DOWNLOAD COVER PAGE

This download is related to a 2005 Saskatchewan decertification and contains a number of different documents that have been consolidated into one download (51 pages).

1. Labour Watch Newsletter - Volume 5, Issue 2 “Union decertification with LabourWatch’s help allowed” (1page).

2. A document prepared by LabourWatch of the Saskatchewan Labour Relations Board Decision (181-04 dated April 6, 2006). Our document contains the 19 paragraphs of 102 total paragraphs in the whole decision that relate directly or indirectly to the employee who led the decertification with the use of LabourWatch content and LabourWatch listed counsel (4 pages)

3. SLRB Decision (File 181-04) dated April 6th, 2005 Union alleges Employer interference with decertification. Board finds no interference. (29 pages)

4. SLRB Decision (LRB File 181-04 & 227-04) dated September 14, 2005 Union applies for Reconsideration. Board dismisses (7 pages).

5. SLRB Decision (LRB File 227-04) dated October 25th, 2005 Union files Objection to Vote. Board finds “employer takes consistent approach” to union and employee decertification vote campaigns and dismisses the union’s application (9 pages).

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ALTERNATIVE UNION INFORMATION SOURCE

Volume 5 - Issue 2 April 2006

Employee Decertification with LabourWatch's Help Allowed

By John Mortimer

It must be getting lonely on shore for those in Canada's labour movement who argue that surfing to a website that provides fair and accurate information on labour laws is off side.

An October 2005 decertification of the United Food and Commercial Workers (UFCW) by employees of a Sobey's store (Varsity Common Garden Market) in Saskatoon gives legs to a new trend: for the second time in two years a Labour Relations Board heard complaints about LabourWatch - and in dismissing all union complaints in its decision – the Board didn't even mention our name. It also represents the first time we are aware of a Labour Board hearing testimony about employee use of LabourWatch for a decertification.

UFCW Local 1400 cross examined witnesses about LabourWatch, questioning whether a store manager had influenced an employee to seek a free vote on decertification by telling staff that LabourWatch provided information about unions.

The Saskatchewan Labour Relations Board, in granting the employee's September 2004 application to decertify in April of 2005, didn't so much as mention LabourWatch in its written decision. Despite further objections raised by the Union, the Board finally approved the employee's decertification in late October 2005 ([2005] S.L.R.B.D. No. 9).

Unions and their lawyers have long objected to LabourWatch. In Newfoundland (LRB No. 4766: 1/12/2004 – posted on our website), the Board heard oral complaints and considered two sets of Union pleadings against an Employer's use of the website. The Board chose not to mention LabourWatch in a decision that cleared the Employer of all unfair labour practice complaints.

Unique to the Sobey's case is that it was the first time we are aware that a Board heard such complaints and evidence about the use of the LabourWatch website under oath during a decertification hearing and then chose not to mention it in its decision. Instead, the Board simply said that the employee "went to a web site and obtained information about unions and the name of a lawyer."

In the end counsel for the UFCW, Drew Plaxton of Plaxton Gillies made no written submissions and no closing arguments about the employee's use of LabourWatch and the Board chose to leave our name out of the decision, simply using terms like internet and web site to refer to us.

While the store manager's actions seem quite benign, employers in particular should always retain expert labour law advice when using LabourWatch web resources.

The Sobey's manager had actually mentioned the website during a staff meeting in 2003 while the UFCW was campaigning to unionize the store.

The staff meeting was one held monthly in which representatives from each store department gather to raise and discuss workplace concerns. One employee wanted to know more about unions. The store manager said he wasn't free to discuss unions, and instead suggested LabourWatch.com.

The UFCW was certified in November of 2003. But less than a year later, an employee, never a union supporter, wanted to find out if it was possible to get them out of the store.

Remembering the website's mention, the employee surfed to LabourWatch.com and got the information she needed. She was also able to contact a lawyer, Larry Seiferling, Q.C., of McDougall Gauley whom she retained. He advised her on the decertification process and represented her for the four days of hearings and for the reconsideration of the Board's initial decision. Legal counsel for the Employer was Kevin Wilson of McPherson Leslie and Tyerman LLP.

The Union raised several arguments alleging management influence, the voting eligibility of employees, the conduct of balloting and other issues. The union lost the initial decision and eventually its application for reconsideration and its application to object to the conduct of the vote.

On the crucial issue of whether the employee was influenced to make the decertification application, the Board accepted that she was driven by a sincere, independent desire, that she had never discussed the Union or decertification with anyone in management, and that the Employer knew nothing about her application. In fact, she had already decided to seek decertification before she logged on to LabourWatch.com. The decision also contains analysis and findings with respect to the topic of the employee's legal fees.

In the final of three Decisions, (the October 24th 2005 ruling) the Board rejected the Union's argument that the employee's pre-vote communication campaign "impaired" employee "freedom of choice". Further, the Board found "that the Employer did not interfere" with either campaign.

The Union's evidence was that three staff Union representatives maintained a presence in the store handing out business cards with pro-union slogans and that they had up to 23 employees campaigning with them. There were union buttons, pins and pens in the store and the lunchroom. There were mailings to employee homes.

The applicant employee finally placed handwritten posters in the lunchroom three days before the vote. Union supporters defaced them and tore one down. The applicant employee removed her posters the day before the vote.

When the vote was finally counted, six months later and thirteen months after the decertification application was filed, employees had voted to be union-free again.

This document has been prepared by the Canadian LabourWatch Association. It contains 19 paragraphs out of a total of 102 paragraphs in the full decision that in our judgment relate directly or indirectly to the issues associated with the employee and their counsel that applied for decertification of a UFCW bargaining unit. The employee application was successful.

LABOUR RELATIONS BOARD
Saskatchewan

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant v. SOBEYS CAPITAL INC. operating as VARSITY COMMON GARDEN MARKET, Respondent

MICHELLE BRESSERS, Applicant v. UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400 and SOBEYS CAPITAL INC. operating as VARSITY COMMON GARDEN MARKET, Respondents

LRB File No. 181-04; LRB File No. 227-04; LRB File Nos. 255-04 to 257-04; April 6, 2005

Vice-Chairperson, Wally Matkowski; Members: Duane Siemens and Joan White

For the Applicant:	Larry Seiferling, Q.C.
For the Certified Union:	Drew Plaxton
For the Employer:	Kevin Wilson

Background:

[1] United Food and Commercial Workers, Local 1400 (the "Union"), is certified as the bargaining agent for a unit of employees of Sobey's Capital Inc., operating as Varsity Common Garden Market (the "Employer") by an Order of the Board dated November 7, 2003. Michelle Bressers filed an application for rescission of the certification Order (LRB File No. 227-04), pursuant to s. 5(k)(i) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") on September 13, 2004 (the "rescission application"). The rescission application was filed within the open period specified by s. 5(k)(i) of the *Act*. The Union opposed the rescission application and argued that it ought to be dismissed, alleging that it had been made in whole or in part on the advice of, or as a result of the influence of, or interference or intimidation by, the Employer or an agent of the Employer within the meaning of s. 9 of the *Act*. The Union also argued that it filed an application for first collective agreement assistance (LRB File No. 181-04) with the Board on June 25, 2004 (the "first contract application") which should be dealt with in priority to the rescission application.

[8] Ms. Bressers subsequently went to a web site and obtained information about unions and the name of a lawyer who she could contact, Larry Seiferling. Ms. Bressers contacted Mr. Seiferling and retained him as her counsel. Mr. Seiferling provided Ms. Bressers with information about the "open period" and with a ballot for the rescission application.

[11] Through his cross-examination of Ms. Bressers, Mr. Plaxton attempted to demonstrate that the Employer was somehow involved in the making of the application for rescission. Ms. Bressers was adamant that she had never discussed anything to do with the Union or decertification with anyone in management and that the Employer knew nothing about her rescission application. The only information that she received from management was when she heard Mr. Marquis say at the focus group meeting that the internet had information relating to unions. She stated that she had already decided to bring the rescission application before she went to the web site.

ARGUMENT:
The Rescission Application

[61] Mr. Seiferling argued that there was no evidence to suggest that Ms. Bressers was motivated or was assisted in any way by anyone in the management of the Employer to make the rescission application. Mr. Seiferling argued that the Board should order a vote and that his client should be entitled to some costs as a result of there being no evidence to suggest Ms. Bressers' application was motivated by the Employer's conduct.

[62] Mr. Plaxton argued that the rescission application ought to be dismissed on the basis of s. 9 of the *Act*. He pointed to the fact that Ms. Bressers had no concrete arrangement with Mr. Seiferling in relation to the payment of her legal fees and asked the Board to draw the conclusion that the Employer was ultimately going to be paying the legal bill of Ms. Bressers. Counsel also argued that the Board should accept the words of Ms. McCullough-Boschman that, at a number of management meetings, Mr. Marquis stated that "the rescission application is going well."

[63] Mr. Plaxton argued that the Board could infer that Ms. Bressers was influenced by the Employer to bring the application because Ms. Bressers was given free reign at the workplace to proceed with the rescission application.

[64] Mr. Plaxton argued that the Board, if it was prepared to order a vote, should delay the vote until the first contract application has been dealt with. Mr. Plaxton argued that this was not a case where, if the Union was unsuccessful, costs should be awarded to Ms. Bressers.

[65] Mr. Wilson argued that there was no evidence of employer influence or even employer knowledge of the rescission application.

ANALYSIS:
The Rescission Application

[66] Instances of interference or influence by an employer or its agent in matters relating to applications for rescission of a certification order are not uncommon and are rarely overt. (See: *Reddekopp v. UFCW Local 1400 and Newswest Corp*., [2001] Sask. L.R.B.R. 174, LRB File No. 278-00, at 178.)

[67] In this case, there was initially some direct evidence that the Employer was involved in the rescission application. That evidence came from Ms. McCullough-Boschman when she stated during cross-examination that Mr. Marquis had advised management personnel, at a number of management meetings, “the rescission application is going well.” However, when Mr. Plaxton probed further with his questions, it became obvious that Ms. McCullough-Boschman was confusing the term rescission application,

with “contract negotiations.” She stated that the people involved in the rescission application needed time off, and she mentioned the names of two people who were on the Union’s bargaining committee. As such, the Board concludes that Ms. McCullough-Boschman was confused when she made this comment and that she was meaning to refer to contract negotiations.

[68] The Union attempted to rely on other pieces of evidence to argue that management was somehow involved in the rescission application. For example, counsel for the Union argued that Mr. Marquis had to know that the decertification application was taking place and that it affected his credibility when he stated that he did not know anything about the rescission application, in that he spent approximately 1 ½ to 2 hours on the store floor each day. Counsel for the Union suggested that if Mr.Marquis was being untruthful in this instance, then his testimony as a whole should not be believed.

[69] The Board found Mr. Marquis to be an extremely credible witness and accepts that he knew nothing about the rescission application and did nothing on behalf of the Employer to assist or influence the rescission application. His evidence was consistent with that of Ms. Smith, who testified that employees were discreet when discussing whether or not they supported the union while at the workplace.

[70] Ms. Bressers was also a believable witness. She did not support the Union from day one and attended at a union meeting following the certification of the Union to complain about some of the Union's tactics that she felt were improper. Ms. Smith testified that she recalled Ms. Bressers raising concerns at a union meeting about the Union's tactics during the organizing drive.

[71] The evidence established that Ms. Bressers was sincere in her desire to have a free vote with respect to whether or not the Union should represent the employees. There was no evidence that her reasons for bringing the application were influenced by the Employer.

[72] Counsel for the Union argued that the Board could infer that there was employer influence given the fact that Ms. Bressers did not know what her legal fees would be and what the payment structure would be.

[73] Counsel argued that it was just not plausible that Ms. Bressers would not know these costs and that, because she did not know these costs, she was not being truthful in her testimony and was having her legal fees paid by the Employer. Counsel also pointed to the fact that Mr. Seiferling represents Westfair Foods and that Mr. Marquis used to be a manager with Westfair Foods. As such, counsel asked the Board to infer that Mr. Seiferling was acting

on behalf of the Employer and that Mr. Marquis was being untruthful when he testified that he had nothing to do with the rescission application.

[74] Counsel for the Union attempted to argue that the case at hand had some similarities to the Board's decision in *Betty Wilson v. Remai Investment Co. Ltd and Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, [1990] Fall Sask. Labour Rep. 97, LRB File No. 088-90 where the Board considered the fact that the applicant could not say what her legal fees would amount to, or the rate at which they would be calculated.

[75] The Board is being asked to arrive at the conclusion that the Employer was paying Ms. Bressers' legal bill or that Mr. Seiferling was acting as an agent of the Employer. These are serious allegations, which would require much more evidence than was presented by the Union. The only evidence before the Board to substantiate these conclusions is that Ms. Bressers did not know what her legal bill would be and that Mr. Seiferling represented a former employer of Mr. Marquis.

[77] The fact that Ms. Bressers did not know what her legal bill would be, or the hourly rate that Mr. Seiferling was going to charge her, does not automatically lead to the conclusion that her legal bill is being paid by the Employer, or that somehow Mr. Seiferling is acting as an agent of the Employer. It is, however, a factor that the Board can consider in making its determination whether there has been employer influence.

LABOUR RELATIONS BOARD
Saskatchewan

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant v. SOBEYS CAPITAL INC. operating as VARSITY COMMON GARDEN MARKET, Respondent

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Vice-Chairperson, Wally Matkowski; Members: Duane Siemens and Joan White

For the Applicant: Larry Seiferling, Q.C.
For the Certified Union: Drew Plaxton
For the Employer: Kevin Wilson

Unfair labour practice – Dismissal for union activity – Probationary employee – Employee's employment terminated because employee unsuitable and failed to meet employer's expectations during probationary period – Employer advised employee of shortcomings well before decision made to terminate employment – No evidence that any type of union activity resulted in termination – Board finds no violation of s. 11(1)(e) of *The Trade Union Act*.

Decertification – Interference – Applicant did not know what legal fees would be or hourly rate at which fees would be calculated – Applicant's apparent lack of knowledge does not automatically lead to conclusion that legal fees being paid by employer but is factor Board can consider in making determination on existence of employer influence - Applicant's reasons for bringing application sincere – Board finds no employer influence pursuant to s. 9 of *The Trade Union Act*.

Decertification – Practice and procedure – Union asks for decertification vote to be postponed until first collective agreement concluded – Requirements for application for first collective agreement assistance not met – Board declines to postpone vote under circumstances.

Collective agreement – First collective agreement – Statutory preconditions – Union argues that Board may intervene even if Board determines that no violation of duty to bargain in good faith - Where no lock-out, strike vote or determination of failure to bargain in good faith, no necessity for Board to intervene in collective bargaining occurring between parties – Board dismisses application for first collective agreement assistance.

Remedy – Costs - Board's process does not allow for examination for discovery and instances of employer influence rarely overt – Counsel for union therefore had to extensively cross-examine employer witnesses as well as applicant in effort to obtain evidence of employer interference – Unions' ability to rely on s. 9 of *The Trade Union Act* could be adversely affected if Board started ordering costs in this type of case – Board declines to award costs.

***The Trade Union Act,* ss. 5(k), 9, 11(1)(c), 11(1)(e) and 26.5.**

REASONS FOR DECISION

Background:

[1] United Food and Commercial Workers, Local 1400 (the "Union"), is certified as the bargaining agent for a unit of employees of Sobey's Capital Inc., operating as Varsity Common Garden Market (the "Employer") by an Order of the Board dated November 7, 2003. Michelle Bressers filed an application for rescission of the certification Order (LRB File No. 227-04), pursuant to s. 5(k)(i) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") on September 13, 2004 (the "rescission application"). The rescission application was filed within the open period specified by s. 5(k)(i) of the *Act*. The Union opposed the rescission application and argued that it ought to be dismissed, alleging that it had been made in whole or in part on the advice of, or as a result of the influence of, or interference or intimidation by, the Employer or an agent of the Employer within the meaning of s. 9 of the *Act*. The Union also argued that it filed an application for first collective agreement assistance (LRB File No. 181-04) with the Board on June 25, 2004 (the "first contract application") which should be dealt with in priority to the rescission application.

[2] The Union challenged the accuracy of the statement of employment filed by the Employer. Following the hearing, the Union continued to challenge the following names: Brett Zabos, Kristyn Blight, Allyce Chapman, Ashley Mailloux, Rachel Munro, Dale Singh and Kaylene Heinrichs (the "late membership card employees"), on the basis that the Union did not receive a signed union membership card in a timely fashion from the Employer for the late membership card employees; and Renee Rieger and Chris Lester (the "transferred employees"), on the basis that the transferred employees were transferred in from other non-union work locations of the Employer and did not then sign union membership cards. No matter how the Board rules in relation to the Union's

objections as to the composition of the statement of employment, Ms. Bressers has filed evidence of support for the rescission application from a majority of employees listed on the statement of employment.

[3] The rescission application was heard at Saskatoon on January 31, February 1, 2 and 3, 2005 in conjunction with unfair labour practice, reinstatement and monetary loss applications (LRB File Nos. 255-04, 256-04 & 257-04) relating to the termination of John Sullivan's employment with the Employer (the "Sullivan applications"). In the Sullivan applications, the Union alleged that the Employer had committed unfair labour practices in violation of ss. 11(1)(a), (e) and (g) of the *Act*. The Employer denied the allegations in its reply. The Union filed an interim application pursuant to s. 5.3 of the *Act* in connection with the Sullivan applications, which was dismissed by the Board on January 17, 2005 in *United Food and Commercial Workers, Local 1400 v. Sobeys Capital Inc. operating as Varsity Common Garden Market*, [2005] Sask. L.R.B.R. ---, LRB File Nos. 255-04, 256-04 & 257-04 (not yet reported).

[4] The parties agreed that there would be some evidence that would be relevant for both the rescission application and the Sullivan applications. As such, these files were heard together. The parties also attempted to deal with the first contract application, but were unable to conclude this file. The Board heard the preliminary issue of whether the Union had met the statutory requirements necessary to have the Board determine the first contract application in Saskatoon on March 29, 2005.

Evidence:

[5] Ms. Bressers testified that she commenced employment with the Employer in 2002, prior to the Union's organizing drive. She testified that she was not a supporter of the Union during the organizing drive and that she is still not a supporter of the Union. She holds the in-scope position of front end supervisor and, besides dealing in the customer service area, she assigns breaks for the cashiers and assigns tills to the cashiers.

[6] Ms. Bressers testified that she was contacted a number of times by the Union during its organizing campaign, but that she refused to support the Union. She was not happy with some of the Union's tactics during the organizing campaign and

started a petition in opposition to those tactics. She also raised her concerns at a meeting of the Union. Since the Union became certified, Ms. Bressers has kept in touch with how bargaining has been proceeding, but she remains opposed to the Union.

[7] Prior to the certification Order being issued, Ms. Bressers attended a focus group meeting, which is a monthly meeting where employees from each department in the store attend and raise any concerns or issues that they or employees in their department may have. The attending employees are elected and a facilitator controls the agenda. Members of management are also in attendance at these monthly meetings. At one of these meetings, a question was asked on behalf of an employee about unions and whether more information could be obtained relating to unions. Len Marquis, the store manager, informed the attending employee representative that information about unions could be obtained on the internet.

[8] Ms. Bressers subsequently went to a web site and obtained information about unions and the name of a lawyer who she could contact, Larry Seiferling. Ms. Bressers contacted Mr. Seiferling and retained him as her counsel. Mr. Seiferling provided Ms. Bressers with information about the “open period” and with a ballot for the rescission application.

[9] Ms. Bressers did not provide Mr. Seiferling with a retainer and enjoyed a rather loose arrangement with respect to what her legal bill would be. Ms. Bressers testified that she never asked, and was never informed by Mr. Seiferling, how much his services would cost or what his hourly charge out rate was. She testified that she has no idea when she will be billed, but stated she expected to be billed. Ms. Bressers testified that she was not comfortable asking other employees to financially assist her in paying Mr. Seiferling’s legal bill. She testified that she had no knowledge that Mr. Seiferling had represented Westfair Foods in the past.

[10] During the re-examination of Ms. Bressers, which occurred on the day after her examination in chief, she testified that she had talked to her husband the previous evening and, following this discussion, she recalled that Mr. Seiferling had advised her that his bill would be ”very fair” or “very reasonable.” Her testimony

remained unchanged that no amount or payment schedule was ever discussed with Mr. Seiferling in relation to his legal fees.

[11] Through his cross-examination of Ms. Bressers, Mr. Plaxton attempted to demonstrate that the Employer was somehow involved in the making of the application for rescission. Ms. Bressers was adamant that she had never discussed anything to do with the Union or decertification with anyone in management and that the Employer knew nothing about her rescission application. The only information that she received from management was when she heard Mr. Marquis say at the focus group meeting that the internet had information relating to unions. She stated that she had already decided to bring the rescission application before she went to the web site.

[12] Ms. Bressers also stated that she talked to an in-scope employee who was employed in the office and obtained information about how many employees were employed at the store.

[13] Ms. Bressers testified that she talked to some fellow union members about her application at the workplace during breaks. She did not have a list of employees, but relied on her knowledge of employees from working at the location for the last three years. She talked briefly to Mr. Sullivan on one occasion and was advised by him that he was not in favour of the Union. She did not have a ballot, so did not obtain his signature at that time.

[14] Warren Underwood, Martha Smith and Shandel Telfer are employed by the Employer and testified on behalf of the Union in relation to the rescission application. Mr. Underwood testified that he came to work on one of his days off and had a discussion with Ms. Bressers. Ms. Bressers was on shift, as far as he knew, though he did not know when her breaks were that day. Ms. Bressers gave him a ballot and then left him alone. Mr. Underwood signed the ballot when Ms. Bressers was absent and testified that he did not read the ballot and only later found out that the ballot was against the Union. Mr. Underwood did not approach Ms. Bressers and ask for his ballot back or advise her that he did not know what he had signed.

[15] Ms. Smith, who is on the Union's bargaining committee, testified that she recalled being moved to another cashier's till, away from the customer service area, and that, after she had been moved, she observed Ms. Bressers and another individual signing papers. She did not know what was being signed and she testified that no management personnel were present when the papers were signed. She testified during cross-examination that she was aware that Ms. Bressers was not happy with the Union from day one and that Ms. Bressers was discreet when she had discussions with individual employees at the workplace. She testified that during the period of time when support for the rescission application was being garnered, there were discreet discussions among the employees about supporting or not supporting the Union at the workplace. She acknowledged that Ms. Bressers was responsible for signing "shift change documents."

[16] Ms. Telfer is on the Union's bargaining committee and testified that, in August, 2004, she observed two incidents involving Ms. Bressers. The first incident was when an individual was signing sheets with Ms. Bressers at the customer service area. Ms. Telfer did not observe what was being signed and conceded that it could have been work related documents that were being signed. The second incident was when she observed the store manager making a signal with his hands "as a signature gesture" towards Ms. Bressers and another individual. Ms. Telfer did not hear what was said or see if anything was signed. She did not ask the people involved what was happening or what they were doing. She acknowledged that Ms. Bressers worked in the customer service area and that employees are called to the customer service area to "sign things."

[17] Ms. Telfer worked with Mr. Sullivan. She testified that Mr. Sullivan liked to tell stories and that he was spoken to two or three times about this issue. She testified that Mr. Sullivan had talked to her about the Union for approximately fifteen minutes, at the workplace, a few days prior to his dismissal. In her opinion, he was still in the decision making process as to whether or not he should support the Union. She testified that Mr. Sullivan was loud and that she told him to be quiet. The end result of the discussion was that Mr. Sullivan advised her that he was "planning to join the Union" and he sounded positive about the Union. She testified that other co-workers were around when she and Mr. Sullivan had this discussion. A few days later, Mr. Sullivan's employment was terminated.

[18] Ms. Telfer was working the day Mr. Sullivan was let go. She testified that Myrna Janzen advised her that "Mr. Sullivan had to be let go," and that, because Jamie McCullough-Boschman was on holidays, Ms. Janzen had to be present. Ms. Telfer described Ms. Janzen as a non-aggressive, 50 year old woman who was upset after Mr. Sullivan was let go. Ms. Telfer testified that Ms. Janzen had advised her on a previous occasion that she had no power to hire or fire employees.

[19] Brandi Tracksell, a special projects representative of the Union, testified on behalf of the Union. She stated that, on September 24, 2004, she attended at the Employer's store and had a discussion with Ms. Janzen. Ms. Tracksell testified that Ms. Janzen advised her that she did not want to talk to Ms. Tracksell because she (Ms. Janzen) was "management." Ms. Tracksell then went to the fish department and was asked by the store manager, Mr. Marquis, to leave because he did not like her talking to his employees while they were working. Ms. Tracksell left the store, but had a lengthy discussion with another employee during the employee's break at the smoking area outside the store. Ms. Tracksell testified that a member of management remained close by until she left. (Even though this incident occurred after the rescission application was filed, the Board heard this evidence based on representations made by counsel for the Union that the Union's evidence would demonstrate a "pattern of conduct" by the Employer that would support the Union's argument of employer influence.)

[20] Amy Price testified on behalf of the Union. She is involved in the Union's administration of the membership cards that the Union receives. Her title, effective May, 2004, was membership services coordinator. She testified that, every month, approximately 350–450 new membership cards are processed. She testified that the Union did not receive membership cards for Brett Zabos, Ashley Mailloux, Kaylene Heinrichs, Adam Kohle or Rob Myers. (Counsel for the Union advised the Board that the Union was not contesting the names Kelly Ballan or Rebecca Graf). During cross-examination, Ms. Price testified that the Union had located a missing membership card and she testified that there is often a backlog of membership cards to be entered into the Union's system.

[21] Donald Logan, the Union's collective bargaining representative testified on behalf of the Union. He testified that, in February, 2003, the Union received a letter from the Employer (Exhibit U-7) which stated in part:

> *This is fair warning to the United Food and Commercial Workers through this letter to you it will be considered as trespassing if the practice of solicitation of our employees for membership in your union continues on our property without permission. Non compliance with this notice will result in any of a variety of actions including charges by police…etc.*

The Union did not file an unfair labour practice with respect to the letter.

[22] After the issuance of the certification Order, Mr. Logan testified that, following an exchange of correspondence between the Union and the Employer, the Employer agreed to carry out the provisions of s. 36 of the *Act* and "to have all new employees complete a union membership card." In relation to the transferred employees and the late membership card employees, the Union only became aware of their existence after reviewing the Employer's statement of employment, and their concern was that people would be hired to vote against the Union on the rescission application.

[23] Mr. Logan testified that the Union has not asked the Employer to fire any of the transferred employees as that would be a last resort, and only after the Union had obtained all the facts. Mr. Logan acknowledged that he had not talked or attempted to talk to any of the late membership card employees to see if they had signed cards after the fact. Counsel for the Union stipulated that the Union's present position is that it will not request union dues until it has obtained a first collective agreement and that all employees listed on the statement of employment were employed by the Employer on September 13, 2004.

[24] Mr. Sullivan testified on behalf of the Union. He started his employment with the Employer in approximately the third week of May, 2004 as a clerk, in the meal solutions department. He recalled that when he commenced his employment with the Employer he signed a stack of papers, including a union membership card.

[25] Mr. Sullivan testified that he received some training from the Employer and worked approximately 30-35 hours per week until he went back to school and worked approximately 20 hours per week thereafter. After working approximately two weeks at 20 hours per week, his employment was terminated by the Employer on September 13, 2004, just shy of the completion of his three month probationary period.

[26] Mr. Sullivan recalled receiving some complaints from both Ms. McCullough-Boschman and Ms. Janzen that he was talking too much and that he was not moving fast enough. He recalled receiving some complaints that he filled out some forms improperly, but testified that he was sick when he made the form entry errors. He acknowledged that he likes to talk and tell stories at the workplace. He recalled instances when he did not complete certain work tasks at the workplace, such as completing the making of pizzas or quesadillas. He recalled receiving complaints from a co-worker, Brenda, and was aware Brenda had gone to management to complain about him.

[27] Mr. Sullivan was presented during his cross examination with an affidavit filed in support of the Union's interim application which stated that he had "never received any formal discipline nor any complaint regarding my work since my employment commenced with this employer." Mr. Sullivan testified that he had been referring to "written warnings" and not verbal warnings in his affidavit and conceded that he had received complaints and that it was possible that he had received numerous complaints from his supervisor. He stated that he did not take some of these complaints as reprimands. He also recalled an incident when he made an inappropriate comment about a movie at the workplace, but stated that he apologized for making the inappropriate comment.

[28] Mr. Sullivan testified that he was approached at the workplace about signing in support of the rescission application on a number of occasions. On each occasion he stated that he would have to think about it. Finally, Mr. Sullivan provided his support for the rescission application in or around the third or fourth week of August, 2004. One of the people who had approached him about obtaining his signature was Ms. Janzen.

[29] Mr. Sullivan testified that he had a change of heart and advised a co-worker, on approximately September 12, 2004, that he was meeting with the Union that evening to "re-sign with the Union." He stated that Ms. Janzen was approximately 10 feet behind him when he mentioned this at the workplace and that, prior to this time, no one would have known that he had changed his mind about not supporting the Union. He testified that he did not know if Ms. Janzen heard him or not and he testified that he had not been hesitant to talk openly when Ms. Janzen was present. Mr. Sullivan met with the Union that evening and did in fact re-sign with the Union. Mr. Sullivan returned to work on September 13 or 14, 2004 and, 45 minutes into his shift, had his employment terminated. A manager of the Employer and Ms. Janzen were present at the termination meeting.

[30] Ms. McCullough-Boschman testified on behalf of the Employer. She holds the out-of-scope position deli-meal solutions manager and supervised Mr. Sullivan. She has held this position for the last year and a half and has approximately 24 employees who report to her. Ms. McCullough-Boschman testified that she has had no dealings with any employees relating to their support for or opposition to the Union and stated that all managers, including herself, were required to acknowledge acceptance of the following memorandum from the Mr. Marquis dated December 8, 2003:

> *Further to our recent meeting, the union recently organized employees of our Varsity Common store in Saskatoon. As we discussed, it is very important that all non-union management and staff do not discuss issues involving the union with bargaining unit employees. It is not appropriate to engage in such discussions or for you to make any personal comments regarding the union, even outside of working hours. If employees initiate union issues or discussions with you, please advise the employee that you are not in a position to engage in such discussions and report the incident to Jack Ferwerda. Breach of these rules would be considered very serious misconduct by Sobeys. Nothing prevents you from continuing to engage unionized employees on workplace issues and solving workplace problems. I encourage you to continue those activities as you did before to ensure the continued success of our operations. If there are any questions with regard to this memorandum, please contact me.*

[31] Ms. McCullough-Boschman testified that Mr. Sullivan was hired on June 15, 2004 and that he signed an "employee probationary period policy" document dated June 15, 2004, (Exhibit E-2) which stated:

> *During the first three(3) months of employment neither employee nor the Company, shall be required to give notice of termination or payment in lieu of. You enter into employment voluntarily, and you are free to resign at any time for any reason or no reason during the first 3 months of employment. Similarly, Sobeys is free to conclude its relationship with any employee at any time for any reason or no reason during their 3 months of employment.*

[32] While Ms. McCullough-Boschman was Mr. Sullivan's supervisor, his immediate supervisor was Ms. Janzen, an in-scope employee. After Mr. Sullivan received his job orientation, Ms. McCullough-Boschman testified that she received some complaints about Mr. Sullivan's work performance from Ms. Janzen and a new employee. The complaints were that Mr. Sullivan "talked to much," "got other staff to do his work," "left notes saying he couldn't get his work done'' and that he "tried to be the supervisor for the new employee." Ms. McCullough-Boschman testified that she raised these concerns with Mr. Sullivan.

[33] Ms. McCullough-Boschman testified that she records, on the back of her schedules, what went wrong during that particular week. Four weekly schedules covering the time frame August 1 – September 4, 2004 were entered as exhibits before the Board and contained notes complaining about Mr. Sullivan's work performance. For example, the following notation appears for August 7, 2004: "Myrna & I told John, less talking, more working. He moved that day, but slowed down after that."

[34] Ms. McCullough-Boschman's notation for August 15, 2004 reads in part:

> *Talk to John. Still talking more than working, & moving slow. Not doing his share of the work. Letting others do it for him. Told him to do less talking and if one person doesn't do their work, it puts all of us behind. He's older and experienced, I expect more from him.*

[35] Ms. McCullough-Boschman testified that she gave Mr. Sullivan a number of chances and only started making notes of her conversations with him referencing

incidents that occurred when she became more concerned about his work performance. She talked to the store manager, the assistant store manager (who she reports directly to) and Ms. Janzen about Mr. Sullivan's work performance but it was her decision, as deli-meal solutions manager, to terminate Mr. Sullivan's employment.

[36] Ms. McCullough-Boschman testified that she had discussions with Mr. Marquis and Ms. Janzen one week prior to dismissing Mr. Sullivan and that Ms. Janzen wanted Mr. Sullivan to be let go because he "wasn't doing his work." Ms. McCullough-Boschman conceded that the Employer moved quickly at the end, but stated that that was because Mr. Sullivan's probationary period was set to expire. She stated that she was not present at the termination meeting because she was on holidays, but the front end supervisor and Ms. Janzen were present at the meeting. The purpose of having Ms. Janzen present was so that she could advise Mr. Sullivan of his work performance problems. She stated that she had no idea whether Mr. Sullivan or Ms. Janzen supported or did not support the Union and that the only reason Mr. Sullivan's employment was terminated was because of his poor work performance.

[37] The notice of termination given to Mr. Sullivan states that his last day worked was September 14, 2004, and that he "didn't make probation."

[38] During cross-examination, Ms. McCullough-Boschman testified that, at a number of Monday management meetings, the store manager, Mr. Marquis mentioned that "the decertification was going well." When Mr. Plaxton continued on with his cross-examination, Ms. McCullough-Boschman provided names of two employees who were involved in the decertification process. These two people are union representatives on the Union's bargaining committee and Ms. McCoullough-Boschman testified that they required time off from work.

[39] Mr. Marquis, the store manager, testified on behalf of the Employer. He is responsible for everything at the store and oversees everything. He signed a document on December 8, 2003 that was similar to the one executed by Ms. McCullough-Boschman about not discussing the union with employees and provided it to the Saskatoon division district manager. Prior to being a store manager with the

Employer, Mr. Marquis had been a manager for Westfair Foods and had dealt with Mr. Seiferling.

[40] Mr. Marquis testified that the Employer has no role in the decertification process and he stated that he did not allow Ms. Bressers or anyone else free access at the store for the rescission drive. He testified that he spends 1 1/2 to 2 hours per day on the store floor and that he did not hear anything about a decertification. During cross-examination, he testified that he was friends with Lorissa, an in-scope employee, who was dating a manager from another Sobeys location and that he and the other Sobeys manager had gone golfing together on one occasion.

[41] With respect to the union membership cards, Mr. Marquis testified that, while he is not actually present when the membership cards are signed, the Employer's normal practice is to send a copy of the signed union membership card to the Union within 2-4 weeks of the card being signed. The Employer maintains a carbon copy of the signed card on its files and copies of the carbons for the late membership card employees (all cards were dated prior to September 9, 2004), were filed as exhibits before the Board. The membership cards also authorize the Employer to deduct union dues and submit them to the Union.

[42] Mr. Marquis testified that, while he did not contact the late membership card employees directly, to the best of his knowledge the cards were signed by the said individuals on the dates set out on the carbon copies of the cards.

[43] With respect to the transferred employees, Mr. Marquis testified that he thought that, because these people were previous hires, the Employer was not required to have them sign union membership cards. The individuals were transferred in March and May, 2004 and no evidence was presented to indicate that the transferred employees had anything to do with the rescission application.

[44] Mr. Marquis testified that Ms. McCullough-Boschman was confused when she testified that he said the rescission was going well and he denied saying what Ms. McCullough-Boschman alleges he said. Mr. Marquis testified that the two people Ms. McCullough-Boschman named in relation to the rescission application were two

employees who sit on the Union's bargaining committee and that these two employees obtained time off for collective bargaining on behalf of the Union.

[45] Mr. Marquis testified that he was not aware of Mr. Sullivan's union beliefs or whether or not Mr. Sullivan supported the rescission application. He testified that Ms. McCullough-Boschman spoke to him a number of times about Mr. Sullivan's work performance problems and that one of the conversations occurred close to the end of Mr. Sullivan's probationary period. Mr. Marquis advised Ms. McCullough-Boschman to document any problems and he reminded her of the three month probationary period. He testified that it was Ms. McCullough-Boschman's ultimate decision to terminate Mr. Sullivan's employment and that, from his perspective, the presence of the Union had nothing to do with the Employer terminating Mr. Sullivan's employment. While Mr. Marquis was not present for the termination meeting, he signed the termination notice, which he described as an administrative form.

[46] Present at the termination meeting was a management representative, as well as Ms. Janzen. Mr. Marquis testified that Ms. Janzen was present because Ms. McCullough-Boschman was off that day and because Ms. Janzen had first hand knowledge of Mr. Sullivan's work performance difficulties.

[47] Mr. Marquis testified that he has never seen Exhibit U-7, the letter threatening the Union if it continued to solicit employees for union membership while on employer property and that, with respect to the September 24, 2004 incident involving Ms. Tracksell, he watched Ms. Tracksell talking with an employee for four to five minutes, then politely asked her to leave, because the employee was supposed to be working. While he had no first hand knowledge, he had been advised by other management persons that other union representatives had come to the Employer's store on previous occasions.

Statutory Provisions:

[48] Relevant provisions of the *Act* include the following:

> *5 The board may make orders:*

(k) rescinding or amending an order or decision of the board made under clause (a), (b) or (c) where:

(i) there is a collective bargaining agreement in existence and an application is made to the board to rescind or amend the order or decision during a period of not less than 30 days or more than 60 days before the anniversary of the effective date of the agreement; or

...

notwithstanding that a motion, application, appeal or other proceeding in respect of or arising out of the order or decision is pending in any court.

. . .

9 The board may reject or dismiss any application made to it by an employee or employees where it is satisfied that the application is made in whole or in part on the advice of, or as a result of influence of or interference or intimidation by, the employer or employer's agent.

. . .

11(1) It shall be an unfair labour practice for an employer, employer's agent or any other person acting on behalf of the employer:

(a) in any manner, including by communication, to interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of any right conferred by this Act;

. . .

(e) to discriminate in regard to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including discharge or suspension or threat of discharge or suspension of an employee, with a view to encouraging or discouraging membership in or activity in or for or selection of a labour organization or participation of any kind in a proceeding under this Act, and if an employer or an employer's agent discharges or suspends an employee from his employment and it is shown to the satisfaction of the board that employees of the employer or any of them had exercised or were exercising or attempting to exercise a right under this Act, there shall be a presumption in favour of the employee that he was discharged or suspended contrary to this Act, and the burden of proof that the employee was discharged

> *or suspended for good and sufficient reason shall be upon the employer; but nothing in this Act precludes an employer from making an agreement with a trade union to require as a condition of employment membership in or maintenance of membership in the trade union or the selection of employees by or with the advice of a trade union or any other condition in regard to employment, if the trade union has been designated or selected by a majority of employees in any such unit as their representative for the purpose of bargaining collectively;*
>
> *. . .*
>
> *(g) to interfere in the selection of a trade union as a representative employees for the purpose of bargaining collectively;*

. . .

> *26.5(1) Either party may apply to the board for assistance in the conclusion of a first collective bargaining agreement, and the board may provide assistance pursuant to subsection (6), if:*
> *. . .*
> *(c) any of the following circumstances exist:*
>
> *(i) the trade union has taken a strike vote and the majority of those employees who voted have voted for a strike;*
>
> *(ii) the employer has commenced a lock-out; or*
>
> *(iii) the board has made a determination pursuant to clause 11(1)(c) or 11(2)(c) and, in the opinion of the board, it is appropriate to assist the parties in the conclusion of a first collective bargaining agreement pursuant to subsection (6).*

ARGUMENT:

The Sullivan Applications

[49] Counsel for the Union argued that the Employer had not satisfied the burden of proof which s. 11(1)(e) of the *Act* places upon it to show that the Employer had not discharged Mr. Sullivan as a result of union activity but for good and sufficient reason. Counsel argued that the timing of Mr. Sullivan's dismissal, shortly after he had advised Ms. Telfer that he was going to support the Union, "spoke very loudly." Counsel

argued that the Board could draw a negative inference against the Employer because it did not call Ms. Janzen as a witness.

[50] Counsel for the Employer argued that Mr. Sullivan was discharged for good and sufficient reason, which had nothing to do with his or any type of union activity. Counsel argued that the Employer had presented a paper trail of evidence which demonstrated that Mr. Sullivan was terminated during his probationary period for work deficiencies. Counsel argued that the Board should look at the timing of when the rescission application was signed, which was prior to the dismissal of Mr. Sullivan.

[51] Counsel argued that Mr. Sullivan was not a key union figure but was a part-time employee, who had yet to complete his probationary period and who, in fact, was originally opposed to the Union. Finally, counsel argued that there was no requirement for the Employer to call Ms. Janzen as a witness given that she was a union member and not a member of management and not the person who made the decision to fire Mr. Sullivan.

ANALYSIS:

The Sullivan Applications

[52] Counsel for the Employer accepted that the Employer had to establish that its reasons for terminating Mr. Sullivan's employment were unrelated to union activity and constituted "good and sufficient reason." The Employer provided compelling evidence that Mr. Sullivan's employment was terminated because he was an unsuitable employee who failed to meet the Employer's expectations during his probationary period. Even one of the Union's witnesses smiled when testifying that Mr. Sullivan "liked to talk."

[53] Mr. Sullivan, for the most part, did not deny that he had been talked to about his work performance, though Mr. Sullivan did not characterize these talks as "disciplinary." The evidence established that Mr. Sullivan was not a strong employee, and that the Employer advised Mr. Sullivan of his shortcomings well before the decision was made to terminate his employment.

[54] This does not end the matter. The Union's main argument is that the Employer did not provide any credible explanation for the coincidence of timing of Mr. Sullivan's decision to no longer support the rescission application but to support the Union, and the termination of his employment. As such, the Board carefully reviewed the evidence immediately prior to Mr. Sullivan's dismissal to ensure the termination of Mr. Sullivan's employment was unrelated to union activity.

[55] Mr. Sullivan testified that, prior to September 9, 2004, no one would have known that he was changing his mind and supporting the Union. This is significant in that the rescission application is dated September 9, 2004. The evidence indicated that Mr. Sullivan had advised a few people that he did not favour the Union and, in fact, he had provided his signature in support of the rescission application in August, 2004.

[56] Sometime during the time period of September 9 to 13 2004, Mr. Sullivan advised Ms. Telfer that he was meeting with union officials and that he would be supporting the Union. Mr. Sullivan testified that Ms. Janzen was approximately ten feet behind him at work and that he had no idea if Ms. Janzen heard him talking or not. On September 14, 2004 Mr. Sullivan's employment was terminated, with Ms. Janzen being present at the termination meeting.

[57] The Union's theory is that Ms. Janzen heard Mr. Sullivan state that he was now going to support the Union, in the sense that he would not be supporting the rescission application, and that Ms. Janzen must have told Ms. Bressers, who then ensured that Mr. Sullivan was fired. In the alternative, Ms. Janzen could have directly told someone from management that Mr. Sullivan was not supporting the rescission application and asked or directed that Mr. Sullivan be fired. Another theory was that Lorissa, a co-worker, who was supporting the rescission application and was dating a manager from a different store (who had golfed with Mr. Marquis on at least one occasion), had advised Mr. Marquis that Mr. Sullivan was no longer supporting the rescission application and directed that Mr. Sullivan be fired. The Union's theories were long on speculation and short on fact, with the only theory requiring any response being that involving Ms. Janzen.

[58] There was no evidence that Ms. Janzen heard Mr. Sullivan say, on approximately September 9, 2004, that he was no longer going to support the rescission application. Even assuming that Ms. Janzen did hear Mr. Sullivan state that he was going to support the Union and not the rescission application, there was no credible evidence to allow the Board to somehow assume or infer that Ms. Janzen then told someone in management that Mr. Sullivan was no longer supporting the rescission application. Likewise, there was no evidence to demonstrate that Ms. Janzen, who is an in-scope employee, held some level of control over Mr. Marquis or Ms. McCullough-Boschman so that Ms. Janzen could ensure that Mr. Sullivan was fired or so that she could ensure other employees who would not support the rescission application were fired.

[59] The Union argued that a negative inference could be drawn because the Employer did not call Ms. Janzen as a witness before the Board. There was, however, no evidentiary requirement for the Employer to call Ms. Janzen as a witness. The evidence clearly established that Ms. McCullough-Boschman made the decision to terminate Mr. Sullivan's employment prior to the expiration of his probationary period. Ms. Janzen, as Mr. Sullivan's in-scope supervisor, was present at the termination meeting because Ms. McCullough-Boschman was not at work that day and Ms. Janzen's role was to respond to any inquiries from Mr. Sullivan about his work performance.

[60] For the foregoing reasons, the Sullivan applications are dismissed as Mr. Sullivan's employment was not terminated as a result of any type of union activity.

ARGUMENT:

The Rescission Application

[61] Mr. Seiferling argued that there was no evidence to suggest that Ms. Bressers was motivated or was assisted in any way by anyone in the management of the Employer to make the rescission application. Mr. Seiferling argued that the Board should order a vote and that his client should be entitled to some costs as a result of there being no evidence to suggest Ms. Bressers' application was motivated by the Employer's conduct.

[62] Mr. Plaxton argued that the rescission application ought to be dismissed on the basis of s. 9 of the *Act*. He pointed to the fact that Ms. Bressers had no concrete arrangement with Mr. Seiferling in relation to the payment of her legal fees and asked the Board to draw the conclusion that the Employer was ultimately going to be paying the legal bill of Ms. Bressers. Counsel also argued that the Board should accept the words of Ms. McCullough-Boschman that, at a number of management meetings, Mr. Marquis stated that "the rescission application is going well."

[63] Mr. Plaxton argued that the Board could infer that Ms. Bressers was influenced by the Employer to bring the application because Ms. Bressers was given free reign at the workplace to proceed with the rescission application.

[64] Mr. Plaxton argued that the Board, if it was prepared to order a vote, should delay the vote until the first contract application has been dealt with. Mr. Plaxton argued that this was not a case where, if the Union was unsuccessful, costs should be awarded to Ms. Bressers.

[65] Mr. Wilson argued that there was no evidence of employer influence or even employer knowledge of the rescission application.

ANALYSIS:

The Rescission Application

[66] Instances of interference or influence by an employer or its agent in matters relating to applications for rescission of a certification order are not uncommon and are rarely overt. (See: *Reddekopp v. UFCW Local 1400 and Newswest Corp*., [2001] Sask. L.R.B.R. 174, LRB File No. 278-00, at 178.)

[67] In this case, there was initially some direct evidence that the Employer was involved in the rescission application. That evidence came from Ms. McCullough-Boschman when she stated during cross-examination that Mr. Marquis had advised management personnel, at a number of management meetings, "the rescission application is going well." However, when Mr. Plaxton probed further with his questions, it became obvious that Ms. McCullough-Boschman was confusing the term rescission

application, with “contract negotiations.” She stated that the people involved in the rescission application needed time off, and she mentioned the names of two people who were on the Union’s bargaining committee. As such, the Board concludes that Ms. McCullough-Boschman was confused when she made this comment and that she was meaning to refer to contract negotiations.

[68] The Union attempted to rely on other pieces of evidence to argue that management was somehow involved in the rescission application. For example, counsel for the Union argued that Mr. Marquis had to know that the decertification application was taking place and that it affected his credibility when he stated that he did not know anything about the rescission application, in that he spent approximately 1 1/2 to 2 hours on the store floor each day. Counsel for the Union suggested that if Mr. Marquis was being untruthful in this instance, then his testimony as a whole should not be believed.

[69] The Board found Mr. Marquis to be an extremely credible witness and accepts that he knew nothing about the rescission application and did nothing on behalf of the Employer to assist or influence the rescission application. His evidence was consistent with that of Ms. Smith, who testified that employees were discreet when discussing whether or not they supported the union while at the workplace.

[70] Ms. Bressers was also a believable witness. She did not support the Union from day one and attended at a union meeting following the certification of the Union to complain about some of the Union’s tactics that she felt were improper. Ms. Smith testified that she recalled Ms. Bressers raising concerns at a union meeting about the Union’s tactics during the organizing drive.

[71] The evidence established that Ms. Bressers was sincere in her desire to have a free vote with respect to whether or not the Union should represent the employees. There was no evidence that her reasons for bringing the application were influenced by the Employer.

[72] Counsel for the Union argued that the Board could infer that there was employer influence given the fact that Ms. Bressers did not know what her legal fees would be and what the payment structure would be.

[73] Counsel argued that it was just not plausible that Ms. Bressers would not know these costs and that, because she did not know these costs, she was not being truthful in her testimony and was having her legal fees paid by the Employer. Counsel also pointed to the fact that Mr. Seiferling represents Westfair Foods and that Mr. Marquis used to be a manager with Westfair Foods. As such, counsel asked the Board to infer that Mr. Seiferling was acting on behalf of the Employer and that Mr. Marquis was being untruthful when he testified that he had nothing to do with the rescission application.

[74] Counsel for the Union attempted to argue that the case at hand had some similarities to the Board's decision in *Betty Wilson v. Remai Investment Co. Ltd and Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, [1990] Fall Sask. Labour Rep. 97, LRB File No. 088-90 where the Board considered the fact that the applicant could not say what her legal fees would amount to, or the rate at which they would be calculated.

[75] The Board is being asked to arrive at the conclusion that the Employer was paying Ms. Bressers' legal bill or that Mr. Seiferling was acting as an agent of the Employer. These are serious allegations, which would require much more evidence than was presented by the Union. The only evidence before the Board to substantiate these conclusions is that Ms. Bressers did not know what her legal bill would be and that Mr. Seiferling represented a former employer of Mr. Marquis.

[76] In the decision *Newnham v. International Association of Heat & Frost Insulators and Asbestos Workers, Local 119 and Earl's Mechanical Insulation Ltd.*, [2004] Sask. L.R.B.R. 37, LRB File No. 014-04, the Board states at 42:

> *... not every suspicious or questionable act or circumstance will necessarily lead to the conclusion that an application has been made as a result of influence or intimidation by the employer.*

[77] The fact that Ms. Bressers did not know what her legal bill would be, or the hourly rate that Mr. Seiferling was going to charge her, does not automatically lead to the conclusion that her legal bill is being paid by the Employer, or that somehow Mr. Seiferling is acting as an agent of the Employer. It is, however, a factor that the Board can consider in making its determination whether there has been employer influence.

[78] In *Newnham, supra*, the Board found, based on a number of factors, that it could infer employer influence. The Board set out the evidence that it considered at 43 and 44:

> *... the parent and daughter relationship between the Employer's principal and its registered directors and the Applicant; the comments made and views expressed by the Employer's principal to the Applicant regarding the Employer's operation as a unionized employer and complaints about the Union over time; the Applicant seeking the opinion of the Employer's principal as to whether she should make the application; the Employer's attempt to individually negotiate directly with one of the employees shortly before the application was made with respect to circumventing union security obligations and contribution to industry benefit plans; the Employer's failure to remit some required deductions and contributions for industry benefit plans on behalf of the Applicant and others; the Employer's failure to abide by its collective agreement obligations with respect to the use of the Union's hiring hall procedure in the hiring of employees; and the Employer's apparent failure to abide by collective agreement obligations with respect to the layoff of an employee shortly before the application was made.*

[79] In the case at hand, there is not the wealth of evidence set out in *Newnham, supra*, that would allow the Board to arrive at the determination that the Employer is paying Ms. Bressers' legal bill or that Mr. Seiferling, unbeknownst to his client, is also acting on behalf of the Employer.

[80] The Union also attempted to lead evidence to establish that the Employer's actions in sending the December, 2003 letter to the Union and the Employer's actions with Ms. Tracksell on September 24, 2004 had an intimidating effect on the Union's members within the meaning of s. 9 of the *Act.*

[81] The Board rejects this argument. The September 24, 2004 incident occurred after the rescission application was filed and was not part of any "pattern of conduct" by the Employer. The December, 2003 letter that warned the Union about attempting to organize the Employer's stores (Exhibit U-7) was addressed to Mr. Logan. No unfair labour practice was filed and Mr. Logan did not testify that the Union halted any organizing drive. The fact is that the Employer was certified approximately one year later.

[82] Finally, there was no evidence that Ms. Bressers was given "free reign" by the Employer during the decertification drive. As such, the Board finds no employer influence, pursuant to s. 9 of the *Act*, which would cause it to dismiss the rescission application.

ARGUMENT:

First Contract Application

[83] Counsel for the Union argued that the Board should postpone ordering a vote in the rescission application until the first contract application has been dealt with. Counsel argued that the Board should follow the "first in, first out" policy of the Board as set out in the decision *National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) v. Saskatchewan Indian Gaming Authority Inc.,* [2001] Sask. L.R.B.R. 42, LRB File No. 092-00.

[84] Counsel for the Employer argued that the Board's policy as set out in *Saskatchewan Indian Gaming Authority Inc.*, *supra*, was inapplicable, in that the Union had not met the statutory preconditions set out in s. 26.5 of the *Act* necessary for the Board to even become involved. Counsel agreed that this issue should be dealt with as a preliminary matter.

ANALYSIS:

First Contract Application

[85] Counsel for the Union conceded that the Union had not taken a strike vote or been locked out by the Employer. However, in its application, the Union

"suggests it is not likely the parties will be able to reach a first collective agreement in a timely fashion without the Board's assistance." With respect to the portion of the first contract application that states "Strike vote/lock out/unfair labour practice orders," the Union provided: "see LRB File No. 003-04."

[86] LRB File No. 003-04 was filed by the Union in January, 2004 and contained allegations that the Employer was guilty of failing to bargain in good faith as required by s. 11(1)(c) of the *Act*. After the final hearing day on September 17, 2004, the Board rendered its decision in *United Food and Commercial Workers, Local 1400 v. Sobeys Capital Inc. operating as Varsity Common Garden Market*, [2004] Sask. L.R.B.R. ---, LRB File No. 003-04 (not yet reported) on November 4, 2004 and found the Employer had not bargained in bad faith and was not guilty of an unfair labour practice. Counsel acknowledged this finding, but argued that the wording of s. 26.5(1)(iii) simply calls for a "determination" by the Board, not a "positive determination" by the Board.

[87] In the decision *Evans v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-CANADA) and Saskatchewan Indian Gaming Authority cob as Northern Lights Casino,* [2002] Sask. L.R.B.R. 313, LRB File No. 258-00, the Board stated at 330:

> *... because under s. 26.5 an applicant union must either have a strike mandate or successfully assert that the Employer is guilty of a failure to bargain in violation of s. 11(1)(c) of the Act, and forfeits its right to strike while the first contract application is pending, the Board should not entertain a rescission application until after a first contract is achieved.*

[88] The Board's logic in *Evans, supra*, is consistent with the Board's decision in *National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) v. Saskatchewan Indian Gaming Authority Inc.,* [2001] Sask. L.R.B.R. 704, LRB File No. 092-00 at 710:

> *There are two stages to the process of hearing an application for first collective agreement assistance under s. 26.5 of the Act. In the first stage, the Board must determine if it will provide assistance to the parties. In order to determine this question, the Board must initially determine that the factors listed in subparagraphs (a), (b) and (c), are present before proceeding further with the application.*

See also: *Glas v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Loraas Disposal Services Ltd.,* [1999] Sask. L.R.B.R. 123 at 126, LRB File No. 031-99.

[89] Counsel for the Union acknowledged the *Evans, supra*, and *Saskatchewan Indian Gaming Authority Inc., supra*, decisions, but argued that they wrongly deviate from the Board's ruling in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Prairie Micro-Tech Inc.,* [1996] Sask. L.R.B.R. 36, LRB File No. 201-95. In *Prairie Micro Tech, supra*, the Board stated at 49:

> *The third requires the Board to examine the conduct of either or both of the parties in the light of the obligation to bargain set out in ss. 11(1)(c) and 11(2)(c). Our reading of s.26.5(1)(c)(iii) is that even if the Board determines that there has been no violation of the duty to bargain collectively, it is open to us to decide that it would be appropriate to assist the parties in the conclusion of a first collective agreement.*

(See also *Board of Education of the Tisdale School Division No. 53 v. Canadian Union of Public Employees, Local 3759,* [1996] Sask. L.R.B.R. 503, LRB File No. 078-96)

[90] Both *Prairie Micro-Tech. Inc.*, *supra*, and *Tisdale School Division, supra,* were among the first applications made to the Board under s. 26.5 of the *Act*. In neither case did the Board find a breach of the duty to bargain. The Board accepts the reasoning set out in *Evans, supra*, that a union must successfully assert that an employer is guilty of a failure to bargain in violation of s. 11(1)(c) of the *Act* and will not expand the principles therein and delay a rescission application when the employer has not been found guilty of a failure to bargain in good faith. If there is no lock-out, no strike vote and no determination of bad faith bargaining, there is no necessity for the Board to intervene in collective bargaining that is occurring between the parties.

[91] The Board's logic in *Evans, supra*, and *Saskatchewan Indian Gaming Authority Inc., supra*, is that s. 26.5(1)(c) sets out a three part objective test that the Board must consider, prior to the Board making the subjective determination whether or not it is appropriate to assist the parties in the conclusion of a first collective bargaining agreement. To accept the logic set out in *Prairie Micro-Tech. Inc.*, *supra*, would remove the objective component set out in s. 26.5(1) of the *Act*.

[92] Therefore, the Board will not postpone the vote in the rescission application given that the requirements set out in s. 26.5 of the *Act* have not been met. As such, the first contract application is dismissed.

ANALYSIS:

Statement of Employment

[93] As stated earlier, no matter what the Board ruling is in regard to the composition of the statement of employment, Ms. Bressers has filed evidence of majority support for her application and, as such, we direct that a vote be conducted among the members of the bargaining unit in the usual manner.

[94] With respect to the composition of the statement of employment, counsel for the Union pointed to the decision *Sinnaeve v. Johnson Controls Ltd. and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 179,* [1990] Fall Sask. Labour Rep. 49, LRB File No. 243-89. In *Sinnaeve, supra*, the Board stated, at 55, that:

> *Complying with the obligation to acquire or maintain membership in the union, in addition to possessing employee status, are the criteria for participation in the representation question.*

[95] It is not necessary for the Board to determine if membership cards for the late membership card employees were lost or misplaced by the Employer, the Union, or Canada Post. Accepting the principle as set out in *Sinnaeve*, *supra*, the late membership card employees are all properly listed on the statement of employment. They have all signed union cards and possess employee status. There was no evidence that these employees were hired by the Employer to vote for the rescission application and there was no evidence that the Employer or anyone else doctored the dates listed on the membership cards signed by the late membership card employees.

[96] With respect to the transferred employees, there was also no evidence that these employees were transferred in by the Employer to vote on the rescission application. One employee was transferred in March and the other in May. However,

they did not sign union membership cards as the Employer was of the belief that they were not required to do so.

[97] The Employer's belief that the transferred employees did not have to sign union membership cards because they were not new employees is erroneous. In *Ackerman v. United Brotherhood of Carpenters and Joiners of America, Local 1990 and Ens Construction Ltd.*, [1985] Aug. Sask. Labour Rep. 41, LRB File No. 105-85, the Board stated at 43:

> *For the purposes of Section 36, employment is considered to commence when an employee begins working for an employer in the area described in the certification order, whether it be in the construction industry or in any other industry.*

[98] The Union had requested that the Employer comply with s. 36 of the Act. The Employer agreed with this request. Upon the transferred employees commencing employment at the Employer's unionized store, they were required to sign a union membership card. While there was no evidence as to whether or not the transferred employees were or would be prepared to sign a union membership card (it could be argued that the transferred employees knew or should have known that the store was certified), the key element, from the Board's perspective, must be that the Union was never given the opportunity to ask the Employer to terminate the employment of the transferred employees as a result of the transferred employees failure to sign a union membership card. As set out in the evidence, the Union was not aware of the existence of the transferred employees until they reviewed the statement of employment.

[99] Given the facts before the Board, there is no reason for the Board to deviate from the rationale set out in *Sinnaeve*, *supra*, that the transferred employees needed to be Union members so that they could participate in the representation question. Therefore, the transferred employees will not be included on the statement of employment. (At the March 29, 2005 hearing, counsel for the Employer advised the Board that only one of the transferred employees was still working at the store).

[100] Board Member White would have allowed the transferred employees to remain on the statement of employment, based on the fact that there was no evidence of

improper employer motive in not having the transferred employees sign membership cards and no evidence of improper conduct on the part of the transferred employees.

ANALYSIS:

Costs

[101] Counsel for Ms. Bressers sought some level of costs on behalf of his client. He argued that it was unfair for his client to have to participate in four days of hearing to determine if a vote should be ordered. While the Board has some level of sympathy for Ms. Bressers, s. 9 of the *Act* clearly allows the Board to dismiss any application where it is satisfied that there has been some level of employer influence. Given that the Board's process does not allow for any type of examination for discovery and that instances of employer influence are rarely overt, counsel for the Union was required to extensively cross-examine employer witnesses as well as Ms. Bressers in an effort to obtain evidence of employer interference. The Union's ability to utilize s. 9 of the *Act* could be adversely affected if the Board started ordering costs in this type of case. The Union did nothing improper in attempting to utilize s. 9 of the *Act*.

[102] Fortunately, most rescission applications are not this lengthy and are not coupled with any other applications. In this case, it made sense for the Sullivan applications to be heard with the rescission application, because some of the evidence overlapped and because, if the Union had been successful in the Sullivan applications, this could have been a factor for the Board to consider in the rescission application.

DATED at Regina, Saskatchewan, this **6th** day of **April, 2005.**

LABOUR RELATIONS BOARD

Wally Matkowski
Vice Chairperson

The Labour Relations Board
Saskatchewan

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant v. SOBEY'S CAPITAL INC. operating as VARSITY COMMON GARDEN MARKET, Respondent

MICHELLE BRESSERS, Applicant v. UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400 and SOBEY'S CAPITAL INC. operating as VARSITY COMMON GARDEN MARKET, Respondents

LRB File Nos. 181-04 & 227-04, September 14, 2005
Vice-Chairperson, Wally Matkowski; Members: Duane Siemens and Clare Gitzel

For Michelle Bressers:	Larry Seiferling, Q.C.
For the Union:	Drew Plaxton
For the Employer:	Kevin Wilson

Reconsideration – Criteria – Board reviews grounds on which applications for reconsideration may be granted – Board concludes that criteria not met and dismisses application for reconsideration.

Reconsideration – Practice and procedure – Party applying for reconsideration must first establish sufficient grounds to warrant reconsideration before Board will proceed to hear and determine reconsideration application – Reconsideration not to be used as appeal – Board determines that not sufficient grounds to warrant reconsideration and dismisses application for reconsideration.

Reconsideration – Practice and procedure – Original Board decision on first contract application followed most recent Board precedents on interpretation of s. 26.5 of *The Trade Union Act* – Board dismisses application for reconsideration.

***The Trade Union Act*, s. 13.**

REASONS FOR DECISION

Background:

[1] United Food and Commercial Workers, Local 1400, (the "Union") applied to the Board for reconsideration of the Board's decision in *United Food and Commercial Workers, Local 1400 v. Sobey's Capital Inc. operating as Varsity Common Garden Market; Michelle Bressers v. United Food and Commercial Workers, Local 1400 and Sobey's Capital Inc. operating as Varsity Common Garden Market*, [2005] Sask. L.R.B.R. 68, LRB File Nos. 181-04, 227-04, 255-04, 256-04 & 257-04 (the "original decision"). The original decision was a ruling

dated April 6, 2005, provided by a panel consisting of Vice-Chairperson Matkowski and Board Members White and Siemens (the "original panel"). Board Member White became unavailable for the reconsideration hearing and was replaced by Board Member Gitzel (the "revised panel").

[2] In LRB File No. 181-04, the Union filed an application for first collective agreement assistance (the "first contract application"). In the original decision, the Board ruled that the Union had not met the requirements of s. 26.5 of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*") and therefore did not delay ordering a vote in LRB File No. 227-04 (the "rescission application"). In the rescission application, the Board ruled that there had been no employer influence, pursuant to s. 9 of the *Act* that would cause the Board to dismiss the application.

[3] The Union made the reconsideration application on the following grounds:

a) The decision turns on conclusions of law and general policy, which were not properly interpreted by the original panel.

b) The decision is precedential and amounts to a significant policy adjudication, which the Board may wish to change.

c) The same constitutes a significant error of law.

d) The same constitutes a significant and unwarranted departure from previous jurisprudence of the Board.

e) The same is made upon a misapprehension and misinterpretation of the evidence lead, inferences from same and the law applicable to the matters at hand.

f) Such further and other grounds as counsel may advise and the Board allow.

[4] The Union also requested in its reconsideration application that "the matter within be heard by an expanded and/or alternate Panel of the Labour Relations Board as determined by the Labour Relations Board or the Minister of Labour." At the hearing, counsel for the Union argued that the revised panel should "step aside, and/or refer this matter back to the Chair of the Board for submissions as to the composition of the panel." Counsel for the Union argued that

stakeholders were entitled to know what the rules are when the Chairperson of the Board assigns panels for reconsiderations.

[5] The revised panel rejected the Union's argument that the matter of the composition of the Board should be referred back to the Chairperson of the Board and advised the parties that the revised panel would hear the reconsideration application. While the assignment of a panel to hear a case is an administrative decision, the Board's normal policy is that a reconsideration hearing is dealt with by the original panel when possible.

[6] The revised panel verbally ruled that the Union had failed to establish that reconsideration was warranted in the circumstances and dismissed the reconsideration application as it related to the rescission application. The revised panel heard full reconsideration arguments in the first contract application.

Reconsideration Criteria:

[7] The Board has dealt with a number of reconsideration applications over the last two years and has consistently applied the same stringent test in determining whether or not a reconsideration application should be allowed. As set out by the Board in *Grain Services Union v. Saskatchewan Wheat Pool et al.*, [2003] Sask. L.R.B.R. 454, LRB File No. 003-02, at 456:

> *A request for reconsideration is not an appeal or a hearing de novo, nor is it an opportunity to reargue a case, raise new arguments or present new evidence, but rather, it generally allows important policy issues to be addressed, such as evidence to be presented that was not previously available, or errors to be corrected.*

(See also: *United Brotherhood of Carpenters and Joiners of America, Local 1985 et al v. Graham Construction and Engineering Ltd. et al*, [2004] Sask. L.R.B.R. 142, LRB File Nos. 014-98 & 227-00.)

[8] The Board, in *Rattray v. Saskatchewan Government and General Employees' Union*, [2003] Sask. L.R.B.R. 528, LRB File No. 011-03, stated that there must be some solid grounds to persuade the Board to exercise its discretion to embark upon reconsideration of an original Board decision.

[9] The reason why such a stringent test is applied by the Board was set out in *City of North Battleford v. Canadian Union of Public Employees, Local 287*, [2003] Sask. L.R.B.R. 288, LRB File No. 054-01 at 291:

> *…the policy behind such a restrictive approach to reconsideration is to accord a serious measure of certainty and finality to the decisions of the Board, while affording "a fulsome degree of flexibility to respond to exigencies of fact and circumstance which may militate against the continued governance of determinations earlier made."*

[10] The criteria consistently reviewed and applied by the Board on an application for reconsideration are set out in *Remai Investment Corporation, operating as Imperial 400 Motel v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union et al*., [1993] 3rd Quarter Sask. Labour Rep. 103, LRB File No. 132-93, at 107-108:

> *Though the Board has the power under Section 5(i) to reopen decisions it has arrived at, this power must be exercised sparingly, in our view, and in a way which will not undermine the coherence and stability of the relationships which the Board seeks to foster. In a comment on an application for reconsideration of a decision of the British Columbia Labour Relations Board in Corporation of the District of Burnaby v. Canadian Union of Public Employees, [1974] 1 Can. L.B.R. 128, at 130, the Board asserted that "speed and finality of decisions are especially imperative in labour relations. Of no area of law is it truer to say that justice delayed is justice denied.*
>
> *In the three jurisdictions we have alluded to above - Canada, British Columbia and Ontario - the recognition of the need to balance the claim for reconsideration against the value of finality and stability in decision-making is reflected in the procedures adopted by labour relations tribunals. In all of them, the procedure followed in connection with an application for reconsideration departs from the procedure employed for other kinds of applications. In all three cases, the applicant is required to establish grounds for reconsideration before a decision is made whether a rehearing or some other disposition of the matter is appropriate.*
>
> *We have concluded that such a two-step approach is appropriate in cases of this kind. We do not agree with counsel for the Employer that we were mistaken in requiring that an applicant who seeks reconsideration of a decision of the Board must persuade us that there are solid grounds for embarking upon that course.*
>
> *Counsel for the Employer argued that we should adopt the alternative of entertaining a full rehearing of the case, rather than establishing this intermediate stage. He predicted that this would not have the effect of an uncontrolled increase in the number of such applications. It is difficult to*

see, however, why allowing an automatic trial de novo to a disappointed applicant would not expose the Board to a growing number of applications to rehear cases in which the contest is serious or the stakes high.

In other jurisdictions, particularly in British Columbia, there has been extensive discussion of the criteria which labour relations boards might use to determine whether an applicant has been able to establish that there are grounds which justify the reopening of a decision. In their decision in the case of Overwaitea Foods v. United Food and Commercial Workers, No. C86/90, the British Columbia Industrial Relations Council set out the following criteria:

> *In [Western Cash Register v. International Brotherhood of Electrical Workers, [1978] 2 CLRBR 532], the Board articulated four criteria in which it would give favourable consideration to an application for reconsideration. Subsequent decisions (Construction Labour Relations Association of British Columbia, BCLRB No. 315/84, and Commonwealth Construction Co. Ltd., BCLRB No. 61/79, [1979] 3 Can LRBR 153), added a fifth and sixth ground:*
>
> 1. *If there was no hearing in the first instance and a party subsequently finds that the decision turns on a finding of fact which is in controversy and on which the party wishes to adduce evidence; or,*
>
> 2. *if a hearing was held, but certain crucial evidence was not adduced for good and sufficient reasons; or,*
>
> 3. *if the order made by the Board in the first instance has operated in an unanticipated way, that is, has had an unintended effect on its particular application; or,*
>
> 4. *if the original decision turned on a conclusion of law or general policy under the Code which law or policy was not properly interpreted by the original panel; or,*
>
> 5. *if the original decision is tainted by a breach of natural justice; or,*
>
> 6. *if the original decision is precedential and amounts to a significant policy adjudication which the Council may wish to refine, expand upon, or otherwise change.*

Arguments:

[11] Counsel for the Union primarily argued that grounds 4 and 6 from the test set out in *Remai, supra,* were applicable in the case at hand and that the Union had established that there were sufficient grounds to warrant reconsideration for both the first contract application and the rescission application.

[12] Counsel for Sobey's Capital Inc. operating as Varsity Common Garden Market (the "Employer") argued that the reconsideration application relating to the first contract application was totally without merit and should be dismissed accordingly.

[13] Counsel for Ms. Bressers argued that the original panel's findings were justified given the evidence presented in the rescission application and that the original decision should not be overturned.

Analysis:

The Rescission Application

[14] As set out in *Remai*, *supra*, the party applying for reconsideration must first establish that there are sufficient grounds to warrant reconsideration before the Board will proceed to hear and determine the application. In the rescission application, the Board dismissed the application for reconsideration with written reasons to follow after the threshold arguments with respect to the sufficiency of the grounds for reconsideration were heard by the Board.

[15] Counsel for the Union attempted to transform the reconsideration application into an appeal. Transcripts of evidence from three witnesses were filed and in its Particulars Re Application For Reconsideration, the Union contended that the original panel "erred in misapprehending, misinterpreting evidence lead in relation to management interference and drawing incorrect interferences (should be inferences) from same." As set out earlier herein, the Board has rejected the approach that a reconsideration application should be turned into an appeal. The original panel is best able to observe the demeanor of witnesses and assess the credibility of their testimony.

[16] In our view, this is not an appropriate case to exercise our discretion to embark upon a reconsideration of the original decision with respect to any of the grounds raised. Based

on the evidence presented before it, the original panel determined that there had been no employer influence pursuant to s. 9 of the *Act* that would justify a decision to deny the employees the opportunity to have a representation vote.

[17] Counsel for the Union also argued that the original panel had pre-determined the credibility of a witness for the Employer, Mr. Marquis. Counsel made this argument based on a discussion during his oral argument with the chairperson of the original panel, when the chairperson advised counsel that Mr. Marquis struck the Board as a credible witness.

[18] The chairperson's comment to counsel for the Union allowed the Union a further opportunity to convince the original panel that Mr. Marquis was being untruthful before the Board. Though he was unsuccessful in his attempts, counsel for the Union took full advantage of this opportunity and there was nothing improper about the chairperson's comments.

The First Contract Application

[19] The Board heard full arguments on the application for reconsideration relating to the first contract application. These arguments, for the most part, were identical to the arguments heard by the original panel. In our opinion, the Union has not adduced solid grounds to persuade us to exercise our discretion to embark upon reconsideration of the original decision. The original decision followed the most recent Board precedents on the interpretation of s. 26.5 of the *Act*.

[20] In conclusion, the Union has failed to establish that reconsideration is warranted in the circumstances of this case and the application for reconsideration relating to both the rescission application and the first contract application is accordingly dismissed.

DATED at Saskatoon, Saskatchewan, this **14th** day of **September**, **2005.**

LABOUR RELATIONS BOARD

Wally Matkowski,
Vice-Chairperson

The Labour Relations Board
Saskatchewan

MICHELLE BRESSERS, Applicant v. UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400 and SOBEYS CAPITAL INC. operating as VARSITY COMMON GARDEN MARKET, Respondents

LRB File No. 227-04, October 25, 2005
Vice-Chairperson, Wally Matkowski; Members: Duane Siemens and Joan White

For the Applicant:	Larry Seiferling, Q.C.
For the Certified Union:	Drew Plaxton
For the Employer:	Kevin Wilson

Vote – Objection to vote – On application for rescission, so long as employer takes consistent approach in relation to union's and applicant's campaigns prior to secret ballot vote, Board will not normally interfere with voting process – Where employer took consistent approach and applicant's campaign did not critically interfere with employees' ability to freely express wishes, Board concludes that union did not establish that conduct of vote improper.

***The Trade Union Act*, ss. 5(k) and 6.**
***Regulations and Forms of the Labour Relations Board*, s. 29.**

REASONS FOR DECISION

Background:

[1] United Food and Commercial Workers, Local 1400, (the "Union") is certified as the bargaining agent for a unit of employees of Sobeys Capital Inc. operating as Varsity Common Garden Market (the "Employer") by an Order of the Board dated November 7, 2003. Michelle Bressers filed an application for rescission of the certification Order (LRB File No. 227-04), pursuant to s. 5(k)(i) of *The Trade Union Act*, R.S.S. 1978, c. T-17 (the "*Act*"), on September 13, 2004. Following hearings on January 31, 2005, February 1, 2 and 3, 2005 and March 29, 2005 of the rescission application and other related matters between the parties, the Board, in *United Food and Commercial Workers, Local 1400 v. Sobeys Capital Inc. operating as Varsity Common Garden Market; Bressers v. United Food and Commercial Workers, Local 1400 and Sobeys Capital Inc. operating as Varsity Common Garden Market*, [2005] Sask. L.R.B.R. 68, LRB File Nos. 181-04, 227-04, 255-04, 256-04 & 257-04 directed that a vote be conducted among the members of the bargaining unit in the usual manner.

[2] The Union's application for reconsideration of the April 6, 2005 decision was dismissed in *United Food and Commercial Workers, Local 1400 v. Sobeys Capital Inc. operating as Varsity Common Garden Market; Bressers v. United Food and Commercial Workers, Local 1400 and Sobeys Capital Inc. operating as Varsity Common Garden Market*, [2005] Sask. L.R.B.R. ---, LRB File Nos. 181-04 & 227-04 (September 14, 2005 – not yet reported).

[3] On April 20, 2005, the Board's Executive Officer designated April 25, 2005 as the date for the vote to be held, under the direction and control of the Board's Investigating Officer.

[4] The results of the April 25, 2005 vote have remained sealed pending the Board's decisions on the reconsideration application and on the Union's objections to the conduct of the vote.

[5] On April 28, 2005, the Union filed objections to the conduct of the vote pursuant to s. 29 of the *Regulations and Forms of the Labour Relations Board*, S.R. 163/72 (the "Regulations"). Initially, the Union objected to the composition of the voters' list, but these objections were ultimately resolved by the parties. The Union also complained that Ms. Bressers placed a number of posters at the workplace that could only be described as "anti-union." The Union contended that the posters should have been removed and that the Union should have been allowed the opportunity to post its own posters in the lunchroom area at the workplace.

[6] The Union also contended in its objections that the Employer allowed "anti-union" supporters free reign to campaign at the workplace during working hours. However, the Union led no evidence in relation to this allegation and did not argue this point at the hearing.

[7] The hearing of the objections to the conduct of the vote took place in Saskatoon on September 29 and 30, 2005. At the hearing, counsel for the Union argued that Ms. Bressers and the Employer were each required to file a reply to the objections to the conduct of the vote. Counsel for Ms. Bressers and the Employer argued that there was no requirement for them to file replies as it was the Union that was objecting to the conduct of the vote and it was incumbent upon the Union to present evidence showing how and why the vote was not properly conducted. Counsel for Ms. Bressers also contended that, because the Union had not filed an unfair labour

practice application, the Board had no jurisdiction to deal with the Union's objections to the conduct of the vote.

[8] The Board provided the parties with a verbal ruling relating to both preliminary issues. The Board stated that it would follow the logic set out in the decisions *Panasiuk v. Service Employees' International Union, Local 299 and Beautiful Plains Villa Ltd.*, [1989] Summer Sask. Labour Rep. 42, LRB File No. 221-88 and *Reese v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union and Holiday Inn Ltd.*, [1989] Summer Sask. Labour Rep. 33, LRB File Nos. 207-88 & 003-89. In *Panasiuk, supra*, the Board stated at 44:

> *In the Board's view, an application remains pending until it is either granted or dismissed. Until then, no decision has been made. If the Board chooses to direct that a representation vote be held following an application for certification or decertification to determine whether a trade union represents a majority of the employees in the appropriate unit, the application remains pending before the Board during the time required to hold the vote, determine the results, consider any objections to the vote and make a final Order.*

[9] The Board verbally ruled that, because the rescission application remains pending before the Board, neither Ms. Bressers nor the Employer was required to file a reply to the objections to the conduct of the vote. The Board ruled that the Union was entitled to proceed with its objections to the conduct of the vote and present evidence that would support an allegation that the improper conduct was such that it restricted the freedom of choice of sufficient voters and thus might alter the outcome of the vote.

Facts:

[10] Brandi Tracksell, Justin Ziola, Renee Randall and Jennifer Loring presented evidence on behalf of the Union while Ms. Bressers testified on her own behalf. Their evidence was for the most part consistent and set out the following sequence of events.

[11] The Union began organizing its campaign once it received the Board's decision dated April 6, 2005 authorizing the vote. The Union's goal was to talk to all of its members about the benefits of maintaining a union at the workplace and to ensure that employees had the opportunity to make an informed decision. Ms. Tracksell, a special projects union representative

("SPUR") and two other union representatives spearheaded the campaign and enlisted the help of approximately 8-20 store employees.

[12] The Union mailed informational leaflets to its members and provided its supporters with union pins, buttons and pens. These union materials ultimately found their way into the Employer's workplace and were present at various times in the lunchroom. The Union also ensured that a document listing the union's last contract demands was placed in the lunchroom.

[13] The three union representatives attempted to have "a presence" at the workplace by either shopping at the store and directly talking to employees or by entering the store and handing out business cards with pro-union slogans on the back. Examples of these slogans were "sick pay for all employees including part-time," "all benefits paid for by the company " and "higher wages." The Union's representatives believed that, by handing out these business cards, they would not be interrupting employees at the workplace who could call the representatives after work hours and ask them any potential questions. The Employer was aware of the union representatives' presence at the workplace and did not thwart or impair any of the steps taken by the Union during its campaign. Employees were able to discuss the advantages and disadvantages of the Union during their breaks at the workplace.

[14] On approximately April 21, 2005, Ms. Bressers observed some of the Union's campaign materials in the lunchroom. She contacted her solicitor and was advised that "if the Union is campaigning, you can campaign." On the evening of April 21, 2005, Ms. Bressers posted approximately four or five handwritten orange posters in the lunchroom and surrounding area. The posters were approximately two feet by three feet. It was common knowledge at the workplace that Ms. Bressers prepared the posters and most employees would have seen the posters during their work breaks. Management personnel also took their breaks in the lunchroom. Ms. Bressers prepared no other materials for her campaign other than the posters and she placed them in the lunchroom area because that was where the Union's materials were and because that was where employees congregate and could read her posters.

[15] The only evidence as to what was normally posted in the lunchroom came from Ms. Bressers. She testified that the walls in the lunchroom were used to announce such things as births, barbecues, Christmas parties, concerts and staff appreciation day. When questioned

by the assistant store manager as to whether or not she could post her posters, Ms. Bressers advised him that she had contacted her solicitor and that she was going to post the posters. She testified that she was not disciplined in any way for posting the posters.

[16] The posters took on a life of their own as individuals wrote pro-union corrections on the posters and anti-union comments were added. One of the posters was torn down. Employees read what was on the posters and the "revised" posters. Ms. Tracksell testified that union supporters were "correcting falsehoods" on the posters.

[17] The Union instructed supporters to take photos of the original posters and Greg Eyre, a representative of the Union, faxed a letter to Suzanne Orieux-Koroluk, the Employer's manager of human resources and learning, at 3:35 pm on Friday, April 22, 2005, which stated in part:

> *In order to ensure a fair election process, the Union demands that the anti-union posters be taken down and the union be allowed to put up an equal number of posters the same size for the same period of time advocating the union's position in this vote.*

[18] The Union's counsel also provided correspondence at the same time to the Board and to counsel for the Employer and Ms. Bressers which stated in part:

> *Please be advised that it has come to the union's attention that the employer (Sobeys IGA-Varsity Common) has commenced a course of conduct involving the following: a. the posting of "anti-union" posters in conspicuous places frequented by all employees of Varsity Common IGA…. Also be advised that the union is corresponding to the employer demanding the ceasing of the conduct and requesting equal time and space for union support material and discussions.*

[19] Counsel for the Employer responded to counsel for the Union by fax sent at 8:32 am on April 25, 2005 which stated in part:

> *The Employer has had no involvement whatsoever in the posting of any posters in the Varsity Common Store….The Employer has not interfered in any way in the Board-ordered vote and does not intend to do so.*

[20] Ms. Orieux-Koroluk sent correspondence directly to Mr. Eyre on April 25, 2005, which stated in part:

> *I have now had an opportunity to investigate the allegations made in your letter. It does appear that the applicant has placed posters in the coffee room of the Varsity Common Store. They were not posted by management….The employer has remained neutral and has not participated in the debate and will continue to take that position.*

[21] Ms. Bressers removed her remaining posters on April 24, 2005 and the Union had no complaint about how the vote was conducted on April 25, 2005.

[22] One of Ms. Bressers posters stated "when talking to employees they fail to mention the union dues everyone—full time and part time-will have to pay monthly. They say it will be 5-7% of your wages." Ms. Bressers testified that she was given this information by the Union when she attended a union meeting following the issuance of the certification Order.

[23] Ms. Tracksell was not present at the union meeting following the certification Order, but testified that union dues for a new unit are pro-rated between $5-$9 per week, and that they can change after that. Ms. Tracksell stated that union dues are normally 2% and that Ms. Bressers' numbers were incorrect. During cross-examination, Ms. Tracksell stated that it was possible that union dues at the Employer's store in Yorkton, Saskatchewan amounted to 4%. (The Board had previously been advised by counsel for the Union that the Union was not collecting any union dues until a first collective agreement had been achieved). Ms. Tracksell also testified that the Union's website did not mention some of the Board's recent decisions relating to this workplace.

Relevant Statutory Provisions:

[24] Relevant provisions of the Regulations include the following:

> *s. 29(1) Any trade union or any person directly affected having any objection to the conduct of the vote or to the counting of the vote or to the report shall, within three days after the last date on which such voting took place, file with the secretary a written statement of objection in Form 15 and verified by statutory declaration together with two copies thereof, and no other objections may be argued before the board except by leave of the board.*
>
> *(2) The secretary shall cause all statements of objections and all copies thereof, when filed, to be stamped with the date on which they were received in the office of the board.*

Arguments:

[25] Counsel for the Union argued that Ms. Bressers' posters were inaccurate with respect to union dues and that, because the Union was not given an opportunity to respond to the posters, the employees' "freedom of choice was likely impaired." Counsel argued that the posters were anti-union and were tacitly endorsed by the Employer. Counsel suggested that the Board could set aside the vote and delay ordering a new vote or order a new vote. If a new vote was ordered, counsel suggested, among other things, that the Union should be given an equal opportunity to post posters in the workplace.

[26] Counsel for the Employer argued that there was no evidence that the Employer had interfered in the voting process. Counsel argued that it was not necessary for the Employer to vet the contents of the posters, the Union's newsletter, the Union's business cards or the Union's web site. Counsel argued that the Employer remained neutral in the campaign and did not tell the Union what it could or could not do in relation to anything, including posting posters.

[27] Counsel for Ms. Bressers argued that there was no evidence of any unfairness in the conduct of the vote. Counsel stated that the evidence demonstrated there was a normal campaign conducted at the workplace and that it was obvious where any power imbalance existed. Counsel argued that there was no evidence of improper, coercive or intimidating conduct on the part of his client or the Employer that would justify the Board's interference in the voting process.

Analysis:

[28] Counsel all referenced the *Panasiuk* and *Reese* decisions, *supra*, when arguing as to whether there was anything improper done by either Ms. Bressers or the Employer during the campaign prior to the vote. In *Panasiuk, supra*, the Board found the employer guilty of an unfair labour practice by in effect offering employees an incentive to vote against the union. The Board found that the employer's pre-vote misconduct was likely to critically interfere with the employees' judgment then crafted a remedy so that a second representation vote could be held. In *Reese, supra*, the particulars filed on behalf of the union again indicated a wage hike to employees if the union was unsuccessful.

[29] In *Reese, supra*, the Board stated at 35:

> *It is generally accepted that the results of representation votes will be ignored where either party employs campaign methods and tactics that interfere critically with the ability of employees to express their free wishes. At the same time, labour relations boards do not monitor and evaluate the content of pre-representation vote campaigns designed to persuade eligible voters to exercise their franchise one way or another. Instead, the proponents of varying views are permitted to put forward their most persuasive arguments and the electorate is presumed competent to evaluate and decide.*

[30] As a basic principle, so long as an employer takes a consistent approach in relation to the union's and the applicant's campaign prior to a secret ballot vote, the Board will not normally interfere with the voting process. In this case, there was no evidence that the Employer interfered in the voting process or that the Employer attempted to influence or coerce any employee to not support the Union. Likewise, there was no evidence the Employer was guilty of pre-vote misconduct or that the Employer took an inconsistent approach in relation to the Union's or Ms. Bressers' campaign. The evidence demonstrated that the Employer did not interfere in the Union's campaign or Ms. Bressers' campaign.

[31] If the Union and/or its supporters had posted posters that were removed by the Employer, or the Union and/or its supporters had directly asked the store manager or assistant store manager to post posters and were denied the opportunity, or if supporters of the Union had been threatened or reprimanded by the Employer for defacing or removing Ms. Bressers' posters, or if there was some evidence that Ms. Orieux-Koroluk was aware of the posters and delayed responding to the Union's request until April 25, 2005, the Board would have had some evidence to support the proposition that the Employer was attempting to improperly influence the vote or was not taking a consistent approach. The Board would then have considered if this behavior likely impaired or interfered with the employees' freedom of choice.

[32] The Union did not argue that it was unable to get its message out to its members. Counsel for the Union did, however, in discussions with the Board during his argument, state words to the effect that the "handwritten posters that Ms. Bressers posted at the workplace were massively different than the Union's campaign." Counsel stated that the posters were similar to a big neon sign posted at the top of the building stating "vote no" and that the Employer was attempting to improperly influence the vote by allowing the posters. The Board disagrees that

Ms. Bressers' posters, which were written on (one was ultimately removed), were similar to a big neon sign and thus evidence of interference by the Employer in the campaign process.

[33] The Union also argued that Ms. Bressers' message that members would have to pay 5-7% of their wages as union dues was inaccurate and had a dramatic effect on the employees at the workplace.

[34] Even assuming that Ms. Bressers' comment relating to union dues was incorrect, at least in relation to employees working significant hours per week, the degree of the alleged inaccuracy was never clearly presented to the Board. That being said, was the employees' freedom of choice likely impaired as a result of Ms. Bressers' written comments?

[35] The Board does not believe so. The fact that employees would have to pay some level of union dues should have come as no surprise to most if not all employees. The union dues issue was raised and discussed by Ms. Bressers at a post certification union meeting and the posters themselves fostered a form of discussion as union supporters "corrected falsehoods" on the posters. Considering the fact that this was the third campaign at the workplace over the last two years dealing with the representation issue, the Board presumes that the electorate is competent to evaluate the information it receives relating to union dues. Ms. Bressers' comments did not critically interfere with the ability of employees to express their free wishes.

[36] In conclusion, the Union has failed to establish that the conduct of the vote was improper and, as such, the vote results can be conveyed to the parties.

DATED at Regina, Saskatchewan, this **25th** day of **October**, **2005.**

LABOUR RELATIONS BOARD

Wally Matkowski,
Vice-Chairperson