ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **0066-15-R**

Lawrence Bakelaar, Applicant v the Labourers' International Union of North America, Local 607, Responding Party v **K. A. Vanderzwaag Construction Inc.**, Employer

BEFORE: Caroline Rowan, Vice-Chair

DECISION OF THE BOARD: January 13, 2017

APPEARANCES: Ken Alexander and Lawrence Bakelaar for the applicant; Yu-Sung Soh and James Stirrup for the responding party

1. This is a construction industry application under section 63 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") for a declaration that the responding party, Labourers' International Union of North America, Local 607, (the "Union") no longer represents the employees in a bargaining unit for which it is the bargaining agent.

2. The application was filed on April 8, 2015. The responding party was certified by decision of the Board dated August 15, 2013 for a bargaining unit of construction labourers, carpenters and carpenters' apprentices, ironworkers and ironworkers' apprentices, rodmen and rodmen apprentices and operating engineers employed by K.A. Vanderzwaag Construction Inc. ("Vanderzwaag" or "the employer") in all sectors of the construction industry other than the industrial, commercial and institutional ("ICI") sector in the District of Thunder Bay.

3. The applicant takes the position that the responding party and Vanderzwaag entered into an "interim collective agreement" effective April 22, 2014 and expiring April 21, 2015. The bargaining unit description in that interim agreement reads as follows:

> All construction employees of Vanderzwaag engaged in road building, site preparation, drilling and blasting, wrecking and heavy engineering, excluding sewer and water main construction and excluding bridge construction outside of the municipal boundaries of the City of Thunder Bay, in the geographical Districts of: Kenora, including the Patricia portion, Rainy River, Thunder Bay and that part of the District of the Cochrane which lies north of the 49 parallel of latitude and is not within a radius of 81 kilometers (approximately 50 miles) of the Timmins Federal Building, save and except non-working foreman, those above the rank of non-working foreman, office and clerical staff and security guards.

The responding party, on the other hand, takes the position that the parties had not yet reached a first collective agreement at the time the application was filed. The responding party argues that the interim collective agreement is not a collective agreement within the meaning of the Act. The responding party consequently takes the position that the application is untimely and ought to be dismissed having regard to the appointment of a conciliation officer on April 17, 2014.

4. The responding party also takes the position that there were no employees in the bargaining unit on the date of application and that the application was filed at the initiation, and with the support, of the employer.

5. Vanderzwaag did not file an intervention or otherwise participate in this proceeding.

6. By decision dated April 14, 2015, the Board (differently constituted) directed that a representation vote be taken of the employees of Vanderzwaag employed in the bargaining unit described above.

7. The outstanding issues in this application include the timeliness of the application, the status of the applicant, and the responding party's request for the dismissal of the application under subsection 63(16) of the Act.

8. The Board heard evidence concerning the relevant facts from the applicant and from Mr. James Stirrup, an assistant business manager of the Union.

Timeliness of the Application

9. The first issue to be considered is the timeliness of the application. In the present case, the Union was certified on August 15, 2013 to represent a bargaining unit consisting of all construction labourers, carpenters and carpenters' apprentices, ironworkers and ironworkers' apprentices, rodmen and rodmen apprentices and all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in repairing or maintaining the same and employees engaged as surveyors in the employ of Vanderzwaag in all sectors of the construction industry other than the ICI sector in the District of Thunder Bay and save and except the usual managerial exclusions.

10. Following certification, the Union sent the employer notice to bargain on September 4, 2013. The parties subsequently met on a number of occasions commencing in 2014. According to Mr. Stirrup, the main issue raised by the employer at that time was that Vanderzwaag was bidding on a bridge project in the City of Thunder Bay. The parties then discussed entering into an interim agreement in order to allow the employer to bid competitively on the bridge project. The parties specifically excluded from the scope of the recognition clause of the interim agreement sewer and watermain construction and excluded bridge construction outside of the municipal boundaries of the City of Thunder Bay.

11. That interim agreement was signed on April 22, 2014, a few days after the Minister had appointed a conciliation officer on April 17, 2014. After entering into the interim agreement, the parties continued to bargain a collective agreement relating to the entire scope of the Union's bargaining rights. Following a number of exchanges of proposals, Mr. Stirrup forwarded to the employer a proposal for a collective agreement he believed the employer would sign.

12. According to Mr. Stirrup's understanding, the interim agreement expired on April 21, 2015. He testified that, in negotiating the interim agreement, the parties intended to cover the bridge project on which the employer was seeking to bid while negotiations were ongoing and did not consider the legal ramifications of that agreement. According to his uncontradicted evidence, the parties' intention was reflected in the language negotiated in the duration clause which contemplated that the agreement would remain in effect "…for a

period of one year from the date of signing or **until any ongoing projects are completed or any project that the employer was considered the low bidder by the owner…"**. The duration clause also contains a provision at Article 10.02 which provides that "[t]his Agreement is made without prejudice to the right of either Party to seek first collective agreement arbitration and the terms of this agreement shall not be referred or relied on by either Party in a first collective agreement arbitration proceeding."

13. The Union takes the position that the interim agreement reached is a type of project agreement which was made without prejudice to the pending negotiation of a collective agreement. In this connection, the Union refers to Mr. Stirrup's evidence to the effect that the parties continued to negotiate a more permanent collective agreement after the interim agreement was reached and also refers to the fact that they did not thereafter advise the conciliation officer that his services were no longer required. Rather, they advised the conciliation officer that the parties continued to negotiate but did not need his assistance at that point.

14. In the circumstances, the Union submits that subsection 67(1)(b) of the Act applies to bar the present application given that no No Board report had issued following the appointment of a conciliation officer. The Union also argues that the interim agreement was never intended to be a collective agreement within the meaning of the Act and that the application should accordingly be dismissed as untimely pursuant to subsection 67(1) of the Act.

15. In the alternative, the Union submits that, in the event that the Board counts the ballot cast in this matter and gives effect to the ballot by terminating the Union's bargaining rights, the Board should be clear that the only bargaining rights which would be terminated are those set out in the interim agreement and not all of the bargaining rights which the Union obtained in its original certificate. In this regard, the Union refers to the parties' specific exclusion of work in the sewer and water main sector and of bridge construction work outside of the municipal boundaries of the City of Thunder Bay.

16. The salient provisions of the Act read as follows:

> (1) **Definitions.** – In this Act,
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> …
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> "collective agreement" means an agreement in writing between an employer or an employer's organization, on

the one hand, and a trade union that, or a council of trade unions that, represents employees of the employer or employees of members of the employers' organization, on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, the employers' organization, the trade union or the employees, and includes a provincial agreement and does not include a project agreement under section 163.1;

...

67. (1) **Application for certification or termination after conciliation.** – Subject to subsection (3), where a trade union has not made a collective agreement within one year after its certification and the Minister has appointed a conciliation officer or a mediator under this Act, no application for certification of a bargaining agent of, or for a declaration that a trade union no longer represents, the employees in the bargaining unit determined in the certificate shall be made until,

(a) 30 days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator;

(b) 30 days have elapsed after the Minister has released to the parties a notice that he or she does not consider it advisable to appoint a conciliation board; or

(c) six months have elapsed after the Minister has released to the parties a notice of a report of the conciliation officer that the differences between the parties concerning the terms of a collective agreement have been settled, as the case may be.

(2) **Same.** – Where notice has been given under section 59 and the Minister has appointed a conciliation officer or a mediator, no application for certification of a bargaining agent of any of the employees in the bargaining units as defined in the collective agreement and no application for a declaration that the trade union that was a party to the collective agreement no longer represents the employees in the bargaining unit as defined in the agreement shall be made after the date when the agreement ceased to operate or the date when the Minister appointed a

conciliation officer or a mediator, whichever is later, unless following the appointment of a conciliation officer or a mediator, if no collective agreement has been made,

(a) at least 12 months have elapsed from the date of the appointment of the conciliation officer or a mediator;

(b) a conciliation board or a mediator has been appointed and 30 days have elapsed after the report of the conciliation board or the mediator has been released by the Minister to the parties; or

(c) 30 days have elapsed after the Minister has informed the parties that he or she does not consider it desirable to appoint a conciliation board, whichever is later.

...

132. (1) **Application for termination, no agreement –** If a trade union does not make a collective agreement with the employer within six months after its certification, any of the employees in the bargaining unit determined in the certificate may apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit.

(2) **Agreement.** – Any of the employees in the bargaining unit defined in a first agreement between an employer and a trade union, where the trade union has not been certified as the bargaining agent of the employees of the employer in the bargaining unit, may apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit after the 305th day of its operation and before the 365th day of its operation.

(3) **Same, agreement.** – Any of the employees in the bargaining unit defined in a collective agreement other than a first agreement referred to in subsection (2) may, subject to section 67, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,

(a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation;

...

> (c) in the case of a collective agreement referred to in clause (a) or (b) that provides that it will continue to operate for any further term or successive terms if either party fails to give to the other notice of termination or of its desire to bargain with a view to the renewal, with or without modifications, of the agreement or to the making of a new agreement, only during the last two months of each year that it so continues to operate or after the commencement of the last two months of its operation, as the case may be.

17. In the present case, while the Union suggested that the interim agreement is like a project agreement, it did not contend that that agreement is a project agreement within the meaning of the Act, nor do I find that it is. Instead, I find that the interim collective agreement is an agreement which meets the definition of a "collective agreement" under the Act. It is an agreement in writing between an employer, on the one hand, and a trade union that represents employees of the employer, on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer.

18. The present application to terminate bargaining rights was brought within the last two months of the operation of that collective agreement, which was made following certification of the trade union, and is therefore timely pursuant to subsection 132(3)(a) of the Act.

19. However, as the Union points out, the collective agreement in this case contains a recognition clause which is both broader and smaller in scope than the certificate which the Union had obtained from the Board. For example, the bargaining unit set out in the collective agreement refers to all construction employees and specifically excludes Sewer and Watermain Construction and bridge construction outside of the municipal boundaries of the City of Thunder Bay. In the circumstances, the bargaining rights which are captured by the certificate issued by the Board, but which were not included in the collective agreement, continue to exist separate and apart from the interim collective agreement entered into by the parties.

20. As noted in *John Hayman & Sons,* [1996] OLRB Rep. November/December 945*,* at paras 17-19, the theory that a certificate

is 'spent' following the negotiation of a collective agreement does not apply in the construction industry because a trade union does not bargain a collective agreement which covers every sector of the construction industry. In *Lido Construction Inc.,* 2014 CanLII 77425 (ON LRB), the Board adopted the reasoning in *John Hayman & Sons,* cited above, when it determined that the Carpenters retained all bargaining rights obtained by way of certification in 2007 when the Carpenters and the employer in that case signed a collective agreement in 2014 covering only part of a sector. In reaching its conclusion, the Board in *Lido Construction Inc.,* cited above, reasoned as follows:

> 22. It is not uncommon for collective agreements to cover part of a sector. There are many accredited employer association collective agreements to apply to only part of a sector. This is particularly so in the residential sector which is often divided into low rise and high rise work and further subsets of that work including roofing, trim, framing and other work. Despite this, the Board will still certify a union for all sectors in a Board Area, even if the employer only had employees working in one subset of the residential sector. Just as there is no reason why a union will be found to have abandoned residential sector bargaining rights solely by virtue of the fact that it only negotiated a collective agreement applicable to roads work, a union in the construction industry will not have abandoned bargaining rights for framing solely because it only negotiated a trim carpentry collective agreement. The policy and statutory reasons for reaching this conclusion, set out in *John Hayman, supra,* are identical in both situations.
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> 23. The result is that the bargaining rights that the Carpenters acquired by virtue of their certification in 2007 were still held by them in 2014 when they signed the impugned collective agreement. …

For the same reasons, the full scope of the bargaining rights acquired by the Union by certificate dated August 15, 2013 in the present case were still held by it at the time the Union and the employer entered into the interim collective agreement at issue in this case.

21. The remaining bargaining rights, which were not the subject of the interim agreement, continue to exist and are not the subject of the present termination application. In this connection, I note that the

applicant was allegedly working under the terms of the interim collective agreement at the time the application for termination of bargaining rights was filed. As such, the termination application is in respect of the bargaining rights set out in that interim collective agreement. An application for termination of bargaining rights in respect of the remaining bargaining rights which were not covered by the interim collective agreement would, in any event, be untimely under section 67 of the Act given the appointment of the conciliation officer on April 17, 2014 and the fact that no report of a conciliation board or mediator, and no report that the Minister did not consider it advisable to appoint a conciliation board, had been released in respect of the remaining bargaining rights.

22. For all these reasons, I find that the present application to terminate the bargaining rights set out in the interim collective agreement signed on April 22, 2014 is timely and that the application does not affect the Union's remaining bargaining rights set out in the Board's certificate.

The Status of the Applicant

23. The next issue to be determined is whether the applicant was an employee in the bargaining unit set out in the interim collective agreement on the date of application.

24. The evidence indicates that Mr. Bakelaar was hired as a construction labourer in or about May 2014, after the Union was certified on August 15, 2013 to represent the construction employees of Vanderzwaag referred to above. The first job he worked on was the Court Street Bridge job site in the City of Thunder Bay. His starting salary was $17 per hour, which was increased several times within the first five or six weeks after he began his employment to his current rate of $24.96 per hour. The applicant testified that he believed he received those increases very early on in his employment with Vanderzwaag because his boss saw his capabilities.

25. Mr. Bakelaar contends that, on the date of application, he performed deficiency work at the Court Street job site, which deficiency work included removing some plywood moulding on a drip edge on the side of the bridge, moving riprap from the south east side to the north east corner of the bridge, locating items using a site plan and marking the locations on the ground with paint where park benches and trees would later be installed in the spring time.

26. Mr. Bakelaar was the only labourer working at that time as the others had been laid off during the winter months. That morning, he was given a copy of a deficiency list for the Court Street job site by Hogan Elder, the employer's estimator. According to the applicant, Mr. Elder advised him what work needed to be done that day when the applicant arrived at the shop that morning. It had been approximately two months since the applicant had worked at that job site. The applicant noted that some of the work he did would not have been possible to do had there not still been ice. For example, he noted that, because of the ice, he had been able to reach the areas where the plywood needed to be chipped out of the drip edge and also that it was extremely easy to pick up the stones from the south east corner and walk them across the ice to place them on the north east corner of the bridge.

27. In support of its position that the applicant's version of events is implausible, the Union points to the fact that there is nothing contained in the deficiency list, from which Mr. Bakelaar was working, that refers to removing plywood from the drip edge. The Union also refers to the fact that the applicant had not taken a single picture which showed the plywood that had been taken off and placed on the ground or that was in his truck afterwards. The Union further points out that the applicant did not take those pictures even though he did go to the effort of taking numerous pictures to show the Board the other work he had been doing that day.

28. The Union also refers to the fact that the applicant acknowledged that there were areas of the drip edge that could not be accessed without a ladder and yet he was unable to explain why he had not brought a ladder with him and instead simply assumed he would be able to reach the necessary areas. More specifically, the Union refers to Mr. Bakelaar's testimony to the effect that it was, in fact, possible to access the areas without a ladder because all of the areas he needed to reach had a build up of snow and ice.

29. The Union further questions the utility of the work the applicant did that day using spray paint on snow in April in order to mark the locations where the park benches would later be installed a month later. Finally, the Union refers to the work done on the date of application involving relocating riprap from one side of the bridge to the other. Yet, the Union points out that the deficiency list itself indicates that the deficiency work involved both supplying and

installing two square meters of riprap and that it did not refer to removing plywood from the drip edge. Notwithstanding that the deficiency work included supplying the riprap, the applicant did not bring any rocks with him that day. The Union also contends that, even if the applicant did move a few stones on the date of application from one side to the northeast corner of the bridge, it was not productive work that related to what was required on the deficiency list.

30. There is no dispute that the work that the applicant claims to have performed on the date of application is work which falls within the scope of the bargaining unit set out in the interim collective agreement. The only evidence before me concerning what Mr. Bakelaar did on the date of application comes from him and is, on the whole, entirely credible. While the Union seeks to cast doubt on his account of what he did that day, there is simply no basis to do so. For example, the mere fact that the applicant did not take pictures of everything he claims to have done on the date of application, such as his work on the drip-edge, is not a sufficient reason to doubt his otherwise credible and uncontradicted evidence.

31. In addition, the suggestion that the Board should disbelieve that Mr. Bakelaar relocated riprap from one end of the bridge to another because the deficiency list refers to the employer's requirement "to supply" the riprap, and not simply the need to relocate it, is not persuasive. The applicant was not present on that job site at all times and was not therefore in a position to advise where the riprap he moved came from or if it had previously been delivered to the site and, if so, why it was located where it was located at the time of delivery.

32. The applicant was similarly not in a position to explain precisely why he was assigned all of the tasks he was assigned that day, such as why he was asked to mark the ground with paint where the benches would later be installed. The applicant instead could only offer his own assumption about those reasons. For example, he surmised that he had been sent to chip out the plywood from the drip edge on the date of application because it was no longer too cold to work but there was still ice which enabled him to access the necessary areas of the bridge without significant difficulty. Mr. Bakelaar further noted that he was generally aware of the height of the bridge and consequently assumed he could reach the necessary areas without a ladder, which, in fact, turned out to be the case because of the remaining build up of snow and ice. He also explained that he was

able to move the riprap from one side of the bridge to the other reasonably easily because he was able to walk it across the ice. As the applicant explained, it was not difficult to do so because the riprap was no longer covered with a significant amount of snow.

33. In addition, the applicant offered the plausible explanation that he had been asked to mark the ground with paint at that time simply because he was already assigned to work at the Court St. bridge job site that day. He clarified that he did not mark the snow itself with paint, as the Union suggested he did, but rather shoveled the unexpected snow fall from the areas he needed to mark before marking the ground with paint.

34. In all the circumstances, I find that there is an insufficient basis to doubt the applicant's credible and uncontradicted account that he spent the majority of time on the date of application performing labourers' work which falls within the scope of the interim collective agreement. Having regard to the totality of the evidence before me, I find that the applicant spent the majority of his time on the date of application doing work falling within the scope of the interim collective agreement.

Alleged Employer Initiation

35. The final issue to be determined is whether the termination application was initiated by the employer within the meaning of subsection 63(16) of the Act as alleged by the Union.

36. Subsection 63(16) of the Act gives the Board the discretion to dismiss a termination application if the employer is found to have initiated it. That provision reads as follows:

> 63. (16) Despite subsections (5) and (14), the Board may dismiss the application if the Board is satisfied that the employer or a person acting on behalf of the employer initiated the application or engaged in threats, coercion or intimidation in connection with the application.

In the present case, there is no suggestion that there were threats, coercion or intimidation in connection with the termination application. Instead, the Union's contention is that the employer initiated the application within the meaning of subsection 63(16) of the Act and that the application should therefore be dismissed without regard to the results of the representation vote.

37. It is common ground that the onus lies on the Union to establish, on a balance of probabilities, that the employer has engaged in some activity which constitutes initiation for the purposes of subsection 63(16) of the Act. In *Tenaquip Ltd.,* [1997] OLRB Rep. July/August 742, the Board discussed the type of evidence that will be required to establish initiation by the employer and reviewed the purpose of the discretion granted under subsection 63(16) of the Act and the type of conduct that amounts to initiation. In doing so, the Board referred to the following explanation set out at paras 108 and 109 of *Bytown Electrical Services Ltd.,* [1996] OLRB Rep. September/October 721:

> 108. Under subsection 63(16) of the Act, if a termination application is initiated by the employer, the Board has a discretion to dismiss it. The reason for this provision is that if a decertification application is really caused by or originated by the employer, and it is not primarily the conception of the employees who made the application, then it represents an improper interference by the employer in an area which should properly be within the exclusive terrain of the employees. Initiation involves causing, originating or facilitating, the beginning of a process or event. What meaning should the concept, 'initiation', be given in the context of section 63 of the Act? Plainly if an employer prepares a petition to terminate a union's bargaining rights, summons his/her employees and requires then (sic) to sign the petition and then requires an employee to initiate a termination application, the employer initiates the decertification application. But that is an extreme and, hopefully, rare manifestation of improper employer interference in the contemplated process of employees freely deciding of their own initiative that they no longer wish to be represented by a particular, or perhaps any, trade union. Such direct, palpable initiation will in all likelihood be an unusual occurrence. But initiation can also occur indirectly, less palpably than in the example suggested, though no less effectively. There are gradations of employer conduct in relation to a termination application, along a spectrum, part of which will be improper and part of which will be acceptable behaviour. The Act determines that when an employer "initiates" a termination application, the Board has a discretion to dismiss the application. There is a continuum of employer conduct, some of which will amount to 'initiation' some of which will not. How then is the distinction to be drawn?

> 109. We consider the proper interpretation of the notion of "initiation" is to determine whether the employer's conduct amounted to significant or influential employer involvement giving rise to the termination application. In other words, if the application is founded in the conduct of the employer, then it can reasonably be concluded that the employer has initiated that application.

The Board therefore assesses the extent to which the employer's conduct gave rise to, or influenced, the filing of the application in determining whether there has been employer initiation in a given case.

38. Even though the onus is clearly on the Union to establish employer initiation, circumstantial evidence may be sufficient to lead to an inference of improper employer involvement given the difficulty the trade union faces in establishing employer interference through direct evidence. As noted in *Delta-Rae Homes,* 2007 CanLII 14238 (ON LRB), at para 36, the Board is entitled to draw reasonable inferences about facts in the absence of direct evidence of those facts. It may also in appropriate circumstances draw an adverse inference from the unexplained failure of a party to call material evidence (*Clairborne Industries Ltd. et. al. v. National Bank of Canada et. al.*, 1989 CanLII 183 (ON CA), 69 O.R. (2d) 65 (Ont. C.A.); *Levesque v. Comeau et al.*, 1970 CanLII 4 (SCC), [1970] S.C.R. 1010; *Vieczorek et. al. v. Piersma et. al.* 1987 CanLII 4403 (ON CA), 58 O.R. (2d) 583).

39. In the present case, Mr. Bakelaar testified about the reasons why he decided to apply to decertify the Union. He explained that union dues are expensive amounting to approximately $200 a month. Although he noted that the benefits are good, he indicated that he did not believe that he would use $2,400 in benefits over the course of a year. He also indicated that he does not wish to pay into the pension plan at this time but has no option not to do so. He noted that he would instead prefer to spend the money paying off his existing loans before paying into a pension plan. He also noted that, when he is ready to invest in a pension plan, he would like to invest in one of his own choosing. Mr. Bakelaar testified that he is certain that he will not be in the Union long enough to benefit from a full pension.

40. Mr. Bakelaar also indicated that he feels he does not need the Union to represent him in his employment relations with the employer.

He explained that he has been working in construction for 12 years and has only worked for non-union companies and feels that the Union is a completely unnecessary middle man at Vanderzwaag. Finally, he explained that, although he was not employed at Vanderzwaag at the time of the certification application, he heard stories from his co-workers about the tactics the Union had used to get them to join. Although he acknowledged that this information was simply hearsay, he noted that he believes his co-workers were telling the truth and that he does not want to be part of a Union which engages in practices which he feels are unethical.

41. Mr. Bakelaar then explained that he came to learn how to bring the decertification application by obtaining information from the Labour Watch website. He testified that he was not coerced, or threatened to file the present application, or assisted in any way. He testified that he waited until he was assigned bargaining unit work at the Court Street job site in Thunder Bay during what he believed to be the statutory open period.

42. The Union contends that it is reasonable to infer from the evidence that there was employer initiation in this case for a number of reasons, including the timing of events. More specifically, the Union refers to the fact that the applicant was coincidentally the only employee who was not laid off by the employer in March and early April 2015, during the alleged open period of the interim agreement, and to the fact that the applicant was also coincidentally sent out during this period to do deficiency work, something he had not done since December 8, 2014. The Union also points out that the date the applicant was sent out to do that deficiency work on April 8, 2015 was a mere two days after the Union gave the employer a counter offer for a final collective agreement it believed the employer would sign. In addition, after performing eight hours work on that date, the applicant was not sent back to that job site to work for approximately one month when he later returned to install the park benches.

43. Even though counsel for the Union acknowledges that this circumstantial evidence is not sufficient to establish employer initiation, he also refers to the fact that the applicant's account of the work that he did on the date of application is implausible. Counsel also points out that the employer completely ignored the collective agreement as far as wage rates were concerned but nonetheless made union contributions in respect of work the applicant performed that was not covered by the collective agreement. The Union submits that

the Board should draw an inference from these facts that the employer was grooming the applicant for a significant role in its organization given that he was the only individual who was not laid off and he was being paid a much higher wage rate than that provided for under the collective agreement.

44. The Union further points out that the applicant had started filling out the termination application in March and then completed it the day before the application filing date. As such, he had to have had the information in advance of the date of application concerning the number of employees working in the bargaining unit on the date of application and where he was going to be working on that date. According to the Union, the fact that he was able to complete the form the day prior might have made sense if the applicant had been working at the Court Street bridge job site the previous day and knew he was returning the next day.

45. However, the Union suggests that the applicant originally testified that he found out about his assignment at the Court Street bridge job site that morning when the employer's estimator assigned him to work there and gave him the deficiency list to complete. The Union submits that the applicant then "changed his story" when he testified that the owner of Vanderzwaag had told him the week prior to the application date that he would be going to the Court Street job site the following week and did not explain why the owner would have told him that in advance.

46. Having carefully considered the evidence led in this case, and for the reasons that follow, I am not persuaded that there is a sufficient basis to draw an inference of employer involvement in the filing of this application. Not only did the applicant provide a credible account of his reasons for bringing the application, his evidence about the circumstances leading to its filing was also, on the whole, credible and consistent.

47. As noted, the Union raised questions about how Mr. Bakelaar knew in advance that he would be working at the Court St. job site on the date of application such that he was able to complete the paperwork the day before. However, Mr. Bakelaar explained that he had learned through discussions with Kevin Vanderzwaag earlier in the week or in the previous week that he would be working at that job site that week and was again informed the day before, on April 7th, that he would be returning to the Court Street job site. According to Mr.

Bakelaar's uncontradicted evidence, it was not out of the ordinary for Kevin Vanderzwaag to discuss future plans.

48. It is, in my view, entirely plausible that the owner of Vanderzwaag would have discussed upcoming work with the applicant in passing in advance of the date in question, including the applicant's anticipated return to the Court Street job site, and would have provided him with a general idea of the work to be done at that job site. The instructions about precisely what the applicant was to do that day were however given to him that same morning by Hogan Elder, the engineer, who also gave him a copy of the deficiency list in order to make the applicant's assignment clear.

49. The Union also referred to the fact that the employer paid the applicant an hourly rate which was in excess of the collective agreement rate. The applicant assumed that his rate included certain additional premiums referred to under the interim collective agreement. The applicant also testified that he got several rate increases very early on in his employment because the owner recognized his capabilities. No evidence was led to contradict the applicant's evidence in that regard. In view of the uncontradicted evidence that the employer increased the applicant's rate of pay shortly after he was hired, there is nothing about the timing of those increases which would lead to an inference of employer initiation.

50. Similarly, the fact that the employer made remittances to the Union in error for the applicant's work in the shop, which was not covered by the interim collective agreement, does not give rise to an inference of employer initiation. The fact that the employer made remittances to the Union for all hours worked, rather than only those related to work falling under the interim agreement, suggests that the employer made an error early on in its relationship with the Union. It is not suggestive of employer involvement.

51. The timing of the application, which was filed during the open period of the interim collective agreement, does not further give rise to an inference of employer involvement in all the circumstances. While the Union suggested that its timing two days after the Union presented the employer with a counter proposal was suspect, I note that the evidence was that the Union's representative had presented the employer with a proposal that he *expected the employer would sign*. As such, the evidence suggests that the counter proposal provided by the Union to the employer was one that the Union believed would be

acceptable to the employer. There was also no suggestion that the negotiations were particularly difficult or acrimonious. In the circumstances, the suggestion that the employer somehow orchestrated the filing of the present application in short order following receipt of the Union's counter proposal is not particularly compelling.

52. Finally, it should be noted that the employer was under no obligation to intervene in this proceeding and, as such, its failure to do so does not, in my view, give rise to an adverse inference of employer involvement.

53. For all these reasons, I am not persuaded that there is sufficient evidence, circumstantial or otherwise, to give rise to an inference of employer involvement in this case.

Disposition

54. For all these reasons, the Board finds that the application is timely, that the applicant was an employee in the bargaining unit set out in the interim collective agreement, and that the application should not be dismissed under subsection 63(16) of the Act.

55. This application is accordingly referred to the Manager of Field Services to appoint a labour relations officer in order to arrange for the counting of the ballot cast in this application.

"Caroline Rowan"
for the Board