UNITED ASSOCIATION OF JOURNEYMAN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA LOCAL 179, Applicant v YORKTON PLUMBING & HEATING LTD./YPH MECHANICAL, Respondent

LRB File No. 060-19; November 13, 2019
Panel: Vice-Chairperson, Barbara Mysko; Board Members, Aina Kagis and Mike Wainwright

For the Applicant Union: Greg D. Fingas
For the Respondent Employer
Yorkton Plumbing & Heating Ltd.: Justin Yawney

Unfair Labour Practice Application – Section 6-62 of *The Saskatchewan Employment Act* – Application dismissed.

Clause 6-62(1)(a) – Threaten to close shop – Change in bidding practices – Employee of reasonable intelligence and fortitude – Absence of clear, convincing, cogent evidence – Applicant fails to meet onus – Legitimate reasons for closure of shop and bidding practices.

Clause 6-62(1)(g) – Layoff of employees – Subsections 6-62(4) and (5) – Reverse Onus – No clear, convincing, or cogent evidence of anti-union animus – Employer meets onus of good and sufficient reason.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: On March 15, 2019, the United Association of Journeyman & Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 179 [“Union”] filed an unfair labour practice application, as against Yorkton Plumbing & Heating Ltd. [“Employer” or “YPH”]. The Union is the designated bargaining agent for the plumbing and pipefitting trade division in the construction industry. The Employer is a provider of commercial and industrial plumbing, HVAC, and electrical services in Saskatchewan and Manitoba. A hearing on the unfair labour practice application [“Application”] was held on August 12, 2019. These are the Board’s Reasons for Decision, dismissing the Union’s Application.

[2] By way of background, the Union filed a series of certification applications in relation to employees of the Employer, which applications were dismissed by the Board.[1] The unfair labour practice application arises from the organizing drives that led up to those certification applications and continued at various sites thereafter. The first of the four certification applications was filed on or around November 1 and 2, 2018, and the last was filed on December 13, 2018.

[3] The Union alleges that the Employer was aware of the employees' attempt to exercise their rights pursuant to *The Saskatchewan Employment Act* ["Act"], took actions to interfere with the exercise of those rights, and discriminated against employees in respect of their terms and conditions of employment. The Union relies for its application on clauses 6-62(1)(a), (g), (h), and (i) of the Act.

[4] More specifically, the Union alleges that the Employer hired Union members to perform work at various sites, was aware of their Union affiliation, and proceeded to issue layoff notices, or transfer members to other sites, and then staffed the job sites with newly-hired members not affiliated with the Union. The Employer has also laid off senior and more qualified members while retaining less experienced and less qualified non-Union employees. Furthermore, the Employer made threats about the performance of work or a potential closure, refused to make reasonable efforts to secure work while the certification applications were outstanding, and communicated to employees that it was closing the Regina shop, a site which was subject to a certification application.

[5] In its Reply, the Employer alleges that it was unaware of the employees' attempts to exercise their rights, has not interfered with the exercise of those rights, and has not discriminated against any employees. As of March 15, 2019, there was no ongoing work at the Nutrien Rocanville potash mine. The last time work was performed at that site was on January 15, 2019. The Employer has exercised its management rights by raising performance issues with employees when necessary, has been unable to assign employees in locations where work has not materialized, has hired only one new employee, a dispatcher, in 2019, and continuously lays off employees as work comes to an end.

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[1] *United Association of Journeyman And Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 179 v Yorkton Plumbing and Heating Ltd./YPH Mechanical*, 2019 CanLII 43226 (SK LRB).

Evidence:

[6] The Union led evidence from Cody Summers ["Summers"], Business Development Representative, as well as Kyle Mierau ["Mierau"], Richard Storozuk ["Storozuk"], and Jared Wilk ["Wilk"]. The Employer's evidence was provided by the President of YPH, Justin Yawney ["Yawney"].

[7] Summers provided a brief description of his organizing activities. He explained that he was involved in organizing the employees of YPH throughout the province of Saskatchewan and in Manitoba, and in his opinion, the "word had gotten out" to the Employer quite quickly.

[8] The remaining Union witnesses testified about their personal qualifications as tradespersons, their involvement in Union activities, and the circumstances involving their work with YPH and eventual layoffs. Yawney testified as to the operations of the business and the rational underlying the layoffs and the closure of the Regina shop.

[9] All of the evidence is outlined in more detail in the following paragraphs.

Applicable Statutory Provisions:

[10] The following provisions of the Act are applicable:

> ***6-4(1)*** *Employees have the right to organize in and to form join or assist unions and to engage in collective bargaining through a union of their own choosing.*
>
> . . .
>
> ***6-62****(1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following:*
>
> > *(a) subject to subsection (2), to interfere with, restrain, intimidate, threaten, or coerce an employee in the exercise of any right conferred by this Part;*
> >
> > . . .
> >
> > *(g) to discriminate with respect to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including termination or suspension or threat of termination or suspension of an employee, with a view to encouraging or discouraging membership in or activity in or for or selection of a labour organization or participation of any kind in a proceeding pursuant to this Part;*
> >
> > *(h) to require as a 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 its opinions to its employees.*
>
> *. . .*
>
> *(4) For the purposes of clause (1)(g), there is a presumption in favour of an employee that the employee was terminated or suspended contrary to this Part if:*
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> > *(a) an employer or person acting on behalf of the employer terminates or suspends an employee from employment; and*
> >
> > *(b) it is shown to the satisfaction of the board or the court that employees of the employer or any of them had exercised or were exercising or attempting to exercise a right pursuant to this Part.*
>
> *(5) For the purposes of subsection (4), the burden of proof that the employee was terminated or suspended for good and sufficient reason is on the employer.*

Analysis:

[11] It is well-established that the Union bears the burden to prove the allegations of unfair labour practices pursuant to clauses 6-62(1)(a), (h), or (i) of the Act, on a balance of probabilities. The evidence presented in support of the allegations must be sufficiently clear, convincing, and cogent.

[12] The Union focused on clause 6-62(1)(a) of the Act, which 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 any of the following:*
>
> > *(a) subject to subsection (2), to interfere with, restrain, intimidate, threaten, or coerce an employee in the exercise of any right conferred by this Part;*

[13] On an application pursuant to clause 6-62(1)(a), the Union must satisfy the Board that the actions of the Employer have interfered with, restrained, intimidated, threatened, or coerced an employee of reasonable intelligence and fortitude against the exercise of a right conferred by the Act.[2] This test involves a contextual analysis of the probable consequences of the Employer's conduct on employees of reasonable intelligence and fortitude. It is an objective test. If the Board is satisfied that the probable effect of the conduct would have been to interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of protected rights, the Board may find a breach. The Board has previously found that prohibited conduct is that which would compromise the free will of the employees.[3]

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[2] See, *Cypress Regional Health Authority v SEIU-West*, 2016 SKCA 161 ["*SAHO (SK CA)*"].
[3] *SAHO (SK CA)*; reversing in part 2015 SKQB 222; reversing 2014 CanLII 17405 (SK LRB).

[14] Subsection 6-62(2) states that clause (1)(a) does not prohibit an employer from communicating facts and its opinions to its employees. As the Court of Appeal observed in reviewing the Board's decision in *SAHO*:

> *[81] …Under this line of analysis, a communication that is a fact or opinion does not receive a free pass, i.e., an employer cannot send out coercive or intimidating communications with impunity simply because they can be characterized as facts or opinions. The determinative issue is always whether the communication improperly impairs the employee's ability to exercise his or her rights. […]*

[15] The Board must take into consideration the circumstances of an organizing campaign, in that employees during an organizing campaign are particularly vulnerable to employer interference, and to other employer conduct prohibited pursuant to clause 6-62(1)(a).

[16] The Union relies on a series of cases to demonstrate that an unfair labour practice can be made out on the basis of: veiled threats which would have caused employees to conclude that supporting a union would endanger their job security; threats that an employer would cease carrying on its business if the union was certified; and employer discrimination in the availability of work or promotions, in response to union activity.[4] The Union argues further that taking steps to implement such threats in the absence of a valid business purpose is also impermissible.[5] The Board agrees that all of the foregoing are legitimate examples of potential unfair labour practices. However, each case must be considered on the basis of the particular facts presented in evidence.

Clause 6-62(1)(a)

The Fillmore-Storozuk Discussion

[17] To ground an unfair labour practice pursuant to clause 6-62(1)(a), the Union relies on Storozuk's testimony about statements made by Clint Fillmore, the Project Manager at the Conexus site, on December 14, 2018.

[18] Storozuk testified that, after the weekly meeting on that date, Fillmore told Storozuk that Yawney was "livid" and that Yawney said he would shut down the company if the certification

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[4] *UA, Local 496 and Bilton Welding and Manufacturing Ltd., Re*, 2018 CarswellAlta 165 (AB LRB); *Kootenay Veneer Ltd. v Industrial Wood and Allied Workers of Canada (CLC, Local 1-423)*, 2000 CanLII 27463 (BC LRB); *Direct Disposal Corporation v International Union of Operating Engineers, Local 115*, 2003 CanLII 62989 (BC LRB); *Certain Employees of Transwest Roofing Ltd. v Transwest Roofing Ltd*., 2003 CarswellBC 2467.

[5] *Communications Workers of Canada v Academy of Medicine*, 1977 CanLII 446 (ON LRB); *Catholic Independent Schools Diocese of Prince George v B.C. Government and Service Employees' Union*, 2000 CanLII 27820 (BC LRB).

went through. In his testimony before the Board, Storozuk added: “it is up to your interpretation”. Storozuk did not reveal whether Fillmore’s statement was made in the presence of a group. Instead, he offered, “that is what he did tell me”, suggesting that the impugned conversation was restricted to Fillmore and Storozuk. There was certainly no suggestion that Yawney’s alleged statement was made to anyone other than Fillmore. Any surrounding context is minimal.

[19] The evidence on this point is not sufficiently clear, cogent, or convincing to support the allegation of an unfair labour practice. To be sure, while it is unclear whether Fillmore had the requisite authority to purport to act on behalf of the Employer under the circumstances, the Union led some passing testimony to suggest that Fillmore was generally perceived as an Employer representative.

[20] Even assuming that Fillmore was so perceived, the evidence of this conversation is frail and relatively devoid of context, despite the Union’s heavy reliance on this one, allegedly pivotal conversation. The Board accepts that Yawney was concerned about Union organizing due to his personal perceptions about the potential, consequent cost of doing business. But while the Board agrees that the conversation as relayed by Storozuk was unfortunate, it represents, in its worst characterization, a passing personal observation of Yawney’s reaction to the filing of the certification application. Furthermore, to the extent that Fillmore was communicating an observation of Yawney’s reaction to the organizing drive, Storozuk’s testimony about Fillmore’s observation is hearsay.

[21] Pursuant to clause 6-62(1)(a), the Board is charged with assessing whether the Union has met its onus to demonstrate that the actions of the Employer have interfered with, restrained, intimidated, threatened, or coerced an employee of reasonable intelligence and fortitude against the exercise of a right conferred by Part VI. This is an objective test. In the Board’s view, the evidence about the Fillmore-Storozuk discussion is not sufficiently clear, convincing, or cogent to satisfy this test. Furthermore, to the extent that the Board can take the conversation as presented, the Board is not persuaded that this single conversation would have interfered with, restrained, intimidated, threatened, or coerced an employee or employees of reasonable intelligence and fortitude in the exercise of a protected right.

Closure of Regina Shop and Bidding Practices

[22] The Union also relies on the fact that the Employer closed its Regina shop in a manner consistent with its threats. Yawney offered that the closure resulted from a decline in work. The

Board found, following the certification hearing, that the Regina shop was closed due to unapproved welding activities.[6] Yawney was not cross examined on this previous finding of the Board. Therefore, the Board is unable to draw inferences as to credibility on this point. Yawney's present explanation is reasonable. The reduction in work could not justify the continued cost. Besides, employees hired by YPH were mainly hired to work on job sites, not at the Regina shop. The Regina shop was only one part of YPH's operations. Closing the Regina shop was not tantamount to shutting down YPH's operations.

[23] The Union also relies on YPH's change to its bidding practices after having learned of the Union organizing drive. The Union states that the Employer did not discuss any "means of making YPH's bids more competitive" and then "began attributing its failure to secure work, including its resulting layoffs, to that choice". Yawney explained that YPH began bidding at Union rates for the Regina projects, not all new projects, to stay on top of its financial planning. The downturn in the economy meant that existing bids were unsuccessful. Yawney acknowledged that he was not required to bid at Union rates, and that it was a conscious decision to do so. He did not take up Summers' invitation to discuss alternatives, but he was unconvinced by the invitation alone.

[24] Yawney's explanation for YPH's bidding practices is logical, coherent, and persuasive. His evidence was candid and genuine. The Board is not persuaded that YPH was attempting to sabotage its own operations such that it interfered with, restrained, intimidated, threatened, or coerced an employee of reasonable intelligence and fortitude against engaging in Union activity.

Clauses 6-62(1)(h) and (i)

[25] The Union also cites clause 6-62(1)(i) in support of its argument that the Employer engaged in intimidation, restraint, coercion, interference and threats on behalf of the Employer. Clause 6-62(1)(i) states that it is an unfair labour practice for an employer, or any person acting on behalf of an employer, to interfere in the selection of a union. The Union has failed to establish interference with the exercise of a right conferred by the Part, being the right to organize in an effort to secure a bargaining agent, being the Union. There is no further or more specific evidence before the Board pertaining to interference with the selection of a union. Therefore, the Board is unable to find a violation on the basis of clause 6-62(1)(i) of the Act.

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[6] *United Association of Journeyman and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 179 v Yorkton Plumbing and Heating Ltd./YPH Mechanical*, 2019 CanLII 43226 (SK LRB) at para 29.

[26] The Union cited but did not focus on clause 6-62(1)(h) of the Act. Clause 6-62(1)(h) creates an unfair labour practice where an employer, or any person acting on behalf of the employer, requires as a 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 Part VI, except as permitted. The Union has led no evidence demonstrating that the Employer implicitly or explicitly required as a 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 Part VI.

Discrimination re Clause 6-62(1)(g)

[27] The Union also alleges that the Employer breached clause 6-62(1)(g) of the Act. Subsections 6-62(4) and (5) establish a presumption in favour of an employee in relation to clause 6-62(1)(g), resulting in a reverse onus, borne by the Employer. To benefit from the reverse onus, the Union must demonstrate that the Employer terminated or suspended the employment of an employee; and that employees of YPH or any of them had exercised or were exercising or attempting to exercise a right pursuant to Part VI. If both of these criteria are met, the Employer bears the burden of proof that the employee was terminated or suspended for good and sufficient reason.

[28] The Union says that there is evidence of an organizing campaign in the relevant workplace, and therefore it is clear that the employees were seeking to exercise their rights pursuant to Part VI. As evidence of termination, the Union relies on the layoffs, and the Employer's failure to further employ, in relation to Union members, Mierau, Wilk, and Storozuk. The Union says that the Employer bears the onus to satisfy the Board that it has good and sufficient reason for these terminations. The Board agrees that the Union has met its threshold onus in relation to the layoffs, and therefore the Employer bears the onus to demonstrate good and sufficient reason.

[29] In outlining the applicable test pursuant to clause 6-62(1)(g), the Union relies on the Board's review of jurisprudence as outlined in *Saskatchewan Government and General Employees Union v Lac La Ronge Indian and Child Services Agency Inc*., 2015 CanLII 80539 (SK LRB) ["*Lac La Ronge*"], at paragraph 29:

> *[29] In Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Sakundiak Equipment, supra, the Board also reviewed its prior jurisprudence with respect to the similar provision within The Trade Union Act, section 11(1)(e). At paragraphs [100] – [103], the Board outlines that jurisprudence as follows:*

[100] The Board has recently outlined its jurisprudence with respect to the application of s. 11(1)(e) of the [Act in] *Canadian Union of Public Employees v. Del Enterprises Ltd. o/s St. Anne's Christian Centre. That decision referenced the Board's decision in Canadian Union of Public Employees, Local 3990 v. Core Community Group Inc., which decision referenced the Board's decision in Saskatchewan Joint Board, Retail Wholesale and Department Store Union v. Moose Jaw Exhibition Co. Ltd.*

[101] In the Moose Jaw Exhibition case, supra, the Board quoted from para. 123 of its decision in Saskatchewan Government Employees Union v. Regina Native Youth and Community Services Inc. as follows:

> *It is clear from the terms of Section 11(1)(e) of the Act that any decision to dismiss or suspend an employee which is influenced by the presence of trade union activity must be regarded as a very serious matter. If an employer is inclined to discourage activity in support of a trade union, there are few signals which can be sent to employees more powerful than those which suggest that their employment may be in jeopardy. The seriousness with which the legislature regards conduct of this kind is indicated by the fact that the onus rests on the employer to show that trade union activity played no part in the decision to discharge or suspend an employee.*

[102] In United Steelworkers of America v. Eisbrenner Pontiac Asuna Buick Cadillac GMC Ltd. the Board made this observation about the significance of the reverse onus found in s. 11(1)(e) of the Act. In that decision, the Board outlined two elements that the Board must consider as follows:

> *When it is alleged that what purports to be a layoff or dismissal of an employee is tainted by anti-union sentiment on the part of an employer, this Board has consistently held, as have tribunals in other jurisdictions, that it is not sufficient for that employer to show that there is a plausible reason for the decision. Even if the employer is able to establish a coherent and credible reason for dismissing or laying off the employee…those reasons will only be acceptable as a defence to an unfair labour practice charge under Section 11(1)(e) if it can be shown that they are not accompanied by anything that indicates that anti-union feeling was a factor in the decision.*

[103] Also, in The Newspaper Guild v. The Leader-Post, a Division of Armadale Co. Ltd., the Board noted that in making its analysis of the decision, it would not enter directly into an evaluation of the merits of the decision.

> *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. … 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 into the mind of the Employer.*

[30] The Board agrees with the Union that the burden on the Employer is high. Even if the Board is satisfied that there were otherwise good and sufficient reasons for the Employer's actions, it may still find a violation if it is satisfied that the Employer's actions were motivated, even in part, by anti-union animus. In other words, actions motivated by anti-union animus will invalidate an otherwise good and sufficient reason. To adopt the Union's characterization, if the evidence discloses that the Employer through terminating employees intended to inflict punishment for, or signal displeasure about, Union activity in the workplace, then the Employer's actions will be found to offend clause 6-62(1)(g). In assessing the Employer's conduct, the Board must not expect that anti-union animus will be overt, but instead must be alert to its subtle signs.

[31] While the Union argued vigorously that there was anti-union animus, it relied primarily on the aforementioned set of three concerns in support of that argument - the Fillmore-Storozuk discussion, the closure of the Regina shop, and the bidding practices. The Board is not persuaded that any or all of those concerns establish anti-union animus on the Employer's part.

[32] Next, the Board turns to its assessment of whether the Employer's explanation meets the onus of good and sufficient reason. Yawney provided a number of reasons, including: an economic downturn impacting available jobs; the necessity of cost-cutting measures; a company preference to minimize leave of absence pay; and seniority-based layoffs. Yawney explained that YPH hires and lays off workers continuously with no regard to Union affiliations. The Union says that YPH's explanations are implausible. The supposed pattern of seniority-based layoffs is not borne out by the evidence and the reluctance to pay for travel is implausible in relation to the Clearwater Dene site.

[33] The Employer's explanation discloses a rational response to an economic downturn. Yawney explained that YPH's staff decreased from approximately 73 to 16 employees in one year. The employee list shows a significant reduction (mainly through layoffs and resignations) during the relevant and surrounding timeframe.[7]

[7] The Board notes that, it was unclear as to whether there was any connection between the high number of resignations and the downturn.

[34] However, the Union argues that the Employer's reasons do not withstand the weight of the remaining evidence, and are implausible on the totality of the circumstances. As explained by the Union:

> *Instead, Yawney offered a series of explanations which included seniority (in circumstances where the same work was repeatedly offered to employees with less seniority), and travel pay to Regina which would not have represented a reason to discriminate in offering work in La Loche.*
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> *For UA's other members, no specific explanation was provided at all other than a supposed practice of laying employees off by seniority which is not borne out by the evidence before the Board. By the employer's own incomplete account:*
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> a. *Dallas Follick and Rick Storozuk were hired after Kyle Mierau as journeyman plumbers, but laid off afterward; and*
> b. *Craig Poirier was hired after Jared Wilk as a 3rd-year plumber, but laid off afterward.*

[35] It is therefore necessary for the Board to consider the coherence and credibility of the Employer's stated reasons on the whole of the evidence.

Kyle Mierau ["Mierau"]

[36] First, the Board will consider the circumstances involving Mierau's hiring and eventual layoff. Mierau was hired to work as a plumber at the Rocanville site beginning on October 1, 2018. Shortly before his layoff, Mierau was told that if he was willing to travel he would be assigned work in the new year. He agreed to travel. He could not otherwise recall if, at the time of hire, he had a discussion about the duration of his employment. He was aware that the Rocanville job would end around Christmas.

[37] Mierau was involved in Union organizing during his employment at the Rocanville site. Summers explained that he and Mierau had had discussions about distributing Union materials, and Summers concluded that Mierau was laid off "because of that". In reference to whether the Employer had knowledge of his activities, Mierau recalled that he wore a Union "hoodie" to work every day on the job site and that his Union discussions occurred at the lunch table. Yawney testified that he might have been on the Rocanville site once while Mierau was working there. Still, the Board accepts that the Employer had knowledge of the organizing activities at that site.

[38] The Union urges the Board to note and draw conclusions based on certain inconsistencies in the Employer's Reply, for example, the statement that YPH "was unaware of any attempt by its employees to exercise their rights pursuant to Part VI of [the Act] prior to the Union filing its application for certification". In the present case, the Board does not find that this inconsistency

is sufficiently concerning such that it impugns Yawney's credibility. Furthermore, the Board observes that the Union falls short, in its own sworn Application, of meeting the standard of consistency and accuracy that it has set for the Employer.[8]

[39] Mierau was laid off on December 7, 2018. He was the only person laid off on that day, and at the time of his layoff he had expected to work at Rocanville through to December 20. According to Mierau, the work was at a critical phase where it needed to be pushed to completion. Prior to the layoff he had worked overtime hours. About six months prior to the hearing, Yawney had told Mierau that he liked the quality of Mierau's work. At the time of the layoff, Mierau was not told that he would *not* be returning.

[40] In his testimony, Yawney explained that the Employer hires and lays off workers continuously with no regard to whether they are unionized. Mierau had done a good job, the work had ended and there was a possibility that he would return for Phase II of the project, but Phase II did not materialize. Generally speaking, this is a credible and coherent explanation for Mierau's layoff.

[41] In assessing the Employer's reasons, the Board must also gauge the plausibility of the Employer's seniority-based layoff explanation. However, there are some limitations on the Board's ability to determine the identity and seniority of Mierau's coworkers at the Rocanville site. First, Mierau experienced understandable difficulty in recalling the names of those on site. Second, the Employer's employee list provides hiring and layoff dates, but does not specify the working location of the employees at any point in time.[9] Therefore, the Board is left with assessing a combination of Mierau's testimony and the employee list for purposes of determining who was employed at the relevant site, during the relevant timeframe.

[42] Mierau could recall the following tradespeople working at the Rocanville site at the time of his layoff:

a. Curtis Usher, hired on September 24, 2018.[10] According to the employee list, he was not laid off, but instead quit in July 2019.
b. Reid Melle, hired on June 8, 2018.[11] No termination date is noted on the employee list.

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[8] See, for example, paragraph 11 "Glenboro to Indian Head". Note, also, the substantial discrepancies between the facts alleged in the Application and the facts asserted in response through the Reply, many of which the Union did not dispute in direct evidence or through cross examination.
[9] Furthermore, Storozuk's name, for example, does not appear on the list.
[10] According to the employee list (E-1).
[11] According to the employee list (E-1).

c. Brad Totoski, a name that does not appear on the employee list. An employee with a similar name, and a later hire date than Mierau, appears on the employee list.
d. Three additional sheet metal workers. Mierau testified that he believed, but could not confirm, that one of the sheet metal workers (involved in organizing) was laid off shortly after he was.

[43] Mierau was not able to recall any other individuals or confirm the hire dates, or seniority, of any of the tradespeople at the site.

[44] On the issue of "Brad Totoski", the Board cannot supplement Mierau's evidence by transplanting a name from the employee list into his recollection. Furthermore, there was no cross examination on this point. Of those employees who Mierau could recall, the Board has had to review the employee list to determine their seniority, based on the listed date of hire. Based on the employee list, the employees named were more senior than Mierau, even if only by a week. Furthermore, when asked, Yawney explained that Chad Maleschuk and Brian Lubiniecki were also working at the Rocanville site in January, 2020. According to the employee list, both of these employees are significantly more senior than Mierau.

[45] The Union makes the point that the Employer hired Dallas Follick ["Follick"] after Mierau's layoff instead of recalling Mierau to work. The employee list confirms that Follick was hired on December 3, 2018 and laid off on July 3, 2019. However, Follick was working at the Conexus site in Regina with Storozuk. He was not hired for the Rocanville job. Follick's hiring is consistent with the Employer's stated preference for Regina-based employees on Regina jobs.

[46] The Board concludes that the Employer's explanation as to seniority-based layoffs is credible and coherent.

[47] Next, the Board must assess the Employer's explanation that it preferred to minimize leave of absence pay.

[48] Yawney testified that he preferred not to compensate employees for travel allowances if not necessary. To avoid extra costs, YPH had increasingly been relying on Regina-based employees to do jobs in and around Regina. Storozuk was hired on December 10, 2018 to work at the Conexus site in Regina, and for a couple of weeks at Buffalo Pound.

[49] Mierau had been working far from Saskatoon in Rocanville, and had been advised that he could continue working there if Phase II was awarded. Mierau's paystub confirms a Saskatoon mailing address during the relevant timeframe, and displays a meal allowance and mileage reimbursement. Yawney explained that he was not prepared to pay someone from Saskatoon a travel allowance for a job "in town", meaning Regina. It was not inconsistent for YPH to provide travel pay for a Rocanville job.

[50] Based on the foregoing, the Board finds that the Employer's travel pay explanation is credible and coherent. YPH was increasing its reliance on Regina employees. With Regina-based employees at its disposal, YPH chose not to compensate for travel in relation to jobs taking place in Regina and area.

[51] The Union highlighted certain problems with Mierau's record of employment, which are reasonably and logically explained by Yawney's testimony about administrative error. Contrary to the Union's assertion, the issues with the record of employment are not indicative of an inconsistent or contradictory approach to Mierau's layoff. Besides, the record of employment displays the layoff month as "December" and the expected date of recall as "unknown". This is consistent with Yawney's testimony that Mierau could return to work if YPH was awarded the Phase II work for Rocanville. Phase II of the project did not materialize, and so Mierau was not recalled for work.

Dallas Follick and Jared Wilk

[52] In late June 2018, Wilk was hired as a third-year plumber to work on the Costco site in Regina. He later worked on different sites. Wilk described his involvement in organizing in the following, rather unspectacular, fashion: "we talked to some people, I guess." Wilk was later laid off in either January or February, 2019.[12] At the time of his layoff Wilk was working at Buffalo Pound.

[53] According to Wilk, the work at Buffalo Pound was incomplete at the time of his layoff. Steven Kowalsky ["Kowalsky"],[13] Follick, and "some other people" remained. According to Storozuk, there were also "quite a few guys" coming and going on that job site over time. Wilk explained that he was not offered the opportunity to work at any other sites. The employee list

[12] There is some discrepancy in Wilk's layoff date. Wilk testified that he was laid off around the end of January 2019, while the employee list indicates that he was laid off on February 22, 2019.
[13] Spelling based of the Employer's employee list.

discloses that Kowalsky was hired on May 28, 2018 and laid off on February 28, 2019 due to a shortage of work. This is consistent with Yawney's testimony about seniority-based layoffs.

[54] Follick was a journeyman plumber, thereby discounting any comparison between Wilk and Follick.

[55] The Union also took issue with the Employer both hiring and laying off an employee, referred to as Craig Poirier ["Poirier"], after Wilk. The employee list discloses that Poirier was hired on October 22, 2018 and laid off on May 28, 2019. No evidence was led as to where Poirier was working during his employment with YPH, where he was from, whether he was a Union member, or whether he was involved in organizing. The relevance of the Union's comparison between Poirier and Wilk is entirely unclear.

Clearwater Dene Project

[56] The Union took issue with the fact that Mierau, in particular, was not recalled for the Clearwater Dene project, despite the fact that he was willing to travel.

[57] According to Yawney, there was general reluctance to work on the Clearwater Dene project. YPH had asked all of the guys that were working at the Buffalo Pound, Assiniboia and Conexus sites "whether anyone wanted to work up there", or whether they were aware of anyone who did. Sometime in mid-January, 2019, YPH did a call out for a few tradespeople to work at Clearwater for the ensuing six to eight weeks. By this point, Mierau had been laid off for over a month.

[58] When Storozuk's work dried up, Yawney contacted Storozuk to request his assistance with the Clearwater project. For Yawney, it made no sense to lay off Storozuk so that he could recall someone else. Things had changed in December. In the end, Storozuk was unconvinced, and YPH filled the Clearwater job with other, existing employees. Nonetheless, it was perfectly rational to request Storozuk's assistance at the Clearwater site.

[59] Based on the foregoing, the Employer's explanation with respect to the Clearwater site is credible and coherent. It would have been completely unreasonable to expect Mierau to be recalled for this purpose, without first relying on existing staff.

Tim Shuya ["Shuya"] and Rory Bell ["Bell"]

[60] Throughout the course of the proceedings, the Union changed its approach to Shuya and Bell. In its Application, the Union alleged that Shuya and Bell were laid off in a discriminatory manner; in its Brief, the Union suggested that these same employees were transferred in a discriminatory manner. The first of these allegations involves a reverse onus; the second does not.

[61] Minimal evidence was presented in relation to these two individuals, who apparently worked at the Dauphin site for a period of time around December, 2018. Summers testified that he made multiple visits to that site within a period of three days. After the third visit on December 18, 2018, Shuya and Bell were transferred off the site, and then laid off sometime after. Summers implied that these employees were transferred off the site as a result of his visit.

[62] Summers suggested that there was some openness to his presence on the day of his third visit. He implied that this openness was really a masked interest in identifying the problem employees. He did not indicate who was open to his presence, or what caused him to draw that conclusion. There is minimal evidence of the nature and extent of Shuya's and Bell's involvement in these visits, their engagement with the Union, or the transfers off site. The link between the visit and the transfers is so vague as to be indiscernible. There was no cross examination of Yawney on this issue.

[63] On the issue of discriminatory transfers, the reverse onus is not engaged. The Union has failed to demonstrate, on a balance of probabilities, that due to their transfers, Shuya and Bell were discriminated against or subject to coercion or intimidation with a view to discouraging activity in the Union, pursuant to clause 6-62(1)(g) of the Act.

[64] The Union led minimal evidence as to the timing and circumstances surrounding the layoffs of Shuya and Bell. But for the sake of being thorough, the Board has considered whether the Employer has met the reverse onus pursuant to subsections (4) and (5) in relation to their layoffs, and has found that it has met this onus. The Board notes the Employer's Reply, which indicates that Shuya was seeking a better job in December, 2018 and that Bell did not want to work on the Clearwater site in January, 2019. The Union abstained from cross examining Yawney on either of these explanations. For the foregoing reasons, the Board finds that the Employer had good and sufficient reason to lay off these employees.

Remedial Procedure - Bifurcation:

[65] At the end of the hearing, the Union asked that the matter before the Board be bifurcated such that the issue of damages would be addressed in a separate hearing. For obvious reasons, the Board expressed its concern with the Union's announcement at the end of the substantive hearing, with no notice to the Employer. Despite this, the Employer advised that it had no concerns with proceeding in the manner requested by the Union. As it turns out, due to the Board's determination on the substantive matter, it has not had to address the issue of damages in any fashion. Despite this, the Board wishes to remind the Union of its expectation that requests for bifurcation are to be submitted and addressed at the beginning of the hearing.

Conclusion:

[66] For the foregoing reasons, the Union's application is dismissed.

[67] The Board is grateful to the parties for their helpful evidence and written submissions, all of which have been reviewed in the course of the Board's deliberations.

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

DATED at Regina, Saskatchewan, this **13th** day of **November, 2019.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson