ONTARIO LABOUR RELATIONS BOARD

Labour Relations Act, 1995

OLRB Case No: 0433-18-R
Certification (Industrial)

Unifor, Applicant v Kuehne + Nagel Ltd., Responding Party

OLRB Case No: 0753-18-U
Unfair Labour Practice

Kuehne + Nagel Ltd., Applicant v Unifor, Responding Party

COVER LETTER

TO THE PARTIES LISTED ON APPENDIX A:

The Board is attaching the following document(s):

Decision - September 4, 2018

DATED: September 04, 2018

Catherine Gilbert
Registrar

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ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **0433-18-R**

Unifor, Applicant v **Kuehne + Nagel Ltd.**, Responding Party

OLRB Case No: **0753-18-U**

Kuehne + Nagel Ltd., Applicant v Unifor, Responding Party

BEFORE: Kelly Waddingham, Vice-Chair and Board Members Lori Bolton and Thomas Collins

DECISION OF THE BOARD: September 4, 2018

1. Board File No. 0433-18-R is an application for certification filed on May 7, 2018. Board File No. 0753-18-U an unfair labour practice ("ULP") complaint filed on June 1, 2018 by Kuehne + Nagel Ltd. ("K+N" or the "Employer") alleging that Unifor's inside organizers committed a number of unfair labour practices and violated sections 2, 5, 76 and 77 of the *Labour Relations Act, 1995,* S.O. 1995, c.1, as amended (the "Act"). The Employer seeks the dismissal of the certification application pursuant to section 11.1(2) of the Act.

2. This decision deals with the responding party's two preliminary objections to the ULP. First, Unifor submits that the Employer failed to file the ULP in a timely manner and, second, that the allegations in the ULP fail to establish a *prima facie* breach of the Act.

Background

3. Unifor applied for certification of the bargaining unit that is the subject of the certification application on May 7, 2018. The Employer filed a response in which it gave notice under section 8.1 of the Act and proposed an alternative bargaining unit.

4. By decision dated May 10, 2018, the Board found that the bargaining unit proposed by Unifor could be appropriate and that Unifor had established sufficient membership support for the purposes of obtaining a representation vote.

5. On May 14, 2018, a representation vote was held and the ballots were counted. Unifor won the vote. Eighteen employees voted in favour of the Union and sixteen voted against the Union.

6. The Employer's scrutineer, who attended the vote on May 14th, signed the Board's Certificate of Conduct of Vote in which he certified that "balloting was fairly conducted and that all eligible voters were given an opportunity to cast their ballots in secret, and that the ballot box was protected in the interest of a fair and secret vote." A Certification Worksheet submitted at the same time indicated that the only issue in dispute was the issue of the bargaining unit description. The Employer did not sign the Certification Worksheet.

7. In its May 10, 2018 decision the Board directed as follows: "Any party or person who wishes to make representations to the Board about **any issue remaining in dispute which relates to the application for certification, including any matters relating to the representation vote** must file a detailed statement of representations with the Board and deliver it to the other parties, so that it is received by the Board within five days (excluding Saturdays, Sundays and holidays on which the Board is closed) of the date on which the vote is taken" (emphasis added).

8. On May 22, 2018, counsel to the Employer filed post-vote submissions regarding the description of the bargaining unit. The Employer made no submissions regarding the conduct or fairness of the vote, nor any allegations that the Union engaged in improper conduct during the organizing drive, or that the vote did not reflect the true wishes of the employees.

9. On June 1, 2018 the Employer filed the application under section 96 of the Act alleging that Unifor had engaged in unfair labour practices prior to the representation vote, and breached sections 2, 5, 76 and 77 of the Act. On June 19, 2018 the Employer filed supplementary pleadings to its ULP. The Employer asserts that the consequence of Unifor's alleged violations of the Act is that the representation vote taken on May 14, 2018 does not reflect the true wishes of the employees. It seeks relief pursuant to section 11 of the Act. Briefly stated, the Employer's ULP allegations are:

- In February, 2018, an inside organizer for Unifor advised employees that management had decided to dismantle the workplace's "Labour Representative Committee". The information was false, and was intended to induce employees to sign Unifor membership cards;

- Unifor's inside organizers applied "relentless" and "incessant" pressure tactics to "bully, intimidate, coerce, threaten and harass" employees in the bargaining unit to sign membership cards and vote in favour of Unifor;

- Unifor's inside organizers spread a rumour that Unifor and/or an inside organizer would know how each employee voted at the representation vote. Unifor did nothing to deny or dispel the rumour, which had a "dramatic" and "significant" effect on the employees' right to freely choose whether or not to support the Union.

Timeliness Objection

10. The Board's *Rules of Procedure* relevant to this matter are as follows:

> RULE 3 – TIME
>
> **3.2** The Board or the Registrar may shorten or lengthen any time period set out in or under these Rules, as either considers advisable.
>
> RULE 5 – OBLIGATION TO MAKE ALLEGATIONS PROMPTLY
>
> **5.1** Where a party in a case intends to allege improper conduct by any person, he or she must do so promptly after finding out about the alleged improper conduct and provide a detailed statement of all material facts relied upon, including the circumstances, what happened, when and where it happened, and the names of any persons said to have acted improperly.
>
> RULE 11 – REPRESENTATION VOTES

> **11.1** Where the Board directs the taking of a representation vote, the Registrar may make all necessary directions and arrangements.
>
> **11.2** After the vote, or after the ballots have been counted where the ballot box was sealed, the returning officer will prepare a report of the vote which will be given or sent to the parties and which must be posted in the workplace by the employer.
>
> **11.3** Any party or person who wishes to make representations about the vote or the report must file those representations in writing promptly, and in any event within five (5) days of the date the report was first posted. If a party or person wants an oral hearing, this request must be set out in the representations together with the reasons for the request in the way required by these Rules.

Unifor's Submissions

11. Unifor submits that the Employer's ULP complaint is untimely, as it was filed seventeen days after the representation vote. Rule 11.3 of the Board's Rules requires that any issue raised "about the vote or the report" must be made "promptly" and "in any event within five days of the date that the report was first posted." Unifor asserts that pursuant to Rule 11.3, the Employer was required to raise any issues pertaining to the conduct or outcome of the vote within five days of the vote. Unifor claims that the Employer failed to make its allegations within five days of the vote despite the fact that the concerns forming the basis of the allegations were brought to its attention prior to the expiry of the five-day period, and in many instances prior to the vote itself.

12. Unifor contends, further, that the Employer's post-vote representations constitute an "agreement" that the vote was conducted fairly and that it represents the true wishes of K+N employees. It points out that: a) the Employer's scrutineer certified (by signing the Certificate of Conduct of Vote) that all eligible employees were given the opportunity to cast ballots in secret and that the ballot box was protected from tampering; b) the Certification Worksheet indicated that there were no other issues in dispute; c) in correspondence date May 15, 2018, K+N Vice-President, Lisa McConnell indicated that the Employer agreed that the vote reflected the wishes of the employees; and, d) in its post-vote submission filed on May 22, 2018, the Employer failed to mention any concerns it may have had about the conduct of the vote or whether the vote reflected the true wishes of the employees.

According to Unifor, the Employer is now attempting to resile from the agreement.

13. Unifor asserts that the Board should refuse to entertain a request for remedies pursuant to section 11.1 of the Act where the allegations have not been raised in a timely manner, and where the Employer is attempting to resile from its earlier agreement that the vote was conducted fairly and by secret ballot.

14. Unifor refers the Board to the following decisions: *Brick and Allied Craft Union of Canada v. Moscone Marble Ltd.,* 2017 CanLII 5616 (ON LRB); *Carpenters and Allied Workers Local 27* v. *Adam Savage* 2016 CanLII 43373 (ON LRB); *Service Employees International Union, Local 1 Canada v. Sunrise Senior Living North (Sunrise of Burlington)*, 2013 CanLII 67291 (ON LRB); *Labourers' International Union of North America, Local 183 v. BMC Masonry (2032686 Ontario Limited)*, 2014 CanLII 47294 (ON LRB); *Ontario Public Service Employees Union* v. *Midtown Meats Cold Storage Ltd.*, 2002 CanLII 31687 (ON LRB); *Atlas Specialty Steels*, 1991 CanLII 6181 (ON LRB).

The Employer's Submissions

15. The Employer submits that it met all required deadlines under the Act with respect to its ULP complaint. It asserts that the Act is silent with respect to the deadline by which a party must file an unfair labour practice complaint. It points out that the only "restriction" on the timeliness of a complaint is the obligation, pursuant to Rule 5 of the Board's *Rules of Procedure*, to make any allegation(s) of improper conduct "promptly" after finding out about such conduct. The Employer cites *United Steelworkers of America* v. *Baron Metal Industries Inc.*, 1999 CanLII 19988 (ON LRB) in support of the proposition that the Board measures promptness of unfair labour practice complaints in "months" rather than any longer or shorter period.

16. The Employer asserts that Rule 11.3 of the Board's *Rules of Procedure* is restricted to the conduct of the vote. The Employer submits that it has not raised any allegations with respect to unfair or improper conduct of the vote. The Employer submits that Unifor is conflating the requirement under Rule 11.3 (five days to make representations after the vote) with the requirement under Rule 5 (to file an unfair labour practice complaint "promptly"). It asserts that Unifor's claim is contrary to the legislative intent of the Act. It submits that the obligation imposed by section 76 of the Act (to refrain from intimidation and coercion)

applies at all times, and that complaints regarding breaches of the provision are not subject to any prescribed deadlines.

17. In the alternative, if the Board finds that the ULP complaint is untimely pursuant to Rule 11.3, the Employer asks the Board to exercise its discretion pursuant to Rule 3.2 to relieve against the strict application of the five-day time limit and extend the time for filing the complaint.

18. The Employer points out that when determining whether to extend the deadline for post-vote representations under Rule 11.3, the most important consideration applied by the Board is the "relative prejudice to the parties caused by the delay" (*Baron Metal Industries Inc.*, *supra* at para. 27). The Employer asserts that its nine-day delay in filing the ULP complaint did not cause serious prejudice to Unifor, which would have been in no better position to respond to the complaint had it been filed five days after the representation vote. On the other hand, the Employer contends, Kuehne + Nagel and its employees would suffer "considerable" prejudice if the time was not extended for filing the ULP complaint, as they would be deprived of the opportunity to prove the allegations of unlawful conduct, and be forced to accept the results of a representation vote "tainted by illegality". The Employer referred the Board to *Baron Metal Industries Inc.*, *supra*, and *United Steelworkers of America* v. *Maxi*, [1998] O.L.R.D. No. 3975 as examples of cases in which the Board determined that the relative prejudice caused by the delay militated in favour of extending the deadline and allowing the application to proceed.

19. The Employer denies that it resiled from an agreement that the representation vote was conducted fairly and by secret ballot. It asserts that by signing the Certificate of Conduct of the Vote, it agreed only that balloting was fairly conducted *on the day of the vote*. The Employer contends that the Certificate does not indicate that it took no issue with Unifor's conduct in the period leading up to the vote.

20. Similarly, the Employer asserts that the Certification Worksheet does not constitute an agreement between the parties "on any issue". According to the Employer, the fact that the Worksheet was marked "N/A" on the question of the "positions of the parties on any other issues in dispute" does not affirm that there were no issues in dispute apart from the issue of bargaining unit description. The Employer points out that the Worksheet was prepared by a Vote Officer away from the site of the representation vote and was not signed by either party.

21. The Employer distinguishes the situation in this case from that in *Midtown Meats Cold Storage Ltd*, *supra*. In that case, employer and union representatives signed the Certification Worksheet, indicating that "the parties are agreed that the application will be dismissed". The Board dismissed the union's ULP complaint on the basis that its signature on the Worksheet constituted an agreement that there were no further issues in dispute between the parties. The Board held that allowing the union to proceed with its complaint in such circumstances would create uncertainty around settlements and undermine the significant labour relations value of encouraging parties to settle their disputes. The Employer submits that, in contrast, K+N did not sign the Certification Worksheet and did not enter into an agreement that its application would be dismissed.

22. The Employer notes that the Board in *Moscone Marble Ltd.*, *supra*, distinguished *Midtown Meats Cold Storage Ltd.* on the same basis. In that decision, the union filed an unfair labour practice complaint three weeks after termination vote, and following the submission of a Termination Worksheet indicating that there were no section 63(16) allegations raised at or following the vote. The Board found that the Termination Worksheet lacked sufficient clarity to signify agreement between the parties that there were no issues in dispute. Furthermore, it allowed the union to proceed with a section 63(16) claim for relief and to rely upon events occurring close to the representation vote. The Employer submits that for the same reasons, K+N should be allowed to proceed with its application and to rely upon events occurring close to the vote.

Unifor's Reply Submissions

23. Unifor reiterates that the circumstances of the Employer's application are governed by Rule 11.3. It asserts that a party who alleges that the results of a representation vote do not reflect the true wishes of the employees is making a "representation about the vote or the report" within the meaning of that rule. Citing the reasons of the Board in *Baron Metal Industries Inc., supra*, (at paras. 19-21), Unifor submits that an unfair labour practice complaint that raises allegations of misconduct connected to a representation vote must be raised within the five-day time limit set out in Rule 11.3. It asserts that the five-day time limit reflects the Board's mandate to address disputes arising during the certification process expeditiously.

24. Unifor acknowledges that the Board may relieve against the strict application of the time limit. However, it asserts that this is not a

case in which the Board should do so. It points out that the complaint was filed more than two weeks after the vote (with the amended pleadings coming nearly five weeks after the vote), despite the fact that the Employer was aware of the alleged misconduct prior to the vote and prior to the filing of the application. According to Unifor, the Employer has not explained why the issues were not raised within the five-day time limit and, in the case of the amended pleadings, why the allegations were not included in the original application. Unifor contends that it has been prejudiced by the late filing of the ULP in that it has prevented the expeditious resolution of its certification application without explanation from the Employer as to the cause for the delay. With respect to the Employer's claims of prejudice to employees, Unifor submits that there is no evidence before the Board that any of the employees in the bargaining unit support the Employer's submissions.

25. Unifor contends that the Employer's submission that it should be allowed to raise new allegations pertaining to the vote is based on a misapprehension of the rationale in *Moscone Marble Ltd.*, *supra*. In that case (involving a claim for relief under subsection 63(16) of the Act), the Board allowed the union to rely on alleged conduct of which it was not aware when it filed its response. The Board did not allow the union to rely on the allegations pleaded in the post-vote submissions that were known to it when it filed its response to the application. In the present case, Unifor asserts, the Employer knew about the allegations prior to the vote, and did not raise them when it signed the Certificate of Conduct of Vote, and did not object to the contents of the Certification Worksheet.

Analysis

Was the ULP complaint filed in a timely manner?

26. Rule 5 of the Board's *Rules of Procedure* provides that "where a party in a case intends to allege improper conduct […], he or she must do so *promptly* after finding out about the alleged improper conduct" [emphasis added]. As the Board indicated in *Baron Metal Industries Inc.*, *supra*, (at para. 20), the Board measures timeliness in unfair labour practice complaints in "months". However, as the Board also indicated in that decision, an unfair labour practice in the context of a representation vote is also governed by Rule 11 (previously, rule 41) and Form T-36 (Returning Officer's Report). At paragraph 21 the Board wrote:

> But the union's unfair labour practice application is, in large measure, also governed by Rule 41 (and Form T-36). The wording of Rule 41 and of Form T-36 is sufficiently broad to encompass most of the unfair labour practice application. The application is incorporated within the terms, "any matter relating to the application for certification which remains in dispute" or "any matter relating to the representation vote". The gist of the union's complaint is that the representation vote was tainted by the action of persons whom the union alleges were acting at the behest of the employer and its certification application has been thwarted by that action. [...] All conduct directly connected to the representation vote, such as the serious intimidation and coercion alleged by the union, is covered by the provisions of Rule 41 and Form T-36. The union should therefore have filed representations and a detailed statement of material facts by November 23, 1998. The effect of this conclusion is that the requirement merely to file the application "promptly", as provided for in Rule 16, is constricted by the specific context of the complaint against the employer, which brings the application within the parameters of Rule 41 and Form T-36.

27. In the present case, directions set out in the Board's May 10, 2018 decision directing the representation vote have the same effect. The May 10 decision provides (at paragraph 11):

> Any party or person who wishes to make representations to the Board about **any issue remaining in dispute which relates to the application for certification, including any matters relating to the representation vote**, must file a detailed statement of representations with the Board and deliver it to the other parties, so that it is received by the Board **within five days** (excluding Saturdays, Sundays and holidays on which the Board is closed) of the date on which the vote is taken (emphasis added).

28. The decision makes clear that the requirement to make representations within five days of the vote is not restricted to issues regarding the conduct of the vote. The Employer's allegations that Unifor intimidated, threatened and coerced employees in the weeks preceding the representation vote (which the Employer claims resulted in the representation vote taken on May 14, 2018 not reflecting the true wishes of the employees) constitute "an issue remaining in dispute which relates to the application for certification" and are captured by the phrase "matters relating to the representation vote". Accordingly, the requirement to file the application "promptly" as required by Rule 5 is constricted by the Board's direction to make representations to the

Board within five days of the representation vote. On this basis, then, the Employer's ULP application is untimely.

29. In appropriate circumstances the Board can relieve against the strict application of its Rules, as contemplated in Rule 3.2 of the *Rules of Procedure*. In *Baron Metal Industries Inc.*, the Board outlined some of the questions it considers when determining whether to extend the time for filing an ULP complaint.

> 27. What is significant in all of the cases to which I was referred is that the Board has not adopted a bright line test in dealing with the late filing of particulars. The Board approaches the matter by asking questions like the following: What is the extent of the delay? Is there a good explanation for the delay? Was notice of the application given in a timely manner? Was the party seeking condonation of the late filing duly diligent in bringing the application to fruition or could the application reasonably have been brought within the prescribed time limit? Are the allegations made in the application particularized, and are they substantive allegations which, if proved, might constitute a serious violation of the Act? Most importantly, what is the relative prejudice to the parties caused by the delay? The Board will balance these considerations against its interests of ensuring that parties are encouraged to comply with the time limits set out in the Board's Forms and Rules and that its procedures remain expeditious (see, in this regard, paragraph 17 at page 63 of *H.D. Lee Company of Canada Limited).*

30. The Employer has provided no explanation for the late filing of its ULP complaint, nor for its failure to make representations relating to the vote within the time limit set out in the Board's May 10 decision. The ULP was filed nine days after the five-day time limit for making representations as set out in Rule 11.3 and the Board's May 10, 2018 decision. From the application itself, it is clear the Employer was aware, either before the vote or in the days following, of alleged misconduct by Union organizers relating to the certification drive (and, thus, the representation vote). However, the Board is not persuaded that Unifor would have been in any better position to respond to the ULP had the allegations been brought to its attention nine days earlier, nor would it be with respect to the supplementary allegations brought on June 19. Furthermore, the prospective bargaining unit members are not substantially inconvenienced by the effect the delay may have on the certification application. In the circumstances, therefore, the Board finds

that no prejudice has been caused to Unifor by the Employer's delay in raising its allegations.

31. The Board is satisfied that the Employer has not resiled from any agreement that there were no outstanding issues between the parties. The present case can be distinguished from *Midtown Meats Cold Storage Ltd.*, *supra*, in which the parties signed the Certification Worksheet, agreeing that the ULP application could be dismissed (thereby indicating that there were no remaining issues in dispute). In the present case, neither the Certification Worksheet (which was sent electronically to the parties and which remained unsigned by either party) and the Certificate of Conduct of Vote can be said to constitute an agreement by the parties that there were no issues in dispute between them.

32. For the reasons stated above, the Board is satisfied that the prejudice to Unifor of receiving the complaint nine days late is not so significant that it has been unable to respond to the allegations set out therein. Accordingly, the Board will allow for the late filing of the ULP. The Union's first preliminary objection is therefore dismissed.

Prima Facie

The Allegations

33. The Employer alleges that the membership evidence filed in support of the application for certification as well as the representation vote were tainted by the improper conduct of Unifor's inside organizers and of Unifor itself. The Employer submits that the alleged misconduct constitutes a violation of sections 2, 5, 76 and 77 of the Act. The Employer's allegations are based on information purportedly communicated to K+N managers before and after the May 14 representation vote (in particular, on Thursday May 10 and Thursday May 17, 2018). The alleged conduct includes:

- Inside organizers lied to and disparaged employees to get them to sign membership cards. In a meeting held on February 12, 2018, inside organizer Greg Comrie ("Comrie") told employees that the Employer intended to dismantle the Labour Representative Committee, thereby leaving employees without representation. The information was false, as the Employer was not intending to dismantle the Committee;

- One worker was told that Unifor could get back benefits that the organizers claimed the Employer had taken away (extra vacation days and a cash bonus for not taking sick days). Another worker was told that Unifor wanted to certify all six of the Employer's locations when, in fact, the Union intended to certify only one location. The same worker was told he would be "stupid" not to sign a membership card;

- Unifor's inside organizers and supporters intimidated, coerced, bullied and harassed employees to sign membership card and vote in favour of Unifor. They spoke to workers on the workshop floor, approached them in the washroom, and called and texted workers at home asking them how they intended to vote and urging them to vote for Unifor. A worker who expressed doubt about voting for Unifor was purportedly subject to surveillance by inside organizer Bibi Goolmohamed ("Saadia"), and ostracized by Unifor supporters. Saadia subjected employees who were not supporters of Unifor to "aggressive and harassing behaviour";

- In the days leading up to the representation vote, Comrie and Saadia initiated and/or failed to dispel a rumour that Unifor would know how employees voted. One employee was told by a Union organizer that the organizer who would be acting as the Union scrutineer during the vote (Comrie) would know how employees voted. Many employees believed this to be true. Neither the inside organizers nor Unifor took steps to correct the mistaken belief or dispel the rumour.

34. According to the Employer, many workers were particularly vulnerable to misinformation regarding the vote because English is not their first language. The Board's notices, as well as notices posted by Unifor and the Employer, explained that the voting was by secret ballot. However, as the notices were in English only, many workers would have had difficulty reading and understanding them.

Unifor's Submissions

35. Unifor submits that the Employer's allegations, even if assumed to be true, fail to establish a breach of the Act. According to Unifor, the allegations, as particularized by the Employer, fail to set out what "relentless and incessant" pressure tactics it used to intimidate or coerce employees to support it. It submits that the conduct of Saadia and Comrie described in the complaint amounts to nothing more than "repeated canvassing", which is not a violation of section 76 (citing *Unifor v. Armatec Survivability*, 2018 CanLII 62801 (ON LRB), at para. 34). Unifor contends that the allegations submitted by the Employer consist of "the subjective impressions of certain employees". Subjective feelings of intimidation or coercion, the Union contends, are "immaterial and insufficient to establish a violation of section 76 of the Act". Unifor submits that a complaint alleging a violation of section 76 must set out objective facts demonstrating that "a reasonable employee possessed of critical faculties would have felt intimidated or coerced into supporting (or not supporting, as the case may be) a union organizing campaign" (citing *United Brotherhood of Carpenters and Joiners of America, Local 93* v. *Fondations Brisson Inc.*, 2013 CanLII 52878 (ON LRB); *United Food and Commercial Workers International Union, Local 175* v. *Student Transportation Canada Inc.*, 2017 CanLII 40210 (ON LRB); and *CFM Majestic Inc.* v. *United Steelworkers of America*, 1999 CanLII 19998 (ON LRB)). Unifor submits, further, that the objective facts must include evidence of force or threatened force against an employee (or multiple employees), in particular, the threat of harm to an employee's physical safety or economic security. The threat must be such that it deprived the employee(s) of the ability to choose freely whether or not to be represented by a union (*Labourers' International Union of North America* v. *Tradelink Stucco & Construction Inc.*, 2017 CanLII 53376 (ON LRB); *Fondations Brisson Inc.*, *supra*; *Atlas Specialty Steels*, *supra*).

36. According to Unifor, the allegations submitted by the Employer contain no facts capable of establishing that Union organizers used force or the threat of force against prospective bargaining unit members. Unifor asserts that there is no basis upon which the Board can conclude that the Union intentionally misled employees about the confidentiality of the vote in an effort to intimidate or coerce employees into voting "yes". It submits that printed materials both it and the Employer distributed before the vote clearly indicated to employees that their ballots would be secret. Unifor contends that it was not required to provide information to K+N employees regarding the vote in a language

other than English and French (citing *AluminArt Products Ltd.*, 1991 CanLII 6125 (ON LRB)).

37. Unifor submits that a union is not responsible for rumours that arise out of conversations between workers in the context of an organizing drive, nor is it responsible for unauthorized statements made by union organizers (Unifor cites *Unifor v. Armatec Survivability*, *supra*, for the principle that absent evidence of fraud, the actions of employee organizers will not be attributed to the union: see para. 49). In any event, if a rumour regarding the secrecy of the vote had taken root in this workplace, Unifor asserts that its campaign literature and other information it provided to employees (both verbally and in writing) should have dispelled it. Finally, Unifor submits, there is no allegation that the Union threatened that some specific harm would result if employees were to vote "no" in the representation vote. Accordingly, Unifor submits, the complaint is incapable of establishing a breach of section 76.

38. Unifor asserts that section 77 of the Act is not a provision that can be violated or form the basis of an unfair labour practice complaint (citing *Trademark Stucco Inc.*, *supra*, and *Fondations Brisson Inc.*, *supra*). Accordingly, it submits, the Employer's allegations that Unifor solicited employees during working hours and on company property cannot be used to support the Employer's ULP complaint.

The Employer's Submissions

39. The Employer asserts that a violation of section 76 of the Act is not limited to instances of intimidation and coercion involving "force or a threat of force". In support of this proposition, it cites *Labourers' International Union of North America, Local 1059 v. Bronnenco Construction Ltd.,* 2013 CanLII 40271 (ON LRB), a case in which the Board found the employer in violation of section 76 by its failure to disassociate itself from an anti-union campaign initiated by one of its employees. While the anti-union campaign involved no direct threats to the physical safety or economic security of the employees, the Board found that the campaign – and the employer's failure to "clear the air" – resulted in the vote not reflecting the true wishes of the employees. In the present case, the Employer submits that once Union organizers became aware of the rumour that Unifor would know how employees voted, they had an obligation to clear the air. By failing to do so, the Employer asserts, the organizers contributed to the result that the true wishes of K+N employees were not likely reflected in the vote.

40. In the alternative, the Employer submits that the intimidation and coercion of K+N employees was, in fact, accompanied by a threat from Unifor. It asserts that Unifor's failure to dispel the rumour that it would know how employees voted constituted a threat. The Employer claims that employees were afraid that they would be subject to continuing bullying and harassment if they did not vote in favour of the Union. It asserts that by not denying and dispelling the rumour, Unifor "intentionally" fuelled the employees' fears. The Employer cites *United Steelworkers of America v. Wal-Mart Canada, Inc.*, 1997 CanLII 15529 (ON LRB) for the proposition that failure to answer workers' questions may constitute a threat. The Employer submits that Unifor had a positive obligation to dispel the rumour that the Union scrutineer would know how employees voted, even if it was not involved in originating or circulating the rumour (citing *Communications, Energy and Paperworkers Union of Canada v. Boehmer Box LP*, 2010 CanLII 11171 (ON LRB), in which an employee's anti-union letter was ultimately linked to the employer).

41. The Employer acknowledges that the test the Board must apply in considering whether there has been a violation of section 76 is an objective one, that is, the Board should question whether the reasonable employee of average intelligence and fortitude would have been able to exercise their rights under the Act, and express their wishes as to whether or not to be represented by a union. However, while the test is objective, the Employer submits that the Board can also take into consideration the "subjective evidence of the persons affected" (citing *Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry v. Centro Mechanical Inc.,* 1996 CanLII 11202 (ON LRB) at para. 53).

42. The Employer asserts that the acts and omissions of Unifor were such that they compromised the ability of reasonable employees of average intelligence and fortitude to exercise their rights under the Act and to express their wishes regarding representation by Unifor. It asserts that as a result of Unifor's intimidation and coercion, at least one of K+N's employees voted in favour of the Union. It further asserts that the fact that a *prima facie* violation of the Act occurred is reinforced by the fact that many K+N employees have difficulty reading and understanding English (and thus believed the rumour that the Union would know how they voted), and that eight employees (out of the 34 in the bargaining unit) approached K+N managers to express concern about Unifor's conduct in the days preceding and following the vote.

Analysis

43. The test in respect of the *prima facie* objection, is whether, taking the complainant's allegations as being true and provable, the Board can find that there has been a violation of the Act. The Complaint alleges that Unifor, by its conduct surrounding the organizing drive and the representation vote, violated the following provisions of the Act:

> **Purpose**
>
> **2.** The following are the purposes of the Act:
>
> 1. To facilitate collective bargaining between employers and trade unions that are the freely-designated representatives of the employees.
>
> 2. To recognize the importance of workplace parties adapting to change.
>
> 3. To promote flexibility, productivity and employee involvement in the workplace.
>
> 4. To encourage communication between employers and employees in the workplace.
>
> 5. To recognize the importance of economic growth as the foundation for mutually beneficial relations amongst employers, employees and trade unions.
>
> 6. To encourage co-operative participation of employers and trade unions in resolving workplace issues.
>
> 7. To promote the expeditious resolution of workplace disputes.
>
> **Membership in trade union**
>
> **5.** Every person is free to join a trade union of the person's own choice and to participate in its lawful activities.
>
> **Intimidation and coercion**
>
> **76.** No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers'

> organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.
>
> **Persuasion during working hours**
>
> **77.** Nothing in this Act authorizes any person to attempt at the place at which an employee works to persuade the employee during the employee's working hours to become or refrain from becoming or continuing to be a member of a trade union.

44. The Board will address each of the allegations in the order that they are set out above. The following passage, quoted in *Student Transportation Canada Inc.*, *supra*, (at para. 20) provides a useful starting point for the inquiry:

> This Board has had many occasions to consider whether actions complained of in a vote are coercive or not. The test the Board applies in such cases is not based on the most gullible or the most firm voter, but rather on the reasonable voter who is possessed of critical faculties and the ability to assess issues and inquire on his or her own behalf. The Board has recognized that while it has the authority to set aside a representation vote and to order a new one, that is not a neutral decision nor one to be taken lightly. Hence, a new representation vote will not be directed unless the evidence establishes that the occurrences complained of are so serious and pervasive as to render improbable a reliable expression of employee wishes, and, that despite the secrecy and reliability of the ballot box, the vote was not likely to have been a reliable expression of the employees' wishes (*International Union of Painters and Allied Trades, Local 114* v. *Abhe & Svoboda Inc*., 2012 CanLII 78461 (ON LRB) at para. 50).

45. With respect to the first allegation, the Board finds that misstatements and/or falsehoods allegedly made by inside organizers Saadia and Comrie during the membership drive could not constitute violations of the Act by Unifor. There is nothing in the complaint, as particularized, that indicates that statements attributed to Saadia and Comrie (i.e. regarding the fate of the Labour Representative Committee, the breadth of Unifor's organizing drive, and the restoration of certain employee benefits) were authorized by Unifor. As the Board stated in *Armatec Survivability*, *supra*, absent evidence of fraud, the actions of employee organizers will not be attributed to the Union:

> 49. The allegations in this case do not suggest that the statements made by employees were authorized by the Union.

> The fact that the campaign took place under the authority of a staff Union organizer is not enough by itself to cause the Board to find that the comments of the employees should be attributed to the Union. In these circumstances, absent evidence of fraud (i.e. non-sign) the action of employee organizers will not be attributed to the Union.

46. Furthermore, the alleged falsehoods or misstatements could not amount to intimidation or coercion, nor could they interfere with the employees' right to choose freely whether or not join the Union. The employees were always free to critically evaluate the information provided to them by inside organizers (who, it must be remembered, were nothing more than co-workers) and to seek additional information from K+N managers. The following passage, addressing an allegation that statements contained leaflets distributed to employees by the union constituted intimidation or coercion, captures the Board's approach to misinformation propagated in the context of a certification campaign (*CFM Majestic Inc.*, *supra*):

> 39. In the Board's opinion these two leaflets do not constitute either intimidation or coercion within the meaning of section 76 of the Act. From the earliest cases the Board has been very careful to indicate that it will "not normally interfere with a vote preceded by propaganda which is speculative, exaggerated, misleading or even false. The Board recognizes that in representation votes as in other electoral processes voters must be presumed capable of assessing critically the conflicting arguments often presented by the interests which compete for their votes" (CROCK & BLOCK RESTAURANT [1984] OLRB Rep. Jan. 19 [...].
>
> 40. The Board is of the opinion that the statements in the leaflets are not of such a character that a reasonable employee would either feel intimidated or coerced either to join a union or vote for a union. [...].

47. The Board finds that the conduct described in the Employer's second allegation also does not rise to the level of "intimidation and coercion" required for it to find that Unifor or its inside organizers violated section 76, or interfered with employees' rights under sections 2 or 5 of the Act. As set out above, the Board in cases such as these assesses the alleged conduct by way of an objective test based on the "reasonable employee" (see also *Centro Mechanical Inc.*, *supra*, at para. 53; *Student Transportation Inc.*, *supra*, at para. 21; and, *Fondations Brisson Inc.*, *supra*, at para. 57). In making its assessment, the Board may have regard to the subjective perception of persons affected by the

alleged conduct (*Centro Mechanical Inc.*, para. 53). However, in order to meet the objective standard, the conduct must generally include harm or the threat of harm (by someone with the capacity to carry out the threat) to employees' physical safety or economic security (*Fondations Brisson Inc.*, at para. 57; *Trademark Stucco & Construction Inc.*, *supra*, at para. 6; *Atlas Specialty Steels*, *supra*, at para. 12).

48. In the present case, the complained-of conduct consists of primarily of persistent canvassing of employees by inside organizers, both at work and at home. Additionally, it may have included surveillance and/or ostracism of at least one employee by Unifor organizers or supporters. In neither case can it be said that employees were subject to harm or a threat of harm, or that their ability to express their rights under the Act or their wishes regarding representation by the Union was compromised. The organizers' conduct also does not constitute a violation of section 77 of the Act. As previously noted by the Board, section 77 does not prohibit campaigning (either for or against a union) during working hours, and is not a section of the Act that can be contravened (see *Tradelink Stucco & Construction Inc.*, *supra*, at para. 8 and *Fondations Brisson Inc.*, *supra*, at para. 55).

49. The Board finds that Employer's third allegation also could not amount to a violation of the Act by Unifor. First, there is nothing in the pleadings that suggests that Unifor directed or encouraged inside organizers to propagate or perpetuate such a rumour, or even that Unifor staff were aware of the existence of the rumour. An inference in the nature of that drawn by the Board in *Boehmer Box LP*, *supra*, (at para. 63) cannot be drawn here. Second, if it can be said that the rumour encompassed a "threat" to the organizers' fellow employees, such threat was not to employees' physical safety or economic security (as it was in *Wal-Mart Canada Inc.*, *supra*), nor even of "significant negative consequences" which included threats to job security (as described in *Bronnenco Construction Ltd.*, *supra*). Finally, it is clear that information was readily available to employees, including information provided by Unifor, that would have cleared up any misunderstandings employees may have had regarding the secrecy of their ballots. Consequently, it is the Board's view that given the availability of truthful information regarding the representation vote, a reasonable employee of average intelligence and motivation would have understood that his or her ballot was secret, and that how he or she voted would not be known to the Union. As is evident from the Employer's pleadings, at least some of the employees did, indeed, understand that the representation vote was by secret ballot.

50. The Board acknowledges the Employer's submission that many employees in the prospective bargaining unit have a first language other than English (or French) and their ability to read or understand written materials regarding the vote may be limited. However, as the Board has stated previously, it cannot be called upon to determine in advance what additional languages are required, in a given case, to be used on materials distributed or posted in workplaces for the purpose of informing employees about the conduct of certification votes (see *AluminArt Products Ltd.*, *supra*, at para. 16). If either of the parties foresees or identifies a problem regarding employees' understanding of the voting process arising out of a language barrier, it is open to (or, indeed up to) that party to distribute materials in a language that is understood by the employees concerned (*AluminArt Products Ltd.*, *supra*, at para. 15).

51. The Board therefore concludes that the pleadings do not show that Unifor engaged in unfair labour practices in relation to either the certification campaign or the representation vote at Kuehne + Nagel, or that the representation vote was not a reliable expression of the employees' wishes. The Employer's ULP complaint is therefore dismissed.

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APPENDIX A

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