MITCHELL WENTWORTH, Applicant v TEAMSTERS CANADA RAIL CONFERENCE, Respondent and BIG SKY RAIL CORP., Respondent

LRB File No. 102-18; June 24, 2019

Vice-Chairperson, Barbara Mysko; Board Members: Maurice Werezak and Laura Sommervill

Counsel for the Applicant:	Maurice Dransfeld
Counsel for the Respondent Teamsters:	Heather M. Jensen
Counsel for the Respondent Big Sky Rail:	Anna Maria Moscardelli

Application to cancel certification order – Employer influence – Provision of contact information for lawyer – Delay in bringing decertification application – Member of management used words "sooner would be better than later" – Application filed within a week – Employer intransigence in collective bargaining not established – Board dismisses application pursuant to section 6-106 of *The Saskatchewan Employment Act*.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: On April 19, 2018, Mitchell Wentworth ["Wentworth"], an employee with Big Sky Rail Corp. [the "Employer" and "Big Sky"], filed an application to cancel a certification order. The Teamsters Canada Rail Conference [the "Union"] filed a reply, asking that the Application be dismissed pursuant to section 6-106 of *The Saskatchewan Employment Act* [the "*Act*"], having been made in whole or in part on the advice of, or as a result of influence of or interference or intimidation by the Employer.

[2] The hearing of this Application took place on September 5 and 6, 2018, before then Vice-Chairperson Graeme Mitchell, Q.C., and panelists Don Ewart and Shelley Boutin-Gervais. Vice-Chairperson Mitchell was appointed as a Judge of the Court of Queen's Bench on September 21, 2018. The parties were offered three options to allow the Board to render a decision in this matter, the default, failing consent, being to convene a new hearing before a newly constituted panel. A new hearing was held before a panel consisting of Vice-Chairperson Mysko, Maurice Werezak and Laura Sommervill on May 8 and 9, 2019.

[3] The Employer operates a short-line railway in the Province of Saskatchewan, co-founded by members of the Affleck family. The Employer was subject to an application for successorship rights and a related employer declaration, arising from the transfer of a number of branch rail lines from the federally-regulated employer, CN Rail ["CN"]. The circumstances of this application are outlined in the Board's reasons in *Big Sky Rail Corp. (Re)*, [2014] SLRBD No 5 and *Big Sky Rail Corp. (Re)*, [2015] SLRBD No 8. In the latter of the two decisions, the Board concluded:

> *[45] For the reasons stated above, a new certification Order shall issue naming Big Sky Rail as the employer following the transfer of CN's obligations to bargain collectively with the Union. Although the precise language of the new certification Order has yet to be determined, the Union shall represent the same unit of employees that it previously represented subject only to the change in the identity of the employer. In addition, the Union's collective agreement shall apply from this date forward until such time as they are able to negotiate a new collective agreement appropriate for this new workplace. In this regard, we direct that the Union's current collective agreement shall be deemed to have expired and that the parties have given the requisite notice(s) to engage in negotiations towards the conclusion of a new collective agreement.*

[4] By reason of that decision, the Union holds a Certification Order dated March 20, 2015, covering a unit of employees, described as "all employees performing the duties of locomotive engineers, conductors, brakepersons, and yardpersons employed by Big Sky Rail Corp."

[5] The Application before the Board alleges that, "Teamsters Canada has been legally our union for 3 years now and have yet to provide us with a collective agreement. We like things the way they are and have no need for a union."

[6] A Direction for Vote on decertification was ordered on April 24, 2018. The Union filed its Reply to the Application on May 2, 2018. A Notice of Vote was mailed on April 24, 2018, and an Amended Notice of Vote was mailed on May 7, 2018, requesting that ballots be returned by May 21, 2018. The Amended Notice of Vote included a total of 27 employees. The votes were held and the ballots remain sealed.

[7] By the time this panel heard the Application, the Union and the Employer had reached a partial agreement as to the eligible voters list. By agreement, nine employees are included on the list. An additional two employees remained subject to dispute. Both of the disputed employees had been included in the Amended Notice of Vote.

Argument on Behalf of the Parties:

Employer Interference

Wentworth – Argument

[8] Wentworth relies primarily on *Hannah Crowder v SEIU-WEST and The Saskatoon Society for the Protection of Children Inc*., LRB File No. 023-16 (July 28, 2016) ["*Crowder*"] and *Williams v United Food and Commercial Workers, Local 1400 and Affinity Credit Union (Hague Branch)*, 2014 CanLII 63996 (SK LRB) ["*Williams*"], as indicative of a new analytical framework for objections related to employer influence. According to Wentworth, the Board in *Crowder* adopted a shift in attitude towards decertification applications, reflecting the constitutional protection of employee choice, pursuant to section 2(d) of the *Charter*, and a greater statutory acceptance of employer communications. The Board no longer assumes that an applicant for rescission is acting as the Employer's agent, but respects the employees' right to choose, interfering minimally with the exercise of that choice.

[9] Wentworth argues that the effect of dismissing a decertification application is to strip the employees of their right to choose whether to be represented by a union. Bearing this in mind, the Board should scrutinize these cases through a unblemished lens, and not through the "arched eyebrow of suspicion". The Board must exercise its discretion to dismiss for employer interference only exceptionally, in the clearest of cases.

[10] On the facts, Wentworth's motivation is straightforward and plausible. He was and remains uninterested in Union representation. His concerns with the Union are his own. Wentworth enjoys a normal, rather than extremely close, relationship with management. He has not been afforded any kind of special treatment. There is no compelling evidence of interference. What discussions took place amounted to permitted forms of employer communication. Wentworth was given relatively little assistance by the Employer. What assistance he received is inconsequential. While it may have assisted him it did not motivate him. Nor did it reasonably impair the capacity of the employees to decide the representational question.

[11] Wentworth addressed a comment made by a member of management following a crew meeting in April 2018. The comment was to the effect that, if Wentworth were to bring the Application, "sooner would be better than later". According to Wentworth, the comment did not communicate a position on the merits of decertification or strip Wentworth of his ability to decide the representational question.

Union – Argument

[12] According to the Union, Wentworth has the onus of establishing that the majority of the unit no longer wishes to be represented. Improperly permitting a decertification application undermines the stability of collective bargaining. The Board's power to dismiss a decertification application is complementary to the statutory protection of employee choice of bargaining agent. The Board guards against applications that reflect the will of the employer rather than the will of the employees. Employer influence or interference may be indirect or subtle, and may occur unwittingly and without deliberation.

[13] The Union says that the circumstances in this case are strikingly similar to *Nadon v USA and E-Potential Products Inc.*, [2003] SLRBD No 32, 2003 CanLII 62864 (SK LRB) ["*Nadon*"].[1] In that case, the employer representative told the applicant that he could not discuss the application but then provided the name of a lawyer who could. The decertification application was dismissed for employer influence.

[14] In this case, the Employer created an impression that the presence of the Union was a barrier to wage increases. Shortly after the Union "put a stop" to further delays in bargaining, the Employer called a lengthy crew meeting. The meeting, held on employee time, involved a discussion about "matters of union representation" and carried a thinly veiled promise of benefit in exchange for removing the Union. After the meeting, a member of management told Wentworth that if he was going to file for decertification, "sooner would be better than later".

[15] The Union points out that the employees did not, at the time of the application and vote, have the opportunity to experience a negotiated collective agreement. The Board has previously recognized that employees have a right to be informed in the voting process, and to this end, has delayed votes until after a collective agreement was in place, removing any incentive to delay collective bargaining.

[16] In case the Board does not dismiss the Application, the Union seeks the addition of two employees to a voters list otherwise agreed to by the parties.

The Employer – Argument

[17] Finally, the Employer defends its record on collective bargaining. Contrary to the Union's assertions, the Employer insists that it demonstrated a willingness to bargain with the Union, was

[1] See also, *Jones v SGEU and Hill View Manor*, [2006] Sask LRBR 404 at para 32 ["*Jones*"].

accommodating with bargaining dates, and to the extent that there was a delay in bargaining, was not responsible for that delay.

Voter Eligibility:

[18] On the issue of voter eligibility, the parties agree that nine individuals were eligible to cast ballots pertaining to the representational question. These are:

1. Allan Paziuk
2. Barry Donaldson
3. Dave Paquin
4. Dylan Fister
5. John Hilbig
6. Lorne Dyck
7. Mitchell Wentworth
8. Preston Hubble
9. Scott McManaman

[19] The Union claims that an additional two individuals should be deemed eligible to cast ballots. These are: Norman Dyck [“Dyck”] and Yvan Charbonneau [“Charbonneau”]. Dyck and Charbonneau have rights under the CN Rail collective agreement, which pursuant to the normal operation of successorship provisions, is the default agreement. As there is no replacement agreement, these individuals continue to be members with seniority rights under the existing agreement. Employees with sufficient connection and continuing interest in the bargaining unit are eligible to vote.

[20] The Employer relies on the wording of the Certification Order, specifically the phrase “performing the duties”, to suggest that Dyck and Charbonneau were not eligible to vote on the representational question:

> *all employees performing the duties of locomotive engineers, conductors, brakepersons, and yardpersons employed by Big Sky Rail Corp.*
>
> *[emphasis added]*

[21] The Employer says that the Board is compelled to consider who falls within the bargaining unit in and around the time of the Application. While Dyck and Charbonneau fell into the

bargaining unit at the time of the Certification Order, they were not performing the duties in or around the time of the Application, and on that basis, they were not eligible to vote. The Union's insistence on their inclusion misrepresents their legitimate interest in the outcome of this Application. If the employees fall outside the bargaining unit, they do not have seniority rights.

Evidence:

[22] Two witnesses testified: Wentworth and Raymond Donegan.

Mitchell Wentworth ["Wentworth"]

[23] Wentworth is a 25-year old conductor with Big Sky.

[24] Wentworth joined CN in Winnipeg around April 2014, working for about a year before being laid-off. CN employees are, and were then, represented by Teamsters. When he was laid off, Wentworth reached out to the Union. He was told that there was nothing they could do. He was deeply impacted by this response.

[25] Wentworth started working for Big Sky in September 2015. In the interim period, he found work moving houses in Saskatchewan. As an employee of Big Sky, he works approximately 80 hours over a two-week period of time. He enjoys a healthy annual income supplemented by a snow removal business and personal investment activities.

[26] In his early days at Big Sky, Wentworth worked alongside a group of ex-CN employees, still reeling from the impact of their terminations. The impact manifested as outward hostility toward management, targeted at one of the "hold-overs", a manager who had executed the terminations personally. This group pinned their hopes for change on union representation. Even Wentworth was open to the prospect.

[27] In 2016, the Union called a meeting at the Thirsty Scholar in Saskatoon. Previously, Wentworth had had no contact with the Union at Big Sky. Everyone contributed their ideas. Wentworth assumed that the Union would soon commence collective bargaining. He has not been contacted since.

[28] Wentworth was disappointed about the lack of follow up. He decided to explore alternatives. He contacted Steelworkers, and his contact was interested. But then, a few days later, he received a disheartening email containing Teamsters' certification decision and an

explanation about non-interference with existing union relationships. Around the same time, a Steelworkers representative expressed some surprise at the lack of collective bargaining progress. To Wentworth, this was telling. There was something wrong about what was going on.

[29] Wentworth considered pursuing the decertification process, but it seemed intimidating.

[30] In the summer of 2017, one of the managers, Bob Keen ["Keen"], asked Wentworth to join the safety committee. Wentworth welcomed the additional responsibility. He was required to bring safety concerns to the safety meeting, on a monthly basis, and perform on-site track inspections. Around the same time, the surrounding "negative influences", made their exit. The combined changes had an improved effect on the work environment, and Wentworth's perception of management.

[31] Wentworth and Keen travelled together to perform the site inspections. While on the road, they discussed a variety of issues. Wentworth advised that he was considering decertification. Keen was always cautious about what he said, but he gave Wentworth the phone number for a lawyer at a Calgary firm. Wentworth "sat on" the number for a while, relying on it only after the Union objected to his decertification Application.

[32] Wentworth made little progress on the decertification front. He explained that he is a "bad procrastinator". All of this changed in April 2018. There was a "crew meeting", consisting of staff, along with the management team (Kent Affleck, Keen, and Ryan Leverton ["Leverton"]) in an office on 51st Street in Saskatoon. Kent Affleck advised that the Union had contacted the Employer to start negotiations. One of the staff asked about raises. Kent Affleck explained that, while they were negotiating, they could not talk about raises. No one suggested the Union was preventing wage increases.

[33] Wentworth explained that he was well aware that Teamsters has a good reputation for realizing raises through collective bargaining. He also understood that there was no guarantee of raises without a union. He acknowledged this. Despite this, he was no longer interested in Union representation.

[34] Immediately after the meeting Wentworth approached Leverton, explaining that he wished to decertify. Leverton explained that they could not talk about it, but added that if Wentworth was going to apply, "sooner would be better than later". After this conversation, Wentworth drove "to the Labour Board in Saskatoon", and once there, was provided with the Regina number. He called

the number and spoke with Jonathan Swarbick, who walked him through the decertification process, step-by-step. When asked how he knew to go to the Board, Wentworth said he thought "it is universally known". Or, perhaps he had heard it from a coworker at some point.

[35] Wentworth proceeded to draw up the support document, and contacted the employees using his own phone, who then attended at his house to sign. He explained that their signatures were needed for a "petition to decertify". All activities were conducted off duty. He used his personal computer and printer. When asked how he obtained his coworkers' numbers, he explained that, as they worked together, the numbers were in his contact list. Blacked out copies of the support documentation was filed with the Board. It read, "I…hereby declare I do not desire to be represented by Teamsters Canada or any other union at my workplace, and would like to decertify."

[36] Wentworth's girlfriend filled out the first page of the Application so it would "look good". He obtained Teamsters' contact information by contacting them directly.

[37] Wentworth acknowledged that, prior to the April 2018 meeting, he had taken no concrete steps toward decertification. He explained that he is "bad for needing a reason to do something" and was intimidated by the process.

[38] Wentworth spoke to the question of voter eligibility. First, he explained that Dyck is a van driver who transports the workers to their destination. He picks workers up at the office and then takes them to their train. Second, Charbonneau builds and maintains the track. He has nothing to do with operating the trains.

[39] Wentworth provided clarification on cross examination. First, he acknowledged that, he had met one of Big Sky's owners while moving houses in the summer of 2015, and basically "talked himself into a job". He has interacted with the Afflecks to say "hi", but there has been little interaction beyond that.

[40] The April 18, 2018 meeting lasted one to two hours and Wentworth was paid for a three-hour attendance. While crew meetings are supposed to be quarterly, that "doesn't always" happen and, in fact, Wentworth "doesn't recall the last meeting". He was unable to say how many meetings have been held since – maybe two. However, it is not unusual for all managers to attend one crew meeting.

[41] Wentworth was asked about personal wage increases. He explained that his wage was increased only once, in December 2015. He was asked about the lawyer's number. He replied: "I didn't do much with the number until after the Union objected" to the Application. He later explained that he planned to cover the legal expenses himself, through his wage. He was asked about his relationship to Leverton. He explained that Leverton is the "crew caller" and that he calls Wentworth to work shifts.

Raymond Donegan ["Donegan"]

[42] Donegan was hired with CN in 1998. Through CN, he received a two-week training to become qualified as a Brakeman Trainman. Donegan is General Chairman of the Union.

[43] Donegan described some of the key roles in the rail industry. The locomotive engineer is responsible for running and operating the locomotives. The trainman (or brakeman, an older term), is the assistant conductor, responsible for tying up the tracks, joining cars, tying hand brakes, and conducting air tests and line switches. The conductor is the "office manager of the train". The yardman assembles the cars in order, marshalls trains, and does industrial work within yard limits.

[44] Neither Dyck or Charbonneau are currently working as conductors, but they are still qualified, and still have seniority. Seniority is based on the hire date. Conductors are certified by CN and are required to recertify every three years. They should have a say in the jobs that they are qualified to do. Recall rights do not expire.

[45] Donegan is the chief contact for the local. The bargaining committee is relatively large. After the Certification Order was granted, the first bargaining meeting was held on April 7, 2015. Donegan presented Sheldon Affleck and Kent Affleck with a sample collective agreement that would work for their operation, the Great Sandhills Railway agreement. The Afflecks committed to review the agreement and provide a list of employees to the Union. The Employer provided the list on the same day. A commitment was made to set further dates.

[46] There was no further contact until February 2016. Donegan created the impression that the Employer was a recalcitrant, unwilling negotiator. Management failed to approach the Union unless the Union approached management. The phrase "a lot of moving parts" was used frequently. To be fair, the national negotiations were dominating his time. On occasion, when asked to acknowledge the Union's responsibility for the delay, he did so, but then re-directed attention to the Employer's conduct.

[47] Donegan explained the purpose of the Thirsty Scholar meeting. His intention was to inform the members that the Union was “pushing” for a meeting with management.

[48] In September 2016, a meeting was held, with an incomplete bargaining committee. The Employer expressed some concerns about part-time employees who had retired from other railroads and did not want to work full-time. The Union suggested that the Central Manitoba Railway collective agreement may contain suitable language. The Union also provided the Hudson Bay Railroad collective agreement. Kent Affleck asked for another copy of the Great Sandhills collective agreement. The Employer was going to review the collective agreements and get back to him.

[49] In February 2017, Donegan sent a letter to the Employer, but they were unable to set up a meeting. They met informally on April 19, 2017. On June 26, 2017, the Employer provided the Union with a list of 21 issues. In October 2017 there was an unsuccessful attempt to set dates. The next meeting was held in March 2018 with the full committee. Both sides committed to a working draft of a collective agreement.

[50] The Union filed email correspondence between the Employer and the Union, reflecting their efforts to set dates for collective bargaining. The Board notes that the Employer emailed the Union in October 2017, about a date in November 2017, only to hear from the Union in January 2018.

[51] As of the date of the hearing, Donegan believed that the parties were about “halfway there” in achieving a collective agreement. The next meeting could wrap it up. As for the timeline, Donegan stated that he has never negotiated a collective agreement in three months. It usually takes 18 months to two and a half years.

[52] Finally, Donegan observed that Wentworth had, in the hearing held in September 2018, claimed that he had contacted the lawyer on April 18 and that she had told him to contact the Board. This contradicted Wentworth’s testimony in the hearing held in May 2018. Donegan raised the alleged contradiction as a matter of prior, inconsistent evidence.

[53] Donegan was subject to cross examination by both counsel for the Employer and counsel for Wentworth.

[54] On cross, he acknowledged that Teamsters represents between 1800 to 2400 members. The vast majority of those members fall into the CN unit. In comparison with the whole, the membership of Big Sky is fewer than 10. As one might imagine, much of Donegan's time is devoted to the CN bargaining unit.

[55] Donegan acknowledged that the bargaining unit does not cover employees who transport employees to the trains, or employees who work on track maintenance - "for the most part". He further acknowledged that the salary and benefits subject to collective bargaining are specific to the trades included in the bargaining unit.

[56] Donegan acknowledged that the seniority list has to be negotiated between the Union and the Employer. He agreed that Charbonneau was not doing the work of a running trainman at the time of the Application and that he had received two employee lists from the Employer, neither of which included Dyck or Charbonneau. Despite this, he did not object to or ask any questions about those lists.

[57] There was extensive examination on whether and which collective agreements were provided to the Employer. There was also extensive examination on scheduling and the parties' respective share of responsibility for the delay in collective bargaining. Suffice to say, there was a difference of opinion on both of these points.

[58] There was also a great deal of discussion about the content of collective bargaining. Donegan characterized the Employer's approach as: "They always said that…glad to get a collective agreement. Then we wouldn't hear from them".

[59] While Donegan suggested that they were "halfway" there, there was no agreement on any of the provisions in the draft agreement. The fact is, by the end of March 2018, not a lot of progress had been made.

Relevant Statutory Provisions:

[60] The following provisions of the *Act* are applicable:

> ***Right to form and join a union and to be a member of a union***
> *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.*

Application to cancel certification order – loss of support

6-17(1) An employee within a bargaining unit may apply to the board to cancel a certification order if the employee:

(a) establishes that 45% or more of the employees in the bargaining unit have within the 90 days preceding the date of the application indicated support for removing the union as bargaining agent; and

(b) files with the board evidence of each employee's support that meets the prescribed requirements.

(2) On receipt of an application pursuant to subsection (1), the board shall direct that a vote be taken of the employees in the bargaining unit.

(3) If a majority of the votes cast in a vote directed in accordance with subsection (2) favour removing the union as bargaining agent, the board shall cancel the certification order.

(4) An application must not be made pursuant to this section:

(a) during the two years following the issuance of the first certification order; or

(b) during the 12 months following a refusal pursuant to this section to cancel the certification order.

Board powers

6-104 …

(2) In addition to any other powers given to the board pursuant to this Part, the board may make orders:

(a) requiring an employer or a union representing the majority of employees in a bargaining unit to engage in collective bargaining;

(b) determining whether an unfair labour practice or a contravention of this Part, the regulations made pursuant to this Part or an order or decision of the board is being or has been engaged in;

(c) requiring any person to do any of the following:

(i) to refrain from contravening this Part, the regulations made pursuant to this Part or an order or decision of the board or from engaging in any unfair labour practice;

(ii) to do any thing for the purpose of rectifying a contravention of this Part, the regulations made pursuant to this Part or an order or decision of the board;

. . .

(f) rescinding or amending an order or decision of the board made pursuant to clause (b), (c), (d) or (e) or subsection (3), or amending a certification order or collective bargaining order in the circumstances set out in clause (g) or (h), notwithstanding that a motion, application, appeal or other proceeding respecting or arising out of the order or decision is pending in any court;

(g) amending a board order if:

(i) the employer and the union agree to the amendment; or

(ii) in the opinion of the board, the amendment is necessary;

(h) notwithstanding that a motion, application, appeal or other proceeding respecting or arising out of a certification order or collective bargaining order is pending in any court, rescinding or amending the certification order or collective bargaining order;

Power to dismiss certain applications – influence, etc., of employers

6-106 The board may reject or dismiss any application made to it by an employee or employees if it is satisfied that the application is made in whole or in part on the advice of, or as a result of influence of or interference or intimidation by, the employer or employer's agent.

Analysis:

Onus of Proof

[61] It is the Union's onus to prove, on a balance of probabilities, that the Application was made in whole or in part on the advice of, or as a result of the influence of or interference or intimidation by the Employer or Employer's agent. The evidence led must be sufficiently clear, convincing and cogent.

[62] Wentworth distinguishes between historical and contemporary decertification cases, suggesting that historical cases involved a presumption of employer interference, to be rebutted by the applicant. The current, more dispassionate approach, involves no such presumption. This appears to be an interpretation of the previous approach in which the hearing pre-dated the decertification vote. It is simply not accurate to describe the previous approach as involving a reverse onus. Nor can it be said that there was a presumption of interference that has since shifted along with the related change in timing.

Employer Advice, Influence and Intimidation

[63] The question before the Board is whether the Application has been made in whole or in part on the advice of, or as a result of influence of or interference or intimidation by, the Employer or the Employer's agent. The language of the provision is clear that the Application need only be made "in part" on the advice, influence, interference or intimidation of the Employer. It is not necessary for the Board to find that the Employer's actions were the sole or even the primary reason for bringing the Application.

[64] The Board proceeds on the basis that employees have the right to join a union, as set out in subsection 6-4(1) of the *Act*, and that joining a union is a matter of employee choice, as confirmed by section 2(d) of the *Charter*. Given that choice, employees are entitled, through the operation of the legislation, to "periodically revisit the representational question".[2] The process is designed to ensure that the results of the representational question reflect the true wishes of the employees impacted by the application in issue.

[65] For these reasons, it has often been said that an employer has no legitimate role to play in the representational question. The Board bears this in mind when reviewing and assessing the

[2] *Williams v United Food and Commercial Workers, Local 1400 and Affinity Credit Union (Hague Branch)*, [2014] SLRBD No 8 at para 28 ["*Wiliams*"].

circumstances that have led to a representational vote. The Board in *Williams* described the two prevailing themes in the decertification cases:

> *[31] Generally speaking, the cases where this Board has invoked s. 9 of The Trade Union Act have generally fallen into one of two (2) categories:*
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> *1. Circumstances where the Board had compelling reason to believe that the real motivating force behind the decision to bring a rescission application was the will of the employer rather than the wishes of the employees. Examples of such cases include Wilson v. RWDSU and Remai Investment Co., supra; Larry Rowe and Anthony Kowalski v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Canadian Linen and Uniform Services Co., [2001] Sask. L.R.B.R. 760, LRB File No. 104-01; Tyler Nadon v. United Steelworkers of America and X-Potential Products Inc., [2003] Sask. L.R.B.R. 383, 2003 CanLII 62864 (SK LRB), LRB File No. 076-03; and Paproski v. International Union of Painters and Jordan Asbestos Removal, supra.*
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> *2. Circumstances where the Board lost confidence in the capacity of the employees to independently decide the representational question because the nature of an employer's improper conduct was such that it likely impaired them of their capacity to freely do so. Examples of such cases include, Schaeffer v. RWDSU and Loraas Disposal Services, supra; and Patricia Bateman v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Empire Investments Corporation (Northwood Inn & Suites), 2009 CanLII 18238 (SK LRB), LRB File No. 149-08.*

[66] The Board confirmed that its task is to balance the right of employees to revisit the representational question with the need to be "alert to signs of improper employer influences".[3] In doing so, the Board "examines the impugned conduct of the employer and measures the likely impact of that conduct on employees of reasonable fortitude giving due consideration to the circumstances occurring in the workplace at the relevant time, including the maturity and status of collective bargaining".[4] This is an objective test.

[67] Not every suspicious or questionable act or circumstance will lead to the conclusion that an application has been made as a result of advice, influence, interference, or intimidation by the Employer. Furthermore, in a hearing involving allegations pertaining to section 6-106, the focus is properly on the employees' wishes, and not the welfare of the Union as an organization. As the Board notes in *Williams*:

> *However, in doing so, it is important to keep in mind that the purpose of s. 9 is to protect employees from the improper influences of management; not to protect trade unions from a desire for change in their membership.*[5]

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[3] *Ibid* at para 32.
[4] *Ibid*.
[5] *Ibid* at para 30.

[68] However, it is commonly understood that signs of improper employer conduct, as contemplated by section 6-106, may be indirect and even subtle. It is a rare case in which an employer will transparently telegraph its influence, interference, or intimidation, such that the pieces of the puzzle seamlessly fit together. As the Board noted in *Nadon*:

> *18 It is necessary to be vigilant regarding the exercise of influence by an employer in such cases, because the cases are legion that such influence is seldom overt but often may be inferred from unusual circumstances and inconsistent events, meetings and conversations not adequately explained by innocent coincidence.*

[69] The Board in *Nadon* explained that it had denied a previous, related application primarily because the employer had, shortly before the application, negotiated directly with the applicant. The Board found that, by bargaining with the applicant, the employer had undermined the union, signaling to the membership that the union was ineffectual.[6]

[70] Some analysis of the contemporary cases is warranted. To recap, Wentworth suggested that *Crowder* signals a new direction for the Board, buoyed by recent freedom of association cases that strengthen the protection for employee choice. There are a few issues with this argument. First, *Crowder* describes amendments that allowed "employees to make their choice by secret ballot". The Board observes that secret ballot voting existed for decertification applications prior to the 2008 amendments. As previously alluded to, the noteworthy change was to the timeline. Whereas a decertification hearing previously took place before the vote, the vote now occurs before the hearing. Therefore, to the extent that the analysis in *Crowder* is influenced by the notion of a newly introduced secret ballot vote, which is unclear, it raises concerns.

[71] Second, the Board in *Crowder* found that certain communications fell within the expanded acceptability of employer communications under the *Act*.[7] The concerning communications, in that case, amounted to bargaining updates from the employer. The Board made similar comments in *Williams*, explaining that the permissible scope of communication by employers is presently more generous than in the past, signaling greater tolerance for the capacity of employees to receive information and opinions from employers.[8]

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[6] *Nadon v USA and E-Potential Products Inc.,* [2003] SLRBD No 32, 2003 CanLII 62864 (SK LRB) ["*Nadon*"] at para 18.
[7] *Hannah Crowder v SEIU-WEST and The Saskatoon Society for the Protection of Children Inc.,* LRB File No. 023-16 (July 28, 2016) ["*Crowder*"] at paras 30-34.
[8] *Williams* at para 34.

[72] However, this Board finds that, to the extent that such facts and opinions constitute advice on, influence of, interference in, or intimidation in relation to a decertification application, they may still run afoul of section 6-106. The primary determinants remain whether the motivation in bringing the application was truly that of the applicant, or whether the employer's improper conduct sufficiently impaired the employees' free exercise of their choice. The statutory tolerance of certain types of employer communications, generally, does not alter the circumstances in which an employee of reasonable fortitude is likely to be influenced by those communications.

[73] Third, the Employer's reliance on the *Charter* as permitting a greater scope of employer conduct cannot be isolated from the Supreme Court's direction, in *Mounted Police Association of Ontario v Canada (Attorney General)*, [2015] 1 SCR 3, 2015 SCC 1 (CanLII), to ensure a degree of choice and independence sufficient to enable employees to determine their collective interests and meaningfully pursue them. It is understood that a degree of independence from management is necessary in order to permit employees to fully exercise their choice, in particular, in relation to the representational question. The safeguard for independence co-exists alongside the protection for employee choice.

[74] The central question remains whether the Board is confident in the employees' ability to decide the representational question, independent of the influence of management. This requires a balancing of the employees' democratic rights against the need to guard against improper employer influence.[9] Furthermore, it remains the case that a compelling labour relations justification is necessary before the Board can withhold the right of employees to decide the representational question.[10]

[75] Section 6-106 provides the Board with discretionary power to dismiss a decertification application when the application has been made in whole or in part due to employer advice, influence, interference or intimidation. The Board must consider the whole of the circumstances. While each case must be assessed on its facts, the Board routinely examines the following factors in assessing a given case:

a. The plausibility of the applicant's motives for bringing the application;
b. The relationship between the applicant and management, or the provision of special treatment;

[9] *Jones* at para 31.
[10] *Williams* at para 32.

c. The provision of information or resources to the applicant, on behalf of the employer;
d. Words or conduct, on behalf of the employer, that suggest, whether indirectly or overtly, that decertifying will result in a benefit to the employees;
e. Demonstrated conduct on behalf of the employer that has hindered bargaining and damaged the union's reputation.

[76] Each of these themes arose in the course of the hearing, with varying degrees of emphasis. The Board considers the whole of the circumstances to determine whether there is evidence of employer advice, influence, interference or intimidation, and if so, whether that evidence discloses that the real motivating force behind the Application is the Employer, or whether the Employer's improper conduct likely impaired the employees' ability to decide the representational question, on an objective standard.

[77] The Board will consider each of the foregoing issues in turn.

Plausibility of Motives

[78] The first factor is whether Wentworth's motives for bringing the decertification Application are plausible. This question is subordinate to the larger issue, which is whether the real motivating force behind the Application is the Employer, or whether the Employer's improper conduct likely impaired the employees of their ability to decide the representational question.

[79] Wentworth provided a credible explanation for his desire to bring the Application, beginning with his lay-off from CN, the ongoing delays in collective bargaining, and the obstacles to securing an alternative bargaining agent. Granted, his expectations that the Union protect employees from lay-offs and conclude a collective bargaining agreement within a few short months were impractical. But the question for the Board is whether Wentworth's motives are plausible, not whether they are correct. Employees are not required to demonstrate a good or valid reason for wanting to displace a union.[11]

[80] The problem is that, although he wanted to bring the Application for personal reasons, he did not. Wentworth took little to no action, but for an intervening and precipitating event. So, while Wentworth may have wanted to bring the Application, his desire did not materialize into action until after the Employer intervened. Therefore, while Wentworth had a genuine personal desire to

[11] *Williams* at para 37.

bring the Application initially, he was not motivated to follow through. Furthermore, there is a concerning failure to account for the uncharacteristic speed with which he acted immediately following the April meeting. This raises issues about the extent to which Wentworth's motives were entirely his own.

Relationship between Applicant and Management

[81] The next issue is whether Wentworth had a close relationship with management. Depending on the circumstances, a close relationship can result in an inference that the Application has been brought as a result of employer influence. It may also create "an apprehension of betrayal" that has the effect influencing decision-making in relation to the representational question.

[82] In the current case, this factor is not a concern. The Union suggests that the circumstances of Wentworth's hiring reveal a close relationship with management. This conclusion is not supported by the evidence. Granted, the sole evidence on this point arises from Wentworth's testimony. But on that evidence, it seems clear that Wentworth enjoys a friendly, but professionally distant relationship with the Afflecks. There is nothing unusually close or unusual in their interactions.

[83] Based on his testimony, Wentworth enjoyed a closer relationship with Keen, having spent significant time with him performing site inspections. It is clear that Keen had the opportunity to influence Wentworth through the course of their many conversations. According to Wentworth, Keen distanced himself from the decertification issue when it arose. On this basis, the evidence discloses, in Keen, a manager who generally conducted himself with the requisite detachment and neutrality, when dealing with employees who raised the representational question, as expected by the Board. As will be explored in the next section, Keen's conduct in providing a lawyer's number to Wentworth represented a departure from that requisite neutrality.

Provision of Information or Resources to the Applicant

[84] The Union raised an issue about Wentworth contacting his coworkers via the telephone numbers stored in his phone, numbers acquired over time through work relationships. There is no evidence that the Employer provided Wentworth with a list of phone numbers. The fact of obtaining phone numbers in the manner described does not equate to Employer provision of resources or Employer influence. Furthermore, Big Sky is a small work place. The requisite

support evidence was relatively minimal. There is nothing suspicious or problematic in Wentworth's reliance on his telephone contact list.

[85] On the other hand, Keen's act in providing Wentworth with the lawyer's number does raise a concern. Wentworth's counsel suggested that providing a lawyer's number is equivalent to providing the Board's number, which this Board has deemed permissible.

[86] In that vein, a comparison to *Williams* is warranted. In that case, the employee had sent an email asking how a change could be made to the union's status, and received a response from the labour relations manager, providing the contact information for the Board. In *Williams*, the Board examined the reasoning in *Button v United Food and Commercial Workers, Local 1400 and Wal-Mart Canada Corp.*, [2011] 199 CLRBR (2nd) 114, in which the Board decided that advising employees to contact the Board for information about displacing a union does not constitute objectionable employer interference.[12] The Board in *Williams* found that such information may assist an employee in completing an application but is not likely to motivate him or her to do so, or to reasonably impair the capacity of employees to decide the representational question.

[87] This contrasts with the Board's decision in *Nadon*, in which the employer representative advised that he could not discuss the application but then assisted the applicant by providing the name of a lawyer experienced in labour relations. The Board observed that it was "puzzling…why Mr. Lazaruk would provide any information to the Applicant beyond advising him to consult the Law Society or the Board after being told at the start of the conversation by the Applicant that the reason for his inquiry was that he was spearheading an application for rescission". Clearly, the Board saw a distinction between providing the contact information for the Board and the contact information for a labour relations lawyer.

[88] This Board agrees that there may very well be such a distinction, depending on the circumstances. It is reasonable to infer that an employer who provides the contact information for a lawyer, has done so due to his or her perception of that lawyer's competence and ability to bring the application to a successful resolution. By doing so, the employer has provided the prospective applicant with a tool in the form of advocacy. This may also send an implicit message to the employee, to the effect that the employee has the employer's support.

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[12] *Williams* at para 42.

[89] There is a dispute as to whether Wentworth received assistance from the lawyer in contacting the Board and/or completing the Application, or whether he contacted the lawyer only after the Union objected to the Application. While it is unlikely that Wentworth simply knew that he should contact the Board, there is insufficient evidence to conclude that he contacted the lawyer prior to completing the Application.[13] Even if this is the case, there is little that the Board can draw from it. At worst, it means that Wentworth contacted the lawyer, who then re-directed him to the Board who assisted him with the Application.

[90] Wentworth testified that he prepared the Application on his personal time and at his personal residence, with the assistance only of his girlfriend. A superficial review of the Application supports this. As aptly noted by his counsel, it did not reflect the "handiwork of experienced counsel". Wentworth's evidence was consistent and clear that he relied on the Board staff in completing the Application, calling the Board on a number of occasions. It seems unlikely that, if his lawyer was on retainer, he would be calling the Board to obtain such assistance. The question as to whether the lawyer was contacted before or after the filing of the Application adds nothing substantive to the determination of whether there was improper Employer influence.

Promised or Implied Benefit

[91] More concerning is Leverton's advice following the April meeting, to the effect that "sooner would be better than later", if at all. In relation to this statement, there was very little context provided. Leverton was not called to testify. The absence of a satisfactory explanation raises concerns. Given the evidence, Leverton's statement can be taken to imply that there is some benefit to removing the Union sooner rather than later. It seems likely that the implied benefit is one that accrues, at least partially, to the Employer.

[92] The primary context is the immediately preceding crew meeting, at which the status of collective bargaining was discussed. The Union suggested that the Employer linked the prospect of raises to the decertification. The extent of the evidence consists of one employee, not Wentworth, asking about raises, and a reply from management that raises could not be discussed until collective bargaining was concluded. The Board cannot take from the evidence that the Employer deliberately held a meeting to encourage the employees to remove the Union. Nor can the Board find that the Employer directly advised the employees that decertification would result

[13] Furthermore, by the time Wentworth contacted the Board he had a copy of a certification order that had been issued by the Board. He did not, however, suggest that this is how he acquired the information about the Board.

in wage increases. However, it is an inescapable fact that a combination of the meeting and Leverton's advice as to timeliness spurred Wentworth into action and resulted in the filing of this Application.

[93] Wentworth proceeded to get in his car and drive to what he believed was the Saskatoon Board office. Leverton's advice was a turning point. Wentworth was a self-described procrastinator. He was no longer procrastinating. He did not return home and consider his options. He did not take additional time to consider what he wanted to do and when. He spoke to Leverton and immediately set the Application in motion. From the date of the crew meeting until the filing of the Application, less than a week passed. The Application before the Board is, in large part, a direct result of Leverton's comment and the immediately preceding events.

[94] Not every statement made by an employer will lead to the conclusion that an application has been made on the employer's influence or interference.[14] The statement must be of a nature and significance that the probable impact is to inject the employer's will into the application or to compromise the ability of the employees to freely exercise their rights under the *Act*, on an objective standard.[15]

[95] The Board does not accept that the circumstances disclosed by the evidence are such that the real, or only, motivating force behind the decision to bring the Application was the will of the Employer. However, it remains for the Board to consider whether, in light of the Employer's conduct, it still has confidence in the capacity of the employees to independently decide the representational question. In considering this issue, the Board must keep in mind that, despite the greater latitude for employer communications under the *Act*, the Employer has no legitimate role in the representational question. The Board must also consider the often indirect and circumstantial nature of evidence of employer influence.

[96] The Board accepts that the Employer's conduct was such that it likely impaired the employees' ability to independently decide the representational question. The Board can infer from the circumstances, including the timing of the crew meeting, the directness of Leverton's comment, the uncharacteristic haste that ensued, and the speedy completion of support evidence, that the Employer's conduct influenced more than just the filing of the Application, but the overall resolve of employees to oust the Union. Given the whole of the circumstances, this is an

[14] *Williams* at para 33.
[15] *Ibid.*

appropriate case in which to temporarily suspend the employees' right to decide the representational question.

[97] It is therefore unnecessary to consider the issue of voter eligibility.

[98] The Board wishes to make some final remarks about collective bargaining. The Board does not find that the Employer demonstrated intransigence in collective bargaining.[16] Nor does the Board find that the Employer was anything less than responsive to the Union's requests to bargain and to provide requisite information to facilitate bargaining. Certainly, both parties could have been more active in reaching out and securing bargaining dates. However, the Union has made it clear that it prioritized another collective bargaining process over this one.

[99] The Board trusts that the Union will review these Reasons and resume its representative role with the requisite dispatch. If the employees wish to resume their pursuit of decertification they will be required to comply with the 12-month waiting period as outlined at clause 6-17(4)(b) of the *Act*.

[100] For the foregoing reasons, the Board makes the following Orders pursuant to sections 6-103 and 6-106 of the *Act*:

a. That the application to cancel the Certification Order be dismissed; and
b. That the ballots in this matter be destroyed unopened.

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

DATED at Regina, Saskatchewan, this **24th** day of **June, 2019.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson

[16] See, *Walters (Re)*, [2005] SLRBR No 16 at para 88.