labourwatch

British Columbia Labour Relations Board Decision B309/2002 (09/17/2002)

This BC LRB decision discusses the use of LabourWatch during an organizing drive as a result of the employer referring employees to the site in a memo. It is the first decision that we are aware of and came 22 months after our website became available. The decisions held that "nothing turns on the content of the site alone in this case". Further, ". . . the information on the website is neutral" by explaining the Code, the Regulations etc. but "it is not pristine in its neutrality from the perspective that it is apparently limited to offering a countervailing view to what information an organizing union may be prepared to give employees."

The bottom line is that our content fared very, very well. We have provided the excerpts below that deal with LabourWatch. We can find only positive outcomes in reading the parts of this decision that relate to us. This is even more significant given that the totality of the employer's conduct was held to be "some of the worst and most egregious acts" possible. Our content was, appropriately, not tarnished at all by the Board's findings regarding the employer's conduct, in spite of the Union's claims at the hearing. The Board ordered a remedial certification for the totality of conduct driven by the termination of three employees, all organizers and one of their friends.

The only issue we note with the decision is that the Vice Chair said that we do not "apparently offer instructions on how to obtain union representation". It is very likely that the Vice Chair may not have seen the first two paragraphs of the Introduction to LabourWatch in our About Us section where we commend the excellent union websites that employees can go to if they want a union, and link them to a section of our website that contains links to the Canadian Labour Congress and every provincial Federation of Labour in Canada. We do not duplicate what is already well done, just provide what is either not available or augment what is incomplete online.

Starting at page 7:

37 As indicated out the outset, **The Brick admitted** on August 30 before the Board **that the dismissals were unlawful** contrary to Sections 5(1), 6(3)(a) and 6(3)(b) of the Code. This admission and the Board's declarations and orders were published in BCLRB No. B287/2002. **That decision was ordered to be distributed to all employees** who had received the initial bulletin of August 29, 2002. **The Brick attached a covering letter to the Board's** decision indicating, among other things, that as an employer, it was limited to what it could say to employees. The Brick gave the dates of the continuation of the Board hearing **and invited employees to visit a website: www.labourwatch.com for more information about unionization. The Brick also invited employees to visit Local 15's website if they so chose.**

38 **Local 15 contended that www.labourwatch.com was a virulent anti-union website. It invited me to take judicial notice of its contents and draw appropriate inferences. Local 15 led no evidence about the website's contents. The Brick denied that the website was anti-union. It said that it contained strictly neutral information and invited me to visit the site.**

39 **I did view the site at the invitation of both parties and find that it offers countervailing information to what employees might reasonably expect trade union organizers or representatives to disseminate during an organizing campaign. For example, as contended by Local 15, it offers detailed instructions on how to revoke union membership and how to initiate a decertification application in each jurisdiction in Canada. It does not apparently offer instructions on how to obtain union representation. I will comment more on this website below, but I can say at this point that nothing turns on the content of the site alone in this case.**

Continuing at page 11:

60 I have more difficulty concluding that the memo distributed to employees on August 29 was intimidating or coercive. I have no trouble concluding that it was misleading and disingenuous. By that time The Brick knew it was going to face a hearing at the Board and that its chances of success regarding the dismissals was slim to none, yet it continued not only to profess its innocence, but to appoint itself as a defender of the employees' right to vote having by its own admitted actions jeopardized that right in the first place. I suppose that one could say the audacity of such a pronouncement reflects a "nothing can stop us" attitude which, as argued by Local 15, was inherently intimidating. **Local 15 also argued that I draw just such a conclusion in view of the memo attached to the Board's previous decision directing employees to the www.labourwatch.com website. While the information on the website is neutral from the perspective of conveying information which is readily available in the Code, the Regulations and the Board Rules, or from the Labour Board's Information Officer it is not pristine in its neutrality from the perspective that it is apparently limited to offering a countervailing view to what information an organizing union may be prepared to give employees.**

61 Does such a reference then disclose an employer's hidden displeasure with the activities of its employees seeking union representation and is it therefore coercive or is it protected by the amended Section 8? Whether either memo alone amounts to improper conduct is not something I need to decide in this case. It is sufficient in the present circumstances to conclude, as I do, that The Brick's other conduct overall taken together with and in the context of the admitted improper four dismissals amounts to the most egregious conduct consisting of intimidation, coercion and interference that an employer can engage in during an organizing drive short of closing the business altogether. As such, I find The Brick has in total violated Sections 5(1), 6(1), 6(3)(a), 6(3)(b), 6(3)(d) and 9 of the Code by engaging in unfair labour practices.

BRITISH COLUMBIA LABOUR RELATIONS BOARD

THE BRICK WAREHOUSE CORPORATION

("The Brick")

-and-

OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 15

("Local 15")

PANEL:	V.A. Pylypchuk, Vice-Chair
APPEARANCES:	Keith J. Murray and Chris E. Leenheer, for The Brick Allan E. Black, Q.C., for Local 15
CASE NOS.:	47971 and 48007
DATES OF HEARING:	September 3 and 4, 2002
DATE OF ORAL DECISION:	September 17, 2002
DATE DECISION PUBLISHED:	September 24, 2002

DECISION OF THE BOARD

The following oral reasons were rendered on September 17, 2002. Further to the Board's memorandum to the labour relations community on July 9, 1997 regarding oral decisions, at the time of rendering the decision I reserved the right to edit the decision should a request for reasons be made. That right has been exercised sparingly in the following, which basically remains a transcription of the oral reasons. There are no substantive differences between the oral and written reasons.

I. NATURE OF APPLICATION

1 Local 15 has applied pursuant to Sections 5, 6(1), 6(3)(a), 6(3)(d), 9, 14, 133 and 143 of the *Labour Relations Code* alleging that The Brick has committed a number of unfair labour practices. The largest portion of Local 15's complaint concerns the dismissal from employment of Brenda Komick, Matt McAdams, Kimberley Duck and Ben Morphy.

2 At a hearing held on August 30, 2002, The Brick admitted that it dismissed Komick, McAdams, Duck and Morphy contrary to Sections 5(1), 6(3)(a) and 6(3)(b) of the Code for having exercised their rights under the Code, for proposing to become or seeking to induce others to become a member or officer of a trade union or for participating in the promotion, formation or administration of a trade union, and all without proper cause while Local 15 was conducting a certification campaign amongst employees of The Brick.

3 The admission was made with prejudice allowing Local 15 to rely on it to make out the balance of its case seeking among other remedies, remedial certification.

4 In BCLRB No. B287/2002 I recorded the admission and The Brick's offer to reinstate the dismissed employees as well as to make them whole. As a result, I ordered their reinstatement and ordered that they be made whole for any wages and benefits lost as a result of The Brick's admitted unlawful termination of their employment. I also ordered The Brick to cease and desist from committing any further unfair labour practices in breach of the Code. I ordered that the Board's decision be posted and distributed to certain employees of The Brick.

5 This decision addresses the balance of Local 15's complains and the additional remedies sought.

II. PRELIMINARY MATTER

6 Before addressing the balance of Local 15's application, I turn to deal with an application filed by The Brick alleging that Local 15 had breached Section 7(1) of the Code because its organizer Morphy approached numerous employees at the workplace

during their working hours without The Brick's permission and attempted to persuade them to join the Union. The Brick also alleged that Morphy informed some employees that 80 to 85% of the other employees had already signed union membership cards. The Brick said that Morphy told employees Nick Hanz and Heather Lewis that if he signed up 45% of the employees in the proposed bargaining unit, Local 15 would attend and speak to the employees. The Brick asked the Board to investigate what Morphy told employees during his organizing efforts.

7 The Brick gave me a copy of this application at the commencement of the continuation hearing into Local 15's complaints. I was asked by The Brick to consolidate its application with that of Local 15 and to hear the matters together. I declined. The Brick now requests that I record the reasons for refusing to consolidate.

8 The reason, which I gave at the time, was that to my knowledge The Brick's application had not yet been processed by the Registry and had not been assigned to me for adjudication. I advised The Brick that I was not prepared to delay the hearing into Local 15's complaints in order to accommodate the consolidation process. However, The Brick was permitted to lead evidence regarding the substance of its complaint insofar as it may have been relevant to adjudicating Local 15's application. Such evidence was led by The Brick.

9 At the time that I was handed the application by The Brick, I also advised The Brick that its complaint that Morphy had advised employees that he had already signed up 80 to 85% of other employees was without merit for the reasons given by the Board in *T. Jordan Inc.*, BCLRB No. B51/96.

10 The evidence elicited by The Brick in cross-examination of Morphy confirmed that Morphy told most people that if they signed a card Local 15 would attend and talk to them. Heather Lewis, an employee in the office at The Brick, testified that Morphy told her she had a right to vote and that signing a card meant a representative of Local 15 would come and speak to the employees.

11 In cross-examination, The Brick named a number of individuals to whom Morphy made the alleged remarks about Local 15 attending to talk to employees. None of these were called to testify.

12 The Brick's application has now been assigned to me for adjudication and, at the same time, The Brick has now applied to withdraw its application alleging a breach of Section 7. The Brick says that the evidence in the hearing disclosed that its store manager was aware of the organizing occurring on company time and did not order it stopped. Consequently, The Brick said it now had doubts as to whether it would be successful in its application. However, The Brick continues to request that the Board assign a Special Investigating Officer to investigate what Morphy told employees. Local 15 opposes the request for an investigation and submits that the request should be summarily dismissed.

13 Having heard the evidence, I agree with The Brick's assessment and I have decided to grant the request for a withdrawal of The Brick's application alleging a breach of Section 7 of the Code. However, I decline to order an investigation into Morphy's conduct for the following reasons. First, the allegations about Morphy telling employees that 80 to 85% had already joined the Union are meaningless even if true for the reasons set out in *T. Jordan Inc., supra.* If employees choose to sign membership cards for such an insignificant reason as to go along with their peers, they deserve the consequences of such ill-considered decision-making. Second, with regard to the allegation of the Union coming out to talk to employees if 45% or more sign cards, Morphy has already admitted as much in his testimony. An investigation will not improve on that admission.

14 It is also obvious from the cross-examination that The Brick heard from a number of employees about what Morphy had said to them. However, there are no particulars of any other alleged statements either provided by The Brick or elicited from Morphy or other witnesses by The Brick during the hearing which would provide a basis for a further investigation.

15 In the present circumstances, an investigation in my view would be a waste of Board resources. For those reasons, the request to withdraw the application is granted and the request for an investigation is denied.

III. BACKGROUND

16 The Brick operates a furniture warehouse store in Coquitlam among other locations. The store is managed by Robert Kliss. Kliss reports to the Regional Manager Craig Wensel. Kliss has four managers reporting to him: two operations managers and two sales managers. The sales managers are Robert Duchek and Roger Baker. At the material time when the Local 15 organizing first began Rakesh Chetal was a manager in training. The employees involved in this matter are commissioned sales personnel whose job it is to sell furniture, mattresses and appliances.

17 From the employees' perspective there were a number of problems at the store. Morphy testified that employees were being treated unfairly; they were being "yelled at and coerced and pushed around". In particular, the problems revolved around the perceived preferential treatment of Chetal, the employee and salesperson who was the manager in training. Chetal in turn took to treating his fellow salespersons aggressively and unfairly. Morphy's other complaints were directed at sales manager Ducheck. Other witnesses confirmed that Chetal was behaving in an aggressive manner and this was causing problems in the store. The result was that the employees were unhappy.

18 This state of affairs had subsisted for some time before the Local 15 organizing campaign began. Employees had discussed their unhappiness amongst themselves and with Morphy who took it upon himself to contact Local 15 some time around mid July. As a result Local 15 began its sign up campaign. Morphy, Duck and Komick were the employee organizers.

19 I accept that there was an initial surge of interest in Local 15. Between July 25 and July 28, eleven membership cards were signed. The proposed bargaining unit was described to be approximately 38 employees.

20 While this initial drive was occurring, the store manager, Kliss, received a telephone call on July 25 from corporate sales telling him that he had a problem on the floor. Kliss was advised that union organizing was occurring. According to Kliss, the information had originated from McAdams who had spoken to someone in corporate sales about a possible position. Kliss spoke to Chetal who advised Kliss that he knew nothing about a union drive. Kliss then directed Chetal to see what he could find out.

21 Several events then occurred in close succession over the few days following. Chetal approached Morphy about the union on at least two occasions and a confrontation occurred. Chetal wanted to know how many cards had been signed and spoke out aggressively against the union.

22 As well, Morphy and Kliss had several meetings. Kliss put the meetings as taking place July 26, 27, and 28 with there being two meetings on the 28th. Morphy put the meetings later on July 30, 31, August 3, 4 and 5. Although Morphy gave five dates he testified that only four meetings took place. I prefer Kliss's recollection as to the dates because I conclude from the context of the discussions and Wensel's subsequent involvement that the meetings occurred before Wensel returned from vacation. He returned on July 29, 2002.

23 There was also a dispute in the evidence as to who initiated the meetings. Morphy claimed that he was directed by Kliss to meet while Kliss testified that Morphy attended voluntarily at his own instance.

24 From the context of the conversation that took place in the first meeting on July 26, 2002, and Chetal's involvement at Kliss's direction the day before, I conclude that Morphy initiated that meeting. Morphy told Kliss that Chetal was telling people that he, Morphy, was organizing a union. I conclude that Morphy became concerned and decided to confront Kliss as a result of that information. Morphy wanted to know if he was going to lose his job. Kliss in turn questioned Morphy about the organizing. I find that Kliss assured Morphy that his job was not in jeopardy. Morphy denied any involvement. Kliss became emotional, telling Morphy that employees were free to speak to him about their concerns.

25 According to Kliss, there was a subsequent meeting the next day, Saturday, July 27. Kliss said he had received complaints from employees who said they felt threatened and harassed by Morphy's organizing. From that context I conclude that Kliss initiated the meeting in order to address what he perceived to be other employees' concerns. According to Kliss, during that meeting Morphy identified Chetal as the problem and source of "everyone's dissatisfaction". Morphy confirmed he was signing people up. Kliss wanted to know why Morphy was organizing on such a busy day but did not tell him to stop.

26 That Saturday Kliss interviewed 15 to 18 staff asking them whether they had any issues. Kliss testified that he never asked them whether they signed union membership cards.

27 Kliss spoke with Morphy again on Sunday, July 28, 2002. Komick was present during that conversation. Morphy testified that Kliss said, "If the union comes in the store will be shut". Kliss denied threatening to close the store. Both Morphy and Kliss agree that Kliss expressed concern for his own job on the Sunday and said that if the union comes in Kliss "would not be part of it" so employees would have to deal with another manager. According to Kliss this conversation occurred at a second meeting that day.

28 Given that both Morphy and Kliss agreed that Kliss expressed concern for his job and that employees would have to deal with another manager or someone else if the union came in, I conclude no threat to close the store was made by Kliss. Such a threat would have been inconsistent with these agreed remarks and the subsequent concern shown by employees over Kliss's job. Kliss admitted becoming very emotional during that meeting. Kliss wanted to address the problems in the store. Kliss also advised that the union drive issue was too big for him to handle and that he was going to go to Wensel about all of it.

29 According to Morphy, Kliss also wanted to know who was supporting Local 15 and who had signed cards. Kliss said that Morphy told him that he had signed 21 members. Morphy testified that all he told Kliss was that he had signed enough. Nothing turns on this particular discrepancy.

30 Kliss also testified that he had heard from another employee that Morphy told her that if Chetal became aggressive or threatened anyone again, he would submit the cards which he had gathered to Local 15. Morphy confirmed that he had made such a statement to this other employee.

31 According to Morphy there was at least one more meeting during which Kliss proposed that employees become part of an advisory committee to assist store management to address problems in the store. Kliss confirmed making such a suggestion.

32 Wensel returned from vacation on July 29, 2002 and was apprised of the events which had occurred at the store. On July 30 Wensel had lunch with employees of the store. The lunch was paid for by Wensel and employees were required to attend. The employees assumed that the lunch was an opportunity to discuss store problems, in particular an opportunity to express concern over Kliss's job. Wensel refused to engage in these discussions except to say that no one had to fear for their jobs. He told employees that he did no want to discuss problems at this time, but that employees could talk to him about their concerns at any time. He then proceeded to talk about his vacation. I accept that this lunch was an unusual event; such an event never before having happened.

33 Kliss testified that management began to address employee concerns. According to Kliss, Chetal's manager-in-training status was terminated, although Morphy, McAdams and Duck insisted in their evidence that Chetal continued to exercise management functions. Cindy Nelson, a sales consultant, testified that problems with Chetal had been addressed two to three weeks before the terminations of Morphy, Duck, Komick and McAdams which occurred on August 20 and 21. Morphy confirmed that sometime in early August he had approached Kliss and told him he was impressed with the changes Kliss had made so far. I find that in the first part of August management did indeed to some degree address the problems identified to Kliss by Morphy.

34 I also find that from July 28, when the last substantive meeting between Kliss and Morphy occurred, until approximately mid-August, Local 15's organizing drive appeared to have stalled. Then there was a renewed interest with four additional cards being signed on August 16, 17 and 18. Morphy testified that five other employees told him they had signed cards but refused to turn them over to him as a result of the dismissals which occurred on August 20 and 21.

35 On August 20, 2002 Komick, Duck and McAdams were dismissed. All were told that the company was moving in a different direction and that they would not be moving with it. On August 21, 2002 the same fate befell Morphy.

36 On Thursday, August 29, 2002, The Brick distributed a bulletin to employees in which it offered to reinstate Morphy, Duck, Komick and McAdams while professing its innocence insofar as any violation of the Code was concerned. In that bulletin, The Brick went on to assure employees that it would do everything in its power to ensure that a union was not imposed on them, i.e., that is that the Board not grant the remedial certification.

37 As indicated out the outset, The Brick admitted on August 30 before the Board that the dismissals were unlawful contrary to Sections 5(1), 6(3)(a) and 6(3)(b) of the Code. This admission and the Board's declarations and orders were published in BCLRB No. B287/2002. That decision was ordered to be distributed to all employees who had received the initial bulletin of August 29, 2002. The Brick attached a covering letter to the Board's decision indicating, among other things, that as an employer, it was limited to what it could say to employees. The Brick gave the dates of the continuation of the Board hearing and invited employees to visit a website: www.labourwatch.com for more information about unionization. The Brick also invited employees to visit Local 15's website if they so chose.

38 Local 15 contended that www.labourwatch.com was a virulent anti-union website. It invited me to take judicial notice of its contents and draw appropriate inferences. Local 15 led no evidence about the website's contents. The Brick denied that the website was anti-union. It said that it contained strictly neutral information and invited me to visit the site.

39 I did view the site at the invitation of both parties and find that it offers countervailing information to what employees might reasonably expect trade union organizers or representatives to disseminate during an organizing campaign. For example, as contended by Local 15, it offers detailed instructions on how to revoke union membership and how to initiate a decertification application in each jurisdiction in Canada. It does not apparently offer instructions on how to obtain union representation. I will comment more on this website below, but I can say at this point that nothing turns on the content of the site alone in this case.

40 Finally, McAdams testified that upon his return to work after reinstatement, the atmosphere in the store was uncomfortable although management did not give him any problems. Morphy testified that since he was fired, other employees would not speak to him.

41 I may also refer to other facts and evidence as the analysis unfolds.

IV. THE ISSUES

42 The issues left for me to decide in this case are whether the dismissals violated any other sections of the Code as alleged - namely Sections 6(1), 6(3)(d), and 9; and whether any of the other matters described in testimony that occurred during the meetings, and the meetings themselves, the bulletins distributed by The Brick and the lunch with Wensel and other employer conduct amount to unfair labour practices. Finally, I must decide what the appropriate remedies, if any, in addition to the reinstatements and cease and desist order ought to be. In particular, I must address Local 15's request for remedial certification.

V. ANALYSIS AND DECISION

43 I begin by observing that the dismissals of Morphy, Duck, Komick and McAdams, three of whom were union organizers, was one of the most egregious acts that an employer can commit during an organizing drive. I have no hesitation in concluding that these dismissals were intended to squelch the renewed interest in Local 15 which had manifested itself about mid-August. I also find they were intended to have and did have an intimidating effect on members of the potential bargaining unit. I note in particular that the dismissal of McAdams resulted from the simple fact that he was an acquaintance of Duck, one of the organizers. As McAdams testified, he was not even interested in the Union. However, his friendship with Duck was enough to make him a target. I conclude that the dismissals were intended to coerce employees to refrain from becoming members of Local 15 and I accept Morphy's evidence that in at least five cases, The Brick successfully achieved that goal.

44 The Brick led evidence suggesting that the dismissed employees were to some degree poor sales performers. The Brick's theory in leading this evidence was that other employees would not be intimidated or coerced because they would rationalize the dismissals as being a product of poor performance and not anti-union animus. In

other words, because other employees might conclude that the dismissals were some how justified based on performance, the coercive and intimidating effect would be dissipated or diluted. However, no evidence was led to establish that any other employees knew of any performance concerns regarding any of the dismissed employees. Moreover, after examining the evidence provided by The Brick in support of its contention that performance was of some concern, I concluded that the evidence charitably put was incredibly thin.

45 McAdams testified that he was a high salesman when he was dismissed. The documents show that the amount of sales he wrote for the1 ½ months that he worked at the Coquitlam store put him within easy reach of claiming a spot in the top five over the long term. The complaint against him seemed to have been that he came to work hung over one day because he had gotten drunk after having ended his relationship with a girlfriend. He was excused from working at his request, but nonetheless remained for a sales meeting.

46 A document was introduced showing that Komick had given some improvement targets to meet in writing. Yet she stood seventh overall in year to date sales.

47 Duck had only been with the store since some time in April but was situated roughly in the middle of the pack of salespersons. She had won a trip to Italy as a result of sales of Italian leather furniture which qualified her for a draw to win the trip. Parenthetically, that trip was taken away from her when she was dismissed.

48 Finally, Morphy's sales placed him roughly 13th overall, also roughly in the middle of the pack. Morphy agreed that he had been given a choice to be laid-off or to go part-time, because his sales had fallen below expectation. However, that event had transpired before he was dismissed on August 21 and I find it was unconnected to the dismissal.

49 Another complaint raised by The Brick was that Morphy had fallen down drunk on the job on one occasion, but no discipline was ever meted out for that event. Morphy testified that he was ill and collapsed as a result of nerves and stress and was rushed to the hospital. I give all of this evidence little weight and dismiss The Brick's contention that somehow this material would ameliorate the impact on other employees of the wrongful dismissal of the Local 15 organizers. I therefore conclude that in dismissing Morphy, Duck, Komick and McAdams The Brick violated Sections 6(1), 6(3)(d) and 9 of the Code in addition to the sections which The Brick admitted violating.

50 I now turn to consider whether the content of the discussions between Morphy and Kliss and other conduct by The Brick amounts to a violation of the Code by The Brick. I note that neither party expressly addressed whether the facts of this case fell to be decided under the amended Section 8 which went into effect July 30, 2002 or under Section 8 as it previously stood. Section 8 currently reads:

> Subject to the regulations, a person has the freedom to express his or her views on any matter, including matters relating to an employer, a trade union or the representation of employees by a trade union, provided that the person does not use intimidation or coercion.

51 Section 8 previously read:

> Nothing in this Code deprives a person of the freedom to communicate to an employee a statement of fact or opinion reasonably held with respect to the employer's business.

52 While arguably the amended Section 8 broadens the scope of permissible free speech, the matter was neither argued nor is it necessary for me to decide at this juncture. What remains clear is that the intimidation and coercion continue to fall outside the scope of any permissible free speech. Coercion is defined in *Cardinal Transportation B.C. Incorporated and Ed Klassen Pontiac Buick GMC (1994) Ltd.,* BCLRB No. B344/96 (Reconsideration of BCLRB Nos. B463/94 and B232/95), (1997), 34 CLRBR (2d) 1 *("Cardinal Klassen")* as "any effort by an employer to invoke some form of force, threat, undue pressure or compulsion for the purpose of controlling or influencing an employee's freedom of association": (para. 212). Moreover, the Board in that case stated that the line for permissible communication "is clearly crossed when an employer seeks to illicit from employees (either individually or collectively) an indication as to whether they have signed membership cards or otherwise support the union": (para. 203).

53 Both of these aspects continue to apply: the first because it is expressly coercive and thus prohibited, and the second because it is more than an expression of opinion or views, but rather is inquisitorial in the notorious tradition of the word and is implicitly coercive.

54 I find that some of the conduct and contents of the discussions meet this test and thus run afoul of Sections 6(1), 6(3)(d) and 9 of the Code and cannot be saved by Section 8 - amended or not. I also point out that it is improper under Section 6(3)(d) "to seek by…a promise… to induce an employee to refrain from becoming or continuing to be a member…of a trade union".

55 First, I find that the inquiries made by Kliss directly as well as through Chetal fall outside the permissible expression of views. The inquiries were intended to identify union supporters, a matter which the Code expressly protects from employers. As pointed out in numerous cases of the Board, employees are vulnerable when they seek to organize and employer attempts to discover which employees support unionization are inherently intimidating.

56 There was disagreement between Local 15 and The Brick whether at the material time Chetal was a manager as a result of his manager-in-training status. The Brick claimed he remained an employee within the meaning of the Code. Moreover, The Brick said that his status had changed when his training was terminated. Local 15

argued that he performed management duties. Alternatively, Local 15 submitted that the resolution of that issue was unnecessary because it was clear that Chetal was acting on The Brick's behalf at Kliss's behest.

57 I agree with the latter proposition. The Code prohibits a person acting on behalf of an employer from engaging in prohibitive conduct. The Brick in this case must bear responsibility for Chetal's actions given that Kliss sent him to discover what was going on.

58 Further, I find that Kliss inappropriately intruded into the organizing campaign by offering to address employee issues and by offering to create an employee advisory committee. While I find that Kliss was in part genuinely motivated by a desire to rectify problems which he had either ignored too long or of which he had been unaware, I infer from the circumstances he was also motivated by a desire to make the union problem go away. While Kliss did not expressly say that he would do these things if employees did not unionize, I find Kliss's promises to address the problems identified by employees and offering an advisory committee role and The Brick's acting on those promises to some extent in the circumstances of the organizing drive amounts to a violation of Section 6(3)(d) of the Code. I also conclude that while Kliss was genuinely upset at the thought that his employees were unhappy, he must have realized by mid-August, if not earlier, that events had overtaken his ability to do much to reverse matters at that point. Moreover, the conduct of Wensel in dismissing the four employees put Kliss in an untenable situation. I conclude that Kliss was perhaps initially of the view that unionization was being used by the employees to leverage changes in the workplace (and certainly Morphy may have left such an impression with at least one other employee). It was clear by mid-August when interest in Local 15 did not wane but picked up again, that there was more to it than simple leveraging by a group of aggressive sales persons. I find that this in turn prompted Wensel to act against the organizers. The Brick has already admitted that action to have been improperly motivated by anti-union animus.

59 The lunch meeting held by Wensel on July 30, 2002 is alleged by Local 15 to be improper and to constitute an unfair labour practice. The Brick argues that it is entirely innocent. In assessing such events the Board must always be mindful of the overall context in which they occur and that employers rarely advertise their actions as being anti-union (despite The Brick's later admission in this case of improper conduct relating to the dismissals). Taken alone, at another time and in another context, the lunch, which was an unusual one-off event, might well be seen as innocent. However, in this context, in these circumstances, and at that time and place, I find that the activities of Wensel in mandating the lunch and then controlling the conversation to carry a subtle message that The Brick has power over the lives of its employees. Again, standing alone and absent other conduct such a subtle message may not carry a sufficient degree of intimidation, but in view of what transpired later I find that it was intended to be coercive and intimidating.

60 I have more difficulty concluding that the memo distributed to employees on August 29 was intimidating or coercive. I have no trouble concluding that it was

misleading and disingenuous. By that time The Brick knew it was going to face a hearing at the Board and that its chances of success regarding the dismissals was slim to none, yet it continued not only to profess its innocence, but to appoint itself as a defender of the employees' right to vote having by its own admitted actions jeopardized that right in the first place. I suppose that one could say the audacity of such a pronouncement reflects a "nothing can stop us" attitude which, as argued by Local 15, was inherently intimidating. Local 15 also argued that I draw just such a conclusion in view of the memo attached to the Board's previous decision directing employees to the www.labourwatch.com website. While the information on the website is neutral from the perspective of conveying information which is readily available in the Code, the Regulations and the Board Rules, or from the Labour Board's Information Officer it is not pristine in its neutrality from the perspective that it is apparently limited to offering a countervailing view to what information an organizing union may be prepared to give employees.

61 Does such a reference then disclose an employer's hidden displeasure with the activities of its employees seeking union representation and is it therefore coercive or is it protected by the amended Section 8? Whether either memo alone amounts to improper conduct is not something I need to decide in this case. It is sufficient in the present circumstances to conclude, as I do, that The Brick's other conduct overall taken together with and in the context of the admitted improper four dismissals amounts to the most egregious conduct consisting of intimidation, coercion and interference that an employer can engage in during an organizing drive short of closing the business altogether. As such, I find The Brick has in total violated Sections 5(1), 6(1), 6(3)(a), 6(3)(b), 6(3)(d) and 9 of the Code by engaging in unfair labour practices.

VI. REMEDY

62 What then is the appropriate remedy? I note that Kliss has expressed regret for The Brick's conduct in dismissing the employees, and some of the evidence reflected a genuine effort on his part to put matters behind him. I accept that Kliss is largely well intentioned. However, a remedy under the Code is not about punishment; it is about undoing the harm done and putting Local 15 and the employees in the position they would have been in but for The Brick's conduct. It is in this context that I turn to consider Local 15's request for remedial certification.

63 The test to be applied is set out in Section 14(4)(f) of the Code and asks the Board to determine whether, but for the employer's unlawful conduct it is more probable than not that a union would have achieved the requisite majority support. This test requires me to predict an outcome based on a number of interrelated factors whose weight and focus will vary depending on the circumstances of the case: *B.C. Garment Factory Ltd.*, BCLRB No. B401/97. These factors are:

> (a) the level of membership support prior to and subsequent to the employer's unfair labour practice;

> (b) the seriousness of the employer interference and reasonable effect (assessed objectively) of that interference on employees;
>
> (c) the specific nature of the employer and employees;
>
> (d) the point or stage in the organizational drive of the employer's interference;
>
> (e) the 'totality of the conduct' of the employer; and
>
> (f) if less than a majority of employees are members of the trade union whether there is adequate or sufficient support to conduct collective bargaining (i.e., negotiation, representation, etc.) (para. 26)

64 In *B.C. Garment,* the Board said that the first five factors relate to the impact upon or momentum of the organizing drive directly relevant to the but for test established in Section 14(4)(f). The last factor injects an element of discretion for the Board to determine the appropriateness of the remedy if the but for test is met: (para. 27).

65 This is a difficult test to apply and requires the adjudicator to draw inferences of what is likely to have transpired but for the events which did in fact take place. There is no set pattern or formula for making this determination and there are many variables which affect the nature and progress of each organizing drive. As a result, the analysis must reflect the consideration of the totality of the circumstances.

66 I am satisfied in this case that Local 15 had achieved sufficient support for a vote and likely would have carried the vote. I reach that conclusion for the following reasons. First, The Brick made an issue of what Morphy told employees in order to argue that support was conditional and therefore not reliable. I reject that argument. An identical statement as that made by Morphy was considered by the Board in *Kelowna Electroplating Ltd.,* BCLRB No. B234/95, and was found not to constitute a misrepresentation and thus not to equivocate the membership cards.

67 I accept Morphy's testimony that some employees had signed cards but refused to deliver them in light of dismissals which occurred. Given the level of support which already existed and the renewed momentum in mid-August I find that Morphy's testimony is credible. It is consistent with the state of affairs at the time and in that place.

68 Further, had Local 15 been given a fair opportunity to build on that support I conclude that more probably than not it would have carried the vote. I reach that conclusion because of the continued level of interest in Local 15 even after Kliss had addressed employee issues regarding Chetal in early August. I also reach that conclusion based on the fact that The Brick resorted to such desperate and draconian measures immediately upon the increased level of union activity in mid-August. That

reaction leads to a powerful inference that Local 15 was marching towards success. I therefore find that Local 15 was closing in on success in its drive and, but for The Brick's conduct, would have achieved it.

69 Further, unlike the case in, but in the words of, *B.C. Garment, supra,* The Brick's conduct in the culmination of its attempts to foreclose unionization reached a degree of exceptional severity. Union organizers were unlawfully dismissed and one person was targeted by virtue of his association with one of the organizers. That sent a deeply chilling and powerful message to other employees.

70 The Brick's approach to the unionization effort seemed to be a combination of carrot and stick. Initially, promises of addressing problems, an employee advisory committee and only mild forms of intimidation were employed. When that failed to stop interest in Local 15 over the longer term, some of the worst and most egregious acts were ultimately committed which put all of The Brick's conduct in the most negative light possible.

71 What effect would this have on employees? The Brick argued that these employees are all sophisticated, aggressive sales people who could handle pressure. I accept that initially they stood up well to The Brick's interference -- that is, the inquiries and the promises, and indeed, there was some indication that they were perhaps leveraging some changes themselves. Certainly Morphy gave that indication to at least one other employee. Had that been the sum total of The Brick's conduct, then remedial certification would have been out of the question.

72 The Brick argued that this workforce was not particularly vulnerable; in fact, it said, they are sophisticated and aggressive salespersons. In *BC Garment, supra,* the fact that there was a vulnerable workforce was considered a factor to measure the effect of not so serious employer conduct upon employees. However, when it comes to conduct of exceptional severity, I find sophistication or aggressiveness are no barrier to vulnerability. That was clearly demonstrated in this case. Thus, with regard to the character and makeup of the workforce, I find in light of the severity of The Brick's conduct it is a non-factor in this case.

73 Given that I accept Morphy's testimony that five employees who signed cards refused to deliver them and given that Morphy testified that employees would no longer speak to him and McAdams testified that the atmosphere was strained after their return to the workplace, I find objectively that The Brick's conduct overall and the dismissals in particular had a serious chilling effect on Local 15's organizing drive. It was stopped cold in its tracks.

74 Finally, I find that the totality of The Brick's conduct reflects anti-union animus and attitude towards accepting employee freedom to choose union representation. The Brick's conduct is more than sufficient to undermine employee free choice to the point where meaningful and significant remedy is required.

75 I am satisfied that the but for test has been met in this case.

76 I now turn to the last test or factor which requires the Board to exercise some discretion deciding whether to grant remedial certification. The Brick has argued that if a lesser remedy would undo the harm the Board should exercise its discretion to apply that lesser remedy. Indeed, The Brick suggested that it is Board policy to take such an approach: *Cardinal Klassen, supra*, para. 328. Local 15 has argued that a lesser remedy will not undo the harm done. It said if remedial certification cannot issue in a case like this then when would it ever issue?

77 First, the last factor is directed at ensuring that remedial certification is not an empty remedy or nothing more than a prelude to decertification. Lengthy delay between the time of application and the decision combined with a high turnover of employees may portend such an outcome. In this case, there is virtually no delay and despite there being a turnover in the workforce from time-to-time, the present group of supporters still remains employed. I am therefore satisfied that remedial certification would not be an empty remedy and that there is a sufficient amount of support to give collective bargaining a fair opportunity.

78 What then of The Brick's argument for a lesser remedy. I considered whether it might be appropriate in these circumstances. I also considered Local 15's submission that lesser remedies such as meetings and extended campaigns have little effect in undoing the harm caused by an employer unfair labour practices. I also thought about whether such an argument made by Local 15 is nothing more than a design to extract a remedial certification from the Board. I also turn my mind to the question of whether the amended Section 8 ostensibly giving employers greater latitude in free speech may have the unintended effect of off-setting the effectiveness of lesser remedies, such as union-held meetings, which the Board might otherwise have been inclined to order consistent with *Cardinal Klassen*, para. 328. However, in the end I concluded that it was not necessary to resolve any of these issues.

79 I find that in the circumstances of this case the conduct of dismissing four employees, three of whom were organizers, as well as all of the other matters taken in context of those dismissals amount to such exceptionally severe conduct of interference, intimidation and coercion so as to make remedial certification the only realistic remedy.

80 A remedy must be proportional to the harm caused, the conduct engaged in, and sufficiently effective to undo its consequences: *Cardinal Klassen,* paras. 321, 332, and 334. In this case I find that only remedial certification will achieve that goal.

81 I therefore order that a Certification be issued to Local 15 to represent a bargaining unit of employees of The Brick at Coquitlam. As a result of The Brick's request for clarification, I leave it to the parties to draft an appropriate bargaining unit description reflecting the unit of approximately 38 employees identified during the hearing. I further order that any collective agreement negotiated by the parties be submitted to the employees for ratification.

82 I decline to order the reimbursement of Local 15's organizing expenses as it has effectively now achieved what it set out to do when organizing began.

83 I further order that a copy of this decision be posted and distributed to employees as was the previous decision, but this time without comment or attachments.

84 Finally, Local 15 requested that the order reinstating the four employees contained in the previous decision be issued by the Board in the form of a formal order. That request is granted, a formal order will be prepared and delivered to the parties.

LABOUR RELATIONS BOARD

"V.A. PYLYPCHUK"

V. A. PYLYPCHUK
VICE-CHAIR