5473 **[2014] L.R.B.D. No. 11**

IN THE MATTER OF
***Labour Relations Act*, R.S.N.L**
C. L-1, as amended and a complaint
pursuant to Section 122 of the *Act*
affecting

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 7144 **Applicant**

- and -

Rambler Metals and Mining Canada Limited **First Respondent**

- and -

Lloyd Mitchell **Second Respondent**

Before: **Mr. John C. Sweetland, Q.C., Vice-Chairperson**
Mr. Grant Barnes, Board Member
Mr. Richard White, Board Member

REASONS FOR DECISION

Introduction

1. On 12 November 2013, the Union filed an application for certification for a unit of employees of Rambler Metals and Mining Canada Limited (Board File 5462).

2. An in-person vote was held on the 26 and 27 February 2014. The parties agreed to allow certain employees to cast mail ballots. On 3 March 2014, the Board extended the time for the taking of the vote up to and including 21 March 2014. On 20 March 2014, the Board further extended the time for the taking of the vote up to and including 11 April 2014.

3. On March 28, 2014 pursuant to section 122 of the *Labour Relation Act* United Steel and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 7144 (hereinafter referred to "the Union") filed a complaint against Rambler Metals and Mining Canada Limited (hereinafter referred to as "the Employer" or "Rambler") seeking an order pursuant to section 122 of the *Labour Relations Act* (hereinafter referred to as "the Act") declaring the Respondent (the "Employer") violated sections 23(1) and 25(1) of the *Act* and further in addition and/or in

the alternative the Union seeks an order declaring, that Lloyd Mitchell, the Second Respondent, has violated section 25(3) of the *Act*.

4. The complainant requests the Labour Relations Board (hereinafter referred to as "the Board") order the Employer to cease and desist from violating sections 23(1) and 25(1) of the *Act* and in addition or in the alternative the complainant requests the Board order the Second Respondent to cease and desist from violating section 25(3) of the *Act*.

5. The Complainant goes further, it submits that individually and/or collectively, the violations of the *Act* influenced the representation vote and as a result, the vote cannot be relied upon as a reflection of the true wishes of the employees in the proposed bargaining unit. Hence the Union alleges that the Board is not bound by the outcome of the vote and hereby requests in accordance with section 38(2) of the *Act*, that the Union be certified as bargaining agent for Local 7144 on the basis of the membership evidence submitted in support of the application for certification.

6. The Board appointed an Investigating Officer and considered the Officer's report and supplementary report together with the Replies and Responses of the parties and decided that a hearing was necessary to decide the matter; the hearing was held on 16 and 17 June 2014. At the hearing the Applicant called one witness namely Jethro Saunders. The Employer called four witnesses namely Hubert Jenkins, Derek Sacrey, Clarence E. Fifield and Steven Burton.

Facts

7. The Board will first set out the facts which are agreed to by both parties, and/or accepted as fact by the Board. It is agreed that there are four shifts at the mine referred to as shifts A, B, C & D. There are two shifts a day 11 hours each consisting of a day shift and a night shift. Each shift has a person designated as a shifter who is part of management, he is recognized as the shift boss, his duties include assigning job tasks to employees underground ensuring safety and efficiencies in the workplace. The shifter is also responsible for completing appropriate paper work. A tag system is used by the shifter to know who attended work, who goes underground and to confirm who safely returns from underground. As well the employees sign a sheet as they start their meeting which is held at the start of each shift. This sheet is then delivered by the shifter to the superintendent and then passed on to payroll for the purpose of paying the employees. The shifter holds a safety meeting early every morning at the beginning of each shift at approximately 6:45 a.m. The meeting is attended by the employees and contractors; it lasts for about a half an hour.

8. Every Thursday a safety meeting is held, it is presided over by the superintendent; in this case it is Hubert Jenkins, who is responsible for mine safety. This meeting deals with safety issues arising while each crew is on its days off and includes representatives from different departments like mechanical, electrical and engineering. There is a sheet signed by all employees present at this meeting. There were two exhibits entered as follows: C.F. #1 and J.S # 2. C.F. # 1 shows the sheets signed by all the employees in the crew "A" in attendance at the January 16th and 17th, 2014 safety meeting as witnessed by their

signatures. J.S. # 2 established that Jethro Saunders and Jeremy Martin were gas checkers on January 16th, 2014. It is agreed that gas checkers do not attend the morning safety meeting since as soon as they come on the job they go underground to check gas levels before the crew goes underground. Crews "A" & "B" complement one another while "C" & "D" complement one another. That is to say when crew "A" is working days, crew "B" is working nights and likewise when crew "C" and crew "D". The crews work 7 days on and 7 days off and when crew "A" and crew "B" are working, crew "C" and crew "D" are off It is agreed that January 16th, 2014 was day shift for crew "A". Jethro Saunders, Jeremy Martin, Clarence Fifield, Kerry Sacrey and Steve Burton are on crew "A". Lloyd Mitchell works on crew "D". Robert McGuire is general manager of Rambler, Hubert Jenkins is mine superintendent and his duties include improvement to safety at the mine and getting the ore to the surface.

9. Every Friday there is a meeting in the same room as all other morning meetings. This meeting includes Bob McGuire, the mine general manager, who welcomes crew back and gives an update on what is coming up for the Company as a whole. The third page of C.F. # 1 shows the employees in attendance at the Friday January 17th, 2014 meeting. It establishes which employees who were in attendance at this meeting. Derek Sacrey, Steve Burton, Jethro Saunders and Jeremy Martin were at that meeting. The vote was held on February 26th and 27th 2014. Note: The following evidence will only deal with facts in dispute or at issue in this matter.

First Witness – Jethro Saunders

10. Mr. Saunders is the only witness for the complainant. He says he has worked for the Respondent, Rambler, for three years as a truck driver. One of his duties in the mine is as a gas checker. He says he worked with crew "A".

11. He says that at the January 16th, 2014 meeting Mr. Fifield said that if the Union did not get in, the employees would get a 3% raise and have their health benefits paid for by the Company.

12. Further, Saunders says that Kirk Young said to Fifield, "you can't say that Clarence." He says that Young then asked Fifield if he was told to say that and Young said that Clarence just shrugged and said "more or less."

13. Next, Mr. Saunders said he heard a couple of employees, whom he did not identify, say they overheard Hubert Jenkins talking to Lloyd Mitchell in the yard. He says the employees said they heard Jenkins telling Mitchell that if the Union got in the shifts would go from 7 days on 7 days off to 4 days on and 4 days off. Saunders says that if the Company goes to 4 days on and 4 days off there would be a loss of a crew resulting in a layoff of about 20 employees. He says rumors were going on all throughout, both before and after the vote.

14. Saunders says Fifield made the pay increase statement in the lunch room around the middle of the month between 15th and 17th of January 2014. He says it was a night shift because it was in the evening when he went to work.

15. When Saunders was asked if he had heard Lloyd Mitchell say anything about layoffs at Rambler he replied "no".

Second Witness – Hubert Jenkins

16. Hubert Jenkins is a mine superintendent and has worked for Rambler for three years. His duties include mine safety and getting the ore to the surface. He explained how the sheets identified as exhibit C.F. # 1 are used. He says if the sheets are not signed the employee will not get paid.

17. Jenkins denies having said anything to Lloyd Mitchell about shifts going from 7 on to 7 off to 4 on and 4 off. He admits to having a discussion with Mitchell but it was not about shifts. He says he would not have been at the mine at around 7:00 p.m. except he was at the mine as a scrutineer for the vote being held to decide whether or not there would be a Union at the mine. He says it was a short conversation since Mitchell was going to work and he was going home. He said there was no one else there except a couple of guys went by but he does not know who there were, he said he thought Mitchell was on crew "D".

18. Jenkins denied that he made any statements or comments about a 3% raise and health benefits at any meeting with the crews. He says he was instructed by Bob McGuire not to discuss Union issues with the employees. Further he says he was present when Bob McGuire was asked by employees about what was going on in relation to Union activity. He said McGuire smiled and said he could not speak about it. He said he was not suppose to, nor is he allowed to talk about money or the Union saying his hands are tied.

19. Further, on the alleged conversation Jenkins is able to categorically deny that he spoke with Mitchell on February 24th, 2014 because he leaves work at 5:30 or 6 p.m.

20. Jenkins says he was aware of the newsletter. He says he saw them on the shifters wicket. He explained the wicket is where the shifters make reports, do paperwork and hand out and collect tags. He says he picked up the letter and read them. He says he also saw them underground.

21. On the next issue Jenkins denies he said to anyone that the shifts would go to 4 on 4 off if the Union was successful nor did he say anything about 20 employees getting laid off.

Third Witness – Derek Sacrey

22. Sacrey says he was working day shift on January 16th and 17th 2014. He says he worked for Rambler for seven years. His position at the mine is referred to as a scoop operator.

23. He says he did not hear Fifield say anything about a pay raise if the Union did not get in. He says it was discussed between the employees. It did not come from the Employer. He says he worked all the shifts in January 2014 and he did not hear Fifield say anything about raises or layoffs anytime.

24. Sacrey says he never received the November 28th, 2013 newsletter, he did receive the December 17th, 2013 letter and he is not sure about the January 24th, 2014 letter. He said the letters would be put on the table during the meeting. He says he read parts of the second letter but he did not contact either the Union or LabourWatch.

25. He says Jethro Saunders does not have a reputation of being a fibber or liar. He says he is not able to comment as to what Saunders may have said or heard. He says he did not hear about the 3% raise before the vote but he is not sure about the shift change rumor. He says the talk about raise and benefits was amongst the employees not management. Finally he says he did not hear management deny any of the rumors going around the work place.

Fourth Witness – Clarence E. Fifield

26. He has worked one and a half years with Rambler. He says crew "A" was working day shift on January 16, 2014. He explained how the morning meetings worked which has been set out above. He denies that he brought up 3% raise and payment of health benefits if the Union did not get in at any of the morning meetings. He does remember that some members brought up his own pay increase but he does not remember where it was brought up. He thinks it was before Christmas.

27. Fifield remembers the newsletters. He thinks there were two, maybe three. He said he read them. They were put at the wicket to be picked up. He advised the crew there was material there to be picked up and read. Upon being shown Exhibit J.S. #. 1 he says he recalls reading all three letters.

28. He was asked what, if anything, he was allowed to say about certification of the Union. He was called into Hubert Jenkins office and told about the process. This happened in November 2013. He said he had previous experience with certification when he was working at Duck Pond. He was told the Union had applied and he was not allowed to make any comment about the process.

29. He says he is not sure how the first letter was distributed. He says at least one of the letters say the Company would prefer to deal with individual employees. He says he is not sure if the Company is against the Union. Fifield says he thought of the letter as general information.

30. He says there were all kinds of rumors in the workplace both before and after the application. He says he pays little attention to rumors. He says he had not heard the rumors about a change of shift from 7 on and 7 off to 4 on and 4 off, nor had he heard rumors of layoffs.

31. He says that Saunders seemed to be a straight shooter with no reason to believe he would make something up. Fifield denies that he said anything about pay increases or health benefits. He says he would not make a comment like that. No employees approached him about rumors.

Fifth Witness – Steven Burton

32. He has worked with Rambler as a bolter operator for three years. He worked on crew "A".

33. He explains the duties of a gas checker as set out above.

34. He says he was at the January 16th, 2014, meeting and he did not hear Fifield say anything about a pay raise or payment for benefits. He said he heard the rumor but he did not hear Fifield say it and if he did he would have heard it.

35. Burton says he got one or two newsletters but he did not read them. They got them after a morning meeting, he thinks they were left on the table in the meeting room.

36. He says he did not hear Jenkins make any statement about shift changes or layoffs.

Legislation

37. The relevant sections of the *Labour Relations Act* include the following:

> 23. (1) An employer or employers' organization, and a person acting on behalf of an employer or employers' organization, shall not
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> (a) participate in or interfere with the selection, formation or administration of a trade union; or
>
> (b) contribute financial or other support to a trade union. …
>
> 25. (1) An employer and a person acting on behalf of an employer shall not seek by intimidation, threat of dismissal or other kind of threat, or by the imposition of a monetary or other penalty or by other means to compel a person to refrain from becoming or to stop being a member, officer or representative of a trade union or to refrain from
>
> (a) testifying or otherwise participating in a proceeding under this Act or other law;
>
> (b) making a disclosure that he or she may be required to make in a proceeding under this Act or other law;
>
> (c) making an application or filing a complaint under this Act or other law; or
>
> (d) exercising another right under this Act or other law…

… (3) A person, whether or not he or she is an employer, shall not seek by intimidation or coercion to compel an employee to become or refrain from becoming or stop being a member of a trade union. …

38. (1) Where a trade union makes application for certification under this Act as a bargaining agent of employees in a unit, the board shall determine whether the unit in respect of which the application is made is appropriate for collective bargaining and the board may, before certification, where it considers it appropriate to do so, include additional employees in, or exclude employees from, the unit, and shall take those steps that it considers desirable to determine the wishes of the employees in the unit as to the selection of a bargaining agent to act on their behalf.

(2) Where as a result of an application for certification under this Act by a trade union, the board has determined that a unit of employees is appropriate for collective bargaining,

(a) where the board is satisfied that the majority of the employees in the unit are members in good standing of the trade union; or

(b) where, as a result of a vote of the employees in the unit, the board is satisfied that a majority of them have selected the trade union to be a bargaining agent on their behalf; or

(c) where, as a result of a vote of the employees in the unit, the board is satisfied that at least 70% of the employees in the unit have voted and a majority of those voting have selected the trade union to be a bargaining agent on their behalf,

the board may certify the trade union as the bargaining agent of the employees in the unit.

47. (1) Where an application for certification is supported by at least 65% of the employees in the unit at the time of application and the board is satisfied that the other requirements for certification under this Act have been met, the board shall certify the union as the bargaining agent for the employees in the unit.

(2) Where an application for certification is supported by at least 40% but less than 65% of the employees in the unit at the time of application, the board shall take a vote of the employees in the unit, in accordance with section 47.1, to determine their wishes with respect to the certification of the applicant trade union as their bargaining agent.

(3) Where an application for certification is supported by less than 40% of the employees in the unit at the time of application, the board shall dismiss the application.

(4) Notwithstanding subsection (2), the board is not required to take a vote where the trade union and the employer in the unit to which the application relates jointly request that the board not take a vote.

47.1 (1) A vote taken as required by subsection 47(2) shall be taken at the time and place, or by mail, as the board determines.

(2) Where a vote is taken, it shall be taken no more than 5 days, excluding holidays and weekends, after receipt by the board of the application for certification.

(3) Notwithstanding subsection (2), the board may in exceptional circumstances extend the time for the taking of the vote by the number of days which it considers appropriate.

(4) Where a vote is taken under subsection (1), the board shall remove and destroy, without counting, the ballots cast by persons who, at the time of application, are not employees in the unit to which the application relates.

(5) The board may order costs with respect to the vote under this section against the appropriate person, where, in the opinion of the board, the application was frivolous or vexatious.

(6) The board is bound by the outcome of a vote taken under this section except where the board determines that the procedure under this section has been influenced by intimidation, threat of dismissal or other kind of threat or coercion.

(7) With respect to an application for certification as a bargaining agent, the board shall adhere to the date of the application as the operative date for determining support on the basis of membership records.

122. (1) A trade union, council of trade unions, employee or other person may make a complaint to the board

(a) that an employer, employers' organization or a person acting on behalf of either is contravening or has contravened subsection 23(1);

(b) that an employer or a person acting on behalf of an employer is contravening or has contravened

(i) paragraph 24(1)(a),

(ii) paragraph 24(1)(b), or

(iii) subsection 24(2);

(c) that an employer or a person acting on behalf of an employer is contravening or has contravened subsection 25(1);

(d) that an employer is contravening or has contravened subsection 25(2);

(e) that a person is contravening or has contravened subsection 25(3);

(f) that an employer or a person acting on behalf of an employer is contravening or has contravened section 26; or

(g) that an employer is contravening or has contravened section 45.

(2) An employer, an employers' organization or other person may make a complaint to the board

(a) that an employee or a person acting on behalf of a trade union is contravening or has contravened subsection 28(1);

(b) that a trade union or a person acting on behalf of a trade union is contravening or has contravened subsection 28(2); or

(c) that a trade union or a person acting on behalf of a trade union is contravening or has contravened section 29.

(3) A trade union, council of trade unions, employer, employers' organization or other person may make a complaint to the board

(a) that an employer or employers' organization or a certified bargaining agent is in contravention of section 74; or

(b) that a party to a collective agreement is in contravention of section 75.

123. (1) Where a complaint is made to the board under section 122 the chief executive officer of the board may serve a notice of the complaint on the person against whom the complaint is made, and the chairperson may appoint an officer to inquire into the complaint and try to effect a settlement.

(2) Where the chairperson does not appoint an officer under subsection (1) or where the officer is unable to effect a settlement within the period that the chairperson thinks reasonable in the circumstances, the board may inquire into the complaint.

(3) The board may refuse to inquire into a complaint in respect of a matter that, in the opinion of the board, could be referred by the complainant to an arbitrator, arbitration board or other body under a collective agreement.

(4) Where, in the opinion of the board, a complaint is without merit, the board may reject the complaint.

(5) Where the board is satisfied after an inquiry that an employer, employers' organization, trade union, council of trade unions, employee or other person has failed to comply with subsections 122(1) and (2), the board

(a) shall issue a directive to the employer, employers' organization, trade union, council of trade unions, employee or other person concerned to do or to stop doing the act in respect of which the complaint was made;

(b) may, in the same or a later directive, require the employer, employers' organization, trade union, council of trade unions, employee or other person concerned, as the circumstances may require,

(i) to reinstate an employee suspended or discharged contrary to those provisions,

(ii) to pay to an employee or former employee suspended or discharged contrary to those provisions compensation not exceeding the amount that, in the opinion of the board, would have been paid by the employer to the employee,

(iii) to rescind a disciplinary action or monetary or other penalty taken or imposed contrary to those provisions,

(iv) to pay a person compensation not exceeding the amount that in the opinion of the board is equivalent to the monetary or other penalty imposed on a person contrary to those provisions, or

(v) to pay to an employee in respect of a failure to comply with the provisions referred to in subsection 122(1) compensation not exceeding the amount that, in the opinion of the board, is equivalent to the remuneration that would have been paid to the employee by the employer if the employer had complied with the provision referred to in subsection (1) of that section.

(5.1) Where the board is satisfied after an inquiry that an employer, employers' organization, trade union, council of trade unions, employee or other person has failed to comply with subsection 122(3), the board

(a) shall issue a directive to the employer, employers' organization, trade union, council of trade unions, employee or

other person concerned to do or stop doing the act in respect of which the complaint was made; and

(b) may in the same, or a later directive, require the employer, employers' organization, trade union, council of trade unions, employee or other person concerned, as the circumstances may require, to do any act or thing which the board considers necessary and which is appropriate in the circumstances.

Issues

38. Four issues have arisen as a result of the application filed by the Complainant. They are:

1. Both the Complainant and Respondent agree that the vote be counted and if unionization is accepted that would be the end of the matter BUT IF it is not accepted then the complaint would be pursued. This request was put before the Board which it took under consideration and response herein.

2. Has the First Respondent, Rambler Metals and Mining Canada Limited individually and/or collectively committed an unfair labour practice, contrary to sections 23(1) and 25(1) of the *Act* as a result of alleged utterances in the workplace.

3. Has the Second Respondent, Lloyd Mitchell committed an unfair labour practice contrary to section 25(3) of the *Act* and should the Board grant the Second Respondent's non-suit application.

4. Did the First Respondent violate the *Act* by distributing memoranda prior to the representation vote.

Issue 1 - Complete vote count and proceed if not successful

39. Counsel for the Union has requested that the Board proceed to count the ballots cast for the certification application before it proceeds with the unfair labour practice hearing and if the vote turns out to be unsuccessful then the unfair labour practice hearing would proceed. If it is successful then the Board would proceed directly to issue a certification order. The Board has been advised by Counsel for the Employer that it agrees to proceed as requested by the Union.

40. The Counsel for the Union sets out several reasons supporting the request:

1. Efficient use of the Board's time and resources;

2. Efficient use of the parties time and legal resources;

3. Sound labour relations purposes such as avoiding a five (5) day hearing thereby running the risk of becoming divisive among employees, and between the Union and the Employer. As well as avoiding an acrimonious hearing between the parties allowing collective bargaining to commence with equanimity; and

4. The parties will have a better chance to build a relationship in an effort to reach a first collective agreement.

41. Counsel for the Union also referred to three cases dealing with the issue, one of which involved circumstances whereby both parties had each laid unfair labour practice charges against the other. Neither of the cases were from this jurisdiction.

42. The Board finds the reasons stated for this request are reasonable and legitimate reasons to be considered on this request; however, the Board is of the opinion that there are also reasons not to grant such a request and it believes these reasons trump the Union's request.

43. The reasons offered by the Board not to grant this request include:

1. The Complainant has grounded its complaint/application on the fact that violations of the *Act* influenced the representation vote and as a result, the vote cannot be relied upon as a reflection of the true wishes of the employees in the proposed bargaining unit. The Board has determined that the certification application (Board file 5462) is subject to the legislative requirements of section 47(2) of the *Act*. Section 47(2) reads "where an application for certification is supported by at least 40% but not less than 65% of the employees in the unit at the time of application, the Board shall take a vote of the employees in the unit, in accordance with section 47.1, to determine their wishes with respect to the certification of the applicant trade union as their bargaining agent". The Board also notes its responsibility under section 46 which reads "For the purposes of determining whether the majority of the employees in a unit consist of members in good standing of a trade union or whether a majority of them have selected a trade union to be their bargaining agent, the board may make the examination of records or other inquiries that it considers necessary, including the holding of the hearings or the taking of the vote, that it considers expedient, and the board may prescribe the nature of the evidence to be provided to the board. The Board further notes that, in accordance with section 38(1), where it considers it appropriate to do so the Board shall take those steps it considers desirable to determine the wishes of the employees in the unit as to the selection of a bargaining agent to act on their behalf.[emphasis added]

It is important to bear in mind the Board's legislative responsibilities and its reliance on the ballots cast in the representation vote, with specific emphasis on the integrity of those ballots, to determine the true wishes of the employees as it relates to the certification application referenced above. In accordance with sections 47(2), 46 and 38(1) of the *Act*, the Board is of the view that without a hearing to determine whether or not there was an unfair labour perpetrated, the Board could potentially be using tainted

ballots to determine whether a majority of the employees have selected the Union to be their bargaining agent. This is a serious concern for the Board where rights of employees are a prime responsibility.

2. The Board believes there is a need for an unfair labour practice process in the *Act*. If for no other reason it is an unbiased way of determining whether or not the employees are obtaining or achieving their democratic rights. To grant the request of the Union could put such proceedings in jeopardy.

3. To allow for the procedure as requested could create a dangerous precedent which could allow for the manipulation of the process now followed by the Board Officer when pursuing an unfair labour practice application. Counsel for the Union suggests, because the parties agree, a precedent would not be set for any time in the future. With respect the Board is not convinced that is necessarily the case. One never ceases to be surprised at the efforts to which Counsel may go on behalf of his or her client. The Board is of the opinion, to grant the request could lead to a frustration of the attempts, by employees, to achieve their rights as permitted by the *Act*.

Decision

44. The Board has considered the reasons raised by the Union in the matter and views them as reasonable but with all due respect, the Board believes the potential impact of such a process could result in a quagmire of procedural pit-falls, thereby disrupting an already set of procedures around unfair labour practice applications, that seems to be working well. The Board's concern is centered around idiosyncrasies of the *Act* and the rights of employees who are a prime responsibility and concern of the Board. For the reasons stated above the Board respectfully denied the request of the parties hereto.

Issue 2 - Has the First Respondent, Rambler Metals and Mining Canada Limited, individually and/or collectively committed an unfair labour practice contrary to section 23(1) and section 25(1) of the *Act* as a result of alleged utterances in the workplace.

Argument

45. The United Steelworkers, Local 7144 filed an application for the certification of a unit of employees employed with Rambler Mines. A vote was held on site on February 26th and 27th, 2014. The Board granted an extension of time to the 11th April, 2014 to complete a portion of the vote by mail. Before the vote was counted the Union filed an unfair labour practice on March 28th, 2014. The agreed facts along with facts at issue are set out above. The Board now considers the arguments put forward by the parties in support of their respective positions.

Union's Position

46. The matters at issue here are set out on the first page of the complaint as follows:

(a) After certification was filed and before the vote was taken promising employees a pay raise and health benefits fully paid by the Employer if the Union is unsuccessful in its certification application;

These are the alleged comments of Mr. Fifield and Mr. Jenkins:

(b) threatening, on the night before the vote, to adversely change the shift schedule at the Mine from 7 days on / 7 days off to 4 days on / 4 days off in the event the Union is certified;

These comments are alleged to have been made by Hubert Jenkins and or Lloyd Mitchell.

(c) while the mail-in ballot vote was ongoing, threatening that, if the Union is certified there will be layoffs and the Mine would go to a 4 days on / 3 days off schedule; and

(d) in a written communication to employees in the proposed bargaining unit, the Employer denigrated the Union and called into question the value of collective bargaining.

Paragraphs (a) & (c) of the complaint will be dealt with next.

On Paragraph (a) of the Union's complaint

Union's Position

47. The first issue to be looked at concerns the comments of Clarence Fifield who is a shifter, a management position, with Rambler. Mr. Gordon Forsyth Q.C., Counsel for the Union says in the month of January 2014 Jethro Saunders, a member of crew "A" with the Employer, at a safety meeting at the end of his shift heard Fifield say that if the Union did not get in then the employees would get a 3% raise and the health benefits for the employees would be paid by the Company. Management employees had already received such a raise. Mr. Forsyth goes on to say that Saunders says that Kirk Young asked Fifield "Clarence what are you saying? You can't say that sort of stuff, were you told to say that?". Saunders says that Fifield nodded and said "more or less". Mr. Forsyth says Saunders evidence was credible and straight forward. Mr. Fifield explained that Mr. Jenkins had informed him that he was not to discuss Union issues with the employees. Counsel for the Union says Fifield's testimony shows attempts to portray the Employer in the most favorable light. He referred to the denial of Fifield having made the comment about the pay raise. Counsel referred to the denial of Fifield having discussed certification with his supervisor, Mr. Jenkins. Given that Fifield and Jenkins spoke on a daily basis on this 7 day shift rotation is just not believable. It is argued that Fifield took a similar position on his discussions with other shifters he would be meeting on a daily basis. Mr. Forsyth says that Fifield's position is incredible. Counsel for the Union says the Employer's position on unionization is clear yet Fifield tried to minimize or neutralize the Employer's anti-union position. It is

argued that Fifield could not explain why Saunders may have been motivated to "make-up" such a story. Mr. Forsyth suggests that it was in Fifield's personal interest to deny he made the statement because he would be in trouble with his employer if he had in fact made the comments contrary to their instructions. Saunders says the rumor in the workplace started with Mr. Fifield. Counsel for the Union goes on to comment on the evidence of two other witnesses called by the Employer, namely Derek Sacrey and Steven Burton. Both said that they did not hear Fifield make the alleged statement. Mr. Forsyth argues, given the length of time between the date of the statement (January 2014) and the date which both Employer witnesses were questioned about the statement (June 2014), the witnesses either forget what they heard or they were not present at that time.

48. After Ms. Willette filed her argument Mr. Forsyth filed his reply. The issues dealt with included a reference to the evidence of Mr. Saunders' evidence about Mr. Young's discussion with Mr. Fifield, Forsyth denies that Mr. Saunders evidence was hearsay since he was present when the discussion took place.

49. Next Mr. Forsyth denies his argument has amended its complaint saying the complaint alleged that the Employer was responsible for rumors in the workplace that would negatively influence how employees viewed unionization. The Union says the Employer allowed rumors to circulate uncorrected while correcting rumors that were pro-union. Mr. Forsyth says when the Employer issued three newsletters to correct rumors in the workplace it failed to correct the accuracy of anti-union rumors. He says the fact that the Employer was aware of the rumors and did nothing to contradict them, after having corrected other rumors in the workplace would be a signal to a reasonable employee that the Employer agreed with the anti-union rumors.

Company's Position

50. Next the Board examined the Employer's argument in relation to the evidence of Jethro Saunders and allegations by the Union as set out in their complaint. Ms. Willette, commences her argument by referring to paragraphs 26 & 27 of the Union's complaint which alleges Clarence Fifield made the statement dealt with above. As well, Ms. Willette continued with her reference to the alleged comment of Mr. Jenkins whom the Union says made a statement similar to that ascribed to Mr. Fifield dealing with a raise and payment of health benefits by the Company if the Union was not successful.

51. Ms. Willette, after referring to the Board's Investigating Officer's Report, says the Officer asked for names of employees who could support Saunders's evidence. The Officer was supplied with five (5) names from crew "A" and four (4) names from crew "B". Upon contact with all nine (9) employees the Officer says only two of them said they heard the statement alleged to be made by Mr. Fifield. To be clear the statement from the four employees who work with crew "B" made their comment about their shifter Eugene Regular. Counsel for the Employer says the Union did not lead evidence about crew "B" nor did they lead evidence concerning Mr. Jenkins alleged comments concerning pay raises or payment for health benefits. However, when Mr. Jenkins was on the witness stand he did deny making such statements.

52. While commenting on the lack of specificity contained in the complaint Ms. Willette referenced what she referred as one of the few specific allegations in the complaint. She says the Union alleged the comment of Mr. Fifield occurred on night shift on or about January 2014. This contention did not hold up under cross-examination. Initially Mr. Saunders, on cross-examination stated the comment was made on the night shift on January 16th, 2014. He later said he could not be sure of the date except that it was the night shift. Ms. Willette refers to Exhibit JS #2 as well as all witnesses provided by the Company, all of which or whom establishes crew "A" was just returning from its week off and that it was the first day of crew "A's" day shift.

53. Next, Counsel for the Employer refers to Exhibit C.F. #1 which clearly establishes that Mr. Saunders could not have been at the safety meeting since he was a gas checker on January 16th, 2014. This duty requires the checker to go directly underground to check gas levels before the crew goes underground. Saunders agreed, on cross-examination, that, if he was on gas check, he would have missed the Thursday safety meeting.

54. Counsel for the Company asserts, notwithstanding the level of detail in the complaint, at the hearing the evidence which they led was vague and uncertain in terms of timing of the alleged comments by Mr. Fifield.

55. Ms. Willette notes the change of the location that Kirk Young held the verbal exchange with Mr. Fifield, along with the addition of the verbal response "more or less" to the evidence by Mr. Saunders whereas the references to this exchange as referred to in the complaint at least left the impression that the exchange was in the meeting room and it omitted to say that Mr. Fifield gave a verbal response to Mr. Young.

56. It is pointed out by Counsel for the Employers that changes between allegations set out in the complaint is in concise detail about crew "A" and the testimony of Mr. Saunders, at the hearing, is such that it became totally unreliable. Ms. Willette says procedural fairness and natural justice dictates that a respondent to a complaint know the case it has to meet. Ms. Willette says the changes to the specifics set out in the complaint and the viva voce evidence from Mr. Saunders, the only witness for the Union, is such as to give rise to such a concern.

57. Next Ms. Willette deals with particulars of Mr. Fifield's evidence explaining why he would not make a statement such as is alleged by Mr. Saunders and after vigorous cross-examination his evidence remained consistent.

58. Next Ms. Willette dealt with the evidence of two crew "A" employees Derrick Sacrey and Steve Burton, both of whom testified that they did not hear Mr. Fifield make the alleged statement.

59. The Company now deals with the Union's attempts to question the testimony of Mr. Fifield. The Union says it is not credible that on a daily basis during his seven day shift that the issue of certification did not come up. Ms. Willette then goes into an in-depth examination of how the logistics of the interaction of the workers would unfold on a daily basis. By her analysis Mr. Fifield's interaction with Mr. Jenkins would be fairly

regular for approximately one week per month while on day shift and a brief turn over meeting at the end of his night shift. As well, both Mr. Fifield and Mr. Jenkins were once Union members and she argues there was nothing so extraordinary to cause them to become involved in an intense conversation during their work day, especially given the importance of their daily duties at the mine. As well, Ms. Willette explained away the lack of conversation between other shifters based on the serious duties of the shifters while on the job as well as the short time available for discussion between the parties.

60. Ms. Willette explains that the description of Mr. Saunders as a "straight shooter" was that of Counsel for the Union. Mr. Fifield's response was "not that I am aware of". Similarly the comments of both Mr. Sacrey and Mr. Burton when questioned about Mr. Saunders demeanor were as follows: "I don't know" and "Yes, all the boys are good."

61. Ms. Willette argues that Mr. Fifield was consistent and credible with his evidence. Likewise the testimony of both Sacrey and Burton was consistent, particularly in content. She draws attention to Mr. Burton's response to Mr. Forsyth's question about Fifield's alleged statement he said "if the statement was made at a safety meeting I would have heard it". Further when asked by Mr. Forsyth if he would remember the statement Burton said "I think it would have stood out".

62. The Union says Fifield's credibility should be questioned because the statement was in his personal interest and further the Union says Fifield's credibility should be questioned because the rumor about a raise and improved health benefits originated with Mr. Fifield's alleged statement. In response to the Union's position on credibility the Company argues the fact of the circulation of the rumor does nothing to support the idea that it started with Mr. Fifield neither does the existence of the rumor somehow diminish the credibility of Fifield. The witness Burton testified that the rumor may have originated amongst discussions of 4 or 5 of his co-workers. Both Burton & Sacrey testified that discussions about these rumors was among a few hourly employees with no management employees present and Mr. Sacrey testified that he thought the discussions were after the vote.

63. Ms. Willette says Counsel for the Union attempts to argue that Mr. Saunders's evidence should be preferred to the evidence from Mr. Sacrey and Mr. Burton saying the Company's witnesses either did not hear the alleged comment because they were not present or have forgotten what they heard. She goes on to point out that both Company witnesses were consistent in their testimony. Sacrey says he was at all meetings in the month of January unlike Saunders and Burton who are both gas checkers. Sacrey says he never heard Fifield make the alleged comment. Mr. Burton testified that if the comment was made at a safety meeting he would have heard it. Ms. Willette says to suggest that two hourly employees would forget a comment about a raise and health benefits is incredible.

64. Next the Company suggests it is the testimony of Mr. Saunders that is not credible. Ms. Willette submits Saunders evidence is vague and self-serving:

1. The sort of "layoff" rumor here does not originate from management employee.

2. Saunders evidence about the conversation between Hubert Jenkins and Lloyd Mitchell supposedly about shift change originates from an unidentified group of employees.

3. Saunders says two of the three newsletters were delivered in his paystubs while the evidence of all four witnesses for the Company is contrary to his evidence.

65. Ms. Willette argues that Saunders motivation to make up the allegation is to trigger automatic certification pursuant to section 47(8) (47.1(6) at the time of the Application) of the *Act*. Hence resulting in a disregarding of the representation vote.

66. The Company says the Union has not met the burden of proof required to establish an unfair labour practice on the part of the Company in relation to the allegation under paragraph 26 of the complaint. Nor is there evidence which would deny Rambler's hourly employees the opportunity to have their representative votes counted.

On paragraph (c) of the Union's complaint

67. The second issue raised by the Company dealt with in its argument about the alleged plan of the Company to change the shift configuration from 7 on 7 off to 4 on 4 off if the Union was to be successful with its application. This allegation is set out in paragraph 19 of the complaint.

68. Ms. Willette points out the only evidence of the Union originated with the testimony of Mr. Saunders. He says while walking across the parking lot he ran into "a bunch of guys hanging out" and someone said that they heard Mr. Jenkins tell Lloyd Mitchell about the shift change. Ms. Willette says Mr. Saunders could not remember who made the statement or whether or not it was before or after the vote. She says Mr. Jenkins, on direct examination denies that he spoke to Mr. Mitchell about certification or shift changes. He admits he spoke to Mr. Mitchell but there was nobody else present. When asked on cross-examination, Mr. Jenkins was sure of the date he replied that he was on site because he was scrutinizing the representation vote, he said this is what caused him to be late going home, otherwise he would not have run into Mr. Mitchell,

69. The Company says the Union has failed to meet the burden of proof required to establish an unfair labour practice on the part of the Company in relation to the shift change allegation.

70. The next issue dealt with by Ms. Willette in her argument on behalf of Rambler dealt with the allegations that if the Union has certified there would be layoffs at the mine. This allegation was contained in paragraph 22 of the Union's complaint.

71. On this issue the Investigating Officer, in her Investigation Officer's Report asked the Union to supply names of employees who would support this allegation. The Company

says, of the five (5) employees contacted the Officer reported that none of them said they heard Mr. Jenkins make the statement. Ms. Willette says that the Union did not offer any evidence to support this allegation nor did it identify the one witness who was supposed to have made the statement.

72. Rambler argues that the Union has failed to meet the burden of proof required to establish an unfair labour practice on the part of the Company. As well the Company argues there is not sufficient evidence to deny its employees the opportunity to have their vote counted.

73. In conclusion of her argument on Issue #2 Counsel for Company referred to Mr. Forsyth's opening comment saying in the Union's opinion what is important is what is in the minds of the employees, regardless of the source and regardless of the origin. Ms. Willette says this perspective is not supported in law. She says if the Board is going to make a finding that the representation votes are not reliable, the Board requires evidence of intimidation, coercion, threats or promise. Not just idle talk. She says the source and origins of the comments does matter. Something more than vague allegations and hearsay is required to result in the Board questioning the validity on a representation vote.

74. Rambler says the Union has only lead the evidence of one witness before the Board and his evidence was not sufficient to prove that what was in the minds of employees in regard to the rumors in the workplace, originated with the management of the Company. Ms. Willette argued that an objective test is required to conclude that any comments of the Company would amount to intimidation, coercion or threats.

75. The Company concluded that there is no evidence before the Board that the vote by the employees is tainted or unreliable. Ms. Willette asks that the complaint be dismissed and that the vote be counted.

Analysis on Issue #2

76. In this portion of the Board's decision it will deal with the evidence delivered during the hearing of this matter. In that regard the Board will look to the evidence as it decides whether or not the Union has succeeded in establishing, on the balance of probabilities, that the Respondent has breached the sections 23(1) and/or section 25(1) of the *Act* has been breeched. As the Board puts its mind to this issue it will consider the credibility of the evidence of all witnesses, as well it will take under consideration whether or not such evidence may be classified as hearsay evidence, both of which could and will have an impact on the weight of evidence produced at this hearing.

77. As the Board considered the test applicable to deciding whether or not sections 23(1), 25(1), (3), (4) of the *Act* it refers to the Modern Paving Ltd case (supra) paragraph 59 as follows:

> 59 An objective test will be applied to determine whether the employer's right has been appropriately exercised. The test is as described by the Ontario

Board above: being whether an employee of average intelligence and fortitude would reasonable construe the employer's view as coercive or as interference.

78. The only witness for the Union was Jethro Saunders he says that Mr. Fifield, at a safety meeting on January 16th, 2014, told the meeting that the employees would get a 3% raise and have their health benefits paid for by the Company, if the Union was not elected. Saunders also says he was on night shift at the time. This allegation was denied by Mr. Fifield and two other witness, who were in attendance at the same meeting. They say they did not hear Mr. Fifield make that statement. Those two witnesses were Derek Sacrey and Steven Burton. There is documented evidence which establishes that the January 16th, 2014 meeting was on shift A's day shift, that evidence is contained in Exhibits J.S. #2 and C.F. # 1. These exhibits also establish that Jethro Saunders and Jeremy Martin were gas checkers on January 16th, 2014 meeting which proves that Saunders could not have been in attendance at the January 16, 2014 meeting since he would have immediately gone underground to carry out the duties of the gas checker. These exhibits also establish that on the January 16th, 2014 shift Mr. Sanders was not working night shift. Mr. Fifield denies making the alleged statement; he says he was called into his supervisors office, Mr. Jenkins, in November 2013 who advised him not to speak to the employees about certification.

79. On Mr. Saunder's evidence dealing with Mr. Fifield it is noted that he says he it was on night shift that Fifield made the statement and that he was in attendance at the meeting on January 16th, 2014. Both these statements have been proven wrong with documented evidence. As well two other witnesses deny hearing Fifield make the alleged statement. Mr. Fifield also denied making the statement. The Board seriously questions the credibility of the evidence lead by the Union in relation to the alleged statement of Mr. Fifield.

80. The next piece of evidence which the Board puts its mind to also comes from Mr. Saunders it deals with evidence which may be classified as hearsay evidence. The Board's position on hearsay evidence is dealt with in the Modern Paving Ltd. Case paragraph 73 (*supra*) as follows:

> 73 As an aside, the Board notes that the Respondent raised a concern as to the value of Mr. Crotty's hearsay evidence with respect to the employees' concerns as to retaliation. However, it is not uncommon for the Board to accept the evidence of a Director of Organizing regarding information received by the Union from employees during an organizing campaign (Eastern Health). Section 15(2) of the Act allows the Board to "receive or accept evidence and information on oath, affidavit or otherwise that it considers appropriate, whether or not that evidence or information is admissible as evidence in a court of law". The Board therefore considers it to be appropriate, in this matter, to accept Mr. Crotty's evidence of information received by the Union from employees.

81. Ordinarily this hearsay evidence which may be denied in a court of law, after looking to section 15(2) of the *Act* such evidence may be admitted as the Board does here. However notwithstanding the admittance of such evidence it is also appropriate to

evaluate the weight of this evidence, particularly when it is weighed against evidence that is not hearsay.

82. Now the Board deals with evidence from Mr. Saunders who says that Kirk Young told Mr. Fifield that "you can't say that Clarence". Saunders then says that Young asked Fifield if he was told to say that, and Saunders says "Young says that Fifield just shrugged and said "more or less." Mr. Fifield denies all of the alleged comments by Mr. Saunders. It has long been the practice of the Board, unless circumstances arising give cause to otherwise view such evidence, the viva voce evidence of a witness, in person, will almost always be accepted over hearsay evidence, The Board finds that to be the case here. This would be the case even if Saunders' evidence was not considered to be hearsay.

83. The only other evidence offered by Mr. Saunders deals with Lloyd Mitchell which will be dealt within under issue 3. The Union did not lead any evidence dealing with rumors of layoffs.

84. In relation to this section the Union in its complaint alleges:

> (a) After the certification application was filed and before the vote was taken, promising employees a pay raise and health benefits fully paid for by the Employer if the Union is unsuccessful in its certification application;

Decision

85. The only evidence led by the Union is as set out above and the Board finds there is not sufficient evidence to find that the First Respondent, Employer has perpetrated an unfair labour practice against the Complainant as alleged hence has not violated sections 23(1) and 25(1) of the *Act*.

86. The allegations dealing with the supposed rumors of 7 on – 7 off will be dealt with under the complaint against Lloyd Mitchell.

Issue 3 – Has the Second Respondent, Lloyd Mitchell committed an unfair labour practice contrary to section 25 (3) of the *Act* and should the Board grant the Second Respondent's non-suit application?

87. The Union in its complaint alleges the following unfair labour practices as follows:

> (b) threatening, on the night before the vote, to adversely change the shift at the Mine from 7 days on / 7 days off to 4 days on / 4 days off in the event the Union is certified.

These comments are alleged to have been made by Hubert Jenkins and/or Lloyd Mitchell.

(c) while the mail-in ballot vote was ongoing, threatening that, if the Union is certified there will be layoffs and the Mine would go to a 4 days on / 3 days off schedule; and

88. The only evidence on the record dealing with changes to 7 on / 7 off and layoffs is from the evidence of Jethro Saunders who says that a couple of employees, whom he does not identify, told him they overheard Hubert Jenkins talking to Lloyd Mitchell in the yard. They say they overheard Jenkins telling Mitchell that if the Union got in the shifts would go from 7 on / 7 off to 4 days on / 4 days off. Saunders says if there was such a shift change there would be a loss of a crew and there would be layoffs. Mr. Jenkins denies having said anything to Lloyd Mitchell about shift changes. Mr. Saunders says he did not hear Lloyd Mitchell say anything about layoffs.

89. At this point Counsel for Mr. Mitchell made an application for non-suit which was granted. That application is dealt with below.

Application for Non-Suit

90. After Mr. Forsyth closed his case, Mr. Peddigrew, Solicitor for Mr. Lloyd Mitchell made application for non-suit. He argues there is a lack of evidence needed to establish the allegations against his client. These allegations are set out in the Union's complaint as follows:

> … 3 The Union states in the alternative that the Respondent Lloyd Mitchell, if not acting on behalf of the Employer, but rather acting on his own behalf, contravened section 25(3) of the Act by telling fellow employees that Mine Superintendent said on the night before the vote that, if the Union was successful on its application for certification, the shift schedule at the mine would be changed from 7 days on / 7 days off to 4 days on / 4 days off. Mr. Mitchell's actions constitute intimidation or coercion to compel employees to refrain from becoming or stop being a member of the Union, contrary to the Act…
>
> … 19. Mr. Hubert Jenkins is the Mine Superintendent. As he was leaving work on Wednesday, February 25, 2014 (the eve of the vote), he told the Respondent Lloyd Mitchell, a miner, that if the Union comes in then the Mine would be going to a 4 days on / 4 days off schedule. Mr. Mitchell then told other miners on the Wednesday night shift what Mr. Jenkins had said,
>
> 20. During the Wednesday night shift, there was much talk among the crew about Mr. Jenkins' statement that the Mine would go to a 4 days on / 4 days of (sic) schedule if the Union was successful. Some crew members indicated they had heard staff saying the same thing. There was a lot of concern expressed among the miners about going to a 4 days on / 4 days off schedule, which many miners see as a significant and adverse change to their terms and conditions of employment.

21. Word about what Mr. Jenkins had said spread amongst the other miners on the Thursday day shift and then the Thursday night shift. As noted above, a second voting time was scheduled at the Mine Site for Thursday, February 27, 2014, from 5:00 p.m. to 7:00 p.m.

22. Following the in-person vote, but while the mail-in vote was ongoing, Mr. Jenkins informed one employee that, if the Union was successful, the Mine would go to a 4 days on / 3 days off shift schedule, and that 20 employees would be laid off. The employee then communicated this message to other employees.

91. Counsel for Mitchell points out that the only witness for the Union is Mr. Saunders. His evidence is as set out above. Rules of evidence in a court of law would classify Saunders evidence as hearsay evidence and ordinarily would not be admissible. However the Labour Relations Act at section 15(2) states:

> (2) The board or panel may receive or accept evidence and information on oath, affidavit or otherwise that it considers appropriate, whether or not that evidence or information is admissible as evidence in a court of law.

92. This becomes relevant as the Board considers whether or not to allow the non-suit application to proceed. Mr. Forsyth's position argues that there is testimony that can be accepted with sufficient "probative sufficiency" to infer liability, hence the non-suit application should be denied.

Analysis

93. The criteria established for the acceptance of a non-suit application has been dealt with in *Abitibi Consolidation* decision. There the test to be applied is stated at pages 17 to 19 as follows:

> The Board agrees that the test to be applied is the "probative sufficiency" test. This is described by Chief Justice Green in Petten v. E. Y. E. Marine Consultants as not involving any weighing or assessment of the evidence. Rather, the probative sufficiency test invites the inquiry as to whether liability might or could be inferred. Chief Justice Green stated at paragraphs 4 and 5 of the decision as follows:
>
> > Before a non-suit motion can be granted, the trial judge must be satisfied that no case has been made out "upon the facts and the law". The evidence must therefore be viewed against the legal framework of the claims which are being relied upon. Although the plaintiff may have adduced evidence to link the defendant to the circumstances of the case, that in itself is not enough; the evidence must be capable of supporting the specific causes of action alleged. The judge may determine the applicable law on a non-suit

> motion because questions of law are always for the judge, and not the jury, to decide.
>
> The test to be applied is often stated as: has the plaintiff presented evidence upon which a reasonable jury, properly instructed, could find in the plaintiff's favour?

And Chief Justice Green further states at paragraph 10 as follows:

> What is contemplated by the probative sufficiency test is nothing more than a threshold common sense screening of the evidence to ensure that it has some meaning and is not fanciful or ridiculous. Thus, it would not be enough to resist a non-suit motion simply to point to the fact that words were uttered during viva voce testimony or were contained in a documentary exhibit which, if taken literally and outside of their context, could result in the trier of fact finding liability. If the words, judged by common experience or when viewed in the context of the remainder of that witness's evidence (including, say, an unequivocal later retraction) are insensible or ridiculous and cannot have any real meaning or substance or cannot have their literal meaning, the judge on a non-suit motion would be entitled, notwithstanding their existence, to conclude that the words themselves did not have enough probative sufficiency from which a jury reasonably instructed, could infer liability. Beyond that, however, the weighing and assessment process is for the trier of fact and not the judge on the motion. The judge sitting without a jury, although the ultimate trier of fact, must nevertheless resist the temptation at the non-suit stage to weigh the plaintiff's evidence to determine whether on a balance of probabilities the case has been proven to that point. The plaintiff is entitled, on putting forward as part of his or her case some evidence of probative sufficiency from which a trier of fact could infer liability at that stage, to require the defendant to put his or her case before the court and to take advantage, if possible, of evidence so tendered that might bolster the plaintiff's case.

94. In the context of this matter, the Applicant submitted that the Board must consider whether it might or could infer from the evidence that what the Applicant was saying actually occurred. While the Board agrees that the probative sufficiency test is the test to be applied in this matter, the Board does not agree with the Applicant's characterization of the manner of application of the test. Rather, the appropriate inquiry is whether the Board might or could make a finding of a violation of Section 23(1)(a) of the Act based on the Applicant's evidence. In other words, the test to be applied in the matter is whether the evidence adduced is "capable of supporting" the allegation that there has been a violation of Section 23(1)(a) of the Act.

Decision

95. The Board has applied this test in case *James Evely vs. Resource Development Trades Council of Newfoundland and Labrador and Iskueteu*.

96. The bottom line as to what the Board has to put its mind to is whether or not the evidence under consideration here is capable of supporting the specific allegations against the Employer. What arises here is whether or not the evidence of Mr. Saunders on this issue is hearsay evidence or is it necessary to go there to reach a decision on this matter. To assist the Board in this regard, it refers to the testimony referred to above. Mr. Saunders says a couple of employees whom he failed to identify told him they overheard Mr. Jenkins tell Mr. Mitchell about the alleged shift change. There is no evidence that Mr. Mitchell told anybody about the shift change. Also there is no evidence about layoffs that is attributable to Mr. Mitchell. The only reference to layoffs comes from the conclusion of Mr. Saunders if there was a shift change. None of which has anything to do with Mr. Mitchell. Finally Mr. Jenkins has categorically denied the alleged statement being made.

97. Accordingly the Board does not need to put its mind to whether or not there is hearsay evidence here. There is no evidence that Mr. Mitchell said anything to anybody about shift changes or layoffs. The Board grants the non-suit applied as there is no evidence that Mr. Mitchell violated section 25(3) of the *Act*.

98. Finally as indicated above the decision concerning the changing of shifts from 7 on / 7 off to 4 on to 4 off would be dealt with here. The Board had determined that the only evidence here is hearsay and in accordance with section 15(2) of the *Act* has decided to accept this evidence but that is not the end of it. Such evidence can and should be weighed against viva voce evidence on the record which denies such hearsay evidence. The evidence of Mr. Saunders comes from an unidentified source with no evidence that Mr. Mitchell did or said anything about it or with it. In the opinion of the Board, the viva voce evidence of Mr. Jenkins trumps the hearsay evidence hence it follows that the Board find the Employer has not violated sections 23(1) or 25(1) of the *Act*.

Issue 4 – Did the First Respondent violate sections 23(1), 25(3) of the *Act* by distributing memoranda prior to the representation vote?

99. The Respondent issued three (3) newsletters to employees. These newsletters were from Mr. Robert McGuire, General Manager of the Employer as follows:

1. The first letter was dated November 28th, 2013 and sent to all staff employees.

2. The second letter was dated December 17th, 2013 and sent to all hourly employees.

3. The third letter was dated January 14th, 2014 and sent to all employees (both staff and hourly)

100. The letter of particular attention is the 2nd letter dated December 17th, 2013 which was sent to all hourly employees.

101. The Complainant in its complaint refers to portions of paragraph 2, 3, 4 and 5 of the letter. The Board feels it is useful to reproduce the full text of the second letter so as to put the complainant's references in the context of the complete document.

102. The December 17, 2013 letter reads as follows:

> A number of you have advised management personnel that you continue to be contacted at home by United Steel Workers (USW) officials over the past few weeks or so. I also understand that some of our employees have been told that the United Steel Workers are certified as the bargaining agent for hourly employees. I feel that it is important to clarify certain facts to you because it appears that some of the information circulating may be inaccurate.
>
> On November 12, 2013, the USW, Local 7144 filed an application for certification with the Labour Relations Board seeking to represent:
>
> > All employees of Rambler Metals and Mining Company Limited employed at the Ming Mine, the Nugent Pond Mill and the Goodyear's Cove Port Site, Baie Verte save and except persons employed as shifters, office and clerical staff, supervisors, and those employed above the rank of supervisor and those excluded by section 2(1)(m) of the Newfoundland and Labrador *Labour Relations Act*.
>
> The Company, through legal counsel, responded to the Certification application and filed its Reply on November 26, 2013. After our Reply was filed, the USW, Local 7144 responded to the Reply and asked to have its certification application "held in abeyance" or, in other words, put on hold. This request was apparently made because the USW, Local 7144, having sought the signing of membership cards from a number of you, is now claiming that other locals of that Union have a certification order that binds the Company and its operations. So USW, Local 7144, has asked the Labour Relations Board to delay consideration of its application until either (i) the Company voluntarily recognizes the other locals as the certified bargaining agent of the Company's employees, or (ii) the Labour Relations Board makes a determination under section 93 of the *Labour Relations Act* that the other locals represent the employees of the Company based on a certification order issued in 1967 and another in 1976. The Company has denied that those locals have "successor rights" in relation to the current operations and has contested the request that the Application be held in abeyance. The Labour Relations Board has decided to provide the other USW locals with copies of the Certification Application as well as the Company's Reply, the request for an abeyance

and the Company response to that request and seek their submissions in the matter. Those locals have now received those documents and have time limits in which to provide the Labour Relations Board with their position. **The Mine, Mill and Port hourly employees are not certificated by the USW, Local 7144.**

By law, management of Rambler is restricted in what it can say to its employees during an attempt by a union to organize them. Therefore, in light of some of the comments that are circulating in the workplace and being relayed to Management, we feel at this time that it is appropriate to communicate with you about the status of the application through the newsletter. The Company is cognizant of the restrictions under the legislation and wants to ensure that it complies with the law and does not want to inadvertently say anything that could be perceived as a violation the Act. Please do not interpret our hesitation to approach you directly and engage in conversation about this process as a lack of interest on our part. Management is interested but we do not want to say or do anything that might interfere with the process.

In regard to possible certification of Rambler's Staff Employees, you should become familiar with the process by which a union obtains the right to represent a group of employees. The Labour Relations Board can help you in this regard. Generally, speaking, under Newfoundland and Labrador labour laws, if a union is able to convince 40% or more of the employer's eligible employees to sign a union membership card, the union is entitled to make an application to the Labour Relations Board to be certified as the bargaining agent for that group of employees. If 65% or more of the eligible employees sign union cards, the Board may automatically certify. Where more than 40% but less than 65% of the eligible employees sign a membership card, the Labour Relations Board will hold a vote to determine the wishes of the employees.

Where a vote is held and a majority of the employees in the proposed bargaining unit vote in favour of the Union, or where at least 70% of the members of the bargaining unit have voted and a majority of those voting have voted in favour of the Union, the Board will issue a Certification Order, certifying the Union to represent the employees in the bargaining unit for purposes of collective bargaining. The vote will be by secret ballot and just because you may have signed a Union membership card and/or joined the Union does not mean you must vote in favour of the Union. If a vote is held, you are free to vote "yes" or "no" and we encourage you to make an informed choice. Should you have any questions about the process please do not hesitate to contact the Labour Relations Board.

We ask that you also recognize that if the Labour Relations Board accepts the USW's attempt to be revive the certification orders from 1967 and

1976, or if USW, Local 7144 is certified through the application process as the employees' representative at Rambler (either the Mine, Mill and Port employees or the Staff Employees), what the Union gains is the right to negotiate with the Company. This bargaining process takes time. Any changes to the working conditions resulting from these discussions must be mutually agreed between the Company and the Union. Even if you refuse to sign a membership card or vote for the Union, if the majority of others do, you will become a member of the bargaining unit and will in all likelihood be required to comply with the Union's constitution and any collective agreement, including the payment of union dues.

You should understand that under the laws of Newfoundland and Labrador, it is the right of each individual to freely choose whether or not they want to be represented by a union and no one is permitted to intimidate or coerce you with respect to your choice. Therefore, if you do feel intimidated or coerced by the Union through their repeated contact of you at your home, please advise Management personnel.

We respect your right to choose, we ask that you make an informed choice. In order to do this we urge you to gather as much information about the Union and the process that you can. Should you have any questions about the organizing process or your rights, feel free to contact the Labour Relations Board at 729-2707. The Board's website is: http://www.hrle.gov.nl.ca/lrb/. Should you have any questions about the Union or what it means to be represented by the Union, including your duties and obligations, you should seek answers from the Union. In addition, a website devoted to answering employee questions on this issue can be found at www.labourwatch.com.

It has never been necessary in the past for any employee of Rambler Metals and Mining Canada Limited to have to join a union and pay union dues, initiation fees or other possible assessments to any union in order to work at Rambler and we would prefer to continue to deal with our employees on an individual basis as we have in the past.

If you do have an opportunity to vote on the certification application, we ask that you please take the time to consider your choice and make an informed decision.

Consider the following:

1. Has the Union told you have much it will cost to be a member of the Union? What are your obligations with respect to membership fees, union dues and any other assessments?

2. If you become a member of the Union you will be subject to their Constitution. Union constitutions often provide that you can be fined

or subject to other discipline for violations of the construction or by-laws? You should familiarize yourself with the Union's Constitution and your obligations thereunder.

3. Has the Union told you that if they are certified, all they get is a right to bargain with the Company and that any changes to working conditions resulting from these discussions must be negotiated between the Company and the Union?

Have you thought about who would represent you if the Union was successful in becoming your bargaining agent? Once a union is certified, Rambler is, by law, prohibited from dealing with you directly as individuals. You should therefore weigh any benefits of unionization against the personal costs (union dues and other assessments), loss of personal freedom (ability to negotiate on your own behalf) and the possibility of job restrictions and job disruptions, such as strikes. You should also think about whether you honestly feel that certain of your fellow employees are better able to speak for you and handle your problems and opportunities with Rambler than you are yourself.

The key question that you as an employee should consider in making your decision is, do I really need a union, or put another way, does a union have anything to offer me for my money? To answer this key question, you have to consider the reasons why people join unions. It is usually in response to promises relating to fair treatment, fair and competitive compensation and job security that a union makes to employees.

We believe that if you examine each of these elements, you will find that you have all of these at Rambler and without having to pay union dues to get them.

Fair Treatment

Unions often promise employees that they will ensure fair treatment for employees as their representatives. We believe that an import aspect of fair treatment of employees is ensuring an opportunity for you to be heard – an opportunity for you to bring your concerns to management and have them dealt with on an ongoing basis. We believe that we have demonstrated our ability to deal fairly with our employees in the past and to address your concerns on an individual basis and therefore we do not believe that you need a union to represent you in this regard. The Company's improved salaries, health benefits plan and work towards implementing a pension plan are examples of how we believe that employees and management have successfully worked together to address concerns in the workplace. We recognize these improvements have been incremental but will improve over time as Rambler becomes more established. The Company has been dealing directly with our Employee

Relations Committee (ERC) and were making significant progress to implement recommendations made by the ERC. Examples of recommendations by the ERC that were agreed upon the Company and implemented to the benefit of the employees includes: mill training with corresponding wage increases upon successful training; banked time; wage increases for some job positions and bonus increases for certain job positions to name a few. In addition, the ERC, as well as individual employees have recommended equipment purchases & safety equipment which have not been purchased or ordered by the Company.

Fair and Competitive Compensation

> Issues of wage and benefit increases are often high on the Union's priority list of promises. As you know, these matters are heavily dependent upon our ability to remain competitive in the industry and cannot be guaranteed simply by joining a union. We continually review the terms and conditions of employment of our employees and strongly feel that your compensation is competitive with other employees both in our business and our area. We believe that the issues we have raised under "Fair Treatment" reflects the actions we have taken and are examples how we will continue to work with our employees to improve their benefits and wages.

Job Security

> Unions will often make promises regarding lay-off protection. The reality in our work force, however, is that unions cannot protect employees from being laid off where declines in business demand fewer employees. The most a union can do is ensure that seniority is used as the factor of determining who retains employment. We want you to know that if business conditions demanded that people be laid off, the Company's approach has been and remains that seniority is a key factor in identifying those to be laid off. This had been and remains our practice.

Thank you for your time and attention and remember that the decision to have a union represent you in the workplace should only be made after you have carefully considered all of the factors we have raised in this letter.

You are free to choose whether you want the Union to represent you for the purposes of collective bargaining. It is unlawful for either the Union or the Company to coerce, intimidate, threaten or interfere with your choice.

> Don't allow yourself to be pressured. The choice is yours and yours alone. We ask only that you examine all the facts and make an informed choice.

103. The Complainant's remarks in support of its position on violation of section 23(1) and 25(3) are confined to references to the second letter dated December 17th, 2015, hence it will not be necessary to refer to the first and third letters further in this matter.

Argument

104. Mr. Forsyth, Solicitor for the complainant, commences his argument concerning newsletters by referring to pages 3-4 of the second newsletter which states:

> Considering the following:
>
> 1. Has the Union told you how much it will cost to be a member of the Union? What are your obligations with respect to membership fees, union dues and any other assessments?
>
> 2. If you become a member of the Union you will be subject to their Constitution. Union constitutions often provide that you can be fined or subject to other discipline for violations of the constitution or by-laws? You should familiarize yourself with the Union's Constitution and your obligations thereunder.
>
> 3. Has the Union told you that if they are certified, **all they get is a right to bargain with the Company** and that any changes to working conditions resulting from these discussions must be negotiated between the Company and the Union? [emphasis added]

105. And pages 2-3 of the same newsletter which states:

> "… if USW, Local 7144 is certified through the application process as the employees' representative at Rambler (either the Mine, Mill and Port employees of the Staff Employees), **what the Union gains is the right to negotiate with the Company** …. [emphasis added]

106. He argues that these statements are incomplete and misleading, saying they imply that the "only" role of the Union is to bargain a collective agreement. It is argued that it is implied that this is all the employees will get in exchange for paying union dues, implying it is not worth the price. Mr. Forsyth argues that these statements ignore the importance and ongoing representative role played by the Union with respect to the rights of bargaining unit employees under the collective agreement. The Complainant alleges the incomplete and misleading statements amount to interference in the formation and selection of a trade Union, and undue influence, intimidation and coercion directed toward the employees not becoming members of the Union or exercising rights under the *Act*, contrary to sections 23(1) and 25(1) of the *Act*.

107. Ms. Willette, Solicitor for the First Respondent disagrees with the assertions of the Complainant. Support for her contention will become clear and better dealt with as the Board deals with cases raised by parties to this matter.

108. The first case raised by Mr. Forsyth in this hearing was *UFCW, Local 1252 v. The Telegram* File No's 4689 and 4693. There a manager told employees that established work practices would be changed and part-time employees would lose their benefits if the Union was certified. The message to employees was that their terms and conditions of employment would change to their detriment if the Union was certified. The Board in this matter said these statements interfered with the selection by employees of a trade union finding that intimidation or coercion directed at employees to not become members of a trade Union or exercise another right under the *Act*.

109. The Complainant referred to *Labourers Local 1208 vs WRH Construction Inc* File No's 5295, 5299, 5300 & 5345 which case confirmed the test required to establish the legality of newsletters. The Board confirmed the test is whether an employee of average intelligence would reasonably construe the Employer's views as expressed in a newsletter and by a foreman as, at the very least, intimidating to the extent that the vote could be influenced. It is an objective test.

110. The next case provided by the Complainant is *ACTW v. Dylex Ltd* [1977] 2 Can., L.R.B.R. 171. There the Board found that three newsletters by the Employer were deliberately circulated to play upon employees fears for their job security. Mr. Forsyth says, together with other facts, they constituted under influence.

111. Finally, the case *CEP v. Boehmer Box LP* [2010] O.L.R.D. No. 992 is put forward to support the complainant's position that the Employer has committed an unfair labour practice. In this case the Board made such a finding when in its newsletters the Employer insinuated that the Company's prospects for a better future might be impaired by the introduction of a Union into an otherwise functional workplace and raised the specter of job loses.

112. The Company now deals with the complainant's argument pertinent to the statements in the second newsletter, particularly those on pages 3-4 and 2-3. Ms. Willette refers to *Griffiths Guitars* [2004] N.L.L.R.B.D. No.6 and *Northland Contracting Inc*. (Re) [2005] N.L.L.R.B.D. No. 16 where she points out these two cases deal with statements the same or similar to the form in the newsletters as dealt with by the Complainant on pages 3-4 and 2-3.

113. The Board, in *Northland*, comments on both newsletters as follows

> 4 In essence, the same sentiments and tone are used in both of these Newsletters. This Board sees no reason to find that the subject Newsletter amounts to intimidation, coercion, or threat anymore than the previous decision.
>
> …

> 5. The Board has examined the newsletter in depth and cannot find anything overtly threatening therein. In fact, the said letter carefully points out that the Decision as to whether or not to unionize was strictly the workers' desire, although it did not point out the clear terms that the employees should weight any benefits of unionization against the costs, and the probability of job restrictions and job disruptions. As previously stated, such language has been accepted as not offending the Act by the Board.

114. Finally on the wording of the Board's decisions *Twin Cities, Northland* and *Griffiths Guitars* the Employer says the wording in particular to the matter at issue here is the same or significantly similar to that contained in the three decisions referred to above.

115. Rambler argues the contents of the subject newsletter should not give rise to a violation of the *Act*.

116. Next Forsyth refers to page 3 of the second newsletter. The relevant portion of the said letter is as follows:

> Have you thought about who would represent you if the Union was successful in becoming your bargaining agent? **Once a union is certified, Rambler is, by law, prohibited from dealing with you directly as individuals.** You should therefore weigh any benefits of unionization against **the personal costs (union dues and other assessments), loss of personal freedom** (ability to negotiate on your own behalf) and the possibility of **job restrictions and job disruptions, such as strikes**. You should also think about whether you honestly feel that certain of your fellow employees are better able to speak for you and handle your problems and opportunities with Rambler than you are yourself.

117. The Union argues this portion of the letter implies that certification will result in all direct communication between the Employer and the Employees and all workplace matters having to go through the Union. The Union says this is not the case. It argues that an average employee may construe the words of this paragraph as an undue interference in the management of the business, employees jobs and in the workplace generally the Union goes on to argue that the reference to "the possibility of job restrictions" is coercive and threatening. The Union says the statement implies that unionization may negatively affect employees jobs, job duties and advancement.

118. It says to raise the possibility of job disruptions and strikes in the context of rumors of layoffs and unwanted changes to work schedules is coercive and intimidating and an exercise of undue influence.

119. Ms. Willette argues this paragraph was contained in the Board's decisions *Twin Cities, Northland* and *Griffiths Guitars* in an almost verbatim state. In neither of these cases did the Board find that the passage denigrated the Union nor did it call into question the value of collective bargaining. None of those decisions found the passage to be coercive or threatening.

120. The next issue raised by the Union refers to pages 4-5 of the second newsletter as follows:

> Fair Treatment
>
> **Unions often promise employees that they will ensure fair treatment for employees as their representatives. We believe that an important aspect of fair treatment of employees is ensuring an opportunity for you to be heard – an opportunity for you to bring your concerns to management and have them dealt with on an ongoing basis.** We believe that we have demonstrated our ability to deal fairly with our employees in the past and to address your concerns on an individual basis and therefore we do not believe that you need a union to represent you in this regard. The Company's improved salaries, health benefits plan and work towards implementing a pension plan are examples of how we believe that employees and management have successfully The Company has been dealing directly with out Employee Relations Committee (ERC) and were making significant progress to implement recommendations made by the ERC. Examples of recommendations by the ERC that were agreed upon by the Company and implemented to the benefit of employees includes: mill training with corresponding wages increases upon successful training; banked time; wage increases for some job positions; and bonus increases for certain job positions to name a few. **In addition, the ERC, as well as individual employees have recommended equipment purchases & safety equipment which have now been purchased or ordered by the Company.** [emphasis added]

121. The Union says this paragraph is misleading and it denigrates the Union as well as calling into question the value of collective bargaining. It argues that the said passage implies that unionization will result in employees not being allowed to voice their concerns to management, including safety issues.

122. Rambler points out that the contents of this passage is contained verbatim in the *Griffiths Guitars* newsletter with the exception of referring to safety issues. The Board found that letter did not violate the *Act*. On the safety equipment purchase issue the Employer argues the purchase of the safety equipment is a statement of fact. It says it is only one of the multiple examples of benefits enjoyed by employees as a result of the fair treatment by the Employer. The Employer argues that such comments could not reasonably be interpreted to mean that unionization would result in an inability of employees to voice their concerns particularly about safety.

123. The final issue raised by the Union was an allegation that the Employer committed an unfair labour practices when it failed to advise employees that certain rumors were untrue after it had sent out three different newsletters.

124. The Union says it applied for certification on November 12th, 2013. It says, within three weeks the Employer responded with three newsletters. The Union went further, it goes on to say the Employer states it wished "to clarify inaccurate information"

circulating in the workplace. At least one of the letters stated that the Employer's preference was to remain union free.

125. Mr. Forsyth says several rumors were circulated in the workplace before, during and after the February 26th and 27th 2014 vote. He says the rumors were:

1. Shifts would change from 7 on 7 off to 4 on 4 off. 7 on 7 off was the preference of employees.

2. If the Union was certified there would be layoffs.

3. If the Union did not get certified, the Employees would set a 3% increase in salary and all health benefits would be paid by the Employer.

126. The Union says these alleged rumors contravened sections 23(1) and s. 25(1)(2) & (4) of the *Act*. It alleges there is evidence that Mr. Fifield being part of management made the statement concerning a pay raise and other benefits but goes on to admit there is no evidence saying the Employer made statements No. 1 & 2.

127. The Union argues when the Employer published newsletters for the ostensible purpose "to clarify certain inaccurate information" and it contradicted some information but did not contradict the rumors set out in (1), (2) and (3) above, knowing they were circulating on site, it gives a reasonable employee the impression that the rumors are true.

128. The Union argues that the case Walmart *supra* supports this argument. It says such failure to clarify the rumors amount to a breach of sections 23(1)(a), 25(1), (2) and (4) of the *Act*.

129. The Employer takes issue with the argument by the union as it deals with failures to deal with rumors in the workplace in either of its three newsletters.

130. The first argument raised by Ms. Willette was in relation to her suggestion that the Union attempted to enlarge the complaint. She argues that is so by virtue of the Union raising new allegations in its legal submissions. She says the Employer had no basis to believe that it should have led evidence in relation to the nature and extent of rumors in the workplace.

131. Ms. Willette argues that the amendment to the complaint at this stage of the proceedings would be a denial of natural justice and procedural fairness and the Board should find it would be unreasonable in the circumstances.

132. The Employer argues in the alternative, if the Board should decide to consider the new allegations of the Union as flowing out of the accusations already contained in the complaint, it goes on to argue that the further circumstances in this case do not give rise to an obligation on the Employer to dispel rumors in the workplace.

133. Ms. Willette distinguishes the Walmart case (*supra*) by comparing the facts of that case

with the facts before the Board. She points out that the employer in the Walmart case freely responded to the employees questions about certification during meetings with its employees. The only question not answered by the employer at these meetings was whether or not the store would close if the Union was certified.

134. The Board in the Walmart (*supra*) case found that the refusal to answer this question amounted to intentionally generating an implied threat to employees job security in violation of the legislation of the appropriate jurisdiction.

135. The Employer differentiated the facts of the Walmart case (*supra*) with the case before the Board by pointing out that management employees at Rambler did not engage in any oral discussions with hourly employees about the certification application or the effect of certification.

136. The Employer next deals with the Union's allegations that rumors were wide spread by arguing there is no evidence that the three rumors were wide spread. It says Mr. Sacrey's evidence says he had heard the rumors about shift changes and pay raises but he thought the rumor about the pay raise was after the vote. He also says he had not heard rumors about layoffs.

137. Mr. Burton testified on cross-examination that he did not hear rumors about pay raises saying he is probably one of the employees to have made the comment in idle conservation with co-workers. When questioned by Mr. Forsyth about how wide spread was the rumor about the pay raise Mr. Burton responded that he did not hear management say it. Mr. Burton also indicated that rumors of layoffs were shared by 4 - 5 employees with no management employees present. Burton says he did not hear rumors about the shift changes.

138. The Employer argues, given the fact that Sacrey did not hear the layoff rumors and Mr. Burton's testified that he did not hear rumors of shift changes and since both Sacrey and Burton were in the same crew not only were those rumors not widespread through the Company, the said rumors were not widespread throughout crew "A".

139. The Employer says the evidence of Mr. Jenkins has not contributed to the allegations that the rumors were widespread.

140. Rambler submits a review of all three newsletters and particularly the subject letter disclosed the purpose of the issuance of the three letters was to counter definitive comments being made in the workplace and not to counter rumors.

141. The first letter dated November 28th, 2013 was issued as result of being advised that a union organizer advised a staff employee that the union was already certified. The Employer says the Company issued the newsletter in the event that other staff employees had been given this misinformation.

142. Ms. Willette takes issue with Mr. Forsyth's allegations that the Company "quickly" issued

three newsletters following the certification application. The Employer points out the second letter was filed one month after the first one and was prompted as a result of the Union's own activity.

143. Rambler says the first letter was to staff employees, the second letter was distributed by the Company to hourly employees to respond to three issues:

1. Persistent communications from the Union to Employees in their home.
2. To advise employees that the union did not have pre-existence certification order in place.
3. The Company, feeling the need to communicate with its hourly employees, in the said fashion, took the opportunity to indicate its preference to remain non-unionized, to explain the certification process and to encourage the employees to educate themselves prior to the deciding the vote, if given the opportunity.

144. The Employer says the third newsletter was issued to all employees in an effort to explain the further delays in the certification process.

145. The Employer submits that its failure to correct rumors in the workplace is not properly before the Board in the case at hand as it was not raised in the complaint. In the alternative the Employer submits that the Union has failed to satisfy its burden of proof that the rumors were so wide spread in the workplace and known to management that to remain silent in the face of them constitutes an unfair labour practice. Rambler stated the Act does not hold Employers to a positive obligation to correct rumors in the workplace.

Analysis on the Newsletters

146. The Board has carefully considered the contents of the subject letter and contents of letters considered in similar Board decisions.

147. The Board accepts the position set out in the case *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Modern Paving Limited*, No, 4970 and No. 4976 at paragraph 70 which states as follows:

> 70 The Respondent correctly states that if we consider just the contents of the subject memorandum and compare it to each of the memorandums in Griffiths, Twin Cities and Northland, the subject memorandum is more benign. Indeed, there are references in this memorandum which have been in other newsletters accepted by the Board. However, it would be improper for the Board, or employers, to simply accept previous templates or memorandums which have been accepted by the Board without consideration of the context in which they are issued. Therefore, while the Respondent is correct in stating that certain parts of the subject memorandum have, in the past, been accepted by the Board, this does not mean that the same or similar will be acceptable to the Board in all present and future cases. Content must be considered in the context of each matter. As a result, an identical memorandum may result in a finding of an unfair labour

practice in one matter, but not in another.

148. The Board will examine the content of the letters in this matter in the context of this particular matter.

149. To assist the Board in its assessment of the subject memorandum it refers to the *Modern Paving Ltd.* case (*supra*) and the criteria which the Board used to assist it in assessing the memorandum in that case. In that case four (4) criteria were used as follows:

1. Manner of distribution of the memorandum
2. Timing of distribution
3. Context
4. Reason for distribution

150. Manner of distribution:

> 75 The Board has considered the evidence and the submissions of the parties and agrees with the Applicant that the enclosure of the memorandum with the pay cheque was indeed a reminder of the economic power that the Respondent has over its employees. This memorandum was different than all others distributed by the Employer in the past: all other memorandums in evidence were less than one page; many dealt with unrelated issues, such as safety; and none were remotely similar in content to the subject memorandum. There is little doubt that an average employee would reasonably view the subject memorandum, distributed with or without the pay cheque, as extraordinary. The Board is of the view that, by delivering it with the pay cheque, an average employee would reasonably link the memorandum with the economic power of the Employer over the employees. Therefore, the manner of distribution is a contextual factor to consider when evaluating whether there has been a violation of the Act by the Respondent.

151. Timing

> 78 In this matter before the Board, the memorandum was sent to employees the day before the representation vote. It is the Board's view that, if there are any comments of concerns in the memorandum, the fact that the Respondent did not have sufficient time to counteract them is relevant in determining whether such comments are objectionable; and thereby a violation of the Act.
>
> 79 With respect to the time of circulation, the Board must consider whether the impact of potentially objectionable employer's communications can be overcome by an appropriate Union response and whether there is adequate time for the Union to make such a response. This was a factor considered by the B.C. Labour Relations Board in Viva Pharmaceuticals at paragraph 91:
>
> > Another factor which might legitimately be considered in weighing the

possible impact of the managerial statements is the fact that afterwards both Union and Management has the opportunity of correcting any imbalance that may have been created by the Employer's comments.

80 The Board notes that it is not reasonable to argue that the Union has the option of seeking an extension of time for the taking of the vote in order to allow it to correct any imbalance caused by the Employer's comments. The policy reason behind the legislated quick 5 day vote was to prevent the interference, intimidations, etc. by an employer. The Union should not be expected to forsake the benefit of this time period because of the actions of the Employer.

81 Timing is also relevant in determining whether the procedure under section 47 was influenced by intimidation, threat or coercion or whether there is interference pursuant to section 23 of the Act. An employer's communication distributed in close proximity to the representation vote will likely have significant influence.

152. Context

70 The Respondent correctly states that if we consider just the contents of the subject memorandum and compare it to each of the memorandum in Griffiths, Twin Cities and Northland, the subject memorandum is more benign. Indeed, there are references in this memorandum which have been in other newsletters accepted by the Board. However, it would be improper for the Board, or employers, to simply accept previous templates or memorandums which have been accepted by the Board without consideration of the context in which they are issued. Therefore, while the Respondent is correct in stating that certain parts of the subject memorandum have, in past, been accepted by the Board, this does not mean that the same or similar will be acceptable to the Board in all present and future cases. Content must be considered in the context of each matter. As a result, an identical memorandum may result in a finding of an unfair labour practice on one matter, but not in another.

153. Reason for Distribution

77 Another contextual factor to consider is the reason for distributing the memorandum in the first place: Mr. Cameron's evidence was clear in that the memorandum was not distributed in response to any misinformation or representations by the Applicant. Rather, the memorandum was prepared to answer two questions - "whether the entire Company was being unionized" and "who would be affected by the application". He also wanted to ensure that the Respondent's preference on the matter was made clear and to state that it was ultimately the employees' choice as to whether they should be unionized.

Analysis

154. The Board now examines the subject memorandum to consider the particular statements complained of by the Union. For clarity, the Board shall only be dealing with the second memorandum dated December 17th, 2014 in this examination unless otherwise referenced.

155. The first and second pages of the said memorandum deal with the reasons why the Employer moved to write it. The mine superintendent, Robert McGuire, states as follows:

> 1. He had been advised of persistent communications from the Union to the Employees in their homes.
> 2. He had been advised that employees had heard that a pre-existence certification order may already have been in place.
> 3. Having been moved to write this letter for the above two reasons Mr. McGuire felt it appropriate, in light of the restrictions on communication with employees place on it by legislation and the lack of communication with the employees to this point in the process, to explain the reasons for hesitation in communication by the Company with the employees.

156. The Board accepts the stated reason as legitimate and acceptable reasons to write the memorandum. Certainly the first two issues dealt with were serious enough to move the Company to write the letter. Further the Board believes that it is reasonable for the employer to feel, given that the Company had not communicated with the employees up to the time of writing the subject memorandum, the need to explain the lack of communication and how it feels about being unionized. The Company says the employees are either entitled or deserved to know how the Employer felt above unionization. In the opinion of the Board the Employer did nothing to violate s.23(1) or s.25(1) of the *Act*.

157. Next the Board looks at pages 3 and 4 of the subject memorandum. There the employer points out that the employees are free to choose whether or not to be represented by a union. It points out that neither the Employer nor the Union are permitted to intimidate or coerce the employees as this process is being perused. The Employer then goes on to suggest that the employees make an informed choice supplying sources of information on the issue. The Employer supplies telephone numbers and email addresses of the suggested sources of information. The Employer pointed out that it is not necessary to join a union and pay union dues to work at Rambler. It goes on to say that the Company would prefer to deal with their employees on an individual basis. This type of statement has not been found objectionable by the other boards as they considered such clauses in memorandums under their consideration. In the context of the subject memorandum, the Board finds the employer stated choice of non-unionization does not violate sections 23(1) or 25(1) of the *Act*. It finds the Employer neither threatened, intimidated nor coerced the employees.

158. The next paragraph examined by the Board is located on the top of page 4 of the subject letter referred to as No. 3. This paragraph asks the employees if the Union had told them that if certified, all they would get is a right to bargain with the Company and any change to working conditions resulting from those discussions on negotiations have to be agreed to between the Company and the union. It is useful, once again, to look to the *Modern Paving Ltd* case (*supra*) to assist the Board in its consideration of this particular issue.

> 84 The Board has concerns about the memorandum's fifth paragraph, particularly the following comments:
>
> > A union only gets to sit down and bargain with the Company every one or more years when negotiating or renegotiating the terms of the collective agreement. We believe there is a greater opportunity for us to hear and address your concerns on an ongoing basis without a union.
>
> 85 The Board agrees with the Applicant that this would be misleading information to an employee who might reasonably infer that there will be no other contact between an employer and the union except in the course of collective bargaining; particularly given the lack of experience of these employees with unions. The reality is that employees "concerns" may be addressed through shop stewards and the grievance process on a more frequent basis than once everyone or more years. The Board finds that, considering the timing of distribution of the memorandum, there was inadequate time for the Union to correct or clarify this misleading information. Therefore this comment is objectionable.

159. The Board has considered the above and has concluded that, given the timing of that letter and noting in the *Modern Paving* case, the letter was only delivered one day before the vote, the timing of the subject letter was significantly longer. Here the letter was delivered on December 17th, 2013 and the vote was held on February 26th, 2014 being in excess of two (2) months before the vote. As noted in the *Modern Paving* case (*supra*) timing of the delivery of the letter in that case was a consideration in reaching the decision in that case. In this case the employees had more than two (2) months to correct any miss information in the subject letter. Further it is to be noted that the Employer urged the employees to make an informed choice naming the Labour Relations Board, the Union and LabourWatch as sources of information, along with telephone numbers and email addresses. Having considered the above, the Board concluded there was enough time for misinformation to be clarified and/or corrected. Hence the Board concluded the paragraph under consideration here does not violate section 23(1) or section 25(1) of the *Act*. Under the circumstances the Board concludes the subject letter does not interfere, threaten, intimidate or coerce the employees. To be clear, were it not for the time allowed to correct misleading information the Board may have come to a different conclusion.

160. Next the Board refers to the bottom of page 3 and a portion of page 4 of the subject memorandum. Here the Employer raises or suggests that the employees consider the costs and/or obligations of belonging to a union. The letter says the only thing the

employees get is the right to bargain with the Company. In *Modern Paving Ltd* (*supra*) at paragraph 64 the Board stated:

> 64 The Board had concerns over statements that did not provide complete information and could be misleading and, for example, statements which may be construed as indicating the amount of union dues. The Board notes that the newsletter invites employees to obtain further information, and found that the statements did not amount to interference, threats, intimidation or coercion contrary to the Act.

161. It is to be noted that, here, the Employer not only suggested that the Employees seek further information the Company also suggested that the employees check with the Labour Relations Board, the Union and LabourWatch supplying telephone numbers and email addresses. One of the concerns identified in the *Modern Paving* case was whether or not statements provided complete information or could they be misleading. In that case the Board found such statements did not amount to interference, threats, intimidation or coercion. In this case the Board considers the request by the Employer of the employees to seek further information and considering the full context of this letter finds the said references on pages 3 - 4 do not amount to interference, threats, intimidation or coercion and under the circumstances neither section 23(1) nor section 25(1) have been violated.

162. Next the Board considered the "fair and competitive compensation" paragraph on page 5. Here the Employer pointed out that wages and benefits are a high priority on the list of promises by the Union. The Employer goes on to point out that these matters heavily depend on the ability of the Company to remain competitive in the industry and cannot be guaranteed, simply by joining a union. It points out that they believe their Company is competitive. The Company refers to its actions referred to under the heading "fair treatment" as examples of how they work to improve the benefits and wages.

163. The Board has looked to this paragraph to consider whether or not there is misleading information, omissions or other influences that could lead a reasonable person to conclude such a statement amounts to interference, threats, intimidation or coercion contrary to the *Act*. The Board recognizes that as the matter of wages are being dealt with, it must be cognizant of the reality of the imbalance of power between the employer and employees. It is useful to refer to the *Modern Paving Ltd* case (*supra*) paragraph 71 to assist in dealing with the subject paragraph:

> 71 As stated, in all unfair labour practice complaints, the Board must consider the reality of the imbalance of power between an employer and an employee when examining circumstances. In this matter, the Board should also consider the manner of distribution of the memorandum, the Respondent's reason for the circulation of the memorandum and the timing of the distribution of same.

164. The Board has put its mind to the above referred to paragraph immediately above. It does not find an attempt by the Employer to take advantage of its position as it raised the

issues under "fair treatment". A close reading of this paragraph reveals the Employer deals with raises and benefits in a positive sense, it does not refer to wages and benefits in a negative sense. It basically deals with the history of past dealings between the parties and promises to continue in the same manner into the future. There does not appear to be an attempt to take advantage of the imbalance of power between the parties, hence the Board finds it has not committed an unfair labour practice, on the issue.

165. We continue with a consideration of the issue of imbalance of power between the parties. This issue may arise when the manner of distribution is being considered. That is to say it is possible to give rise to the imbalance issue if the memorandum is distributed as an enclosure in the pay cheque. That is not the case here, however, it is necessary to consider the evidence supplied on the record dealing with the method of distribution of the memorandum. There was one witness who said at least one of the three memorandums was distributed in his pay cheque. None of the other four witnesses said they received the letter in their pay cheque. The Board, on the balance of probabilities, finds that the memorandum was not distributed or enclosed by or in the pay cheques. It follows that the imbalance of power does not arise here. On the issue of an imbalance of power between the parties the Board neither finds a violation of sections 23(1) and s.25(1) of the *Act* nor committed an unfair labour practice by virtue of the Employer's paragraph dealing with "fair treatment".

166. Now the Board considers the paragraph on page 5 of the memorandum headed up "Job Security". The Employer points out that the Union will often make promises of "layoffs" protection or seniority. The Employer points out that the most a Union can do is to ensure seniority is used as a factor in deciding who retains employment. The Employer goes on to point out that, if layoffs become necessary, seniority has been and will continue to be its practice. It is only necessary to consider the said paragraph from a contextual point of view to properly evaluate whether or not it amounts to interference, threats, intimidation or coercion contrary to the *Act*. It is the Board's view that the said paragraph does not give rise to such a finding. The paragraph is a statement of fact, it does not use such statements as if you (employees) do something we (employer) will do something. The said statement merely states that, regardless of whether there is a union or not, seniority will be used to decide who will be laid off and the Employer says it will continue to use seniority as the required criteria governing who will be laid off.

167. As referred to above the Union has taken issue with the paragraph on the bottom of page 4 in the subject letter. It deals with "fair treatment". As the Board considers the paragraph it is appropriate to ask the question if the paragraph denigrates the union or does the paragraph imply that unionization results in the employees not being allowed to communicate or voice their concerns to management. The Employer points out that, with the exception of the "safety" reference, the *Griffiths Guitar* case (*supra*) contains an identical passage in the newsletter under consideration there. The Board in that case did not find such a section violated the *Act*. The Board is aware that just because a passage, in a particular newsletter is found not to violate the *Act*, it does not follow that will be acceptable in another newsletter. The Board accepts that the particular passage in a newsletter must be considered and evaluated within the context of the whole letter in

which the questionable passage is contained. The Board examined the passage in question here in the context of the whole subject letter. It noted that the Union will often promise fair treatment for employees they represent. It does not make the statement in an negative sense. The Employer goes on to give practical examples of how the employee, generally or individually, have been treated by the employer. At the same time the Employer states that it believes the employees do not need a union to represent them for the purposes of fair representation since they are already receiving it from the employer. The Board accepts the notion that the expression, by the Employer, to remain non-unionized does not by itself, amount to a breach of the *Act*, as long as it is not associated with any other unfair labour practice. The question is, does the statement imply that the employee will not be around to voice their concerns to management. The Board finds there are no words or phrases that would lead to a reasonable person of average intelligence and fortitude to reasonably construe the Employers views as coercive or interference. The Employer refers to the employee relations committee and the accomplishments achieved by that committee. All of these references are factual; there is nothing to cause a negative connotation in the words of the Employer at least in the context of the whole newsletter. Additionally, even if a negative context can be drawn from the words of the Employer, the employees had in excess of two (2) months to investigate and inform themselves on the situation. There is ample time for the employees to rectify misleading understandings of the words in the paragraph in question. The Board finds that this clause does not violate the *Act*.

168. Finally the Board considered the argument raised by the Union dealing with the failure of the employees to deal with rumors that allegedly, were circulating throughout the workplace. The Union begins the argument by referring to the reasons why the Employer wrote the subject memorandum. The record shows one of the reasons expressed by the Employer for writing the letter was to clarify inaccurate information circulating in the workplace. The Union's argument is set out above.

169. The Employer takes issue with the fact that the Union raised this issue in the first place. It says the Union, by raising the issue, is attempting to enlarge the complaint. It says the Employer had no reason to believe that it should have led evidence in relation to the nature and extent of rumors in the workplace. The Employer argues that the amendment to the complaint at this stage of the proceedings would be a denial of natural justice and procedural fairness by the Board and would be unreasonable in the circumstances. The Employer then proceeded to argue, in the alternative, the validity and/or substance of the Union's accusation, basing its position on the facts and allegations already contained in the unamended complaint. The Employer says the factual circumstances do not give rise to an obligation of the Employer to dispel rumors in the workplace.

170. Given the conclusions which the Board has reached, it will not be necessary to deal with a consideration of the denial of natural justice and procedural fairness allegations. The Board, accepts the Employer's argument in the alternative based on all the allegations flowing out of the evidence on the record and the unamended complaint.

171. The Board accepts the Employer's position on the *Walmart* case (*supra*). In that case the

employer was engaged in an ongoing dialgue with the employees whereas other than the newsletters there were no communication between the employer and the employee in this case. In the Walmart case the only question not answered by the employer was whether or not the store would close if the employees unionized. The Board found this to be an intentionally generating and implied threat to the jobs of the employees. The Employer in this case differentiates the facts in this case with the *Walmart* case by pointing out that the managerial employees did not engage in any oral discussions with the hourly employees about certification. In this case there was no question from employees to management about whether or not the plant would close pending unionization. Hence there is no implication as to job losses by the employees.

172. The Board considered the idea as to whether or not rumors were wide spread throughout the workplace and concluded there is not sufficient evidence of wide spread rumors throughout the workplace, particularly to the knowledge of management, to create an onus on the employer to deal with rumors as it undertook to write the subject letters. The Employers stated reasons for writing the letter were as a result of being advised of Union's home visits to employee, being aware of actual discussions concerning a previous certification and finally informing the employees of its position concerning unionization. There is no evidence that Robert McGuire was advised of rumors in the workplace. That one of the reasons for issuing the memorandum in question was to counter definitive comments being made in the workplace, not to counter rumors.

Decision

173. The Board accepts the reasons set out above dealing with the reasons for which all three letters were written by the Employer. There is no evidence to the contrary. The Board accepts the Employer's allegation that the Union has failed to prove that rumors were so widely spread in the workplace and known to management that to remain silent about them in either letter would amount to a breach of the *Act* or constitute an unfair labour practice. Given the circumstances and evidence in this case, to place such an onus on the Employer is unreasonable. Dealing with the uncertainty, and nebulous character of rumors in the workplace the Board says substantial evidence would be required before a failure to deal with them in a newsletter would amount to an unfair labour practice.

174. The Board wishes to acknowledge the efforts of all counsel on behalf of their clients and their professional competence and demeanor as they put forward their respective positions and in conclusion hereinafter summarizes the four decisions arrived at in this matter:

1. The Board refused to grant the Union's request to count the ballots prior to proceeding with the unfair labour practice;

2. The Board found that the First Respondent has not perpetrated an unfair labour practice against the Complainant in accordance with section 23(1) and 25(1)of the *Act*;

3. The Non Suit Application dealing with the complaint that Lloyd Mitchell breached Section 25(3) of the *Act* is granted and further, the Board finds there is no evidence supporting the allegations of rumours in relation to shift changes; and

4. The Board finds that the Employer issued letters does not contravene sections 25(1) and 25(1) of the *Act*.

Summary of Board's Determination

175. The Board finds that there is insufficient evidence before it to support the Union's allegations.

176. The Board finds that there was no intimidation or coercion within the meaning of section 47(6) of the *Act*. The Board is therefore bound by the outcome of the vote.

177. As a result of these conclusions the section 122 application is rejected. The Board will issue its order accordingly. The ballots cast with respect to the application for certification (5462) affecting the within parties shall, as per the Board's Order of 19 March 2014 (matter 5462), be referred to the returning officer for counting and the appropriate Board order be issued following the count.

DATED at St. John's, in the Province of Newfoundland and Labrador, this 27th day of October, 2014.

For the Board,

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JOHN C. SWEETLAND, Q.C
VICE - CHAIRPERSON