition of employment:*
>
> *(a) membership in or maintenance of membership in the union; or*
>
> *(b) the selection of employees by or with the advice of a union.*

Employer's arguments:

[9] Gregg's argued that the text messages from Mr. McGhee were "inflammatory" such that they would be likely to coerce or intimidate a reasonable employee. Gregg's argued that in sending these texts, McGhee was acting as an agent of the union. In support of its

position, Gregg's cited *Pineda v. IUOE, Local 870*[4]. Gregg's argued that McGhee went beyond stating his own opinions, but actively sought to "bridge the gap" between union officers and Gregg's employees.

[10] Gregg's argued that the test under section 6-63(1)(a) was similar to that utilized by the Board under section 6-62(1)(a) of the SEA. It argued that the test, as stated by the Board in *UFCW v. Securitas Canada Limited*[5] should be applied.

[11] Gregg's argued that the words chosen by McGhee were clearly coercive and intimidating. They noted that McGhee characterized the union organizing campaign as a "war" which pitted the employees against the employer engaged in unlawful activities.

[12] Gregg's argued that in his group communication, McGhee accused Gregg's of illegal practices in communicating with its employees. Gregg's argued that he stated this as a fact due to his having spoken to the Union's lawyers and that such conduct would attract "heavy fines and possibly jail time".

[13] Gregg's argued that McGhee miscommunicated when he suggested that should the union organizing drive fail that Gregg's would fire employees "for sneezing the wrong way". This communication, Gregg's argued would be likely to intimidate or coerce and employee of reasonable intelligence and fortitude into support for the Union.

[14] In his second communication to Mr. Smith, McGhee suggested that "Brent" would likely face retaliation from Gregg's if the union organizing campaign failed. Gregg's also argued that McGhee's comments concerning the continued employment of two other employees was dependent upon support for the union. This, Gregg's argued was coercive and intimidating as it left the impression that Mr. Smith should also be concerned about his own job security.

Union's arguments:

[15] The Union argued that the communications must be read in the light of the level of control exercised by an employer vs. and employee. They argued that McGhee did not have any level of control over the livelihood of any of the other Gregg's employees. It argued that

[4] 2002 CarswellSask 862 (Sask. LRB)
[5] 2015 CanLII 43778 (SK LRB) at para. 31.

McGhee had no ability to control the livelihood of other employees and that the communications should not be treated in the same manner as communications by an employer.

[16] The text messaged, the Union argued, represented a relatively non-invasive means of communication and the advocacy positions taken by McGhee, even if they are found to be inaccurate and inflammatory, were not coercive or intimidating. It argued that "[Promises] and puffery and hyperbole and exaggeration are common features of representational campaigns".

[17] The Union also argued that there should be no symmetry of the analysis of the unfair labour practice alleged to have been committed by Gregg's and the unfair labour practice here as against McGhee and the Union. It argued that Gregg's had failed to meet the onus of proof with respect to this case.

Analysis:

[18] In the Board's recent decision in *Amenity Health Care L.P. v. Workers United Canada Council, Tanya Parkman and Gwen April Britton*[6], the Board confirmed the test to be applied with respect to section 6-63(1)(a) of the *SEA*. At paragraph [96], the Board confirmed that the test to be applied was the same test as used by the Board in *Cypress Regional Health Authority v. SEIU-West*[7]. The Board said:

> ***[96]*** *In Re: Cypress Regional Health Authority, the Board adopted an objective standard with respect to whether the conduct of the Union would interfere with, restrain, intimidate, threaten or coerce an employee of average intelligence and fortitude.*

[19] In this case we have some intemperate communications between McGhee and members of the proposed bargaining unit. However, there is nothing to show that McGhee exercised any control over these employees or precluded them from expressing their choice during the secret ballot process conducted by the Board. McGhee had no way of knowing how any of the employees voted or intended to vote albeit he may have drawn some sort of conclusion based upon his knowledge of the employees involved.

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[6] 2018 CanLII 68441 (SK LRB)

[20] He was stating his opinion regarding his preference for a union and was advocating his position to other employees. Some of his comments were clearly misinformed or outright wrong, but there is nothing in those comments which can be seen to be coercive or intimidating to any employee of reasonable intelligence and fortitude. Placed in the context of an organizational campaign, these comments do not amount to an unfair labour practice.

[21] We would not, however, go as far as the British Columbia Labour Relations Board in *7-Eleven Canada Inc. v. U.F.C.W., Local 1518*[8] in condoning, as fair game:

> *Promises and puffery, and hyperbole and exaggeration are common features of representational campaigns. Considerable leeway has been allowed especially where the party complaining has had the opportunity of rebutting any erroneous statements alleged to have been made.*

[22] Union and Employee communication, even in the context of an organizing campaign should be expected to express fact and opinion only. Wide exaggeration or outright mistruths should not, in our opinion, be condoned. Nor should promises which cannot reasonably be expected to be fulfilled should also not be tolerated. While we recognize that puffery, hyperbole and mild exaggeration will often be present, the Board will be vigilant to insure that such puffery, hyperbole and mild exaggeration does not cross the line into being intimidating or coercive.

[23] Mr. McGhee certainly had the right to (a) have a position with respect to the union campaign, and (b) to express that position or opinion. Any mistruths or misrepresentation was, we think, his personal opinion and his understanding of the situation. That those facts[9] were incorrect was probably not known to Mr. McGhee.

[24] What it boils down to is whether or not we have evidence that any employee was interfered with, restrained, intimidated, threatened or coerced by Mr. McGhee's comments. We have nothing to link these communications with any such concern. While the communications were forwarded on to Gregg's by Mr. Smith, there was nothing to suggest that either he or the other employees were in any way impacted by the communications.

[25] There was also an issue raised regarding the Union having purchased Mr. McGhee's drinks at the dinner meeting attended by Mr. Mohl from the Union, Mr. McGhee and

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[7] 2014 CanLII 17405 (SK LRB)
[8] 2000 CarswellBC 3067 (BC LRB) at para. 240
[9] For example: his stating that the employer would face serious "jail time".

Mr. Bakos. The evidence did not disclose that the Union treated Mr. McGhee or Mr. Mohl. Nor did the evidence in any way suggest that even if the Union had bought the drinks that this was in any way a breach of section 6-63(1)(a) of the *SEA*.

[26] For these reasons, the application by Gregg's is dismissed.

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

DATED at Regina, Saskatchewan, this 31st day of December, 2018.

LABOUR RELATIONS BOARD

Kenneth G. Love Q.C.
Vice-Chairperson