ONTARIO LABOUR RELATIONS BOARD

0474-08-R Communications, Energy and Paperworkers Union of Canada, Applicant v. **Boehmer Box LP**, Responding Party.

0493-08-U Communications, Energy and Paperworkers Union of Canada, Applicant v. **Boehmer Box LP**, Responding Party.

1866-08-U Communications, Energy and Paperworkers Union of Canada, Applicant v. **Boehmer Box LP**, Responding Party.

BEFORE: Patrick Kelly, Vice-Chair, and Board Members J. A. Rundle and S. McManus.

APPEARANCES: J. James Nyman and Daniel McBride for the applicant; Michael S.F. Watson, Andrew D. Newman and Mark Caines for the responding party.

DECISION OF VICE-CHAIR PATRICK KELLY AND BOARD MEMBER S. McMANUS: March 3, 2010

1. Board File No. 0474-08-R is an application for certification under the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended ("the Act"). Board File No. 0493-08-U ("the first complaint") and Board File No. 1866-08-U ("the second complaint") are unfair labour practice complaints under section 96 of the Act. The first complaint is mainly over several written employer communications to employees in the course of an organizing campaign. The second complaint deals with the treatment of an employee organizer months after the representation vote in the application for certification. By agreement of the parties, all three matters were consolidated and heard together.

Background

2. One of the central issues is the application, if any, of section 11 of the Act. Section 11 deals with the Board's authority to provide remedies where it is satisfied that, due to an employer's misconduct, the true wishes of the employees were not likely reflected in the representation vote. The applicant (or "the union" or "the CEP")) lost the representation vote by a large margin, although it had obtained approximately 66 per cent support of employees for the application for certification as of the date it was filed. The union maintains that the real reason for the lost vote is the alleged misconduct of the responding party ("the company"), and the effect that misconduct had upon the voters. In particular, the union contends that certain literature distributed by, or with the alleged approval of, the employer, threatened the livelihood of the employees if they chose to unionize. Among other remedies, the union seeks remedial certification pursuant to section 11.

3. The company denies engaging in any unlawful misconduct, and requests that all three applications be dismissed.

Evidence

4. By agreement of the parties, the union presented its evidence first. The witnesses who testified on behalf of the union were: Daniel McBride, the union's National Representative who was responsible for the 2008 organizing drive of the company's employees; Tom Murray, the lead inside employee organizer on the union's organizing campaign; and Claude Ouelette, an employee in the Finishing Department and also a member of the union's inside organizing committee.

5. The company called the following witnesses: Mark Caines, President and Chief Operating Officer; Janet Magee, the Manager of Human Resources; Mark Szymanowski, a Team Leader in the Maintenance Department; Mark Young, the Director of Operations; and Sean Foster, a forklift driver in the Shipping Department.

6. At the outset of the union's case, we made an order excluding witnesses.

7. The union has tried and failed on two occasions in the past to organize the company's employees. In the union's 2003 campaign, approximately 52 per cent of employees signed membership cards; by comparison, the 2004 campaign generated about 47 per cent membership. In both cases, applications for certification were made and the vote went against the union. The union was only able to obtain about 40 per cent of the counted ballots cast in the 2003 vote, and about 38 per cent in the 2004 vote. There was also at least one other attempt to unionize the plant by another trade union in 1997, in which the trade union was able to muster just over 44 per cent membership, but gained only 17 percent of the counted ballots cast in the representation vote.

8. As we have noted, approximately 66 per cent of employees signed membership cards in this application for certification. The applicant, however, managed to attract only about 33 per cent of the counted ballots cast in the vote on May 15, 2008.

9. The company is in the business of manufacturing folding cartons for businesses such as Loblaws, Sobeys, Metro and others in the grocery industry. The majority of its clients are "co-packers", contractors who produce food items mainly for the well-known grocery chains. The company operates out of two locations in Kitchener, at a manufacturing plant on Trillium Drive ("the plant") and at a warehouse on Battler Drive ("the warehouse"). At the time of the union's organizing drive, the workforce consisted of approximately 180 employees, 150 of whom were production workers in the plant. The employer's shipping function straddles both the plant and the warehouse, and there are shipping employees working in each location.

10. The company and Strathcona Paper in Napanee were once owned by the Roman Corporation. The Roman Corporation sold both enterprises to Atlas Holdings. The CEP had bargaining rights and was a party to a collective agreement at Strathcona Paper during the relevant period.

11. Except for a very brief period in April 2008 the plant's production employees have for years operated on a continuous, rotating shift basis from 11:00 p.m. Sunday until 11:00 p.m. Friday. In around January 2008, the company reduced from a five-day to a four-day operation due to a downturn in business. However, it resumed its five-day schedule within a few weeks after the representation vote. The reduction of the work week and the subsequent return to five-day operations were not called into question by the union in these proceedings.

12. Mr. Caines has been with the company since 2005, initially as the Chief Operating Officer. When he joined, the company was in serious financial trouble. Mr. Caines turned his mind to making operational changes while his superior, Gail Morant[1], dealt with the company's banks. Mr. Caines took on the additional responsibilities of President in 2006.

13. Mr. Caines was not present in the workplace during the other three failed organizing drives, but he was aware of them. He has had significant prior work experience in union environments and in collective bargaining. However, the union's organizing drive that is the subject of these proceedings was his first.

14. Mr. Caines has six Directors and one of three Area Managers – Ms. Magee in Human Resources – reporting to him[2]. They form the management team. One of the Directors, Mark Young, runs the plant on a day-to-day basis. There are also nine or ten Team Leads. Mr. Caines described them as "the go-to persons". They deal with production problems and issues raised by the employees in the course of the shift, and they help train employees as well. They are in the bargaining unit. There used to be persons engaged as Supervisors by the company, but Mr. Caines eliminated that position in the organization, and some of the Supervisors' responsibilities devolved to the Team Leads.

15. The company has an Employee Committee consisting of management and non-management employees. It had been in place well before the union's organizing drive. Mr. Caines and Mr. Murray, the lead inside union organizer, were and remain members. The Employee Committee meets monthly and deals with a variety of workplace issues, including employee complaints. Minutes of the meetings are taken and posted in the workplace.

16. After some initial consultation between Mr. McBride and Mr. Murray concerning the unionization of the workplace, an inside organizing committee of seven individuals was established in about March 2008. After further discussions between Mr. McBride and the inside organizing committee, a decision was taken to launch the organizing campaign on Tuesday, April 22, 2008.

17. According to Mr. Murray, the reason for selecting April 22, 2008 was because of a change in the shift schedule announced by Mr. Young, the Director of Operations, on April 14, 2008. The effect of Mr. Young's announcement was that, as of Sunday, April 20, 2008, the company would no longer start the work week on Sunday nights and end on Friday nights. Instead the work week was to commence on Mondays at 7:00 a.m. and end at 7:00 a.m. on Saturdays. The union wanted to start the organizing campaign as employees were coming off the night shift and other employees were coming to the plant to begin their day shifts. Thus, instead of launching the campaign on Monday, April 21, 2008, the union began organizing on the following day.

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[1] Ms. Morant was the Chief Executive Officer of CanAmPac, a holding company associated with Boehmer Box. The details of that association were not canvassed in the evidence. At the time of the organizing drive, Ms. Morant was located in Toronto. She attended at the plant on a few occasions during the union's campaign. She did not testify in these proceedings.

[2] One of the Area Managers who does not report directly to Mr. Caines is Joe Piotto. Mr. Piotto, who did not testify, was responsible for the Shipping Department at the time of the organizing drive. He recommended Sean Foster for hire in the Shipping Department a few months prior to the commencement of the union's campaign. There was no dispute in this case that the Shipping Department employees were particularly vocal in their opposition to the union. As will become evident later in this decision, Mr. Foster authored a document critical of unionization that referred to a number of unionized plant closures in the Kitchener-Waterloo area.

18. Mr. Young introduced the shift start change mainly out of concern about poor attendance on the Sunday night shift. He was also concerned that the Sunday night shift did not include maintenance personnel in the event of machinery malfunction during the shift. According to Mr. Murray, Mr. Young had raised the idea of starting the work week on Monday mornings with the Employee Committee well before he announced the change publicly, and was told by the employee members of the Employee Committee that they did not like the idea. On the other hand, Mr. Young, Mr. Caines and Ms. Magee, all of whom were members of the Employee Committee and attended its meetings, testified that the issue was never proposed to or discussed by the Employee Committee. The minutes taken of the Employee Committee meetings appear to support their testimony. The only discussion concerning the plant shifts reflected in the minutes had to do with a debate about alternatives to the rotating shift schedule. Nothing is recorded about the weekly shift start day.

19. As we have alluded to earlier, the change in the shift start day implemented by Mr. Young lasted for a very short time. Mr. Young testified that he decided to revert back to the old schedule after receiving many employee complaints the week following the announcement, and consulting with Mr. Caines on Friday, April 18, 2008. He took the weekend to think it over, and on Monday, April 21, 2008, he advised Mr. Caines of his intention to return to the Sunday night shift start. Mr. Caines indicated that that was fine with him, but that he wanted to see the written notice to employees before it was issued. Mr. Young worked on a draft, but by the time he obtained Mr. Caines' approval, the Human Resources staff had left for the day. Mr. Young decided to postpone posting the notice until he had given Human Resources an opportunity to review his document, as was his practice. However, when he arrived at the plant the next day, the union drive was underway. Despite his misgivings about how the reversion to the old schedule might now be interpreted, Mr. Young still arranged for Human Resources to review the draft, and then he posted the notice later that day.

20. Early on the morning of April 22, 2008, Mr. McBride and four members of the inside organizing committee, together with two other union representatives, showed up at the plant and began distributing union leaflets to employees at the plant. The leaflets identified all the inside organizing committee members by name, and included photographs of six of them. The union organizers lined up on both sides of the entrance to the plant's driveway, and attempted to engage the employees as they drove in and out of the plant. Later that morning, Mr. McBride, with the consent of the seven inside organizers, notified Mr. Caines in writing of the union's decision to launch an organizing drive, and identified the individuals on the inside organizing committee.

21. Mr. Caines arrived at work at about 6:45 a.m. and immediately recognized what was going on. He testified that he felt disappointment. He further testified that he gathered the management team together, and that some of them had had experience with the previous organizing drives. They discussed their understanding of the "Do's" and Don'ts" that management ought to heed in such circumstances, and Mr. Caines endorsed those views. Despite Mr. Caines' and Mr. Young's evidence that the meeting included Ms. Magee, the Human Resources Manager, she testified that she did not attend. She testified that she met with Mr. Caines in the afternoon, and that she did not recall what that meeting was about.

22. Ms. Magee also testified that she was not surprised to discover the union outside the plant on April 22. She told the Board that there had been rumours circulating about the union for several months. Apparently she did not share these rumours widely, because Mr. Young, the person responsible for the day to day operation of the plant, indicated he was very surprised by the organizing drive.

23. According to Mr. McBride, the inside organizing committee set about obtaining membership cards from employees. The organizing drive went very well in the early stages compared with the other failed organizing drives at the workplace. Tom Murray, the lead on the committee, collected the cards from the others and kept them, eventually remitting them to Mr. McBride.

24. On or about April 25, 2008, three days after the commencement of the organizing drive, Mr. Caines wrote a memorandum to all the company's employees which was sent to them by courier to their residences. The full text of the memorandum is set out in Appendix I to this decision. In his communication, Mr. Caines began by stating that the company's employees had a right to choose whether or not to be represented by a trade union, and that if they wished to refuse unionization, they were protected against intimidation and coercion by any union organizers. This is then followed by observations by Mr. Caines regarding job security in a period of difficult market conditions, and how the success of the business and satisfied customers ensure the employees' job security. (Those comments were echoed somewhat near the end of the memorandum where Mr. Caines suggested that the company would be in a better to position to deal with its business challenges if it were able to continue to enjoy direct communication with the employees without the intervention of a third party.) The memorandum goes on to point out what, from the company's perspective, are the disadvantages of choosing unionization, including the payment of union dues, the possibility of a closed shop, the difficulties in terminating bargaining rights once established, restrictions on direct communication between the employer and the employees, and so forth. Mr. Caines also emphasized what he saw as the advantages and benefits of the Employee Committee.

25. Near the end of the communication, Mr. Caines pointed out that the company had taken steps to ensure its long-term success in a very competitive market, and that it had achieved a substantial degree of openness. The union was particularly concerned with Mr. Caines' concluding remarks:

> If we work together to make Boehmer Box a better place to work, our organization will be a better place for our customers to do business with so we can grow and sustain our business.

26. On or around April 28, 2008, a large number of copies of an anonymous letter concerning the closure of several unionized Kitchener area manufacturers was placed in the employee lunchroom, change room and various other common areas of the plant. These copies remained in the plant for at least a couple of days. The letter reads:

BF Goodrich-Closed

Budd Automotive-Closed

Lazy Boy-Closed

VSA (Apex)-Closed

LEDCO-Closed

Boehmer Box????????

What do the top 5 have in common?

They were closed down even with "union protection". At LEDCO, the employees were approached about taking a paycut to keep the plant open. The overwhelming response was yes, but the union would not allow the vote and the plant was closed. Like so many other manufacturing plants in the area, jobs were lost. They had an opportunity to at least fight to keep the plant running and stay employed, to work with the company, but were not allowed to act or vote for how they truly felt.

There was a time and place for a union, but not now. There are too many labour laws to protect the worker and their rights. The union has already stated that they will not fight for wages or benefits, so what are they going to do? They will take a cut of your existing wages to do what? Go to management to fight for something that in the long run, they really can't win? The other thing a union will do is to make seniority the way things are done. If layoffs happen, it will be only the new employees that this will affect, not the least effective employees. A strong partnership between companies and workers should be to make the company stronger, not protect the weak and lazy. If a company decides to shut the doors, will the union help feed your family? Ask the people that were at the above mentioned companies how much they have heard from the unions since the doors were shut. A STRONG EMPLOYEE committee will do the same for you without taking your wages.

THINK BEFORE YOU VOTE!

27. Mr. Murray, the lead inside organizer, testified that once the anonymous letter was in the hands of his co-workers, "they ran from me like the plague" and stopped speaking to him. He estimated that the union obtained no more than about 12 to 13 membership cards after April 28, 2008 or thereabouts. Mr. Murray's co-worker and fellow inside organizer, Claude Ouellette, agreed that employees were no longer willing to talk to him after the letter appeared.

28. As it turns out, the anonymous letter was authored by Sean Foster, an employee in the plant's Shipping Department. Mr. Foster had been hired in January 2008. He worked for the company up until the representation vote on May 15, 2008, following which he then took up employment with Sun Life Insurance. When he learned of the union's organizing drive and read the union's literature, he testified he felt he ought to communicate with his co-workers, and give them the benefit of the views of one of their peers. The plant closures referred to in his letter did in fact occur in the Kitchener-Waterloo area, and involved unionized businesses.

29. Mr. Foster testified that he alone composed his letter, and that no one from management had any part to play in its conception or content. He drew upon the experience of friends and acquaintances affected by some of the plant closures, as well as what he had learned in the media about the closures. He composed the letter at home, and brought about 10 to 15 copies to the plant. He testified in cross-examination that he showed a copy to a Team Leader by the name of Randall for the purpose of gaining approval to distribute the other copies. Randall expressed approval of the content, but said he wanted to take it to Mr. Piotto, his boss in the Shipping Department, to see if it could be disseminated more broadly. When Randall left, Mr. Foster went ahead and left copies in one of the company's lunchrooms. Randall returned and told Mr. Foster that Mr. Piotto would not allow the distribution of his letter. Somehow, many more copies of the letter were produced and distributed throughout the plant, and they remained there for two days. Mr. Foster did not know who made the many extra copies or distributed them. He speculated that Randall may have done so, because he liked what Mr. Foster had written.

30. Upon learning of the anonymous letter, Mr. McBride instructed legal counsel to write a letter of protest to Mr. Caines. By correspondence dated April 30, 2008 counsel for the union did so, and requested that Mr. Caines remove all copies of the anonymous letter and tell employees that the company disassociated itself from the letter's content. A reply letter dated May 1, 2008 from counsel for the company denied that the employer had had anything to do with the drafting or the distribution of the anonymous letter, and advised that the company would remove any copies of the letter as and when discovered in the plant. There was no evidence, however, that Mr. Caines subsequently told employees that the company disagreed with, or otherwise disassociated itself from, the contents of the anonymous letter.

31. According to Mr. McBride, the organizing campaign "dried up" at this point. He said that, after April 30, 2008, the union obtained only "a couple" of membership cards. We have reviewed the membership evidence filed with the application for certification. The union filed 115 membership cards for a bargaining unit of 173 or 174 individuals. The union's most significant success occurred in the period from April 22 to April 25 when it signed up 90 members (50 on April 22, 20 on April 23, 14 on April 24 and 6 on April 25). After April 30, 2008, and up until May 6, the last day on which an individual signed a card, the union managed to attract only eight more members.

32. Mr. McBride and members of the inside organizing committee, together with other union representatives, appeared at the plant on May 9, 2008, the day after the application for certification was filed. They distributed leaflets in the morning and in the afternoon. The leaflets advised of a strong majority of support from among the employees, the filing of the application for certification and the upcoming secret ballot vote. The union alluded to "false and misleading material", and warned that the company would make every effort to convince employees to vote against the union, including the use of trickery, fear and inducements.

33. On the same day, May 9, Mr. Caines arranged to send by courier to all employees a second memorandum, the full text of which is reproduced at Appendix II of this decision. It too was delivered to the employees' homes. Although in his examination in chief Mr. Caines said that he was the author of all of the company's correspondence during the organizing drive, in cross examination he said the May 9 document was a collaborative effort with his superior, Ms. Morant. In fact, she did the first draft of the May 9 memorandum (and, as it turned out, the subsequent memorandum described below). Mr. Caines admitted that, in the process of collaborating on the letter, he and Ms. Morant had reviewed the Sean Foster letter, among the documents sent to Mr. Caines by counsel for the union on April 30, 2008. According to Mr. Caines, Ms. Morant was primarily responsible for the references in the memorandum to closures of plants where the CEP represented workers, including Cascades where, according to the memorandum, workers had earned far less than the company's employees. Mr. Caines testified he and Ms. Morant were aware of other closures involving non-union plants, but that they did not include any reference to those plants in the memorandum. Below is an excerpt that deals with the unionized plant closures and the issue of job security:

> The CEP has promised that the starting point for negotiations is the present compensation package. With folding carton plants closing and the economy in a downturn, how realistic are these promises? Boehmer Box employees could pay real dollars of their hard-earned wages in the form of union dues in the hope of negotiating something that may never be achievable or may not even cover the cost of the union dues. **There is no guarantee the union can get everything, or anything, that it promises you. It is not the union that pays your wages and benefits.** The pie does not necessarily get bigger or divided better simply because a union is involved. As a business, we have to live in a world of competitive realities and it is our customers

> who determine the size of the pie that can be divided. You have seen the front-page news about how many manufacturing plants are closing. It's a company's customers that determine the businesses that survive and thrive and those that don't because our customers **CHOOSE** to do business with us based on what we deliver to them in quality and service for a market price. After all, it is our customers who pay our bills.
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> Have the CEP also told you about the jobs lost and CEP members put out of work when many plants represented by the CEP such as Abitibi, Bowater, Crown Packaging, Cascades closed? Have they told you what they did for the CEP members after these plants closed? **If not, why not?**
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> Have they told you about how many CEP members they have today in these organizations compared to five years ago, or two years ago? Job security doesn't come from a union. Job security rests with serving our customers and growing our business. This is particularly true in a difficult market and weak economy. We have to make sure that we have people in place that have our customers' interests at heart. That is what protects jobs – giving our customers what they need, when they need it and at a competitive price.
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> The CEP has promised protection of wages and benefits. Have the CEP told you that during CCAA Strathcona Paper's workers represented by the CEP agreed to freeze their defined benefit pension plan and that these were benefits given up? Did Boehmer Box employees give up any benefits at that time? The answer is NO. Why did this happen? Because economic reality determines if companies survive. Not unions. If wages and benefits are too high and customers can't afford to pay for them, then companies don't survive. Job security does not rest with words. It results from deeds. You want a management team that understands economic reality and makes the difficult but right decisions to scale the company's cost structure to ensure long-term competitive viability.
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> (emphasis in original)

34. Later in the memorandum, Mr. Caines compared the fortunes of the company with its competitors. He stated:

> The CEP asks whose interest management has at heart. Think about it. Management has the long-term interests of the employees at heart by making sure we have a viable business to serve our customers and pay wages and benefits. Boehmer Box's volumes are up this year over last. We have secured new business. We are doing what some of our competitors such as Somerville Packaging, Cascades, H.J. Jones and Crown Packaging failed to do. That is, to make sure that the business is sustainable with customers who can provide the job security that we all seek.

35. The union kept up its presence at the entrance to the plant leading up to the representation vote on May 15, 2008. The union also filed and delivered the first of its two unfair labour practice complaints on May 12, 2008, referring to both of Mr. Caines' communications to employees as well as the anonymous letter. On May 13, 2008 the union issued its third set of leaflets. They appear to comprise a response to Mr. Caines' communication the day prior, at least in part. In this leaflet, the union derided the company's Employee Committee, and claimed that the union would institute a real grievance process and a real seniority system. The leaflet also alluded to the recent policy change and reversal concerning the company's shifts. Finally, with respect to plant closures, the union claimed that such closures were not attributable to unionization but rather to the loss of customers and/or demand for products and/or bad management.

36. Mr. McBride found the employees were less open to taking these leaflets. Individuals who previously had been open to discussion with representatives of the union now were not willing to engage. Mr. Murray noticed Ron Muhlman, the Director or Head of Maintenance inside his corner office taking photographs of the outside activities. In the course of his testimony, Mr. Caines acknowledged the taking of photographs, but stated that the purpose was to identify non-employee participants in the organizing drive so as to prevent a repeat of an earlier incident during the union's 2004 organizing campaign in which non-employee union representatives were found wandering around in the plant without authorization.

37. On May 14, 2008, the day prior to the vote, Mr. McBride and other union representatives handed out yet another leaflet at the plant's entrance. This one dealt primarily with details of the vote, its location, the times of the polls, the question on the ballot and so forth. The leaflet included a reproduction of a typical Board ballot, marked "Yes" in favour of unionization. The union also acknowledged that the company's continued business success was in the interests of all parties.

38. The same day, in the morning, Mr. McBride received a copy of a document from an employee who claimed it had been distributed by a group of co-workers standing on the plant driveway. It was entitled "Just Say No". Mr. Ouellette testified that he saw it posted in the plant near the punch clock and in a bathroom. Later in the afternoon, a bargaining unit employee in a Lead Hand position with about ten years service, Mark Symonowski, distributed his own literature to employees. He was outside, in plain view of Mr. McBride. There is some dispute as to whether or not he was standing on the company's property. In any event, his communication, entitled "Just a thought", encouraged his fellow employees to give serious thought before casting ballots in the representation vote. In it, Mr. Symonowski states his case that the union does not understand the employees, and that the company has several positive attributes, including the Employee Committee, and has survived tough economic circumstances. Mr. Symonowski does not urge employees to vote against or for the union, but it is fairly clear that he believes they would be better served by rejecting the union.

39. Mr. Symonowski's uncontradicted testimony was that he alone composed the "Just a thought" document on a company computer. His wife and one other bargaining unit employee, Sean Allishaw, the chair of the Employee Committee, were the only people who saw the document before its distribution. There was no evidence to suggest that any member of management knew about it or put Mr. Symonowski up to it.

40. On May 14, 2008, Mr. Caines issued his third all-employee memorandum. We have reproduced the full text at Appendix III to the decision. This communication was distributed to employees at the plant. Again, Ms. Morant prepared the original draft. The document clearly articulates the company's view that employees should vote against the union. It reiterates some of the themes found in the previous company communications, for example that the employees would have to pay dues, that the union could not guarantee wage increase or other changes, and so forth. Mr. Caines again emphasized that the company's customers determine success, and that if the customers were dissatisfied with the company's quality, service and price, they had the option of looking to other businesses to meet their expectations. He gave two examples where two of the company's customers did precisely that. He stated:

> As you know it is our ability to work together to meet our customers' expectations for quality, service and price that ensure job security. We cannot compromise our ability to meet customers' needs. Customers **CHOOSE** to do business with us and if we let them down, they can elect to change suppliers. Chapman's Ice Cream was a large

> account that Boehmer lost due to quality issues. Recently, we lost the Novelis account due to quality issues. We can't lose customers because we fail to deliver the quality and service they need. There is no job security in a business model that doesn't ensure quality, service and price meet customer expectations.
>
> **WILL YOU AND YOUR FAMILY BE BETTER OFF WITH THE CEP UNION?**
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> **WE DO NOT BELIEVE THAT YOU WILL BE.** All you have to do is take a look at newspaper articles concerning unions and our industry to know.
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> (emphasis in original)

41. At the vote the following day, the union was only able to secure 54 ballots in its favour out of 166 ballots cast and counted. According to Mr. McBride, there is almost inevitably some "slippage" in support during an organizing campaign, about ten per cent. However, Mr. McBride characterized the loss of support in this case as "unprecedented" in his experience.

42. As we have indicated earlier, the second unfair labour practice complaint dealt with events that occurred long after the representation vote. On September 14, 2008, Mr. Ouellette received a witness summons to testify in these proceedings. On September 15, 2008, after consulting with his supervisor and with Mr. Murray, both of whom directed him to Janet Magee in Human Resources, Mr. Ouellette proceeded to her office with the summons in hand. Mr. Ouellette showed Ms. Magee the summons, and she made a copy of it. Ms. Magee did not seriously dispute Mr. Ouellette's testimony that when she returned the original document to him she said that the legal costs of the litigation would be taken out of the employees' bonus plan which had been introduced by Mr. Caines in August 2008. Later that day Ms. Magee happened by his work area and, according to Mr. Ouellette, said she hoped that he had not misconstrued her earlier statement to him. Ms. Magee testified that she did not recall making such a statement to Mr. Ouellette. She said she came by to explain to Mr. Ouellette the bonus plan, because he had not appeared to understand how it worked when he had spoken to her earlier that day.

43. Mr. Ouellette also gave evidence that Bruce Strecheniuk, the Director of Quality, started to pay much closer attention to Mr. Ouellette's work performance once the organizing campaign began in the latter part of April 2008. Whereas Mr. Ouellette had noticed Mr. Strecheniuk only very rarely in the workplace, after the organizing drive commenced Mr. Strecheniuk twice emerged in Mr. Ouellette's work area and checked on what he was doing, ensuring proper compliance with paperwork and labelling processes. After the vote, Mr. Ouellette noticed Mr. Strecheniuk in his area two or three times weekly, and this went on for some time until Mr. Ouellette mentioned it to Mr. McBride, who he believes said something to someone in the company. In cross-examination, however, Mr. Ouellette admitted that in the spring of 2008, in response to customer complaints about receiving "mixed product", the company introduced a new audit control mechanism for which Mr. Strecheniuk was responsible. That initiative involved the hiring of a quality control inspector under Mr. Strecheniuk's supervision. Mr. Strecheniuk trained the new inspector on the floor during a two-week period when Mr. Ouellette was working. Mr. Ouellette, in fact, participated in meetings about the issue, and according to Mr. Caines, Mr. Ouellette worked closely on the mixed product problem. In any event, Mr. Ouellette did not seriously challenge counsel for the company's assertion that Mr. Strecheniuk's increased presence in his workplace had to do with the new quality control initiative.

Analysis and Conclusions

44. The first question to be determined is whether or not the employer committed a breach or breaches of the Act. If not, the application for certification and the unfair labour practice complaints must be dismissed. If, however, we find there was at least one breach of the Act, then the second question concerns whether the applicant is entitled to relief under section 11 of the Act, and in particular, whether the union is entitled to certification despite having lost the representation vote. To grant that relief the Board must be persuaded there is no other available remedy to counter the effects of the violation of the Act.

45. The union alleges that the company violated sections 70, 72 and 76 of the Act. Those provisions read:

> **70.** No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.
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> **72.** No employer, employers' organization or person acting on behalf of an employer or an employers' organization,
>
> (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
>
> (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
>
> (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.
>
> **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.

46. Four aspects of the union's case – the reversal of the shift start change, the Magee/Ouellette confrontation, the increased presence of Mr. Strechniuk in Mr. Ouellette's work area, and the taking of photographs by Mr. Muhlman – are more easily dealt with than the fifth, the issue of the anti-union communications. With respect to the reversal of the weekly shift start day, it is our view that the company did not commit an unfair labour practice. We are satisfied,

based upon the uncontradicted testimony of Mr. Caines and Mr. Young, that the decision to revert to the Sunday night start-up was taken before the commencement, and without any foreknowledge, of the union's campaign on April 22, 2008. We are also satisfied with Mr. Young's explanation as to the delay in posting the announcement of the reversal until several hours after the campaign began that morning. Accordingly, we find that the company's reversal was not a response to the organizing drive, and was not a violation of the Act.

47. We are also satisfied that the employer offered a plausible and uncontradicted explanation regarding the taking of photographs by Mr. Muhlman, which we accept. In any event, the union did not provide much detail concerning the circumstances in which the photographs were taken that would lead to the conclusion that any employees were aware of, or likely intimidated by, Mr. Muhlman's activities. We find no breach of the Act here.

48. Similarly, the company provided a plausible and uncontradicted explanation for Mr. Strechniuk's increased presence in Mr. Ouellette's work area, which we also accept. Again, we see no violation of the Act by the company arising from those circumstances.

49. Was Ms. Magee's exchange with Mr. Ouellette a violation of the Act? There was no dispute between them that, upon being presented with Mr. Ouellette's summons to appear in this proceeding, Ms. Magee commented that the legal costs associated therewith would be subtracted from the account funding the employees' bonus plan. Arguably, the message she meant to convey to Mr. Ouellette was that the employees would suffer the financial consequences resulting from the costs incurred by the company to defend the litigation initiated by the union. It probably was made in an unguarded moment of irritation, which Ms. Magee later regretted, thus accounting for her subsequent visit to Mr. Ouellette's work station. If her conduct was a breach of the Act, it was not a particularly egregious one. In any event, this incident cannot be said to have compromised the true wishes of the voters who participated in the vote months earlier.

50. The heart of the union's case against the employer, particularly as it pertains to remedial certification under section 11, concerns the three memoranda under Mr. Caines signature (the latter two of which featured contributions by Ms. Morant) and Mr. Foster's letter. We begin with an analysis of employer free speech in the context of the impugned campaign literature.

51. Section 70 prohibits among other things employer interference with the formation or selection of a trade union but it also confers upon employers the freedom to express views about unions and the effects of unionization upon the workplace so long as those views are not coercive, intimidating, threatening, promissory or unduly influential. As noted by the Board in *Capelas Homes Ltd.*, [1998] O.L.R.D. No. 3121 at paragraphs 16 and 17:

> 16. It is clear from the Board's jurisprudence that the employer's right to express its views is a substantial right. An employer is not required to stand mutely by when one or more trade union seeks to organize or be certified as the exclusive bargaining agent for its employees. Similarly, if the employer's right to express its views is to have real meaning, it cannot be that an employer is free to express its views so long as it says nothing negative about a union or organization. On the contrary, it is well established that an employer may say negative things and express its opposition to a union or organization.
>
> 17. On the other hand, no freedom is absolute, and there are limits to what an employer can say or do. These limits are found in section 70 itself. That is, an employer cannot use coercion, intimidation, threats, promises or undue influence

> under the guise expressing its views or exercising its freedom of speech, and thereby deny the more fundamental right upon which the entire Act is based; namely, the right of employees to freely choose for themselves whether they will or will not be represented by a trade union in their employment relations with their employer. In that respect, the Act attempts to balance the employer freedom of speech with the right of employees to choose without interference in a manner which is consistent with the norms of a democratic society, while recognizing the sensitivity of the employment relationship and the effects that an employer's words or actions can have on employees. The Act does not guarantee employees the freedom to choose without any pressures or influences. It would be unrealistic, indeed impossible, to attempt to insulate employees from the real world in an absolute way. Consequently, it is not "interference" in some general sense which is prohibited by section 70, but rather an interference through the use of coercion, intimidation, threats, promises or *undue* influence. The line between acceptable conduct and conduct which is contrary to the Act can be a very fine one, and employers (and unions) are wise to avoid trying to walk it.

The Board further noted at paragraph 25 that:

> An employer is therefore permitted to say: "I don't want a union." It is permitted to say: "Vote No." It is permitted to express a preference for continuing to deal with [sic] legitimate association or trade union it is already dealing with...

52. In his three memoranda to the company's workers, Mr. Caines certainly made no bones that the company preferred to engage with the staff through the Employee Committee and did not want to deal with a trade union, and he clearly expressed his hope that the employees would see it that way too. He made many negative comments about unionization, suggesting unions were in the habit of making empty promises, were less than democratic, and were motivated by financial gain. He also questioned the motives of the inside organizers, and implied they were not to be trusted. By the third memorandum, Mr. Caines openly and expressly urged the employees to cast their ballots against the union. All of these types comments have been viewed as fair game in the Board's jurisprudence.

53. Having said that, we do not lose sight of the anti-union nature of these documents in assessing the other messages within them. While employers may be free to cast aspersions against trade unions (and vice versa), they must be careful not also to suggest or speculate without a factual foundation, however subtly, that unionization will necessarily undermine the viability of the enterprise, and thus compromise employees' job security. That is threatening conduct which runs afoul of the freedom of employer speech and invites the Board's intervention. An illustration is provided in *Vogue Brassiere Incorporated*, [1983] OLRB Rep. Oct. 1737. In that case, in a speech to employees the respondent's Vice President alluded to the company having weathered a recessionary storm and emerging in better condition than its competitors, without the kind of layoffs and plant closures that the company's competitors had had to face. The majority of the Board concluded that this statement was a speculative prediction, made in the abstract, implying that collective bargaining would impair job security. The Board explained the basis for its close scrutiny of employer predictions of future job loss. First, by virtue of its rather exclusive knowledge of the economics of its industry, an employer's statements about job loss will tend to carry great weight with employees. Second, such statements are aimed at the most crucial interest of the employees, that is, their interest in remaining employed. Third, linking job loss with unionization fails to take into account that a campaign for certification is merely the first step in the process of collective bargaining. The prospect of unionization may well introduce an element of uncertainty about the future of the workplace, but it is only when the trade union tables its bargaining proposals that any concrete debate about the effects of the employees'

decision to unionize can truly begin to take shape. Accordingly, employers must be extremely cautious not to prematurely overstate the impact of unionization on job security.

54. The Board in the *Vogue* decision went on to find that the Vice President's statement alluding to layoffs and plant closures among the company's competitors, and the fact that it was made during the course of a captive audience meeting, compromised the voluntariness of the employee petitions challenging the union's documentary evidence of more than 55 per cent support. It therefore disregarded the petitions and certified the applicant based on the card-based system that existed at the time.

55. In *Viceroy Construction Company Limited*, [1977] OLRB Rep. September 562, the trade union lost a pre-hearing vote, but asked the Board to issue a certificate under section 7a (the equivalent of the current section 11) of the Act as it then was. The trade union pointed to two letters issued by the employer to the employees in the course of the organizing campaign. The first letter raised the prospect of a long strike and the concomitant unemployment of the employees, and perhaps the permanent loss of their right to return to work in the event a strike lasted longer than six months. In the second letter, the employer stated that the trade union could not guarantee job security, that job security could only be achieved by the employees working together to produce a quality product at competitive prices, and appended to the letter several newspaper articles describing the closure of unionized plants. The Board found that the letters went beyond employer free speech, and accordingly issued a certificate under section 7a.

56. A similar result was reached twenty years later in *JAK Electrical Contractors Limited*, [1997] OLRB Rep. July/August 578 in which a residential electrical contractor in the construction industry predicted that unionization of its employees would negatively affect its ability, vis-à-vis non-union contractors, to bid on construction work because of higher costs associated with collective bargaining. The employer in that case led evidence showing that when it had previously been unionized (the employees later decertified the bargaining agent), it lost work opportunities. It relied upon that evidence to argue that it had not merely speculated about the impact a trade union might have in the workplace. The Board disagreed. It stated at paragraph 148:

> 148. In my view, the employer's argument must fail. It was entirely appropriate for the employer to comment on issues such as wages, benefits and competitiveness during the course of this organizing campaign, as long as it did not comment in such a way as to promise, threaten, coerce, intimidate or unduly influence its employees. Because of the highly sensitive nature of the concept of competitiveness, and its connection to job security, great care must be taken in how an employer comments on that issue. As noted by the Board in paragraph 36 of *Vogue Brassiere Incorporated*, cited above, "an employer who raises the spectre of a loss of jobs incurs a significant risk of running afoul of the law". In order to ensure that it does not violate the Act, the employer must not make predictions regarding the impact of unionization in the abstract or that are speculative in nature. Any such prediction must be, as noted in the *Gissel Packing Co.* [(1969) 395 U.S. 575] case, carefully phrased, be made on the basis of objective fact, and reflect the employer's belief regarding the demonstrably probable consequences of unionization. In my view, this is where the employer erred in its communications with its employees.

57. In more recent decisions, the Board has continued to carefully scrutinize employer comments regarding competitiveness. In *West Elgin Construction Ltd.*, [2005] OLRB Rep. May/June 502, for example, the Board found unlawful the concrete forming contractor's allusion to the closure of another unionized company and its documented claim that unionization might

result in fewer jobs and the exposure of more junior employees to layoffs. At that time, the Board did not have the statutory option to order certification, but it did have the option to order a second representation vote in the event of a violation, and it did so. Similarly, in *Riverstone Masonry Inc.*, [2009] OLRB Rep. January/February 120, a masonry contractor was found to have violated the Act when, in the course of a meeting with employees its principal said unionization meant that about 80 per cent of the contractor's customers would not be able to afford the resulting additional costs associated with collective bargaining, and there would likely be a loss of business. The Board then was under the current statutory regime, and having regard to the employer's statements, as well as its habit of closely questioning employees about the unions' campaigns, it certified the trade unions despite their defeat in the respective representation votes.

58. In fairness, we note that the *Viceroy Construction*, *JAK Electrical*, *West Elgin Construction* and *Riverstone Masonry* cases all arose in the construction industry, and as the Board noted at paragraph 26 in the latter decision, in the construction industry, " employment is simply more precarious." (On the other hand, it is difficult to argue that employment in the manufacturing industry in Ontario currently is appreciably less precarious.) Indeed, counsel for the employer referred to two decisions decided under the industrial provisions of the Act in which the Board found employer communications to be valid. Those bear further analysis below.

59. In *Kraft Canada Inc.*, [1997] OLRB Rep. March/April 239, the employer issued four letters to employees during an organizing campaign. According to the Board, all of them referred to business competitiveness, but only the fourth and last letter, which was reproduced in the decision, was attacked by the union. The basis for the trade union's complaint was two-fold. One, the union claimed that the employer misrepresented the effect of section 86 of the Act, commonly known as the "freeze" provision restricting the ability of an employer to change conditions of employment following notice to bargain. The second objection concerned the following statement by the employer:

> We urge you to remember what we have achieved so far at Scarborough. Over the last five years our plant has continued to thrive and maintain a leading position versus internal and external competitors. Because we are competitive, that has led to growth and plantwide investment. We need to STAY competitive.
>
> (emphasis in original)

The trade union argued that the message conveyed by the employer in the above statement was that competitiveness was equated with having no union, and that investment in the plant would be compromised by the introduction of a trade union in the workplace. The Board disagreed with both of the trade union's arguments, and with respect to the impugned statement, the Board found that the employer's statement was within the acceptable parameters of employer free speech. We note, however, that the letter complained of by the trade union in the *Kraft Canada* case did not, unlike the facts in the matters before us, contain any hint of plant closures by unionized competitors and made no express reference to job security.

60. The other industrial case cited by the company in the matter before us is *Pattison Sign Group*, [2005] OLRB Rep. May/June 468. In that matter, the employer's plant manager, Al Thomson, issued five letters to the employees in the course of an organizing campaign. The majority of the Board described the letters in general terms at paragraph 8 of its decision, as follows:

> 8. ... In all of his communications, Thomson stresses that the applicant can only be certified following a secret ballot conducted by the Board, and he expresses the responding party's preference to continue to operate without a union. He encourages all employees to cast a ballot in the representation vote, and he encourages them to "vote no". One of the communications employs a question and answer format and addresses such issues as who is entitled to vote, the obligation to pay union dues, how and when to decertify, and individual employees' rights in the event of a strike. This communication also includes a sample ballot, in which an "X" has been placed in the "no" box. None of these written communications from the responding party contain any threats respecting the continued viability of the company's operations or the security of employment of any of its employees. ...

The trade union's complaint involved not only the employer's written communications, but also other events that need not be detailed here. The majority of the Board found no violations of the Act in regard to any of the allegations. In respect to the letters, the majority noted that they contained no threat to the workers' employment or other economic interests, nor had they been accompanied by any offensive verbal commentary.

61. What distinguishes the *Kraft Canada* and *Pattison Sign* cases from the matter before us is that in the instant case there were several references by Mr. Caines in all three of his letters to job security in the context of competitiveness and several express references in the second letter to closures of the unionized plants of competitors. Over and over again in these memoranda, Mr. Caines points out that competitiveness and job security go hand in hand. The second letter, issued after the company was aware of the application for certification, raises for the first time the fact of plant closures of unionized businesses. In the third letter, issued on the eve of the vote, there is a barely veiled reference to plant closures in the section which reads:

> **WILL YOU AND YOUR FAMILY BE BETTER OFF WITH THE CEP UNION?**
>
> **WE DO NOT BELIEVE THAT YOU WILL BE.** All you have to do is take a look at newspaper articles concerning unions and our industry to know.

Counsel for the company argued that the messages contained in the Caines memoranda were as follows:

- You have the right to choose.
- Whatever you do, vote.
- Has the union told you everything, and are the union's promises believable?
- You have got a good employee committee.
- The company's prospects are good and they can continue if we pay attention to customer service.

62. We agree that Mr. Caines repeatedly conveyed these thoughts. However, it is not accurate to suggest that they formed the entirety of the message he delivered to the employees. The fact of the matter is that there were references in the second and third memoranda, some more subtle than others, to unionized plant closures, and among the plants named happened to be

unionized enterprises where the CEP had held bargaining rights. There must be a reason to have included this information, but not to refer to the closures of non-union plants of which Mr. Caines and Ms. Morant were aware. Certainly, the union's literature did not warrant a response by the company discussing plant closures. We are left, then, to conclude that the purpose for this information was to insinuate that the company's prospects for a better future might be impaired by the introduction of a union into an otherwise functional workplace. We have little doubt that the company's employees would be keenly alive to such a warning. We are convinced on the basis of the written words chosen by Mr. Caines and Ms. Morant in this regard, viewed in the context of a series of communications which clearly and increasingly express the company's antipathy to unionization, that the company raised the spectre of unemployment and job loss by connecting unionization with a diminution of the company's competitive position, and in so doing, went beyond what the Act permits. They may well have held a genuine belief in the inevitability of their predictions. Mr. Caines struck us as sincere in his view that the collective bargaining process creates hurdles to organizational success. Nevertheless, we are of the opinion that a reasonable employee would conclude from the memoranda, taken as a whole, that a vote for the union might jeopardize his or future employment.

63. We turn now to the Sean Foster letter. If, as the union postulated, Mr. Foster's supervisor, Joe Piotto, distributed the letter widely throughout the plant, or approved its distribution, or knew of the letter and did nothing to prevent its distribution or pursue its confiscation, that too would constitute a violation of the Act by the company even though it appears it had nothing to do with the letter's creation. The circumstances are suspicious. Why was the letter unsigned, if, as he claimed, Mr. Foster's purpose was to give employees the wisdom of his views as their peer? How would they know the letter was even authored by a peer? Secondly, there is no coherent explanation for how the letter came to be distributed. Mr. Foster denied that he placed copies everywhere in the plant, and yet they made their way to all the common areas. He speculated that the Lead Hand might have been responsible, but that seems to us unlikely given that that individual had the foresight to seek out Mr. Piotto's approval to distribute Mr. Foster's letter, and then reported to Mr. Foster that Mr. Piotto forbade it. There was no direct evidence that any manager knew that copies were lying about and did nothing about the situation, but it seems odd that management was oblivious to the letter's existence given the length of time it remained available for all to see, and the breadth of its distribution throughout the plant. Mr. Foster's version of events raises unanswered questions. Moreover, we found it troubling that the details in his testimony concerning his interaction with the Lead Hand did not emerge in his examination in chief, but only after he was more closely scrutinized in cross-examination. In our view, the company did not adequately explain the circumstances surrounding the distribution of Mr. Foster's letter. We therefore draw an adverse inference that, to some degree, the company encouraged or facilitated its dissemination.

64. Following the discovery of Mr. Foster's letter, counsel for the union urged Mr. Caines to disavow its contents. Mr. Caines did not do so. Rather, he and Ms. Morant compounded the problem. Knowing that there had been an unsigned letter widely circulated throughout the plant predicting the demise of the company if it became unionized, and that the union considered it unlawfully inflammatory, they made similar references to other failed unionized businesses in the second memorandum. Rather than distancing themselves from Mr. Foster's warnings of disaster, Mr. Caines and Ms. Morant played a variation on the same theme. In essence, they adopted Mr. Foster's letter. That, in our view, must have compounded any employee anxiety that Mr. Foster's may have aroused, and probably did arouse.

65. For all these reasons, we find that the company violated sections 70, 72(c) and 76 of the Act.

66. We must now consider the application of section 11. It reads:

> **11.** (1) Subsection (2) applies where an employer, an employers' organization or a person acting on behalf of an employer or an employers' organization contravenes this Act and, as a result,
>
> (a) the true wishes of the employees in the bargaining unit were not likely reflected in a representation vote; or
>
> (b) a trade union was not able to demonstrate that 40 per cent or more of the individuals in the bargaining unit proposed in the application for certification appeared to be members of the union at the time the application was filed.
>
> (2) In the circumstances described in subsection (1), on the application of the trade union, the Board may,
>
> (a) order that a representation vote be taken and do anything to ensure that the representation vote reflects the true wishes of the employees in the bargaining unit;
>
> (b) order that another representation vote be taken and do anything to ensure that the representation vote reflects the true wishes of the employees in the bargaining unit; or
>
> (c) certify the trade union as the bargaining agent of the employees in the bargaining unit that the Board determines could be appropriate for collective bargaining if no other remedy would be sufficient to counter the effects of the contravention.
>
> (3) An order under subsection (2) may be made despite section 8.1 or subsection 10(2).
>
> (4) On an application made under this section, the Board may consider,
>
> (a) the results of a previous representation vote; and
>
> (b) whether the trade union appears to have membership support adequate for the purposes of collective bargaining.

67. Insofar as the application of section 11 is concerned and the union's request for remedial certification, the applicant relies chiefly upon the three Caines' memoranda and the Foster letter for the proposition that those communications irrevocably compromised the true wishes of the voters. That, in the union's submission, forecloses any other remedy but certification of the applicant.

68. Counsel for the union provided the Board with a brief history of section 11 from its inception in the Act (as it then was) as section 7(a) in 1975. He pointed out that, despite legislative developments since then, the test to be applied in determining whether the vote is a true expression of employee wishes is still relevant today in applying the current section 11. The test was and remains an objective one. The Board determines on the evidence adduced whether or not, on an objective assessment and without regard to the subjective views of the employees

themselves, the true wishes of the voters have likely been ascertained: *JAK Electrical Contractors Limited, supra*. Counsel for the company did not take issue with these principles.

69. As pointed out in a number of the authorities cited in this decision, the Board has granted remedial certification under two broad categories: one, in circumstances where an employer has linked risks to job security with unionization; or second, where the cumulative effect of a range of unlawful employer acts, none of which in isolation would warrant automatic certification, would be to undermine the employees presumed confidence in the rule of law. This case falls into the first category. We have found violations of the Act in respect of the written communications and the links made in those communications between unionization and job security.

70. Generally, employees know they are vulnerable to the authority of their employer. If there was any doubt on that score in this case, Mr. Caines made it abundantly clear in his first memorandum when he asked employees why they would consider giving authority "to people you don't know and who don't rely on Boehmer Box for their livelihood?" Mr. Caines' unlawful comments alluding to the risks of unionization must be viewed through the lens of this reality. We have no hesitation, therefore, in concluding that the company's linkage of unionization with plant closures and job loss compromised the true wishes of the employees as expressed in the representation vote. Accordingly, the union has satisfied subsection 11(1) of the Act. We find that the true wishes of the employees were not reflected in the representation vote. The question remaining is how to remedy the company's violation.

71. Section 96(4) of the Act confers upon the Board an extensive range of remedial responses to the unlawful conduct of persons, employers and trade unions. Section 11(2)(c) mandates that the Board consider and reject all the remedial options available to it before it exercise its discretion to certify a trade union despite the results of the representation vote. But as the Board pointed out in the following passage from paragraph 159 of the *JAK Electrical* case cited previously:

> 159. ..., even the broad remedial powers exercised by the Board have practical limitations. In certain circumstances, it is not possible to magically return the genie back into the bottle, particularly where the employer has broadly communicated a threat of job loss as a consequence of unionization. In those circumstances, one could fairly question the ability of the Board to eliminate the effect of such threats from the minds of the employees. It simply may not be possible to fashion a remedy that will neutralize the memories of the employees affected by threats of job losses. Accordingly, only when the Board is satisfied, on balance, that a remedy or series of remedies can be devised which will fully and completely counter the effect of the contraventions of the Act, will those remedies be imposed when the circumstances would otherwise lead the Board to certify automatically. It must be remembered at this juncture that it is important that remedies ordered by the Board be effective. If the remedy ordered by the Board is insufficiently curative, the effect is to erode the integrity of the Act (see the comments of former Chair George Adams in "Labour Law Remedies", in Swan and Swinton, *Studies in Labour Law* (Butterworths), at p. 59), and to eliminate the substantive purpose of section 11 of the Act.

72. In this case, counsel for the company argued that a second vote would counter the effects of Mr. Caines' remarks if the Board found them unlawful. Remedial certification would not, in his submission, be appropriate in this case for a number of reasons. First, Mr. Caines' communications were not as egregious as the circumstances in the decisions cited by counsel for the union in which remedial certification was granted. There were no captive audience meetings,

and no evidence of any management hectoring of the employees. Second, there has been a lengthy history of failed union organizing drives in this workplace, and it would offend good sense to certify the union in circumstances where the employees have repeatedly voted against unionization. Third, given that well over 18 months will have elapsed from the first representation vote and a possible second vote, there is no reasonable prospect that the voters will continue to have in their minds any anxiety over Mr. Caines' comments when they enter the polling station to cast a ballot.

73. Our task is to determine if there are remedies other than certification available to counter the effects of the company's communications that we have found constituted a violation of the Act. Assessing the relative egregiousness of the offence in this case compared to the circumstances in other Board decisions does not provide a particularly helpful means to deal with that issue. It is true that Mr. Caines' memoranda were not accompanied by other related misconduct on the part of the company prior to the vote. On the other hand, the company's literature went to each and every employee in the organization. We have to assume that, given the source of those documents and the subject matter, they were widely read by most if not all the workers. Furthermore, we have found that in all probability the company had some role in facilitating the circulation of Mr. Foster's letter.

74. The company's history with failed union drives is a factor to take into account in the exercise of our remedial discretion under section 11. As far as we know, the employees' true wishes were reflected in those votes. At those junctures, the employees ultimately did not wish for representation by a trade union. Of course, what differentiates this organizing campaign from the others is the employer's unlawful behaviour, which in our view, based upon an objective assessment, would likely have unduly influenced the voters to fear for their future. While we are mindful that employees of the company have thrice rejected unionization, in our view that factor does not outweigh the impact of the company's misconduct in this case and thereby tip the balance in favour of a second representation vote as urged by the company.

75. Finally, we reject counsel for company's assertion that, in fashioning the remedies, we ought to take into consideration the length of time that has passed since the representation vote. For one thing, such an approach might motivate a party to engage in tactics to draw out litigation before the Board. Secondly, there is no factual basis or jurisprudential principle to support the notion that in matters of labour relations time heals all wounds or that the memories of employees, once threatened, are short.

76. No other remedies short of remedial certification, other than a second vote, were submitted by the company for our consideration. We conclude that a second representation vote is not sufficient to counter the effects of the employer's misconduct. Nor, in our view, would the Board's other customary remedies (directing the employer to post notices, to provide copies of the decision to employees, to permit the union an opportunity to meet with the employees and determine the best timing for a vote), in combination with a second vote, adequately respond to the threats raised by the employer's written communications. Those communications linked the viability of the enterprise, a subject which an employer is uniquely qualified to comment upon, with unionization. Mr. Foster's anonymous letter warning of the possibility of the closure of the business circulated throughout the plant for two days. Surely in such circumstances employees might well conclude that, only with management's tacit approval could an anonymous communiqué travel throughout the facility with the ease it did. Mr. Caines' second communication following Mr. Foster's unsigned letter did nothing to distance the company from Mr. Foster's warnings, and in fact, implicitly endorsed them by referring to other unionized plant closures. That had the probable effect, in the minds of the employees, of associating the

selection of a bargaining agent with job loss. The company's actions negated any real choice between unionization and a non-union workplace. Even in a second vote scenario, the employees will likely feel compelled to vote only one way, against the union, because as a direct result of what the employer has told them they fear that, otherwise, they may lose their livelihood. Nor will a mere decision of the Board or a Board notice telling the employees that their employer breached the Act likely restore the employees' free will, unfettered by fears of future plant closure. Certainly, the union is in no particular position to persuade the workers that the threats to job security were empty and without any foundation. So, it is not clear to us that providing the union with liberal access to the employees for the purposes of communicating with them prior to a second vote will likely undo the effects of the company's threats to job security.

77. For these reasons, we are satisfied that the union ought to be certified pursuant to section 11.

78. Counsel for the applicant advised us in final argument that the union was agreeable to the company's proposed bargaining unit. Consequently, a certificate will issue to the applicant in respect of the following bargaining unit which we find appropriate for collective bargaining:

> all employees of Boehmer Box LP in the City of Kitchener, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff.

79. Copies of the posting attached to this decision as Appendix IV, together with a copy of this decision, are to be posted in a prominent place at the employer's plant and warehouse and to remain posted for a period of 30 calendar days from the date of this decision.

"Patrick Kelly"
for the majority

DECISION OF BOARD MEMBER J. A. RUNDLE: March 3, 2010

80. I disagree with the majority's conclusion that the Employer has contravened the Act. The results of the vote denying the application trade union certification should stand. I do not think that the conditions under s. 11(1)(a) [this is, the true wishes of the employees in the bargaining unit were not likely reflected in a representation vote] has been met. Further and alternatively assuming s. 11(1)(a) is met, I believe that an order under s. 11(2)(b) [another vote], along with the other directions is an appropriate exercise of the Board's discretion given the circumstances of this case which were neither egregious nor flagrant and do not call for remedial certification overriding the results of a vote by the majority of the workforce.

81. This application concerns a workforce that has been through two prior organizing drives by the applicant, union in 2003 and 2004. Most personnel are long-service employees of the Company. Many were through at least one of the earlier drives. This workforce has a hard-working labour-management Committee operating for years and with some of its employees members well-known Union supporters. This is also a workforce extremely well-versed in the ways of an organizing campaign. All of the employees knew there was going to be a secret ballot vote and many would have had the experience of voting in the prior votes. The employee

understood that signing a membership card did not mean they were committed to vote for the Union. They could have expected, based on the past, that results of their vote would determine union representation. With this history it should be taken as a given that the employees understood the privacy of a secret ballot vote.

82. Most important this was an open campaign i.e. the workforce had a good knowledge of who supported the Union and who did not. The employees, both supporters and non-supporters, were actively engaged in the campaign. There is no evidence that individuals were disciplined for expressing their views.

83. The timing of the organizing campaign was deliberately chosen by the applicant to capitalize on the employee's displeasure with the employer's decision to change to a Sunday night start up [shift start change]. This shift start change was more likely than not to have been the major reason for the employee's decision to sign union cards. The reversion decision (return to the *status quo* re shift start time) by the employer made prior to the commencement or knowledge of the union's campaign was delivered to the employees coincident with the start of the organizing drive. The reversion decision was clearly significant to the employees. The evidence shows that the employer made this change after receiving many employee complaints. I have no doubt that the employer's decision to revert to the old schedule was a turning point in the minds of many employees. Accordingly, this action by the employer in all likelihood affected the wishes of the employees and caused support for the union to decrease.

84. It is my view that on a balance of probabilities the true wishes of the employees were likely reflected in the representation vote held on May 15, 2008. I base this on the following factors: first, the result is consistent with the union's loss in three previous representation votes, the last two with the applicant (s. 11(4) allows consideration of these votes). In 2004 support went from 47% membership to 38% in the vote; in 2003 support went from 52% membership to 40% in the vote; in 1997 support went from 44% membership to 17% in the vote. In my view past behaviour is often a likely indication of future behaviour; particularly, in this case where we have a stable group of employees and an important issue such as the shift change reversion. Given that the employees failed to support the union on three previous occasions it is impossible to say it is improbable that employees would again choose not to support the union a fourth time for entirely legitimate reasons. In 2003 and 2004 the Union was only able to garner an average of 39% of the ballots cast. On this basis alone (past employee conduct) I would say the true wishes of the employees were likely reflected in this representation vote that is no more than a pattern of behaviour.

85. Tellingly and consistent with the "natural" tendency for the Union support to trail off there was specific evidence from the Union that a drop in support often occurs between card signing and a vote. A signed membership card does not equate to a vote for the Union. Here, while the drop appears to have been more substantial than previously (66% membership to 33% in the vote) there still exists; in my opinion, the likelihood that the tendency for support to drop, along with the drop in support for the Union as a result of the reversion of the shift change, both of which were enough to cause the union to lose.

86. I disagree with the majority's determination that the job security issue originated with the employer. This is difficult to accept in light of Mr. Foster's letter, and other employee campaign literature that preceded the employer's first mention of job security. From Mr. Foster's letter:

> "The Union has already stated that they will not fight for wages or benefits, so what are they going to do?"

From the "Just Say No literature":

> "Job Security – be reliable, do your job efficiently, this shouldn't be a problem".
>
> "Better Wages" – Comparable companies under this union are generally lower".

In the "heat" of a union campaign how can it be an unfair labour practice for an employer to take up an issue it sees in an employee letter? There has been no finding, nor could there be a finding, that the content of Mr. Foster's letter and other employee campaign literature was induced by the Employer. Mr. Foster's evidence provided no proof of Employer participation in the composition of his letter. Why then can't an employer lawfully express a view on the campaign of the Union as described by Mr. Foster?

87. The content of Mr. Foster's letter and the legitimacy of the employer's reaction is a separate question from whether the employer acted quickly in response to the union's demand that the letter be removed from the workplace. The majority draws a general negative inference from "unanswered questions" on the part of Mr. Foster. What the "unanswered questions" are and what importance they have is not stated by the majority. In a process that is fact and evidence driven I am unclear how one can conclude anything in the absence of drawing a specific inference from the evidence. It was not the Company's responsibility to explain the circumstances surrounding the formulation of Mr. Foster's letter. It was not the Company's letter. Neither can the Company be held responsible for the distribution of a letter they did not control or author. The union bears the onus at least to cross-examine Mr. Foster to give something the Board can draw inferences from – providing an explanation for these matters or provoking evidence to show the content of his letter did not reflect the union campaign. This onus, in my view, they clearly did not meet.

88. Quite apart from the majority's conclusion of there being an unfair labour practice committed by this employer, my greatest concern is the remedial response by the majority to these findings. This was a very active campaign in which the Union, employer and most importantly the employees, were fully engaged. The employee letters thoughtfully expressed their views and displayed a knowledge of their rights not often found in the average workplace. I would attribute this awareness to their involvement in the previous union organizing campaigns. The workforce displays an understanding of both the Union's organizing strategy as well as an appreciation of the Company's role in the campaign. This workforce was not naïve about the decisions they had to make. The majority's approach to the events of this organizing campaign is paternal and out of step with the realities of the situation. (Letters attached as Appendices V and VI.)

89. Even if the conditions under s. 11(1)(a) are met, the combination of the difficulty in this case in determining what the true wishes of the employees really were affected by, coupled with the employer's behaviour being a low-grade crossing of the presumed boundaries for expressions of its views makes remedial certification unwarranted. The behaviour is simply not, as the cases have shown, egregious. There have been no discharges; there have been no captive audience meetings; there have been no physical threats; there have been no lay-offs; there were no questions or interviews about who signed or did not sign membership cards; there was no increased activity by plant management on the shop floor.

90. On an egregiousness scale this unfair labour practice is not comparable to any of those cases that were the foundation of prior decisions automatically certifying a Union applicant. See *Mana Cleaners*, [1982] OLRB Rep. Dec. 1848; *East Elgin Concrete Forming*, [2007] OLRD No. 3166; *Miller Group*, [1997] ORLD No. 1237 (this case involved the circulation of letters similar to those in the present case and the Board did not order remedial certification) *Palladium Catering Services Corp*, [1997] OLRD no. 309; *Price Club Westminster*, [1994] OLRB Rep. Aug. 1029.

91. In a period of time when the Board did not have the power to automatically certify, it is instructive to look at *Baron Metal Industries Inc.*, [2001] OLRB No. 1210. In this case of 90 employees in the bargaining unit, 6 employees did not vote, the vote result was 42 for the union and 42 against the union within the context of a severely poisoned work environment severely poisoned by terrible unfair labour practices. As a result of serious workplace intimidation and threats of the most egregious nature a second vote and various remedial orders were directed by the Board. The second vote results were "inconclusive" which translates that there was no overwhelming loss or negative change away from membership support. This supports my theory that the remedial orders of the Board can be effective in even the most egregious cases. The case before us is not in the category of *Baron Metals*. Certainly in the case before us we should ask the question – why can we not contemplate the effectiveness of extensive remedial orders to clear the air for a genuine representation vote.

92. I dissent from the majority with respect to the remedy because the breach they found does not require the vote results to be set aside and certification granted. It is not egregious [or is even close to cases where certification was granted without a vote]. It cannot be determined whether the vote results represented a significant shift in employee's views because they had lost their belief in the ballot box protecting them. It makes more labour relations sense to order another vote. If the employees vote to support the union then it will be clear that the union has the support of a majority of employees and the likelihood of bargaining a collective agreement is enhanced. However, if the Board orders certification after the vote rejecting the union and the union does not have the support of the majority of employees, then the likelihood of bargaining a collective agreement is significantly diminished.

93. I would find no violation of the Act; however in the alternative, if the employer's conduct is an unfair labour practice, this is a circumstance where the Board should order another representation vote with the following conditions:

(a) forwarding to the union a list of employee name and addresses;
(b) the union be allowed to meet with the employees on company time at a time deemed appropriate by the union;
(c) a posting by the Board;
(d) a second vote to be held at a time of the union's choosing.

"J. A. Rundle"
Board Member

File No. 0474-08-R

The Labour Relations Act, 1995

Before the Ontario Labour Relations Board

Between:

Communications, Energy and Paperworkers Union of Canada,

Applicant,

- and -

Boehmer Box LP,

Responding Party.

Certificate

Upon the application of the applicant and in accordance with the provisions of the *Labour Relations Act, 1995* THIS BOARD DOTH CERTIFY Communications, Energy and Paperworkers Union of Canada as the bargaining agent of all employees of Boehmer Box LP in the City of Kitchener, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff.

This certificate is to be read subject to the terms of the Board's Decision(s) in this matter and, accordingly, the bargaining unit described herein is to be read subject to any qualifications referred to in the said decision(s) of the Board.

DATED at Toronto this 3rd day of March, 2010.

ONTARIO LABOUR RELATIONS BOARD

Tim R. Parker

Registrar

APPENDIX I

TO: [name of employee]

FROM: Mark Caines, President and COO

DATE: April 25, 2008

RE: YOUR RIGHT TO KNOW – YOUR RIGHT TO CHOOSE

As you are well aware, a union is, once again, attempting to ask you to sign a membership card in order to become your official bargaining agent. You have the right to choose to join, or not to join a union. You also have the right to decide whether you want to remain, or not to remain a member of the union, if you have already signed a membership card. Of course, each of you has every right to act according to your best judgement. That is your democratic right.

I am writing this memo to each of you because I feel that this is something very important that must be addressed in an open and factual manner. Rumours, which may sometimes be inaccurate, should not be the only source of information that is available to you.

TO CHOOSE TO REFUSE - YOUR RIGHT

No one representing the union may interfere with you in reaching your decision as to whether or not you should join the union. That is the law in Ontario. You should make your decision voluntarily. The law states that no person may intimidate or coerce another employee in making his or her decision. This applies to union organizers and any fellow employees who are assisting union organizers.

THE ORGANIZING CAMPAIGN: WHAT IS LIKELY TO HAPPEN

The union may promise you many things such as more control over the workplace, higher wages, better benefits, or greater job security. Promises are easily made. You should bear in mind that all changes in working conditions and wages would be subject to negotiation between the union and your employer and would not become effective unless agreed upon by both sides. Job security comes to Boehmer Box through all of us working together as a team to ensure that our organization is a competitive and successful business, providing our customers with the service and quality that they desire. This is particularly important during difficult market conditions, such as the current conditions being experienced by the grocery retailers, our customers and Canadian manufacturers in general. It is not the union that pays your wages and benefits. It is our customers through sales of folding cartons to them and their payment to the company for the goods and services they ordered. There is absolutely no guarantee that the union will get what it may promise to you.

CERTIFICATION AND MEMBERSHIP: WHAT DOES IT MEAN TO SIGN UP?

Before you commit yourself, you should carefully consider the union's constitution and by-laws. You can and should ask to see them. Once you sign a union membership card it becomes the property of the union and the union does not have to give it back to you even if you ask for it back.

STOP AND THINK

Before you sign a union card remember:

- It may lead to certification.
- Once a union is certified it is very difficult to decertify the union.
- Look closely at the efforts, successes and structure of your employee committee.

UNION DUES: WHAT DOES THIS MEAN?

Everyone has heard about the money that unions accumulate. Where do the unions obtain their money? Primarily from you, the employees - where else? A primary source of union funding comes from union dues. If the union obtains bargaining rights on your behalf and asks for dues deductions, everyone will have to pay union dues. This is so whether or not you become a member of the union. That is the law in Ontario.

One of the problems is that you never see the money that you pay as dues to the union. This money will be deducted automatically from your pay cheques and forwarded to the union. The union will be able to use this money to support other employee groups outside of Boehmer Box, outside Kitchener and for any expenses that it incurs all over the Province. Furthermore your dues would be used to finance matters that the union considers to be important, matters in which you may have no personal interest or where you may not agree with the union's position. Is it reasonable to expect a group of employees in one company to support another group of totally unrelated employees, especially when these employee groups may not have common interests or a need to resolve similar issues?

As well, a good part of your hard earned money that would be deducted from your pay cheques as dues would be used to pay the salaries of union officers, union organizers, and other union head office expenses.

UNION MEMBERSHIP: IS IT A MUST LATER ON?

If the union becomes your representative, you may have to become members of the union whether you want to or not. Whether or not everybody has to become a member of the union would depend on the kind of contract that the union negotiates with your employer. If the union were to obtain the right to represent the employees the union would try hard to get what is called a "closed shop" or "compulsory membership", provision in a collective agreement. If the union were successful in getting such a provision every employee would have to become a member of the union as a condition of employment. You should know that the union may require its members to pay initiation fees, union dues, fines and other special assessments. You as a member will have to personally pay these fees in order to keep your membership in good standing. This means that if any employee did not pay union dues, did not join the union or failed to keep his or

her membership in good standing, the union would demand that Boehmer Box terminate that employee.

DECERTIFICATiON: IT'S NOT EASY

If you were to give the union a chance to act on your behalf, and you subsequently decided that you didn't like the union, or didn't like the Bargaining Committee could you get rid of the union?

It is very difficult for employees to get rid of a union that they do not want. In most cases an application like this must be brought within the last three months that a collective agreement is in effect. In the meantime, you could be paying union dues for a long time to a union that you do not want to support.

THE EMPLOYER'S RIGHT TO SPEAK OUT

You may wonder why we have not aggressively expressed an opinion as to what decision you should make. The law severely limits what and how much an employer (unlike the union) can say about unions to its employees. We are interested and we are concerned. We are concerned with your welfare but we would not want to say anything that might be considered to be an attempt to interfere or unduly influence your decision. We want the decision to be your own, but we want your decision to be an informed decision.

YOUR REASONS TO REFUSE TO JOINING A UNION

GOOD COMMUNICATIONS - IT WORKS AND IT'S THE BETTER WAY

COMMUNICATING DIRECTLY WITH OUR EMPLOYEES

We feel that nobody will ever represent you better than yourself. We maintain an open door policy for that reason giving you the opportunity to discuss issues and business conditions directly with all levels of management. You have the opportunity through Town Hall Meetings and Breakfasts with Mark to speak directly with senior management about issues and concerns. Issues that are of a general nature as well as ones that are personal to you. Employees can bring matters directly to management or they can choose to work through the Employee Committee. That process has worked and continues to work.

YOUR EMPLOYEE COMMITTEE

The Employee Committee continues to meet on a regular monthly basis and deals with all of the issues you bring to their attention. Once a year management shuts down all the shifts for an hour so that the Employee Committee can meet with you as a group and compile all of your collective concerns. Your Employee Committee was voted in by you and is comprised of Shaun Allishaw, Tom Murray, Nathan Knowles, Tim Balfour, Ned Kunalic, Terry Cameron, Craig King and Ryan Donahue.

The Employee Committee has brought to our attention many outstanding issues, which has enabled us to resolve things in an efficient, fair and effective manner taking into account your input. We have also been able to work collectively with the Employee Committee to explain business decisions and the rationale for changes. The minutes of Employee Committee Meetings are posted so that you can see both the issues they have raised on your behalf as well as the results of their efforts. The following are examples of some of these issues/workplace

improvements that have been successfully raised, resolved or implemented with the cooperation of the Employee Committee:

- Your Employee Committee worked with management to receive approval from the Federal Government for work share for 24 weeks. This has been a very effective salary bridge during the difficult economic times our industry is facing.

- Your Employee Committee made the recommendation for increased ventilation which led to the installation of the large screen doors.

- Your Employee Committee worked with management to ensure that all Boehmer Box employees received at least one week of vacation during the summer, and one week of vacation at Christmas time.

- Your Employee Committee worked with Management to implement a Rewards and Recognition program for employees to recognize their years of service with the company.

- When shifting was an issue your Employee Committee worked with you to determine the best possible solution given all of the various preferences that were raised by you. The present shift change policy has a frame work that was a compromise from all of the different requests that were received from all the employees. It even allows employees to have fixed shifts if they can come to agreement with their co-workers on opposite shifts and negotiate their own deals. A union environment will not have this type of flexibility.

- A very important fact that should not be overlooked is that in the past year there have been NO issues that were raised by the committee that were not resolved in favour of the employees. If there are issues of concern then these should be addressed through the Employee Committee. You have a mechanism in place that has a proven track record. **Why would you want to pass that responsibility over to people you don't know and who don't rely on Boehmer Box for their livelihood?**

We encourage you to bring your concerns and problems to your elected Employee Committee so that we can deal with them quickly and effectively. We encourage you to support and help your Employee Committee so that collectively we can help make our organization a strong and secure place to work. It is important to note that those employees who have traditionally promoted a union have also had the opportunity to be part of the Employee Committee and contribute in a positive manner to the betterment of the work place at Boehmer Box.

A NEED FOR MUTUAL TRUST AND RESPECT

I would urge each of you to give this very important and serious matter a great deal of thought. Effective and direct communication is an important element of any relationship. It is even more so when faced with business challenges that must be addressed. Boehner Box is not alone in facing the challenge of current market conditions. We continue to take the steps necessary to

ensure our long-term success in a very competitive market sector. The kind of working relationship that we have, and the improvements that we have implemented in the workplace, reflect an atmosphere where open door communication has been encouraged. We understand that not every decision we make will be embraced by all employees. However, what is important is that we have the process to communicate about the reasons for decisions and the remedies for business challenges.

If we work together to make Boehmer Box a better place to work, our organization will be a better place for our customers to do business with so we can grow and sustain our business.

Mark Caines

"Mark Caines"

President and COO
Boehmer Box

APPENDIX II

TO: ALL INTERESTED BOEHMER BOX EMPLOYEES
FROM: Mark Caines
DATE: May 9, 2008

A UNION CERTIFICATION VOTE WILL BE SCHEDULED FOR NEXT WEEK. WE WILL POST THE DETAILS OF THE DATES AND TIMES AS SOON AS WE HAVE THEM CONFIRMED FROM THE ONTARIO LABOUR RELATIONS BOARD.

YOU HAVE RECEIVED INFORMATION FROM THE CEP AND FROM THE COMPANY. PLEASE READ THE FOLLOWING IMPORTANT INFORMATION SO THAT YOU CAN MAKE AN INFORMED DECISION AND VOTE ABOUT HOW WE WILL WORK TOGETHER IN THE FUTURE.

The CEP has made a number of representations and promises to you about the benefits of having a union in the workplace at Boehmer Box. They claim to have a strong majority of cards signed and want to negotiate improved wages and benefits and job security. **But are you really hearing all the facts?**

Have they told you that Boehmer Box employees earn more in hourly wages than Cascades employees represented by the CEP in 74% of hourly wage classifications, in all cases by up to almost $7 per hour more than Cascades CEP employees? The CEP couldn't do as well for their members at Cascades' plants as Boehmer Box employees currently have! Think about that and think about what promises mean versus results seen.

The CEP has promised that the starting point for negotiations is the present compensation package. With folding carton plants closing and the economy in a downturn, how realistic are these promises? Boehmer Box employees could pay real dollars of their hard-earned wages in the form of union dues in the hope of negotiating something that may never be achievable or may not even cover the cost of the union dues. **There is no guarantee the union can get everything, or anything, that it promises you. It is not the union that pays your wages and benefits.** The pie does not necessarily get bigger or divided better simply because a union is involved. As a business, we have to live in a world of competitive realities and it is our customers who determine the size of the pie that can be divided. You have seen the front-page news about how many manufacturing plants are closing. It's a company's customers that determine the businesses that survive and thrive and those that don't because our customers **CHOOSE** to do business with us based on what we deliver to them in quality and service for a market price. After all, it is our customers who pay our bills.

Have the CEP also told you about the jobs lost and CEP members put out of work when many plants represented by the CEP such as Abitibi, Bowater, Crown Packaging, Cascades closed? Have they told you what they did for the CEP members after these plants closed? **If not, why not?**

Have they told you about how many CEP members they have today in these organizations compared to five years ago, or two years ago? Job security doesn't come from a union. Job security rests with serving our customers and growing our business. This is particularly true in a difficult market and weak economy. We have to make sure that we have people in place that have our customers' interests at heart. That is what protects jobs – giving our customers what they need, when they need it and at a competitive price.

The CEP has promised protection of wages and benefits. Have the CEP told you that during CCAA Strathcona Paper's workers represented by the CEP agreed to freeze their defined benefit pension plan and that these were benefits given up? Did Boehmer Box employees give up any benefits at that time? The answer is NO. Why did this happen? Because economic reality determines if companies survive. Not unions. If wages and benefits are too high and customers can't afford to pay for them, then companies don't survive. Job security does not rest with words. It results from deeds. You want a management team that understands economic reality and makes the difficult but right decisions to scale the company's cost structure to ensure long-term competitive viability.

The CEP has stressed the value of having a contract with the Company in place. Each and every employee at Boehmer Box has a personal contract with the Company today by virtue of being employed at Boehmer Box and there are no dues to pay. Your rights are set out in the law. However, if a union is certified, it is the union that will have the contract with Boehmer Box, not the employees. Employees would have a contract with the CEP and be bound by its constitution and by-laws. Did the CEP offer to negotiate the terms of their contract with you? How democratic is this?

The CEP has said they have a strong majority of cards signed and want to bring on the vote. Many people feel pressure to sign a card when approached by a fellow employee during a union drive. But that is not the same as a vote on a secret ballot. In the past we have seen that many people that signed a card stopped and thought about the long-term implications and the cost to them of having a union before they voted. Then they voted NO. Boehmer Box has been in this situation before, with the CEP claiming to have a strong majority of cards and yet when the vote was taken, it was a resounding NO!

The CEP has said that management only listens when the CEP is involved. This is simply not true. The democratically elected Employee Committee at Boehmer Box has been instrumental in providing valuable input that has resulted in important changes in the workplace. These changes have been done with consultation and input of the Employee Committee.

The CEP asks whose interest management has at heart. Think about it. Management has the long-term interests of the employees at heart by making sure we have a viable business to serve our customers and pay wages and benefits. Boehmer Box's volumes are up this year over last. We have secured new business. We are doing what some of our competitors such as Somerville Packaging, Cascades, H.J. Jones and Crown Packaging failed to do. That is, to make sure that the business is sustainable with customers who can provide the job security that we all seek.

We invite all employees to join us in continuing to make our business successful. Good teamwork and communication is at the root of all successful companies. We continue to build on the strength of our company and the dedication of our employees. I personally feel that open communication works best when people communicate freely and directly without the involvement of a third party with a separate agenda. Every employee within the proposed bargaining unit has the legal right to vote. Every vote is important. I urge you to make sure you

vote. Your vote can make the difference in how we will communicate and work with each other in the future. Don't let other people decide your future. Make sure you do! Vote!

"Mark Caines"

Mark Caines,
President & COO
Boehmer Box LP

APPENDIX III

May 14, 2008

TO ALL EMPLOYEES OF BOEHMER BOX LP

Tomorrow, May 15, 2008, is a very important day in your relationship with your Company. It is **your** decision day. Tomorrow morning, between 6:00 a.m. and 8:00 a.m. and tomorrow afternoon, between 2:00 p.m. and 4:00 p.m., the Ontario Labour Relations Board will conduct a secret ballot vote in the main lunchroom to determine if you want a union to represent you in your future relationship with your Company.

When you go into the lunchroom to vote, a representative of the Ontario Labour Relations Board will hand you a ballot. You will then go into the private voting booth and mark an "X" in the appropriate box, then drop the completed ballot in the box. To **Vote for No Union**, simply mark an **"X" In the NO BOX.**

No matter what your position prior to the Vote, you can vote **NO!!** Even if you have signed a Union Card you can vote **NO!!** It is a secret ballot vote. No one will know how you vote. If 50% + 1 of those votes cast are **NO**, then there will **NO UNION IN OUR COMPANY!!!!**

IT IS IMPORTANT THAT EVERYONE VOTES.

EVERY VOTE MATTERS

Take time to think carefully about your decision as it will affect us all for a long time. It should not be taken lightly.

BEFORE YOU VOTE ASK YOURSELF:

WHAT DOES THE CEP GUARANTEE?

THE UNION WITHOUT ANY HESITATION CAN 100% GUARANTEE THAT THEY WILL COLLECT MONEY FROM YOU. Once a union is certified and signs a collective agreement, the union can demand that an employer deduct union dues from the employee's pay cheques and the employer must do so, regardless of any employee's wishes.

ARE ANY OF THE PROMISES THE UNION HAVE MADE REALISTIC?

The **TRUTH** is that the CEP ***CANNOT*** **GUARANTEE WAGE INCREASES OR ANY OTHER CHANGES.** If the union does get in, the union and Company will try to negotiate a first collective agreement. This means that **BOTH** parties have to agree to any changes. **NO MATTER WHAT THE CEP PROMISE YOU, A UNION *CANNOT* MAKE MANAGEMENT AGREE TO MAKE CHANGES OR TO PAY ANY MORE THAN IT IS WILLING OR ABLE TO PAY.** Decisions about wages will not be based on threats from the union. Ask the union organizers and those supporting them what they can assure you they will accomplish on your behalf.

WHAT ABOUT MANAGEMENT RIGHTS IN A UNION ENVIRONMENT?

A collective agreement will have a management rights clause that clearly establishes management's right to run the business. The following is from the CEP collective agreement with Strathcona Paper "it is the exclusive function and right of the Employer to operate and manage its business in all respects, except where any right to do so has been specifically restricted by the terms of this Agreement. **The Employer reserves the right to formulate and implement, from time to time, rules, regulations, policies and procedures** regarding the use and operation of equipment and plant facilities and the conduct of employees in the plant."

WHAT ABOUT SENIORITY?

Here are the **FACTS**. 112 hourly employees have over 5 years of seniority with the Company and 62 hourly employees have over 10 years of seniority with the Company. Experience, skill and ability all play a part in making sure that we produce a high quality product at a competitive price for our customers. As you know it is our ability to work together to meet our customers' expectations for quality, service and price that ensure job security. We cannot compromise our ability to meet customers' needs. Customers **CHOOSE** to do business with us and if we let them down, they can elect to change suppliers. Chapman's Ice Cream was a large account that Boehmer lost due to quality issues. Recently, we lost the Novelis account due to quality issues. We can't lose customers because we fail to deliver the quality and service they need. There is no job security in a business model that doesn't ensure quality, service and price meet customer expectations.

WILL YOU AND YOUR FAMILY BE BETTER OFF WITH THE CEP UNION?

WE DO NOT BELIEVE THAT YOU WILL BE. All you have to do is take a look at newspaper articles concerning unions and our industry to know.

The TRUTH is that the CEP have a real financial interest in getting certified. **THEY STATE THAT UNION DUES ARE APPROXIMATELY 2.5 TIMES YOUR HOURLY WAGE PER MONTH!** Ask yourself who pays the union organizer's salary, who pays for union halls, who pays for union lawyers, who pays for union office staff, WHO PAYS AND KEEPS PAYING? – IT'S PEOPLE LIKE YOU IF YOU VOTE FOR THE UNION.

HAS MANAGEMENT REACTED LIKE THE CEP SAID IT WOULD? DO THEY EVEN KNOW THIS COMPANY?

The TRUTH is that we have encouraged employees to make up their own minds by asking questions and looking at the union's constitution and their history and reputation and what they have done for other plants that they represent. We have encouraged employees not to be intimidated or threatened by the union. The union may promise you many things will be better if they are certified, but the only thing that is for sure is that you will be paying union dues if the union is certified and a collective agreement negotiated. Promises are easily made. What is the track record of keeping the promises? Union organizers and those supporting them will have to tell you that there is absolutely no guarantee that the union will get everything that it may promise you.

WHICH EMPLOYEES ARE LEADING THE UNION DRIVE?

Take a good hard look at the individuals pushing for the CEP. Are these the type of individuals that you trust to shape your future employment relations? Have they ever worked in a union plant before? Are they individuals who take the time to think before they act? Consider who is pushing for the union and ask yourself – what type of leaders these people would be? Have they been in a leadership position before? Do you trust them to look after your interests? OR ARE THEY ORGANIZING FOR THE UNION TO LOOK AFTER THEMSELVES?

IT IS IMPORTANT THAT EVERYONE VOTES.

DO NOT LET YOURSELF BE INFLUENCED BY OTHERS.

MAKE UP YOUR OWN MIND.
THE VOTE IS BY SECRET BALLOT – MAKE THE RIGHT CHOICE

VOTE NO.

"Mark Caines"

Mark Caines
President & COO
Boehmer Box LP

APPENDIX IV

The Labour Relations Act, 1995

NOTICE TO EMPLOYEES

Posted by order of the Ontario Labour Relations Board

This notice has been posted in compliance with a direction of the Board, issued after a proceeding in which both the company and the union participated.

The Ontario Labour Relations Board found that Boehmer Box LP violated the *Labour Relations Act, 1995* by, among other things, threatening the employment of its employees. The Ontario Labour Relations Board further concluded that, as a result of these violations, the true wishes of the employees were not likely to be ascertained in the representation vote on May 15, 2008, and it certified the union as bargaining agent for the group of employees described as:

> All employees of Boehmer Box LP in the City of Kitchener, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff.

Employees in Ontario have these rights which are protected by law:

- To organize themselves;
- To form, join and participate in the lawful activities of a trade union;
- To act together for collective bargaining;
- To refuse to do any and all of these things.

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 30 consecutive days.

DATED this 3rd day of March, 2010.

APPENDIX V

Just Say No

As we are all aware the CEP has called for a vote to determine whether we will become unionized or stay as we are. As a group of concerned employee's, we feel that everyone should seriously think of the implications of voting for a union.

What guarantees have been given other then payment of union dues, what promises seem too good to be true and do you really want the people leading this drive to be responsible for our future. We have heard everything from more money to better job security to a more structured work week. To the best of my knowledge, half the people leading this drive have never even worked for a union, how they can say it would be so great without having ever experience it is beyond us. The self appointed leader and two others of this group have been working for Boehmer Box for a very long time and I'm sure if this place was as bad as they make it out to be they could have found work else where, but they haven't, they have stayed and worked and collected a pay check and now they want to put us all in jeopardy. We have people here at Boehmer Box who have worked in union shops and we urge you to seek them out and ask them their opinions, ask them if the union is so great why are they here, what happened to make them leave. As far as the promises of better things to come:

Job security – Be reliable, do your job efficiently, this shouldn't be a problem.
Better wages – Comparable companies under this union are generally lower.
More benefits – Our benefits are as good as or better than a lot of companies.

Remember, once a union agreement is in place, you are bound by law. The labor board will tell you that you must go through the union if you call for advice. Whatever is written in the contract is what you will have to live with until the contract is up and all your issues must go through your union steward. We have a committee now that is suppose to represent the opinions of the employees, has this committee done its job? Well if they had we probably would not be looking at a union vote, so why not hold an election and get the representation we want. We are sure that there are people on the committee that care but we are sure there are people that are on the committee just for the overtime and to get out of working. Why pay to have a third party take care of what we are more then able to take care of ourselves. There are labor laws to protect the workers and the labor board is a free service to all of us. A strong employee committee that is educated with the knowledge of the labor board and has the backbone to use it is what we need, **NOT** a union.

At the end of the day the final decision is ours as employees of Boehmer Box, don't be tempted by false hope or promises without guarantee and if guarantees are given ask for them in writing by the CEP because verbal guarantees are worthless. Think about what you have and whether you are willing to give it all up because by voting yes, that is the chance you will be taking. We really hope that intelligence will prevail and the final out come will be an overwhelming **NO** to union activity at Boehmer Box.

Employees Against Unionization for Boehmer Box

APPENDIX VI

Just a thought

Hello,

I just wanted everyone to stop and really put some thought into voting this Thursday for the future of Boehmer Box. I've worked for Boehmer for around ten years now and have seen a lot of changes. I consider myself to have a good relationship with my fellow employees some who have been here longer then I and others who are new. In my opinion, the one thing that we can continue to work on is the gap between departments. The union will NOT bridge that gap, and a union cannot work without that bridge. We Boehmer Box Employees can bridge that gap. The union sends out these memo's which state continuously We need change, We need to vote Yes to win, We need to better our lively hoods. With a union We can do better. The union doesn't know anything about Boehmer Box Employees. What we will be doing is paying their pay cheques with our money.

Lately, I've been thinking about what Boehmer Box has done for their employees. Most importantly they have put food on our tables. We have a great pension plan, great benefits and a great working environment/facility compared to the Belmont days. We have experienced some hard times and changes in the industry but we have stayed afloat and I do see light at the end of the tunnel. Don't get me wrong I do feel that Boehmer Box, like other facilities, have issues but I question if a union is the answer. All manufacturing facilities have there struggles but in comparison I believe we are better off. The next question people are going to ask me is "We've tried everything else, what can we do!". My answer will come.

The Last memo stated "It's time for a Real Employee Committee, it's called a union" Wow, isn't that an insult to us the employees who voted for our employee committee and most importantly to the rest of our Employee Committee.

The answer to the question above can only be answered by you and I, as Boehmer Box employees. Through strong participation with our Social Club, Safety Committee, Employee Committee, and in our day to day jobs tasks will inturn strengthen our moral which can always be improved. This is a personal choice. With good moral, positive thoughts and participation from everyone, everything else will fall into place.

In closing I would just like to say. I'm not a professional speaker, I haven't been approached by anybody regarding my opinions and I'm not telling you to vote yes or no. I would just like everyone to stop and think about the pros and cons as non-union Boehmer employee before making your decision on Thursday.

Your fellow employee

Mark Szymanowski