ONTARIO LABOUR RELATIONS BOARD

Labour Relations Act, 1995

OLRB Case No: 0266-13-R
Termination (Industrial)
Dan Little, Applicant v United Brotherhood of Carpenters and Joiners of America and the Carpenters' District Council of Ontario, and its affiliated Unions, Local 18, Local 27, Local 93, Local 249, Local 397, Local 494, Local 785, Local 1030, Local 1072, Local 1256, Local 1669, Local 1946, Local 2041, Local 2222, Local 2486, Responding Party v Pedersen Construction Inc., Intervenor

OLRB Case No: 0298-13-R
Termination (Industrial)
Jeff Dessureault, Applicant v United Brotherhood of Carpenters and Joiners of America and the Carpenters' District Council of Ontario, and its affiliated Unions, Local 18, Local 27, Local 93, Local 249, Local 397, Local 494, Local 785, Local 1030, Local 1072, Local 1256, Local 1669, Local 1946, Local 2041, Local 2222, Local 2486, Responding Party v Pedersen Construction Inc., Intervenor

COVER LETTER

TO THE PARTIES LISTED ON APPENDIX A:

The Board is attaching the following document(s):

Decision - November 20, 2014

DATED: November 20, 2014

Catherine Gilbert
Registrar

Website: www.olrb.gov.on.ca

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ONTARIO LABOUR RELATIONS BOARD

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ALL NOTICES MUST IMMEDIATELY BE POSTED BY THE EMPLOYER (IN LOCATIONS WHERE THEY ARE MOST LIKELY TO COME TO THE ATTENTION OF EMPLOYEES OR OTHER INDIVIDUALS AFFECTED BY THE APPLICATION) NEXT TO THE APPLICATION, THE BOARD'S NOTICE TO EMPLOYEES OF APPLICATION, AND/OR THE BOARD'S DECISION

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ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **0266-13-R**

Dan Little, Applicant v United Brotherhood of Carpenters and Joiners of America and the Carpenters' District Council of Ontario, and its affiliated Unions, Local 18, Local 27, Local 93, Local 249, Local 397, Local 494, Local 785, Local 1030, Local 1072, Local 1256, Local 1669, Local 1946, Local 2041, Local 2222, Local 2486, Responding Party v **Pedersen Construction Inc.**, Intervenor

OLRB Case No: **0298-13-R**

Jeff Dessureault, Applicant v United Brotherhood of Carpenters and Joiners of America and the Carpenters' District Council of Ontario, and its affiliated Unions, Local 18, Local 27, Local 93, Local 249, Local 397, Local 494, Local 785, Local 1030, Local 1072, Local 1256, Local 1669, Local 1946, Local 2041, Local 2222, Local 2486, Responding Party v **Pedersen Construction Inc.**, Intervenor

BEFORE: David A. McKee, Vice-Chair

APPEARANCES: Elizabeth Forster and Dan Little appearing for Dan Little; Melissa Kronick, Tom Cardinal and Gabe Parent appearing for United Brotherhood of Carpenters and Joiners of America and the Carpenters' District Council of Ontario, and its affiliated Unions, Local 18, Local 27, Local 93, Local 249, Local 397, Local 494, Local 785, Local 1030, Local 1072, Local 1256, Local 1669, Local 1946, Local 2041, Local 2222, Local 2486; Karl Pedersen and Michael S. Ruddy appearing for Pedersen Construction Inc.; Elizabeth Forster and Jeff Dessureault appearing for Jeff Dessureault.

DECISION OF THE BOARD: November 20, 2014

1. These two applications are terminations brought pursuant to the termination provisions of the *Labour Relations Act, 1995*, S. O. 1995 ch. 1 as amended (the "Act"), and in particular sections 63 and

132 of the Act. Board File No. 2066-13-R is brought by Mr. Dan Little, seeking to terminate the bargaining rights of the United Brotherhood of Carpenters and Joiners of America, Carpenters District Council of Ontario in respect of its bargaining rights in the ICI Sector of the construction industry in the Province of Ontario. In Board File No. 0298-13-R, Mr. Jeff Dessureault seeks to terminate the bargaining rights of United Brotherhood of Carpenters and Joiners of America, Local 2486 in respect of bargaining rights in the Heavy Engineering Sector of the construction industry. Since their interests were allied I refer to the Union parties simply as the "Carpenters".

2. Pedersen Construction Inc. is a construction company that has been active in Northern Ontario for 60 years. It was founded by the father of its present owners. Its current principals are its President, Karl Pedersen and his brother Alex Pedersen. Each one runs half the projects of the company. (Two other brothers, Trevor and Devon were identified but were not otherwise referred to in the evidence in these proceedings.) The Carpenters were certified in 2010 for all carpenters and carpenters' apprentices in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in Board Area 21 (the Timmins Area). Pedersen thus became bound to the Carpenters Provincial Collective Agreement in the ICI sector. It also negotiated a collective agreement with only Carpenters Local 2486 covering the Heavy Engineering Sector of the construction industry covering the entire province. It is the bargaining rights in those two collective agreements that the applicants here seek to terminate. In this decision I shall refer to the employer as "Pedersen" and to Karl Pedersen and Alex Pedersen by their full names.

3. The applicants are, of course Jeff Dessureault and Dan Little. However, they are represented by and assisted throughout by the Christian Labour Association of Canada ("CLAC"). It was CLAC in the person of Mr. Ian DeWaard who advised the applicants, prepared and filed the applications, and retained and instructed counsel throughout the proceedings.

4. The filing dates in each of these applications are: April 22, 2013 in Board File No. 0266-13-R (for Mr. Little in the ICI sector) and April 23, 2013 (Board File No. 0298-13-R (for Mr. Dessureault in the Heavy Engineering Sector). There is no dispute now that there were the same three persons working in the bargaining unit under each collective agreement on the respective application dates: Mr. Dessureault, Mr. Little and Deric Gervais.

5. All three were at work under the appropriate collective agreement doing carpenters' work for the majority of the day. On April 22, 2014, they were at work at the KL Gold Mine expansion project (agreed to be in the ICI sector) and on April 23, they were at work on a bridge connected with the Timmins Waste Water Treatment Plant in Timmins ("the Bridge") (agreed to be in the Heavy Engineering Sector). There are only two issues to be decided, both related to the allegation of the Carpenters that Pedersen has "initiated" the applications, contrary to subsection 63 (16) of the Act.

6. First, the Carpenters assert that the applications should be dismissed because of what is often called the "April Waterproofing" principle, named after the Board's decision in *April Waterproofing Limited* [1980] OLRB Rep Nov 1577 ("*April Waterproofing*"). It asserts that by violations of the collective agreements and a selective hiring, layoff and recall of employees it facilitated or encouraged the applications. Second, the Carpenters assert quite simply that Pedersen co-operated with and assisted CLAC in bringing these applications as agents for Messrs. Little and Dessureault, and that the applications should be dismissed pursuant to subsection 63(16). I will deal with these two types of allegations in order.

Sequence of Events

7. Some background information about the recent history of the company is useful in understanding the evidence.

8. As noted, Pedersen has been in business for roughly 60 years. It was founded by Karl Pedersen's father. In 2007 the Carpenters filed an application for certification resulting in a certificate issued on January 18, 2010. Mr. Little and Mr. Dessureault were employees at that time. They were involved in the application for certification as they alleged that the Carpenters had misrepresented to them the nature and quality of the membership evidence which they signed. The Board rejected that assertion.

9. Mr. Little and Mr. Dessureault remained at work. However pursuant to an agreement between Pedersen and the Carpenters, they were not taken into membership until May 1, 2010, the day after the open period in that year.

10. The third employee, Deric Gervais, was hired by Pedersen directly either because the Carpenters' could not supply employees at the time or because they simply agreed to permit him to do so. His

membership was accepted by the Carpenters. All three of these employees continued to work on and off for Pedersen until 2013.

11. Pedersen also called the union hiring hall to the supply it with carpenters in late 2012. They were all working at the KL Gold Mine site and were laid off of the end of November 2012. While they were working the Carpenters appointed a steward by letter dated October 16, 2012. He was also laid off in November 2012. Mr. Little and Mr. Dessureault were not.

12. In February 2013 Pedersen bid on and was awarded the contract for the Bridge project, although the work did not begin on that project until March or April.

The April Waterproofing Argument

13. The Union alleges that Pedersen manipulated the composition of the bargaining unit to ensure that only CLAC supporters were at work on the dates that the applications were brought. It alleges that Pedersen was in violation of the hiring, layoff and recall provisions of the two collective agreements to achieve that end. Even if it is not in breach, or in substantial breach of the provision of the two collective agreements, the Carpenters assert that the composition of the bargaining unit was chosen for this purpose by Pedersen and that hence, the applications should be dismissed.

14. While the *April Waterproofing* decision does indeed rely exclusively on an employer's violation of the collective agreement and its hiring provisions as grounds for dismissing a displacement application, all of the facts as recited indicate what was really going on in that case. In that case the employer arranged with a rival union to the one representing the employees in the bargaining unit to hire a crew from the rival union to permit it to displace the other, incumbent union. Subsequent decisions have more clearly identified the Board's real concern: the determination of whether or not the employer has provided any sort of assistance to the applicant union in its efforts to displace the incumbent union. In *Ken Acton Plumbing & Heating Inc.* 1992 CanLII 6322, the Board said:

> Subsequent decisions have referred to the "mischief" with which *April Waterproofing* was concerned, often characterized as a positive act by an employer to undermine the union's bargaining rights, to distinguish that case from other situations where the Board has held the *April Waterproofing* rationale inapplicable. In

> the Board's view, those cases may be roughly grouped under two categories: those following relatively closely on the heels of the introduction of province-wide bargaining and those wherein the conduct of the union holding bargaining rights significantly impacted upon the relevant circumstances.

15. See also: *1408118 Ontario Inc. o/a W.P. Stucco* 2013, CanLII 19489 at paragraph 13, *Marsil Mechanical* [1998] OLRB Rep Sept/Oct 835.

16. That is, did the employer do something, or fail to do something, that was usually (but not always) a violation of a collective agreement that changed what would otherwise be the composition of the bargaining unit in order to facilitate or encourage a raiding union? Some cases are also required some form of unreasonable behavior on the part of the employees who were in fact working on the application date. However, if the incumbent union has acquiesced in the employer's actions, that would constitute a proper defense to the allegation.

17. In all of these cases the Board's real concern is the ability of employees, or in these cases of the persons who ought properly to be employees in the bargaining unit, freely to choose a bargaining agent without interference from their employer. The Board is concerned both with the rights of those who would otherwise have been employees, and the desire to ensure that a bargaining relationship is not founded on an employer choice of the union with whom they will be sitting down to bargain a collective agreement. This course it is, at least in form, a termination application and not a displacement application. However the Board's concerns remain the same with respect to an employee seeking to terminate the incumbent union's bargaining rights. Further, one cannot ignore the role of CLAC in this case.

18. Hence the motivation of the employer in taking certain steps, or failing to take others, is of considerable significance in any analysis. There is no such thing as a definite rule; one cannot say that every case comes down exclusively to an analysis of the employer's motive. However, in cases where an employer violated the entire hiring provisions of the collective agreement by hiring persons who were not members of any union, that does not amount to a situation covered by the *April Waterproofing* argument. See, for example *Aero Block and Precast Ltd*. 1982 CanLII 1265 at paragraphs 15 and 16. In such a case the employer's motivation was entirely economic and raises none

of the concerns that employer interference with the acquisition or loss of bargaining rights raises.

19. Having reviewed all of the evidence, I come to two conclusions. First, Pedersen may have violated the Provincial Collective Agreement, but, other than with respect to the steward, did so only in a very technical way and not in a manner that would have changed the composition of the bargaining unit at all. Pedersen's violation of the Heavy Collective Agreement, if there was one, was not at all apparent to Karl Pedersen. If the interpretation of that collective agreement by the Union is correct, it ought to have created a substantially different group of people in the bargaining unit, but there is no evidence that Pedersen attempted or encouraged a particular result through its pattern of hiring and transfer.

20. Second, even leaving aside the collective agreement issues, I do not find that Pedersen hired, laid off and transferred employees in order to create a situation that would be favorable to a termination application. The most Pedersen could have been doing was to switch employees between two sites to facilitate applications on two consecutive days, but there is no evidence of that either.

21. The facts are relatively straightforward. The three employees in the bargaining units have been employed for some time by Pedersen. The two applicants were employed by Pedersen and indeed appeared as witnesses in the proceedings that led up to the certification of Pedersen in 2012. The third employee Deric Gervais was hired directly by Pedersen effective January 31, 2012, at which time the Union accepted him into membership and issued a referral slip. All three of them continued in Pedersen's work force through 2013.

22. Pedersen also hired additional carpenters from the Union's hiring hall in 2012. By late 2012, the one project that Pedersen had left ongoing was the KL Gold Mine. It laid off all of the employees that it had hired from the hiring hall and retained three employees, Mr. Little, Mr. Dessureault and Mr. Gervais in its employ. One of the persons laid off had been appointed steward on the job. There was very little work after that time. There were three employees in December, only two in January, February and March (one employee worked only 14.5 hours in February) and then three persons in April and May, 2013. In February, 2013, Pedersen bid on and obtained a contract for work on a second project building the Bridge. However, it did not start work until April, 2013. It transferred the three employees at different times to that site. The work on the Bridge raises a

separate issue dealt with below. The provisions of the Provincial Collective Agreement that apply are:

> 5.05 Except as provided otherwise in the trade appendices, an employer may recall former employees who had previously been on the payroll of the employer in the area of the Local Union or District Council.
>
> 5.07 To qualify for recall a former employee must be requested within six (6) months of termination. The former employee must be on the payroll of the employer for at least ten (10) working days in order to be eligible for subsequent recall within six (6) months of termination. If the former employee is on the payroll of the employer for a period of less than ten (10) working days he is eligible for subsequent recall within three (3) months of termination.
>
> 14.02 (a) The employer acknowledges the right of the Union to elect or appoint stewards and the employer agrees to recognize such stewards. The Union undertakes to keep the employer informed of such appointments in writing. No discrimination shall be shown against a steward for carrying out his duty, but in no case shall his duties interfere with the general progress of the work.
>
> (b) The steward shall be one of the last two (2) employees on the job provided he is qualified to perform the available work. In the event the job is temporarily closed down to the extent that no employees are working, on re-opening the job, the steward shall be one of the first two (2) employees to be recalled.
>
> (c) A steward(s) will not be transferred to another project of the employer unless by mutual consent of the parties involved.
>
> (d) A steward shall not unreasonably be excluded from a crew for overtime work provided he is willing and capable of performing the available work.

23. Much time was spent in argument on a theory by Pedersen that there was some sort of tacit agreement or condoned practice by which Pedersen was entitled to lay off the carpenters obtained from

the hiring hall before "his" regular carpenters. The theory was an ingenious one, but has no factual foundation. Karl Pedersen testified that his practice was, before and after certification, to lay off an order of seniority. He thought it was only fair that when layoffs occurred, that he should "let the younger men go first". While this comment does serve as a testament to the appearance of fairness that layoff an order of seniority often has, there is no such requirement in either of the collective agreements.

24. Karl Pedersen did not say that he thought that was what he was permitted to do. He did refer to one the email dated November 15, 2012, where he believed the Union gave him "permission" to retain one of the employees obtained from the hiring hall over another employee from the hall (not the steward). That is, Karl Pedersen was asking for "permission" to make an exception to his own rule of laying off by seniority. I read the e-mail reply from the Union ("Yes he can") as simply clarifying Pedersen's rights under the collective agreement since no "permission" was necessary.

25. In any event, aside from the question of the steward, there is nothing to prevent an employer under the Provincial Collective Agreement from doing anything it chooses to do in terms of selection for layoff. It can choose any order it wishes. The Union cannot be said to have "acquiesced" in a pattern of layoffs when the collective agreement did not fetter Pedersen's right to choose whom to layoff.

26. In one respect, Pedersen did commit a substantial violation of the Provincial Collective Agreement. It laid off the steward in November while retaining more than one employee. This was a clear violation of the collective agreement. However I accept the evidence of Karl Pedersen that he was unaware of this provision of the collective agreement and simply laid off in accordance with seniority. He should have retained Andrew Geary (the steward). Although it is not a defence to a grievance (which this is not) on the evidence I heard, had the steward continued to work on the site or sites, he would still have been, at most, one of three persons on one or both job sites when the applications were made. On the facts as set out below, the campaign was relatively short and secretive. The two applicants were quite able to make sure that any steward knew nothing of the termination application they were bringing. Hence, in the final result, any violation of the Provincial Collective Agreement would not have affected the result in this case.

27. Pedersen also violated Articles 5.04 and 5.05 when he rehired Deric Gervais in April. However he had a right to recall him under

Article 5.07, provided only that he had been "laid off" in December and had registered at the hiring hall for work. Again I attribute this to a lack of knowledge and understanding on the part of both of them. Had they been aware of the collective agreement provisions and had they complied with them (there is no reason why they would not) when work resumed in April 2013, he could still have recalled Mr. Gervais. Hence the result of complying with all the provisions of the collective agreement was the same as complying with none of them: Mr. Gervais would still be on the job.

28. The Heavy Collective Agreement covering work in the Heavy Engineering Sector of the construction industry provides as follows:

> 4.01 The Employer agrees to hire and continue to employ only employees who are members in good standing of the Union as long as the Union can supply employees in sufficient numbers. The Union must confirm within 24 hours of the Employer's request that they can supply the required number of men and the men must be supplied by starting time of the second day after receipt of the Employer's request.
> It is understood that if the Union is unable to provide the required manpower within forty eight (48) hours of the time specified by the employer the employer is free to hire such manpower. The employee may apply to the union for membership and a temporary work permit shall be issued for the employee
>
> 4.02 On any job or project an Employer shall be allowed to name hire from the Local Union unemployed list up to fifty percent (50%) of the crew engaged in the work covered by this Agreement.
>
> 4.03 From one geographic area served by a Local Union or Council to any job or project in a geographic area served by another Local Union or Council, an employer shall be allowed to transfer employees up to fifty percent (50%) or five (5) employees of the crew, whichever is greater, engaged in the work covered by this Agreement.
>
> 4.04 However, notwithstanding this provision or any provision in any individual schedule in Schedule "D", the Union may, in writing, permit the Employer to transfer any number or all of its employees from the geographic area of one Local Union or Council to the geographic area of another Local Union or Council, and such written statement by the Union shall be binding.

29. The Union argues that the terms "hire", "transfer" and "movement of employees" (Article 4.07) should all be read as referring to hiring, transfers or movements within the boundaries of the Heavy Engineering Sector. Hence, on this theory, it is not possible to "transfer" employees from an ICI project to a Heavy Engineering project, since the word "transfer" under the Heavy Collective Agreement can only refer to transfer from another project also governed by the same collective agreement. Otherwise the hiring provisions of the Heavy Collective Agreement could be entirely undermined by transferring employee from outside the bargaining unit. In that respect the Union relies on *D. D. R. Landscaping Contractors Ltd.* 2011 CanLII 46600.

30. While, in the absence of argument to the contrary, it is quite possible that this argument is correct, I conclude that once again, the possibility that the Heavy Collective Agreement could be interpreted in that way obviously never occurred to Karl Pedersen. Frankly it is hard to fault him for that. The result may be correct, but is not one that is intuitively obvious. For the moment, I will assume that the Union is correct in its interpretation of the collective agreement. The most one can say that there was no decision by Pedersen to manipulate the identity of the people in the bargaining unit to facilitate this termination application. It clearly never occurred to him that he could not transfer employees on his own simply following his rule about seniority for his entire work force. Again, this is an inquiry into whether the Employer manipulated the composition of the bargaining unit to encourage or enable a termination application to be brought; it is not a grievance.

31. Karl Pedersen did have one conversation about this project with Mr. Parent, business agent of the Union. Karl Pedersen was asking if the Local had carpenters experienced in the laying of heavy beams on bridges. He simply wanted the assurance that such would be available at the right time. Mr. Parent assured him that the Local could supply him with such employees. The issue of transfers did not arise in any unintelligible fashion in that discussion, so there was no opportunity to discover that they had different views of the collective agreement hiring and transfer process.

32. Finally, in this regard the Union alleged he had a deliberately arranged the work on the Bridge and at the KL Gold Mine and to ensure that all three employees would be present on the application date on the two projects. Without detailing the evidence, suffice it to say that I am not persuaded. Karl Pedersen's explanation about his sequencing of the Formwork is one that made sense in the context of

the cost of transporting the concrete and pump truck to the site, and the difficulties of pouring concrete in what was still cold weather in Northern Ontario. No other witness was called to give any opinion on whether this manner of proceeding was usual or not. The Carpenters suggest it is a simple matter of common sense. Given the many and different ways of accomplishing the same task on any construction site, and quite frankly the Board's relative lack of experience and expertise in the daily direction and deployment of work crews on a jobsite, I cannot accept the argument. That is, there is nothing so evidently strained or irrational about the way the work was assigned and performed that I am able to conclude that there was any evidence of manipulation or "staging". In any event, as Pedersen points out in argument, there were a number of days in April where the application could have been brought under the Heavy Collective Agreement. There is no need to choose this one particular day.

Allegations of Employer Initiation

33. The Union pointed to a number of instances where it alleged that the evidence of Mr. Little and Mr. Dessureault was inconsistent or lacking in essential detail or credibility. Further it asked the Board to draw a negative inference against the applicants from the fact that they did not call Mr. DeWaard to the stand where there was evidence that they asserted only he could give. I will review each of these submissions in chronological order.

34. It is worth remembering that the issue in this case is the allegation of the Union pursuant to subsection 63(16) of the Act that the Employer "initiated" the application. There is no need in a termination application for an applicant to justify the application, or (in terms of the pre-1993 petition cases) explain the origin, circulation and custody of the petition. It is up to the Union to demonstrate on a balance of probabilities that the employer in some way was involved in the initiation or facilitation of the application.

35. It is also worth remembering that employees will bring a termination application for all sorts of reasons, in some cases for illogical, irrational, petty, vindictive or ideological reasons or for reasons that are patently contrary to their own interests. The Board has no authority or, frankly, interest in assessing the appropriateness of the decision to bring such an application. That is a choice that every employee has. On the other hand, people who take any sort of legal action generally do so for a reason, no matter how inarticulately described. Whatever the limits of the person's verbal skills, he or she usually has no trouble explaining why they wanted to take the action

and how they went about doing it. That sort of evidence is frequently lacking in the testimony of Mr. Little and Mr. Dessureault.

Timing

36. This application was, of course, brought during the open period. Mr. Little's evidence as to how he became aware of the open period was rather vague, but nothing turns on this. After the Carpenters were certified, Pedersen and the Carpenters agreed that Mr. Little and two others would be refused membership in the Carpenters' Union (though they continued to work for Pedersen) after the certification until the day after the end of the open period in 2010. Given that history, the significance of the open period and frequency of such occurrences certainly would have remained in his mind. In any event, the right to make the application is a right enshrined in the Act. Open periods ought not to be a secret. At one point Mr. Little said he believed Karl Pedersen had said something about three years just after the company was certified in 2010. The communication of a statutory right to an employee, with nothing else, (and particularly when the conversation took place three years earlier), does not concern the Board.

37. Mr. Dessureault said he knew nothing about the timing. He testified that he had spoken about terminating the Carpenters' bargaining rights (or collective agreement) with Mr. Little, but did nothing until Mr. Little told him about a meeting that he had set up with CLAC over how to "get rid of the Carpenters". He and Deric Gervais, who had been involved in the earlier discussions, met with Mr. Little and Mr. DeWaard at 7:00 p.m. on April 18, 2013.

Decision to Terminate

38. Mr. Little said that he decided in April 2013 that he wanted to terminate the Carpenters' bargaining rights as he no longer wished to be represented by them. He said he spoke to Jack Cote, an equipment operator employed by Pedersen (Karl Pedersen described him as a "powderman"). Mr. Cote had been involved in an earlier application brought by CLAC seeking to represent only the construction labourers and equipment operators employed by Pedersen. The application was dismissed due to insufficient membership support. He asked Mr. Cote to put them in touch with CLAC.

39. This led to some rather odd answers in cross-examination. Clearly this is an application brought by and sponsored by CLAC. It chose to precede by way of a termination of bargaining rights before

doing anything else, that that is its option. However, in explaining his reasons for bringing his application, Mr. Little on occasion tried to justify a straightforward dislike of the Carpenters' Union (e.g. that the carpenters from the hiring hall worked too slowly) but gave this evidence in a hesitant and cautious manner. He was much more comfortable in explaining that he preferred CLAC as a representative union. This is not in itself significant, but does detract from his credibility. He is, at least nominally, one of the applicants. Rather than simply saying what he wanted to do and what final result he hoped to achieve, he appeared to be telling a story to fit the nature of the application.

40. His explanation for preferring the CLAC over the Carpenters' was certainly lacking in detail. As noted, the fact that an employees' reasoning appears to be illogical, is neither here nor there. However, an employee usually has some idea of why he or she prefers one union over another. In this case his evidence was:

> Q. What specifically did you like about CLAC?
>
> A. I agreed with what he [Mr. DeWaard] had to say. Their premise and how they operate.
>
> Q. What specifically?
>
> A. I liked it overall. I liked the overall impression. Basically I liked them.
>
> Q. Have you any doubts about CLAC?
>
> A. No.
>
> Q. What about the pension?
>
> A. I didn't say that, just the overall thing.
>
> Q. What was it you liked?
>
> A. I just liked it. Nothing specific. I believed I would get more from CLAC. I don't know when.
>
> Q. So you know nothing about them?
>
> A. A little bit. You pay in and you get something out of it. I really don't know.
>
> Q. How is their pension different?

> A. I'm not really interested in the pension thing. It doesn't interest me.
>
> Q. So you don't like the CLAC pension?
>
> A. No I do but it is not a priority.

41. The examination continued in this vein for a while. At this point in his evidence, Mr. Little was uncharacteristically inarticulate. I found this evidence to be somewhat lacking in credibility. As noted, the reasons need not stand up to any logical scrutiny, but usually an employee has some idea of why he wanted to bring the application.

42. Mr. Dessureault's evidence on the point was very brief. His comments about why he desired to be rid the Carpenters' or to enjoy the benefits of representation CLAC were difficult to follow. He testified that he preferred the CLAC pension plan, but could not say what it was. Even when prompted in chief about the fact that was an RRSP contribution plan, he could not give a coherent answer. He too complained that the carpenters who had come from the Union hiring hall worked too slowly. He described in a hesitant and somewhat distracted manner examples of such behaviour in Pedersen's jobs at a Caisse Populaire and Advance Forms. However he agreed that he had not complained to the foremen on the job site, the site superintendent, the Company, or the Union about their lack of productivity.

Initiating the Applications

43. Dan Little telephoned Mr. DeWaard in Toronto from New Liskeard and asked him if he could help them "get rid of the Carpenters". Mr. DeWaard agreed to fly from Toronto to New Liskeard on April 18, 2013. He arranged to meet with Mr. Little and Mr. Dessureault and Deric Gervais at a restaurant in New Liskeard. Only Mr. Little had spoken to Mr. DeWaard before the meeting. They met in a restaurant at 7:00 p.m. on Thursday, April 18, 2013. At the meeting Mr. DeWaard had in his hand the two termination applications prepared and typed and ready for signature. In both cases the bargaining unit which defined the bargaining rights which were sought to be terminated, were spelled out in full:

> 0266-13-R (ICI sector):
>
> All carpenters and carpenters' apprentices in the employ of Pedersen Construction Inc. 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.
>
> 0298-13-R (Heavy Engineering sector):
>
> All journeymen and apprentice carpenters performing work in the heavy construction industry (non-ICI construction) in the province of Ontario.
>
> A more specific description for the "heavy construction industry" is provided at Article 1.05 of the collective agreement between the parties and is attached hereto.

44. What was, in fact, attached to the application as filed with the Board was the title page and the first two pages of the Heavy Collective Agreement.

45. Much time was spent in cross-examination about the second of these bargaining unit descriptions. The first, the ICI Provincial Collective Agreement, is publicly available on many web sites, and is easily obtained. The second, however, is not a standard bargaining unit for a single, geographically based, local union. Further, the photocopy of the collective agreement contained amendments made and initialed by the Union and Karl Pedersen. The question asked repeatedly was from where Mr. DeWaard had obtained the copy of the collective agreement that was attached to the application, or more simply the bargaining unit description. The only copies of the Heavy Collective Agreement were in the hands of the Union and Pedersen. It had never been given to any of the employees, which does not speak well for the Union. Mr. Little and Mr. Dessureault testified that they had not seen a copy before the first day of hearing at the Board. Mr. Little did not remember seeing a copy of the collective agreement at the meeting with Mr. DeWaard on April 18, 2013, and Mr. Dessureault said firmly that there was no copy of the agreement at that time. The two union witnesses, who had been business managers of the local union at one time or another testified that they did not give it to them. Karl Pedersen said in cross-examination:

> Q. Do you agree that CLAC must have had a copy of the Heavy Collective Agreement in order to bring the application?
>
> A. I don't know.
>
> Q. Do you agree that Mr. Dessureault would not know the answers to any of the questions [on the form]?

A. Yes.

. . . .

Q. Did you ever forward the Heavy Collective Agreement to CLAC?

A. No I didn't know who CLAC was until they filed their own certification application. I don't know any CLAC people. I only met Mr. DeWaard here at the Board in August.

Q. Did your brother?

A. No I am the only one with the collective agreement.

Q. Did you ever direct Mr. Ruddy to forward it? Did you or your counsel agree to forward it?

A. No.

Q. Can you think of any way CLAC could get a copy of the collective agreement?

A. No.

46. The Act requires both parties to a collective agreement to file it in the collective agreement library maintained by the Ministry of Labour. No party asked questions about this at all. That is presumably because, as the Board knows full well, outside of the ICI sector collective agreements, construction industry collective agreements are rarely filed in that library.

47. The question of when Mr. DeWaard got the collective agreement was not answered. It seems virtually certain that the Carpenters' Union would not give a rival union of a copy of the collective agreement for termination purposes. This leaves only Pedersen as the logical source, even if it was not Karl Pedersen himself. Counsel made one valiant last attempt to suggest that Mr. Pedersen may have instructed or known that counsel would be sending this in the course of the application by CLAC. Mr. Pedersen said "no" to that as well. In fact the application, Board File No. 1192-12-R was filed on July 16, 2012 and withdrawn two weeks later. The only reference to the Carpenters is a letter from that Union asserting that they had not received a copy of the application, but in any event they were not intervening because it did not affect them.

There was no logical reason to send the collective agreement to CLAC in that application.

48. Mr. Pedersen could not think of another way Mr. Dessureault could have gotten a copy of the collective agreement. The Board cannot think of how it came into CLAC's hands except from Pedersen. If there is another one, Mr. DeWaard, who was sitting beside and instructing the applicants' counsel throughout, did not say what it was.

49. Mr. Little testified that Mr. DeWaard had the forms filled out entirely except for the signature line. Mr. Dessureault said that there were a number of lines to be filled in on his, particularly in the Declaration of Employee Wishes, with respect to the number of people in the bargaining unit. Mr. Little went so far as to say he believed the dates for the filing of the application were filled in on April 18, 2013, but he was unsure. There was no discussion about the information that was found in these applications; Mr. Little and Mr. Dessureault were simply asked to sign them. Mr. DeWaard said to them that he wanted to wait until there were three employees on each of the two sites before he filed the application. It was he who decided that Mr. Little should sign one application and Mr. Dessureault the other.

50. Mr. Little said that he and the other two employees signed or were offered membership in CLAC at this meeting. Neither Mr. Dessureault nor Mr. Little could give any explanation as to why that was part of an application for termination of bargaining rights. Both said they did not understand the purpose, although they did prefer CLAC to the Carpenters' Union. Mr. Little testified that they did speak about the process of bargaining a collective agreement by CLAC after the carpenters' bargaining rights had been terminated.

Filing the applications

51. The ICI application was filed on Monday, April 22, 2013. It could, of course, have been filed on April 19, 2013, although Mr. DeWaard was likely traveling that day. Mr. DeWaard told Mr. Little and that he wanted to make sure that all three employees were on each of the two sites before he filed the application. Mr. Little had some difficulty remembering whether he had spoken to Mr. DeWaard after that, or when he spoke to him, but from reviewing his cell phone records from that date, he believed that an unidentified incoming call recorded at 1:54 p.m. was likely a conversation between himself and Mr. DeWaard.

52. The Heavy Collective Agreement application was filed on Tuesday, April 23, 2013. Mr. Dessureault said that he had received a call or jobsite notification from Alex Pedersen the day before to attend the bridge the following day for work there. Mr. Dessureault said he did not remember anything about advising Mr. DeWaard that all three were working on a bridge project. He did not initiate a call, nor did he remember receiving a call. He suggested that Mr. Little might have called. When advised that this had not been part of Mr. Little's testimony, he suggested that someone else might have called. While he was uncertain at best, he definitely resisted the efforts of CLAC in cross to conclude that it was logical or likely that he had received a call from Mr. DeWaard. Again, he and Mr. Little did not explain how Mr. DeWaard knew that it was appropriate to file the Heavy Collective Agreement application on April 23, 2013. Nor did Mr. DeWaard.

Conclusions

53. The meaning of the term "initiation" in subsection 63(16) was first articulated by the Board in *Bytown Electrical Services Ltd.* [1996] OLRB Rep Sept 721 and has been followed relatively consistently since then. In that decision the Board said at paragraph 107 and 108:

> . . . The voluntariness of the petition is no longer the crucial consideration for determining the validity of a petition. Bearing in mind that the union only weakly advanced the contention that Bytown or Mr. Boyd "engaged in threats, coercion or intimidation in connection with the application", the issue to determine whether the decertification application was in fact initiated by the employer or a person acting on behalf of the employer. That is not the same determination as had to be made previously. There has been a shift of onus. The union must now establish that the application has been initiated by the employer, rather than the petitioners having the overall burden of proving the voluntariness of their petition. That is not the only difference. The notions of 'voluntariness' and the absence of 'employer initiation' are not necessarily coterminous or coincidental. Furthermore, the point of consideration by the Board is different as between its former determination of 'voluntariness' and its current consideration of the application of section 63(16) of the Act. The inquiry into voluntariness focused upon the circumstances of the signing of a petition, the current inquiry focuses upon the launching of the application. The focus is not restricted to the signing of the petition and includes the bringing of the

> application. In most cases this will be a distinction without a difference, but in some it may be significant.
>
> 108. Under subsection 63(16) of the Act, if a termination application is initiated by the employer, the Board has a discretion to dismiss it. The reason for this provision is that if a decertification application is really caused by or originated by the employer, and it is not primarily the conception of the employees who make the application, then it represents an improper interference by the employer in an area which should properly be within the exclusive terrain of the employees. Initiation involves causing, originating or facilitating, the beginning of a process or event. What meaning should the concept, 'initiation', be given in the context of section 63 of the Act? Plainly if an employer prepares a petition to terminate a union's bargaining rights, summons his/her employees and requires then to sign the petition and then requires an employee to initiate a termination application, the employer initiates the decertification application. But that is an extreme and, hopefully, rare manifestation of improper employer interference in the contemplated process of employees freely deciding of their own initiative that they no longer wish to be represented by a particular, or perhaps any, trade union. Such direct, palpable initiation will in all likelihood be an unusual occurrence. But initiation can also occur indirectly, less palpably than in the example suggested, though no less effectively. There are gradations of employer conduct in relation to a termination application, along a spectrum, part of which will be improper and part of which will be acceptable behaviour. The Act determines that when an employer "initiates" a termination application, the Board has a discretion to dismiss the application. There is a continuum of employer conduct, some of which will amount to 'initiation' some of which will not.

54. See also *Tenaquip Ltd.* [1997] OLRB Rep Jul/Aug 742, (*Kun v. IBEW Local 804*) *Fritz Electric Inc.* 1999 CanLII 19498 and (*Jeff Watt v. LIUNA, Local 1059) Woolatt Building Supply Ltd.* 2002 CanLII 27706. No party argued that the Board ought to apply any different test.

55. Nor was there any dispute that the Board was entitled to come to conclusions by drawing inferences from circumstantial evidence. Two useful comparisons were cited by the Carpenters. In *Maple City Electric* [2002] OLRB Rep May/June 411, the Board reasoned at paragraph 22 in that case that:

> As set out above, Mr. Lavigne articulated independent reasons for bringing the application, and detailed his efforts, with the agreement of his colleagues, to get more information and bring about the application. The "missteps" in that process -- alerting both the union and the employer to the plans to bring the application and including Mr. Hoekstra in the list of employees supporting the application -- are evidence of the complexities and subtleties in this area of the law rather than evidence of employer initiation. However, I am unable to escape the conclusion that the idea to bring this application was not Mr. Lavigne's but Mr. Hoekstra's. Or put another way, Mr. Lavigne's reasons for bringing the application are not all that compelling. While he may have retained counsel, and discussed the matter with his colleagues, I find that Mr. Lavigne would not have taken those steps and would not have brought the application without Mr. Hoekstra having suggested it. As the panel wrote in Bytown above, where an application "is founded on the conduct of the employer" the Board will conclude that the application was initiated by the employer.
>
> 23. I am satisfied that Mr. Hoekstra initiated this application, in violation of section 63(16) of the Act. I hereby exercise my discretion to dismiss this application.

56. In *Woolatt Building Supply Ltd.,* above, the Board said at paragraph 42:

> 42. In addition it is clear from Mr. Watt's evidence that he did not have the understanding or knowledge to prepare either the petition or the application. He testified that he had never seen the collective agreement, didn't know what constituted a bargaining unit, and really had no knowledge of what constituted an application for termination. A knowledge of the expiry dates of the collective agreement and a description of the bargaining unit is of course necessary information to file an application to terminate bargaining rights. Mr. Watt thus, as he testified, relied on the prior application filed in September 2000 and relied on his friend to prepare this petition and application. This leads to an obvious question as to who really is the motivating force behind the petition and application. By not producing the friend as a witness the applicant takes a risk as to the inferences that may be drawn by the Board.

Analysis

57. There are a number of matters that raise questions that have not been answered, but by themselves are not evidence of employer initiation. Examples cited by the Carpenters include Mr. Little's vague evidence about what he thought he was doing and why, and the sudden presence of Mr. DeWaard many miles from home to assist in terminating bargaining rights but not in conducting a displacement application. These facts are curious, but none of them are in my view of any significance. They are indeed odd, and the second issue was not explained by Mr. DeWaard. However, they are explicable in many different ways and do not necessarily point to any involvement of the employer as more likely than any other.

58. However, we are left with two significant and otherwise unexplained factual issues, both of which are central to the issue of the initiation of the application: the source of the portion of the Heavy Collective Agreement attached to the second application (0298-13-R) and the information that all three employees were at work on the Bridge project on April 23, 2013.

59. Of the two, the first is of greater significance. Despite Mr. Pedersen's denials, the only possible conclusion one can come to is that the copy of the collective agreement from which Mr. DeWaard worked and which he copied came from Pedersen. The evidence as recited above, combined with the decision not to call Mr. DeWaard to the stand to explain where else he might have got the information, leads me to conclude that despite Karl Pedersen's denial, the source of the collective agreement was from the employer and that it was supplied for purposes of the termination application.

60. The second, the source of information about the number of people on the Bridge project, weighs less heavily. There are more than one possible sources of information about the number of employees. What is significant is that that source was not Mr. Dessureault, the applicant. Further, the recipient of the information, Mr. DeWaard, again did not choose to explain where the information came from. There may be other possible sources, but if it was the employer (as it must have been for the copy of the Heavy Collective Agreement), that too constitutes employer initiation. In the absence of a simple explanation from Mr. DeWaard, I conclude it too came from the employer, Pedersen.

61. These factual issues, of course arise only out of the Heavy Collective Agreement application. However, it is evident that the two

applications were conceived of by CLAC (though not the applicants) as being two parts of the same process, to be drafted by the same person, signed by one or the other of the same group of three, filed and prosecuted by the CLAC and the same three employees. If the one is tainted, it must inevitably affect both of them.

62. For these reasons I conclude that the Employer was involved in the initiation of both applications and accordingly they must be dismissed.

63. The Board is, however, concerned that part of this decision appears to turn on access to information that should have been available to the employees from the beginning. Employees who have decided they no longer (or never did) support the Union are not to be held captive by their bargaining agent by withholding of information. Ultimately employees have the right to terminate those bargaining rights *if that is indeed their wish*. The Board will not countenance employer interference in relations between an employer and its employees when a union is the bargaining agent. But once the employees' wishes are clear and formed without such interference, they should not be defeated by details that ought to be in their possession.

64. The open period for the next ICI collective agreement will be (assuming the current Bill 18 is given royal assent) March 1, 2016 to April 30, 2016. One cannot be so sanguine about the Heavy Collective Agreement. The Board therefore directs the Union to provide the applicants with a copy of the current Heavy Collective Agreement, and to provide them with copies of any renewals or modifications to it. The Union is also directed to file a copy of the Heavy Collective Agreement with the Collective Agreements Library. The information about what their bargaining agent has done on their behalf should not be a secret to the employees involved.

65. For all of these reasons, these applications are dismissed.

"David A. McKee"
for the Board

APPENDIX A

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