

PROVINCE OF NEW BRUNSWICK



Labour and Employment Board

IN THE MATTER OF THE *INDUSTRIAL RELATIONS ACT*

AND IN THE MATTER OF TWO COMPLAINTS OF UNFAIR PRACTICE

IR-041-13

BETWEEN:

United Steelworkers, Local 1-306

Complainant,

- and -

B.W.S. Manufacturing Ltd.

Respondent.

- and -

IR-003-14

Duane Watson

Complainant,

- and -

B.W.S. Manufacturing Ltd.

Respondent.

BEFORE:

G.L. Bladon
Alternate Chairperson

APPEARANCES:

For the Complainants:

Daniel Leger

For the Respondent:

*Jamie Eddy and
Jessica Banguay*

For the Petitioners:

Clarence Bennett

DATES OF HEARING:

December 9 and 10, 2013, January 22 and 23,
April 29 – June 4, 2014, November 12, 13
and 14, 17, 18, 19, 20, 21, 23, 2014, January
27, 2015, written submissions completed May
4, 2015

DATE OF WRITTEN REASONS:

May 19, 2015

REASONS FOR DECISION

INTRODUCTION

1. The Board is faced with two Complaints of Unfair Practice. The first filed by the United Steelworkers, Local 1-306 (the Union) on September 18, 2013, amended November 22, 2013. It alleges B.W.S. Manufacturing Ltd. (B.W.S., the Employer) laid off the named grievors because they were believed to be members of the Union. The second Complaint was filed by D.J. Watson (Watson) on January 22, 2014. It alleges, firstly, that Watson was laid off because he was perceived by the Employer to be a member of the Union and, secondly, that the Employer interfered with the circulation of the Statement of Desire filed in the Union Certification Application. The Complainants allege the Employer breached subsections 3(1), (2) and (3) of the *Industrial Relations Act* (the *Act*).

2. By agreement of the parties, this decision of the Board relates to the Union Complaint and the first part of the Watson Complaint. The parties also agreed that the evidence given on the Watson Complaint would, so far as it was relevant, apply to the Union Complaint.

THE EVIDENCE

The setting

3. B.W.S. Manufacturing Ltd. was founded in 1967 to manufacture truck bodies and snow plows, largely for the agricultural industry. Expansion occurred in 1978 and again in the mid 1990s with markets in the US and Eastern Canada. The Company encountered

financial difficulties in 2008, but recovered with the expansion of dealer networks in western Canada and the eastern United States. Currently it manufactures trailers in seven categories from air detachable goosenecks to flat beds, tag-a-longs, loggers and three types of trailers for use in the oil and gas sector. In its best year, B.W.S. manufactured 525 trailers and related equipment. Its 2013 gross sales totalled \$23.6 million dollars, 95% of which was based on sold orders and 5% on new products. The plant's production facility is located "down the hill" at 23 Hawkins Road in Centreville, New Brunswick, which it acquired in 2012 (98,000 square feet). The finishing/shipping facility is "up the hill" at 10 Montana Street (60,000 square feet) – the original plant. On September 16, 2013, the Company employed 87 production workers and approximately 30 administrative staff.

4. The company management team consists of the CEO and President, Randy McDougall, and nine managers. This group is supported by four supervisors and approximately 14 lead hands.

The Union

5. The union organization drive at B.W.S. began in early September 2013 as a result of dissatisfaction with wages among several employees following their annual review in the late summer of 2013. The Union was contacted through its website by Stan Tyrer, a welder, who joined the Company on April 30, 2013. Mario Fortunato, a Union organizer of some 16 years' experience, travelled to Centreville, New Brunswick, to meet with a number of employees on September 5, 2013. Over the next ten days, he contacted various

production workers. As a result, Fortunato testified that he had signed up 42 employees of the 55 spoken to as of September 15, 2013. He testified that with three or four more days work, he would “easily” achieve sufficient union support for the Union to warrant automatic certification pursuant to section 14(3) of the *Act*. Fortunato commented, “It was a done deal in my eyes.”

6. In the afternoon of Monday, September 16, 2013, the Company laid off 26 employees, 24 of whom had signed union cards. Eighteen union members continued in the Company’s employ.

The Employer

7. The B.W.S. manufactures trailers/units based on orders from its network of dealers. It aims at a production rate of 52 units per month. The production schedule is dependent upon a number of factors which include a 60 to 90 day lead time for the acquisition of parts (the Company does not stock inventory) and the dealers’ requested delivery dates.

8. June of 2013 was a good month in that the production floor was busy. However, orders slowed down in mid-July, which was not of great concern as the Company’s annual shut down was set for the end of July, beginning of August. Potential orders from the Province of New Brunswick, the State of Maine and the US Army were outstanding, but anticipated. On the return to work following the annual shut down, Gary Thomas, the Plant Manager, noted that the production schedule indicated that without further orders, the

Company would run out of work by November 15, 2013. Thomas mentioned his concern to McDougall in a casual conversation shortly before and then again at the management meeting of August 28, 2013. Running out of work meant layoffs. Thomas suggested the sales force contact their major dealer in western Canada to advise that production space would soon be available hoping that this would motivate the dealer to place further orders. Because he did not think that he had McDougall's attention on August 28, 2013, Thomas sent the following email to McDougall on August 29, 2013:

“Good morning Randy I would like to have a 15 min meeting with the management team today about production I am thinking of pulling back the throttle to 40 hr next week and no overtime which will delay the finish and delivery date in Sept and Oct.

Maybe if DINT. and other dealers [k]new this was happening that it would spear [sic] them to order.

Your thoughts?”

9. Thomas' recommendation of a reduction in working hours from 44 hours a week to 40 hours and the elimination of overtime was immediately implemented. At the management meeting on September 4, 2013, the Company was concerned with the reduction of hours to 40, which did not work well from a production standpoint, and the possibility of a layoff. On Tuesday morning, September 10, 2013, Thomas was present in the foreman's office on the production floor when an employee entered and announced that he was “visited by a union rep last night”. This was the first Thomas heard of any union activity. McDougall first learned of union activity at B.W.S. when he stopped for coffee on his way to work about 6:30 a.m. on September 10, 2013. This was confirmed when he was told of the employee's comment in the foreman's office about 8:30 a.m.

10. McDougall had not had any prior experience with unionization. He contacted his Advisory Committee and was referred to an individual in Toronto who had dealt with unions in the workplace. McDougall testified that he was told that all employees have the right to join a union, that union activity was largely over benefits, not wages, and while management should not take any action to interfere with the employees' rights and to advise the Managers and Superintendents accordingly, it was recommended that McDougall undertake the creation of an employee group that would allow employees direct access to McDougall as the President and Chief Executive Officer of the Company.

11. McDougall convened a brief (five minute) Managers' meeting on September 10, 2013 to apprise them of Union activity. He told them to make no comment on the Union's efforts to the employees and to give the Supervisors the same message.

12. At the management meeting on Wednesday, September 11, 2013, there was little talk about the Union. The focus was on the workload and projected staffing requirements. The workforce needed for production of the 52 units scheduled for October was 52.96 production workers. The actual staff total was 73.20 (Exhibit 48). For November 2013 (22 units), 20 production days were scheduled requiring 19.99 employees with a statistical staff of 73.20 (Exhibit 49). In fact, the Company had 87 employees working in production. It was apparent that B.W.S. was seriously overstaffed based on sold orders to September 11, 2013. A possible layoff was discussed for the first time at the September 11, 2013 management meeting.

13. The conundrum facing B.W.S. lay in the potential for work from the outstanding bids for tag-a-long trailers for the State of Maine, the US Military contract and, at least McDougall believed, the possibility of obtaining the sander box contract from the Province of New Brunswick. If these contracts materialized, then the resulting production for October, November and December would resolve the overstaffing problem. If a layoff occurred too soon, then there was the real danger that key employees would find work elsewhere and might not be available if the outstanding bids succeeded.

14. At 8:24 a.m. on Thursday, September 12, 2013, the B.W.S. National Sales Manager advised McDougall by email that the proposal to build the 34 tag-a-long trailers for the State of Maine, with a value to B.W.S. of approximately \$1 million, was not successful. An hour later, McDougall learned that the bid to produce 31 low bed trailers for the US Department of the Army, having a value to B.W.S. of approximately \$4 million, had failed. McDougall then called the Provincial Minister responsible for the New Brunswick sander box quote only to learn that that contract had been awarded to a Quebec company, thus B.W.S. lost the opportunity to earn approximately \$800,000.00.

15. McDougall met with Thomas and Todd Saunders, the Human Resource Manager, to address the bad news. Both Thomas and Saunders, recommended an immediate layoff. McDougall was reluctant to lay off employees on a Friday and the Company was unprepared, at that point, to undertake such action. Furthermore, McDougall wanted time to consider the issue.

16. On September 12, 2013, McDougall spoke to Saunders about the creation of an Employee Representative Committee explaining that with the split in the two facilities – production - “down the hill”, finish off - “up the hill”, McDougall was out of touch with the employees and wanted a vehicle to remedy that situation. McDougall then met with the employees at both facilities separately on the afternoon of Friday, September 13, 2013. In his presentation to the employees, McDougall said that B.W.S. was going “through a lot of change” as the operation was now spread over 40 acres with approximately 120 employees. The market place was very competitive and hence the need to improve quality and productivity. This in turn tied in with a “new Bonus program”, introduced September 3, 2013. The purpose of the Committee was to improve communication in order to keep McDougall “in tune and assures I am getting the information I need to maintain harmony and take the necessary action to do so”. Meetings would occur bi-weekly to discuss suggestions or complaints raised to the departmental representative by the employees. McDougall would respond in writing. No mention was made of the Union or its organization activities. The employees responded as requested. Confirmation of the formation of the “Production Employees Representative Committee” (PERC) is found in the two B.W.S. memos to all employees dated September 16, 2013. The Committee met for the first time on September 17, 2013 and has met regularly since.

17. On Friday, September 13, 2013, McDougall asked his staff to generate the necessary financial information needed for a layoff, but he was still trying to determine if there was potential for further sales so as to avoid a mass layoff. He said he was “pretty

sure I was going to do a layoff on Monday, but I wanted to re-evaluate all the information available and I was not comfortable doing a layoff on Friday as it is unfair to the employees to be laid off before the weekend and have no source of information for two days. I was still thinking about the size of the layoff". McDougall considered the matter over the weekend of September 14 and 15, 2013 deciding, he said, about 7 p.m. or 8 p.m. Sunday evening, to do a layoff between 24 and 28 employees on Monday, September 16, 2013. He felt that this would allow the scheduled production to be spread over the remaining 60 employees.

18. On Monday morning, September 16, 2013, McDougall asked Thomas and Saunders to provide him with a list of 24 to 28 names of employees who could be laid off. Thomas and Saunders prepared the list based on the needs for the production anticipated for October and November. That list was reviewed by McDougall; no changes were made. At 3:30 p.m., 26 production employees met individually with McDougall and were handed layoff notices. The layoff procedure adopted on September 16, 2013 mirrored prior substantial layoffs at B.W.S.

POSITION OF THE PARTIES

The Union

19. The Union notes that there are two complaints of unlawful employer interference contrary to ss. 3(2) and (3) of the *Act* before this Board. The Union Complaint, as amended, alleges that the layoff of 24 of the 26 employees on September 16, 2013, was the

result of their union membership. The Watson Complaint raises the same issue in that he was laid off because of his perceived union involvement and, further, that Watson was requested to sign a Statement of Desire propagated by the Employer.

20. The Union submits the Employer was aware of the union organizing drive and responded by laying off 26 employees on Monday, September 16, 2013, 24 of whom were union members. This fact, coupled with (i) the choice of employees laid off and (ii) the execution of the layoff process constitute proof of a *prima facie* case under subsection 106(7)(a) of the *Act*, thereby requiring the Employer to establish that its actions were not tainted, in any way, by anti-union animus. See *Re Dunbar Construction Ltd.*, [1999] N.B.L.E.B.D. No. 84; *Swiss Chalet Restaurant No. 1250*, [2012] O.L.R.D. No. 4295.

21. The Union submits that in determining the taint issue, the Board must examine the totality of the circumstances surrounding the alleged violation as illustrated by this Board's decision in *Re Sinclair and United Brotherhood of Carpenters and Joiners of America, Local 1386 and Acadian Construction (1999) Ltd.* – [2014] N.B.L.E.B.D. No. 17.

22. These circumstances begin with the Union drive which resulted in the signing of 42 employees as Union members of the 55 employees spoken to by September 15, 2013. Following the layoff, the union organizer testified he was unable to obtain any further union support.

23. Stan Tyrer was the employee who made the initial contact with the Union about September 5, 2013. He facilitated the union drive by hosting meetings with employees in his home and he travelled with the union organizer during the recruitment drive. Shortly after 12 p.m. on Monday, September 16, 2013, Tyrer was confronted by Billy Crain, an employee identified as the lead hand in the axle shop. Thomas, the Plant Manager, had spoken to Crain at about 7 a.m. on September 16, 2013, inquiring of Crain's knowledge of union activity. Thomas testified that he knew Crain would nose around and find out about the union organization drive, if there was one. Crain demanded a list of employees who joined the Union from Tyrer and threatened to bloody Tyrer's nose if he failed to produce it by the end of the shift. The Union pointed out that Tyrer was the sole Red Seal welder employed by B.W.S. He began work on May 1, 2013 and received a wage raise on August 21, 2013 which placed him close to the top half of B.W.S. wage scale. Finally, the Union submitted that Tyrer was on the recall list, but Thomas testified Tyrer would not be recalled by the Company.

24. Ryan Goguen was a senior welder with Canadian Welding Bureau (C.W.B.) certification earning close to the top half of the wage scale. In the morning of September 16, 2013, Goguen was approached by Larry Berry, the B.W.S. Welding Supervisor, and the second-in-charge of the production floor after Lester Brooker, the Production Manager. Berry was also involved in other management related activities which, in the Union submission, indicates that he was a management employee. Berry questioned Goguen about his union involvement and that of seven other employees named by Berry. Goguen,

who signed a union membership card, was one of the 26 employees laid off.

25. Simon Thomas was a C.W.B. certified welder and a Union member who was laid off. Subsequently, he was contacted by phone on September 24, 2013 by Shane Nicholson at 10.50 a.m. Nicholson, a lead hand in the Union's view, was in charge of operations during the summer shut down and, thereby, tied to management. Nicholson suggested to Simon Thomas that if he signed "out of the Union", he might get his job back. The Union said that although Nicholson was promised as a witness by the Employer, he was not, in fact, called to testify.

26. Ian Fenton was a Finish Off technician who worked continuously for B.W.S. for the last three years and seven months before being laid off on September 16, 2013. Fenton testified that when McDougall was soliciting volunteers for the Employee Representative Committee from the Finish Off shop, Ben Hoyt was the only volunteer. However, on the morning of September 16, 2013, Ernie Till, a shunt driver, and not a member of the Finish Off shop group, met with Gaylen Smith, the Finish Off Manager, in Smith's office. When Till came out, he announced and conducted an election for the Finish Off representative on the Employee Committee. Another employee, not Hoyt, was elected. Hoyt's offer was ignored. Fenton was also identified as an employee on the recall list who Gary Thomas said would not be recalled. Fenton testified that Brian Kilcollins, identified by Thomas as a lead hand in the Finish Off department, had publicly observed that both the Nackawic and Juniper Mills closed as a consequence of union activity.

27. Ben Hoyt, a Union member, was laid off on September 16, 2013. He had been continuously employed at B.W.S. for more than the last three years. He confirmed that he was the sole Finish Off shop volunteer for the Employee Committee and yet an election was conducted. Hoyt also confirmed Kilcollins' anti-union comments.

28. The Union argued that like Shane Nicholson, Kilcollins was to be called by the Employer to testify but, like Nicholson, was not. Gaylen Smith, the Finish Off manager, was also not called as a witness. The Union therefore submits that this weighs against the Employer in its attempt to answer the Union's *prima facie* case.

29. In a similar vein, the Union referred to the evidence of Joe Brayson, a senior welder, with three plus years of continuous employment and a wage rate in or close to the top half of all B.W.S. employees. Brayson said he was approached by Brent Taylor who, according to Gary Thomas, was third in charge of the production floor after Brooker and Berry. Taylor said jobs would be lost if the union drive succeeded. Billy Crain, identified by Thomas as a lead hand in the axle shop, was in the conversation and commented that the Plant would close if unionized. Both inquired of Brayson's union status.

30. Brayson also said he saw Crain speaking with Brooker, the Production Manager, on the shop floor during the morning of September 16, 2013. Crain had a clipboard and was looking up and down the production floor. "They were scoping it out, you might say".

While the Union conceded that there was no evidence of the contents of the clipboard, the Union argues that Crain and Brooker were putting together a list of production employees who joined the union to be used for the layoff later that afternoon.

31. D.J. Watson, who did not join the union, testified to Gary Thomas meeting with Crain at approximately 7 a.m. on September 16, 2013, following which Crain approached Watson and other employees on the production floor asking about their union involvement.

32. Following his layoff, Watson contacted Todd Saunders, the Human Resource Manager, on September 24, 2013, saying he did not sign any papers with the Union and wanted his job back. Saunders said to Watson that Watson's name was "on the list" - a reference to the original Complaint in which Watson was listed, mistakenly, as a grievor. Saunders then directed Watson to the shop floor for assistance. Watson subsequently contacted Billy Crain who then referred him to Ernie Till who had him sign a form withdrawing Watson's [non-existent] union membership. The Union argues that this exemplifies the connection between management and Till and Crain who were circulating the Withdrawal of Union Membership forms and thereby substantiates the alleged violation of subsection 3(3) of the *Act*.

33. The Union points out that Ernie Till was not called as a witness by the Employer but rather by counsel for the Petitioners. Till testified that he was contacted by a union representative on Sunday evening, September 15, 2013. Till was opposed to the union and

telephoned Gary Thomas, the Plant Manager, immediately following the union approach. On Monday, September 16, 2013, he conducted a vote in the Finish Off shop at the request of Gaylen Smith, the Shop Manager. Counsel for the Union says that the Interim Relief Application was initially returnable Friday, September 20, 2013 and then adjourned for further submissions to Tuesday, September 24, 2013. In the meantime, Till said, he accessed the Labour Watch website on September 22, 2013. The documents filed as Exhibit 28 indicate that the website material contained suggested law firms who might be of assistance in “How to Cancel a Union Card”. Till and Crain were circulating Withdrawal of Membership forms on Tuesday, September 24, 2013. Till said he retained Clarence Bennett, the solicitor for the Petitioners, but he did not say when, what the financial arrangement with Bennett was, or how it would be calculated. He said an envelope was passed around into which employees put unknown amounts of money which was then delivered, uncounted, to Bennett. The Union argues that Till’s evidence lacks precision; for example, it suggests that Bennett accepts cash for bills not rendered and for an unknown amount from unidentified employees; consequently, the Union submits that Till is not a credible witness and his evidence is unreliable. Further, the Union says that the alacrity with which Till, unsophisticated in labour relations, managed to circulate, with Crain, the Withdrawal of Union Membership forms by Tuesday, September 24, 2013, suggests that management “had injected itself into the process”.

34. Billy Crain, like Till, testified on behalf of the Petitioners, but the parties agreed that his evidence, so far as it was relevant, could apply to the Complaints. On September

16, 2013, Crain was approached by Gary Thomas, the Plant Manager, at the beginning of the shift at 7 a.m. Thomas asked what he knew about union activity. Crain said ‘Nothing’, but Thomas knew Crain and knew that Crain would find out. Crain did. He spoke to Watson, Cody Williams, Brayson, Peter Martin and Tyrer asking if they were involved with the union. He was seen speaking to Brooker, the Production Manager, clipboard in hand, looking up and down the production floor. Crain said he did not know what he was talking to Brooker about, but he was clear that it was not about a list of union members. Crain said he contacted his personal lawyer to inquire about his “rights”. The lawyer referred him to Employment Standards. Crain said both were “useless”. When cross-examined by Union counsel, Crain could not clarify what “rights” he was concerned with.

35. The Union submits that the evidence indicates that Till and Crain were not close friends and worked in different parts of the Plant, yet they found each other in time to circulate the withdrawal forms on September 24, 2013.

36. Crain had no recollection of “passing the hat for Bennett”, saying that this was between Till and Bennett. But, on the other hand, he was crystal clear in his evidence that he made sure that the Union Membership Withdrawal forms were signed voluntarily and only during scheduled breaks in the course of the work day.

37. The Union argues that Brooker should have been called given the evidence of his contact with Crain and the union “buzz” on the production floor on the morning of

September 16, 2013. Therefore the Board is urged to draw an adverse inference from the failure of Brooker to testify and to find this is a further factor supporting the Union submission that the Employer had failed to answer the *prima facie* case.

38. The Union reviewed McDougall's evidence indicating that he was advised on Tuesday, September 11, 2013, to create a Production Employee Representative Committee. By Friday, September 13, 2013, the concept was in place and McDougall spoke to the employees describing the function of the committee – essentially the creation of a conduit for employees' concerns to McDougall – and he solicited their cooperation in choosing a representative from the various parts of the Plant. His presentation was positive and forward looking. It is interesting, the Union says, that there was no mention of “The Perfect Storm” of September 12, 2013 confirming the loss of projects worth approximately \$5.8M. In this context, McDougall's conduct “does not make sense”, the Union submits, particularly where one third of the workforce is laid off on September 16, 2013 and where, in one instance, an election is held for an Employee Representative, and the Committee's structure is circulated initially in a memo signed by McDougall on September 16, 2013 – Exhibit 17, which subsequently had to be changed later that day – see Exhibit 6. The Union says that the creation of the Employee Committee was a ruse by the Employer to determine the strength of the Union drive and to identify the leaders in the workplace.

39. The Union addresses the Employer's “legitimate business reason”/“economic imperative” argument in this way: the Employer was aware on September 11, 2013 at its

management meeting that it had orders on the books that would only maintain production to mid-November. If no further orders were received between September 11 to November 15, 2013, the Plant would have to shut down. Gary Thomas testified that no further orders of significance were received from July until November. Orders placed in mid-November, 2013, allowed the Company to recall some of its employees and return to a 44 hour work with full production in January of 2014. The evidence indicates orders on the books; *i.e.*, trailers ordered but not yet built, were July - 125, August - 113, September - 109. Thomas testified that he could not remember a month in which production was less than 30 trailers. If the minimum 30 trailers were built in July, and no new orders were received until November, as Thomas testified, then there would be 95 orders ($125-30=95$) on the books for August, not 113; and if 30 were built in August, then 65 trailers would remain for September, not 109 – thus the Union says the Company’s evidence is contradictory and that submission is based on a minimum number of 30 trailers produced per month, whereas the evidence indicates that the production floor was working a 44 hour week in August and consequently more than 30 trailers must have come off the production line – a further Employer inconsistency. This is further illustrated by the fact that the Company continued hiring until the layoff and maintained its usual component of students despite the absence of new orders. The Company remained in production through November and December and into January, albeit with a reduced workforce, and it enjoyed its second most productive year by fiscal year end, June 2014. These facts, the Union insists, negate the need for a layoff.

40. The Union argues that the Employer's claim of a sudden and unexpected contract cancellation on September 12, 2013 ("the Perfect Storm") is simply a circumstantial convenience for justification of the layoff. The cancellation of the proposal made to the Province of New Brunswick for the building of sander bodies came in May of 2013. The Company never previously received an order from the State of Maine of the magnitude of some 33 tag-a-long trailers in its history, and it had never received any prior contract work from the US army. The Union therefore argues that the expectation that these proposals would be accepted was unrealistic and not material to the layoff.

41. The Union submits that the Employer's claim that the criteria for retention of employees, rather than layoff, was based on the individual employees skill, productivity and seniority. This is undermined by the fact that the Employer laid off (i) Winston McLean, an employee since 1985, (ii) Neil Kilcollins, a 14 year employee, because of unsubstantiated drug use, and (iii) Ryan Goguen, who was said to be able to do any job in the plant, because of his association with Ian Fenton, whom Thomas was told was likely a drug dealer – a fact not put to Fenton when he was cross-examined by the Employer, and (iv) Stan Tyrer, the Union motivator, a Red Seal welder who, one month before the layoff, was given a raise. Not only were these employees laid off, Gary Thomas said they would not be recalled.

42. The Union submits that the evidence implicates (i) Lester Brooker, the Production

Manager, by his contact on the production floor in September 16, 2013 with Billy Crain, and (ii) Gaylen Smith, the Manager of the Finish Off shop by his contact with Till and the questionable vote of September 16, 2013. Yet neither of these witnesses were called to explain their role by the Employer. Further, Gary Thomas said that he did not consult with managers Brooker and Gaylen Smith, who were directly responsible for production and the Finish Off shop, in determining who to lay off, but limited his consultation to Saunders, the recently appointed Human Resource Manager. Greater explanation from witnesses available to the Employer ought to have been called, the Union argues, and the failure to do so allows the Board to draw a negative inference that their evidence would not support the Employer's position. This is emphasized by the evidence that both Thomas and Berry ignored the management advice not to get involved with any union activity.

43. Other questionable issues arise from:

- (i) The unsatisfactory evidence of Till and Crain relating to Bennett's retainer;
- (ii) The fact that the Withdrawal of Union membership forms were circulated before the Certification Application was filed;
- (iii) Till's contact with the Labour Watch website, Sunday, September 22, 2013 and by Tuesday morning, September 24, 2013, he was in possession of and circulated Withdrawal of Union Membership forms such that some were received by the Board that day, being the return date of the adjourned Interim Relief Application;
- (iv) The failure of the employer to confront Tyrer with the Employer's reason for his layoff and the decision never to recall him;
- (v) The fact that the Reply makes no mention of the Employer's awareness of the union drive and that it had no impact on the

layoffs; and

- (vi) The promise to call two witnesses, Shane Nicholson and Brian Kilcollins, that were not called.

Consequently, the Union says consideration of all of these factors in the face of a layoff of one third of the Company's workforce during a successful union drive of which the Employer was aware, shows that the Employer has failed to satisfactorily establish that the layoff was not, at least in part, motivated by anti-union sentiment.

44. The Union complains that although the New Brunswick legislation provides for a shift in the onus of proof from the union to the employer in this case, the union is obliged to lead its evidence in its entirety in advance of the respondent employer who, following the establishment of a *prima facie* case by the union, carries the burden of proof; yet it has had the opportunity, having heard the complainant(s) case, to build its evidence accordingly.

The Employer

45. The Employer acknowledged that the fact of the layoff and its timing on September 16, 2013 constitute a *prima facie* case against the Employer requiring it to establish that the layoff and the individual employees laid off were not motivated by anti-union animus pursuant to ss. 106(7)(a) of the *Act*. The Employer argues, however, that the onus varies with the weight of the Union's evidence; *i.e.*, if the *prima facie* case is weak, then the evidence required of the Employer is correspondingly lessened.

i) *The Economic Imperative*

46. The Employer submits that McDougall, Thomas and Saunders, the layoff decision-makers – all testified and were subjected to cross-examination. The undisputed facts reflect the historically low production in the first two quarters of the fiscal year, July through September, October through December. The financial statement indicates a loss of \$88,050.00 in August of 2013 – Exhibit 47. It also reflects a production schedule for the next four months: September - 45 trailers, October - 53, November - 8 and December - 1. These numbers raised concerns. As a result, Thomas reduced the work week from 44 hours to 40 and eliminated overtime. At the management meeting on September 4, 2013, Thomas said “We need to think about a layoff”. At the September 11, 2013 management meeting, the contents of Exhibit 48 and 49, “Staffing Requirements for: 01-OCT-13 to 01-OCT-13” and “Staffing Requirements for: 01-NOV-13 to 30-NOV-13”, were discussed. They reflect overstaffing by 20 statistical employees in October to produce 52 units and overstaffing of 53 employees for 12 units in November. These financial and statistical facts make the need for a layoff, the Employer says, more than abundantly clear. The only hope was that the three outstanding bids with the Province of New Brunswick, the State of Maine and the US army would materialize. On September 12, 2013, this hope, faint or otherwise, was dashed. Furthermore, there were no spring bookings coming in from the major dealer in Western Canada.

47. In the third week of September 2013, orders began to come in but, when taken with

the time to acquire the necessary materials, meant production could only begin in January 2014, and it was in January 2014 that B.W.S. went back into full-time production recalling 11 of the 26 employees laid off, most of whom are union members. Consequently, the Employer submits that the evidence makes it obvious that the layoff was not motivated by anti-union animus, but rather by an obvious and necessary business reason.

ii) The Layoff

48. In terms of timing, the need for the layoff was identified on Thursday, September 12, 2013. There were no tag-a-long trailers to be built, there was one ADG and three sander bodies. Consequently, large areas of the production floor needed to be shut down. September 12, 2013, then, would have been the most advantageous time for the layoff to occur from the Employer's perspective. However, the layoff was not made until Monday, September 16, 2013 because it was the policy of the Employer not to lay off on a Friday and leave the employees without access to information over a weekend. The Employer submits that the choice of employees to be laid off was made by Gary Thomas and Saunders between 8 a.m. and 11:30 a.m. on September 16, 2013. The list was scrutinized by McDougall and approved without change. There was no evidence to suggest that Brooker, Crain, Smith or Berry spoke to anyone in management concerning employees to be laid off on September 16, 2013.

49. The criteria for layoff was similar to that used in the past layoffs at B.W.S.: *i.e.*, skill, versatility, performance, seniority (greater than 3 years versus less than 3 years) and departmental needs. Thomas was the primary decision-maker, supplemented by Saunders.

Thomas said that he knew his employees' skill set, productivity and efficiency based, in part, upon a computer program reflecting their efforts. There was no need then to speak to Production Managers Brooker and Gaylen Smith. Thomas had no knowledge of employees who had signed with the Union. While such was discussed on the production floor on the morning of September 16, 2013, there was no evidence whatsoever that the floor "buzz" reached either Thomas, Saunders or McDougall.

50. The fairness of the layoff choices was illustrated by the layoff of Thomas' son and another relative, and the layoff of Berry's son. Further, of the 26 employees laid off, 24 had signed with the union, but 18 union members remained in the Company's employ. Of the 26 employees laid off, 12 were contacted for recall and 11 returned to B.W.S. Nine of the 11 were listed as grievors in the Union's complaint and 3 of these grievors testified against the Employer at these proceedings. Further, Thomas testified that 5 additional employees - all Union members - would be recalled in the future.

51. The Employer points out that its knowledge of union activity was minimal: a conversation between McDougall and a local convenience store operator, Jason Dixon's disclosure to Thomas in the production floor office on September 10, 2013 that he had been contacted by a union member, and Till's similar communication to Thomas by phone on the evening of September 15, 2013. The Employer's response to this information was the creation of an Employee Representative Committee following a meeting among McDougall and the management team wherein McDougall advises that he is neither for or nor against a union, that the employees have rights and management must stay out of it.

When McDougall met with the employees on September 13, 2013 in connection with the Employee Representative Committee on both the production floor and in the finish shop area, his comments were directed to the committee. He said nothing about the union.

52. The Employer acknowledged that Thomas and Berry were in breach of McDougall's instructions not to inquire about union activities, but there was no evidence indicating that Thomas knew which employees had signed with the Union. The confrontation between Tyrer and Crain when Crain demanded a list of union employees from Tyrer took place about 12 p.m. on September 16, 2013, approximately half an hour after Thomas and Saunders had finalized the layoff list. Berry, who was closest to management, had overheard names in the smoking area of employees who presumably signed with the Union, but he did not have any communication with Thomas on that point on September 16, 2013.

53. The Employer argues that its activity leading up to the layoff was premised on business concerns. Its knowledge of the Union's activity was marginal and the evidence required to rebut the Union's *prima facie* case is correspondingly minimal. See *Re Camden Park Terraces Inc.*, [2005] N.B.L.E.B.D. No. 97 at paras. 19, 23 and 24.

The Union's Reply

54. The Union submitted that the *prima facie* case was made on each of the following facts: the layoff, its timing, and the choice of employees; *i.e.*, a strong *prima facie* case,

therefore a placing a high onus of rebuttal upon the Employer.

55. The Union argues that although there was no direct evidence of a communication from Brooker to senior management following his clipboard conversation with Crain on the production floor on the morning of September 16, 2013, the circumstances on the production floor that morning and a layoff of 24 union employees among the 26 employees laid off suggest that the Board should draw an inference that such a communication occurred.

56. As to the Employer's "Perfect Storm" submission, the Union replied that the production schedule for September would have been created 60 to 90 days in advance thereof – or in May or June. Similarly, the schedule for October would have been known in June or July and the schedule for November in August of 2013. Hence the Employer knew well before September 16, 2013 that a layoff was likely to happen. The imposition of the layoff in the midst of a successful union drive then, was not the result of cancellation of unrealistic bid expectations, but rather the result of the union drive. This is evident, the Union says, from the fact that Thomas was inquiring about the Union from Crain – "the nosiest person in Carleton County" – on the morning of the day of the layoff. Further, it demands, in the circumstances, some explanation from Brooker who was seen "scoping out" the production floor on the morning of September 16, 2013.

57. Finally, the Union says a "significant visual" was created by the Employer calling

in the employees to be laid off in the presence of other employees on the production floor at the end of the shift on September 16, 2013.

ANALYSIS AND DECISION

58. The statutory framework for these two Complaints is found in ss. 3(2) and (3) of the *Act* which essentially prohibits the Employer from sanctioning its employees for being members of a union. Critical to the resolution of the Complaints by the Union and Watson, under these subsections, is s. 106(7)(a) which provides:

Where in a complaint under this section it is alleged on an inquiry by the Board that

(a) any employer has discharged any employee or refused to employ or to continue to employ any person or threatened the dismissal of an employee contrary to subsection 3(2), (3) or (4), or ...

and the person complaining establishes a *prima facie* case against the employer or union, the burden of proving that the employer or union did not violate the provision lies with the employer or union, as the case may be.

59. The analysis in relation to anti-union animus is described in *Re Camden Park Terraces Inc.*, *supra*, at paras. 18-20:

18. In earlier decisions the Board has recognized that as employers are not likely to admit anti-union animus, **the tribunal may rely upon circumstantial evidence to determine if the employee's membership in the union was present in the mind of the employer and at least one of many reasons for the imposition of the disciplinary sanction...** If the complainant is able to establish direct or circumstantial evidence that the employee was engaged in union activity and the employer knew of it, then the burden shifts to the employer to provide an explanation for its actions... If there is no evidence of anti-union animus, the Board will normally uphold a dismissal, as the issue of just cause is not a matter properly to be determined...

19. That said, where the onus shifts to the employer to provide an

explanation for its action, if the employer is able to establish good cause, then the Board may require more cogent evidence of “union activity, the grievor’s participation in the campaign, and the employer’s knowledge of it” before determining whether the employer was motivated in whole or in part by anti-union animus...

20. Several factors have been identified as being helpful to the Board in determining whether the action of the employer is *bona fide* in light of all the circumstances... four such factors... being “1) the existence of a pattern of anti-union activity; 2) the extent of the respondent’s knowledge of the existence of union activity and the employee’s involvement in that activity; 3) the manner in which the employee was discharged and 4) the credibility of the witnesses”.

[Emphasis added]

60. Here the Employer laid off 26 employees, 24 of whom were union members, during a union drive of which the employer was aware. Ernie Till told Gary Thomas, the Plant Manager, on the evening of September 15, 2013, that he (Till) had been told by the Union Organizer that almost half the employees had signed with the Union. The layoff occurred at 3:30 the next afternoon. There is then a *prima facie* case made out by the Union, *i.e.*, the Union has adduced sufficient evidence to warrant a finding in its favour absent contradictory evidence from the Employer. The Employer acknowledges that it must provide justifiable explanation for its actions. The Employer’s position in this respect is found in paragraphs 7(c) and 7(e) of its Reply which read:

7(c) the employees selected for layoff were among the Respondent’s most junior and least skilled production employees.

...

7(e) The layoffs were solely the result of a lack of work, caused by a significant and steady decrease in sales orders and lost contract opportunities in the months preceding the layoffs.

61. The nature and extent of the Employer’s motive for its actions must be examined.

In *W.J. Beairsto Co.* (1994), 24 C.L.R.B.R. (2d) 161, this Board said at paragraph 47:

47. **Nor need anti-union animus be the sole motivating factor or intent underlying the conduct of an employer breaching the normative prohibitions of the Act. It suffices if such is but one in a complex of motives which drive that conduct.** Again the matter is eloquently put by the Supreme Court of the United States in *National Labour Relations Board v. Erie Resistor Corp.*, (1963) 373 US 221. There, the court asserted (at pp. 228-30):

The outcome may well be the same when intent is founded upon the inherently discriminatory or destructive nature of the conduct itself. The employer in such cases must be held to intend the very consequences which foreseeably and inescapably flow from his actions and if he fails to explain away, to justify or to characterize his actions as something different than they appear on their face, an unfair labour practice charge is made out. *Radio Officers v. Labor Board*, *supra*. **But, as often happens, the employer may counter by claiming that his actions were taken in the pursuit of legitimate business ends** and that his dominant purpose was not to discriminate or to invade union rights but to accomplish business objectives acceptable under the Act. **Nevertheless, his conduct does speak for itself – it is discriminatory and it does discourage union membership and whatever the claimed overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but which he must have intended.** As is not uncommon in human experience, such situations present a complex of motives and preferring one motive to another is in reality the far more delicate task, reflected in part in decisions of this Court, of weighing the interest of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct. This essentially is the teaching of the Court's prior cases dealing with this problem and, in our view, the Board did not depart from it. (p. 228-30)

This approach too has been adopted by Canadian labour relations boards, including our own, and approved by the courts. See *Re J.M.L. Shirts Ltd.* (1977), 17 N.B.R. (2d) 590, (Q.B.); dismissed on appeal (1977), 18 N.B.R. (2d) 695 (C.A.)". [pp. 187-8].

[Emphasis added]

The Board then is concerned with the legitimate business reason advanced by the Employer

for its conduct, the timing of the layoff and the choice of employees laid off.

A. *The Economic Imperative*

62. There are three components to this justification advanced by the Employer. First, the B.W.S. “Operations Income Statement” (Exhibit 47) for the month ending August 31, 2013 reflects a loss for the month of August 2013 of \$88,050.00. Secondly, the Employer said that it was notified that the proposals to build units (a) for the Province of New Brunswick having a value to the Employer of approximately \$80K, (b) the State of Maine – \$1M and (c) for the US army - \$4M, were all unsuccessful as of September 12, 2013. Thirdly, the orders for production had been declining. The B.W.S. Order Book Comparison indicates total orders for units to be built going forward as of: June – 149, July – 125, August – 113, and September – 109. The Employer argues that with 109 trailers to be built from September through the Fall and, as no new orders of significance had been received between July and September, production at the rate of approximately 52 units per month would cease mid-November because all existing orders for trailers would have been built, assuming a workforce of 87 production employees, and hence the obvious need for a layoff.

63. In support of its position that the layoff was in part the result of declining orders, the Employer offers its “Order Book Comparison” which appears to show that the orders on the Employer’s Books were reducing from June through September for both 2012 and 2013. As noted, the first quarter of the fiscal year (June-August) is always the slowest.

Looking at the figures for 2013, July has 125 orders to be filled in the order book; *i.e.*, 125 units to be built from July 2013 forward. Thomas testified that there were no new orders of significance received between July and November 2013. No evidence was introduced to indicate the actual number of units produced in July, but Thomas said he could not remember a month in which the production level was less than 30 units. If the minimum number of units were produced in July and no new orders were received, then the remaining orders to be filled going forward as of August 1, 2013 should be 95 ($125 - 30 = 95$). The order book indicates the orders remaining on the books to be 113. The same calculation can be done for the September ($113 - 30 = 83$), yet the order book shows 109 for September.

64. This calculation indicates that the order book numbers are incorrect or that, in fact, orders were coming in from July into September which contradicts Thomas' evidence. This difficulty is magnified when one considers that the Employer was operating at full capacity in July and August meaning that it was likely producing not the minimum of 30, but something close to the monthly goal of 52. This seems more likely when the staffing requirements for October (Exhibit 48) printed out on September 16, 2013, indicates 52 detailed production units scheduled for production in October 2013. And it seems peculiar that on September 16, 2013, approximately 2 weeks in advance of the October schedule, no modification had taken place given the Employer's awareness of declining orders since July 2013.

65. Fundamental to the Employer's economic imperative argument is that the layoff would allow the Company to remain in production through the fall of 2013 by spreading the reduced workload over a smaller workforce. New orders arriving customarily in November and December would carry production into the New Year. It illustrated this argument by taking the 109 orders on the books as of September 1, 2013, and suggested that production of 30 units per month from September through November with 19 units remaining for December up to the Christmas shutdown would be the answer ($30 + 30 + 30 + 19 = 109$). The problem, firstly, is that the 109 figure utilized by the Employer in his argument is unreliable as it does not square with Thomas' evidence, nor does it explain why as of September 16, 2013, the production schedule for October indicated a production of 52 units in October.

66. Furthermore, Thomas was asked in cross-examination what the production level was for the last four months of 2013. He "guessed" 42 in September, 35 in October, 30 to 32 in November, and 20 to 25 in December. However, when he was then confronted with the schedule of production as of October 31, 2013 (Exhibit 47, page 19), indicating production of 45 units in September, 53 in October, 8 in November and 1 in December, Thomas yielded to the written schedule saying that his estimate of production was "just going from memory". The evidence is conflicting and confusing and the Employer bears the onus of clarification.

67. The critical issue is the level of production for the last four months of 2013. The

Employer unquestionably must have the actual production figures for those months. If the actual production corresponded approximately to the level of production the Employer calculated or hypothesized, then the Employer's economic imperative argument, in this context, might have some weight. The Employer did not choose to offer the actual production numbers in evidence.

68. The Employer submitted further that one need not necessarily rely upon the questionable orders on the books to justify the layoff. Rather regard may be directed to Exhibits 48 and 49 – “Staffing Requirements for October and November 2013” printed out on September 16, 2013. The production forecast for October was 52 units, not the hypothetical 30. The manpower needed was, statistically, 52.96 production workers. Actual staff was 73.20, consequently the Employer would be overstaffed by 22.4 employees. Similarly, the November statement shows a production schedule of 12 units needing a staff of 19.5 employees and with 73.20 production employees, the overstaffing would be 53.21 employees. Hence the obvious need for a layoff. The Employer chose to lay off 26 employees, 24 of whom are union members, and this still results in overstaffing for November of approximately 27 employees, $(73-26=47)-20=27$, which is greater than the complaint of variance in October. It may well be that sense can be made of these numbers. How, for example, was the calculation made to yield an anticipated production of 12 units in November? What were the actual numbers of units produced in each of the last four months of 2013? How was that accommodated on the production floor? Further, it must be remembered that fiscal 2014 (July 1, 2013 to June 30, 2014) was the second

most successful year in the Company's history. In the circumstances of this case, the Employer must explain comprehensively the need for its decision to lay off 26 employees. It cannot rely on a hypothetical calculation when an accurate calculation is available to substantiate its position.

B. Timing of layoff

69. The Employer says that the timing of the layoff was the result of the "Perfect Storm" of September 12, 2013, when approximately \$5.8M in contract proposals were rejected. There were two communications to the Employer in this context: (i) an email, dated September 12, 2013, from the B.W.S. National Sales Manager reading in part "... we were unsuccessful in our bid for 34 tag-alongs to the State of Maine" and (ii) a letter, dated September 12, 2013, from the US Department of the Army which indicated the contract upon which B.W.S. had made an offer was awarded to another bidder. And further, the evidence of McDougall that he contacted the New Brunswick Provincial Minister responsible for the \$8K sander body proposal directly on September 12, 2013 and was told that the B.W.S. offer had not been successful. The so-called "Perfect Storm" of Thursday, September 12, 2013, before the lay off on the following Monday, September 16, 2013, pales somewhat when weighed against the fact that B.W.S. had been notified on April 30, 2013 that its proposal to the Province had been awarded to another contractor. And despite McDougall's efforts, this rejection was confirmed by an email from the New Brunswick Minister of Government Services on June 17, 2013. While B.W.S. had built units for the State of Maine previously, it had never succeeded with a proposal of similar magnitude to

that of 34 tag-a-long trailers rejected on September 12, 2013. The proposal to the US Army was the first offer that B.W.S. had ever made to this prospective purchaser. The evidence indicates that the likely success of the US bids was not great and to rely upon these proposals to maintain full production into the fall of 2013 was not realistic. In other words, to suggest that these rejected proposals were the reason for the sudden layoff is unconvincing.

C. Employees laid off

70. The Employer argued that it employed its traditional criteria for determining which employees would be laid off: seniority – greater/lesser than three years, productivity and versatility. However, in at least one case it would appear that strict adherence to the policy was not followed. Stan Tyrer initiated contact with the Union and assisted Fortunato in the recruitment drive. Tyrer joined B.W.S. April 30, 2013. He was the only Red Seal welder on B.W.S. production floor, nonetheless, he failed the Canadian Welding Bureau test; twice, according to Thomas. This led to controversy with C.W.B. officials which Thomas testified was embarrassing for B.W.S. On expiration of his three month probationary period in mid-August 2013, Tyrer asked Berry for a further raise following the \$1/hr raise he received in mid-June 2013. Tyrer said he would accept no less than \$16 an hour but “I wanted \$18”. Berry delayed his response but when pressed by Tyrer, Berry said Tyrer would see the raise in his next pay cheque. When it was not there on the second week following Berry’s promise, Tyrer was upset, took his lock off his locker and went home. He did not go into work the following day. Berry telephoned Tyrer on August 30, 2013

admitting his mistake. Tyrer said he was not coming back to work until he received an email indicating the raise and its effective date. Tyrer immediately received a letter over Thomas' name, and that of Berry, confirming his raise to \$16 an hour effective August 26, 2013. Notwithstanding Tyrer's experience and recent increase in wages, Thomas testified that Tyrer was not only laid off, but that he would not be recalled because of the embarrassment he caused B.W.S. with C.W.B. officials. The so called "embarrassment" existed prior to the wage dispute at the end of August 2013. It did not deter B.W.S. from giving Tyrer his raise on August 30, 2013 and asking him to return. The only change in circumstances after the end of August was the Employer learning that Tyrer facilitated the union drive. It is more likely then, that the Employer's treatment of Tyrer was motivated, at least in part, by anti-union animus.

71. The Employer, following its historic pattern, proceeded to gather employees around the Foreman's office on the production floor at the end of the shift on Monday, September 13, 2013. It called in 26 employees individually and McDougall handed each of them their layoff notice. The laid off employee then proceeded out of the office and into the area where the other employees had gathered. Twenty-four of 26 of these employees laid off were members of the Union. It would be naïve not to appreciate the impact this process would have had on the workforce as a whole. In fact one employee sarcastically remarked to Tyrer, "Thanks a lot, Stan", on exiting the production office with his layoff notice in hand. This is further evidenced by the Union organizer's testimony that following September 16, 2013, he was unable to interest any other employees in joining the Union.

72. The Employer's evidence indicates that a layoff was being seriously considered on Thursday, September 12, 2013. McDougall's policy was not to do a layoff on a Friday but he also said that he wanted to think about it over the weekend. On Sunday evening, Thomas was told by Till that the Union organizer told him (Till) that almost 50% of the employees had joined the Union. Thomas reported his conversation with Till to McDougall early Monday morning. The layoff occurred approximately 9 hours later.

73. The Employer's explanation for the layoff and the evidence offered in support – declining orders, overstaffing, and the “Perfect Storm” of September 12, 2013 are, for reasons set out, insufficient to overcome the *prima facie* case made out by the Union that the September 16, 2013 layoff was motivated, at least in part, by anti-union sentiment. As a result B.W.S. is in breach of ss. 3(2) and (3) of the *Act*. The Union's Complaint is successful, as is Watson's Complaint insofar as it relates to his being laid off. The second part of his Complaint arising out of interference by the Employer in the circulation of the Petition remains outstanding.

D. Production Employees Representative Committee (PERC)

a. Procedure

74. As set out at paragraphs 10 and 15, on September 13, 2013, the Employer proposed an Employee's Production Representative Committee (PERC) to its workforce. The Committee's composition and formation were confirmed on Monday, September 16, 2013 by McDougall's memo of that date reading, in part:

BWS is pleased to announce the implementation of a newly formed “Production Employee Representative Committee”.

Effective immediately, this committee formed from volunteers of all the production groups will meet on bi-weekly with Randy McDougall, President & CEO, to discuss suggestions on how we can continue to provide an “employee friendly” environment and optimize Quality, Safety, productivity and general morale of the employee base.

The individuals from the groups, either by volunteering or nominations from their group, will sit on the committee for 6 months intervals at which time, some other person from that group will take their position. This Committee will provide the opportunity for the President & CEO of BWS to better monitor the pulse of our employee base and provide a direct line “Voice for the employee groups” to table any suggestion or concerns they may have within their respective groups. As of Friday, September 13, 2013, the committee representative will be:...

Neither the Complainants, nor the Respondent, addressed the creation of PERC, its timing or implementation in argument. The Board was faced with a dilemma: in reaching its decision on the dispute between the parties, does it ignore the evidence of essentially undisputed facts surrounding the establishment of Production Employees Representative Committee by the Employer on September 13, 2014, which could be significant in the determination of the dispute, because those facts were not argued by the Complainants as a ground for the Complaints of Unfair Practice, or does the Board draw the parties’ attention to those facts and request submissions from the parties to be considered by the Board in resolution of the Complaints?

75. The Supreme Court of Canada addressed this issue in *R. v. Mian*, 2014 S.C.C. 54. There the Court was dealing with an appeal from the Alberta Court of Appeal from an acquittal of Mian on a charge of possession of cocaine for the purpose of trafficking and possession of currency obtained by the commission of an offence. The issue raised, for the

first time by the Alberta Court of Appeal, was the consideration of an improper question asked in cross-examination, *i.e.*, the limits of cross-examination and the consequences of exceeding those limits. The Alberta Court of Appeal requested submissions from the parties and ultimately allowed the Crown's appeal on the basis that the trial Judge erred in law by relying on the impermissible cross-examination of a police detective.

76. The first sentence in *Mian, supra*, under the heading "Analysis" by Rothstein J., writing for the Court, reads "It is not disputed that an appellate court has jurisdiction to invite submissions on an issue that neither party has raised". The same underlying theoretical principles applying to an appellate court's jurisdiction in this context apply equally to trial judges. See *King et al. v. Canada (AG) et al.* (1997), 187 N.B.R. (2d) 185 N.B.C.A., adopting the observation of Vallerand J.A. in *R. v. Fraillon* (1990), 62 C.C.C. (3d) 474 (PQCA) at p. 476:

It is first wrong that the trial judge ruled as he did without giving the parties an opportunity to argue the issue. **Generally, it is open to the judge to point out to the parties that, in his mission to do justice, he is troubled by a point in the facts or in the law which neither one raised.** This is especially the case where it is a right recognized by the Charter. But again, he must point it out to the parties and give them all the time necessary to completely argue the question before he rules on it. Here the parties to their great astonishment learned during the rendering of judgment that it was based, and based solely, on a question that the judge had only raised and resolved *proprio motu*. This manner of proceeding is inadmissible and is sufficient in and of itself to result in the granting of the appeal... [Emphasis added]

And see *Backman v. Maritime Paper Products Ltd.*, [2009] N.B.J. No. 303 (NBCA), citing Drapeau J.A. (now Chief Justice) in *Parlee v. McFarlane* (1999), 210 N.B.R. (2d) 284

(CA):

I find the following observation by Hoyt C.J. in *King et al. v. Canada (Attorney General) et al.* (1997), 187 N.B.R. (2d) 185, at p. 196 to be particularly apt in the circumstances:

Judges must resist the temptation to raise new issues, particularly those that are determinative, without giving the parties an opportunity to respond. ...

This obligation extends to all proceedings, be they criminal, quasi-criminal or civil. ...

77. The Respondent referred the Board to *CUPE, Local 108 v. Halifax Regional Municipalities*, 20 N.S.C.A. 41 where the court addressed an arbitrator's decision to "inject an issue that the parties have decided to exclude from the submission to arbitration in a grievance arbitration under a collective agreement." The court held, at paragraph 45, "Nor should the Arbitrator supplement or compete with the union as the grievor's strategic counsellor..." citing *Canadian Labour Arbitration*, Brown, Beatty and Deacon, (4th ed.) looseleaf, (Aurora: Canada Law Book, 2010) at paragraph 2:1300:

2:1300 The Submission to Arbitration

Just as the collective agreement defines the general scope of the arbitrator's jurisdiction, so the submission to arbitration defines his jurisdiction in the particular case. As was stated by one arbitrator:

This board is mindful of the fact that, unlike the Courts, it possesses no inherent jurisdiction and its jurisdiction and authority in the absence of the mutual agreement of the parties, is that conferred upon it by the collective agreement and the grievance or submission to it.

The submission may consist of the written grievance or it may be an independent document. But regardless of the form, once the submission is made the arbitrator cannot of his own volition extend, amplify or add to the issues, or substitute other issues for or in lieu of the issues defined by the submission to arbitration. However, if there is agreement to do so or if there is conduct amounting to acquiescence in the modification of the submission then the arbitration board

may thereby acquire jurisdiction.

An arbitration proceeding, of course, quite a different matter than a proceeding before this Board which is statutorily mandated to “inquire forthwith into the matter” by sections 106(2) and (3) of the *Industrial Relations Act*.

78. In *Mian*, the Court sets out the appropriate procedure to be followed in the exercise of the discretion to raise a “new issue”. Firstly, the Court, or Board in this instance, must determine if the failure to raise a new issue would risk an injustice. In the appellate context, the test is articulated as: “Is there a good reason to believe that the result would realistically have been different had the error not been made?” – paragraph 45. Recast in the trial context, the test must be: “Is there a good reason to believe that the issue, raised by the trier of fact, would have a significant impact on the result?”, *i.e.*, is there a risk of injustice if the issue is not argued by the parties? The Court goes on to observe that this is a *preliminary* determination as the merits of the issue have not been addressed. In *Mian* at paragraph 47: “However, a court’s failure to raise a new issue will not risk an injustice in the absence of a preliminary indication that there is good reason to believe that an identified potential error would have affected the result”.

79. Here the issue the Board has raised is the creation of an Employee Representative Committee by the Employer with knowledge of union activity in the workplace. A cursory examination of the relevant jurisprudence suggested these facts, in some circumstances, have been found to constitute an unfair practice complaint. See for example: *International*

Woodworkers of America v. Upper Canadian Furniture Ltd., [1981] O.L.R.B. Rep. July, 1016; *Burlington Golf and Country Club Ltd.*, [1996] O.L.R.B. Rep. March/April 5050; *Ming Pao Newspapers (Canada) Ltd.*, 2012 CanLII 3525 (ON LRB). As a result, the issue of the creation of the Committee meets the “risk of injustice” test.

80. There are further considerations identified in *Mian* bearing on this issue:

1. *Does the Court have jurisdiction to consider the issue in the first place?* There can be no doubt that this Board has the requisite jurisdiction to address the creation of an Employee Representative Committee by the Employer in the midst of an organization drive in the context of an unfair practice complaint documenting the creation of the Committee and its subsequent operation.
2. *Is there a sufficient basis on the record on which to resolve the issue? i.e., is there a “manageable ... evidentiary record?”* In this case, as has been set out, the evidence is found in the pleadings - paragraphs 6, 27 and 28 of the Complaint, paragraph 6 and 7 of the Reply, the evidence of McDougall, the respondent’s President and CEO of the steps taken by the Employer to create the Committee and its presentation by the Employer to the employees, and Exhibits 6, 17 and 84 documenting the creation of the Committee and its subsequent operation. In the Board’s view this evidence, essentially undisputed and led by the Employer, constitutes a manageable evidentiary record upon which the Board can resolve the issue which it has raised. The Respondent, not unexpectedly, submits that had it been aware that the creating of the Employee Representative Committee was part of the Complaint; it would have “called direct evidence, adduced documents, cross-examined Union witnesses and made legal argument at the hearing” in explicit defense to such an allegation. Without greater specificity as to the additional evidence the Respondent would have led, the Board is not convinced that the existing record is in any way incomplete for the purpose of determining this issue.

[Emphasis added]

3. *Is there any procedural prejudice to either party? – Mian, supra,*

paragraph 52; *i.e.*:

- a. *Was the issue raised by the Board “as soon as practically possible after the issue crystallizes” so as to avoid undue delay?* Here the Board first raised the issue by letter dated February 13, 2015 following the completion of argument by the parties on January 27, 2015. There was no suggestion by either party of delay.
- b. *Is the notice of the issue raised by the Board appropriate? i.e., does the notice contain sufficient detail to allow the parties to respond to the new issue, but without indication that the Board has formed an opinion?* The Board is of the view, that its letter of February 13, 2015 – attached as a Schedule A to these reasons – meets this test.
- c. *In the circumstances of the case, does the process addressing the new issue by way of sequential written submissions ensure that the Board will receive full representations on the issue by the parties?* The Board requested submissions from the parties and afforded them ample time for their preparation in its initial letter of February 13, 2015. The Respondent, rather than including its submission on the propriety of raising the Employee Committee issue by the Board with its representations on the merits of the issue – as anticipated by the Board’s letter of February 13, 2015, chose on February 26, 2015, to challenge the Board’s request for the submissions on the merits. The Complainants responded on March 9, 2015 and the Respondent replied on March 20, 2015 – both in accordance with the Board’s request. The Board advised the parties of its ruling on the propriety of its request on March 27, 2015, and set out a subsequent schedule for the sequential delivery of the arguments on the merits. The rules of natural justice and of *audi alteram partem* have been preserved. No objection to the process was made by either party.

81. The Board has met the requirements bearing on the raising of a new issue, as set out in *Mian*.

b. Merits

The Union

82. The Union argues that the PERC was “front and center” as an issue in its Complaint; a fact reflected in the pre-hearing record; *i.e.*, paragraphs 1, 6, 27 and 28 of Schedule “A” to the Union Complaint, paragraph 5b of the Union Complaint, paragraphs 6 and 7 of the Reply, and the pre-hearing summons directed to B.W.S. to produce copies of any written company memorandum and/or communication with employees pertaining to the “Committee” referenced at paragraph 6 of the Employer’s Reply. At the hearing, the Union led evidence from two witnesses as to the creation and “manipulation” of the Committee’s composition. The Employer introduced McDougall’s notes for his announcement of the Committee to the employees (Exhibit 83) and the minutes of the Committee’s meetings beginning on September 17, 2013 and continuing bi-weekly up to the present time. The Union argues that despite its pleadings to the contrary, the Employer conceded that the Committee was “formed as a direct result of the Union’s organizing efforts”. Thus the Union submits that the Committee was “a component of the Employer’s anti-union animus and the first action which ultimately led to a mass layoff [of] 26 employees as a result of the organizing drive”.

83. The Union relied upon *Burlington Golf and Country Club Ltd.*, *supra*, and the reference to *Upper Canadian Furniture Limited.*, *supra*, where the Board said at para. 38:

...For an employer to attempt to use his right to free speech to initiate an employee association to compete with a union is not protected by section 56

[now 64] [and now section 70] [NB IRA ss. 3(1)]. Even where an employer does not sow the seed of an employee association, its active support for the association may become a potent form of interference in contravention of section 56 [now 64] [and now section 70] of the Act. Given their economic dependence on their employer, employees may be readily swayed by employer conduct, even where subtle, which indicates support for an association over a competing union.

[Emphasis added]

The Employer

84. The Employer argues that its knowledge of union activity at B.W.S. was limited and that it was based on rumour. Nonetheless in response to the limited information, McDougall took advice on September 10, 2013 and “establish[ed] an Employee Committee that tables concerns and ideas and discusses them with me.” The Employer says that McDougall advised his management team of the need for neutrality vis-à-vis the Union. The purpose of the Committee was, in effect, to maintain and promote good employer/employee relations which would be mutually beneficial.

85. The Employer relies on the right of freedom of expression contained in s. 2(b) of the *Charter of Rights* and s. 3(5) of the *Industrial Relations Act*. The Employer notes the Union did not allege a breach of s. 3(5) of the *Act*, nor did the Union lead evidence to suggest that the “exercise” of the Employer’s right was done “in a manner that is coercive, intimidating, threatening or intended to unduly influence any person”.

86. The Employer submits that the establishment of an Employee Committee is not *per*

se an unfair labour practice. The Board must assess the balance intended to exist between the Employer's right of freedom of expression and the employee's right to freedom of association found in s. 2(d) of the *Charter* and s. 2(1) of the *Act* on the basis of "the total context in which the statements were made". It cites *Oromocto (Town) (Re)*, [2009] N.B.L.E.B.D. No. 6; *FedEx Ground et al. and Canada Council of Teamsters*, 2011 C.I.R.B. 614; *Re Irving Oil Ltd. Refining Division*, [1995] N.B.L.E.B.D. No 34; *Re Marusa Marketing Inc.*, [2000] M.L.R.D. No. 17.

87. B.W.S. acknowledges that in some circumstances, an employee committee has been found to violate s. 3(5) of the *Act*, but it argues that the inappropriate conduct found in those cases is absent here. See *Upper Canadian Furniture Ltd.*, supra; *Ming Pao Newspapers (Canada) Ltd.*, 2012 CanLII 3525, (ON LRB); *RMH Teleservices International Inc. (Re)*, 2005 CanLII 24889; *Star of Fortune Gaming and Management (BC) Corp. (Re)*, [2014] B.C.L.R.B.D. No. 81.

88. Here the Employer submits that the evidence demonstrates that PERC was established by the Employer to improve workplace communication "in the honest constructive management of its business and consequently does not violate s. 3(5) of the *Act*."

ANALYSIS - Facts

89. A summary of the facts surrounding the Employer's creation of PERC is found at paragraphs 10 and 16 of these Reasons. A slightly more detailed review of those facts follows:

- (i) McDougall was first alerted to a union presence by the owner of the convenience store where he stopped for coffee at 6:30 a.m. on September 10, 2013. The owner told McDougall that he heard "there was union activity in the area and some of your employees have been visited".
- (ii) At 6:55 a.m. on September 10, 2013, Thomas and Saunders were in the production floor office when an employee, Jason Dixon, came in with blueprints in his hand. Thomas testified that Dixon said: "Gary, you didn't hear it from me, but I was visited by a union rep last night". Thomas said he commented to Saunders "Well, that's interesting". Later that morning, as Thomas returned to his office, he stopped by McDougall's office and inquired: "You've heard what I've heard about the union?" McDougall responded "Yes, I've spoken to Saunders".
- (iii) About 1 p.m. on Tuesday, September 10, 2013, and as McDougall "had no education on union campaigns", he contacted a member of his Advisory Board who referred McDougall to Todd Parsons, the Comptroller of "Give and Go", a grocery store chain in Ontario, who had experience with the formation of unions in the workplace. Part of the advice McDougall received was that management should not take action, as employees have rights; however, he was advised to undertake the creation of an employee committee/group "to allow employees access to the CEO of the Company".
- (iv) McDougall testified he undertook to draft "a document introducing a desire to form an Employee Committee". McDougall said he presented the Committee to his employees at the end of the shift at the two production locations on Wednesday, September 11, 2013. He was mistaken as to the date. Saunders testified he finalized McDougall's notes (Exhibit 83) for the presentation of the Committee on September 13, 2013, when later in the day, it was announced to the workforce.
- (v) The employees were to select representatives to the Committee from each Department immediately following McDougall's

presentation. Hoyt and Fenton described their involvement in this process – see paragraphs 26 and 27.

- (vi) On Monday, September 16, 2013, a memo was distributed by the Employer announcing the implementation of the Committee and listing the Department Representatives – Exhibit 17. A second memo of the same date was subsequently circulated once it was determined that the two Reps from the Main Line Assembly department were among the 26 employees laid off.
- (vii) The Committee continues to function, meeting bi-weekly.

Decision

90. The issue is whether the creation of the Committee can be said to be a legitimate exercise of the Employer's Charter Right to freedom of expression recognized in s. 3(5) of the *Industrial Relations Act*. That provision reads:

3(5) Nothing in this Act shall be deemed to deprive an employer or an employers' organization, or a person acting on behalf of an employer or employers' organization, of freedom to express his or its views so long as he or it does not exercise that freedom in a manner that is coercive, intimidating, threatening or intended to unduly influence any person.

Or, put another way, the issue is whether the establishment of the Committee founds an unfair labour complaint as it was intended to unduly influence the employee's Charter Right to freedom of association – s. 2(d), recognized in s. 2(1) of the *Act*. That section reads:

2(1) Every employee has the right to be a member of a trade union and to participate in the lawful activities thereof.

And finally, consideration must also be given to s. 3(1) of the *Act*, which provides, in part:

3(1) No employer or employers' organization, and no person acting on behalf of an employer or employers' organization, shall participate in or interfere with the formation, selection or administration of a trade union or council of trade

unions or the representation of employees by a trade union or council of trade unions or contribute financial or other support to it...

91. In *Oromocto (Town)*, *supra* at para. 16, this Board said:

16 Subsections 3(1) and 3(3) must be read and applied in light of subsection 3(5) which states that nothing in the *Act* can be deemed to deprive an employer of freedom to express its views so long as that freedom is not exercised "...in a manner that is coercive, intimidating, threatening or intended to unduly influence any person."

92. Constraints on the Employer's free speech were considered in *FedEx Ground*, *supra*, at paras. 80 and 81 which read:

80 Although section 94(2)(c) [NB IRA ss. 3(5)] is relatively new to the *Code*, it is similar to corresponding provisions in various provincial legislation. The provincial Boards have generally interpreted the expressions coercion, intimidation, threats and promises at face value, creating a fairly straightforward factual test namely, if a communication is found, as a matter of fact, to consist of personal expression and not found to contain coercion and intimidation, threats, promises or undue influence, it should fall into the exception created in section 94(2)(c). These decisions based on the comparable statutory provisions are of assistance in resolving the issues presented in this case.

81 From the case law, the Board derives the following non-exhaustive principles:

- An employer is entitled to express its views and is not confined to mere platitudes. There is a middle ground, between mere platitudes and interference and undue influence, in which an employer is free to express its views.
- In evaluating employer conduct, the Board should seek to establish whether the employer's conduct has detrimentally affected the employees' ability to express their true wishes. **In other words, has the employer's conduct deprived the employees of the ability to express their true wishes in exercising their decision to associate or not?**
- The definition of intimidation, coercion and undue influence in a labour relations context contains this basic element: the invocation of some form of force, threat, undue pressure or compulsion, for the purpose of controlling or influencing an employee's freedom of association.
- The fact that an employer does not want a union and expresses its opinion to that effect is not necessarily a violation of the *Code*; **a factual analysis must be conducted to determine whether the manner in**

which this opinion is expressed contains an element of coercion, intimidation, threats, promises or undue influence.

- The Board should consider the context in which the statements are made and the probable effect on a reasonable employee of the means used. Circulation of written material is the preferable mode, as the choice of written text is less intrusive than captive audience meetings or private discussions with employees.

[Emphasis added]

93. Again, as the Employer pointed out in its submission, this Board set out limitations on s. 3(5) free speech in *B & N Hospitalities Inc. (c.o.b. Le Château Bathurst), (Re)* [2006]

N.B.L.E.B.D. No. 32, at para. 58:

58. As previously stated the Board has consistently imposed, upon parties to a labour dispute, limits to their communication. In dealing with an employe[r]'s communication with its employees the Board adopted, in *Métallurgistes Unis d'Amérique, section locale 9254 c. Groupe Qualité Lamèque Ltée.*, the principle found in *Taggart Service Ltd.* expressed in the following manner:

“An employer may express his views and give facts in appropriate manner and circumstances on the issues involved in representation proceedings in so far [sic] as these directly affect him and has the right to make appropriate reply to propaganda directed against him in relation thereto. However, he should bear in mind in so doing the force and weight which such expressions of views may have upon the minds of his employees and which derive from the nature and extent of his authority as employer over his employees with respect to their wages, working conditions and continuity of employment. He should take care that such expressions of views do not constitute and may not be reasonably construed by his employees to be an attempt by means of intimidation, threats, or other means of coercion to interfere with their freedom to join a trade union of their choice or to otherwise select a bargaining agent of their own choice.”

[Emphasis added]

94. In an analysis under s. 3(5), *Oromocto (Town) (Re), supra*, directs that the Board assess the action and statements of the Employer in the total context in which the statements were made or action taken, *i.e.*:

- (i) *The means employed* - McDougall announced the creation of PERC in the late afternoon of Friday, September 13, 2013, the immediate selection of departmental reps by the employees, and the subsequent implementation of the Committee on Monday, September 16, 2013;
- (ii) *The context or setting in which the Employer's conduct took place* - The workplace environment into which the Committee was injected by the Employer was unsettled. This was reflected, firstly, in Tyrer's evidence that a number of employees were dissatisfied with their wages following their annual review in August of 2013. Secondly, by the fact that Fortunato, the Union Organizer, had been in contact with 55 of the 87 production employees by September 15, 2013, 42 of whom 42 signed union cards. Thirdly, there was the prefatory remark by Dixon in advance of his comment regarding union activity to Thomas on September 10, 2013, "You didn't hear it from me..." and finally, Crain's threat to Tyrer on September 16, 2013, about noon, that if Tyrer didn't produce a list of employees who signed with the Union by the end of the shift, Crain would bloody his nose;
- (iii) *The timing* - The union recruitment drive had been ongoing since September 5, 2013. McDougall heard rumours of union activity for the first time on September 10, 2013. By the early afternoon of September 10, 2013, McDougall "responded" to those rumours by contacting a member of his Advisory Board and subsequently the comptroller of an Ontario corporation whom McDougall understood was experienced with union organization. McDougall immediately acted upon the advice he received to establish an employee Committee which was to address employee concerns in the workplace. On Friday, September 13, 2013, McDougall announced the Committee to his employees and sought their cooperation by selecting representatives for each department immediately following the presentation. On Monday, September 16, 2013, the Committee was implemented, with its first meeting on Tuesday, September 17, 2013.

95. There can be no doubt on these facts that the creation of the Committee was motivated – the evidence suggests, solely - by the Union's activity, although it need only be found to be a part of the Employer's purpose. See *W.J. Beairsto Co. Ltd. v. Sheet Metal*

Workers' International Association, Local 437 at para 47. This is one of those cases where the effect of the Employer's conduct is "so clearly foreseeable that the Employer may be presumed to have intended the consequence of his actions." The Employer established the Committee when it did and how it did in an effort to compete with the Union. See *Upper Canadian Furniture Ltd., supra*, at para. 35 and at para. 39 when the Ontario Board said:

Standing alone it may be reasonable for an employer to want a group of employees to have a mandate from the rest of the employees before considering altering terms and conditions of employment on the strength of their representations. In this instance, however, the timing of the employer's comment causes the Board concern. With the knowledge of a union campaign in progress the employer's comment threw employee support into a competition between supporters of the plant committee and supporters of the union. At this critical time the Board concludes that the employer knew or ought to have known that the natural result of his comment could be to pull some employees away from the union.

McDougall's protestations that the creation of the Committee was to improve employer/employee relations ring hollow in these circumstances.

96. The Board has no difficulty in concluding that the creation and implementation of the Committee was intended by the Employer to impact upon the employee's right to make a free and informed choice vis-à-vis the Union and thereby constitutes a violation of ss. 3(1) and (3) of the *Act*.

97. It is argued that in McDougall's presentation of the Committee to the employees, no mention was made of the Union and thus the comments cannot be found to be Union related. It is true that McDougall made no reference to the Union in his announcement of

the Committee Friday afternoon, and interestingly, he did not mention the “Perfect Storm” of September 12, 2013 when the Employer says it learned of the failed bids for approximately \$5M of work. The failure to mention the Union on Friday afternoon to the employees does not immunize the Employer’s comments and consequent actions given the environment on the production floor. The reasonable employee would have little difficulty in connecting the Employer’s Committee to the Union and seeing that Committee as an alternative to the Union. To find otherwise would ignore the practical reality of the workplace.

98. Attention should also be paid to the language of the announcement of the formation of the Committee on September 13, 2013. McDougall said that he was establishing the employee Committee that “tables concerns and ideas and discusses them with me on a regular basis”. Leading up to that statement, McDougall said, in part: “We are in a very competitive marketplace”... “We need to continually improve on quality, safety, productivity and rework and I want to help in that direction”... “With the new Bonus Program, if the company does well, you to[sic] do well. I want to help make that happen.”

What would the reasonable employee take from these remarks?

Arguments by an employer directed to his employees have such an ambivalent character; they are legitimate enough as such, and pro tanto the privilege of “free speech” protects them; but, so far as they also disclose his wishes, as they generally do, they have a force independent of persuasion. The [National Labour Relations] Board is vested with the power to measure these two factors against each other – words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used, of which the relation between the speaker and the hearer is perhaps the most important. What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a

determination which it is not safe to thwart. The Board must decide how far the second aspect obliterates the first. *NLRB v. The Fedderbush Co. Inc.* (1941) F.2d 954 at 957 - cited in *Beairsto* at para. 46

What McDougall was saying, given that the comments were made in the midst of a union organizing drive, was that competitiveness and success in the marketplace and job security of the employee go hand in hand. In the specific context of the creation of the Employee Committee by management, the reasonable employee would conclude that failing to support the Employer's Committee might jeopardize his future employment. See *Boehmer Box LP*, [2010] O.L.R.D. No. 992.

99. In *Burlington Golf, supra*, the employer initiated the idea of an employee committee to the employees and encouraged its creation **by** the employees. The Ontario Labour Relations Board, after reviewing the jurisprudence on the issue, found that such conduct violated the Ontario equivalent of s. 3(1) of the New Brunswick *Industrial Relations Act*. Here the employer went a step further and took it upon itself not to suggest the creation of the Committee, but to establish the employee committee itself. It cannot escape, then, a finding of a violation of s. 3(1). The creation of PERC by the Employer violates the protection from undue influence contained in s. 3(5) of the *Act*.

100. The Employer relied upon *Star of Fortune, supra*, to support its argument that the establishment of an Employee Committee by the Employer for the purpose of good employee relations is not an unfair labour practice. Apart from the finding here that the

Employer's purpose in establishing the PERC was motivated by union activity in the workplace – at the very least, in very large part – the case is also distinguishable on a number of factors, one of which is that it took place in a decertification context, *i.e.*, a time when employees are far less vulnerable than they are when the union first enters the workplace.

101. As is apparent from the foregoing, the Union's Complaint and the first part of the Watson Complaint succeed. The Employer has been found to have violated ss. 3(1), (2) and (3) of the *Act*. The matter will resume at the convenience of the parties and the Board to address the remedy appropriate to the Board's finding and the outstanding part of Watson's Complaint.

Dated at Fredericton, New Brunswick, this 19th day of May 2015

G.L. BLADON
ALTERNATE CHAIRPERSON
LABOUR AND EMPLOYMENT BOARD