

Aurora Electric Inc. (Re)

British Columbia Labour Relations Board Decisions

British Columbia Labour Relations Board

Panel: Brett Matthews, Associate-Chair

Decision: February 14, 2022.

Case Nos.: 2021-001226, 2021-001252, 2021-001544

[2022] B.C.L.R.B.D. No. 20 | 2022 BCLRB 20 | 92 C.L.R.B.R. (3d) 104

Aurora Electric Inc., (the "Employer"), and International Brotherhood of Electrical Workers, Local 230, (the "Union")

(99 paras.)

Appearances

Christopher J. Wiebe and Matt Stainsby, for the Employer.

Brandon Quinn, for the Union.

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 The Union has applied to represent employees of the Employer on Vancouver Island other than office and sales staff (the "Unit"). An electronic representation vote was held from Thursday, November 4, 2021, to Friday, November 5, 2021 (the "Vote").

2 The Union says the Employer breached Sections 6(1), 6(3)(d), and 9 of the *Labour Relations Code* (the "Code") when it, or persons acting on its behalf, made a series of statements to employees in the days before the Vote.

3 For the following reasons I find the Employer breached the Code and, pursuant to Section 14(4.1), I order that the Union be certified to represent the Unit.

II. BACKGROUND

4 As Micheal Lucas arrived at the Employer's job site in Langford, B.C. on Monday, November 1, 2021, it must have seemed the start of an unremarkable day.

5 Lucas, who lives in the Okanagan, had arrived on Vancouver Island the previous night. He went for dinner with his stepson, Jayden Wright-Hainz, and then on to his hotel room for the night.

6 Lucas, the Employer's president, founded the Employer only about six months earlier - in June 2021 - as an electrical contracting company operating in the construction industry, with a focus on wood-frame, multi-family residential buildings. From the outset, the Employer had a relationship with a company called Highstreet Ventures Inc. ("Highstreet"), with whom it initially shared a director. The Employer began operations with three employees, but grew rapidly. In its first week of operation, it had hired ten new employees. Within a month, the Employer had 40 employees.

7 The Employer's business involved three projects on Vancouver Island. In Langford, B.C. the Employer was performing work on the "Skygate" project. In Comox, B.C. it performed work on the "Aspen View" project, and in Nanaimo, B.C. it performed worked on the "Lake View" project. In all three instances the Employer was performing electrical work for Highstreet on the construction of wood-frame, multi-family residential buildings.

8 On that Monday morning - November 1, 2021 - Lucas arrived at the Langford job site and handed Gareth Church, the foreman at the site, copies of two documents which were to be distributed to employees: a document titled "Employee Handbook", and a document which the Employer calls a "fit for duty" document. Lucas instructed Church not to hand those documents out to staff just yet. He explained he would be back to talk about those documents himself. Lucas says he intended to return to the site on Wednesday, November 3, 2021, for that purpose.

9 The Employee Handbook and "fit for duty" document were the work product of Ashley Corcoran, the Employer's human resources and safety coordinator. Corcoran was hired in early September 2021 and, like Lucas, worked primarily out of the Employer's head office in Summerland, B.C. Corcoran created those two documents in late October 2021 - shortly before Lucas' trip to Vancouver Island.

10 After Lucas had handed the documents to Church, he did a "site walk" to review progress on the project. Lucas returned to his vehicle at around 11:00 a.m. His plan was to drive to the Nanaimo job site to hand out the two documents to the site foreman there, and then on to the Comox site where he would do the same. Lucas got into his vehicle, and before beginning his drive, checked his email.

11 It was at that point that Lucas saw in his inbox a notice from the Board advising that the Union had applied to be certified to represent the Unit.

12 In his testimony to the Board, Lucas said that learning of the Union's application left him "distraught". He explained he was "shocked", felt "off guard", and like he didn't really know what was going on. Lucas was not pleased to receive news of the Union's application. He said he did not want his employees to join the Union and that he had "started [the Employer] to be a non-union company".

13 Lucas immediately emailed Corcoran and Dan Campbell, a project manager and estimator who worked out of the Employer's Summerland head office. Campbell called Lucas back and they spoke about the Union's application. Lucas then began his drive to Nanaimo.

14 Despite being shocked and distraught, Lucas says he did not call or communicate with anyone in the Unit on Monday, November 1, 2021, about the Union's application. Specifically, Lucas says he did not call his stepson, Wright-Hainz, who works on the Employer's Langford project. He says he did not call Church, the foreman at the Langford project with whom he'd just met. Nor did he call Paul England, another of the Employer's foremen at the Langford Project.

15 When he arrived at the Nanaimo worksite, Lucas did not go inside the job site. He did not drop off the documents as he had planned. Instead, Lucas met with the foreman briefly outside the site before leaving.

16 Lucas attributes his change of plans to the fact that he was still feeling distraught. He agreed with Union counsel that at that point he knew there were some limits to what an employer could talk about when it came to an organizing drive, though he was not sure precisely what those limits were.

17 Thereafter, Lucas drove to the Comox Valley, but instead of going to the Employer's job site in Comox as initially planned, Lucas went straight to his hotel in Courtney.

18 At some point after he left Nanaimo and before he arrived in Courtney, Lucas called **Brandon** Kehoe. Lucas

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described Kehoe as the Employer's general foreman responsible for all three projects. Kehoe works a shift rotation, and this was his week off.

19 Lucas explained that he called Kehoe to ask if Kehoe heard what was going on with the Union's application. Lucas says Kehoe told him he had not. Lucas said that, at this point, there was no talk about having Kehoe come back to Vancouver Island early from his time off, though that changed the following day.

20 On Tuesday, November 2, 2021, Lucas got up early and drove to the Employer's job site in Comox. He says he had intended to talk to employees on site, but decided against it. Instead, he continued driving to Nanoose Bay to visit with his parents for a few hours. Lucas says he again spoke to neither Church, nor Wright-Hainz, nor England, on the morning of November 2, 2021.

21 Back in Langford, Church received word from the Employer's head office that he was to post the Board's notice pertaining to the Union's application in the workplace. Church says that, at some point on November 1, 2021, or on the morning of November 2, 2021, he heard from the Employer's head office that the Union "was looking at getting voted in" but that head office did not have all the information and asked him to stand by. Church says Campbell later emailed him the Board's notice which he was to put up in the lunchroom at the Langford site.

22 As project foreman at the Employer's Langford site, Church is generally responsible for the day-to-day operation of that site. When employees need to be hired, he is generally the person to perform the interviews and to make recommendations to Lucas as to whether employees should be hired. Church tells employees what to do and when to do it. He can approve overtime, and has the power - as will be seen shortly - to extend or alter a lunch break.

23 Church printed off a copy of the Board's notice on the printer in the lunchroom at the Langford job site. He posted it on the lunchroom door and, as employees were about to start their lunch break on Tuesday, November 2, 2021, Church explained to employees that he had done so.

24 He also took the opportunity to make his feelings about the Union's application known.

25 Evan Dickenson, an employee in the proposed Unit, explained in his testimony to the Board that he follows, with interest, some of the more high-profile trade union organizing campaigns reported in the media, particularly those in the United States. Dickenson had followed organizing attempts by trade unions at Amazon and Walmart, and the recent job action at Kellogg's. He says he was aware of recordings having been made in connection with those events, and says that he "understood that if they could record I could as well".

26 Once Church started talking, Dickenson began to record the audio on his cellphone:

Church: ... I think its pretty hard to have that much guaranteed work. Most companies that have been around for 40 years can't say they have 10 years of guaranteed work with a contractor. We have that, so just going forward and thinking about it. If you guys vote that, that could not happen anymore.

27 Church can be heard on the recording explaining where the notice was and encouraging employees to talk amongst themselves. He concluded:

I'm just going to say we do have really good pay here, for starters, so I'm not seeing much benefit, but that's just my personal opinion [inaudible].

Awesome, so we'll just, uh, take lunch for an extra five minutes. So lunch will end at 12:05 today instead.

Thanks guys.

28 Church left shortly thereafter and ate lunch offsite.

29 The conversation between employees about unionization, however, continued, and Dickenson continued to record.

30 Among the employees present in the lunchroom during lunch on November 2, 2021, the strongest anti-union voice was that of Wright-Hainz. Wright-Hainz, in addition to being Lucas' stepson, was at the time an electrical apprentice employed by the Employer on the Langford project. He lives in an apartment (the "Crew House") which he shares with Church and Reid Emelson, a journeyman electrician employed by the Employer on the Langford Project.

Wright-Hainz: The union dictates what the company does with hiring. Not the wages or if you get a raise or not but.

Another Employee: But there are 500 people ahead of you in the union, so.

Wright-Hainz: Yeah thousands. We're on the waiting list. Somebody come and the union rep or something because they have to hire a steward, a shop steward to be on site, so he can pick out whoever he doesn't like, tells them to fuck off and then they can hire whoever is on the thousands of people before you on the list. It's fucking crazy.

31 The recorded conversation continued:

Wright-Hainz: I think the whole aspect of it is the work that we have is wood-frame. And then the union company is usually steel stud hospitals, uh apartments [inaudible].

Dickinson: But what's wrong with a union company doing wood-frame? Like couldn't there just be more wood-frame union companies?

Wright-Hainz: There could, but now we get. Uh. So we have one project in Langford. [indecipherable] to start up. Parksville. 22 Acres of Comox. Ah about 20 acres in Kelowna. Um, I think there's some in Metchosin. Don't quote me on that one. But the other ones are guaranteed through Highstreet. Each this size or bigger. Parksville's smaller. That's the only one that's smaller. [indecipherable]. But now.

Another Employee: Are they trying to branch more into Langford and Colwood?

Wright-Hainz: What?

Another employee: Are they trying to branch more into Langford and Colwood? Like I can't work [inaudible].

Wright-Hainz: Oh yeah. No. Wherever there is land Highstreet wants to buy.

Another Employee: No, I mean like, are they actually like, focusing on projects [indecipherable].

Wright-Hainz: Yup, they're just finalizing, uh, the papers for up to [inaudible] in Langford, for that project. And then I think after that one's done, which is the same size as this one ...

[crosstalk]

Wright-Hainz: Yeah exactly. Like these jobs are about a year. And then. So the point of like, [indecipherable] be on the Island is so we transfer the guys from job to job. Like [Church] said its 10 years of work. But now, if we have the Union, Highstreets gonna be like fuck it. We're not gonna give you guys these contracts. Highstreet...

Dickinson: Are we gonna have a union rep come here and give us their...

Wright-Hainz. Yeah, they'll come talk about it. I would assume. Like they can't just let us vote without [inaudible]. Like we'll probably see this all the way round. But the biggest thing is, like, after this job is done, like there's nothing else through [the Employer] on the island. Because, like, Highstreet wont work with a union company. They worked with one union company a long time ago and never again. They won't do it. It sucks.

32 Later in the recording, Wright-Hainz returned to this theme, suggesting again that if the Union were to be certified, the Employer would lose Highstreet work:

Wright-Hainz: But it's just, basically, if you want to work for the [Employer] or somebody else. Because after this job's done, there's nothing. We won't get Highstreet jobs. I've overheard meetings...

33 In his testimony to the Board, Wright-Hainz explained that when he said he had overheard meetings, he was referring to hearing Kehoe talking about how projects were bid and awarded.

34 The recording continued:

Wright-Hainz: ...I've done Highstreet jobs for the last, since the start of my apprenticeship. All I've ever done. Not once has there been a union contractor. [inaudible] And its not even that, it's just if, if. Why would, hypothetically, why would [the Employer] stay on the Island? If we can't afford to get these [residential] jobs, you can't afford to work in Highstreet. We're not gonna start bidding other stuff. And we have a bunch of apprentices and journeymen, the out-of-town guys, are flying in and out from home. And the point is for you guys to, like, work up through the ranks over the next 10 years for these projects and become the best electrician you can be.

But whether you do that at a different company or here, that's totally your decision. I just have a strong opinion. Because I know what's going to happen, and it's just, it's shitty.

35 The message presented by both Church and Wright-Hainz in this recording was that, if the Employer became a union company, Highstreet work would dry up. Wright-Hainz painted the consequences of that in stark terms: if employees chose to join the Union they would have to find work with another employer, since there would be none with the Employer.

36 At the hearing into this matter, Lucas was asked about the recorded comments made by Church and Wright-Hainz. He said he "totally disagree[s] with what they said and how they were said". Lucas said it was wrong to assume that Highstreet would not give the Employer any more work if it became a union company, noting that Highstreet already had a union contractor working for them. Union counsel asked Lucas directly if, in his mind, Highstreet would stop working with the Employer if the Union's application was successful. "No they would not", was Lucas' answer. Lucas said further that it was not his intention to close the Employer down, regardless of the outcome of the Union's application.

37 Lucas also said he did not know that Church and Lucas would make these, or indeed any, comments about the Union application, and that he only learned they had made those comments when he received and reviewed the Union's unfair labour practice complaint on the evening of Wednesday, November 3, 2021.

38 Following his visit with his parents on the morning of Tuesday, November 2, 2021, Lucas drove from Nanoose Bay back towards Victoria. As he drove, Lucas spoke to Campbell about the Union's application. He also spoke to Corcoran at about 1:00 or 2:00 p.m.

39 Lucas and Corcoran decided Corcoran would come to Vancouver Island that evening. Both Lucas and Corcoran say that was to assist with the planned roll out of the Employee Handbook and the "fit for duty" document. Lucas says he wanted to have Corcoran with him because he was "nervous about everything" and "wanted some support". Lucas said that he also wanted Corcoran to "help unfold the handbook properly". Corcoran was booked on a flight that evening arriving in Victoria at 6:30 p.m.

40 Less clear is how Kehoe came to return to Vancouver Island from his week off. Kehoe, I infer, lives in the interior of B.C. According to Lucas he drove to Vancouver Island, arriving on the evening of Tuesday, November 2, 2021. Lucas said Kehoe came to Vancouver Island to "check on how things were going".

41 Lucas picked Corcoran up from the Victoria Airport when her flight arrived, but before he did, he stopped in at the Crew House.

42 Lucas explained that he often visits his stepson when he is on Vancouver Island, and this was no different. He explained that the idea was to stop off and have a beer. Lucas says he made plans to visit Wright-Hainz at the

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Crew House while he was driving from Nanoose Bay. Wright-Hainz, for his part, testified that he did not speak to Lucas that day about him coming to visit.

43 In addition to Lucas and Wright-Hainz, several other of the Employer's employees were present at the Crew House that evening: Church and Emelson (with whom Wright-Hainz lives) were there, as were England and Bailey Wait, a journeyman electrician also working for the Employer at the Langford job site. Church says that he had invited England and Wait to come to the Crew House that evening.

44 The Employer called evidence about what occurred at the Crew House on the evening of November 2, 2021, from three witnesses: Lucas, Church, and Wright-Hainz. All three gave broadly consistent accounts. They say Lucas did not initiate conversation about the Union or its application, but was asked by someone - none of the witnesses were certain who - about what they should tell employees. These three witnesses said Lucas explained that they should say nothing, and that he couldn't speak about the Union's application with them.

45 In his testimony to the Board, Lucas said he tried to avoid talking about the Union or its application because he knew that there were limits to what an employer could say during a union organizing drive.

46 Under cross-examination Lucas volunteered that, at some point while he was at the Crew House, he said that the Union's application was "not good", and that he didn't know what the outcome would be. He explained that, in his mind, it was "not good" because it would change the way the Employer operates. He said he had started the Employer as a non-union company: "That was the intent".

47 Lucas left the Crew House about an hour after he arrived and went to pick Corcoran up from the airport.

48 According to both Corcoran and Lucas, after Lucas picked Corcoran up from the airport, they spoke briefly about the plan for the next morning's crew meeting. They both said that the plan was to say nothing about the Union - to limit discussion to the Employee Handbook and the "fit for duty" document.

49 If that was the plan, however, it was not followed.

50 Lucas and Corcoran arrived at the Langford job site on the morning of Wednesday, November 3, 2021. So did Kehoe. Church brought donuts and coffee for the meeting.

51 All employees who were scheduled to work that day (approximately 14 of them) gathered in the lunchroom.

52 Dickenson pressed record.

53 Lucas began by introducing himself, describing the Employer and the difficulties it had had upon its inception, and briefly - according to Dickinson's recording, for 2 minutes and 3 seconds - spoke about the Employee Handbook and "fit for duty" document.

54 At that point in the meeting, Lucas paused briefly before changing the topic:

We're obviously going through a pretty, um, interesting time right now as far as the company goes.

55 Lucas talked about his own negative experience as a union member:

I was a member of the union at one point. Actually I was a member of this Union years ago. I did some of their biggest projects for them. Mount Milligan. Worked at Rio Tinto at one point for Local 230. I had 360 employees under me. I put my heart and soul into that company. I was doing some of their biggest projects like I mentioned, for Houle and other outfits, and um, I walked in the office one day, and um, [inaudible] wasn't getting along with one of the employees, which was fine, [inaudible] upper management. And I was basically walked off the jobsite, told to go.

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I was like, OK. So I called my union and I asked the union to back me up and they, they weren't there for me. They said 'hey you could go back to work as a journeyman'. I said well, I'm a superintendent on the jobsite, a general foreman. They said well, this is all we can do for you. So from that point forward I thought, you know, the union really didn't think about myself, didn't back me. I thought well this is pretty unfortunate that it's come down to this.

56 Lucas transitioned into a story about difficulties a union may pose to the running of an electrical contracting business:

Then I just started kind of bouncing around the Okanagan. That was after I finished building a house there, and I, um, started another company up with another union contractor that - because at that time I thought well maybe I can try swing it with a different union. I tried working with the Steelworkers. So we put together a team. We started bidding these jobs, and [Kehoe] started with me as well as Trevor and a few other guys. And we were trying to get into the market here in the Okanagan...

57 In his testimony to the Board Lucas explained that he had not, in fact, started another company. Rather, he went to work, as an employee and a member of a Steelworkers local, for a company called Westcana Electric Inc. ("Westcana"). It was that experience, as an employee of Westcana, that Lucas was describing. I find, however, the message which would have been heard by the employees present was that Lucas was describing what might occur if he were to again run a unionized company in a similar market:

Things were going OK. We were doing alright. We weren't making any money. I think in the first year we lost 200 thousand dollars, I think that was the number that came down from head office, that we'd lost 200 grand. The next year we had a couple projects, some big projects. The first one of these that we tried doing, and again, we lost money, legitimately, I'm not gonna lie. We didn't, we didn't succeed. Then we were trying to figure out between ourselves and head office, well how are we going to survive in the wood-frame market as a union contractor.

Well, our only answer with the union was to roll the wages back. Hire people on at a different platform that we can afford to move forward. So we went for a journeyman rate of, I think it was about 32 bucks an hour, I think we dropped it down to 28? Is that right? 28 bucks an hour. We had to slash the vacation pay. We had to slash the medical dental plan. It didn't even exist anymore.

[Inaudible]

So with that, we took these new numbers, we went out to the market and we tried to bid some jobs. We got fucking squashed. Absolutely fucking squashed.

[Inaudible]

So then what do we do, right? We were kinda looking at it. We had these jobs around the Island. We were being pressured by head office the whole time to cut, to cut, to cut, to cut. And, um, things were happening from the union side that I didn't agree with. I mean we had an office there in Penticton and our budget was so tight we couldn't afford a janitor to come and clean our office. Our office wanted us to hire an administration clerk to come and clean our toilets for us, because we were trying to save every single penny. None of this is a lie. This is 100 percent truth, to you guys, right?

58 Lucas juxtaposed this dire situation of a union company with what he described as the much brighter future the Employer offered as a non-union company in a similar market. He did, however, recognize that the Employer had had some growing pains, which he said were now in the past:

So, I approached [Kehoe]. I approached the team. I said, um, I'm tired of the way we're being treated. I'm tired of what's going down here between Westcana, between ourselves, and I don't know what to do. Um, I talked to Highstreet. I want to try to bid these jobs on my own. So we can try to put a team together and make a company that's a great non-union company based on the flow of Highstreet projects.

Highstreet was more inclined to accept my offers, proposal for the projects. And we started making that transition move forward.

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During that transition we did not expect us to grow as fast as we did. We hired, I hired, some of the wrong people in head office. For sure, we had some colossal fuck ups, like colossal. Like, I mean, we were panicking at the 11th hour trying to get you guys paid. Trying to figure out what's going on. Not [inaudible] didn't have no money, which we're tight on now, because of some other issues, but we still always made sure to get your paycheques out. Whether it meant me flying them in on a plane, driving down there overnight, getting your paycheques, giving them to one of your employees to drive them to the job site to make sure that everybody could get their tasks met.

Um, so as you can probably tell, this is hard for me to even have this conversation because, you know, its, who knows what will happen following this vote this week. We don't know.

Anyways, we're going to get back on track here.

So following all that, we got the, um, we got you guys going, we're starting to build some traction. We brought [Corcoran] on board. We had to let some people go from the office. We're finally getting everything together. We've got a proper accounting firm to help us with the numbers, to help us balance our paycheques, to help us fix our ridiculous medical dental plan, and get all that stuff sorted out. I mean its only really in the last two weeks that all this stuff has kind of come into fruition. Which is really unfortunate. Because its finally at the point where we feel like there's a sense of structure there, and we can have you guys say, ok, we're confident with what's going on here. Uh, we got a safety platform that we're trying to roll out., may or may not be rolling out, and um...

59 Lucas then summarized the message he hoped to convey in language that echoed a theme articulated the previous day by Church and Wright-Hainz:

So yeah, so the long and the short of it is that, um, yeah I'm not gonna lie, I've made some mistakes, and if we haven't been there to support you guys I'm sorry, but the idea of [the Employer] was to be a wood-frame, multi-family contractor, focusing with, um, [Highstreet], and keeping you guys going from jobsite, to jobsite, to jobsite. Keeping you guys going non-stop on these projects. To build a team of highly trained electricians that could do these buildings and knock them off one after the other, year after year, without having to think about the same typical problems we have [inaudible].

60 After outlining the Employer's vision for the future, Lucas conveyed to the employees gathered another message broadly similar to the message Church and Wright-Hainz had conveyed the day before - a message that Lucas testified was false, and which he did not ascribe to - that if employees voted to join the Union, Highstreet work would dry up and there would be less work for employees:

So we were in a position here up until this week, that it looked like we could have that. Um, barring, uh, a vote that would take us union, that may not exist, because, uh, quite frankly I don't think that the powers that be above are gonna let us carry it forward. And I don't think we fit in the costs in the marketplace. I'm just gonna be honest with you guys.

61 Lucas then turned the floor over to Corcoran who, like Lucas, spoke about matters other than the two documents as they said they had planned:

If I can just add to that. So, I'm Ashley for anyone who hasn't met me yet. Um, I just moved here. Um, so I just kinda wanna talk about why I chose to work for [the Employer]. There's no easy way, but, um, I had a really great job. A really, really, really great job. Didn't wanna leave. But, I met [Lucas], and you know, we've all worked for really shitty employers before. Um, and we talked about what he wanted out of the company, what his vision was, you know. It really aligned with my values, and I talked about what we could do together to make this really great. And that didn't envision a union.

62 Corcoran then painted a similar picture to that painted by Lucas: one of a company that had made mistakes, but that that had a bright future which may be impacted by the results of the Vote:

But what [Lucas] said to me was really, really awesome. He wants to be, you know when we look at the long term future growth of this company, and where we're gonna take it, we want to be a top 10 employer in Canada. We want to expand. We want hundreds of people. Projects will be overlapping. And there's a plan in place.

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And, yes, we have not communicated those things yet because things have been such a mess. I will be honest with you, I walked into a shitstorm myself. I am cleaning up, I am trying to figure it out, and... But, my job is to work with you guys. You know, as HR and safety, Huge undertaking I have. I have to clean up some things first.

But, there were some really important things that I wanted to get out to you guys, like this Employee Handbook. And yes its going to use the term "policy" and "procedure", but its more of a promise and expectation. We need to define what we expect of you, and we need to define our promise to you. And that's super important. So take a look through that.

There are so many things on the horizon that I'm working on, that [Lucas] is working on - we're all working on. There has been mistakes, for sure. I have days where I'm extremely frustrated myself. And, you know, but, at the end of the day, solid dude. And I know he's here for you guys. He's here for me, and he's been extremely helpful. And, I know where he wants to take this. And, I'm excited.

So, I really hope you guys think really carefully about the decision that you guys have to make. You are in an interesting spot. And it's exciting, its terrifying, but you really, really need to think about what you're doing because its very important. It's very serious.

So, you know, in this handbook, my contact information is in there. [Church], [Kehoe], they have my information. If you guys have any questions, like, please, you know, I have my work cell phone listed everywhere. You can contact me at any time.

You know, there are some things. You know, we had a really awesome planning session last month. And, you know, we set some pretty awesome targets and actions in place. And, you know, there's things that we want to do. And when we get there, you know, um...

But we are making serious progress. And it's exciting. And, you know, we really want you guys to be a part of that, and grow with [the Employer]. So, like I said, just be, just really educate yourself about what's to take place, because it is extremely serious.

63 At this point in the meeting, Lucas spoke again - talking at length about a retirement savings initiative the Employer had initially tried to implement, but had scrapped. The Employer referred to this as the R.E.O.T Plan, and I will do the same.

64 Lucas testified that when the Employer first hired employees, it made the R.E.O.T. Plan available to employees. Effectively, the plan provided employees an opportunity to participate in investment opportunities through the Employer and Highstreet, and to receive matching funds from the Employer. Employees who chose not to participate in the R.E.O.T. Plan would receive an extra \$1.50 per hour on their paycheque.

65 Lucas made it clear in his testimony to the Board that the Employer decided to discontinue the R.E.O.T. Plan. He explained that the accountants the Employer had hired "struggled with the platform" and "couldn't keep it dialled in and flowing smoothly". Lucas explained that, in August 2021, the Employer had to issue employees all new hiring packages which made it clear that the R.E.O.T. Plan was being discontinued, and that, instead, \$1.50 per hour would be added to their wages. Lucas explained that, since August, the R.E.O.T. Plan was a policy that the Employer had "taken off the table". There was no plan to reintroduce it. Nor was there any plan to implement an alternative to it. In redirect, Lucas was asked by Employer counsel if, in November 2021, the R.E.O.T. Plan was something the Employer was trying to continue to implement, or if it was something that was still a possibility. Lucas said it was not.

66 Nonetheless, Lucas told the Employees gathered in the lunchroom at the Langford job site on November 3, 2021, about the R.E.O.T. Plan, going into significant detail. Lucas made it clear, however, that if the Union were certified to represent the Employer's employees, the R.E.O.T. Plan could not be implemented:

Yeah, did you guys remember the, umm...

Unfortunately not all of you guys were here when we had, uh, some other people come down. So, with this, with [the Employer], we had the ability for long term planning [inaudible] another really big part of the picture

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that really [inaudible] me. I'm a firm believer people need to be able to retire, and retire well. By that I'm saying you guys aren't going to be able to rely on old age securities, and old age pensions. It's just not enough money to retire, and you guys really gotta think long-term. Especially for the young guys in here, and girls, um, definitely for you guys, I would say start thinking about that now.

With the program we're trying to put in place that we are[n't]¹ implementing, that's it, if it's non-union we can't, we're not allowed to do this if it becomes union, I've already been told, so.

The R.E.O.T. Plan, how it works, um, the Real Estate Investment Opportunity Trust, is that if you guys work for us, every year we're gonna have an intake on this investment platform. It's similar to an RRSP, it's the exact same thing. If you guys are working, and say you make \$60,000 a year, we match, we'll match 10% of your wages to invest into this RRSP platform. So if you make \$60,000 a year and you save \$6,000 and you want to invest it, [inaudible] [the Employer] will match \$3,000 of that \$6,000. So that means you're getting \$3,000 free money upfront. Guaranteed. Nobody can question it. Marcus, you put the money in, good for you. Jane, you put the money in, good for you. We'll match it. [Emelson] put the money in, good for you, we'll match it. If you decide to leave that money in there for two months and pull it out, that's your decision. I would say it's the wrong decision, because the investment platform that we've lined, similar to what the Union's doing... Ours is paying out an average of 15% per year. Year over year. For the last 16 years. So it's proven, it's solid. It's a good investment platform. Something for you guys to consider and keep in mind also.

If you think, if you're putting away free money, doubling your money every year, every year, we have, we actually had a calculator on it, when you guys go to retire, you guys will be millionaires.

67 Lucas transitioned to talking about wages and suggested employees could soon see a pay increase, though that too was contingent on what happened with the Vote:

With the plan, um, as we get things rolling out [Kehoe] and I were talking about this last week at our meeting, of taking rates even higher, um, pending a formal review and what happens now, um, to make sure that our journeyman rates are actually gonna get bumped up, and if it all works out, because if we look at that platform, it looks like there's a little bit of a teetering scale there too that we may have to [inaudible] and improve on that.

68 Lucas then concluded with a summation of his message:

So yeah, that's who we are as a company. And I hope it's, I hope it resonates with you guys. It resonates with you guys that, you know, we're here for you. Um, think of that this week, and think that, think about the long term. About what we can bring to the table as a team and where we can go with things.

69 After Lucas concluded, Dickinson asked a question. Kehoe then asked Lucas if he could "say [his] piece". Lucas agreed, and Kehoe spoke, though not about the Employee Handbook or the "fit for work" document. Instead, he acknowledged having let the crew down, and elaborated on the revised pay structure Lucas was talking about:

There's a lot of new faces here. Um, I haven't been here much lately, because I've been tied up in Aspen, in Langford. Um, I know like Marcus, [England], [Wait], [Emelson], you guys have seen me here from day one.

Like, I have your guys' back, and, I'm sorry if I failed you guys. That's why we have to go this route. Um, I was always open. I was always a phone call away. If there's any issues, I would have resolved them with you guys. So, sorry for not being there.

Because, really, I was hoping we could start this sliding pay scale for the guys, right. Because I'm sure everybody in this room has worked somewhere where you're getting paid the exact same as the person next to you, right? And you're giving that extra effort, and it's not fair.

So, with the evaluations, and everything that we were implementing in this company, it was gonna change that, right. And you guys are gonna be noted for the extra effort you're putting in. Like we're gonna talk about it. There's gonna be pushes and raises and stuff, for the guys that are giving us extra effort. And, it's kinda sad that that can go on.

70 Kehoe appeared to contrast the wage program he was describing with what he believed would occur if the Union were certified:

Because, I know it's not, I never liked working for a company where somebody beside me is getting paid more than me because they have more seniority right. It's not fair. You guys put in the extra effort you deserve more. And, I think that's how it should be.

Um, I've had experience with IBEW, Steelworkers, and this, and I'm not a union person by any means. That's my personal belief. Um, and I won't be coming [inaudible]. If that means I have to lose my job. Just want you guys to know where I stand.

71 Church then spoke, primarily about his positive impression of the Employer. He also explained that if he had been hard on anyone it was because he saw potential in them. Church explained that he had seen improvement in their work, before noting:

You guys are putting it together now. It's night and day difference, and it makes me really proud to see the growth in everybody. And, it's a little upsetting thinking that something so great that we are building could crumble.

72 Kehoe then concluded, asking the employees gathered in the lunchroom to ask questions, and not to just hear what they want to hear:

This affects your future, like, I'm not even supposed to be working right now. I'm on my off shift. Like, I'm gonna be 5 weeks away from my kid. Um, I'm out here, so I'm gonna go back to my shift. And, I think it's important that you guys get answers you need. And, I'm trying to look out for you guys right.

I'm not telling you what's better. I want you guys to know what's better. So make sure you guys are asking the questions, right. Don't just let them, like, tell you what you want to hear, right. You're smart. That's why you're electricians. Make sure you're, you're thinking about it, getting the answers you need, right, before you make any decisions.

73 With that, the floor was opened up for questions, the first of which concerned the R.E.O.T. Plan Lucas had discussed, and led to a general discussion of that plan and of RRSPs.

74 At that point, Lucas noticed that Dickinson was recording.

75 There followed a heated discussion in which Lucas asked Dickinson to leave the meeting with his phone. Dickinson testified that he showed everyone that he turned off his recording, and that he was allowed to remain in the meeting.

76 The meeting continued for a few more minutes before Lucas, Corcoran, and Kehoe left. Church walked them out of the lunchroom.

77 Inside the lunchroom, the employees remained, and England, a foreman at the Langford site, began to talk.

78 Dickinson pressed record.

England: You know, priorities go to the 20 year IBEW veterans who are in that organization. You still have to pay your non-working dues, which is \$30 a month while you're sitting on E.I.

And you will be sitting on E.I. with no work come Christmas.

Next week, we're all laid off. I guarantee it, if we go union. [Lucas] is gonna shut the doors. So that's it man. If you guys want to get laid off prior to Christmas, to not have any work in the new year, it's up to you. If you so, choose to go non-union...

Dickinson: Paul, Paul...

England: Don't say anything now please.

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If you choose to go non-union, we're gonna be set here for years to come. Highstreet has seven other buildings coming up on this lot, man. Guaranteed work.

Yeah you're not gonna be making \$2 more an hour, but you're going to be stable in your, in your income, for years to come. So, those of you who own houses, car payments or whatever, you know, you gotta do what's right. And the majority of us wanna be working and we want a pay cheque. And you're not going to get either of those if you go union.

That's all I'm saying. Just be prepared for it. You know.

79 England continued:

We're gonna be laid off by the end of the week, if we so, if we go union. You know, [Lucas] is trying as hard as, to keep our wages up to par. You know, we're a non-union [inaudible]. And, right now, he's paying higher than anybody else on the Island, for us working. So you have to take that into consideration.

You'll be um, 999th person on the IBEW list looking for work. You won't have work for a year to come, and we are gonna be building non-union work. You're gonna quit the union and look for work. When you can save your ass right now, by doing the right thing.

80 Lucas and Corcoran left Langford and drove to the Nanaimo and Comox sites, where they held similar meetings.

81 Later that day - Wednesday, November 3, 2021 - the Union filed the present unfair labour practice complaint. In it, the Union described the comments made by Church and Wright-Hainz on November 2, 2021, as well as those made by Lucas, Corcoran, Kehoe, Church, and England on November 3, 2021.

82 As noted, Lucas testified that he did not agree with the comments made by Church, Wright-Hainz, and England, and that he thought they were wrong. He also testified that, on November 3, 2021, he did not ask any of those people whether they had made the comments as alleged, and did not take any steps prior to the Vote to correct what he viewed as misinformation.

III. POSITIONS OF THE PARTIES

83 The Union says that there can be no real dispute that the Employer has breached the Code. While it says Church, Wright-Hainz, and England were speaking on behalf of the Employer - a fact it says I can infer from the similarity of their messages, the context in which their statements were made and their respective positions with the Employer - it says it is sufficient to look purely at the comments made in the meeting on November 3, 2021. The Union says there can be no question that, at this meeting, Lucas, Corcoran, Kehoe, and Church were speaking on behalf of the Employer. The Union says it is clear and obvious that the Employer breached Sections 6(1), 6(3)(d), and 9 of the Code by the various statements made. The Union says the only real question in this case is that of remedy. It says the only appropriate remedy is remedial certification. The Union says that, in a captive audience meeting, the Employer: expressed its anti-union views; threatened dire employment consequences if employees chose to be represented by the Union, including that they would lose their jobs; and offered a bribe in the form of the R.E.O.T. Plan and a wage review if employees decided not to be represented by the Union. The Union says these comments were not protected by Section 8 of the Code, in part because they were false, did not constitute reasonably held beliefs, and were coercive or intimidating.

84 The Employer says it did not breach the Code. It says there is no evidence before me that Church, Wright-Hainz, or England were instructed to make the statements they made, or that they were otherwise speaking on behalf of the Employer when they made the impugned comments. It says the comments made by Lucas and Corcoran need to be understood in context, and that they were made off-the-cuff. The Employer says, if I find the Code was breached, that remedial certification is not warranted. It says the bar cannot be so low that any unfair labour practice in the context of organizing will result in remedial certification. Rather, the Employer says, if I find a breach, I should issue a declaration to that effect, and a cease-and-desist order. The Employer noted that, in some cases, the Board has ordered a new vote - though it does not ask that I do so here.

IV. ANALYSIS AND DECISION

85 For the purposes of this decision I have assumed, without deciding, that the comments made by Church, Wright-Hainz, and England on Tuesday, November 2, 2021, and Wednesday, November 3, 2021, were not made on behalf of the Employer. I find I am able to decide this case on the basis of the comments made by Lucas and Corcoran at the November 3, 2021 meeting.

86 The Employer does not dispute that when Lucas and Corcoran addressed employees on the morning of November 3, 2021, they were speaking on behalf of the Employer. For the reasons that follow, I find their conduct in that meeting constitutes a breach of Section 9 of the Code. I further find that the only effective remedy is remedial certification pursuant to Section 14(4.1).

87 Fundamental to the scheme and objectives of the Code is the right enshrined in Section 4(1) of the Code: that every employee is free to be a member of a trade union and to participate in its lawful activities: *Forano Limited*, BCLRB No. 2/74, [1974] 1 Canadian LRBR 13, at page 17. In the context of union organizing, this fundamental right is guarded by the unfair labour practice provisions of the Code, including Sections 6(1), 6(3)(d), and 9.

88 Part 3 of the Code sets out a scheme by which employees may choose to be represented by a trade union. The Code recognizes, however, that this choice needs to be that of the employees themselves. It cannot be coerced. Notably, the Code excludes employers from the decision-making process. The choice to be represented by a trade union belongs to employees, not their employer.

89 In *Cardinal Transportation B.C. Incorporated*, BCLRB No. B344/96 (Reconsideration of BCLRB Nos. B463/94 and B232/95) ("*Cardinal*") the Board explained:

The unfair labour practice provisions set out in Sections 6 and 9 are intended to ensure that the right of "freely chosen" trade union representation for the purpose of collective bargaining is meaningful. It has been recognized at least since the drafting of *The National Labour Relations Act*, Chapter 372, 49 Stat. 449 (1935) (the "*Wagner Act*") in 1935 that employees are economically dependent upon their employers, and are thereby unusually vulnerable to any attempt by employers to influence or interfere with their choice in collective representation. The unfair labour practice provisions of the Code, and the equivalent provisions in other labour legislation in North America, are intended to protect the right to bargain collectively; i.e., the right to freedom of association in the workplace. Such provisions are one of three essential components of all legislation modeled on the *Wagner Act* (including all labour legislation in Canada): certifications, unfair labour practices and the duty to bargain in good faith.

Without unfair labour practice protections, certification and collective bargaining could simply be defeated by the coercive use of economic power held by employers over employees...

(paras. 186-187)

90 Consequently, because of the inherent power and control of an employer over its employees - the economic dependence of employees on their employer - the conduct of an employer may violate the Code, even when that same conduct by another person would not be unlawful (*Cardinal*, para. 199). The Board in *Cardinal* cited Justice Learned Hand's comments in *N.L.R.B. v. The Federbusch Co., Inc.* (Sec. Circ., 1941), 4 LC 60,604 at 16,508 for that principle:

No doubt an employer is as free as anyone else in general to broadcast any arguments he chooses against trade-unions; but it does not follow that he may do so to all audiences. The privilege of "free speech", like other privileges, is not absolute; it has its seasons; a democratic society has an acute interest in its protection, and cannot indeed live without it; but it is an interest measured by its purpose. That purpose is to enable others to make an informed judgment as to what concerns them, and ends so far as the utterances do not contribute to the result. Language may serve to enlighten a hearer, though it also betrays the speaker's feelings and desires; but the light it sheds will be in some degree clouded, if the hearer is in his power. Arguments by an employer directed to his employees have such an ambivalent character; they are legitimate enough as such and *pro tanto* the privilege of "free speech" protects them; but, so far as they

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also disclose his wishes, as they generally do, they have a force independent of persuasion. The Board is vested with power to measure those two factors against each other, a power whose exercise does not trench upon the First Amendment. Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used, of which the relation between the speaker and the hearer is perhaps the most important. What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart. The Board must decide how far the second aspect obliterates the first.

(para. 192)

91 The Board in *Cardinal* defined coercion as "any effort by an employer to invoke some form of force, threat, undue pressure or compulsion for the purpose of controlling or influencing an employee's freedom of association" (para. 196), and recognized that context is important when considering whether conduct is coercive (para. 199). In particular, the Board "examine[s] with a strict level of scrutiny" comments made in meetings called by an employer which employees feel compelled to attend. The Board explained its approach in *Cardinal*:

... Employers in the normal course of their business are free to express their views to employees from the date of hire; they can and do on a continual basis issue written material to employees and post all such material in the workplace. They may, as a matter of management prerogative, devote as much supervisory time and resources to workplace communications as they desire. These communications can and do include one-to-one meetings between supervisors and employees, small group meetings and meetings of the entire company.

Inevitably, however, one of the responses of an employer who wants to discourage the unionization of its business is to suddenly increase its communications with its employees; and one particular kind of communication by an employer, which often takes place during a union organizing drive and that has received special attention by all Canadian labour boards, is the "captive audience" meeting. It has some or all of the following characteristics: it is held on company property during working hours, with no deduction in pay; attendance is compulsory, or if the employer states that it is voluntary, all employees feel compelled to attend because not to attend would be to clearly identify oneself as a supporter of the union; and senior management is in attendance. There is typically a discussion about: current wages and working conditions; company performance, and industry or sector performance; the position of competitors (and the wages which they pay); the changes which may take place in a business once a stranger (union) inserts itself into the relationships between employee and employer; the implicit knowledge of management of the union's organizing drive; and in some cases express or implied threats of layoffs, closures, alterations of wages and working conditions.

(paras. 204-205)

92 I find that when Lucas and Corcoran addressed the gathered employees on the morning of Wednesday, November 3, 2021, they did so in a 'captive audience' meeting as that term is used in the passage from *Cardinal* cited above. The meeting was held at the employees' work site, during work hours, with no deduction in pay, and Senior management was present. I am satisfied that, to the employees gathered, attendance would have felt compulsory. Lucas and Corcoran discussed wages and working conditions, company performance, and the changes which may take place in its business if the Union inserted itself into the relationship between the Employer and its employees. Moreover, I find, it included implied threats of layoffs, closures, and alterations of wages and working conditions. It also included promises of potential wage increases and investment opportunities that were contingent upon the Vote not favouring the Union.

93 Consequently, I find the comments made in that meeting must be examined with a strict level of scrutiny.

94 When I consider the context in which Lucas and Corcoran's comments were made, the content of those comments, and the fact that they were made by representatives of the Employer who held a position of economic power over the employees gathered, I find they constituted a form of force, threat, undue pressure or compulsion.

95 A reasonable employee hearing those comments would hear more than merely an appeal to rational persuasion from Lucas and Corcoran. Instead, that reasonable employee would hear that the Employer: did not want a trade union in the workplace; was set up specifically to operate non-union; may cease to operate, or may cease to operate in the same way, if the Union were certified; and would offer a review and potential wage increases, and "free money" in the form of the R.E.O.T. Plan, but only if the Union was not certified. In other words, the employees were told that the outcome of the Vote may determine: whether or not they continued to have a job; and if they did, whether or not they would see a wage increase and investment opportunities. They heard this message from Lucas and Corcoran - representatives of the Employer with the power to implement, or not implement, these workplace changes. In the words of Justice Hand cited in *Cardinal*, to the extent the Employer was appealing to rational persuasion, that was "obliterated" by the circumstances in which the comments were made. Employees were left, not with a free choice as to whether to join a trade union, but with a choice of whether to thwart the wishes of the Employer and bear the consequences of that decision.

96 I am satisfied in these circumstances, that the conduct of Lucas and Corcoran in the November 3, 2021 meeting constituted coercion or intimidation that could reasonably have the effect of compelling or inducing a person to refrain from becoming or to continuing be a member of the Union. I find the Employer has, therefore, breached Section 9 of the Code.

97 I need not decide whether the Employer also breached Sections 6(1) and 6(3)(d) by that conduct.

98 I further find that aside from remedial certification under Section 14(4.1), no other remedy will adequately remedy the Employer's breach of the Code. The Employer's conduct was egregious, and the extent to which it interfered with the fundamental right of employees to decide whether to join a trade union was severe. The damage to the employees' right to freely choose to be represented by the Union has been done, and cannot be undone. The Vote is tainted by the Employer's conduct in that it is not likely to disclose the true wishes of employees as to whether they wish to be represented by the Union. Any new vote that I might order would be similarly tainted. I am satisfied, therefore, that certifying the Union to represent the Unit is just and equitable in order to remedy the consequences of the Employer's breach of the Code.

V. CONCLUSION

99 For the foregoing reasons, I find the Employer breached Section 9 of the Code. Pursuant to Section 14(4.1), I order that the Union be certified to represent the Unit.

LABOUR RELATIONS BOARD

BRETT MATTHEWS
ASSOCIATE-CHAIR

1 The end of the word is muffled in the recording. It is unclear whether Lucas says "are" or "aren't".