

BCLRB's Wal-Mart & UFCW Decision Deals with Extensive Employee Use of LabourWatch

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The BC Labour Relations Board recently dealt with a number of unfair labour practice complaints from an organizing campaign in *Wal-Mart Canada Corp. v. U.F.C.W. International Union, Local 1518*, BCLRB No. B156/2003. Some of the complaints related to the distribution of LabourWatch materials to employees, by a Wal-Mart employee who was opposed to the Union's organizing efforts.

The decision was written by the same Vice-Chair who wrote the first and only other decision anywhere in Canada dealing with LabourWatch we are aware of.

Although the decision received some media coverage, the media (and UFCW press release) did not focus or comment on the LabourWatch aspect of the decision. This **221 paragraph decision**, (43 pages), has **53 paragraphs related directly or indirectly to LabourWatch** in the Background and Analysis/ Decision sections. Although the Board found some unfair labour practices, **there was no finding that the distribution of the LabourWatch materials themselves by the employee violated the Labour Code.**

This decision documents at length an employee's use of downloaded site materials in an organizing campaign. The materials were:

- FAQ's – Frequently Asked Questions
- Cancellation of a Union Card, forms and instructions.

The **employee also prepared her own 5 FAQ's and concluding paragraphs which she appended to the LabourWatch materials.** She made and distributed a number of copies to other employees. The Store Manager testified that he learned about LabourWatch in his management training and that he told her to not distribute her materials in the workplace.

The UFCW argued that the employee who distributed the LabourWatch and her own materials did so on behalf of Wal-Mart and that the total package was one-sided and anti-union.

The **Board did not find the employee to be acting or seen to be acting on behalf of Wal-Mart. It was decided that she distributed the combined materials in the workplace on work time and that Wal-Mart did not stop her and intentionally turned a blind eye to her activities.**

The **Board also indicated that the combined materials** handed out by the employee (the package contained LabourWatch material and her own material) **to be anti-union.**

When finding the materials were anti-union, **the Board sometimes, but did not always, clearly separate the materials downloaded from the LabourWatch website from the employee's own materials. Therefore, the Board's finding cannot be interpreted as a finding that the LabourWatch material itself was anti-union.**

Ultimately, the Board found that the employer had violated the Code during the organizing campaign on a basis unrelated to the LabourWatch materials. The unlawful employer influence found by the Board was based on the finding that Wal-Mart created and promoted a negative image of the Union organizer in order to divert employee's focus from the real issues. This is the heart of a long decision about a very involved set of events.

In spite of the Board's finding of unfair labour practices, the Board did not grant the UFCW's requested remedial certification, nor did they order the Union requested vote. There were two main reasons why a remedial certification or vote were not ordered by the Board in this case:

- The Union only signed up 30 out of a bargaining unit of 168 and only contacted 65 employees.
- The unlawful employer influence found in the case was not so wrong as to fall in the category of cases that that would result in a remedial certification. No employees were dismissed or threatened with closure of the business.

The Board ordered Wal-Mart to read the 3 paragraph Summary section at employee meetings with the UFCW present. LabourWatch is not mentioned in this Summary. The Board ordered that the UFCW be allowed to meet with employees for 30 minutes of Company paid time, without management present. The Board also ordered that the full text of the Decision be posted and made available to employees.

It is important to note the decision dealt with these events which largely occurred before employer free speech was expanded under BC's *Labour Code*. Under the new *Code*, everyone has greater latitude in expressing their reasonably held opinions.

On our website you can find the Decision, this summary, the 53 paragraphs that specifically mention LabourWatch or are related to the distribution of both the LabourWatch materials and the employee's own materials.

BRITISH COLUMBIA LABOUR RELATIONS BOARD

WAL-MART CANADA CORP./LA COMPAGNIE WAL-MART DU CANADA
("Wal-Mart")

-and-

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL
UNION, LOCAL 1518
("Local 1518")

This document has been prepared by the Canadian LabourWatch Association and contains the 53 paragraphs out of the total 221 paragraphs contained in the above decision that in our opinion relate directly or indirectly to the LabourWatch materials and other materials associated with an employee who opposed the UFCW organizing campaign.

The total decision follows this document.

II. BACKGROUND

E. The Labour Watch Documents

- 70 Daniel Kimzey testified that "the next week" Neilson came into the associates' lounge smiling. She said she had 40 copies of information about unions for people who wanted it. Kimzey said he went to Neilson the next day and asked her for the information. They agreed that Kimzey would leave the window in his van slightly down and Neilson would stuff the information through the opening and into his van. Kimzey testified that he thought this event occurred Tuesday or Wednesday of that week. Kimzey said that Neilson called him the next day on the telephone at work and asked him whether he got the material. He told her he did.
- 71 Neilson testified that she downloaded the Labour Watch material from the web on July 2nd and made 40 copies of it on Wednesday, July 3rd. She said she stapled it that night. The next day, Thursday, July 4, 2002, she went to speak to Sims invoking the open-door policy. She showed him the Labour Watch material and asked him to read it. She said she would return later to discuss it and she did. She asked Sims whether she could distribute the material to employees. Sims said "no". He reminded her of Wal-Mart's non-solicitation policy and harassment policy. She asked if she could leave it in the lunchroom. He said if she did, she would be coached. Neilson testified she was extremely emotional and upset at this meeting. Sims confirmed that the meeting took place. However he did not confirm her testimony that she was emotional and upset. He said she seemed concerned and nervous.
- 72 Neilson testified that on that day she gave Bonnie Elliott a copy as Elliott was leaving work. Elliott confirmed receiving the material but thought the event occurred 3 weeks after the meeting with Herman. That would put it into the second week of July, a week after the time frame given by Neilson. Neilson also said that she gave other employees copies after work, usually at their cars. She denied giving McHone a copy on June 23 or 24, 2002. McHone confirmed that she received the material from Neilson in the latter part of July, just before going on holidays. According to McHone's time-sheet, this would have occurred sometime before July 27, 2002. Neilson said she was not at the store on June 23 because she was in church.
- 73 Neilson also denied giving the material to Kimzey at the end of June. She said that event occurred mid-July. Neilson said she stuffed the material into Kimzey's van at 3:30 p.m. on a Friday and called him at work from home prior to the start of his shift on a Saturday.

- 74 Time-sheets for Kimzey show that he only worked two Friday's in July: July 5th and July 19th. He never worked on a Saturday. When it was put to Neilson that Kimzey only worked a Monday to Friday schedule, she quipped "oh, I thought he worked Tuesday to Saturday".
- 75 Time-sheets for Neilson show that on Tuesday and Wednesday of the last week in June, she clocked out shortly after 3:30 p.m.
- 76 Neilson also entered a receipt for photocopying into evidence. She testified that this was the receipt for the 40 copies of the Labour Watch material which she had made. She testified that she still has some 25 copies left.
- 77 The receipt shows 225 copies at \$0.13 cents per copy for a total of \$29.25 plus taxes. The Labour Watch material, which Neilson distributed, is a package made up of 15 pages. Twelve pages were downloaded from the web; two pages were created, according to Neilson, by Neilson; and the last page added was a union membership revocation form. Parenthetically, 4 revocations were received by the Board on August 6, 2002. Forty copies of this material would amount to 600 pages, i.e. 600 copies for billing purposes. I conclude that the receipt submitted into evidence reflects that copies of only 15 packages had been run, not 40 as contended by Neilson.
- 78 The Labour Watch material distributed by Neilson consists of 4 segments. The first is entitled "Frequently Asked Questions" (British Columbia). The table of contents lists the questions asked and answered in the document:
- WHY IS THE UNION INTERESTED IN ME?

WHAT ARE MY RIGHTS?

HOW DO UNIONS ORGANIZE?

WHAT SHOULD I CONSIDER WHEN DECIDING WHETHER TO SIGN A UNION CARD OR NOT?

WHAT IF THE UNION SOLICITS ME AT HOME?

WHAT IF I HAVE SIGNED A UNION CARD BUT DON'T SUPPORT THE UNION? WHAT DOES SIGNING A UNION CARD MEAN?

HOW MUCH WILL JOINING A UNION COST ME?

WHAT CAN I DO TO SUPPORT OR OPPOSE THE UNION?

WILL I GET TO VOTE ON WHETHER THERE IS A UNION OR NOT?

- 18 -

BCLRB No. B156/2003

WHAT IF I JUST DON'T CARE?

CAN WE TRY THE UNION OUT FOR A FEW MONTHS?

WHAT CAN THE UNION GUARANTEE?

WHAT WILL HAPPEN IF THE UNION GETS CERTIFIED?

WHAT IS IN A COLLECTIVE AGREEMENT?

WHAT DO UNION DUES GET USED FOR?

WHAT ABOUT STRIKES AND LOCKOUTS?

WHAT ABOUT UNION POLITICS?

WHAT WILL HAPPEN IF THE UNION IS DECERTIFIED?

HOW DO I DECERTIFY A UNION?

79 The next segment was titled "Cancellation of a Union Card" (British Columbia). It contains four substantive sections: (a) Overview; (b) Get the Forms; (c) Timing of your Cancellation; and (d) Deliver your Forms.

80 The Third segment is a two page section entitled "More Frequently Asked Questions". Neilson testified that she authored those pages. The questions set out are:

WILL I BE ABLE TO GET A HIGHER WAGE OF FIFTEEN DOLLARS OR MORE?

DO I STILL GET TO KEEP MY BENEFITS AND OTHER BONUSES?

I AM A UNION MEMBER, CAN I TRANSFER TO A NON-UNION STORE?

IF OUR STORE BECOMES UNION DO I HAVE TO BECOME A MEMBER TO WORK THERE?

IF I HAVE ALREADY SIGNED A CARD, DO I HAVE TO PAY UNION DUES?

81 The two pages conclude with a bolded warning to employees coached in the following terms:

In parting, I would like to add this. When a company and a union are at the bargaining table there are two different objectives. The objective of the union is to increase what is there already. Quite often to the detriment of the company, forcing the company to lay off employees to maintain a level of

- 19 -

BCLRB No. B156/2003

productivity. The companies' objective is to define what is there and maintain the current level of productivity. This is not to say that the company would pursue lower wages or fewer benefits but there needs to be a balance. In a competitive market, there cannot be more going out than there is coming in and so as employees we would undoubtedly lose some of our benefits if the agreement included higher wages. Whether you are for or against the union, you are more equipped to make a decision with all the information available to you. It will enable you to make a decision based on knowledge and not emotions.

- 82 Neilson testified in cross-examination that these two paragraphs were her opinion but admitted that she presented them as fact. She also admitted that there was nothing favourable to the union in those two paragraphs.
- 83 Neilson testified that she composed the two pages to counter Noble's assertions. When pressed to articulate her concerns, she said that Noble talked about the hit-list, that the store would close, that employees would be fired and that he was disclosing who had signed cards. She also added that Noble was promising \$15.00 per hour. She conceded that she never heard Noble make that promise to any other employee. She also conceded that except for the last item, her two pages did not address any of the concerns that she had expressed. She ultimately conceded that her concerns were rooted in gossip and not in actual fact.
- 84 However, Neilson continued to deny that someone else created the document and gave it to her to distribute.
- 85 Finally, the two pages concluded: It is easier to win a fight that never took place than to win at the end of the battle.
- 86 The last page of the Labour Watch package was a form entitled "Notification of Cancellation of Membership Card".
- 87 In testimony, Sims admitted that he was made aware of the Labour Watch website as part of his manager training at Wal-Mart.

F. The Alleged Intrusion Incident

- 88 Nadia Cindric testified that she was first approached by Noble about 10 days after she had heard employees talking about unionization sometime earlier in June. Cindric had gone for a walk when Noble pulled up in his car and asked her if she had heard about the union and would she like to join. Noble testified that he offered her a ride because it was raining. Cindric said the weather was fine but conceded that it might have started to rain at some point during her walk. In any event, Cindric put Noble off and gave him her telephone number. Noble called her house several times. Cindric kept avoiding talking to Noble.

- 20 -

BCLRB No. B156/2003

- 89 At the beginning of July Cindric and another employee, Amber Fouty, were house-sitting. Noble managed to get the telephone number of the house and called Cindric there. Noble testified that Cindric agreed to meet him prior to her shift at Wal-Mart. They were to meet at a coffee shop. Noble attended and waited for Cindric but Cindric never came. Cindric testified in chief that she never agreed to meet Noble. In cross-examination she agreed that she did agree to meet Noble but failed to attend. Cindric admitted that she never told Noble she was not interested in the union or that he should refrain from approaching her.
- 90 On July 5, 2002 Cindric says she got up in the morning and found what she described as union material on the counter in the house she was house-sitting. Fouty had already gone to work which is confirmed by her time sheet. According to Cindric, Fouty had likely not locked the door to the house. Cindric concluded that Noble had entered the house and placed the union literature on the counter.
- 91 Cindric described the union material as consisting of a thick booklet of about 10 pages. She said it took her 15 minutes to read it. She could not recall the colour. She said it was not Wal-Mart specific. She said there was a union membership card attached as part of the booklet which could be torn off and mailed in.
- 92 The description did not match the union campaign material used in this organizing drive. Local 1518's material which was admitted into evidence on consent consisted of 2 brochures, the union constitution and a magazine size publication 12 pages long entitled "Wal-Mart, Not In Our Community". One brochure contained a small tear-off form which could be mailed to UFCW requesting information about how to get involved in community services of various kinds. The description of the material offered by Cindric could just as easily fit the Labour Watch materials being distributed by Neilson. Cindric testified that she disposed of the material she found almost immediately.

93 Cindric testified that she called her mother and told her that Noble had entered the house while she was sleeping. Both Cindric and her mother were concerned that Noble could have done her some physical harm. When she went to work that day, she reported the incident to Labuckas. She talked to Fouty who denied bringing any union material into the house. As a result, she called the RCMP and filed a complaint. The RCMP treated the call as a harassment complaint and the file was assigned to Constable Gord Singh Gill. Gill testified in this proceeding.

94 Gill said he called Wal-Mart and spoke to Patt. Patt advised Gill that Noble was attempting to unionize Wal-Mart as a result of a personal vendetta. Gill then called Noble and arranged to meet him at 5:00 p.m. on July 5, 2002. At that meeting Gill says he warned Noble about his actions and advised him that Wal-Mart viewed his actions to be a personal vendetta. According to Gill, Noble admitted that was part of his motivation, but only a small part. Gill warned Noble to cease his organizing and leave it to professional union representatives.

- 21 -

BCLRB No. B156/2003

95 Noble's take on this meeting is significantly different. According to Noble, Gill told him there will never be a union at Wal-Mart; maybe in Nelson, but not in Quesnel. Noble said that Gill told him to stop following people and stop organizing. Gill denied mentioning Nelson or saying that there would never be a union at Wal-Mart.

96 Later that evening Noble called Gill and told him that he was coming to see him again with some other union representatives. Gill advised Noble that the RCMP do not get involved in union matters.

97 The file was reviewed on July 8 by Gill's superior who advised Gill that it should be made clear to Noble that the police do not concern themselves with organizing matters. Their focus is the harassment issue. Gill admitted that was made clear to him by his supervisor later.

98 Sims testified that Constable Gill called him on Saturday, July 6, 2002 and advised him that he had spoken to Noble and that he had concluded that the intrusion alleged by Cindric did not really happen.

99 On July 17, 2002, Gill called Cindric and she advised Gill that Noble had not bothered her again. On July 24, 2002, Gill advised Noble that the RCMP were closing the file.

100 Gill admitted that he made no effort to recover the material which had allegedly been left in the house by Noble. Gill said this was because they focussed on the harassment aspect of the complaint.

101 This alleged intrusion incident was talked about at work for at least a week. Cindric told employees with whom she worked that Noble had entered her residence when she was asleep and left union material. She expressed great concern that he might have harmed her physically. Daniel Kimzey confirmed that Cindric had announced that she had to call the police on Noble. McHone confirmed that some time in the following week Cindric had advised her also.

III. ANALYSIS AND DECISION

124 Second, the receipt she provided for copies of the Labour Watch package of material that she distributed to employees does not reflect her oral testimony as to the number of copies she had run. While it is conceivable that a printer or copy business may provide some type of discount or run some extra copies free of charge, it is unlikely that they would run forty packages amounting to 600 copies and only charge for 15 packages amounting to 225 copies. It is further unlikely that such a discrepancy would not have been obvious to either the vendor or Neilson and would not have been a topic of some discussion between them. Therefore, if it indeed existed, an explanation would have been provided. None was forthcoming.

125 I also find Neilson's testimony with regard to the material that she delivered to Daniel Kimzey also not believable. Her testimony was tailored to her belief that Kimzey worked on a Tuesday to Saturday schedule. When it was established on the basis of payroll records that Kimzey worked Monday to Friday and never worked a Saturday, and worked only two Fridays in July, it became clear that Neilson was less than forthright about the date on which the event took place. I find that the reason Neilson tailored her evidence about this event was to fit her contention that she never distributed the material or campaigned against Local 1518 on employer time.

126 Further, that was not the only time that Neilson attempted to tailor her testimony to facts she thought she knew. She was asked in testimony whether she attended a Saturday morning meeting with Herman on June 22, 2002. She replied that she did not work on the Saturday and remained at home with her family. She also added that there was no such meeting because Herman left on the Friday. I find that Neilson was privy to the fact that Herman had been scheduled to leave on the Friday, but failed to appreciate that he had extended his stay until Tuesday of the following week.

127 Neilson initially testified that she wanted employees to know all of the facts before deciding whether to support Local 1518. She ultimately admitted that her position was anti-union and her material and remarks were designed to promote an anti-union response. She conceded that she conveyed her opinions, particularly about the issue of employees losing benefits in collective bargaining, as fact. The two additional pages that she contends she added to the Labour Watch material end with a reference to doing battle. Her initial oral testimony regarding her own motivation simply does not accord with either the statements she made at the meetings or the material she distributed.

128 Finally, her testimony about her physical state and demeanour when she spoke to Sims about distributing the Labour Watch material was not confirmed by Sims in his testimony when he was asked the question directly.

- 26 -

BCLRB No. B156/2003

129 When assessing witness credibility, I prefer the contextual approach of weighing the testimony against that of others, assessing both internal and external consistency, and looking for contextual imbedding. All of these elements strongly suggest Neilson's testimony is not credible. Moreover, I find that she told her story in a very linear fashion. When she was questioned on different aspects of her story from different perspectives in cross-examination, she became confused, despite counsel's frequent attempts to restate the question and clarify issues for her.

130 In addition, however, I also took note of Neilson's conduct on the witness stand. Neilson was combative in cross-examination and sarcastic in many of her responses. On occasion, when she gave a glib response, she looked to the employer side of the room for approval. On other occasions, when she was stumped by a question, she would look to the employer's side for help. In short, her conduct on the witness stand was not very persuasive nor did it reflect efforts of an individual trying to truly recount events based on an independent recollection.

131 Consequently, whenever her testimony conflicts with that of others, I prefer the testimony of others.

132 The second person whose testimony I do not find to be very credible is that of Cindric. Wal-Mart argues that Cindric's evidence was credible and that from her perspective she was entitled to conclude that Noble had left the material in her house because Noble was the only one who persuaded her regarding union matters. Wal-Mart argues that it should surprise no one that the material was neither kept nor obtained by the police as their focus was on the harassment aspect of Cindric's complaint. Local 1518 argues that Cindric was not very credible given that she said she had disposed of the alleged union material virtually immediately. Moreover, her description of the material did not match the campaign literature being distributed by Local 1518 in organizing.

133 I find Cindric not saving the material, which she alleges was left by Noble in the house which she was house sitting, to be incredible. I am further perplexed as to why the RCMP made no effort to secure that material as it would have corroborated at least to some degree the allegation of intrusion as well as harassment. The only conclusion that I can reach in this regard is that the RCMP did not find Cindric to be very credible either. I find support for this conclusion in the fact that it took Constable Gill less than 24 hours to conclude that no intrusion occurred.

134 I also find that her description of the "union" material did not match Local 1518's campaign literature. Wal-Mart says that there was a tear-off portion on one of the Local 1518 brochures that matches what Cindric described. However, she testified that the tear-off had to do with union membership while in actual fact the tear-off on the brochure dealt with a request for more information about Local 1518's social activism. I find her description more easily matches the material being distributed by Neilson which clearly had a last page that addressed union membership. The thing is that no one will ever know what it was, if it was anything at all, given

that this critical lynch pin in Cindric's story was, according to Cindric herself, almost immediately thrown away. I

- 27 -

BCLRB No. B156/2003

find it unbelievable that a person in these circumstances would not preserve the only corroborating piece of evidence if she was intent on making a serious allegation that could result in criminal charges against someone else.

135 Indeed, Cindric struck me as somewhat impressionable. I find that the attention that she got from reciting the story to her mother and to Wal-Mart management acted as a catalyst encouraging her to repeat the story again on at least several occasions to her co-workers. When I put that together with her failure to keep the only piece of evidence that could have begun to corroborate her story, I have to ask myself whether the whole thing was not in fact made up.

136 As a result, I find her evidence of this incident unbelievable, but at the same time, the fact that she would repeat it in the workplace on several occasions as relevant.

170 Wal-Mart argues that Neilson is not a manager and that was never disputed. In order for her conduct to be unlawful she has to have been held out as acting on behalf of Wal-Mart. She is seen by all associates as an ordinary employee and indeed someone who Noble approached to sign a card. There was no evidence at any meeting that she attended that she had any authority or that any employees saw her as having any authority. She was cut off at one meeting and told not to attend any further meetings at another.

174 However, Neilson had approached Herman prior to that first meeting and I find that Herman is astute enough to have realized that Neilson was not supporting what Noble was doing. Whether Herman and Wal-Mart actively recruited Neilson to deliver the message that she did, or whether it simply facilitated and permitted her to deliver the message is at the end of the day unnecessary to resolve. In the circumstance of these captive audience meetings, the latter is sufficient to constitute improper interference in a union organizing campaign. Wal-Mart management stood by long enough to permit Neilson to deliver a message which Wal-Mart knew was at least in part false, but which complemented Wal-Mart's desire to discredit Noble. As a result, I find it appropriate to hold Wal-Mart responsible for facilitating Neilson's inappropriate commentary.

182 Local 1518 also argues that by permitting Neilson to distribute the Labour Watch document which, even if factually correct, presents a one sided view of unions, effectively permitted Wal-Mart to communicate its anti-union message to its employees. Local 1518 says that on the balance of probabilities from the perspective of a reasonable employee, employees would conclude that Neilson was acting on behalf of Wal-Mart in expressing her anti-union views and distributing the Labour Watch document. Local 1518 argues that she should be found to be a messenger for Wal-Mart and that Wal-Mart essentially condoned her anti-union conduct at the various meetings that she attended and during the campaign. Finally, Local 1518 asks me to draw the inference that Wal-Mart in fact provided Neilson with the Labour Watch material to distribute.

183 With regard to Neilson's distribution of the Labour Watch material, Wal-Mart argues that McHone's evidence is just plain wrong. McHone testified that she got the material later in July before going on vacation and she did not tell Local 1518 that she got it on the 23rd or 24th of June as Local 1518 alleged in its pleadings. Elliott also

- 36 -

BCLRB No. B156/2003

testified that she did not tell Local 1518 that she got the Labour Watch material in June. Wal-Mart says that whatever conversations occurred between Neilson, McHone and Elliott, occurred in July and not in June as alleged by Local 1518. Wal-Mart further argues that even if the material that was distributed was part of an employee anti-union campaign, it was employee driven and Local 1518 had an opportunity to respond.

184 Wal-Mart argues that there is no evidence that Neilson did not write the two pages that were included in the material. Just because she does not speak in those terms does not mean she cannot write in those terms. Wal-Mart says that any complaint regarding the Labour Watch materials should be dismissed as it does not amount to a breach of the law.

185 The Board, long ago in *Forano*, indicated that employers are unlikely to advertise their unlawful conduct. The Board must reach its conclusions from surrounding circumstances. Despite my

suspicious, I am not in this case prepared to draw the conclusion that this material originated with Wal-Mart. The evidence does indicate that Wal-Mart is more than prepared to ghost write letters and questions and answers and to twist facts to facilitate delivering its own particular message. However, despite my suspicion, there is also no evidence from which I can infer that Wal-Mart gave or expressly directed Neilson to distribute the Labour Watch material.

186 I find that Neilson did distribute the material and that she did distribute it on several occasions on work time. I do not accept her contention that she called Kimzey about the material from home. That does not accord with the documentary record as to when Kimzey was at work. I find that she made the call on work time from a Wal-Mart owned telephone in the building. I further accept McHone's evidence that she was distributing the material on the floor in the building. While I accept that the distribution occurred probably sometime in July, although I have not ruled that might have been as early as the last week of June, the important aspect is that she was doing it on the work floor despite the testimony of Sims who had told her, according to Sims, that if she did she would be coached. Sims told her that she could not distribute the information that she wanted on work time and at the work place.

187 Distribution by Neilson at the workplace is not *per se* indicative of any wrong doing by Wal-Mart: *Wal-Mart, supra*, para. 122. Further, in *Wal-Mart, supra*, Wal-Mart was aware of anti-union campaigning but the Board found that awareness did not oblige it to act because the campaigning was off Wal-Mart controlled property.

188 However, this case is different. I have found that Neilson distributed her anti-union material in the store and I further find that Wal-Mart was aware of this distribution taking place. The evidence revealed that Wal-Mart managers constantly walk the sales floor and interact with the sales associates. I also accept the evidence that this material was seen lying about in the associates' lounge. I also accept that the distribution of the Neilson material took place at least from the day she obtained it on July 5, 2002 until at as late as the third week of July which would be shortly before McHone left on her vacation. I am satisfied that Wal-Mart managers must have seen it and been aware of it at some point during this period of time. I find that Wal-Mart deliberately chose to turn a

- 37 -

BCLRB No. B156/2003

blind eye to Neilson's activities despite Sims' having warned Neilson not to distribute the material.

- 38 -

BCLRB No. B156/2003

IV. REMEDY

(No specific or implied references to the employee's distribution of LabourWatch materials.)

- 42 -

BCLRB No. B156/2003

V. SUMMARY OF BOARD DECISION

(No specific or implied references to the employee's distribution of LabourWatch materials.)

BRITISH COLUMBIA LABOUR RELATIONS BOARD

WAL-MART CANADA CORP./LA COMPAGNIE WAL-MART
DU CANADA

("Wal-Mart")

-and-

UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, LOCAL 1518

("Local 1518")

PANEL:	V.A. Pylypchuk, Vice-Chair
APPEARANCES:	Peter M. Archibald, Q.C., for Wal-Mart Chris Buchanan, for Local 1518
CASE NO.:	47858
DATES OF HEARING:	October 21, 22, 23, 24, 30, December 2, 3, 4 and 5, 2002
DATE OF DECISION	May 8, 2003

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 Local 1518 applies under the *Labour Relations Code* (the "Code") alleging that Wal-Mart committed unfair labour practices prohibited by Sections 6(1), 6(3)(d) and 9 of the Code by interfering with the formation and administration of a trade union; by making and permitting to be made false and derogatory statements about Local 1518 and its organizer; by threatening RCMP involvement against individuals supporting Local 1518; by being involved in RCMP involvement against its organizer; by permitting individuals to communicate to employees that lay-offs could occur because of unionization; by promoting anti-union organizing; and by permitting employees to campaign against Local 1518 on company time at the worksite.

2 Wal-Mart denies the allegations, and, in the alternative, says that even if it did commit some unfair labour practices, Local 1518 should be denied any remedy because Local 1518 engaged in improper organizing when it approached Wal-Mart employees.

II. BACKGROUND

3 The events which became the focus of Local 1518's allegations revolved around its key organizer of the Wal-Mart employees at the Quesnel store, David Noble. Additional facts and evidence may be referred to in the analysis which follows.

4 Noble first worked for Wal-Mart in Calgary in the maintenance department in February, March and April of 2001. He had become acquainted with Tim Seitz who was a co-manager at the Calgary store where Noble worked. Noble had pursued other career paths prior to coming to work for Wal-Mart. Seitz knew of Noble's previous circumstances, which are not relevant to this matter, and invited Noble to apply for work with Wal-Mart and Noble did. Noble said he ended his employment with Wal-Mart in Calgary after he became the victim of retaliation by other store employees. He had reported to Seitz that these other store employees were engaging in time theft and this eventually got back to those employees. Seitz advised Noble that he (Seitz) soon would be given an opportunity to manage a new store either in Saskatchewan or in British Columbia. He invited Noble to enter Wal-Mart's assistant manager program and consider coming to work for Seitz at the new store once that assignment was made.

5 Noble learned shortly after that Seitz had been assigned to manage the new store in Quesnel. He contacted Seitz and ultimately was offered and accepted the position of Pet Department Manager. Noble attended orientation and training at Wal-Mart's Langley, BC, store and then, along with all of the other new employees, travelled to Quesnel to begin work. Noble was employed at the Quesnel store on the day it opened for business in the summer of 2001.

6 Employees, referred to as associates, and department managers are hourly-paid and use a swipe card system to clock their time. They report to the Assistant Managers who in turn reported to the Store Manager, Tim Seitz. Seitz reported to the District Manager who in this case was Chris Fowler.

7 Noble testified that he was doing well at the store and expected to enter the Assistant Manager training program. He spoke to Seitz about it and Seitz told him he had to serve 6 months as a department manager first. Noble again spoke to Seitz about the Assistant Manager program in February of 2002 and was told that Fowler was aware of his interest. Another department manager was going into the program first and in 3 months, it would be Noble's turn.

8 However, Noble became increasingly disenchanted with the prospect of becoming an Assistant Manager at Quesnel and on April 8, 2002, stated an intention to resign effective June 30, 2002. According to Noble, Seitz refused his resignation and suggested that Noble consider transferring to another store or to the shoe division and working as an assistant manager there. On May 29, 2002, Noble expressed an interest to Seitz about moving to the Prince George store.

9 On Friday, May 31, 2002 Noble learned that Seitz was being transferred from the Quesnel store. Chris Fowler made the announcement at the morning meeting of associates. Seitz had actually been told the day before.

10 That evening (May 31) Noble visited Seitz to say farewell and pass on his best wishes. While at the Seitz home, Noble saw minutes of a meeting lying on a table. He noticed that his name and that of Daniel Kimzey were mentioned. Seitz permitted Noble to read the document and Noble did. Noble learned that Seitz was being transferred because, among other things, he failed to address people problems at the Quesnel store, in particular, Noble and Kimzey. According to Noble, Seitz explained to Noble that Wal-Mart intended to dismiss him and Kimzey.

11 Noble was stunned. Noble and Seitz discussed options, among them, getting legal advice or seeking assistance from a union. Noble determined to meet with the Kimzey's, both of whom worked for Wal-Mart, and advise them of what he had learned. Noble met with Daniel and Jennifer Kimzey on Saturday, June 1, 2002. He told them that Daniel's name was on what he said Seitz had referred to as a "hit-list" – along with his own name. At that point Noble determined to record what had happened in writing. He composed a document with Daniel and Jennifer Kimzey's assistance which set out that he knew he was on a hit-list and set out his reactions to events at the Quesnel store. Daniel Kimzey's name was initially mentioned in the document but later blacked out. Noble intended to send a copy to his mother for safekeeping but testified that he decided to contact a lawyer in Prince George instead. Jennifer and Daniel Kimzey both testified and confirmed the events of June 1, 2002.

12 The June 1 document composed by Noble became an exhibit in these proceedings and was also used by Noble in June and July in his organizing efforts on behalf of Local 1518. Wal-Mart objected to the introduction of this document on the

basis that it was self-serving and of no real probative value. I ruled that given that document was composed well before any union involvement at the Quesnel store and well before any of the organizing related events which are the subject of these proceedings occurred, that the document was relevant and probative of the fact that Noble's allegation regarding the existence of a hit-list was not a recent fabrication.

13 Noble went to work on Monday, June 3, 2002, as usual. He said Monday was uneventful. On Tuesday, June 4, 2002 Noble was confronted by John Labuckas, acting manager of the store, regarding an issue that had arisen sometime earlier in May between Noble and another employee, Elaine Pederson. Noble told Labuckas that there was no longer an issue as he had been vindicated at an earlier meeting with Seitz and Pederson and that Pederson had quit her job. Labuckas said he would investigate further and speak to Noble the next day.

14 On Wednesday, June 5, 2002, Labuckas once again spoke to Noble. At first, Noble wanted a witness present, but Labuckas assured Noble that it was not necessary as he (Noble) was not in any trouble. Noble relented and the two met privately. Labuckas proceeded to threaten Noble with "coaching" if Noble was ever again involved in any sort of confrontation with any other store employee. Coaching is a form of discipline in the Wal-Mart system.

15 Noble became further stressed. He had been told in May that Fowler had been unhappy that Noble had refused to apologize to Pederson even though Seitz had supported him and Pederson had quit. Pederson had been subsequently re-employed on another shift and Noble now suspected that his confrontation with Labuckas was staged as the first step being taken by Fowler and Wal-Mart to orchestrate his dismissal. That day Noble went to see a doctor who prescribed anti-stress medication and a leave of absence. Noble delivered his Doctor's note to Dale Patt, an assistant store manager and remained off work. He also wrote to Labuckas telling him that he feared that any future difficulties he may encounter with other employees would not be fairly viewed by Wal-Mart. He accused Fowler of orchestrating a witch-hunt to get him out of the store.

A. BEGINNING THE UNION DRIVE

16 Noble contacted Seitz once again. Seitz drove Noble to Save-On-Foods where Noble met and spoke to a Local 1518 shop steward. He obtained a UFCW Local 1518 business card and called Glen Toombs, a business agent with UFCW. He met Toombs on Tuesday or Wednesday of the following week, June 11 or 12, 2002. At that point Noble decided he was not going to return to Wal-Mart as an employee. He was hired by Local 1518 on a contract basis for a 6-month term from June 15, 2002 to December 15, 2002, primarily for the purpose of organizing the Wal-Mart store in Quesnel. The contract was dated June 17, 2002. Noble drafted a letter of resignation dated June 17, 2002 which he submitted to Patt. His exit interview form showed the termination of employment to be voluntary due to dissatisfaction with his supervisor (Fowler) and that re-hire was recommended.

17 Noble actually began his organizing efforts for Local 1518 on June 14, 2002 and from June 14 to June 21, 2002 he recruited twenty employees. Noble imagined that the campaign would last only 3 to 4 weeks and that within that time he would sign a sufficient number of members for Local 1518 to file an application for certification and obtain a representation vote. There are 168 employees in the target bargaining unit. Noble testified that the attitude of employees he attempted to contact after June 21, 2002 was markedly different from that of the employees he had canvassed before June 21, 2002. Employees cancelled appointments without explanation and he was getting a cool reception.

B. WAL-MART'S RESPONSE TO THE CAMPAIGN

18 On the morning of June 19, 2002, two employees, Tammy Ripley and Len Maley, approached Patt at about 8:45 a.m. and 11:30 a.m. respectively, seeking to avail themselves of Wal-Mart's "open-door" policy. The open-door policy permits employees to speak to management on any topic without the substance of the conversation being held against them. They informed Patt that Noble had approached each of them to sign union membership forms. At 1:03 p.m. Patt relayed this information in an e-mail to Don Toy, the Wal-Mart Associates Relations Manager for the area. In the same e-mail he also described the Noble-Pederson incident and advised that Noble had been on medical leave, but had submitted his resignation on June 17, 2002. Toy in turn forwarded the message to Allan Plant and Don Herman, Regional Personnel Managers for the area, with copies to Jim Caldwell, the Regional Vice-President, and Chris Fowler, late in the evening of the same day. The covering message from Toy to Plant was "Here is the recap as you requested," from which I infer that there had been an earlier communication between Toy and Plant on the same subject.

19 Sometime before 3:30 p.m. travel arrangements were made for Herman to travel from Calgary to Quesnel. Herman testified that the purpose of the trip was to address the union situation although he had intended to visit the store at some point in any event.

20 Herman first testified that he spoke to Caldwell after Patt sent the first e-mail, and Caldwell directed him to go to Quesnel. In cross-examination, Herman maintained that he learned about the union organizing Quesnel through the e-mail and had in fact booked his ticket before learning of the union drive. That contention was obviously incorrect. In redirect, Herman changed his mind and recalled Toy calling him and requesting that he go to Quesnel because of the unionization drive. In any event, Herman had his e-ticket by 3:30 p.m. on June 19th, 2002, and was on the 4 p.m. flight from Calgary to Quesnel via Vancouver. He arrived in Quesnel at 7:00 p.m. that evening.

21 Herman attended at the Quesnel store at 7:45 a.m. the next day. Labuckas introduced Herman to employees attending the pre-store opening meeting. Herman reviewed Wal-Mart's open door policy, the employees did their cheer and the store opened for business. Herman also walked the store floor meeting employees that day.

It is normal Wal-Mart policy for managers to maintain a significant and constant presence amongst sales associates on the store floor.

22 Another e-mail from Patt to Toy, Fowler and Plant on June 20th describes a chronology of some of the events that day. It focuses on Patt's further conversations with Ripley and Maley which occurred earlier in the day. According to Patt's e-mail, both Ripley and Maley explain how they believed Noble knew where they lived and that they had become uncomfortable when Noble raised the topic of unionization when he visited them. Ripley explained to Patt that Noble had told her that Local 1518 had rented a car for him and was paying his expenses. There was no suggestion from either Ripley or Maley that they thought Wal-Mart had disclosed their addresses to Noble.

23 Herman attended the store again on Friday, June 21, 2002. Several employees approached Herman that day. Immediately after the morning pre-store opening meeting, Herman was approached by Crystal Fauchet and Sherri Neilson. Kim Beedle called and met with Herman in a restaurant across the street from the store. According to Herman, Beedle was visibly upset. She told Herman she had a list of employees who had signed union membership cards and that Noble was leading the organizing effort. Herman testified that he did not want the list and Beedle left. Fauchet wanted to know if there was a hit-list and Neilson wanted to know if she would get fired if she talked about the union. She told Herman she had seen Noble earlier that morning.

24 Neilson testified that she had gone to Tim Horton's at 6:35 a.m. before work and saw Noble leaving. He waved to her and she pulled over in her car to talk to him. Noble denied waving to Neilson and testified that it was Neilson who called him over. Margaret Corderre, who had met Noble earlier, was also leaving Tim Horton's at about the same time. She confirmed Noble's version of how the Noble-Neilson encounter got started. While nothing in particular turns on this controversy, except credibility, I find it more likely than not in light of Corderre's testimony, that it was Neilson who attracted Noble's attention by calling to him.

25 Neilson testified Noble told her that he had been shown a hit-list by Fowler and implied that her name was on it. She testified that Noble told her he was working for the union and said if employees joined the union, their jobs would be secure and they would make \$15.00 per hour. Noble asked Neilson for her telephone number and she gave it to him. He cautioned her not to say anything because if Wal-Mart found out, she would be fired. According to Neilson, Noble also said that the organizing effort was going to make the news and that Wal-Mart would likely offer employees raises to make all of this go away.

26 Noble testified he told her he was trying to organize the store to get better wages and working conditions. Noble testified that Neilson gave him her telephone number and asked him to call at around 5:00 p.m. that day as she was running late for work. Noble denied saying anything about \$15.00 per hour or that the campaign would make the news. He also denied telling her that Fowler showed him the "hit-list".

27 That morning, sometime before 10:30 a.m. Herman was in contact with Wal-Mart's head office for Canada in Mississauga, Ontario, and was advised that two letters were being sent to him via fax or e-mail. At about 10:30 a.m. he once again spoke to Sherri Neilson. He explained to her that if a majority of employees, that is 50% plus one, wanted a union, there would be a union.

C. THE LETTERS

28 At noon, the two letters from head office arrived. They were made exhibits in these proceedings. The text of each letter follows. The first letter stated:

Some Associates have approached us to express their concern that in recent days they have been approached by a former Associate to seek their interest in joining a union.

I would be surprised if there were any interest in a union as Wal-Mart has many mechanisms for Associates to use to express their concerns and to solve problems.

The "Open Door" policy is one that is accessible to all Associates to communicate openly and candidly with anyone at any level of Management about any issue. It is also Wal-Mart's policy that Management must address all Associates respectfully and in a timely manner. We are very proud of this mechanism because it allows our Associates complete anonymity and a process free from reprisal in their pursuit of a positive resolution.

The decision to join or not to join a union is a very important one. An employee should carefully consider all the implications of signing a membership card. Union organizers may make appealing statements or promises and apply pressure on employees to sign immediately. This in fact has been reported to us. You will need to be very careful about signing anything before understanding what it will mean for you and your fellow Associates. The union can promise anything they decide to promise but they can only deliver what the Company agrees to in collective bargaining.

As an Associate, you cannot afford to remain indifferent to the union's attempt to certify your store. It is not sufficient to say, "I have not joined the union and don't intend to, and I don't care what other Associates do."

It is important to know that signing a union card means that you are a member of the union. In fact, the union does not even need to have all of the Associates sign a card to obtain certification. In British Columbia, once a union files an application for certification with the support of only 45% of the employees it wishes to represent, there would be a vote to determine the true wishes of all of the employees.

Please educate yourself and ask me or any member of Management any questions you might have with respect to this very important issue. If we don't know the answer we will get one for you as soon as possible.

You owe it to yourself and your fellow Associates to make an informed decision based on all the facts.

29 The letter was dated June 21, 2002 and signed by Don Herman. Herman testified he made no changes to the text of the letter after receiving it from head office. The second letter read:

Some Associates have approached us to express their concern that in recent days a former Wal-Mart Associate, David Noble, went to their home to solicit them to join a union.

These Associates said that no prior approval was given for Mr. Noble to have or use their address for the purpose of soliciting.

Rest assured that we did not provide to Mr. Noble any private information concerning any of our Associates.

It is important for all Associates to know and understand that Wal-Mart will always respect the confidentiality of its Associates' private information such as names, telephone numbers and addresses. We will continue to provide a safe workplace, free from harassment. We will never disclose your personal and confidential information to anyone at any time unless required to do so by law, for instance to a Government body for the purpose of tax reporting.

If you receive any unwanted contact from **David Noble or anyone else**, and feel uncomfortable at all, please feel free to report the contact to Management.

Your Management team remains available to speak to you and to answer any questions or address any concerns you might have. (Bold in the original)

30 This letter was also dated June 21, 2002 and signed by Don Herman. Herman made no changes to the text of this letter either.

D. THE MEETINGS

(i) The Meeting of the #1s

31 Herman had been scheduled to leave Quesnel at 1:35 p.m. that day (June 21) for Saskatoon. However, Herman decided that it was important to deliver the message contained in the letters to the employees. Herman directed Patt to organize the day shift into 2 groups (the #1s and the #2s) and schedule a meeting with each group. Herman met with the first group (the #1s) at 1:30 p.m. The meeting was mandatory.

32 Herman testified that he introduced himself to the employees who were gathered in the receiving area near the loading dock. He said he read the first letter and a commotion broke out as employees reacted to that letter. Herman regained control of the meeting and read the second letter. Herman then answered employee questions.

33 Neilson was one of the employees who attended that first meeting. At some point in the meeting she spoke up. There is a dispute as to when she spoke. Neilson testified that she told employees that she had met Noble earlier in the day and that she had seen Noble's new car. She asked employees, "What is Noble getting from this?" She asked whether they had seen the new car that the Union had obtained for Noble. Neilson testified that despite making the remarks about the car, she had not concluded what Noble's motive was for organizing the store. She did say at a later meeting that she did not believe he was doing it for the good of the employees. At this meeting she contended that she had not yet thought about it or if she had she had not yet decided why he was organizing. She denied saying that Noble was on a vendetta. She also described how she had been stopped by Noble at Tim Horton's.

34 At some point during the meeting an employee asked what could be done if Noble came to their home and would not leave. Herman replied that the police could be called.

35 Daniel Kimzey testified that he attended the second meeting, but because he works in that area of the building, he could not help but overhear some of what happened at the first meeting. He said that Neilson spoke immediately after Herman finished reading the letters.

36 Bonnie Elliott also attended the first meeting. She said that was the first time she learned that Noble was organizing for Local 1518. She said that in addition to Herman, two associate managers were present: Patt and Labuckas. She testified that Neilson had quite a bit to say in opposition to the union.

(ii) The Meeting of the #2s

37 Daniel Kimzey testified about the second meeting. He said it took place in the same back area of the building near the loading dock and was attended by a smaller group of about 15 to 20 employees. Herman introduced himself and read out the two letters. Herman then said the letters would be posted. He asked if there were any questions. Neilson also attended this meeting. According to Kimzey, Neilson interjected and said that Noble would be getting a big bonus cheque; that he was in it for the money – that he was getting \$100.00 for every card signed. Neilson described the meeting at Tim Horton's and according to Kimzey spoke for about 10 – 15 minutes. Kimzey said Herman was present throughout and he recalled Crystal Fauchet saying that her husband had been in a union and it never did him any good.

38 Kimzey testified that Neilson's participation in the meeting looked staged or rehearsed. Kimzey was asked whether what he heard had any impact upon him. Kimzey said that it planted a seed of doubt regarding Noble's motives. He questioned in his own mind what Noble's motives were.

39 Wal-Mart objected to this line of questioning. It argued that the evidence was self-serving and that the Board has never required subjective evidence of the state of employees' minds as necessary evidence. Local 1518 argued that while not necessary, it is admissible and can be relied upon by the Board. I reserved on this objection.

40 Subjective evidence of an employee's state of mind is understood to be testimony of a person saying under oath that he or she felt intimidated or did not feel intimidated; was affected or not affected; or felt coerced or did not feel coerced. The danger of relying on subjective evidence reflecting an employee's state of mind is fourfold. First, as Wal-Mart correctly points out, it can be very self-serving both when coming from a union supporter in whose interest it may be to admit to being intimidated, coerced or otherwise negatively affected, or when coming from a union opponent in whose interest it would be to say that statements or actions had no impact upon him or her. Second, there may be a natural reluctance to admit to any weakness either from a misguided sense of machismo or because the employer is sitting in the hearing and therefore a reluctance to admit to feeling intimidated or coerced or otherwise negatively affected. Third, such testimony tends to encourage a numbers game – how many employees are willing to testify one way or the other. Finally, even if two sides stacked up a list of witnesses testifying both ways, the only way the Board could resolve the dispute is by applying an objective reasonable person test.

41 It is for those reasons that the Board applies an objective test from the perspective of a reasonable, well-informed person in like circumstances. Thus, if the Board concludes that a reasonable, well-informed person in like circumstances would feel coerced or intimidated, that conclusion carries the day regardless of whether employees may have testified that they in particular experienced no such feelings.

42 While such evidence is not necessary to prove an impact on employees for reasons set out above, it is not inadmissible *per se*. I therefore admit the evidence. However its utility is very marginal at best and more than likely not helpful at all. It is but a small and ultimately not a very significant piece of a very large puzzle.

43 Neilson testified about the second meeting. She said she spoke very briefly before Herman cut her off. She then left the meeting. Neilson denied saying that Noble showed up at people's homes and refused to leave. She admitted making a sarcastic remark about the union having given Noble a new car.

44 Neilson also admitted that she was not scheduled to attend this meeting, that she did not clock out for this meeting and she said she never sought permission to attend this meeting.

45 Herman supported Neilson's version of the events. He testified that he cut her off shortly after she began speaking and that she only managed to describe the Tim Horton's encounter and invite employees to see Noble's new car. Herman testified the second meeting was short. He posted the letters after the meeting and then left the building by 5:30 p.m.

46 Elliott also testified that Neilson spoke at the second meeting but not as long as she had spoken at the first.

(iii) The Third Meeting

47 Neilson testified that she also attended the third meeting at 9:05 p.m. that day. That meeting was the regular store-closing meeting except that on this occasion it was attended by Herman who read out the two letters. Neilson said she assumed Herman would be there to read the letters and she also testified that an employee had asked at an earlier meeting whether there would be another meeting later. Neilson was also aware that a regular employee meeting took place at the store closing time. Neilson testified that she had a telephone conversation with Noble sometime around or shortly after 5:00 p.m. She said Noble challenged her to speak to employees at Safeway and Overwaitea about the benefits of unionization. She said she did and discovered that employees after 3 years still made only \$9.25 per hour. She testified that as a result, she was determined to go to the meeting to ensure that employees have all of the relevant information.

48 It is unclear what Neilson meant by 3 years. A UFCW/Overwaitea/Save-On-Foods Collective Agreement was entered into evidence. Only one category of employee would be making less than \$9.25 per hour after 3 years of work calculated in hours. It is however conceivable that other categories of employees who did not work full-time would take more than 3 years to accumulate the equivalent of 3 years in hours worked, so there is a possibility that employees after 3 calendar years in some other classifications may not have exceeded \$9.25 per hour. Nonetheless, the impression Neilson was conveying was a negative one and that is that Local 1518 had not achieved much for employees in the other stores. She said that in her view, employees should have all of the information to make an informed decision.

49 Herman was introduced to the employees at the third meeting by Bradley Antonovitch, a support manager of Wal-Mart in Quesnel. Antonovitch could not recall much of what was said at this meeting.

50 Neilson described that when she entered the store, the employees were gathered in a circle near the tills. Herman was already speaking. When Herman finished, Patt answered questions. Neilson said she then interjected describing her earlier encounter with Noble at Tim Horton's as well as the telephone conversation in which he challenged her to speak to employees at Safeway and Overwaitea. She told employees that they only made \$9.25 per hour at the other stores after 3 years. At that point, according to Neilson, Herman stopped her with a look and later told her not to come to any more meetings. Neilson could not recall whether she also told employees

that Local 1518 was paying for Noble's room or that if employees felt harassed by Noble, they should call the police. She denied saying that Local 1518 would be taking money out of their pockets and putting it into Noble's, or that it had bought Noble a car.

51 Megan McHone testified that she attended the third meeting. She confirmed that Herman read the two letters and asked for questions. She said Neilson spoke up and told employees present that Noble got his hotel paid for by the union and that the union had bought Noble a new car. McHone also said that Neilson said employees would have to pay \$100 per month in union dues. She said Neilson spoke for about 20 minutes.

52 Jennifer Kimzey also testified about the third meeting. She said Neilson came in shortly after 9 p.m. Neilson told Kimzey she came for the night meeting. Kimzey confirmed that the duty manager introduced Herman and Herman read out the two letters. He asked if there were any questions. According to Kimzey, Neilson then spoke-up immediately. She made a long speech in which, according to Kimzey, she asserted that everyone had a right not to join the union and that she was there of her own free will. She said that she had met Noble at Tim Horton's earlier in the day and that Noble had promised her \$15.00 per hour. She asserted that the union would take money out of their pockets and put it into Noble's. She alleged Noble was going to get a bonus for every card signed and invited the employees present to drive by Noble's hotel and see the fancy car Local 1518 had given him. Neilson invited employees to call the police if they felt harassed or concerned.

53 Kimzey was asked what her impression was of Neilson's remarks. She answered that she got the impression that Neilson was intending to make Noble out to be some sort of creepy stalker. Wal-Mart objected to this question and answer. Local 1518 argued that the question clearly fell within the scope of subjective evidence going to the state of mind to which employees can speak. I sustained the objection. While an employee is competent to give evidence about his or her own state of mind, an employee is not competent to testify about the subjective state of mind of another. Here Kimzey was being asked to give insight into what was in Neilson's mind when she made the remarks she did. That is not something she is competent to do. It is a conclusion, however, that a decision maker can draw from the objective evidence.

54 Parenthetically, Kimzey was later asked again what impact Neilson's remarks had on her. She said it made her doubt Noble's motives. No objection was raised to that question. Kimzey's answer was a reflection of her state of mind as opposed to the previous exchange which amounted to speculation about Neilson's state of mind. Again, the question and answer is admissible although its utility is questionable and is ultimately a matter of weight.

55 Kimzey was also asked if she drew any conclusions from Neilson's presence at the meeting. The question was objected to by Wal-Mart. I reserved on the objection. I now rule that the question is admissible. The question is directed at Kimzey's state of mind. Kimzey said that she concluded that Neilson had been asked to attend by Wal-Mart. As I indicated at the hearing, I place little weight on this evidence. The real

question is whether a reasonable, well-informed person in the circumstances would conclude that Neilson was acting on behalf of Wal-Mart - a conclusion which is not dependent upon views expressed by attendees.

56 Herman confirmed being at the meeting which began at about 9:10 p.m. He said Patt started the meeting by reviewing some sales figures and then introduced Herman. Herman read out the letters. He invited questions. There were none so he excused himself and went to the washroom. Herman testified that when he returned, he saw and heard Neilson speaking to the gathered employees. According to both Neilson and Herman, when she saw him, she immediately stopped. He told her not to attend any more meetings. Herman testified that he did not actually hear the content of what Neilson said and was not aware of her presence initially.

57 There was some dispute about the length of this meeting. Kimzey thought it might have been as long as 45 minutes. She testified she clocked out shortly after it was over. Others put the meeting at about 20 minutes. Kimzey's clock-out time shows her leaving the store at 9:37 p.m. The meeting started at around 9:05 to 9:10 p.m. I find that it lasted somewhere on the order of half-an-hour. Nothing turns on the length of the meeting except that there was sufficient time for the letters to have been read out by Herman and for Neilson to have said the things it has been alleged she said.

58 Janice McKinney testified that she attended this third meeting as well. She asked Herman if he was there because of the union and he did not respond. She met with Herman privately later at which time he told her he was there partly because of the union and to meet the new store manager as well. She denied that there was any discussion about harassment, RCMP, Noble's promises or that Noble was organizing out of revenge. She confirmed that employees expressed concern about the store closing. She did not recall Herman's response.

59 Noble testified that he was informed about the allegations that Neilson had made at the various meetings about him receiving a bonus. He denied any such arrangement and on the evening of June 21st drafted a memorandum to Wal-Mart Associates reflecting that denial. He also maintained that Wal-Mart had identified him as unsuitable Wal-Mart material and that it intended to dismiss him. He said that is why he quit. Noble testified that he distributed this memo to employees in his further organizing efforts.

(iv) The 4th Meeting

60 On Saturday morning, June 22, 2002, Herman once again attended at the store. He read the two letters at the store-opening meeting. Neilson was not present.

61 On Sunday, June 23, 2002, the new store manager, Darrell Sims, arrived in Quesnel and met with Herman. Herman advised Sims that there was an active union drive in the store led by a former associate. Herman advised Sims that he may hear talk of a hit-list in the store but that no such list existed.

(v) The 5th Meeting

62 Corderre testified about the 5th meeting which was held between 11 p.m. and
midnight on June 24, 2002 with the night shift associates. Corderre said that Fowler
and Herman were both present at the meeting which lasted between 15 and 30 minutes
at the start of the shift. Approximately 12 employees attended. At this meeting both
letters were once again read. Corderre said Fowler read one letter and Herman read
the other. This was followed by a normal pre-shift discussion of staffing problems,
safety issues, supplies and equipment issues. Then the employees went to work. In
total, the meeting lasted approximately 30 minutes.

63 Corderre testified there was a second meeting of associates on the night shift
which occurred before 3 a.m. in the training room at which Fowler and Herman were
once again present.

64 She said the letters were read out and employees were advised that they could
take advantage of Wal-Mart's open-door policy. Corderre said that employees were told
that if they felt harassed by the union, they could talk to management or the RCMP.
Some associates expressed concern whether Wal-Mart would close or if they would
lose their benefits if the union got in. Corderre said that no definitive answer was given
by the managers.

65 Corderre admitted that she may be confusing the content of the two meetings
and that some of the things she attributed to having been said at that second meeting
were actually said at the first.

66 Herman confirmed that there was a meeting at 11:00 p.m. on June 24, 2002. He
said he read out both letters. Employees asked if the store would close if the union
came in or when the store in Prince George opened and Herman testified that he
answered "no". Herman denied telling employees that Noble was organizing out of
revenge or that employees should not believe promises being made by Noble. Herman
could not recall if he invited employees to speak to management or to the RCMP if they
felt harassed.

67 Herman said there were no subsequent meetings of associates in the training
room. However, Herman confirmed that a couple of associates, including Corderre, met
with he and Fowler a couple of hours later in the training room. At that meeting
Corderre asked if the store would close if the union got in or when Prince George
opened, and Herman said he replied "no". Herman was also asked if he had come to
Quesnel because of the union. He did not give a direct answer but talked about the
management transition which was occurring with Sims taking over the store.

68 Herman testified that he spoke to Corderre at the end of her shift in the morning
to set matters straight regarding the purpose of his visit which he had evaded at the
previous meetings. Herman also stayed for the pre-store-opening meeting and then left
Quesnel.

(vi) Subsequent Meetings

69 After Herman left Quesnel, the new store manager Sims continued to address the organizing drive at regular employee meetings. Sims had been asked by Wal-Mart to read a set of 7 questions and answers to employees which he did on June 28, 29, 30 and July 2, 2002. The questions and answers read as follows:

Q. 1. Will the Wal-Mart store close if there is a union in the store?

A. 1. No. We will not close by reason of a union being certified in this store.

Q. 2. Can the union get us \$15.00 an hour?

A. 2. The union can only "get you" what it can deliver across the bargaining table if it is certified. The union cannot guarantee anyone the successful negotiation of any specific working condition. They can only deliver what we are prepared to agree to at the bargaining table. Any union that makes specific promises as to any improvements is misleading you as to the true process of collective bargaining.

Q. 3. Will our store close when Prince George opens?

A. 3. No it won't.

Q. 4. Does Wal-Mart have a "hit-list" of Associates who the new store manager is going to go after?

A. 4. Absolutely not. Anybody who is spreading this kind of rumour is acting with malice.

Q. 5. What can I do to stop David from coming to my house.

A. 5. Your house is your private property. You can advise "David" not to come to your house and that if he persists, you will consider him to be trespassing. If he persists, you can call the Police.

Q. 6. How much would union dues be?

A. 6. Under a number of UFCW agreements, union dues are \$8.55 per week for employees working less than 20 hours per week and \$9.05 per week for employees working more than 20 hours per week.

Q. 7. Who controls the time of this? and when will it all end?

A. 7. There is no rule as to when organizing campaigns can start and end. We do know that any cards signed become stale-dated after 90 days from the date they are signed and after that, cannot be used for applying to the Labour Board. Most campaigns end with either the union applying for a vote or being satisfied that so few employees want them that their attempts to contact employees to sign cards simply stops.

E. The Labour Watch Documents

70 Daniel Kimzey testified that "the next week" Neilson came into the associates' lounge smiling. She said she had 40 copies of information about unions for people who wanted it. Kimzey said he went to Neilson the next day and asked her for the information. They agreed that Kimzey would leave the window in his van slightly down and Neilson would stuff the information through the opening and into his van. Kimzey testified that he thought this event occurred Tuesday or Wednesday of that week. Kimzey said that Neilson called him the next day on the telephone at work and asked him whether he got the material. He told her he did.

71 Neilson testified that she downloaded the Labour Watch material from the web on July 2nd and made 40 copies of it on Wednesday, July 3rd. She said she stapled it that night. The next day, Thursday, July 4, 2002, she went to speak to Sims invoking the open-door policy. She showed him the Labour Watch material and asked him to read it. She said she would return later to discuss it and she did. She asked Sims whether she could distribute the material to employees. Sims said "no". He reminded her of Wal-Mart's non-solicitation policy and harassment policy. She asked if she could leave it in the lunchroom. He said if she did, she would be coached. Neilson testified she was extremely emotional and upset at this meeting. Sims confirmed that the meeting took place. However he did not confirm her testimony that she was emotional and upset. He said she seemed concerned and nervous.

72 Neilson testified that on that day she gave Bonnie Elliott a copy as Elliott was leaving work. Elliott confirmed receiving the material but thought the event occurred 3 weeks after the meeting with Herman. That would put it into the second week of July, a week after the time frame given by Neilson. Neilson also said that she gave other employees copies after work, usually at their cars. She denied giving McHone a copy on June 23 or 24, 2002. McHone confirmed that she received the material from Neilson in the latter part of July, just before going on holidays. According to McHone's time-sheet, this would have occurred sometime before July 27, 2002. Neilson said she was not at the store on June 23 because she was in church.

73 Neilson also denied giving the material to Kimzey at the end of June. She said that event occurred mid-July. Neilson said she stuffed the material into Kimzey's van at 3:30 p.m. on a Friday and called him at work from home prior to the start of his shift on a Saturday.

74 Time-sheets for Kimzey show that he only worked two Friday's in July: July 5th and July 19th. He never worked on a Saturday. When it was put to Neilson that Kimzey only worked a Monday to Friday schedule, she quipped "oh, I thought he worked Tuesday to Saturday".

75 Time-sheets for Neilson show that on Tuesday and Wednesday of the last week in June, she clocked out shortly after 3:30 p.m.

76 Neilson also entered a receipt for photocopying into evidence. She testified that this was the receipt for the 40 copies of the Labour Watch material which she had made. She testified that she still has some 25 copies left.

77 The receipt shows 225 copies at \$0.13 cents per copy for a total of \$29.25 plus taxes. The Labour Watch material, which Neilson distributed, is a package made up of 15 pages. Twelve pages were downloaded from the web; two pages were created, according to Neilson, by Neilson; and the last page added was a union membership revocation form. Parenthetically, 4 revocations were received by the Board on August 6, 2002. Forty copies of this material would amount to 600 pages, i.e. 600 copies for billing purposes. I conclude that the receipt submitted into evidence reflects that copies of only 15 packages had been run, not 40 as contended by Neilson.

78 The Labour Watch material distributed by Neilson consists of 4 segments. The first is entitled "Frequently Asked Questions" (British Columbia). The table of contents lists the questions asked and answered in the document:

WHY IS THE UNION INTERESTED IN ME?

WHAT ARE MY RIGHTS?

HOW DO UNIONS ORGANIZE?

WHAT SHOULD I CONSIDER WHEN DECIDING WHETHER TO SIGN A UNION CARD OR NOT?

WHAT IF THE UNION SOLICITS ME AT HOME?

WHAT IF I HAVE SIGNED A UNION CARD BUT DON'T SUPPORT THE UNION?

WHAT DOES SIGNING A UNION CARD MEAN?

HOW MUCH WILL JOINING A UNION COST ME?

WHAT CAN I DO TO SUPPORT OR OPPOSE THE UNION?

WILL I GET TO VOTE ON WHETHER THERE IS A UNION OR NOT?

WHAT IF I JUST DON'T CARE?

CAN WE TRY THE UNION OUT FOR A FEW MONTHS?

WHAT CAN THE UNION GUARANTEE?

WHAT WILL HAPPEN IF THE UNION GETS CERTIFIED?

WHAT IS IN A COLLECTIVE AGREEMENT?

WHAT DO UNION DUES GET USED FOR?

WHAT ABOUT STRIKES AND LOCKOUTS?

WHAT ABOUT UNION POLITICS?

WHAT WILL HAPPEN IF THE UNION IS DECERTIFIED?

HOW DO I DECERTIFY A UNION?

79 The next segment was titled "Cancellation of a Union Card" (British Columbia). It contains four substantive sections: (a) Overview; (b) Get the Forms; (c) Timing of your Cancellation; and (d) Deliver your Forms.

80 The Third segment is a two page section entitled "More Frequently Asked Questions". Neilson testified that she authored those pages. The questions set out are:

WILL I BE ABLE TO GET A HIGHER WAGE OF FIFTEEN DOLLARS OR MORE?

DO I STILL GET TO KEEP MY BENEFITS AND OTHER BONUSES?

I AM A UNION MEMBER, CAN I TRANSFER TO A NON-UNION STORE?

IF OUR STORE BECOMES UNION DO I HAVE TO BECOME A MEMBER TO WORK THERE?

IF I HAVE ALREADY SIGNED A CARD, DO I HAVE TO PAY UNION DUES?

81 The two pages conclude with a bolded warning to employees coached in the following terms:

In parting, I would like to add this. When a company and a union are at the bargaining table there are two different objectives. The objective of the union is to increase what is there already. Quite often to the detriment of the company, forcing the company to lay off employees to maintain a level of

productivity. The companies' objective is to define what is there and maintain the current level of productivity. This is not to say that the company would pursue lower wages or fewer benefits but there needs to be a balance. In a competitive market, there cannot be more going out than there is coming in and so as employees we would undoubtedly lose some of our benefits if the agreement included higher wages. Whether you are for or against the union, you are more equipped to make a decision with all the information available to you. It will enable you to make a decision based on knowledge and not emotions.

82 Neilson testified in cross-examination that these two paragraphs were her opinion but admitted that she presented them as fact. She also admitted that there was nothing favourable to the union in those two paragraphs.

83 Neilson testified that she composed the two pages to counter Noble's assertions. When pressed to articulate her concerns, she said that Noble talked about the hit-list, that the store would close, that employees would be fired and that he was disclosing who had signed cards. She also added that Noble was promising \$15.00 per hour. She conceded that she never heard Noble make that promise to any other employee. She also conceded that except for the last item, her two pages did not address any of the concerns that she had expressed. She ultimately conceded that her concerns were rooted in gossip and not in actual fact.

84 However, Neilson continued to deny that someone else created the document and gave it to her to distribute.

85 Finally, the two pages concluded:

It is easier to win a fight that never took place than to win at the end of the battle.

86 The last page of the Labour Watch package was a form entitled "Notification of Cancellation of Membership Card".

87 In testimony, Sims admitted that he was made aware of the Labour Watch website as part of his manager training at Wal-Mart.

F. The Alleged Intrusion Incident

88 Nadia Cindric testified that she was first approached by Noble about 10 days after she had heard employees talking about unionization sometime earlier in June. Cindric had gone for a walk when Noble pulled up in his car and asked her if she had heard about the union and would she like to join. Noble testified that he offered her a ride because it was raining. Cindric said the weather was fine but conceded that it might have started to rain at some point during her walk. In any event, Cindric put Noble off and gave him her telephone number. Noble called her house several times. Cindric kept avoiding talking to Noble.

89 At the beginning of July Cindric and another employee, Amber Fouty, were house-sitting. Noble managed to get the telephone number of the house and called Cindric there. Noble testified that Cindric agreed to meet him prior to her shift at Wal-Mart. They were to meet at a coffee shop. Noble attended and waited for Cindric but Cindric never came. Cindric testified in chief that she never agreed to meet Noble. In cross-examination she agreed that she did agree to meet Noble but failed to attend. Cindric admitted that she never told Noble she was not interested in the union or that he should refrain from approaching her.

90 On July 5, 2002 Cindric says she got up in the morning and found what she described as union material on the counter in the house she was house-sitting. Fouty had already gone to work which is confirmed by her time sheet. According to Cindric, Fouty had likely not locked the door to the house. Cindric concluded that Noble had entered the house and placed the union literature on the counter.

91 Cindric described the union material as consisting of a thick booklet of about 10 pages. She said it took her 15 minutes to read it. She could not recall the colour. She said it was not Wal-Mart specific. She said there was a union membership card attached as part of the booklet which could be torn off and mailed in.

92 The description did not match the union campaign material used in this organizing drive. Local 1518's material which was admitted into evidence on consent consisted of 2 brochures, the union constitution and a magazine size publication 12 pages long entitled "Wal-Mart, Not In Our Community". One brochure contained a small tear-off form which could be mailed to UFCW requesting information about how to get involved in community services of various kinds. The description of the material offered by Cindric could just as easily fit the Labour Watch materials being distributed by Neilson. Cindric testified that she disposed of the material she found almost immediately.

93 Cindric testified that she called her mother and told her that Noble had entered the house while she was sleeping. Both Cindric and her mother were concerned that Noble could have done her some physical harm. When she went to work that day, she reported the incident to Labuckas. She talked to Fouty who denied bringing any union material into the house. As a result, she called the RCMP and filed a complaint. The RCMP treated the call as a harassment complaint and the file was assigned to Constable Gord Singh Gill. Gill testified in this proceeding.

94 Gill said he called Wal-Mart and spoke to Patt. Patt advised Gill that Noble was attempting to unionize Wal-Mart as a result of a personal vendetta. Gill then called Noble and arranged to meet him at 5:00 p.m. on July 5, 2002. At that meeting Gill says he warned Noble about his actions and advised him that Wal-Mart viewed his actions to be a personal vendetta. According to Gill, Noble admitted that was part of his motivation, but only a small part. Gill warned Noble to cease his organizing and leave it to professional union representatives.

95 Noble's take on this meeting is significantly different. According to Noble, Gill told him there will never be a union at Wal-Mart; maybe in Nelson, but not in Quesnel. Noble said that Gill told him to stop following people and stop organizing. Gill denied mentioning Nelson or saying that there would never be a union at Wal-Mart.

96 Later that evening Noble called Gill and told him that he was coming to see him again with some other union representatives. Gill advised Noble that the RCMP do not get involved in union matters.

97 The file was reviewed on July 8 by Gill's superior who advised Gill that it should be made clear to Noble that the police do not concern themselves with organizing matters. Their focus is the harassment issue. Gill admitted that was made clear to him by his supervisor later.

98 Sims testified that Constable Gill called him on Saturday, July 6, 2002 and advised him that he had spoken to Noble and that he had concluded that the intrusion alleged by Cindric did not really happen.

99 On July 17, 2002, Gill called Cindric and she advised Gill that Noble had not bothered her again. On July 24, 2002, Gill advised Noble that the RCMP were closing the file.

100 Gill admitted that he made no effort to recover the material which had allegedly been left in the house by Noble. Gill said this was because they focussed on the harassment aspect of the complaint.

101 This alleged intrusion incident was talked about at work for at least a week. Cindric told employees with whom she worked that Noble had entered her residence when she was asleep and left union material. She expressed great concern that he might have harmed her physically. Daniel Kimzey confirmed that Cindric had announced that she had to call the police on Noble. McHone confirmed that some time in the following week Cindric had advised her also.

G. The August Meetings

102 McHone testified that on August 4, 2002, Sims was in the training room talking to associates. According to McHone, Sims said that if the union comes in we are screwed. Sims denied this ever happened. Sims testified that on August 1, 2002, he met with the night maintenance crew and told them there was no hit-list. Sims said he did this in response to concerns expressed by Corderre about a hit-list. Time sheets show that McHone was at work on August 4, 2002. Sims admitted being at the store at work that day also. Antonovitch also testified that in August he did not tell employees that he saw no reason for them to sign union cards. He said it did not matter to him as he had worked in unionized environments before.

H. The September Telephone Call

103 On September 19, 2002, Noble spoke to Seitz by telephone. The background to how the call came about was set out in BCLRB No. B360/2002. The telephone call was recorded by Noble. Wal-Mart demanded production of the tape. Local 1518 objected claiming litigation privilege. I upheld the objection in BCLRB No. B360/2002. In that decision, however, I also set out conditions under which I would order the tape recording produced.

104 When the hearing resumed in December, Noble was questioned about the content of the conversation. He could not recall much except that Seitz had confirmed the existence of the hit-list and explained why he could not testify. He had not used the tape to refresh his memory prior to testifying. He did admit to listening to it once the same evening that he made it back in September.

105 Wal-Mart again asked for the production of the tape. Local 1518 said it did not object this time as long as it was not seen to be waiving any other privilege. Wal-Mart accepted this stipulation. Consequently, even though none of the conditions I had set out transpired, and even though nothing had materially changed since the last time I addressed the issue of production of the tape, I ordered the tape produced in view of the fact that Local 1518 no longer objected. The tape was produced and transcribed and the transcription was entered into evidence as an exhibit.

106 The transcription confirms that Seitz refused to testify in the proceedings on behalf of Local 1518. Seitz confirmed that Wal-Mart spoke to him about a month before that conversation in September. Seitz confirmed that Fowler had told him in May that there were people problems at the store and that Wal-Mart had to get rid of some people. Seitz also confirmed that the names identified had come from Fowler. Neither Seitz nor Fowler were called to testify.

III. ANALYSIS AND DECISION

107 I begin by noting that the parties agreed that this case must be decided pursuant to the Code as it stood prior to the amendments to Sections 6(1) and 8 which went into effect at the end of July 2002. As a result, the Board's jurisprudence in *Cardinal Transportation B.C. Incorporated*, BCLRB No. B344/96 (Reconsideration of BCLRB Nos. B463/93 and B232/95) ("*Cardinal Klassen*"), on the issue of employer speech is the governing law for the purpose of this case. Only the alleged remarks of Antonovitch and Sims at the beginning of August 2002 occurred after Section 8 and Section 6(1) of the Code were amended and would therefore be subject to the amended Code.

108 The previous version of Sections 6(1) and 8 read as follows:

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

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

109 Unionization is a matter considered to be an aspect of an employer's business on which an employer may make some circumspect comments such referencing the statutory requirements for union membership or correcting incorrect or incomplete statements about its business: *Cardinal Klassen*, paras. 182 and 201 - 203.

110 The amended Sections 6(1) and 8 now read:

- 6(1) Except as otherwise provided in Section 8, an employer or a person acting on behalf of an employer must not participate in or interfere with the formation, selection or administration of a trade union or contribute financial or other support to it.
8. Subject to the regulations, a person has the freedom to express his or her views on any matter, including matters relating to an employer, a trade union or the representation of employees by a trade union, provided that the person does not use intimidation or coercion.

111 Like most cases of this sort, this case turns on the facts and inferences to be drawn from the facts. I agree with Wal-Mart that there are some differences between what was asserted by Local 1518 in its pleadings and the facts as they have come out in the evidence, a point concede by Local 1518. However, I accept Local 1518's argument that that is typical of how a case like this may unfold. The case also turns on the credibility of witnesses who testified before me.

112 Wal-Mart says the alleged unfair labour practices fall into four categories: the letters, the meetings, the allegations against Sims at the beginning of August and finally, the allegations against Antonovitch at the beginning of August. Wal-Mart argues that what really took place overall was nothing more than a form of peer pressure discussion amongst employees which does not constitute undue influence on the part of Wal-Mart.

113 Wal-Mart says that the letters are protected by Section 8 of the Code. Wal-Mart argues that anything Neilson said at the meetings did not amount to a threat or undue influence, nor can it be attributed to Wal-Mart. Neilson is entitled to be critical of Noble and to make the remarks she did. Ultimately, even if there was discussion about Noble at all of these meetings, it amounts to a criticism of organizing behaviour and that is not the kind of criticism of a union that is prohibited by *Cardinal Klassen* as a violation of Section 6(1) not protected by Section 8.

114 Wal-Mart says the hit-list business is a two-edge sword which could have both a positive and a negative benefit for Local 1518. On the one hand, employees may conclude that it is better join the union to gain protection just in case they are on the list. On the other hand, employees might conclude that joining Local 1518 is a sure way to get on the list.

115 Wal-Mart says that the alleged intrusion incident should never have been made
part of Local 1518's complaint because it is not an employment matter. With regard to
the fact that Cindric spoke about the incident to other employees, Wal-Mart has no
obligation to muzzle its employees. Further, Wal-Mart says it did not know that Cindric
was telling people about what she thought had occurred. Wal-Mart says that Cindric's
evidence should be accepted that the issue was spent by the end of the week.

116 Regarding the August incidents, while Wal-Mart had initially suggested that
McHone was not present at work on August 4, it concedes that indeed she was and
indeed there was a meeting with Sims following her coaching on August 2nd. However,
Wal-Mart argues that her evidence is simply not credible. Moreover, Wal-Mart says
Sims denied having said what Local 1518 alleges.

117 Finally, Wal-Mart argues that Anotonovich is not a manager and even if he is,
what he is alleged to have said does not violate the Code.

118 On the other hand, Local 1518 takes a different perspective on all of the incidents
alleged. Local 1518 focuses on what it says was the unjustified besmirching of Noble's
character. Local 1518 submits that one important tool of a union organizer is his
credibility, good name and good reputation. In this case, Wal-Mart permitted false
allegations about Noble to be made that were detrimental to Noble's efforts and Local
1518's signup campaign. Some of these false allegations arose out of a fabricated
intrusion incident. Local 1518 argues that the RCMP investigated the intrusion incident
and concluded within 24 hours that no such incident had occurred. Nevertheless,
according to Local 1518, Cindric was permitted by Wal-Mart to repeat her unfounded
allegations for at least a week, by her own admission, and longer according to the
evidence of other employees.

119 Local 1518 argues that the testimony of Neilson was critical to many of these
events. Local 1518 says that Neilson was not credible and her evidence should be
entirely discounted. Local 1518 points to several areas where her testimony is not
borne out either on the documents or by the testimony of other witnesses.

120 I agree with Local 1518 that the attack on Noble's credibility and reputation is the
proper perspective to take on the events which unfolded at the Quesnel store. From a
factual perspective, a subtle but central theme in Wal-Mart's message communicated to
employees in various ways was designed to promote the view amongst employees that
Noble was engaged in harassment and unlawful activity; that he was acting for purely
selfish and vindictive reasons; and that he was not to be trusted. In short, Wal-Mart's
approach to this organizing campaign was "to shoot the messenger".

121 From the perspective of the law and policy under the Code, the question is
whether this message was a statement of fact or opinion reasonably held by Wal-Mart
regarding its business, and if not, did it constitute interference with the formation,
selection or administration of a trade union. Ultimately, it is the whole of Wal-Mart's
conduct that must be assessed from this perspective.

122 I further agree with Local 1518 that Neilson's testimony is central to the facts in
many respects and that it is internally and externally inconsistent in several key areas.

123 First, her testimony concerning the meeting with Noble at Tim Horton's does not
accord with that of an independent witness whose evidence I prefer.

124 Second, the receipt she provided for copies of the Labour Watch package of
material that she distributed to employees does not reflect her oral testimony as to the
number of copies she had run. While it is conceivable that a printer or copy business
may provide some type of discount or run some extra copies free of charge, it is unlikely
that they would run forty packages amounting to 600 copies and only charge for 15
packages amounting to 225 copies. It is further unlikely that such a discrepancy would
not have been obvious to either the vendor or Neilson and would not have been a topic
of some discussion between them. Therefore, if it indeed existed, an explanation would
have been provided. None was forthcoming.

125 I also find Neilson's testimony with regard to the material that she delivered to
Daniel Kimzey also not believable. Her testimony was tailored to her belief that Kimzey
worked on a Tuesday to Saturday schedule. When it was established on the basis of
payroll records that Kimzey worked Monday to Friday and never worked a Saturday,
and worked only two Fridays in July, it became clear that Neilson was less than
forthright about the date on which the event took place. I find that the reason Neilson
tailored her evidence about this event was to fit her contention that she never distributed
the material or campaigned against Local 1518 on employer time.

126 Further, that was not the only time that Neilson attempted to tailor her testimony
to facts she thought she knew. She was asked in testimony whether she attended a
Saturday morning meeting with Herman on June 22, 2002. She replied that she did not
work on the Saturday and remained at home with her family. She also added that there
was no such meeting because Herman left on the Friday. I find that Neilson was privy
to the fact that Herman had been scheduled to leave on the Friday, but failed to
appreciate that he had extended his stay until Tuesday of the following week.

127 Neilson initially testified that she wanted employees to know all of the facts
before deciding whether to support Local 1518. She ultimately admitted that her
position was anti-union and her material and remarks were designed to promote an anti-
union response. She conceded that she conveyed her opinions, particularly about the
issue of employees losing benefits in collective bargaining, as fact. The two additional
pages that she contends she added to the Labour Watch material end with a reference
to doing battle. Her initial oral testimony regarding her own motivation simply does not
accord with either the statements she made at the meetings or the material she
distributed.

128 Finally, her testimony about her physical state and demeanour when she spoke
to Sims about distributing the Labour Watch material was not confirmed by Sims in his
testimony when he was asked the question directly.

129 When assessing witness credibility, I prefer the contextual approach of weighing the testimony against that of others, assessing both internal and external consistency, and looking for contextual imbedding. All of these elements strongly suggest Neilson's testimony is not credible. Moreover, I find that she told her story in a very linear fashion. When she was questioned on different aspects of her story from different perspectives in cross-examination, she became confused, despite counsel's frequent attempts to restate the question and clarify issues for her.

130 In addition, however, I also took note of Neilson's conduct on the witness stand. Neilson was combative in cross-examination and sarcastic in many of her responses. On occasion, when she gave a glib response, she looked to the employer side of the room for approval. On other occasions, when she was stumped by a question, she would look to the employer's side for help. In short, her conduct on the witness stand was not very persuasive nor did it reflect efforts of an individual trying to truly recount events based on an independent recollection.

131 Consequently, whenever her testimony conflicts with that of others, I prefer the testimony of others.

132 The second person whose testimony I do not find to be very credible is that of Cindric. Wal-Mart argues that Cindric's evidence was credible and that from her perspective she was entitled to conclude that Noble had left the material in her house because Noble was the only one who persuaded her regarding union matters. Wal-Mart argues that it should surprise no one that the material was neither kept nor obtained by the police as their focus was on the harassment aspect of Cindric's complaint. Local 1518 argues that Cindric was not very credible given that she said she had disposed of the alleged union material virtually immediately. Moreover, her description of the material did not match the campaign literature being distributed by Local 1518 in organizing.

133 I find Cindric not saving the material, which she alleges was left by Noble in the house which she was house sitting, to be incredible. I am further perplexed as to why the RCMP made no effort to secure that material as it would have corroborated at least to some degree the allegation of intrusion as well as harassment. The only conclusion that I can reach in this regard is that the RCMP did not find Cindric to be very credible either. I find support for this conclusion in the fact that it took Constable Gill less than 24 hours to conclude that no intrusion occurred.

134 I also find that her description of the "union" material did not match Local 1518's campaign literature. Wal-Mart says that there was a tear-off portion on one of the Local 1518 brochures that matches what Cindric described. However, she testified that the tear-off had to do with union membership while in actual fact the tear-off on the brochure dealt with a request for more information about Local 1518's social activism. I find her description more easily matches the material being distributed by Neilson which clearly had a last page that addressed union membership. The thing is that no one will ever know what it was, if it was anything at all, given that this critical lynch pin in Cindric's story was, according to Cindric herself, almost immediately thrown away. I

find it unbelievable that a person in these circumstances would not preserve the only corroborating piece of evidence if she was intent on making a serious allegation that could result in criminal charges against someone else.

135 Indeed, Cindric struck me as somewhat impressionable. I find that the attention that she got from reciting the story to her mother and to Wal-Mart management acted as a catalyst encouraging her to repeat the story again on at least several occasions to her co-workers. When I put that together with her failure to keep the only piece of evidence that could have begun to corroborate her story, I have to ask myself whether the whole thing was not in fact made up.

136 As a result, I find her evidence of this incident unbelievable, but at the same time, the fact that she would repeat it in the workplace on several occasions as relevant.

137 Local 1518 submits that Herman's credibility is in doubt as well. According to Local 1518, the most telling point of his testimony occurred when he was questioned about when he first learned of Local 1518's campaign. Local 1518 points out that Herman testified that he learned of it from his e-mails, which he could not have seen until late on the evening of June 19th, yet he had his flight booked to Quesnel in the early afternoon. Only in re-examination did Herman recall that Toy had called him and that is how he had learned about the Union's organizing campaign. Herman's testimony is internally inconsistent and therefore Local 1518 submits not very credible.

138 Again, I agree with Local 1518 and find Herman's testimony lacking in credibility in several aspects. I find his testimony as to how he was advised or came to know about the Local 1518 drive in Quesnel to have been less than persuasive. Given that it is beyond dispute that Herman attended at Quesnel largely for the purpose of addressing the Local 1518 drive I would have expected that the direction that he obtained for going to Quesnel would have been something that he would have remembered very clearly.

139 Local 1518 argues that with regard to what Neilson said at the three meetings, the evidence of its witnesses should be preferred to that of Herman. Local 1518 argues that Herman told his managers at a meeting on June 20th, to keep a log of what was transpiring: who, what, when and where. Then, says Local 1518, incredibly Herman testified that no one kept notes of what was said in the meetings on June 21st. Herman himself did not keep any notes and it would not be in his interest to confirm all of the things that Neilson actually said.

140 Wal-Mart argues there was little evidence that clearly established what Neilson said both at the second and at the third meeting which she attended. There was consistent evidence that the meetings were shorter than Local 1518 had alleged. Wal-Mart argues, therefore, that Neilson's remarks were likely to be shorter as well, particularly at the third meeting, as she would not know people on that shift.

141 I find that Herman's testimony as to what Neilson said in the various meetings she attended to be less than persuasive as well. He says that at that third meeting he

was absent at the bathroom for the bulk of Neilson's remarks. Wal-Mart argues that there was no conclusive evidence to establish that Herman did not leave that third meeting. However, I find that explanation just too convenient coming at the very critical point when Neilson spoke. Further, I accept that Neilson was present from the outset of that third meeting and accept that Herman remained present throughout. I have concluded that while Herman may well have reined Neilson in, he only did so after she had finished conveying the salient points about Noble to her co-workers. I further find it hard to understand that if Herman indeed wanted to stop Neilson from speaking why he did not do so immediately at the second and the third meeting.

142 Local 1518 argues that it is odd that Herman initially denied discussions of potential store closure when in the follow up question and answer provided by Wal-Mart, Wal-Mart actually addressed issues about store closure. Local 1518 says if there were no such concerns previously as Herman had first testified, then why would Wal-Mart go to such lengths to produce a question and answer document addressing those very issues? I find that these questions did come up at the later meetings. Herman did testify that he denied the store would close. However, I find that his denial was only definitively given in the private meeting, not at the full staff meeting. That would explain the reason why Wal-Mart would want the answer more broadly circulated in the subsequent question and answer document. Nothing turns on this point as I find Wal-Mart did not engage in intimidation or coercion.

143 The guiding principle which I used in determining the facts is the often quoted comment in *Forano Limited*, BCLRB No. 2/74, [1974] 1 Can LRBR 13 at p. 14:

Employers don't ordinarily advertise their anti-union activities. Such intention must be pieced together from a pattern of circumstantial evidence.

144 I find this to be such a case.

145 Wal-Mart submits that another passage in *Forano* that is helpful in this case is found at page 18:

Employer conduct which has a significant impact on the employee's freedom to make up his or her own mind about collective bargaining is the kind of conduct which will run afoul of s. 3. In making that judgment, we must always be conscious of the fact of employee dependence on the employer, especially for job security, and the opportunity this gives the employer for undue influence on that choice. Comments and predictions which might seem innocuous in a political campaign take on a very different hue when voiced by management. The safe course for an employer is to remain an interested bystander, to resist the temptation to become an active partisan in a campaign against a union.

146 Wal-Mart argues that conduct which amounts to interference and breaches the Code must be significant and substantial and it must impact on an employee's right of

free choice. Wal-Mart says that it simply stood by and did nothing to participate in a partisan way in this campaign. The discussions were largely generated by and amongst employees.

147 I agree with Wal-Mart that discussions amongst employees are matters best left to employees for the most part. However, the Board in *The Baptist Housing Society of B.C. (Central Care Home)*, BCLRB No. B80/98 said that conduct which may be permissible for employees, if it is encouraged, approved or condoned by an employer may cross the boundary and amount to improper interference or an unfair labour practice: para. 45. Further, the Board said that it will not police discussions amongst employees in certification or decertification campaigns short of intimidation or coercion, even if that discussion becomes acrimonious at times. However, if the content of the discussion is such where employees may reasonably perceive as coming from their employer, the Board may be compelled to intervene: para. 61. There must be some objective link between the person speaking or engaging in the conduct which interferes in a union's campaign and the employer. In this case, the objective link is in Herman's permitting Neilson to address captive audience meetings which she had no business attending.

148 This is a case where Wal-Mart simply could not resist the temptation to take on a partisan role. The difference in this case is that its partisanship was more subtle and with a unique twist: it chose not to debate the benefits of unionization *per se*, but rather, as Local 1518 has argued, to discredit Local 1518's organizer. Wal-Mart argues that criticism of a union organizer's approach does not amount to undue influence on employee freedom to choose. However, while different, discrediting the union organizer without justification in this case turned out in my view to be as effective a tool as any other for the purpose of interfering in a union campaign and undermining employee rights under the Code.

149 I find that the evidence established that Wal-Mart had a motive for such an attack on Noble. At the outset of the events in question Wal-Mart knew that Noble was the organizer and it took the view that Noble's organizing was a matter of a personal vendetta against Wal-Mart. This latter point was confirmed by the testimony of Constable Gill who said that when he contacted Patt in early July, he was told in no uncertain terms that Noble was engaged in a personal vendetta against Wal-Mart. I find that was Wal-Mart's view from fairly early on in the sequence of events.

150 A vendetta occurs when a person single-mindedly seeks vengeance for a wrong or injustice committed against them. In more colloquial terms "getting even" might be an appropriate description. Consequently, holding the view that Noble was engaged in a personal vendetta begs the question for what injustice or wrong was he seeking vengeance. What was it that he was perceived by Wal-Mart to be getting even for? The evidence reveals that fairly early on in the sequence of events Wal-Mart heard about Noble's referencing a "hit-list". Indeed, when Patt sent his e-mail account to senior management detailing what employees were telling him, he included a description of the Noble-Pederson people problem which Seitz had been unable to resolve to Fowler's satisfaction and which led to Seitz's transfer: ergo, the "hit-list".

From all of these circumstances I conclude that Wal-Mart's perception that Noble was acting out of a personal vendetta in fact betrays the existence of, if not a physical, at least a notional hit-list.

151 I have also reviewed the circumstances surrounding Noble's acquiring knowledge of the hit-list and his subsequent use of it during the organizing campaign. I am satisfied on the evidence that there was no physical list of employees who were being targeted for dismissal by Wal-Mart. However, I am also satisfied based on Noble's evidence of the meeting between Noble and Seitz as well as the transcript of the telephone conversation which occurred in September between Noble and Seitz, that Fowler and therefore Wal-Mart, indeed did target Noble and Kimzey for dismissal. Wal-Mart had identified those two employees as Seitz's people problems which it intended to remove. I accept that their names appeared in the minutes recording the meeting between Fowler and Seitz.

152 One of the most significant protections that comes with unionization accorded by the Code is the mandatory just cause provision which is written into every collective agreement by statute and protects employees from arbitrary employer dismissal. Given the above described confluence of circumstances I conclude that Wal-Mart was concerned that Noble's referencing the "hit-list" in organizing may meet with some success.

153 I have also concluded that Wal-Mart did not maintain a neutral stance as counselled by the Board in *Forano*. As already stated, I find the approach used was to subtly undermine the credibility of Local 1518's organizer Noble. It began with the reading of the letters by Herman in the captive audience meetings.

154 Wal-Mart argues that the first letter read by Herman is clearly protected by Section 8 and does not exert an undue influence or power over employees. It invites the employees to ask themselves some questions. Wal-Mart says that *Forano* may be best remembered for the admonition that it is a better course for employers to stay neutral, but the fact is that the case law does not prevent employers from communicating as long as the communications are not intimidating or coercive.

155 Wal-Mart says that it is entitled to tell employees that it prefers to deal directly with them and not through a union. Its opinion could influence employee choice but nothing in the law prevents an employer from expressing an opinion that might have some influence. All Wal-Mart did was invite employees to make an informed decision and there is nothing improper in that approach.

156 Local 1518 argues that the clear message conveyed at the three meetings by Wal-Mart through the letters and by answering questions was that Noble was harassing employees by attending uninvited and unwanted at their homes and staying after being asked to leave. Local 1518 says that another impression left by Wal-Mart in those meetings is that Noble somehow improperly obtained their addresses in order to approach people. Further, Local 1518 argues that Wal-Mart deliberately conveyed the

impression that Noble's approaching people to sign union cards or to distribute campaign literature amounted to improper and unlawful harassment.

157 I find the first letter read to employees by Herman in each of the meetings does not run afoul of the law and policy of the Code, as interpreted by the Board in *Cardinal Klassen, supra*, even though it does express surprise on the part of Wal-Mart that anybody would find it necessary to seek union representation in the Wal-Mart environment. Standing by itself that letter would not have led me to conclude that any undue influence was being exercised by Wal-Mart despite the fact that it was read out in captive audience meetings which attract greater Board scrutiny: *Cardinal Klassen*, paras. 204 - 208.

158 However, I find the second letter does amount to an interference in Local 1518's campaign. That letter reflects Wal-Mart's approach to discredit Noble by inferentially advancing the theory that Noble was conducting himself inappropriately. I reach this conclusion by juxtaposing what the letter purports to address against what Wal-Mart knew to be true at the time. I cannot conclude that the statements made or opinions expressed were reasonably held by Wal-Mart about its business and thus are not saved by Section 8 of the Code.

159 Herman testified that information obtained from employees Maley and Ripley caused Wal-Mart to write the second letter. But, Wal-Mart was well aware that the two employees that Patt interviewed, Maley and Ripley, provided a very plausible and reasonable explanation as to how Noble obtained their addresses and attended their homes. None of that involved a breach of confidentiality of any sort, or any unlawful or inappropriate appropriation by Noble of personal information in Wal-Mart's possession to which Wal-Mart has some proprietary right or in relation to which Wal-Mart owes a duty of confidentiality. Employees have a right to relay information in their personal knowledge about fellow employees to a union conducting an organizing campaign in order to facilitate union organizing. There is nothing improper or inappropriate about such conduct. That is how all campaigns work. Further, there was no question raised by Ripley and Maley about any personal information having been improperly obtained from Wal-Mart. There was never any suggestion that Wal-Mart had breached any confidentiality in revealing their names, telephone numbers and addresses.

160 Yet, that second letter implies that there is a mystery as to how Noble obtained addresses of associates and implies that Noble is conducting himself inappropriately by not getting prior approval to attend at the homes of employees. The letter also implies that Noble's conduct is causing employees to suspect that Wal-Mart provided the information unlawfully requiring Wal-Mart to defend itself. In short, it subtly plants the idea that Noble is acting maliciously towards Wal-Mart. It extends an assurance that Wal-Mart did not and would never release personal information to Noble because that is contrary to law. It effectively sets up a straw man to knock down portraying Wal-Mart as the keeper of privacy and the defender of employee rights to privacy which implies that Noble is therefore the opposite. The letter suggests that Noble's conduct equates with harassment and that Wal-Mart is providing a safe haven from that kind of harassment.

In short, Wal-Mart paints Noble as an organizer engaged in inappropriate conduct against whom Wal-Mart was prepared to protect its associates.

161 I infer from the circumstances that Wal-Mart's Quesnel activities were carefully scripted by labour relations professionals in Mississauga. But given the context, I find that the script was not intended to avoid mistakes by complying with the law and policy of the Code, but rather to cloak a message which Wal-Mart knew would have an effect on its captive audience. Contrary to Wal-Mart's assertions, the statements or opinions expressed were not responsive to any demonstrated employee concerns. Parsed out one by one in an abstract setting or in other circumstances, each statement might be considered "reasonably held" about Wal-Mart's business. However, I have assessed what was said both in the context of what Wal-Mart claimed had generated the response and in the context of the letter being read in a captive audience meeting. In these circumstances, there was no reasonable basis for advancing the statements regarding confidentiality of employee information which Wal-Mart conveyed in the meetings.

162 This Board has said that if an employer wishes to express its views reasonably held about its business, which includes matters relating to collective bargaining and union representation, it should do so in writing so that there will be no dispute as to what actually was conveyed to employees. The written material can simply be posted or distributed leaving employees to take it or leave it and to make up their own minds about the content. Had these letters simply been posted, I might well have attributed far less importance to them and in particular, the second one: *Cardinal Klassen*, para. 208. But they were not simply posted. Herman testified that he felt compelled to get the content of the letters to the associates as soon as possible. I conclude that delivering the message in captive audience meetings was designed to enhance its attempts to provoke an anti-Noble sentiment and thus an anti-union sentiment amongst employees. I also conclude that it was designed to give Neilson a forum at which to speak.

163 Wal-Mart says that there is nothing unlawful about captive audience meetings *per se*. What the case law says is that captive audience meetings are subject to greater scrutiny. However, this Board has also said that captive audience meetings are inherently intimidating and coercive, and the content of the message delivered in a captive audience meeting may take on a wholly different dimension than had it simply been posted.

164 Further, Wal-Mart invited questions and its answers continued the underlying theme that Noble's conduct was improper. While it did not appear in the letter, Wal-Mart invited employees to call the police if they were not happy with Noble's conduct.

165 Wal-Mart argues that for the most part it was responding to employee concerns and that those responses do not amount to a criticism of Noble. Wal-Mart says that a lot of the discussion which occurred at the meetings largely consisted of employee comments to each other. Any reference to the police was in response to employee questions and any criticism of Noble's motives came from employees. Wal-Mart argues

that it is proper for an employer to give advice to employees about what they could do about unwanted company.

166 I disagree with Wal-Mart's spin on the facts. There was no direct evidence from any employee that Noble would not ultimately leave their residence if asked. Further, Noble's evidence was, confirmed by those employees who did testify, that he attempted to arrange meetings at appropriate and convenient times. At worst, Noble may have made some cold-calls on employees to enlist their support, but there was no direct evidence that he overstayed his welcome. He may have exerted pressure in his attempts to enlist support, but that is to be expected and is certainly nothing over which to call the police.

167 I find that it was important for Wal-Mart to impress on employees its view that Noble was not a person to be trusted or believed, that he held a grudge, that he was somehow getting personal benefits from all of this, and that he was in fact acting maliciously out of a personal vendetta. Juxtaposing the police against what Wal-Mart knew Noble's conduct to be was designed to portray Noble as doing something inappropriate.

168 Wal-Mart's desire to discredit Noble was also reflected by the remarks made by Neilson at these meetings. It is undisputed that Neilson invited employees at all three meetings to see Noble's new car that "the Union had got for him". I find that Neilson was implying that the new car was a reward for Noble for organizing the employees in contradistinction to a tool to be used in organizing efforts.

169 Again, Wal-Mart was well aware that Local 1518 had not "got" any new car for Noble as Ripley had informed Patt at the very first meeting that Local 1518 had rented a car for Noble to use while he was organizing. That is certainly not the impression that was being left by Neilson and Wal-Mart was more than happy to have Neilson leave that impression at all three meetings.

170 Wal-Mart argues that Neilson is not a manager and that was never disputed. In order for her conduct to be unlawful she has to have been held out as acting on behalf of Wal-Mart. She is seen by all associates as an ordinary employee and indeed someone who Noble approached to sign a card. There was no evidence at any meeting that she attended that she had any authority or that any employees saw her as having any authority. She was cut off at one meeting and told not to attend any further meetings at another.

171 Wal-Mart says that there is no reason to doubt Neilson's motive for attending that third meeting as she had uncovered new information regarding Local 1518's campaign which she wished to convey to employees. Further, Wal-Mart says that there was no evidence that Neilson attended the Saturday morning meeting. The fact is, according to Wal-Mart, that after Herman prohibited her from going to any further meetings at the third meeting on Friday, she never spoke again at any subsequent meeting.

172 I accept that Herman cut Neilson off at some point in each of the latter two meetings, but I also conclude that he only did so after Neilson had delivered her message to employees. I find it was important for Wal-Mart that the message that Noble was acting inappropriately motivated by a personal grudge against Wal-Mart or for personal gain reach the associates. I also conclude that Neilson being able to speak at these captive audience meetings gave her message more legitimacy and force than had she been confined to conveying it on the store floor at lunch or coffee breaks employee to employee. I find that a reasonable, well-informed person could easily conclude under these circumstances that Neilson's efforts were endorsed by Wal-Mart.

173 Wal-Mart argues that the evidence against Neilson comes from ex-employees and it is evident that they harbour ill will towards Wal-Mart. Wal-Mart says that Neilson's evidence should be preferred when it comes to what words were actually spoken as the testimony from other employees was unfocused and in some cases contradictory. Whatever she said, Wal-Mart argues there can be no finding that her remarks were made on behalf of management or Wal-Mart. Wal-Mart argues that employees have the right to comment negatively on a trade union. Wal-Mart says it would be perfectly natural for employees to question Noble's motives, particularly given that he was hired by Local 1518 to organize the store. According to Wal-Mart, it is not surprising that the focus of the debate amongst employees centred on Noble's motives rather than the positive or negative benefits of unionization itself. Finally, Wal-Mart says that there was no evidence that Herman would have known or could have known that Neilson would have spoken out against the Union the way she did at the first meeting.

174 However, Neilson had approached Herman prior to that first meeting and I find that Herman is astute enough to have realized that Neilson was not supporting what Noble was doing. Whether Herman and Wal-Mart actively recruited Neilson to deliver the message that she did, or whether it simply facilitated and permitted her to deliver the message is at the end of the day unnecessary to resolve. In the circumstance of these captive audience meetings, the latter is sufficient to constitute improper interference in a union organizing campaign. Wal-Mart management stood by long enough to permit Neilson to deliver a message which Wal-Mart knew was at least in part false, but which complemented Wal-Mart's desire to discredit Noble. As a result, I find it appropriate to hold Wal-Mart responsible for facilitating Neilson's inappropriate commentary.

175 Wal-Mart's approach to this campaign was further reinforced in the question and answer sessions conducted by Sims. Wal-Mart argues that the question and answer document was in response to questions being posed by employees. Wal-Mart says that it is extremely sensitive about the topic of store closure following what happened in Windsor, Ontario: *Wal-Mart Canada Inc.*, [1997] OLRB Rep. January/February 141. While I accept that Wal-Mart was justified in reassuring employees that the store would not close if unionized, that alone does not exonerate the rest of the question and answer document.

176 In question 2, Wal-Mart emphasizes that Local 1518 can only get what Wal-Mart agrees to at the bargaining table. That also is not in and of itself improper: *Wal-Mart Canada Inc.*, BCLRB No. B90/98 at para. 104. However, the information provided is

nothing more than a repetition of what was contained in the first letter read out by Herman in the various meetings. So why repeat it?

177 I conclude that the answer lies in the new piece of information found in the question which Wal-Mart purports to address. That question asserts that employees have been asking whether Local 1518 can obtain a \$15/hour wage rate for them. More importantly, it implies that someone, in this case Noble, made such a promise or representation to the employees.

178 Noble vehemently denied making any representations or promises about a \$15 wage rate. The only evidence that he made such a representation came from Neilson. And as I have already indicated, I find Neilson's testimony not to be credible and prefer that of Noble. I therefore conclude that the real purpose of question and answer #2 is not to advise employees of what may happen in collective bargaining, which they have already been told before, but to paint Noble as someone making promises Local 1518 cannot keep and therefore as someone not to be trusted.

179 In question 4, Wal-Mart not only denies the existence of a hit-list, but also accuses anyone claiming that there is a hit-list of acting with malice. I find that Wal-Mart was really telling employees that Noble is acting with malice.

180 Finally, in question 5, Wal-Mart again paints Noble as doing something unlawful if he attends at the residence of any employee.

181 Consequently, I find that the question answer document read out by Sims provides answers to several questions that may well reflect legitimate concerns expressed by employees. However, interspersed among those are the three question and answers reviewed above which continue the theme that Noble, the malicious organizer is conducting himself unlawfully and is making promises Local 1518 cannot deliver and is thus not to be trusted or believed.

182 Local 1518 also argues that by permitting Neilson to distribute the Labour Watch document which, even if factually correct, presents a one sided view of unions, effectively permitted Wal-Mart to communicate its anti-union message to its employees. Local 1518 says that on the balance of probabilities from the perspective of a reasonable employee, employees would conclude that Neilson was acting on behalf of Wal-Mart in expressing her anti-union views and distributing the Labour Watch document. Local 1518 argues that she should be found to be a messenger for Wal-Mart and that Wal-Mart essentially condoned her anti-union conduct at the various meetings that she attended and during the campaign. Finally, Local 1518 asks me to draw the inference that Wal-Mart in fact provided Neilson with the Labour Watch material to distribute.

183 With regard to Neilson's distribution of the Labour Watch material, Wal-Mart argues that McHone's evidence is just plain wrong. McHone testified that she got the material later in July before going on vacation and she did not tell Local 1518 that she got it on the 23rd or 24th of June as Local 1518 alleged in its pleadings. Elliott also

testified that she did not tell Local 1518 that she got the Labour Watch material in June. Wal-Mart says that whatever conversations occurred between Neilson, McHone and Elliott, occurred in July and not in June as alleged by Local 1518. Wal-Mart further argues that even if the material that was distributed was part of an employee anti-union campaign, it was employee driven and Local 1518 had an opportunity to respond.

184 Wal-Mart argues that there is no evidence that Neilson did not write the two pages that were included in the material. Just because she does not speak in those terms does not mean she cannot write in those terms. Wal-Mart says that any complaint regarding the Labour Watch materials should be dismissed as it does not amount to a breach of the law.

185 The Board, long ago in *Forano*, indicated that employers are unlikely to advertise their unlawful conduct. The Board must reach its conclusions from surrounding circumstances. Despite my suspicions, I am not in this case prepared to draw the conclusion that this material originated with Wal-Mart. The evidence does indicate that Wal-Mart is more than prepared to ghost write letters and questions and answers and to twist facts to facilitate delivering its own particular message. However, despite my suspicion, there is also no evidence from which I can infer that Wal-Mart gave or expressly directed Neilson to distribute the Labour Watch material.

186 I find that Neilson did distribute the material and that she did distribute it on several occasions on work time. I do not accept her contention that she called Kimzey about the material from home. That does not accord with the documentary record as to when Kimzey was at work. I find that she made the call on work time from a Wal-Mart owned telephone in the building. I further accept McHone's evidence that she was distributing the material on the floor in the building. While I accept that the distribution occurred probably sometime in July, although I have not ruled that might have been as early as the last week of June, the important aspect is that she was doing it on the work floor despite the testimony of Sims who had told her, according to Sims, that if she did she would be coached. Sims told her that she could not distribute the information that she wanted on work time and at the work place.

187 Distribution by Neilson at the workplace is not *per se* indicative of any wrong doing by Wal-Mart: *Wal-Mart, supra*, para. 122. Further, in *Wal-Mart, supra*, Wal-Mart was aware of anti-union campaigning but the Board found that awareness did not oblige it to act because the campaigning was off Wal-Mart controlled property.

188 However, this case is different. I have found that Neilson distributed her anti-union material in the store and I further find that Wal-Mart was aware of this distribution taking place. The evidence revealed that Wal-Mart managers constantly walk the sales floor and interact with the sales associates. I also accept the evidence that this material was seen lying about in the associates' lounge. I also accept that the distribution of the Neilson material took place at least from the day she obtained it on July 5, 2002 until at as late as the third week of July which would be shortly before McHone left on her vacation. I am satisfied that Wal-Mart managers must have seen it and been aware of it at some point during this period of time. I find that Wal-Mart deliberately chose to turn a

blind eye to Neilson's activities despite Sims' having warned Neilson not to distribute the material.

189 Turning to the Cindric matter, there is no evidence that satisfies me that Noble entered Cindric's home and left any material there for her to read. What I find to be most telling about the incident is that when Constable Gill spoke to Patt the day the incident was reported his notes indicate that Patt told him that Noble was organizing because of a personal vendetta. I conclude from this that it was Wal-Mart's view that Noble was conducting a personal vendetta against Wal-Mart and that that was the motive attributed to his campaign.

190 I find that Cindric did repeat her story on several occasions over the upcoming week, and perhaps longer, to fellow employees. While there is no direct evidence that satisfies me that Wal-Mart permitted Cindric to continue to make this false allegation against Noble in the workplace, I find that the circumstantial evidence leads me to conclude otherwise. Again, Wal-Mart managers constantly monitor the work-floor and I find it unbelievable that they would not have known that Cindric was continuing to repeat her allegations against Noble. Wal-Mart knew by July 6, 2002, the day after the alleged intrusion incident, that the RCMP had concluded that no such incident occurred. As a consequence, I find that Wal-Mart did have an obligation to prohibit Cindric from continuing to relate her allegations in these circumstances.

191 Finally, Local 1518 argues that the comments made by Sims at the beginning of August were coercive and intimidating and therefore not saved by the amended Section 8. Further, Local 1518 says that Antonovitch should be regarded as a manager and the comments he made that there was no value in joining a union, should also be considered as running afoul of both the old and new Section 8. The amended Section 8, according to Local 1518, does not permit an employer to tell employees that there is no value in joining the union.

192 Wal-Mart says that Antonovitch is not a manager and even if he did say what was alleged, he is entitled to express his views. However, Wal-Mart argues that he did not say such things and that Antonovitch's testimony should be accepted that it did not matter to him whether the place was union or not, as he had worked in unionized environments before.

193 I need not decide whether Antonovitch was a manager in this case. I find that even if he was, none of the comments attributed to him or Sims in August fall outside the range of permissibility under the amended Section 8 of the Code: *Convergys Customer Management Canada Inc.*, BCLRB No. B62/2003.

194 Wal-Mart argues that Local 1518 alleged that it has breached Sections 6(1), 6(3)(d) and 9 of the Code. It says that none of the elements of those breaches have been established by Local 1518. Much of the evidence according to Wal-Mart is irrelevant and does not relate to the complaint. Wal-Mart argues that any interference in order to be unlawful has to have a significant impact and amount to undue influence over the employees. Undue influence is a species of intimidation. Wal-Mart says there

has virtually been no assertion of power of the employer over employees demonstrated in any of the evidence. Wal-Mart argues that it bent over backwards to make it clear to employees that there was no risk to job security. That context is entirely missing from this case.

195 I agree that at no time did Wal-Mart threaten or coerce employees. As a result, I find no case has been made out under section 6(3)(d) or 9 of the Code. I have concluded that Wal-Mart painted Noble as a person engaged in inappropriate conduct motivated by a personal grudge. The only question with any substance in this case is whether Wal-Mart's conduct amounts to interference under Section 6(1) of the Code. I find it does.

196 Wal-Mart has argued that an organizer's reputation is fair game. In *Teleflex (Canada) Limited*, BCLRB No. B69/97, I held a union's reputation may become the subject of comment by employees in an organizing campaign. I agree with Wal-Mart that an organizer's reputation may also become the subject of discussion. However, it is one thing for employees on their own to debate an organizer's established reputation and quite another for an employer to create and promote a negative image of the organizer and to divert employee focus to that from the real issues. My comments in *Teleflex* do not go so far as to approve the latter form of conduct.

197 I agree with Local 1518 that an organizer's credibility is one important tool in his bag. I find that being unfairly discredited by an employer does amount to interference contrary to section 6(1) of the Code. In view of the parties' stipulation that this case falls under the previous language of the code, I need not decide for the purposes of this case whether such conduct would amount to a breach of the amended section 6(1) of the Code.

IV. REMEDY

198 Wal-Mart says Local 1518 should be denied any remedy because Noble falsely accused Wal-Mart of having a hit-list. Wal-Mart argues that Noble had no basis in fact for misleading employees in that way. He misled many employees implying that they were on the list. Wal-Mart says the most that Noble knew was that Seitz had people issues and that he and Dan Kimzey were the people issues. Wal-Mart submits that the Board cannot conclude from that that Noble was entitled to refer to a hit-list.

199 Local 1518 argues that there was nothing improper about Noble discussing the hit-list with employees. Noble received the information from the former store manager who said there was a list of employees mentioned by Fowler. There was no evidence that Noble suggested any other employee other than he and Kimzey were ever on that list and no other employee except for Neilson testified that they believed that Noble had implied that they were on the hit-list.

200 While there may not have been a physically constituted hit-list, I find that it was not inappropriate to euphemistically refer to the targeting of one or more employees for dismissal as being on "a hit-list". I am satisfied based on the evidence I heard as well

as the fact that Seitz and Fowler were not called to testify by Wal-Mart, that Noble was justified in using the euphemistic term "hit-list" to refer to Wal-Mart's intention to solve its immediate people problems by dismissing he and Kimzey. The fact that this was one of the reasons that Seitz was transferred illustrates that removal by Wal-Mart of Noble and Kimzey fell well within the realm of probabilities.

201 One of the most significant protections that comes with unionization accorded by the Code is the mandatory just cause provision which is written into every collective agreement by statute and protects employees from the kind of employer conduct reflected in just such a euphemism. It is therefore fair, where the facts and circumstances warrant, such as in this case, for organizers to point to the existence real or euphemistic hit-lists as good reason why employees may want to unionize in order to avail themselves of the just cause protection provided by the Code. If Wal-Mart is concerned about this as an organizing tactic, then it should refrain from arbitrarily targeting employees for dismissal as an easy way to solve its people problems. I recognize of course, that at common law it is an employer's right to dismiss on notice any employee and if Wal-Mart wishes to avail itself of that common law right in the absence of a union certification it is certainly free to do so. However, it cannot then in the same breath complain if union organizers use Wal-Mart's proclivity to avail itself of that right as justification for why employees might wish to unionize.

202 I am therefore satisfied that it was reasonable and fair for Noble to point out to employees during the organizing campaign that Wal-Mart had a hit-list. I conclude that in these circumstances the use of the euphemism "hit-list" was not inappropriate. As a result, I find no basis to deprive Local 1518 of a remedy as urged by Wal-Mart.

203 Turning the matter of remedial certification, Local 1518 argues that in the days before June 21st, the campaign was moving very quickly. In a matter of 4 or 5 days Noble had signed-up 1/8th of the bargaining unit and submits there was a real possibility Noble could have achieved the required 45% within a fairly short period of time. Local 1518 argues that it was Wal-Mart's interference, and in particular, the conduct deriding Noble's credibility and character which caused the campaign to die. Local 1518 says that despite the unfair labour practices by Wal-Mart, it was able to add an additional 10 or so employees to its numbers, but that that should not be held against it. Local 1518 argues that this is an appropriate case for remedial certification.

204 Wal-Mart argues that this is not an appropriate case for remedial certification. Local 1518 only contacted 65 people and more than half rejected the idea of unionization. Wal-Mart says 65 is well short of the required 45% based on a bargaining unit of 168. Wal-Mart says it would be grossly inappropriate to issue a remedial certification in a case where a campaign had little chance of success given the size of the bargaining unit.

205 Further, Wal-Mart argues that sign-up continued and that there is no evidence that the sign-up would have been any greater had it not said or did what the evidence reveals it to have done at the end of June. According to Wal-Mart, Local 1518 basically took a risk hiring Noble and letting him decide how to conduct the campaign. There was

no leafleting, no publicly held meetings, and no head office types from Local 1518 assisting in the organizing. Noble was basically on his own and his message was of the sort that would cause employees to question his motives.

206 Finally, Wal-Mart says that Local 1518, as part of its campaign material, distributed a brochure attacking Wal-Mart and it would be ironic if a remedial certification were to be issued forcing Local 1518 and Wal-Mart into a collective bargaining relationship when Local 1518 is so opposed to Wal-Mart establishing stores in many communities.

207 Having reviewed all of the evidence, I find that this is not an appropriate case for remedial certification. Local 1518 managed to sign some 30 employees out of a potential bargaining unit of 168 having only contacted some 65 employees in total. The Board subsequently received four revocations. I agree with Wal-Mart that Local 1518 had not even contacted sufficient employees to make the 45% threshold before abandoning its efforts. I also agree with Wal-Mart that the organizing campaign lacked many features one might expect to see, such as meetings and extensive leafleting. Assuming that Local 1518 could have contacted sufficient employees to make the threshold, it is unlikely that each and every employee would have given Local 1518 a positive response.

208 Further, I find it unrealistic that Noble or Local 1518 could have expected by any measure that the rate of sign-up which occurred on the first few days, was typical and would have continued to the point where Local 1518 would have concluded its campaign of this bargaining unit within three to four weeks.

209 While I have found that in this case there was unlawful employer interference in the formation and administration and selection of a trade union, I do not find that the conduct of Wal-Mart was such or so egregious as to fall into that category of cases that would result in a remedial certification. No employees were dismissed. No employees were threatened with the closure of the business. The conduct engaged in by Wal-Mart was not of that egregious category described in *Cardinal Klassen, supra*, that would warrant a remedial certification.

210 What then is the appropriate remedy? Would a representation vote be the appropriate result? I was given little guidance by Local 1518 as to alternative remedies I might consider.

211 I have reviewed the previous cases in which Wal-Mart has been the respondent as urged by Local 1518. Local 1518 argues that in fashioning a remedy I should be influenced by the fact that Wal-Mart has an anti-union history. Wal-Mart simply cannot resist the temptation to get involved in certification campaigns. While Wal-Mart has tended not to repeat its mistakes, there is no shortage of new ones that it finds ways to make.

212 However, my jurisdiction under the Code in fashioning a remedy is to compensate the aggrieved party putting them as much as possible in the position they

would have been in but for the impugned conduct. I find I do not have a general jurisdiction to apply remedies in pursuit of general deterrence. My task is to put Local 1518 in the position it would have been in but for the improper interference.

213 In this case Wal-Mart's improper interference effectively disabled Local 1518's organizer. That resulted in the campaign slowing down. Despite that interference and its effect, I cannot conclude in these circumstances that Local 1518 would have achieved the necessary threshold for a representation vote. According to the evidence, Local 1518 was considerably short of even contacting 45% of the bargaining unit. Further, Local 1518 had other organizers whose reputation had not been sullied who could have jumped into the fray. They did not. Nor was this a case of hit early, hit hard. It was hit early, but hit subtly and Local 1518 could have taken steps to mitigate some of the damage caused. It did not. Wal-Mart argues that Local 1518 pinned all of its hopes on Noble and as a result failed. That is indeed a factor which I must consider.

214 I have concluded that on an objective standard that reasonable, well-informed employees in the circumstances would have been swayed to doubt Noble's motives and to mistrust him based on the material which Wal-Mart produced or permitted to be circulated. As a result, the employees whose rights have been interfered with here as well have lost an opportunity to hear about Local 1518 from a person they perceive to be properly motivated and trustworthy. In addition, whatever momentum Local 1518 had has been effectively neutralized by Wal-Mart's conduct.

215 The purpose of the remedy I have devised is intended to put Local 1518 in the position it would have been in but for Wal-Mart's conduct. First, the remedy is intended to offset the attack on Noble's character by publishing my findings to the employees and permitting employees to make any decisions on unionization based solely on the merits of unionization afforded under the Code. Second, the remedy is also intended to, if not re-establish, begin to permit Local 1518 to replace, to some degree, the lost momentum of its drive as much as possible under the circumstances.

216 One of the problems in putting Local 1518 in the position it would have been in is the passage of the intervening span of time. I considered deeming the cards already signed by employees and delivered to Local 1518 to be signed as of the date of this decision thereby taking the intervening time out of play, to use a sports analogy. However, I have concerns that Regulation 3 may not permit such a remedy. Consequently, I have concluded that the next best option is to permit Local 1518 to meet with the employees on Wal-Mart's time and at Wal-Mart's expense without Wal-Mart interference to attempt to re-establish its momentum.

217 Therefore, in order to level the playing field and remedy the impact of the conduct I order the following:

1. I order Wal-Mart to make arrangements forthwith for Don Herman to attend and read to every shift a summary of the Board's decision in this case which follows at the end of the decision. The readings are to be organized in the exact same manner as were the readings of the Wal-Mart letters and question and answer

sessions. The reading of a summary of the Board's decision is to be without comment from Wal-Mart or any of its management staff regarding the summary or the full decision. There is to be no discussion and no question and answers permitted in the meetings called for the purpose of the readings by Wal-Mart. I further order Wal-Mart to permit a Local 1518 representative to be present at the readings. I further order that during the reading of the decision summary the Local 1518 representative is to refrain from commenting on the decision or decision summary.

2. I further order Wal-Mart to permit Local 1518 to have a one half-hour meeting with every shift on employer time at employer expense without presence of management. These meetings are to take place after and contiguous to the readings of the summary of the Board's decision above. At these meetings Local 1518 is permitted to address employees about the merits of unionization and to answer any questions related to unionization.
3. Finally, I order that the full text of this decision along with the summary to be posted on all employee bulletin boards or be made available in the employee lounges/lunch rooms. If any employee wants a copy of this decision, Wal-Mart is to make one copy available to the employee at no cost to the employee.

218 I have made no orders or given any direction regarding what may occur once the matters addressed in the orders are spent. However, in my view the playing field at that point will be as levelled as I can make it under the circumstances. I echo the caution expressed in *Forano* that Wal-Mart would do well to now leave matters well enough alone and let employees determine their own fate. However, I have no jurisdiction to prevent Wal-Mart from exercising its rights under Section 8 of the Code. If Wal-Mart chooses to do so, it had better ensure that it remains on the right side of the line otherwise other more substantial remedies up to and including remedial certification may become the only realistic remedial tool available to the Board.

V. SUMMARY OF BOARD DECISION

219 The UFCW Local 1518 complained to the Board that Wal-Mart breached Sections 6(1), 6(3)(d) and 9 of the Code by committing unfair labour practices including interfering with the formation and administration of a trade union, by making and permitting to be made false and derogatory statements about Local 1518 and its organizer, by threatening RCMP involvement against individuals supporting Local 1518, by being involved in RCMP involvement against its organizer, by permitting individuals to communicate to employees that layoffs could occur because of unionization, by promoting anti-union organizing and by permitting employees to campaign against Local 1518 on company time at the worksite.

220 The Board has found that Wal-Mart did not breach the *Labour Relations Code* Sections 6(3)(d) and 9. The Board also found, however, that Wal-Mart did commit an unfair labour practice prohibited by Section 6(1) of the Code by interfering with the formation of a trade union by attacking and facilitating others to attack the character and

reputation of Local 1518's organizer, David Noble. The Board has also found that Noble was justified in referring to the hit-list as part of his organizing efforts. The Board said that under the common law, Wal-Mart was free to exercise its right to dismiss any person on reasonable notice. However, the Board found that Wal-Mart was in no position to complain when its resort to that right used for the purpose of solving people problems formed a part of the union's campaign to convince employees of the benefits and protections of the just cause provision under the *Labour Relations Code*.

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As a result of these findings, the Board has ordered Wal-Mart to read the summary to employees in a meeting conducted in the same format as they were conducted when Wal-Mart read its letters and question and answer publication. The Board has further ordered Wal-Mart to permit Local 1518 to address employees and answer any questions for a period of 30 minutes following the reading of the summary in order to give employees an opportunity to focus their minds on the real issues engaged by the question of unionization free from any considerations fabricated about the character of the union's organizer.

LABOUR RELATIONS BOARD

"V.A. PYLYPCHUK"

V.A. PYLYPCHUK
VICE-CHAIR