

PROVINCE OF NEW BRUNSWICK



Labour and Employment Board

IR-035-03

**IN THE MATTER OF THE INDUSTRIAL RELATIONS ACT
AND IN THE MATTER OF AN APPLICATION FOR CERTIFICATION**

BETWEEN:

United Steelworkers of America Local 6551

Applicant,

- and -

APEX Services Inc.

Respondent.

BEFORE: G. L. Bladon
Vice-Chairperson

APPEARANCES:

For the Applicant: *Joël Michaud*
Barbara J. Cooper

For the Respondent: *James F. LeMesurier*

DATES OF HEARING: May 26, 27, 2003

DATE OF PRELIMINARY RULING: June 2, 2003

PRELIMINARY RULING

A. Representations Relating to Voluntariness of the Petition By the Employer

1. Following the completion of the evidence with respect to the voluntariness of the petition, counsel for the trade union presented argument urging the Board to reject the petition. He then objected to counsel for the employer making representations to the contrary. He argued that the voluntariness of the petition was a matter to be determined by the Board in which the employer, at least theoretically, had no interest. The issue is whether the affected employees are either in favour or opposed to the trade union. In my view 'voluntary' as it is meant in the context of the petition filed in this Certification Application, is whether in fact that document or statement of desire is free from any management participation or influence. If not directly, then indirectly, the conduct of management is impugned and therefore the employer must be permitted to make representations on the issue of voluntariness.

B. The Voluntariness of the Petition

2. The petition in this matter was circulated by Gary Gallant on Saturday and Sunday, April 12 & 13, 2003. Gallant worked in the plant as a painter. In answer to questions put by the Board, and supplemented by counsel for the trade union, Gallant said he phoned employees he thought might be willing to reconsider their initial support of the trade union. He contacted approximately 30 employees and obtained 14 signatures in addition to his own. He then faxed the petition to the Board and to the trade union.

3. Some time later Gallant was contacted by Ulric Savoie, a welder, who indicated that he now wanted to express his opposition to the trade union. Gallant said the petition had been sent out and he had another form entitled 'Notification of Cancellation of Membership Cards' which he gave to Savoie. Savoie completed it on April 25, 2003 and mailed it to the Board.

4. There is nothing in Gallant's conduct which suggested employer influence *vis-à-vis* the 14 other signatories to the petition. The statements he is alleged to have made relating to the adverse consequences of unionization, i.e., not bidding on large jobs, cannot be traced to management.

5. The issue is the origination of the petition. Gallant said he spoke to Wayne Carruthers, a maintenance employee, who discussed the trade union with him and downloaded a package from the Internet which contained a Petition form and forms for Notice of Cancellation of Membership Cards. The evidence of management connection was a positive response to a proper but leading question put by counsel for the trade union to Gallant: "You knew that Carruthers was tight with management?" Apart from that answer, there is no evidence to suggest management involvement with the origin or circulation of the petition. That evidence, standing alone as it does, is insufficient to taint the petition.

6. Even in the absence of management involvement, the argument is made that there must be a credible reason for the change of heart from trade union support to opposition in order to discharge the onus of proof that the petition is voluntary. That test was articulated by the Ontario Labour Relations Board in *Cooper Corregated Containers Ltd.* [1983] O.L.R.B. Rep. 1786. It

was referred to by Vice-Chair Kuttner in *Re Quality Control Council and Trispec Technical Services*, Board File IR-013-95 as indicating the circumspection with which petitions are regarded, but Vice-Chair Kuttner does not appear to have expressly adopted the O.L.R.B. test in this jurisdiction. In any event it would present considerable practical difficulties if every supposedly unidentified signatory to the petition had to testify as to why he or she changed his or her mind. The fundamental issue is the voluntariness of the petition. The petitioners bear the onus in that respect and if, upon completion of the evidence, it is apparent the origin and circulation of the petition is free from management participation then the petition will be taken as the expression of the will of those employees who signed it.

7. As to Gallant and Savoie: both indicated that joining the trade union was questionable in their minds from the very outset. It is not surprising or unreasonable that, upon reflection, they would alter their view. There is nothing to suggest that that change was in any way influenced by management.

8. The role of Carruthers is, to some extent, troubling. He initiated discussions about the trade union with Gallant, and he obtained the Petition and Statement of Desire for Gallant. He was seen by Gallant as being 'tight' or close to management. The most that can be said of his involvement, however, was that he facilitated the acquisition of the material to oppose the trade union. This does not amount to a management influence going to voluntariness. The fact that he was involved and did not testify is, despite section 66(5) of the Regulations – and assuming that it applies to him – not determinative of the issue.

9. A careful, albeit brief, consideration of the facts and an appreciation of the quality of the evidence given by Gallant and Savoie in the witness box are sufficient to meet the onus required to establish the petition as voluntary.

C. The trade union's motion to strike paragraph 5 of the employer's Reply

10. The trade union brings a motion to strike paragraph 5 of the employer's Reply in the certification application where the employer alleges trade union breaches of sections 5(2), (3) and section 6(2) of the Act. Those sections read:

“5(2) No trade union or council of trade unions, and no person acting on behalf of a trade union or council of trade unions, shall seek by intimidation, by coercion, by the threat of dismissal or loss of employment, by the imposition of a pecuniary or other penalty, by undue influence, or by any others means, to compel or to induce an employee or other person to become or to refrain from becoming, or to cease to be, a member or officer of a trade union or council of trade unions, or to deprive an employee or other person of his rights under this Act.

5(3) No trade union or council of trade unions, and no person acting on behalf of a trade union or council of trade unions, shall

(a) discriminate against a person in regard to employment or a term or condition of employment, or

(b) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of a belief that he may testify in a proceeding under this Act or because he has made or is about to make a disclosure that may be required of him in a proceeding under this Act or because he has made an application or filed a complaint under this Act or because he has participated or is about to participate in a proceeding under this Act.

6(2) No trade union, council of trade unions, employer, employers' organization, or other person shall use coercion or intimidation of any kind with a view to encouraging or discouraging membership in, or activity in or for, a trade union or council of trade unions.”

11. In the certification process the trade union proffers membership cards signed by employees as reflecting employee support for the trade union. The assumption is that the cards reflect the employee's choice to join the trade union and have the trade union bargain on its behalf with the employer. Suppose, for the sake of argument, that a number of employees were forced to sign the cards against their will and subsequently advised the employer. Is the employer bound to stand mute in the certification process, waiting for the coerced employee to come forward, failing which the matter is foreclosed and the certification proceeds on the initial assumption? If those were the facts then a fraud would be perpetrated on the Board as the trade union membership would be falsely represented. The Ontario Labour Relations Board noted in *Federated Building Maintenance Company Limited*, [1979] O.L.R.B. Rep. Oct. 974 at page 975:

“The first issue is whether the employer has standing to make procedural objections on behalf of employees who have not themselves sought to do so. Generally this Board's experience has led it to respect the ability of employees to represent their interest in applications before the Board. The Board does not, as a general rule, permit an employer to speak for the employees in certification proceedings. The Board will entertain the evidence and representations of an employer respecting allegations of fraud, intimidation or coercion in the gathering of membership evidence. In those cases the employer is entitled to object, firstly, because it has a direct interest not to be party to a collective bargaining relationship based on bargaining rights illegally obtained; and, secondly, because the very unlawfulness alleged would tend to deprive the employees of the ability to freely represent their wishes. Apart from those extreme circumstances amounting to a fraud upon its own procedures, the Board does not place the employer in the position of spokesman for its employees.”

12. In *Re C.L.R.B. and Transair Limited (1976)*, 67 D.L.R. (3d) 421 the employer was prohibited from involvement in trade union membership issues except in the instances of fraud.

There Chief Justice Laskin said:

“If there is any policy in the *Canada Labour Code* and comparable provincial legislation which is pre-eminent it is that it is the wishes of the employees, without intercession of the employer (apart from fraud), that are alone to be considered vis-à-vis a bargaining agent that seeks to represent them. The employer cannot invoke what is a *jus tertii*, especially when those whose position is asserted by the employer are not before the Court.”

13. Of course the employer has a legitimate interest in assuring that the trade union with which it will bargain fairly represents the majority of employees in the bargaining unit. Again, as the Ontario Labour Relations Board noted in *Bennett Paving & Materials Limited*, [1980] O.L.R.B. Rep. Nov. 1579 at 1580:

“This Board of course has always accepted the statement of principle enunciated by the Chief Justice in the passage quoted above. It does, however, treat the reference to “fraud” as being intended in the broadest sense, to encompass all of those situations where membership evidence submitted to the Board does not in fact reflect the true wishes of the employees as it purports to do. The *Transair* decision was considered, for example, in the *St. Michael Shops of Canada Limited* case, [1979] OLRB Rep. Apr. 346, and the Board had this to say:

‘These authorities, however, do not stand for the proposition that a party to a certification proceeding may not bring forth evidence which might raise a doubt as to the reliability of what otherwise appears to be acceptable membership evidence. In an application for certification the Board relies on hearsay evidence in determining the membership support of an applicant union. It is not feasible for the Board to hear from each individual who signed a card to ascertain his true wishes or inquire into the circumstances under which he signed a membership card. *For this system to operate effectively the Board*

must consider any substantial allegation which might cause the Board to doubt the reliability of the membership evidence. To insist that employees alone may raise allegations of intimidation by a union would create an anomalous situation. The more effective the intimidation might be the less likely the Board would be to hear the violation as its continuing effect could deter the employees from lodging a complaint. For the reasons set out above, therefore, the Board finds that the respondent company in this proceeding has status to raise the allegations of intimidation.”

And see *Re G.S.W. Inc.*, [1990] O.L.R.B. Rep. May 535 at paragraphs 55 & 56.

14. For those reasons the employer may allege breaches of sections 5 and 6 of the Act in the context of a certification application: see *Re Phonettix Intelcom Limited and CEP, Local 6N and Michaud* LEB File IR-016-98 where Professor Kuttner said:

“3. REPLY TO APPLICATION FOR CERTIFICATION [IR-016-98]

21. The Board denies the request of the Applicant in its Notice of Intention dated 14 April 1998 to strike paragraphs 5, 6 and 7 from the Respondent’s Statement on Reply. The Respondent, as noted in the *Nova Gypsum* case, is entitled to allege breaches of the Act in obtaining membership support among its employees by the Applicant, and of course may be put to the strict proof thereof in these proceedings.”

15. In *Re CEP, Local 2039 and Nova Gypsum Inc.*, [1993] N.B.I.R.D. No. 36 the Board was concerned with a Complaint of Unfair Practice which the employer sought to advance “on behalf of a number of its employees who were intimidated, threatened and coerced with respect to union membership”. It may be that in the context of an unfair labour practice complaint the employer has no status to advance such breaches of the Act.

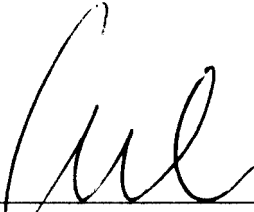
And again, see *Phonettix*:

“2. COMPLAINT OF UNFAIR PRACTICE [IR-027-98]

20. The Board is in agreement with the submission of Counsel for CEP Local 6N, that the principles articulated in re *Nova Gypsum Inc.*, I.R.B. 12-13-93, unreported decision issued 3 December 1993, are applicable in the circumstances. The Complainant Employer has no status to allege breach of the Act on behalf of its employees. Accordingly, reference to breaches of Sections 5(2), 6(2) and 6(3) of the Act and the supporting paragraphs of the Statement of Particulars appended to the Complaint, save for paragraphs 6 and 7 thereof, must be struck in their entirety.”

16. As a result the motion to strike paragraph 5 of the employer’s reply to the application for certification is DISMISSED.

Dated at Fredericton, New Brunswick, this 2nd day of June 20 03.



G. L. BLADON
VICE-CHAIRPERSON
LABOUR AND EMPLOYMENT BOARD