

APPENDIX "A"

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ONTARIO LABOUR RELATIONS BOARD

3317-07-R; 3318-07-U United Brotherhood of Carpenters and Joiners of America, Local 2486, Applicant v. **Southend Drywall & Acoustics Ltd.**, Responding Party.

BEFORE: Marilyn Silverman, Vice-Chair, and Board Members B. Roberts and R. Baxter.

APPEARANCES: Melissa Kronick, Gabe Parent and Scott Rudolf appearing on behalf of the applicant, Damien Buntsma and Jamie Weirmeir appearing on behalf of the responding party.

DECISION OF THE BOARD: March 17, 2010

1. These two applications were filed on January 25, 2008.
2. One is an application for certification filed under section 8 of the construction industry provisions of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"). The other is filed under section 96 of the Act and alleges violations of sections 70, 72 and 76 of the Act by the responding party, Southend Drywall & Acoustics Inc. (the "employer" or the "company" or "Southend").
3. The membership evidence filed with the application does not represent evidence on behalf of 40% or more of employees in the bargaining unit. The applicant ("the union" or "the Carpenters") asserts that its failure to obtain additional membership evidence is a result of the alleged violations. The applicant seeks certification under section 11 of the Act.
4. The standard ICI carpenters bargaining unit is:

all carpenters and carpenters' apprentices in the employ of the responding party in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the responding party in all other sectors of the construction industry within a radius of 57 kilometres (approximately 35 miles) of the City of Sudbury Federal Building, save and except non-working foremen and persons above the rank of non-working foreman.
5. The applicant's case is that the inside union organizer, Scott Rudolf was terminated when he began a card signing campaign at Southend. The union asserts that the owner and principal of Southend, Jamie Weirmeir, learned of Mr. Rudolf's efforts and fired him, thus ending the drive. The applicant says that other employees learned of the termination and were no longer willing to have any involvement with the union. The union says that the effect of Mr. Rudolf's termination was that employees feared for their jobs if they expressed interest in the union and, as a consequence, no order short of certification under section 11 of the Act would remedy the violation.
6. The responding party says that Mr. Rudolf was terminated for just cause. The company relies on the fact that Mr. Rudolf had an attendance problem, which they had warned him about in the past and, as a culminating incident, he was found by the employer drinking beer at lunch on a work day. Further, the employer says that there was no organizing campaign during

the relevant time. Accordingly, the employer asserts there was no violation of the Act and no remedy should be awarded. In the alternative, the employer says that remedial certification under section 11 of the Act is an extraordinary remedy and not one that should be granted on the facts of this case.

7. The Board heard evidence from six witnesses. They were Jamie Weirmeir, the owner of Southend; Ted Weirmeir, a drywall mechanic who is also Jamie's brother; Al Gingras, a supervisor; Scott Rudolf, the union organizer; Marcel Lalonde, a drywaller and former employee of Southend; and Gabe Parent, the outside organizer and union representative for the applicant.

Facts

8. Southend is a construction company operating in Sudbury. It is owned and operated solely by Jamie Weirmeir, who has run the company for six years. Southend employs mainly carpenters. At the time relevant to this determination, Southend was engaged in performing carpentry work on a project at Laurentian University in Sudbury.

9. Mr. Gingras was the supervisor at that site, running the day to day operations. Jamie Weirmeir says that his brother Ted Weirmeir works on the tools and is not supervisory. Ted Weirmeir says that he does not schedule, direct work, hire, fire or discipline. He is an experienced drywall mechanic. As a highly skilled worker, Ted Weirmeir has a high rate of pay. He has no financial interest in the company. Ted Weirmeir had been a supervisor years before but was no longer one at the time relevant to this application. Ted Weirmeir made clear in his evidence and conduct that he does not like unions nor does he like Mr. Parent, the applicant's business manager.

10. Mr. Rudolf was hired by Jamie Weirmeir on August 7, 2007 as an apprentice carpenter to be Ted Weirmeir's helper. Mr. Rudolf knew Ted Weirmeir as the two men had worked together previously for another employer. Mr. Rudolf came to the Southend job site in the summer of 2007 and asked Ted Weirmeir for a job. Ted Weirmeir referred Mr. Rudolf to Jamie Weirmeir. Jamie Weirmeir knew at the time of hiring that Mr. Rudolf was a member of the Carpenters. Jamie Weirmeir says that fact did not concern him nor did it deter him generally from hiring workers.

11. During the period of his employment, Mr. Rudolf missed a number of shifts. He missed work for 4 ½ days in September, ½ a day in October 2007 and 3 days in January 2008. There was never a consistent reason given for his absences. Jamie Weirmeir warned Mr. Rudolf about these absences. Mr. Gingras, in charge of the site, was frustrated with Mr. Rudolf's absenteeism. Mr. Gingras told Mr. Rudolf about this dissatisfaction, and in December 2007 Mr. Gingras and Ted Weirmeir had a discussion about terminating Mr. Rudolf. They decided not to do so because of the upcoming Christmas holiday. Mr. Rudolf was warned by Jamie Weirmeir in December 2007 about the missed shifts. Ted Weirmeir said that Mr. Rudolf was absent often. Ted Weirmeir knew one of the reasons for the absence was that Mr. Rudolf suffered from migraines. There were no written warnings or notifications given to Mr. Rudolf.

12. Mr. Rudolf knew Mr. Parent. In September 2007, Mr. Rudolf told Mr. Parent he was not interested in organizing for the union at Southend. As a consequence, no organizing efforts occurred from August 2007 until January 2008.

13. In January 2008, the events giving rise to these applications began. On Monday, January 7, Mr. Rudolf called in that he would be absent that day. He said he was out late at an NHL hockey game the night before in Ottawa and had a long drive home in a snow storm. In

cross examination, the responding party produced evidence that there was no NHL hockey game in Ottawa on that Sunday night. Although Mr. Rudolf gave evidence the game was the night before his phone call to work, he conceded that he made a mistake and the game could have been Saturday. In any event, he was in Ottawa for a hockey game that weekend and headed home Sunday in a snow storm.

14. On the following day, Tuesday, January 8, Mr. Rudolf attended at work and was told by Mr. Gingras to take the week off and to call Jamie Weirmeir the following week. Mr. Gingras was displeased about yet another absence, and wanted to terminate Mr. Rudolf at that time. Jamie Weirmeir was away that week so Mr. Gingras told Mr. Rudolf that Jamie Weirmeir would contact him. As a result, Mr. Rudolf did not work for the remainder of that week. Mr. Rudolf says he called Jamie Weirmeir on Sunday, January 13 regarding a return to work. According to Mr. Rudolf, Jamie Weirmeir said he would discuss a return with Mr. Gingras or Ted Weirmeir and call Mr. Rudolf back. Mr. Rudolf said Jamie Weirmeir called back and told Mr. Rudolf to report to work on Monday, January 14. Jamie Weirmeir denied these conversations.
15. On Monday, January 14, Mr. Rudolf attended at the site. There is no dispute that Mr. Rudolf worked Monday to Friday that week (January 14 to January 18). Jamie Weirmeir was not at the worksite until the Wednesday of that week and, when he attended at the site, Mr. Rudolf was working. Jamie Weirmeir said that he was confused as to why Mr. Rudolf was at work. Both Jamie Weirmeir and Mr. Gingras said they had not told him to work. Mr. Gingras said that he assumed that Mr. Rudolf was re-hired, but he did not call Jamie Weirmeir, when Mr. Rudolf returned, to verify if that was the case. When Jamie Weirmeir did come to the site he and Mr. Gingras discussed what occurred and determined that neither had hired Mr. Rudolf back. Jamie Weirmeir said that in that discussion the two men decided to let Mr. Rudolf work out the week and then let him go. Mr. Gingras' version is slightly different. He says that they decided to re-evaluate at the end of the week. In the end, neither Mr. Gingras nor Jamie Weirmeir said anything to Mr. Rudolf about his return to work. They let him continue working.
16. On Thursday, January 17 after work, Mr. Rudolf met with Gabe Parent of the union. Mr. Parent made notes of that meeting. They discussed some dissatisfaction that Southend employees had expressed to Mr. Rudolf about holiday pay. Mr. Rudolf said he was then interested in organizing Southend and he took union cards to bring to work the next day. Later that day Mr. Parent called Mr. Gingras to gauge his interest, since he had been a member of the union previously. Mr. Gingras acknowledged this overture by Mr. Parent to join the union. However, Mr. Gingras denies knowledge of any organizing taking place prior to Mr. Rudolf's termination.
17. On Friday, January 18, Mr. Rudolf approached some workers. One of them, Mr. Lalonde, took a card and then asked for another one later in the day. He said that he wanted to show it to someone else. Mr. Lalonde said that discussions had been ongoing that week about the union. Mr. Lalonde asked Mr. Rudolf if there would be a union meeting because he had questions. Mr. Lalonde also said he showed Mr. Gingras the card. According to Mr. Lalonde, Mr. Gingras said he already knew Mr. Rudolf was distributing cards. Mr. Gingras denies this.
18. That Friday, January 18, three individuals, Mr. Rudolf, Ted Weirmeir and Mr. Gingras went to a local sports bar for lunch. Their lunch extended to about an hour, although the allotted lunch break is ½ hour. Each of the men had beer with lunch. Jamie Weirmeir came into the bar and although he did not eat with the three men, he saw them. He too had beer with his lunch.
19. Jamie Weirmeir says there is a policy regarding alcohol consumption at work. The employer produced the company's health and safety policy manual which provides that a worker

will not be permitted to work while under the influence of a substance, and may be disciplined. Jamie Weirmeir said he is not aware his workers would have beer at lunch and return to work as he tells everyone never to drink on the job.

20. Jamie Weirmeir said that he was upset about the men having a beer at lunch but did not want to make a scene in the bar. He said he could not tell if they were under the influence of alcohol though they did not seem to be. When asked about what he did to satisfy himself that the men returning to the site were not under the influence, Jamie Weirmeir said he returned to his office and thought about the matter. He thought about calling Mr. Gingras at the site and telling him and the men not to return to work, but decided not to do that.

21. Mr. Gingras, Mr. Rudolf and Ted Weirmeir returned to work that afternoon, January 18, and finished the day. Jamie Weirmeir did not attend at the site that day. Nothing was said to Mr. Rudolf when he left work that Friday.

22. Mr. Rudolf went to the union office after work and reported that he had handed out cards to Mr. Lalonde and had spoken to another worker after work. That employee had a phone conversation with Mr. Parent later in the day and agreed to have another conversation with Mr. Parent on Sunday. Mr. Parent's assessment from these events and contacts was that the organizing drive was progressing.

23. After leaving the union office, Mr. Rudolf received a series of phone calls. Mr. Rudolf, on the advice of his girlfriend who is a union steward at a different workplace, took notes of those calls. Mr. Rudolf's notes and evidence are that at 4:40 p.m. Ted Weirmeir called and asked about Mr. Rudolf handing out cards at the end of the shift. Mr. Rudolf wrote in his notes that he denied this to Ted Weirmeir. Ted Weirmeir said that Mr. Rudolf should call Jamie Weirmeir who wants an explanation. Ted Weirmeir expressed disbelief that Mr. Rudolf would hand out union cards on "my job". Mr. Rudolf said that Ted Weirmeir was angry. Mr. Rudolf again denied that he was handing out cards and said he would call Jamie Weirmeir.

24. Ted Weirmeir presents a different version. Ted Weirmeir admits two calls with Mr. Rudolf. He says that in the first call he told Mr. Rudolf that he had received a verbal reprimand from Jamie Weirmeir about the beer at lunch. He said that after that call Jamie Weirmeir called Ted Weirmeir to tell him he had terminated Mr. Rudolf. Ted Weirmeir says that in that conversation he was told by Jamie Weirmeir that Mr. Rudolf asked if he was fired because he was "carding people". According to Ted Weirmeir this was the first occasion upon which he learned of Mr. Rudolf's union activity and it was after the termination. Ted Weirmeir was told by Jamie Weirmeir that he had responded to Mr. Rudolf by saying that the termination was for missed shifts and having a beer at work and not for union activity. At that point, Ted Weirmeir made a second call to Mr. Rudolf in which Ted Weirmeir called Mr. Rudolf names for handing out union cards.

25. Jamie Weirmeir's evidence is that he called Mr. Rudolf after work and told him not to return to work because of too many missed shifts. Mr. Gingras said that the termination was Jamie Weirmeir's decision and that he was not consulted on it. Jamie Weirmeir says he first called Ted Weirmeir and Mr. Gingras to reprimand them for drinking during working hours. Jamie Weirmeir said that the first time he learnt that union cards were being distributed at the work site was in that phone call when Mr. Rudolf asked if his termination was because of the cards. Jamie Weirmeir responded that it was because of the missed shifts. Jamie Weirmeir concedes that he did not mention the beer at lunch during this call.

26. The witnesses are agreed that at 5:00 p.m. Ted Weirmeir called Mr. Rudolf again to tell him that he should pick up his tools the next day.

27. Jamie Weirmeir asserts that Mr. Rudolf was laid off for excessive absence and the culminating incident of drinking at lunch hour. As regards the beer at lunch, Jamie Weirmeir testified that Ted Weirmeir and Mr. Gingras were given verbal warnings after work on that Friday that they could not drink during working hours and that conduct should not be repeated.
28. Mr. Rudolf attended at the job site the next day, Saturday, January 19, to pick up his tools. Mr. Rudolf asked the union organizers to accompany him as he was concerned about dealing with Ted Weirmeir. They waited in the car outside the work site while Mr. Rudolf had his cell phone on in his pocket.
29. Ted Weirmeir says that three employees, in addition to Mr. Gingras, were on site that day: Gary Larabie, Rheel Richer and someone identified as "Edward". Ted Weirmeir said he was upset with Mr. Rudolf for "taking my job away". Ted Weirmeir told Mr. Rudolf that he would never work for a non-union company again and would never work in this town again. Mr. Gingras said that he learned that Mr. Rudolf was fired on the Saturday from Mr. Richer and he also heard about the altercation between Ted Weirmeir and Mr. Rudolf from Mr. Richer. Mr. Rudolf said that Mr. Larabie asked him on Saturday why he was handing out union cards.
30. On Monday, January 21, Mr. Lalonde attended work with a union card. Ted Weirmeir took it from him and burned it. Ted Weirmeir says that neither Mr. Gingras nor Jamie Weirmeir were there but there were trades people and other Southend employees present. Mr. Lalonde learned that morning that Mr. Rudolf had been fired. Mr. Lalonde said that no one from the union ever tried to talk to him after Mr. Rudolf was fired and that there was no follow up to the drive.
31. Mr. Parent said that once Mr. Rudolf was out of the workplace, the organizing drive was over. Mr. Parent said he tried to get on the work site but could not. He tried to call the worker he had spoken to on the previous Friday afternoon but was unable to reach him. That worker had never called on Sunday as he said he would. Mr. Parent attributes these events to the fact that Mr. Rudolf was fired, following which Mr. Parent "couldn't get close to anybody". Mr. Parent said he talked to an insulator working for Southend who was not a member of the applicant and who was subsequently removed from the site. Once Mr. Rudolf no longer had access to the work place, there were no other individuals on site who were connected with the workers.
32. Mr. Rudolf was issued a Record of Employment. A follow up letter to that ROE explaining the reason for termination, signed by Jamie Weirmeir, recorded that Mr. Rudolf was terminated because he did not report to work for four days in December and that he was told on the last of those times that he would be terminated if he continued to miss work. Further, that letter says that Mr. Rudolf was consuming alcohol during working hours and recording an extra ½ hour time for that day.
33. Jamie Weirmeir denies being aware of a union organizing campaign prior to the termination of Mr. Rudolf. He also says that he was not aware that Mr. Rudolf was a union organizer.

Submissions

34. The company's argument is twofold: first that Mr. Rudolf's termination was not motivated by anti-union animus and second that even if it were, which is denied, remedial certification is not an appropriate remedy.

35. The responding party argues that Mr. Rudolf was terminated for legitimate reasons and that there was no anti-union motive. It asserts further that the union seeks extraordinary relief under section 11 and that the union is attempting to use the lawful termination of Mr. Rudolf to mask the fact that it did not engage in a legitimate organizing campaign. The employer says this is an example of a large international union attempting to obtain certification without the requisite support.
36. The employer relies on the factors enunciated in *DeVilbiss (Canada) Limited* [1975] OLRB Rep. September 678; *McDonnell-Roland Limousine Service Ltd. (c.o.b. Airline Limousine)* [2007] OLRD No. 1404 (March 30, 2007); and *London Free Press* [2003] OLRD No. 3202 (September 19, 2003) as to when the Board will find section 96 violations.
37. The responding party asserts there was no pattern of anti-union activity by this employer. Jamie Weirmeir knew that some of his men, including Mr. Rudolf, were union members and yet he agreed to their hire. The employer says that to suggest anti-union animus by Jamie Weirmeir who knowingly hires union members is not possible. The company says that the union did not offer credible evidence to suggest that Southend has ever demonstrated itself to be anti-union.
38. The only evidence of anti-union sentiment came from Ted Weirmeir whom the employer asserts is an employee and not a person who speaks for the company. He is entitled to his independent opinion. *FJS Holdings (c.o.b. as My Cousin's Restaurant)* [1994] OLRD No. 4100 (November 9, 1994) and *National News Company Limited* [1990] OLRB Rep. August 870 (August 16, 1990).
39. In terms of credibility the employer says that the evidence of its witnesses should be preferred. The employer submits that Mr. Rudolf's evidence is tainted by the evidence that the hockey game was on Sunday night when it was not. The employer suggests that this testimony was an attempt to deceive the Board and should operate to discredit all Mr. Rudolf's testimony.
40. As regards Southend's knowledge of union activity and the employees' involvement in that activity, the employer submits that it had no knowledge of that activity during Mr. Rudolf's employment. Jamie Weirmeir maintains that he only learned of Mr. Rudolf's involvement when Mr. Rudolf raised it himself on the termination phone call and asked if that was the reason he was being terminated.
41. The employer suggests that despite being terminated by Mr. Gingras after the weekend in Ottawa, Mr. Rudolf returned to work. The employer let him stay but at the end of the week Jamie Weirmeir considered all that occurred, the missed shifts and the beer incident, and decided he had had enough and terminated Mr. Rudolf. Although ill-timed, timing alone is not sufficient and the union has no proof that the company knew that Mr. Rudolf was organizing. The employer contends that the decision to terminate Mr. Rudolf was for clear and justifiable reasons.
42. The employer contends Mr. Lalonde was forthcoming but on many issues he was uncertain. The employer says that the Board should not accept what Mr. Lalonde said about Mr. Gingras' admissions that he knew Mr. Rudolf was trying to get cards signed. The company says we should prefer Mr. Gingras' evidence and conclude that no one acting on behalf of the employer knew of Mr. Rudolf's activity prior to his termination.
43. In summary then on the unfair labour practice portion of the case, the company says that it is clear on the evidence that Mr. Rudolf was terminated for just cause. Accordingly, no unfair labour practices were committed and the section 96 application should be dismissed.

44. Next, the company addresses the request for section 11 certification. It asserts that even if Mr. Rudolf's termination was as a consequence of his union activity, the Legislature never intended section 11 to be engaged in the circumstance of this case. Southend asserts that the true wishes of employees were already known and they did not want the union. Given the extraordinary nature of remedial certification, the company says that the union has failed to adduce sufficient evidence that a lesser remedy or no remedy would not be appropriate under the circumstances.
45. The parties relied on similar case law *1443760 Ontario Inc. (c.o.b. Swing Stage Equipment Rentals Ottawa)*, [2007] OLRB Rep. May/June 485; *L & L Painting and Decorating Ltd.*, [2007] OLRB Rep. September/October 887; *K.D. Clair Construction Ltd.*, [2008] OLRB Rep. January/February 60; and *Lecompte Electric Inc.*, [2008] OLRB Rep. March/April 234.
46. In *Swing Stage* the Board found that the termination of a union organizer was a decisive act giving rise to the entitlement to remedial certification. Southend distinguishes that case in that Mr. Rudolf's termination was not done openly and the employer here, did not know of the organizing drive.
47. The employer relies on *L & L Painting and Decorating Ltd.* for the proposition that a discharge is not itself sufficient to automatically trigger section 11 certification.
48. In *Lecompte* the Board declined to order section 11 certification where it was not persuaded that the union engaged in "grassroots campaigning" and instead relied on the use of "salts" in the workplace. The Board found on those facts that the union had had no contact with over 60% of the workforce and had acknowledged that its organizing drive, which spanned two to three months, was effectively at a standstill.
49. The employer notes from *K.D. Clair* and *Lecompte*, the Board will not invoke section 11 certification as an alternate to broad based organizing efforts. Where a union chooses to do nothing, they will fail to meet the onus entitling it to relief.
50. In that regard, the employer relies on the fact that there was only one valid union card signed and it was filed by the inside organizer. The union talked to two other employees but there was little interest. The employer says that the union is not entitled to section 11 certification because it is evident that the true wishes of employees are apparent by the fact that there was no success in garnering employee interest prior to Mr. Rudolf's termination.
51. The employer argues that the union did nothing other than make a few phone calls, after Mr. Rudolf's termination, to ensure that the campaign was in fact over.
52. There were submissions from the employer referencing the Hansard debates and committee submissions preceding the passage of what is currently the remedial certification provision of section 11 of the Act. The employer submits that the intent of the Legislature as gleaned from those documents is relevant to these proceedings.
53. In summary then, the employer submits that the union is not entitled to any remedy under section 11. When asked by the Board about alternative remedies in the event we find violations of section 96, the employer leaves any remedy in the hands of the Board.
54. The union contends that the discharge of Mr. Rudolf violated sections 70, 72 and 76 of the Act. The applicant highlights five factors in its approach to the case: the burden of proof in section 96(5), inferential reasoning, credibility, timing and circumstances. The union argues it is not able to demonstrate 40% or more of employees appear to be members of the bargaining unit

as a result of the violations. The union asserts that no remedy short of certification would be sufficient to remedy the breach.

55. The applicant argues that this case is about the discharge of the key organizer in a small, fluctuating construction workplace. Mr. Rudolf lost his job immediately after he handed out union cards. Ted Weirmeir is the owner's brother. He threatened that Mr. Rudolf will never work again in Sudbury for a non-union company. That statement was yelled out on the site on the Saturday after Mr. Rudolf was fired. Then on Monday, Ted Weirmeir burned a union card. The union says the company's message is clear that there is a direct connection between job loss and union activity. In the face of that, employees cannot be expected to join or vote for the union without fear of job security. Having established that, the union contends that no remedy short of certification will suffice.

56. The union asserts Mr. Rudolf's discharge was tainted by anti-union animus. Even if attendance was part of the reason for the termination (which the union does not accept), the union submits that the predominant reason was Mr. Rudolf's union activity.

57. In this assertion the union relies on credibility and timing. The union says it is clear that the employer had no intention of firing or disciplining anyone for the beer at lunch until it became aware that Mr. Rudolf was handing out union cards. The union admits it does not know who told Jamie Weirmeir of Mr. Rudolf's activity, but suggests it was likely Mr. Gingras or Ted Weirmeir. It says the evidence is clear that Mr. Gingras knew of the cards being distributed even though he denied it. Both his conversation with Mr. Lalonde and with Mr. Parent were clear evidence that Mr. Gingras knew of the union activity.

58. Given that the company allowed Mr. Rudolf to return to work in the week ending with his discharge, the union asserts that there was no basis to terminate him for attendance problems. He had not been absent again in that week. The only event that changed was the distribution of the union cards. The union discounts completely the beer incident given Jamie Weirmeir's lack of action when he saw the men drinking at lunch.

59. The union suggests that the night of the hockey game in Ottawa is irrelevant to the credibility of Mr. Rudolf. Whatever occurred that weekend, when Mr. Rudolf showed up at work, no one sent him home. In all the circumstances, the union says it is more probable than not that Mr. Rudolf was fired for handing out union cards.

60. The union then addresses the application of section 11 relief. It relies on the decision in *Swing Stage* and disputes that there need be a pattern of anti-union activity or threats to job security in order to trigger that relief.

61. The applicant distinguishes *K.D. Clair Construction Ltd.*, *supra*. In that case the employer reinstated the union organizers and invited the union to communicate with employees.

62. The union says that it made efforts to contact people after the termination. In light of the fact that the drive was in its nascent stages and the inside organizer had been terminated, there was very little else the union could do.

63. The union relies also on *Carlos Barbosa Concrete Ltd.*, [2008] O.L.R.D. No. 2083 and *Riverstone Masonry Inc.*, [2009] O.L.R.D. No. 298 where the Board granted section 11 relief in a climate of fear of job loss.

64. The union says that the only remedy to counteract this violation is certification under section 11 of the Act. Southend is a small employer in the construction industry and no amount of access or postings will change the message that union activity will result in termination.

65. The union asks the Board to conclude that sections 70, 72 and 76 of the Act were violated when Mr. Rudolf was terminated for union activity. It seeks certification under section 11 of the Act and the reinstatement of Mr. Rudolf with compensation.

Statutory Framework

66. The relevant statutory provisions are section 11, section 70, 72 and 76 of the Act:

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.

...

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.

...

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.

Analysis

67. We deal first with the issue of credibility. In areas, the evidence of Mr. Rudolf contradicted that of the employer witnesses. The responding party asks the Board to discount all of Mr. Rudolf's testimony on the basis of the evidence about the hockey game being on a Sunday night when in fact it was on Saturday. We are not prepared to do so for these reasons. Mr. Rudolf admitted the error, the error had nothing to do with the material facts of this case and it was not a fact that assisted the union's case one way or another. There is no dispute that Mr. Rudolf called in absent on Monday January 7, 2008 and nothing arose as to the reasons he did so at that time. In short, other than the fact that he was wrong in that recollection (and admitted it), there was no reason that error mattered to either party or had any substantive impact on the case. He was not so much being dishonest as he was mistaken.

68. Where Mr. Rudolf's version is inconsistent with that of the company witnesses, we prefer Mr. Rudolf's version. Each of the employer witnesses had varying versions of what occurred both when Mr. Rudolf came back to work on Monday, January 14 and again when he was terminated on Friday, January 18. Also, Jamie Weirmeir said he did not mention the beer at lunch during the termination phone call yet Ted Weirmeir said that Jamie Weirmeir told him when he spoke to Ted Weirmeir that afternoon that the missed shifts and the beer were the reasons for the termination. Also, it is not likely that no one authorized Mr. Rudolf's return to

work on January 14 and yet he returned and was allowed to continue to work for four days. Jamie Weirmeir said he was upset about seeing the men drinking beer at lunch yet he said nothing at that time. He allowed them to return to work, issued two of them verbal warnings of which there is no written record, and fired Mr. Rudolf.

69. We turn next to whether the company discharged Mr. Rudolf for union activity. In order to assess that we consider the reasons advanced by Southend for the termination.

70. Jamie Weirmeir said that Mr. Rudolf was terminated for two reasons. One was his poor attendance and the other was the beer he had at lunch in violation of the company policy. We begin by assessing the validity of those reasons as disclosed by the evidence.

71. Mr. Rudolf did have attendance issues. Mr. Gingras was frustrated with Mr. Rudolf's absences and would likely have been willing to terminate him in December 2007. The continuation of that attendance problem was highlighted after Mr. Rudolf called in absent on Monday, January 7, 2008 when he returned from Ottawa. That is why Mr. Gingras was not willing to put him back to work on the Tuesday, but rather told Mr. Rudolf to speak to Jamie Weirmeir upon his return. We do not doubt that the week off Mr. Rudolf was given was in response to the fact that his attendance was not satisfactory and that the option was open to Jamie Weirmeir to discharge Mr. Rudolf at that time. However, Jamie Weirmeir did not choose to terminate Mr. Rudolf. He allowed him to go back to work.

72. What we conclude is that the company decided that Mr. Rudolf's attendance was not, as at January 14, a reason for termination. Given that Mr. Rudolf did attend work on Monday, January 14, that he worked that week (until Friday) without incident and that both Mr. Gingras and Jamie Weirmeir knew he was working, we cannot accept that the company did not condone his absence after the Ottawa incident. We prefer Mr. Rudolf's version of what occurred. It is highly unlikely that Mr. Rudolf would return to work on Monday morning and be allowed to work had Jamie Weirmeir not authorized that return. It is also unlikely that Mr. Gingras did not know Mr. Rudolf was coming to work. What is likely is that Mr. Rudolf called Jamie Weirmeir who in turn called either Ted Weirmeir or Mr. Gingras and discussed Mr. Rudolf's return. It was then on Jamie Weirmeir's direction that Mr. Rudolf returned to work on Monday, January 14. That is why Mr. Gingras did nothing when Mr. Rudolf returned. Another reason we are clear that Mr. Rudolf did not just show up at work unannounced is that the week before when Mr. Gingras told him to wait and speak to Jamie Weirmeir before returning, Mr. Rudolf did so. There is no reason he would show up after that unless he was told to. It seems unlikely that Mr. Rudolf could attend at the workplace and work for a number of days without the company having tacitly or expressly allowed it. The conclusion from these events is that even if Jamie Weirmeir and Mr. Gingras were unhappy with Mr. Rudolf's attendance issues, they were not sufficiently unhappy to fire him at that time.

73. We deal next with that last week of work. Mr. Rudolf was not absent or late from Monday, January 14 until his termination on Friday, January 18. Given that his earlier attendance issues were not sufficient for the employer to terminate him when he was called back to work on January 14 and the fact that he had no further absences that week, it is unlikely that his attendance problems were the only reason for his termination. We accept that they may have been part of the reason. Anti-union animus need only taint an employer's motivation for reprisal against an employee. It need not be the sole or primary motivation. But the onus is on the employer to establish that its actions were not motivated at all by anti-union sentiment – (see *Pop Shoppe (Toronto) Ltd.*, [1976] OLRB Rep. June 299 and *Barrie Examiner*, [1975] OLRB Rep. October 745).

74. Next, we deal with the beer at lunch. Both Jamie Weirmeir and Mr. Rudolf said the beer was not mentioned in the termination phone call. Since Jamie Weirmeir said that the beer was a factor, coupled with the attendance problems, then surely he would have mentioned it in the termination phone call. On his evidence, Jamie Weirmeir called the other two men to verbally discipline them for the beer at lunch and yet did not mention it to Mr. Rudolf when he terminated him.
75. Ted Weirmeir and Mr. Gingras were given only verbal warnings. That is significantly disparate discipline for Mr. Rudolf, particularly since Mr. Gingras was the supervisor and Mr. Rudolf was likely to follow his lead as to what was acceptable behaviour.
76. Finally, if the beer at lunch was a reason to terminate Mr. Rudolf, Jamie Weirmeir would not have let the three men return and remain at work that afternoon. He would either have attended at the site himself or contacted Mr. Gingras. The beer incident occurred at lunch on Friday and yet Jamie Weirmeir waited until after the end of the day to terminate Mr. Rudolf. Further, Jamie Weirmeir said he had decided earlier in the week that Mr. Rudolf would be let go but Jamie Weirmeir did not instruct Mr. Gingras to do so before the men left work that day.
77. A feature of the employer's case is the assertion that there was no organizing activity going on in the week ending with Mr. Rudolf's termination and to the extent there was no company officials were aware of it.
78. Southend emphasizes that there were no union meetings held nor any union information distributed. The union counters that the drive was in the early stages and that it was halted by Mr. Rudolf's termination. We accept this evidence. There was an organizing drive in process at Southend at the time of Mr. Rudolf's termination.
79. In the Board's experience organizing drives take on different characteristics depending on the nature of the industry and the size and composition of the workforce. This was a small workforce (12 employees on Schedule "A" to the response). It is common that an organizing drive in the context of the construction industry occurs with employees talking about the union, taking cards to sign or consider signing, asking for more information or agreeing to meet the outside organizers for information. At that point the union has no clear indication of whether or not it will succeed but that is the start of an organizing drive. Employees who are left to make their decision and express their true wishes decide to join or not. The intervention of the employer at this stage with threats to job security interferes with that free choice.
80. We find that there was an organizing drive at Southend before Mr. Rudolf was terminated. It does not assist the employer that it hires union members. All that evidence bears out is that union members are not of concern to the company provided they do not seek to unionize the company.
81. Jamie Weirmeir said he did not know of Mr. Rudolf's activity until he disclosed it in the termination phone call. We are not persuaded that Mr. Rudolf would raise the issue of his union organizing unsolicited to Jamie Weirmeir in response to being terminated. It fits too with the sequence of phone calls Mr. Rudolf received. Jamie Weirmeir must have had discussions with Ted Weirmeir or someone else and learned of Mr. Rudolf's organizing efforts. Given that we do not accept that either the attendance or the beer at lunch were the reasons, or certainly not the full reasons, for the termination, all that remains is Mr. Rudolf's organizing activity. We are persuaded that was the primary reason for the termination.
82. Therefore, the employer's termination of Mr. Rudolf for union activity was in contravention of sections 70, 72 and 76 of the Act.

83. We turn next to the remedy for those violations.

84. First, the reinstatement of Mr. Rudolf is in order since he was discharged contrary to the Act. As to any compensation, that is referred to the parties to resolve, failing which it can be referred to the Board for determination.

85. We now give consideration to section 11 relief and whether a remedy or group of remedies short of certification would be sufficient to counter the effects of the contraventions.

86. We accept that section 11 certification is extraordinary relief. It requires the Board to make a determination in the absence of a clear expression of employee wishes.

87. In arriving at this decision, we have considered the facts and arguments as they relate to the statute and the Board jurisprudence which has interpreted the provisions of section 11 of the Act. That jurisprudence reflects labour relations considerations. In the result, we have relied upon that jurisprudence and the Board's labour relations focus to determine this case, rather than legislative debates introduced by the responding party, which preceded the introduction of the statutory provision found in section 11 of the Act.

88. The employer argues there was no interest in the union at the time Mr. Rudolf was terminated. That point was addressed in *Swing Stage* at paragraph 56:

The employer suggests that the campaign was effectively over, the employees expressed their views and there was no support for the union. It says that the campaign was dead before the termination of Mr. McCarthy. I find that it is of no value to speculate on whether the union would have obtained the required support were it not for the company's contraventions. The employer did not allow the drive to take its course and did not allow the employees to exercise a free choice. It cut off that choice by putting job security at issue.

89. In *Swing Stage* the actions of the employer were found to serve two purposes: to end the union's access to employees and to send the message that support meant job loss.

90. In this case, Mr. Rudolf was gauging interest for the union. Some employees had been approached by him and at least one had a conversation with the outside organizer. What employees saw next was that Southend terminated Mr. Rudolf. The events of both the Saturday and the Monday following the termination made clear to employees what would happen if they showed interest in the union – they would lose their jobs.

91. This is where the status of Ted Weirmeir presents a significant issue. While we agree with the employer that at all times material to these applications he was not a manager as contemplated under section 1(3) (b) of the Act, Ted Weirmeir is the brother of the owner of the employer. Given Ted Weirmeir's close family connection with the owner, in the context of the key union organizer being fired shortly before, burning a union card publicly in the presence of employees clearly conveyed to them that the company would not tolerate the opportunity for its employees to decide for themselves whether they would want a trade union to represent them or not. In addition, Ted Weirmeir told Mr. Rudolf he would never work again in Sudbury; this occurred in front of other employees. Although not done by the employer itself, the fact that it was done openly during working hours on the employer's premises necessarily suggested tacit approval of this conduct by the employer.

92. We have considered the taking of a representation vote with ancillary and declaratory relief including opportunities for the union to communicate with employees. The Board is asked to fashion a remedy that will enable employees to express their true wishes at the ballot box in the context where the union's inside organizer has been terminated for distributing cards and discussing the union, and where he has been told that he will never work for a non-union company in Sudbury. In addition, the employees have seen a union card being burned on the employer's premises after that termination. The employer did nothing to distance itself from these actions or to reassure its employees regarding their job security. There is nothing the Board could do to counteract the very obvious message that joining the union will mean you will lose your job and potentially any job in the community. We have no confidence that a vote and various ancillary relief would counterbalance the very damaging impact of the employer's conduct in and around the termination of Mr. Rudolf. As the Board stated in *Carlos Barbosa*:

56. ...A representation vote in these circumstances would be meaningless given that those threats will follow the employees into the voting booth in any subsequent representation vote.

93. Unlike the authorities referred to us where the Board declined to order section 11 certification, this is not a case where the message was unknown to the other employees.

94. In *L & L Painting*, the Board concluded that the subject employees did not know of the termination during any relevant time and would not have been affected by the fact that it occurred. The Board held that the "pattern of organizing" was not affected by the termination and declined to order section 11 certification. In the facts of the matter before us, Mr. Rudolf's termination was known to the other employees as was the burning of the union card.

95. *K.D. Clair Construction* presents a unique fact situation. The employer conceded that the termination of two individuals was at least in part for their involvement in union activity. The responding party offered the employees a return to employment. In denying the applicant section 11 certification the Board relied on the fact that the union had not attempted to obtain further membership support from employees when the discharges had not come to the attention of the bargaining unit and before the application for certification was filed. The Board concluded that the union had not established that the unfair labour practice resulted in the inability of the union to obtain 40% support.

96. The discharge of an employee who organizes for, or shows interest in, the trade union is an effective way to end an organizing campaign. It signals to employees that those who support the union will lose their jobs. It is clear that the support would then end. If employees are to express their true wishes they must do so without the shadow of job loss. Otherwise it is their reaction to the threat of losing their job and not their true wishes that is being measured.

97. We are satisfied, from a review of the jurisprudence, and from an assessment of the remedies available to us under section 11 of the Act, that a representation vote would not reflect the true wishes of employees, even if accompanied by ancillary remedies that try to assuage the impact of the employer's unfair labour practices. The true wishes of employees cannot now be obtained through a representation vote and neither that nor any remedy short of certification would be sufficient to counter the effects of the contravention.

98. For these reasons, the union's application for certification pursuant to section 11 of the Act is granted.

99. A certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the United Brotherhood of Carpenters

and Joiners of America and the Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, in respect of all carpenters and carpenters' apprentices in the employ of Southend Drywall & Acoustics Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

100. Further, a certificate will issue to the applicant trade union in respect of all carpenters and carpenters' apprentices in the employ of Southend Drywall & Acoustics Ltd. in all sectors of the construction industry within a radius of 57 kilometres (approximately 35 miles) of the City of Sudbury Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

101. The responding party is directed to forthwith post the attached Notice to Employees in a location or locations where they are most likely to come to the attention of those employees who may be affected by it. These copies are to remain posted for a period of 30 days from the date of this decision.

"Marilyn Silverman"
for the Board

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 Southend Drywall & Acoustics Ltd. violated the *Labour Relations Act, 1995*, by terminating the employment of an inside union organizer contrary to the Act. The Ontario Labour Relations Board further concluded that, as a result of the violation, the true wishes of the employees were not likely to be ascertained in a representation vote, and it certified the union as bargaining agent for the group of employees described as:

all carpenters and carpenters' apprentices in the employ of Southend Drywall & Acoustics Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the responding party in all other sectors of the construction industry within a radius of 57 kilometres (approximately 35 miles) of the City of Sudbury Federal Building, save and except non-working foremen and persons above the rank of non-working foreman.

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 17th day of March, 2010.

The Labour Relations Act, 1995

Before the Ontario Labour Relations Board

Between:

United Brotherhood of Carpenters and Joiners of
America, Local 2486,

Applicant,

- and -

Southend Drywall & Acoustics Ltd.,

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 United Brotherhood of Carpenters and Joiners of America, Local 2486 as the bargaining agent of all carpenters and carpenters' apprentices in the employ of Southend Drywall & Acoustics Ltd. in all sectors of the construction industry within a radius of 57 kilometres (approximately 35 miles) of the City of Sudbury Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

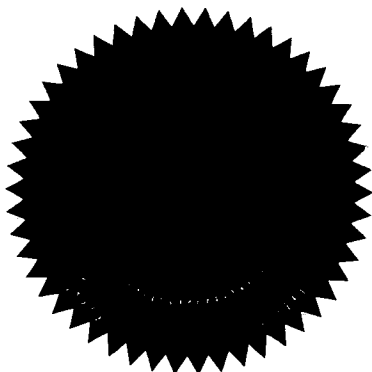
This certificate is to be read subject to the terms of the Board's Decision(s) in this matter and, accordingly, the bargaining unit described herein is to be read subject to any qualifications referred to in the said decision(s) of the Board.

DATED at Toronto this 17th day of March, 2010.

ONTARIO LABOUR RELATIONS BOARD

Tim R. Parker

Registrar



The Labour Relations Act, 1995

Before the Ontario Labour Relations Board

Between:

United Brotherhood of Carpenters and Joiners of
America, Local 2486,

Applicant,

- and -

Southend Drywall & Acoustics Ltd.,

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 United Brotherhood of Carpenters and Joiners of America, Local 2486 on its own behalf and on behalf of all other affiliated bargaining agents of the United Brotherhood of Carpenters and Joiners of America and the Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, a designated employee bargaining agency, as the bargaining agent of all carpenters and carpenters' apprentices in the employ of Southend Drywall & Acoustics Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

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 17th day of March, 2010.

ONTARIO LABOUR RELATIONS BOARD

Tim R. Parker

Registrar

