

ONTARIO LABOUR RELATIONS BOARD

0295-13-R Frank O’Leary, Applicant v. Carpenters’ District Council of Ontario United Brotherhood of Carpenters and Joiners of America Drywall Acoustic Lathing and Insulation Local 675, Responding Party v. **C.A.S. Interiors Inc.**, Intervenor.

0437-13-G Carpenters’ District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, Applicant v. **C.A.S. Interiors Inc.**, Responding Party.

BEFORE: Maurice A. Green, Vice-Chair.

APPEARANCES: Andrew Zinman and Frank O’Leary appearing for the Applicant; Stephen F. Chedas, Claudio Mazzotta and Jozo Krizanac appearing for the Responding Party; Christopher Fiore, Michael McMahon and Lorraine Apanashk appearing for the Intervenor.

DECISION OF THE BOARD: November 14, 2013.

1. Board File No. 0295-13-R is an application under section 63 and/or 132 of the *Labour Relations Act, 1995*, S.O. 1995 c.1, as amended (the “Act”) for a declaration terminating bargaining rights, wherein the applicant, Frank O’Leary (“O’Leary”), seeks to terminate the bargaining rights held by the responding party, Carpenters District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (“the Carpenters”) with the intervenor, C.A.S. Interiors Inc. (“CAS”). Board File No. 0295-13-R is hereinafter referred to as the “Termination Application”. Board File No. 0437-13-G is a referral of a grievance to arbitration (construction industry) under section 133 of the Act filed by the Carpenters against CAS.

2. By decision dated June 10, 2013, the Board directed that the Carpenter’s assertions concerning both its *April Waterproofing*, [1980] OLRB Rep. Nov 1577, allegations and its section 63(16) claim proceed to a hearing with the Carpenters calling its evidence first, followed by O’Leary, and then CAS. The matters commenced on July 19, 2013, and continued on August 30, October 3, and October 11, 2013.

Overview

3. In outline, the Carpenters allege that they obtained bargaining rights with CAS by way of a voluntary recognition agreement (“VRA”) in 1985, and were under the impression that CAS had been inactive since 1993. However, on March 2, 2013 Jozo Krizanac, (“Krizanac”) one of the Carpenter’s business representatives, discovered CAS performing work at a project located at 2250 Matheson Blvd. East, Mississauga. The

actual entity performing the drywall work was identified as West Side Drywall via a sub-contract from CAS. After returning to the Carpenters' office Krizanac discovered that CAS had signed a VRA with the Carpenters in 1985, but that West Side Drywall was functioning as a non-union company.

4. After making contact on March 5, 2013, with Michael McMahon ("McMahon") of CAS a grievance was filed against CAS alleging that it had subcontracted to a non-union contractor, namely West Side Drywall, and was also employing non-members of the Carpenters. Subsequent meetings occurred between the Carpenters and CAS, on March 12, and 28, as well as with West Side Drywall, during which time McMahon, who was effectively running CAS's business with his sister, Lorraine Apanashk, stated that he did not believe that CAS had been properly unionized in 1985, as the VRA was not signed by his father who remained the President and signing officer for CAS. McMahon advised the Carpenters that he would have to check with his father, Stephen McMahon, who was abroad at the time, as he was never aware that CAS was bound to the Carpenters' collective agreement, especially as there had been no dealings with the Carpenters for as long as he had been working in his father's business. McMahon believed there must have been a mistake regarding the claim CAS was bound to a collective agreement. Before McMahon was able to check with his father O'Leary's termination application was filed on April 24, 2013.

5. O'Leary denied the Carpenters assertion that he must have been prompted to apply for a termination of bargaining rights by CAS. He claims that since becoming an employee of CAS in April 2011 he had never heard of the company being unionized; had never had any dealings with the Carpenters until they appeared on the scene in March 2013; and in fact found out about how a union could be decertified through looking up an organization called "LabourWatch" on the internet, after which time he was referred to a lawyer through a friend.

6. Much of the chronology and events that occurred once the Carpenters discovered CAS working with West Side Drywall are not in dispute, however, there are some differences amongst the various witnesses from which the Carpenters submit that the Board can draw the inference that CAS must have been involved to some extent in causing O'Leary to make the application. Thus, the relevant evidence needs to be reviewed.

Evidence

7. Krizanac has been a Carpenters' business representative for approximately 18 years. He first encountered CAS on March 2, 2013, at an office project being performed at 2250, Matheson Blvd. East, Mississauga. At that time he spoke to whom he believed to be the site supervisor, who advised that West Side Drywall was performing the drywall work for CAS. On March 4, 2013, he went to his office in Woodbridge and found that the Carpenters had a VRA with CAS, dating from 1985. As a result he returned to the Matheson Blvd. East site on March 5, 2013, and spoke with O'Leary who advised he was not the owner of CAS, and thus Krizanac left his card and requested O'Leary to get the

owner to call. Krizanac testified that approximately one hour later he received a call from McMahon at which time McMahon said that CAS was not party to any collective agreement with the Carpenters, and he asked Krizanac to leave the site. In response Krizanac stated that he would be filing a grievance, which he did on March 5, 2013. Both Krizanac and McMahon agree that their conversation was somewhat heated. There was some difference between Krizanac and McMahon as to who called whom on March 5, 2013. However, the cell phone records of John Apanashk, site supervisor, shows that two calls were received from Krizanac's phone number on March 5, 2013, which were passed to McMahon. The difference in evidence is simply caused by differing memories as opposed to any intent to mislead, and in any event nothing rests on the difference.

8. Krizanac conceded in cross-examination by O'Leary's counsel that on March 5, 2013, he did not ask O'Leary whether he was an employee of CAS, although he was wearing a CAS T-shirt, or whether he was a member of the union. However, he does recall advising O'Leary that CAS was bound to the Carpenters' agreement, and accepts that O'Leary stated in response that he had "the wrong person" and would have to speak to McMahon. Noticeably, Krizanac agrees that neither he, nor anyone else from the union, ever followed up with O'Leary from March 5, 2013 until after the termination application had been filed on April 24, 2013.

9. In any event, on or shortly after March 5, 2013, McMahon and Krizanac agreed to meet at the Baton Rouge restaurant in Mississauga, together with Nick Marcello ("Marcello") of West Side Drywall. The meeting occurred on March 12, 2013. Present were McMahon, Krizanac, and Marcello. Krizanac confirmed that when he showed McMahon the 1985 VRA McMahon stated that he did not recognize the signature on the document, and that it was not his father's signature, nor name. Krizanac did not contest that McMahon raised the validity of the VRA. Krizanac also did not contest that his strategy was to attempt to put some pressure on CAS in order to convince West Side Drywall to sign a voluntary recognition agreement with the Carpenters. Krizanac agrees that most of the lunch meeting was taken up with attempting to convince Marcello to sign up with the Carpenters. Krizanac also recalls that he made it clear to McMahon that if the Carpenters could not sign up West Side Drywall then they would have to push for damages from CAS. When the lunch meeting broke up West Side Drywall was to get back to the Carpenters with an answer as to whether, or not, it was willing to sign a voluntary recognition agreement with the Carpenters.

10. Krizanac gave no evidence to suggest that at the lunch meeting he raised the fact that CAS was employing O'Leary contrary to the collective agreement, or that O'Leary should be attending the Carpenters' office to sign up as a member. There was simply no discussion concerning O'Leary at the Baton Rouge meeting. Krizanac also confirmed in cross-examination that he never spoke to any other Carpenter representatives about the fact that apparently more than 20 years had passed without CAS having any dealings with the Carpenters.

11. Krizanac confirmed that eventually West Side Drywall called him to advise that it was not willing to sign a voluntary recognition agreement with the Carpenters, and

thus he again turned his attention to CAS in order to attempt to resolve the grievance. As a result, a further meeting between McMahon and the Carpenters occurred on March 28, 2013 at the Carpenters' office. Present at that meeting was Krizanac, Claudio Mazotta, ("Mazotta") a senior Carpenters business representative, and McMahon.

12. Krizanac recalls, and agrees, that Mazotta did most of the talking. He recalls Mazotta providing McMahon with an overview of the Carpenters' union and its collective agreement, a copy of which Krizanac recalls giving McMahon. Krizanac agreed in cross-examination that Mazotta explained to McMahon how CAS had to use union contractors to perform the drywall work. Further, although Krizanac could not recall if Mazotta asked McMahon about which sub-contractors CAS used to perform drywall, he remembers that McMahon may have provided the names of drywall companies with whom CAS had done business. Importantly, Krizanac cannot recall if they spoke to McMahon about CAS hiring directly. He also could not recall if they asked about other work sites. Krizanac also could not recall giving McMahon a short tour of the Carpenters' premises, nor whether McMahon stated that he would have to ask his father about the VRA document, and would get back to them within 2 – 3 weeks, as his father was out the country. Krizanac agrees that no one from the union attempted to contact McMahon between March 29 and April 24, 2013, when the termination application was filed. Importantly, Krizanac confirmed that at the March 28, 2013, meeting the Carpenters did not show McMahon the remittance sheet evidence proving that CAS had forwarded remittances to the union from 1989 – 1993. In fact such information was not provided to CAS and McMahon until well after the termination application had been filed.

13. Finally, Krizanac recalls that before McMahon left the Carpenters' offices Mazotta attempted to get McMahon to sign some "legal documents" that their lawyer would prepare. However, Krizanac confirms that McMahon stated that he did not have signing authority for CAS, and he would have to speak to his father.

14. In cross-examination by counsel for CAS, Krizanac agreed that in general he and the union would attempt to police their collective agreements by, in part, reading such publications as the Daily Commercial News and Toronto Construction Association publication, but that in 18 years as a business representative he does not recall coming across CAS's name.

15. Mazotta has been a business representative for approximately 23 years. He became aware of CAS through being advised by Krizanac, but was unable to attend the lunch meeting at the Baton Rouge restaurant. However, he was present at the meeting on March 28, 2013, when McMahon attended. Mazotta recalls the meeting being about 20 minutes in length with the first portion addressing which non-union drywall companies CAS had been sub-contracting to over the years. He recalls McMahon providing the names of at least three non-union companies CAS had used. The remainder of the meeting was spent with Mazotta providing McMahon an overview of the Carpenters Union and its collective agreement. Mazotta described how he was left with the impression that McMahon was like a "deer in the headlights" when it came to him

explaining the union and its agreement, and that “he was not a bad guy”. Mazotta remembers that McMahon made it clear that his father Stephen McMahon was still in control of the business, in that he retained signing authority concerning major matters, and that McMahon would have to check with his father about the issues.

16. Upon cross-examination by counsel for O’Leary, Mazotta conceded that he was not aware of anyone from the union attempting to contact O’Leary between the time Krizanac first met O’Leary and April 24, 2013, being the date of the filing of the termination application. Mazotta agrees that he spent most of his time overseeing the policing of the drywall companies. Mazotta conceded that his main focus, at the meeting, was to attempt to address the issue of CAS sub-contracting to non-union drywall companies such as West Side Drywall. Mazotta’s understanding at the time of the March 28, 2013, meeting was that there had been “no action” from CAS since 1993, and effectively conceded that the union had not been policing the agreement with CAS between 1993 – 2013. Mazotta did recall asking if CAS had any other jobs, but agrees he did not inquire if CAS had any other bids, or tenders, outstanding. Further, he agrees he did not explicitly refer to whether CAS had direct employees, but rather referred McMahon to the agreement applying to “anything to do with carpentry”. Mazotta also confirmed that McMahon clearly stated that he had to speak with his father as he (Michael McMahon) did not understand the situation, or that CAS was covered by the Carpenters’ agreement. Mazotta also confirmed that it was only when he saw a copy of the remittances from CAS to the Carpenters, following the receipt of the termination application that he was sure that CAS was bound by the VRA.

17. O’Leary confirmed that he commenced working for CAS in April 2011, as a working foreman. He agreed that when he joined CAS he understood that the company was non-union. The first occasion he became aware that there was a possibility that CAS was unionized occurred when Krizanac visited the project on Matheson Boulevard East at the beginning of March 2013. Prior to that date he had never worked at any project where union representatives were present and inquired about CAS. O’Leary recalls Krizanac visiting the Matheson Blvd. East project and speaking to some of the West Side Drywall employees, while he was in the process of cleaning up the site. O’Leary recalls Krizanac speaking to him and advising that CAS had a contract with the union. O’Leary stated that such news “came as a surprise to me”. He recalls asking Krizanac for his card and that he would pass it on to “the office”. The only noticeable difference between the evidence of O’Leary and Krizanac is that Krizanac recalled that O’Leary was seemingly not working and was not carrying any “tools of the trade” at the time. Given the passage of time and the fleeting period of their interaction (being a few minutes) I do not attach any relevance to the difference in memories.

18. O’Leary also testified that Krizanac did not ask him any questions about union membership or whether CAS had other current jobs. O’Leary testified that he returned to CAS’s office and handed Krizanac’s business card to McMahon. When asked for his recollection of McMahon’s reaction upon seeing the card O’Leary stated that he was “shocked”, and simply said he “would deal with it”. According to O’Leary there was no other discussion at that time between himself and McMahon about the Carpenters.

O'Leary recalled that approximately a week later he followed up with McMahon as to whether it was true that CAS was tied to a union contract. O'Leary recalls McMahon replying that apparently there was a contract signed many years ago. According to O'Leary nothing more was said or discussed with McMahon. Upon hearing the information O'Leary felt that he did not join CAS as a union member, or with any expectation that he would become part of a union. O'Leary then described how he spoke to his wife about the situation, as she had had some dealings with unions, (the company she works for being in the cleaning industry) and she suggested he look at the LabourWatch.com web site. He described how he visited the web site and clicked on "decertification" and discovered a 75 page booklet. His wife helped him in reading the information. As to his future choices he realized that he was faced with either joining the union, or having to "move on", i.e. surrender his employment.

19. O'Leary testified that he did not support or believe in unions, and had never heard anything to "entice" him to join a union. He also stressed that he had no conversations with McMahon, or anyone else from CAS, about the choices he faced. He stated that it was his decision alone to decide to attempt to decertify the Carpenters, and that he believed that could be done after reading the LabourWatch material. He enjoyed working for CAS and it seemed to him that if he wished to continue in the position it was the "logical step" to seek decertification. O'Leary testified that he received no resources from CAS to bring the application, nor did he receive any threats that he should do so, and the employer simply did not know he was proceeding with the application. He also understood from the LabourWatch booklet that he should not talk to his employer about his plans to bring the application, and that to do so could endanger his chances of success.

20. As regards obtaining legal advice O'Leary stated that he has a friend who is a union member and who referred him to a union-side labour lawyer. He then contacted that lawyer, who in turn, contacted O'Leary's current counsel, who in turn contacted O'Leary. O'Leary testified in cross-examination that he did not know when the "open period" was until his counsel advised him. As regards the need to pay for legal services O'Leary stated that he had to "tap into" his savings to retain his lawyer. Finally, O'Leary confirmed that he never attended at the Carpenters' hall to "sign up" as a member, as he did not wish to do so, and he continued to work for CAS following the application for termination being filed.

21. Following the filing of the termination application O'Leary recalled that two representatives of the Carpenters visited him on a project at Highway 7 and Highway 400. The two inquired as to why he had filed the application. He explained he did not wish to become a member of a union. He then recalls that they attempted to describe the pros and cons of joining the union. One of the representatives asked if "his boss" had suggested he file the termination application, to which he replied that he had not. In the days following April 24, 2013, there were further visits from other union representatives, and the nature of the discussion with O'Leary was similar to that described above.

22. In cross-examination by union counsel O'Leary agreed that it was not easy to discover where CAS may be working as most of the projects were in existing office

buildings where all the work was performed on a particular floor, and that any CAS signs would be posted inside the building. O'Leary confirmed that he also worked at a CAS project at 77, City Centre and Square One, Mississauga at some point in April, and that he performed carpentry work on doors. O'Leary also stated that at no time did McMahon advise him that he would have to become a union member, but that he had simply "put two and two together". He also denied in cross-examination having any conversation with McMahon about "getting rid of the union" or the "open period" aspect.

23. Michael McMahon provided an overview of CAS's operations over the years. His father, Stephen, commenced the business in 1982. Since its inception CAS has functioned as a general contractor on drywall projects by sub-contracting to either union or non-union drywall contractors depending upon the requirements of the bid/tenders. McMahon testified that CAS generally performed work in the ICI sector such as retail stores, colleges and universities, corporate and government office facilities, as well as Canada Revenue and Canada Post. CAS restricted its work to the Greater Toronto area. The various projects were obtained via the bid system through the vendor of record, such as C.B. Richard Ellis, or the government MERX system. On the average he stated that CAS would perform approximately 20 – 30 projects a year. CAS had completed drywall projects for such companies as AOL Canada, Target Canada, Canada Post, Gateway, Facebook Canada, and E-Bay. Consistent with its requirement to keep a "10% holdback", CAS has advertised in the usual publications including the Daily Commercial News regarding substantial completion certificates. CAS also advertised in the usual construction trade journals on a regular basis. The Carpenters did not challenge such evidence.

24. McMahon described how his father shut down the business in approximately 1993, restarting in approximately 1995, when he first commenced working for his father. McMahon testified that from that point on until the events of March – April 2013, he never saw, nor heard of, the Carpenters union having any dealings with CAS, and that over those years he never had any conversations with his father about the Carpenters union and CAS. McMahon described how his father retained signing authority over major financial matters, although in the last year (2012) he and his sister were in the process of taking over the business.

25. McMahon's recollection of the events relating to March 2, 5, 12, and 28, 2013, testified to by Krizanac and Mazotta do not differ in any material way except for one. That relates to Mazotta's evidence that at the meeting of March 28, he asked McMahon whether CAS had any other current jobs. McMahon does not recall such a question, but did recall that Mazotta did not inquire as to whether CAS had any upcoming projects. McMahon confirmed that from the outset of being told about the 1985 VRA he believed that there must be a mistake, as he did not recognize the name, or signature, on the document. He testified that it was not until he received copies of the union remittance forms via his counsel, in June 2013, that he realized CAS must have been tied to a collective agreement. McMahon's impression of the lunch meeting on March 12, and with Mr. Mazotta on March 28, was that the Carpenters were mostly interested in attempting to persuade West Side Drywall to sign a voluntary recognition agreement. He

did not recall either Krizanac, or Mazotta, specifically requesting that O’Leary attend at the Carpenters’ hall in order to sign a membership card. He did remember Krizanac giving him a short tour of the Carpenters’ offices.

26. McMahon confirmed that when the issue first arose on March 2, 2013, his father was at a cottage north of Toronto, which did not have any phone service. Some time later his father flew to his home in the Bahamas. He agrees that he advised Mazotta on March 28, he would get back to him after speaking with his father. However, his father’s health problems interceded and this did not occur. His father encountered serious heart problems shortly after arriving in the Bahamas, requiring his hospitalization. As a result McMahon felt he could “deal with the situation” himself and not worry his father. As a result it was not until his father eventually returned to Canada that he inquired whether his father recalled anyone signing the 1985 VRA. His father could not recall anything being signed, and McMahon told him not to worry, and that he would look after things. By that point in time the termination application had been filed. The evidence filed clearly shows that Stephen McMahon has experienced heart problems, and his son confirmed that he has been in and out of hospital since April 2013.

27. As regards his interaction with O’Leary, McMahon recalls being given Krizanac’s business card and telling O’Leary not to worry. McMahon agreed that it was possible that O’Leary inquired a second time about what was happening with the Carpenters, at which point McMahon mentioned that something was signed some years ago, but not to worry. Apart from these two conversations McMahon testified that he had no other conversations with O’Leary about the Carpenters until he received a copy of the termination application. At the point he called O’Leary to inquire as to what “it all meant”. O’Leary replied that he was advised that he could not talk to him about it, so McMahon then called his sister, which eventually resulted in CAS retaining counsel.

28. In cross-examination by O’Leary’s counsel McMahon confirmed that prior to the termination application he had no knowledge of the Board’s proceedings; how employees become certified or decertified; how collective bargaining occurs; whether there is any difference between construction and non-construction areas; or the difference between a card-based application and vote-based approach. Further, he was not familiar with the term “open period”, and had never had any discussions with O’Leary about the “open period” prior to the termination application being filed.

Analysis & Decision

29. It is unnecessary to repeat the parties’ final submissions in full. However, the Carpenters stressed the following aspects of the evidence from which they request the Board draw the inference that there must have been some form of either collusion, or support, between CAS (in effect McMahon) and O’Leary, which supports its *April Waterproofing* and section 63(16) allegations. The Carpenters believe it relevant that Krizanac recalls retrieving a copy of the Carpenters collective agreement and providing it to McMahon at the meeting held on March 28, whereas McMahon only accepted that he was shown a copy of the agreement (but may not have left the meeting with a copy).

Carpenters also stress that Mazotta testified that on March 28, he did ask McMahon whether CAS had any other current work to which he answered in the negative. However, as set out in its pleadings the Carpenters claim that this was a misleading statement as two of its representatives visited O’Leary the day after the termination application was filed at a site on Highway 7 in Concord, and which is the site listed on the termination application.

30. The Carpenters argue that it is important to appreciate what McMahon was not saying during the various meetings with the Carpenters, i.e. inferring that he was attempting to withhold information. Namely, that CAS employed a person (O’Leary) who performed some carpentry work and would need to join the union and that other jobs existed. Further, that it is not believable that McMahon did not speak to his father sooner than he suggested about the 1985 VRA. The Carpenters also believe it speaks to McMahon’s credibility that he only recalls O’Leary speaking to him on one occasion (when he handed McMahon Krizanac’s business card), and that he does not recall a second occasion.

31. The responding party relied upon the following Board decisions as regards its section 63(16) submissions: *Delta-Rae Homes, a Divisions of 1138319 Ontario Inc.*, [2007] O.L.R.D. No. 1637; *2890275 Canada Inc. (c.o.b. ENER-TECH)*, [2008] O.L.R.D. No. 1244; and *Manel Contracting Ltd.*, [2012] O.L.R.D. No. 1017; and the following authorities regarding its *April Waterproofing* arguments: *Ken Acton Plumbing & Heating Inc.*, [1992] OLRB Rep. May 604; *Marsil Mechanical*, [1998] OLRB Rep. September/October 835; *Walls.com*, [2008] O.L.R.D. No. 1342; *Morley*, [2010] O.L.R.D. No.3259; *Nicolini Construction and Engineering Ltd.*, [2011] O.L.R.D. No. 631; *Biggs & Narciso Construction Services Inc.*, [2013] O.L.R.D. No. 3118. The Carpenters submit that the fact that neither O’Leary, nor McMahon, took any steps to ensure O’Leary became a member of the Carpenters once CAS was shown the 1985 VRA means that CAS had no intention of abiding by its contractual obligations, and thus its *April Waterproofing* submissions are supported.

32. Counsel for O’Leary submits that none of the witnesses were lying, although there was understandably some variation in recollections of certain specifics. However, what the responding party avoids addressing is the manner in which his client became aware of his rights. Namely, via his wife referring him to the LabourWatch web site, and then being referred by a union friend to a union lawyer, who in turn then referred his name to counsel of record. Further, that McMahon himself did not truly believe that CAS was tied to a union collective agreement, despite seeing a copy of the 1985 VRA, until he was shown copies of CAS’s remittance forms to the Carpenters well after the termination application was filed. O’Leary’s position is that, in part, McMahon’s hesitation about whether CAS was bound was clouded by the fact that the Carpenters were more interested at the March 12 and 28 meetings in attempting to sign West Side Drywall to a voluntary agreement, as it was the non-union company performing the actual work. O’Leary emphasizes that Mazotta, with all his experience, was correct in his assessment of McMahon that he really did not appreciate his legal position.

33. The applicant submits that there is no credible direct, or circumstantial, evidence from which the Board can conclude that the union has met its onus to satisfy a finding that section 63(16) has been triggered. Further, O’Leary argues that it not sufficient for the responding party to simply show that O’Leary was retained as an employee in face of the grievance the Carpenters filed against CAS in early March 2013. The applicant relied upon the following Board precedents: *Ridgeview Trim & Doors Ltd and Veramac Ltd* 2013 CanLII 14655 (ON LRB); *SST Group of Construction Companies Limited* 2013 CanLII 14943 (ON LRB); *Signature Contractors Windsor Inc*, 2013 CanLII 16801 (ON LRB); *Floorwall Flooring Ltd* 2013 CanLII 17733 (ON LRB); *Phoenix Gunitite Services Ltd., 704189 Ontario Limited o/a Phoenix Restoration Phoenix Restoration Inc.*, 2013 CanLII 26030 (ON LRB); and *LPL Plumbing Ltd.*, 2013 CanLII 30079 (ON LRB).

34. CAS’s submissions paralleled those of O’Leary as well as emphasizing such facts as the Carpenters having failed to police its VRA of 1985 from at least 1993 – 2013; the fact that McMahon clearly had no knowledge or experience of having to work with the Carpenters over the years that his father ran the business, as well as the period following his father’s slow withdrawal from the everyday running of the business; the fact that the Carpenters left him with the impression they were mainly interested in chasing West Side Drywall; the fact that no-one from the Carpenters openly informed him that they expected O’Leary to become a member of the union; the fact that the union failed to fully cross-examine McMahon about what other projects CAS had at the time they discovered the Matheson Blvd. East project; and the fact the Carpenters never attempted to contact O’Leary once they became aware of him up to the date of the filing of the termination application. CAS adopts the same legal position as O’Leary, namely, that there are no facts upon which the Board could apply section 63(16), and that the *April Waterproofing* allegations are groundless.

35. In addition to the cases of *SST Group of Construction Companies Limited*; *Ridgeview Trim & Doors Ltd.*, and *Veramac Ltd.*; and *Signature Contractors Windsor Inc.*, *supra*, CAS relies upon *Jones* 2013 CanLII 26903; and *Mirtren Construction Ltd.*, [2013] O.L.R.D. No. 3510.

36. The Board’s approach to applying section 63(16) is well established. As was stated in *Delta-Rae Homes, supra*:

36 There is no question that the onus in proving employer initiation lies on the union that alleges it. At the end of the day, the Board must be persuaded that the employer has engaged in some activity which constitutes initiation for the purposes of section 63(16). I do not accept the proposition put forward by Delta-Rae Homes that the Board is not entitled to draw inferences about facts in the absence of direct evidence of those facts.

Thus, the Board has many times been willing to draw the necessary inferences from circumstantial evidence.

37. As stated in the *Jones* decision, *supra*:

24. The concept of “initiation” has been considered by the Board on numerous occasions. An oft-cited definition of the term “initiation” is that which was articulated by the Board in *Bytown Electrical Services*, [1996] OLRB Rep. September/October 721, at paragraph 109:

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

38. As is seen from the recitation of the evidence in this case there is neither direct nor circumstantial evidence from which one can reasonably conclude that the employer, acting through McMahon, or any other person, initiated O’Leary’s termination application. The contextual and circumstantial evidence in fact supports the intervenor’s position. It is beyond question that the Carpenters failed to adequately police the 1985 VRA once CAS recommenced business in 1995. The fact that it is more difficult to police drywall work when performed in existing buildings does not take away from the fact that the unchallenged evidence established that CAS’s name appeared in the usual construction industry publications on a regular basis. McMahon only started working for his father in the business in 1995. There was simply no evidence called by the Carpenters which could lead the Board to imply, infer, or conclude, that McMahon must have been aware CAS was bound to a Carpenters agreement. The closest one comes to possibly being able to draw any inference is the acknowledged work performed by CAS where it was required, as part of it’s bid, to utilize a union sub-contractor. The Carpenters did not suggest in their submissions that McMahon must have had some familiarity with the Carpenters and its collective agreement in order to prepare a bid involving a union contractor. Further, there is no evidence as to who actually prepared the bids for CAS, when those union jobs took place, or that the Carpenters had any dealings with CAS during those occasions CAS used a union sub-contractor.

39. More telling, and believable, is the fact that McMahon was clearly surprised after the Carpenters visited CAS’s project on March 2, and the resulting claim that CAS had signed a VRA in 1985, when he would have been twelve years old. It is perfectly understandable that when he did not recognize the signature on the VRA, nor the name, that he was puzzled. It is also understandable, and not in dispute, that he would have been left with the impression following the meetings of March 12, and 28, with the union that its main goal was to obtain a VRA from West Side Drywall, and somehow CAS was just caught up in that potential conflict. The Carpenters’ theory that, in effect, McMahon was attempting to string matters out so that O’Leary could file a termination application is not supported by the uncontradicted evidence that he could not contact his father at his cottage, and that when in the Bahamas his father suffered serious heart problems

requiring hospitalization. Thus, he was not able to get back to Mazotta before the termination application had been filed. It is perfectly understandable and believable that McMahon did not immediately wish to discuss the issue of the VRA with his father so as to avoid causing him any worry. His actions were also consistent with the fact that he and his sister were well into the process of taking over the business from his father and he felt that he could “look after things”, as testified to.

40. The fact that McMahon possessed no understanding or knowledge concerning the various aspects of collective bargaining in the construction industry is consistent with Mazotta’s evidence that at the March 28 meeting McMahon left the impression of being a “deer in the headlights”. That being the case it would be unreasonable to then draw any inferences that he in fact initiated the termination application filed by O’Leary. As he testified, he was not even familiar with the term “open period”, so how can it be inferred he somehow instructed or suggested that O’Leary apply for a termination of bargaining rights? To the extent there are some differences between the evidence proffered by McMahon, Krizanac, and Mazotta, it is simply a matter of who had the better recollection. The fact is that Krizanac could not recall many aspects which both McMahon and Mazotta did testify to, thus there is nothing that could lead the Board to conclude McMahon’s evidence should be considered suspect, and thus adverse conclusions or inferences could safely be drawn.

41. As regards the apparent difference between Mazotta’s recollection and McMahon’s regarding whether he inquired as to whether CAS had any other current jobs there is no evidence that the project at which O’Leary was at work on April 25, 2013, had already either commenced, or been confirmed, as of March 28, 2013. Thus, it would be inappropriate to conclude McMahon intentionally misled the Carpenters on that aspect.

42. When one places all these facts alongside the evidence as to how O’Leary found his way to LabourWatch.com, and eventually retaining his counsel, there is no credible evidence of collusion or employer involvement in his application. There was nothing in O’Leary’s evidence that could cause the Board to question its veracity. When viewed in its totality the Board is of the view that the Carpenters have not established on the balance of probabilities that CAS and/or McMahon had any involvement or influence over O’Leary’s application for termination. Thus, the Board dismisses the Carpenters’ reliance upon section 63(16).

43. Turning to its *April Waterproofing* submissions the Carpenters attempt to adopt what I would describe as, theoretically, a “strict constructionist” approach to the Board’s case law. In other words they argue that simply because CAS continued to employ O’Leary following the date Krizanac informed McMahon that the Carpenters held a VRA, and had filed a grievance, that it follows that CAS was knowingly acting in breach of the collective agreement and intended to retain O’Leary “on the books” presumably for the purpose of eventually defeating the union’s bargaining rights. However, as the Board has stated in *Ridgeview Trim & Doors Ltd. and Veramac Ltd.*, *supra*, para 4:

the simple fact that an employer has violated the terms of the collective agreement when it hired or deployed one or more employees does not constitute a violation of the Act such that the persons hired are not employees for the purpose of the application...

5. ... No case, however, has ever suggested that the mere violation of the hiring provisions of a collective agreement deprived persons performing work for money of their status as employees. Accordingly the Board will not entertain the Carpenters' union's *April Waterproofing* argument.

(See also *Swaby* CanLII 35192 (ON LRB). Even if the Carpenters' view of the Board's case law is correct, which I believe it is not, the evidence does not support their theory. It is true that CAS retained O'Leary as an employee after the Carpenters claimed a VRA existed, and filed a grievance. However, it is apparent from the evidence and events referred to in the section 63(16) analysis that McMahon did not accept that CAS was in fact bound to a VRA. It was not until June 2013, almost two months after the termination application was filed that definite proof by way of remittance sheets was supplied by the Carpenters to counsel for CAS. Even Mazotta conceded that effectively he was not fully satisfied an agreement existed until he also saw the remittance sheets. In the circumstances it is not reasonable to conclude CAS knowingly flaunted the agreement prior to the April 24, 2013 application date. This conclusion is buttressed by the fact that the grievance was mainly looking for damages from West Side Drywall and if necessary CAS, for CAS hiring a non-union sub-contractor. The evidence clearly shows that the Carpenters never attempted to openly and clearly require McMahon to cease employing O'Leary unless he joined the union. Finally, the union itself never attempted to seek out O'Leary between March 2, and April 24, and attempt to have him join the union. The only attempts took place the day following his application for termination was filed.

44. For all of the above reasons the Carpenters attempted reliance upon the *April Waterproofing* principles are dismissed.

45. This matter is referred to the Manager of Field Services to convene a meeting of the parties so that the ballot box containing the ballot of O'Leary may be opened and the ballot counted.

46. Board File No. 0437-13-G is adjourned *sine die* for 30 days from the date of this decision. Unless the Carpenters request that the Board proceed with this application within that time, it will be deemed dismissed without any further notice to the parties.

“Maurice A. Green”
for the Board