

BRITISH COLUMBIA LABOUR RELATIONS BOARD

COMOX DISTRICT CONSUMER'S CO-OPERATIVE

(the "Employer")

-and-

UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, LOCAL 1518

(the "Union")

PANEL: Leah Terai, Vice-Chair

APPEARANCES: Andrea L. Zwack, for the Employer
Brandon Quinn, for the Union

CASE NO.: 65563

DATE OF DECISION: August 16, 2013

DECISION OF THE BOARD

I. NATURE OF THE APPLICATION

1 The Union alleges the Employer has acted in breach of Sections 6 and 9 of the
Labour Relations Code (the "Code") by distributing information regarding decertification
at the workplace. The Union seeks a declaration the Employer has violated the Code, a
cease and desist order, an order that the Employer distribute the Board's decision to
employees, and an order that the Union be permitted to hold a meeting to discuss the
decision.

2 I find I am able to decide this matter on the basis of the written submissions filed
by the parties.

II. BACKGROUND

3 On February 22, 2012, the Union was certified as the bargaining agent for
employees in a unit composed of employees at Aspen Co-op Gas Bar at 699 Aspen
Road, Comox, BC employed by the Employer. The parties negotiated a collective
agreement with a term of October 7, 2012 to September 30, 2015.

4 The Employer operates a gas bar and convenience store (the "Store"). Joe
Russell is the General Manager. Sudeera Gangodage was the Operational Manager,
also known as the Store Manager.

5 The Union asserts on May 16, 2013, Russell faxed several pages from the
website "Labour Watch" (the "Documents") to the Store. The Documents contain titles
such as: "Becoming Union Free – What Will Happen If The Union is Decertified?"; "How
to Decertify a Union" (which includes "Get the Forms", "Avoiding Mistakes", "Build
Support" and "Prepare the Forms"); "Union Unfair Labour Practices" (including "Are
There Illegal Things A Union Or Employer Must Not Do?", "What Things Might Be An
Unfair Labour Practice (ULP) By A Union?" and "What Can I Do If I Believe The Union
Is Misleading Me?").

6 The Union says Russell advised Gangodage that he wanted all of the Store
employees to see the Documents.

7 The Union says Gangodage approached Lynn Smith, a bargaining unit employee
and supervisor, and told her that Russell wanted the employees to see the Documents.
Gangodage told Smith to provide the Documents to the employees.

8 Smith left the Documents at the front counter of the Store in a location visible to
employees. The Union says employees saw the Documents and the Union received
phone calls from members concerned about them.

9 The Employer denies that Russell faxed the Documents to the Store and says Russell was unaware the Documents had been given to employees or made available in the Store until receiving the Union's complaint on May 22, 2013. The Employer denies Russell instructed Gangodage by phone or otherwise to provide the Documents to employees.

10 The Employer says when Russell received the Union's complaint, he spoke with Gangodage who admitted giving the Documents to Smith. Russell met with Dionne Crusher, the Union's representative, on May 23, 2013 and advised her that he had not sent the Documents to the Store nor had he directed Gangodage to provide them to employees. The Employer says Russell advised Crusher he did not agree with Gangodage's actions and would ensure employees understood he did not instruct that the Documents be distributed to them and he was not attempting to promote decertification.

11 Gangodage is no longer employed as Store Manager; his last day of work was June 3, 2013. The Employer says it is unaware of where the Documents were placed in the Store by Smith, how many employees saw them, or which employees saw them.

12 On June 25, 2013, Gangodage wrote a letter entitled "Statement of Sudeera Gangodage regards to Union Decertification Incident at Comox District Consumers Co-op" addressed to counsel for the Employer with a copy to counsel for the Union. The Union enclosed Gangodage's statement with its reply submission. In that statement, Gangodage says he met with Russell at his office in Courtenay on May 15, 2013. At that meeting, Russell gave Gangodage the Documents from the Labour Watch website with a number of copies. Gangodage states Russell asked him to distribute the Documents to employees and post them on the staff bulletin board. He states Russell asked him to add the website address of Labour Watch to the office computer for the staff to see.

13 Gangodage states on May 16, 2013, Russell reminded him about the Documents. Gangodage states he gave the Documents to Smith and asked her to distribute them among the staff, telling her they were a handout from Russell.

14 Gangodage states on May 22, 2013, Russell asked him to attend at his office, showed him the complaint filed by the Union and asked Gangodage whether it was true. According to Gangodage's statement, Russell asked him to take the blame and to say he had printed off and handed out the Documents without Russell's knowledge or consent. Gangodage says he refused to take the blame for the Documents. He says Russell suspended him from work for three days and thus prevented Gangodage from attending a meeting with the Union on May 23, 2013. Gangodage says on June 3, 2013, upon his return from his suspension and four days of medical leave, Russell terminated his employment.

III. POSITIONS OF THE PARTIES

15 The Union submits the Employer violated Section 6(1) by interfering with the selection and administration of a trade union by distributing anti-union information in the Store. It submits the Employer violated Section 6(3)(d) by seeking, through intimidation, to induce employees to refrain from becoming or continuing to be members of the Union. It submits the Employer violated Section 9 by using coercion or intimidation, namely by distributing anti-union information in the Store that could reasonably have the effect of compelling or inducing employees to refrain from continuing to be members of the Union.

16 The Employer submits there has been no breach of the Code. It says the Employer's General Manager, Russell, did not instruct the Documents be provided to employees. It says while the actions of Gangodage were unfortunate, those actions do not amount to a breach of the Code.

17 The Employer submits the Documents provided to Smith are a printout from a website that is well known and which provides information about employee rights under the Code. It submits employees have the right to decertify, and should they choose to do so, this website is a source of information about the process. It says the same information could have been provided by the Labour Relations Board. The Employer submits providing information to employees about their rights under the Code and/or about how to exercise their rights, should they choose to do so, is not and cannot be a breach of the Code.

18 The Employer disputes that the information in the Documents can be described as "anti-union". It says the information does not express any opinion about unions or the merits of unionization, nor does it pressure or encourage employees to decertify. It submits advising employees of their rights under the Code and how to exercise those rights if they choose to do so cannot be properly characterized as "anti-union".

19 The Employer submits providing this information to employees is not coercive or intimidating, nor does it constitute interference with the administration of a trade union.

20 The Employer submits even if employees other than Smith (who is an assistant shop steward) saw the Documents, there is no suggestion Smith told other employees the Employer wanted them to see the Documents or that the Employer wanted the employees to decertify. It notes the Union does not allege that Smith was told that the Employer wanted the employees to decertify. Further, even if Smith understood that the Employer wanted employees to consider decertification, there is no suggestion any such campaign was started. It says as soon as Russell learned of this information being distributed, he met with the Union and clarified that he was not seeking to have the employees decertify. The Employer submits the complaint ought to be dismissed.

21 In its reply submission, the Union submits Russell did in fact instruct Gangodage to distribute the Documents. It submits the assertions of Gangodage and Smith contradict Russell's assertion he had nothing to do with the Documents. Further, the Union submits Russell's version of events does not make sense in all of the circumstances. For example, it does not make sense that Gangodage would start a decertification campaign on his own accord.

22 Even if the Employer is correct and Russell did not instruct Gangodage to distribute the Documents, the Union submits the Employer is still liable for Gangodage's actions. It submits the Board has long held that managerial status is, in and of itself, sufficient to found employer liability in unfair labour practice complaints (*Sears Canada Inc. (Victoria)*, BCLRB No. B381/97 ("*Sears Canada*") at para. 49; *P.R. Foods Ltd.*, BCLRB No. B223/2005 ("*P.R. Foods*"). The Union submits it does not matter whether the Employer was even aware what Gangodage was doing, it is still liable for his conduct.

23 With respect to the information in the Documents, the Union agrees the content, viewed on its own, may not be coercive or intimidating. It submits the Board does not just look at the content of statements, it looks at the context in which those statements are made (*Excell Agent Services Canada Co.*, BCLRB No. B172/2003 ("*Excell Agent Services*"). The Union submits while it may be perfectly acceptable for the Board to advise employees how to decertify, it is not acceptable for an employer to provide its employees with detailed directions on how to do so. It submits such conduct sends a clear message to employees that their employer wants them to decertify. The Union submits the Employer's distribution of the Documents is clearly coercive and intimidating especially combined with Gangodage's statement to Smith that Russell wanted employees to see the information in the Documents.

24 The Union submits evidence of an application for decertification actually being filed is not necessary in an unfair labour practice complaint.

IV. ANALYSIS AND DECISION

25 It is undisputed that Gangodage was the Store Manager, that he handed the Documents to an employee and that he instructed her to distribute the Documents to other employees. While there is a dispute as to whether Russell initially provided the Documents to Gangodage with instructions to distribute them to employees, I find it is unnecessary to resolve this dispute as the Employer is responsible for the actions of its managers.

26 In *Sears Canada*, the Board noted:

As stated by the reconsideration panel, in order to reach a finding that an employer has violated either Section 6 or 9 of the Code based on the actions of an employee, there must be an objective evidentiary link to the employer either explicitly or by reasonable inference. In a case where there is no dispute over the

status of an individual as a manager, the fact that the person is a manager provides the necessary link to reach a finding of an unfair labour practice against an employer if the manager is guilty of unfair conduct. The employer is responsible for the actions of its management staff. Given this example, an employer should not be able to rely on a defence that it did not know of, or condone, the manager's actions in order to avoid the finding of an unfair labour practice. (para. 49)

27 Gangodage was the Store Manager and accordingly, I find there is the necessary link to the Employer. The Employer is responsible for Gangodage's actions.

28 I now turn to the question of whether the Employer has acted in breach of Section 6(1) of the Code.

29 Section 6(1) provides as follows:

6 (1) Except as otherwise provided in section 8, an employer or a person acting on behalf of an employer must not participate in or interfere with the formation, selection or administration of a trade union or contribute financial or other support to it.

30 In *Gateway Casinos Limited Partnership*, BCLRB No. B258/2007 (Leave for Reconsideration of BCLRB No. B236/2007), 150 C.L.R.B.R. (2d) 154 ("*Gateway*"), the Board made the following comments with respect to Section 6(1):

The Board's interpretation of Section 6(1) does not read the word "improper" into the provision. Rather, the Board interprets the word "interference" contextually and purposively, in light of the provision and the Code as a whole, including Section 2, the purposes or duties provision (see *Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27). Read in context, we find that, while the provision does not require a finding of anti-union animus to establish a breach, it does require a consideration of not only the objective effect of the impugned employer action on union or employee rights under the Code, but also the employer's business reasons for its action, before it can be concluded that the action "interferes" within the meaning of Section 6(1). (para. 22)

31 There is no dispute the Store Manager gave the Documents to an employee (who was also a supervisor and assistant shop steward) with instructions to distribute them to other employees. The Documents include headings such as "Becoming Union Free – What Will Happen If the Union is Decertified?" and "How to Decertify a Union" with information including "Get the Forms", "Avoiding Mistakes", "Build Support", "Prepare the Forms", "Are There Illegal Things a Union or Employer Must Not Do?", "What Things Might Be An Unfair Labour Practice (ULP) By A Union?" and "What Can I Do If I Believe The Union Is Misleading Me?". The Documents were placed on the counter at the workplace and were available to employees. With this context in mind, I find the Employer has interfered with the selection or administration of the Union within

the meaning of Section 6(1) of the Code by distributing information to employees at the workplace as to the procedure for decertification.

32 I turn next to the question of whether the Employer acted in breach of Sections 6(3)(d) and 9 of the Code.

33 Section 6(3)(d) provides:

(3) An employer or a person acting on behalf of an employer must not

* * *

(d) seek by intimidation, by dismissal, by threat of dismissal or by any other kind of threat, or by the imposition of a penalty, or by a promise, or by a wage increase, or by altering any other terms or conditions of employment, to compel or to induce an employee to refrain from becoming or continuing to be a member or officer or representative of a trade union

34 Section 9 provides:

A person must not use coercion or intimidation of any kind that could reasonably have the effect of compelling or inducing a person to become or to refrain from becoming or to continue or cease to be a member of a trade union.

35 In *Gateway*, the Board noted anti-union animus is required to establish a breach of Section 6(3)(d) (citing *Pacific Press, A Division of Southam Inc.*, BCLRB No. B374/96).

36 In *Excell Agent Services*, the Board set out the test for intimidation and coercion under Section 9 of the Code as follows:

Intimidation and coercion as those terms are used in Section 9 have been defined as the use of force, threats, fear or compulsion for the purpose of controlling or influencing conduct. A threat, whether implied or actual, is a prerequisite for conduct to be characterized as coercion or intimidation. There has to be some sort of unfairly forceful pressure or threat of adverse consequences. The context of the statements, the relative power of the parties, and the ability to take action that would adversely affect the employees if they do not act in the desired manner are relevant factors to consider when deciding whether a threat has been communicated. The Board is more likely to find coercion and intimidation where the party exerting the pressure has the capacity to take action that would directly affect the employees concerned: *British Columbia Housing Management Commission*, BCLRB No. B3/93.

The Board uses an objective test assessing the conduct against a standard of a reasonable employee. Characterizing statements as misrepresentation does not automatically make them coercion or intimidation. The focus instead is on the objective effect of a statement: *North Shore Association for the Mentally Handicapped*, BCLRB No. B474/99, para. 29. (paras. 69-70)

37 In *Certain Employees of RJ Healthlink Ltd.*, BCLRB No. B42/2012 (Leave for Reconsideration of BCLRB No. B135/2011), 208 C.L.R.B.R. (2d) 136, the Board held: "An impugned statement or conduct cannot be excluded from being coercive simply because it is not a threat" (para. 10).

38 In this case, the Union argues the Employer has sought, through coercion and intimidation, to induce employees to refrain from continuing to be members of the Union. The alleged coercive conduct is distributing anti-union information in the Store that could reasonably have the effect of compelling or inducing employees to refrain from continuing to be members of the Union. The content of the Documents, even if they are considered "anti-union", does not express the Employer's view on unionization. The Union agrees the content of the Documents, on its own, is not coercive or intimidating. The Union submits the fact that the Employer gave the Documents to an employee, combined with the statement that the Employer wanted the employees to see the information in the Documents, makes the Employer's conduct intimidating and coercive.

39 In the circumstances of this case, there is no allegation that the Employer, or person acting on behalf of the Employer, spoke with anyone other than Smith or told Smith it wanted the employees to decertify. There is no allegation Smith told employees the Employer wanted them to see the Documents or that employees, other than Smith, knew the Employer had provided the Documents. There is no allegation the employees, including Smith, felt pressured to decertify. There is no allegation the employees, including Smith, felt intimidated, threatened, compelled or induced to refrain from continuing to be a member of a trade union. The Union says that it received calls from members, but does not allege any members told the Union they felt coerced by the Employer to decertify. Although the Employer provided the Documents to Smith and asked that she distribute the Documents, I am unable to find there was any form of pressure or threat of adverse consequences (i.e., intimidation or coercion) sufficient to engage Section 6(3)(d) or Section 9 of the Code. In the circumstances, I do not find a breach of Section 6(3)(d) or Section 9 of the Code.

40 Turning to the remedy for the breach of Section 6(1), I note that the Employer has met with the Union to clarify that it was not seeking to have the employees decertify. In the circumstances of this case, I find the appropriate remedy is a declaration the Employer has breached Section 6(1) of the Code.

V. CONCLUSION

41 I declare the Employer has breached Section 6(1) of the Code. The remainder of the Union's application is dismissed.

LABOUR RELATIONS BOARD

"LEAH TERAJ"

LEAH TERAJ
VICE-CHAIR