BRITISH COLUMBIA LABOUR RELATIONS BOARD

RAMBOW MECHANICAL LTD.

(the "Employer" or "Rambow")

-and-

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 170 AND UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 324

("Local 170" or "Local 324")

(together, the "Union")

-and-

LES SCHNEIDER

("Schneider")

PANEL:	Allison Matacheskie, Associate Chair, Adjudication
APPEARANCES:	J. Najeeb Hassan, for the Employer Brandon Quinn, for the Union and Schneider
CASE NOS.:	64330, 64337, 64373, 64526
DATES OF HEARING:	September 25; October 1-3; October 4-5; October 11; November 7-9; November 19-20, 2012
DATE OF DECISION:	December 18, 2012

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 The Union applies for certification for its standard craft unit for Rambow's employees in British Columbia. At the representation vote, there were four challenged ballots. The Union also filed an unfair labour practice complaint alleging that the Employer had breached Sections 6 and 9 of the *Labour Relations Code* (the "Code"). On the day before the hearing set to adjudicate the challenged ballots and the unfair labour practice complaint, the Employer filed an unfair labour practice complaint alleging the Union and an employee, Les Schneider ("Schneider") breached Section 9 of the Code. During the hearing, the Employer also filed another unfair labour practice complaint under Section 9 against the Union and Schneider. I ordered that all of these matters be consolidated.

II. FACTS

2 Rambow is in the business of providing mechanical systems for commercial and industrial projects. It provides all plumbing, pipefitting and gas fitting and subcontracts other work required on projects. Its offices are based in Kelowna and its workforce generally works out of Kelowna. However, it also provides services throughout British Columbia and worldwide. It is common for Rambow to keep its journeymen plumbers working on out of town projects and to only hire locally as needed.

3 Patrick Waunch ("Waunch") is the owner of Rambow. Rambow was the successful bidder on a project in Victoria (the "Victoria 443 Project"). It sent the employees it had in Kelowna that were available to work on the project and ultimately, hired others locally. Ralph Norman ("Norman") was dispatched as Rambow's foreman at the commencement of the project. He has worked for Rambow for over seven years. On some projects, he will work as the foreman. On others, he works as a journeyman plumber in the field. Schneider has worked for Rambow most recently for approximately three years. At the time of the commencement of the Victoria 443 Project, Schneider was working as a foreman on a different project. When it completed, he commenced working at the Victoria 443 Project.

4 There was considerable evidence led concerning the status of Norman and Schneider. They both cast ballots at the representation vote. The Union has challenged the ballot cast by Norman claiming he is a manager and thus not included in the bargaining unit. The Employer disputes that Norman is a manager but has challenged the ballot cast by Schneider claiming he is a manager and also asserts that his vote should not be counted as he intended to quit the day after the representation vote. This issue will be dealt with further below. However, for the chronology of facts, I find that both Norman and Schneider are foremen who would be included in the

bargaining unit. Schneider hired three apprentices on the Victoria 443 Project. However, he did so without authority as Waunch has made it clear that he has the sole authority or final say on hiring employees. Besides the hiring of the three apprentices, Norman and Schneider both equally fulfilled the role of the foreman on the worksite. They divided the duties where Schneider was primarily responsible for the office work required of a foreman and Norman was primarily responsible for onsite supervision and interacting with the general contractor and the subcontractors. As well, as they were both from Kelowna and working a ten days on and four days off rotation, there were regular periods of time where only one of them would be the sole foreman on the worksite.

On July 23, 2012, Waunch learned about the Union's organizing drive in Victoria. He called Norman and told him he wanted to have all the employees present for a conference call with him at 7:00 a.m. the next morning in the trailer on the jobsite. Norman ensured all of the employees on the Victoria 443 Project attended. One of the employees recorded the conversation and the tape was admitted into evidence without objection. Waunch's tone of voice was conversational. He did not sound angry. Waunch starts off the call by saying:

> OK. Guys, I understand the union is snooping around the site and trying to get you to come across to the union side. If that's your choice that's fine, but we want to make a few things clear up front. First of all, you cannot have a meeting on site with the union representatives. If you want a meeting you can meet at the front of the gate or outside the gate, but there's no meetings that are going to happen on site. The union right now of course they're pretty pissed with us because not only have we taken the helicopter facility but it looks like we have Colwood, which is the first phase of a 20-year project. We will probably, this one here will be starting right away but for our part it probably won't be going until spring because they've got a bunch of pile driving and big things we have to do here on the helicopter facility, so a lot of that is going to take place and then probably in the spring we got 6 buildings over there that we will be running mechanical to. So I want to explain some things too from the union side, I mean whatever your choice is that's fine, but I also want to let you know that we have long term work in there and are going to be in there for a long, long term. We're not planning to just do the helicopter facility and move on. Secondly, I just need you to know that whatever range they're quoting there, you've got to pay union dues to your ... to the associations both Canada and the U.S. and I don't think that's changed with this union versus Local 170. So what we're trying to say is we have long term work for you. Again, if you choose to go down that road, let Ralph know. We sure don't mind. We normally hire a certain amount of union people throughout the year anyway, but we always watch the numbers so that they don't get over the 50% on the particular project and if you decide to go down that road we will probably have a layoff, at this stage, but we will deal with that as circumstances go on here.

6 During the hearing, despite the taped recording of the conversation, Waunch denies that he said:

> We normally hire a certain amount of union people throughout the year anyway, but we always watch the numbers so that they don't get over the 50% on the particular project and if you decide to go down that road we will probably have a layoff, at this stage, but we will deal with that as circumstances go on here.

7 Waunch asserted that when he spoke of percentages during the meeting, he said that Rambow watches the numbers to keep it 50% apprentices and 50% journeymen for quality of work reasons.

8 Three employees who were present at the meeting recall Waunch making statements that connect union support with layoffs. Tyler Cornhill ("Cornhill") said that during the conference call, Waunch made it clear they could talk to the Union and it was okay to make their own decision but if they sided with the Union, layoffs would be coming. Greg Mooney ("Mooney") recalled Waunch saying if they choose to go union, it was their choice but there would probably be layoffs. Romulo Portillo ("Portillo") recalls Waunch saying that he wanted to keep a certain percentage union and it was their choice to go either way but there would be some layoffs involved. Another employee present at the meeting, Scott Lothrop ("Lothrop") recalled Waunch saying he preferred to have a job at 45% union and 55% non-union but does not recall any talk of layoffs.

9 I find based on the taped conversation and the testimony of the employees present that Waunch stated at the meeting that Rambow normally hires a certain amount of union, but watches the numbers so it does not get over 50% and if the employees "go down that road", there will probably be a layoff. I find that "go down that road" means certifying the Union by voting for the Union in the upcoming representation vote.

10 Later in the morning, Local 324 filed an application for its craft unit for Rambow's employees on Vancouver Island. At 11:30 a.m., the Board sent notice of the application and the hearing date to Rambow.

11 Later on the same day, Waunch told Norman to ask all the employees on the Victoria 443 Project if they wanted to be union or non-union. Waunch also contacted the employees working in Kelowna to ask them if they wanted a union or not. He was able to contact all but one of the employees and they all told him they did not support the Union.

12 Norman went onto the Victoria 443 Project worksite with a pen and paper and asked all the employees if they supported the Union. When Norman asked Schneider, Schneider told him he should not be asking as it is illegal and Norman responded that he was going to do what Waunch told him to.

13 All of the employees, except for Cornhill and Mooney, did not respond to Norman's question. Cornhill and Mooney are long term card carrying union members who knew that everyone knew they supported the Union. In his pre-hire interview, Cornhill made a point of making sure that the Employer knew he was a union supporter before he accepted the offer to work for Rambow.

14 At the lunch hour, Cornhill packed up his tools with Mooney and reported to Norman at the trailer as they expected to be laid off. There is a dispute on the evidence concerning whether or not Norman told them to wait until he made a phone call to Waunch. Norman and Waunch deny there was a phone call at this time. Tyler and Mooney say there was. Whether or not there was a phone call to Waunch at that time, it is not disputed that Norman told Cornhill and Mooney they were not laid off and should get back to work. They went back to work and all the other employees on the Victoria 443 Project were aware that they were union supporters and did not get fired or laid off.

15 Norman told Waunch that the employees were not providing him with any information. The next day, July 24, 2012, Waunch sent Norman a form and told him to hand it out to all of the employees. The form was on Rambow letterhead and was titled "Freedom of Choice." It noted it was “without prejudice” and then set out the following:

> The following is answered without intimidation or coercion on myself and it is my right to choose what I feel is in my best interest:
>
> I would NOT like to join the Union _____(print name) _____ (signature)
>
> I would like to join the Union ____(print name) _____(signature)
>
> My union dues are up to date ____ (yes) ____(no) ____N/A
>
> I choose not to participate _____ (print name) ____ (signature)
>
> Please be advised that this document will be accompanying Patrick Waunch, President & CEO of Rambow Mechanical Ltd. to the hearing between Rambow Mechanical Ltd., and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local #324 on Tuesday, July 31, 2012 at 9:30 am in Vancouver, BC.

16 On the same day, Norman gave the “Freedom of Choice” form to each employee and asked them to fill it out and get it back to him as soon as possible. The Freedom of Choice form was also distributed by Waunch to all of the employees in Kelowna. Norman and two other long term employees of Rambow from Kelowna signed and returned the form indicating they did not want to join a union. Norman did not receive any forms from other employees. He then scanned the three signed forms and emailed

them to Waunch. Schneider was the only other long term employee from Kelowna who did not fill out the form. He told Norman he wanted time to talk to his wife about it first. He also made sure that Norman passed this reason on to Waunch.

17 During the hearing, Waunch testified that he distributed the Freedom of Choice form because he had never heard of a poly party union and did not understand what the dues structure would be. He said when he belonged to a union, a member could not vote unless their dues were paid up to date. He said he did not know whether in an organizing drive people have to pay dues up front, but in his experience if dues are not paid, you cannot vote.

18 Waunch agreed in cross-examination that he wanted to find out if the Union had majority support. He said that he thought the Union had nine supporters which would be 42%. He therefore figured the Union did not have enough support for a vote. He agreed he thought that Cornhill, Mooney and the six apprentices on the Victoria 443 Project supported the Union. He said that he also suspected Schneider supported the Union because another employee, Marc Graham ("Graham"), had told him he overheard Schneider talking on the phone in the trailer to a Union representative. Graham was called as a witness by the Employer. Graham denied ever telling Waunch that he heard Schneider talking to the Union on the telephone in the trailer. He said he had no idea who Schneider talked to.

19 On July 27, 2012, the Union filed its poly party application by Locals 324 and 170 for employees within its standard craft description employed in British Columbia by Rambow. Local 324 withdrew the application filed on July 24, 2012.

20 The Union filed the unfair labour practice on July 30, 2012 alleging that the Employer had breached Sections 6(1), 6(3)(d) and 9 of the Code by threatening to terminate or lay off employees and by asking them if they were union members.

21 On August 1, 2012, Waunch sent a letter to Norman who distributed it to the employees on the Victoria 443 Project on behalf of Waunch. The letter says:

> I must start with how much I love the industry we are in and have donated my life to it. There is nothing better than bringing an apprentice through the ranks and see the smiles on their face on what they can accomplish, or to step into a mechanical room and see it well layed out with piping on the square. It makes me proud to be in the industry.
>
> It has taken me 27 years to build my company and I have always treated my employees fair and with respect. I have also helped the Unions in both Alberta and British Columbia when work is slow. I put them to work and they often mention how nice it is to work for Rambow Mechanical rather than the Union due to the fact that we give good working conditions, fair wages and a sense of belonging. We are a family oriented company and believe strongly in freedom

> of choice for all employees. I had no idea that I can't talk to my employees about their union preference and do apologize.
>
> It seems odd that a few people that I haven't met and that have worked for us less than three months can have an impact on a company like ours. I hold no remorse against these people no matter what happens with the vote. They will still have their jobs. The problem I do have is that I have tendered these projects using our values and I may not be able to survive this hit by the Unions nor will I ever be able to get a job in Kelowna for the families I do support. It just doesn't make sense.
>
> I have been charged by the Union with an unfair labour practice because of the freedom of choice document I gave you and conference call I held. I gave you the freedom of choice document because I wanted to find out why you were applying for union representation. We have always had an open door policy at our company where we could talk openly about things like this.
>
> In the conference call, I wanted to know whether you had any question. I never intended to threaten employees with the loss of their jobs because they supported the union and I would never do that.
>
> In closing, I just want to say that we want to work with you as part of our business family. We can't afford the Union Agreement and we don't want an adversarial relationship with our employees where I can't talk directly with our employees if they have issues.

22 On the same day, Robert Brown ("Brown") prepared an e-mail and sent it to Norman to distribute to all employees. Brown is the stepson of Waunch and an employee of Rambow. The Union has challenged the ballot cast by Brown at the representation vote on the basis that he is not within the craft unit applied for. The Union has not challenged his ballot on the basis of his familial relationship with Waunch. In the e-mail, Waunch sets out the positive aspects of working for Rambow emphasizing that it does everything it can to keep employees working, not have layoffs and hires back as soon as possible. He also encourages all employees to ask the Union questions and make the right choice that is best for them.

23 The representation vote was conducted on August 3 and 7, 2012 and was sealed pending adjudication of the challenged ballots and the unfair labour practice complaints.

24 On August 7, 2012, Brown was sent to the Victoria 443 Project to commence working on the jobsite. When he arrived, Schneider told him unless the general contractor really got moving Rambow would be running out of work to do. Schneider suggested that three people should be laid off. Schneider also called the Union to advise that there may be a layoff and it was for legitimate business reasons.

25 Brown called Waunch and told him that Schneider thought layoffs were required. Waunch flew out the next day and toured the site. He decided that six employees could be laid off but decided to lay off five employees. Schneider provided names of three employees that he thought could be laid off. Waunch asked another long term Kelowna employee for his opinion and he provided another name. Waunch chose the fifth person to be laid off.

26 Waunch then had a meeting in the trailer with the five employees who were to be laid off. Reid Philip ("Philip") was one of the employees laid off. He asked Waunch if they were fired or laid off and whether if things picked up, they would be the first ones hired back. There is a dispute on the evidence concerning Waunch's response to this question.

27 Waunch recalls Philip asking the question but denies that he said they would not be recalled because they supported the Union or that he knew they were union supporters or had signed a card. Waunch says he responded that “if it goes union, and you are laid off, you go to the bottom of the list. I presume the union would allow you back on site but I have no control over it”. He also said that he explained to the apprentices that “if it went non-union, we would have 50% of our journeymen on project. We always look at it in proportion and you may not get back all right away but would at some stage”.

28 Philip said Waunch responded that he was not sure if they would be hired back as he watched the numbers and wanted the job to remain 40 to 50% union. Philip says he then asked if he was implying they were part of the Union and Waunch responded, “I know you are part of the Union because I have seen your signed indenture cards”. Philip also testified that Waunch had a piece of paper with their names on it with a column that had a title of “union" and there were check marks by all their names. In cross-examination, Philip said he did not remember Waunch saying anything about recall depending on the union dispatch system or the percentage of journeymen and apprentices on the jobsite. In cross-examination, he admitted he did not know what an “indenture card” was but maintained his evidence that Waunch had said he knew they were part of the Union because he had seen these cards.

29 Three of the other laid off employees testified about this conversation. Lothrop recalls Philip asking if they were fired or laid off and, if laid off, would they be the first ones recalled if work picked up. He could not recall Waunch’s response but agreed he mentioned the Union. Lothrop was called as a witness by the Employer and in redirect he was asked if “Waunch said recall would depend on union dispatch or words to that effect” and Lothrop said "yes".

30 Portillo was another one of the five employees laid off that day. He recalls Philip asking if they would be recalled and Waunch replying “no, because they were union sympathizers and he wanted to keep a low percentage”. Portillo said Philip then asked if he was implying they were union members and Waunch replied that he had seen the cards signed by all of them and they were sympathetic to the Union. Under cross-examination, Portillo at first said he did not remember Waunch telling employees recall

would depend on Union seniority if it was certified and denied that Waunch said anything about the Union having a list. Later in cross-examination, he agreed that Waunch explained the certification procedure that the Union would keep a list for seniority and if the Union succeeded in its application, whether they were called back would depend on whether the Union would dispatch them. Portillo maintained his statement that Waunch said he had seen their union cards throughout cross-examination. When Portillo was asked in cross-examination if “Waunch told you that if the Union wasn’t successful in the vote, the jobs would be 50% journeymen and 50% apprentices” and he responded, "yes".

31 I find that during this conversation Philip asked Waunch if he was implying that they were union supporters and Waunch replied that he knew they were union supporters. This is consistent with the course of action taken by Waunch since he learned of the organizing drive. During the conference call, he told the employees to let Norman know if they were “going down that road”. He also asked Norman to ask everyone if they supported the Union after the conference call and then distributed the Freedom of Choice form seeking that information the next day. He also testified that he figured 9 out of the 42 employees supported the Union and his suspected 9 employees included the 6 apprentices on the Victoria 443 Project. It therefore would not be surprising for Waunch to respond to Philip’s question “are you implying we are union supporters” with the answer “I know you are union supporters". Using the test in *Faryna v. Chorny* (1951), 4 W.W.R. (NS) 171 (BCCA), this answer fits in with the preponderance of probabilities. As well, Waunch agreed in cross-examination that he used words at the layoff meeting similar to his message in the conference call. In the conference call, he clearly said he hired a certain amount of union but always watches the number so they do not get over 50% on any particular project. I find on a balance of probabilities that Waunch made all statements attributed to him by the employees who testified. Philip and Portillo testified that Waunch told them recall was dependent on keeping a low union percentage on the worksite. They did not retract this statement or agree that they were mistaken. Portillo also agreed in cross-examination that recall would depend on keeping a 50/50 percentage of journeymen and apprentices and Lothrop agreed in redirect that Waunch said that recall would depend on union dispatch rules if they were certified. I find it is not inconsistent for Waunch to tell the employees that he knew they were union supporters and recall would depend on keeping the union percentage low and to also say during the same conversation that if certified, recall would depend on union dispatch rules and if not certified, recall would also depend on the relative percentage of journeymen as compared to apprentices.

32 I find that Philip was mistaken when he testified that the list of names Waunch had with him at the meeting had a title of “union” on it. Philip only had a brief glance at the paper, and based on hearing Waunch say that he knew they were all Union supporters, I find he is honestly mistaken and assumed the title over the list of names was "union". I accept Waunch’s evidence that if there was a title, it would have said something like “layoff”.

33 The Union also filed an unfair labour practice complaint alleging that the Employer violated Section 6(3)(a) of the Code by discriminating against Schneider in

regard to conditions of his employment because he was a union supporter. Sometime in early August, Schneider stopped receiving work related e-mails.

34 Waunch initially said he stopped computer access for Schneider because he found out from Graham that Schneider said he was quitting. However, Graham testified he did not tell anyone except Norman that Schneider said he was quitting and he did not tell Norman until he was back from vacation. The e-mail problem commenced before Norman was on vacation.

35 I turn now to the incidents relied on by the Employer in its unfair labour practice complaints filed against the Union and Schneider. The Employer's unfair labour practices against the Union are based in part on Schneider being a Union organizer or acting on behalf of the Union.

36 I find Jim Noon ("Noon"), a representative of Local 324, and Jeff Chapman ("Chapman"), a representative of Local 170, conducted all the organizing on behalf of the Union. During this hearing, Cornhill expressly waived his right to confidentiality concerning union membership. He is a long term union supporter and also contacted Noon when he accepted the job to let the Union know he was working non-union. Cornhill and Noon kept in touch as the Victoria 443 Project progressed. Cornhill set up a meeting with Noon and Schneider in the trailer on the worksite. It was an introduction meeting where Noon and another representative of the Union met Schneider and let him know if the Victoria 443 Project needed more manpower, the Union could provide people. Noon also answered questions from Schneider about wanting to rejoin Local 170 as he was interested in working at the Kelowna General Hospital project. Noon did not commence an organizing drive or hand out any membership cards at that time. He did not seek Schneider's help in conducting an organizing campaign. The Union also did not provide him with blank membership cards to present to other employees. Schneider did not obtain any signed membership cards from any other employees.

37 Schneider later contacted Noon for assistance as he had attempted to join Local 170 but it was not accepting his application because he was working for a non-union company. Noon contacted Chapman of Local 170 and let him know Schneider's concerns and that there was an organizing drive being conducted for Rambow. Chapman then discussed Schneider's application with the business manager of Local 170 and obtained approval for Schneider's application to be accepted. Chapman also received approval for Schneider to pay the minimum possible initiation fee of $40 and three months' dues as he was rejoining during an organizing drive. Forty dollars ($40) is the minimum amount required under Local 170's constitution for initiation fees.

38 The Employer alleges that unfair labour practices occurred at a meeting on July 25, 2012. The Union arranged the meeting as it had heard concerns from employees about the Freedom of Choice forms. The meeting took place at the local Boston Pizza restaurant. Schneider and Lothrop drove there together. They stopped and picked up some work related supplies first. Lothrop went home with other employees after the meeting. Noon arrived at the Boston Pizza restaurant first. Schneider participated in the meeting but it was Noon who was in charge of the meeting. Noon answered all

questions. Noon also handed out membership cards to sign and provided one pen to all employees present. When this point arose in the hearing, through an informal process aimed at protecting the confidentiality of employees present at the meeting, the Employer accepted the stipulation that the Union asked the employees who had signed cards before to sign a new card because of the poly party application. The Board reviewed the membership cards signed and confirmed that there was a previous card signed for every card signed on the date of the Boston Pizza party.

39 The Employer alleges an unfair labour practice occurred on August 9, 2012. After the lay off that day, the five laid off employees gathered with the remaining employees on site. Schneider approached Lothrop and grabbed him by the collar of his shirt and yelled at him saying: “you better not have told [Graham] something you shouldn’t have. I will kick you to the ground". Then Schneider said if Lothrop did not do anything, he apologized for what he said. Schneider then walked away.

40 The Employer alleges an unfair labour practice occurred during a conversation between Schneider and Tim Schaffer ("Schaffer"). Schaffer is another employee of Rambow working out of Kelowna. He and Schneider were friends. On August 2, 2012, Schneider called Schaffer and asked him if he was ready to stick it to Rambow. Schaffer asked what he meant and Schneider responded with the Union. Schaffer said he did not want any part of it. He said he was union before but owed back dues. There is a dispute on the evidence concerning the next part of this conversation. Schneider's recollection of the phone call conversation is the same as Schaffer's except for the response to Schaffer’s comment that he owed back dues. Schaffer says Schneider said "what if we can eliminate or wipe them out?". Schneider says he responded the Union could probably give Schaffer a break as he had received a break on his. They both testified that Schaffer’s response was he wanted no part of it. Schaffer then said Schneider also mentioned there was a two year job in Kelowna and he could get him in. Schaffer said he wanted no part of this. He said he was planning on moving to Saskatoon. Schneider agrees he brought up the Kelowna Hospital job but says he did not make any promises. The conversation ended very cold with Schneider saying he hoped all goes well for him in Saskatoon.

41 The Employer alleges an unfair labour practice occurred during a conversation between Schneider with Derrick Kish ("Kish"). Kish is an employee of Rambow. He has worked out of Kelowna for approximately two years. Sometime just prior to August 3, 2012, Schneider phoned Kish at home and after a brief conversation asked how he was voting. Kish responded that he did not want to talk about it as it stresses him out and his wedding was coming up on August 3rd. Schneider had been invited to his wedding and told him he could not make it to the wedding but would still get him a small wedding gift. Schneider then offered to pay Kish’s Union initiation fees as part of his wedding gift. The Employer in argument asserts that Schneider offered to pay Kish's Union dues. If the Employer intended by this argument that Schneider offered to pay Kish's Union dues in perpetuity, I find this is not established on the evidence of Schneider or Kish. The offer was to pay Kish's initiation fee.

III. SUBMISSIONS

42 The Employer submits that there is no basis for the Board to grant a remedial certification. It says the true wishes of the employees can be shown by simply counting the ballots cast in the representation vote. It says if there is any reason to doubt that the vote does not reflect the true wishes of the employees, it is because Schneider offered a monetary benefit to Schaffer and Kish in an attempt to persuade them they should vote in favour of the Union. It says the Board has no way of knowing whether Schneider or the Union made similar promises or offers to induce other employees to sign union membership cards or to vote in favour of having a union. The Employer says this casts a cloud over the entire certification process.

43 The Employer says it is relevant that Schneider is a foreman and well known among the employees to be a key union organizer and supporter. It says his presence at the meeting at Boston Pizza as a supervisor with significant authority could have had a coercive impact. Also, it says membership cards were handed out with one pen to all the employees. The Employer says it does not matter whether new cards were signed at the meeting or not. It says the important fact is the meeting was the first step in the process that could have had a coercive impact on how employees later voted. It says any card signed on the date of the Boston Pizza meeting should be declared void.

44 Concerning the conversation with Schaffer, the Employer submits that the Board should draw the inference that the offer to get his union dues wiped out was contingent on Schaffer supporting the Union in the vote and getting the Union certified. It says there does not have to be an outright offer of an inducement in exchange for a vote. It says the question is what a reasonable employee would believe was being offered. The Employer says it is clear from Schaffer's evidence that he thought he was being bribed to vote for the Union.

45 Concerning the conversation with Kish, the Employer submits there can be no doubt that Schneider called Kish for the sole purpose of soliciting his support for the Union in the vote. It says it was only when Schneider learned that Kish was more concerned about his wedding and felt that it would be too expensive to join the Union that Schneider conveniently offered to pay his union dues. The Employer says the offer was made to induce Kish to vote in favour of the Union and not to worry about the financial implications of the Union being successful in the vote as Schneider would cover those costs.

46 The Employer says whether the employee in fact is influenced by the offer is not the question. It says the important point is that the integrity of the Board's processes has been compromised: *Certain Employees of R.C. Purdy Chocolates Ltd.,* BCLRB No. B412/2001, 77 CLRBR (2d) 1.

47 The Employer submits that the validity of membership evidence can be challenged on the basis that there was coercion or intimidation by way of threats or inducements: *Ainsworth Lumber Co. Ltd.*, BCLRB No. B143/2009, 168 CLRBR (2d) 137. The Employer says there is no basis for making a distinction between the

impermissibility of obtaining a vote favouring the union by improper inducements and obtaining a membership card by improper inducements. It says the integrity of the process has been violated. It says the employees and the Employer will not have confidence that the vote was the result of a fair process.

48 The Employer submits it does not matter whether Schneider was a union organizer or just a vocal supporter. It says there can be no doubt that Schaffer and Kish would have seen him as intimately involved in the certification process. The Employer says its complaint is against both Schneider personally and the Union. It says the Union is responsible for those who it involves in the organizing process.

49 The Employer says it is long settled that it is not appropriate to organize based on different fees being charged before or after certification: *Haebler Construction,* BCLRB No. B39/93. It says offering to pay membership fees, which is a greater financial incentive than a two tiered initiation fee, is a coercive inducement.

50 The Employer submits that the Board has numerous options available to remedy circumstances where unfair labour practices committed prior to a vote may taint the outcome: *St. Jude's Anglican Home,* BCLRB No. 153/85 (Appeal of Nos. 460/84 and 17/85). It says the Board has the authority to refuse to certify, or alternatively, destroy the ballots and conduct a fresh representation vote after all employees are aware of improprieties that have occurred.

51 The Employer asserts that Schneider assaulted Lothrop and even though this occurred after the vote, it still amounts to coercive and intimidating conduct and constitutes an unfair labour practice. The Employer says the message was clear that employees had best be loyal Union members. The Employer submits that Schneider should also be directed to write a letter to Lothrop apologizing sincerely to him and a separate letter to all members of the proposed bargaining unit explaining that his actions were not only wrong but were contrary to the Code. The Employer says this is particularly important if the Board decides to order a new vote.

52 Concerning the unfair labour practice complaints filed by the Union, the Employer submits the Union seeks an automatic certification because it knows it has never had sufficient support for a vote or majority support through a vote to represent the employees of Rambow.

53 The Employer says the awarding of an automatic certification is an extraordinary remedy that should not be granted lightly: *South Surrey Hotel (Best Western Pacific Inn*, BCLRB No. B25/94. The Employer submits if the Board concludes the Employer has committed unfair labour practices, a remedial certification should only be granted if it can be said that but for the unfair labour practices, the Union would otherwise have obtained certification through a vote.

54 Concerning the conference call on July 24, 2012, the Employer submits that the comments made by Waunch were permissible under Section 8 of the Code. It says although Waunch did state that there might be layoffs if the Union was certified, he

simply meant that there would be a reduction in the number of apprentices so that it equalled 50% journeymen and 50% apprentices. The Employer says he may not have chosen the best way to express it, but that is what he meant. It also says as there is a recording in evidence, it is established that the tone he used was not coercive and he also told them on multiple occasions that they were free to have a union if they wished and explained all the reasons why he thought it was unnecessary. The Employer also says the comment about layoffs is just one sentence in a five minute conversation and should not be taken out of context. It notes that Lothrop did not even recall Waunch mentioning layoffs in the conversation.

55 The Employer also relies on its apology in its August 1, 2012 letter in which it says it assured the employees their jobs were not in jeopardy. It also says employees who testified confirmed in cross-examination that Waunch had withdrawn any suggestion that they would lose their jobs if the Union was certified.

56 The Employer disputes the Union's assertion that the August 1, 2012 letter was a violation of the Code. It says it was merely an expression of its views and was permissible under Section 8 of the Code. It says there is nothing in the letter which is intimidating or coercive and moreover, it made it clear to the employees before the vote that no one would lose their job because they may have supported the Union. The Employer says it made it clear that the decision to join the Union was theirs to make but that it did not believe it could afford the Union's wage rates in their master collective agreement as the jobs they had were bid on Rambow's rates of pay. The Employer says this is a fair thing to tell employees. The Employer submits it did not say it will close down if the Union is certified. It has just given its economic justification for why it is better to remain non-union. It says these are Waunch's genuinely held beliefs and they are protected by Section 8 of the Code: *Convergys Customer Management Canada Inc.*, BCLRB No. B62/2003, Upheld on Reconsideration in BCLRB No. B111/2003 ("*Convergys*").

57 The Employer notes that only three employees filled out the form that Waunch prepared asking if they supported the Union and there were no repercussions to anyone for not having completed the form. The Employer also relies on the fact that the two known Union supporters presented themselves to Norman assuming their employment would be terminated and it was not. The Employer submits this was well known to employees and would have dispelled any assumptions the employees had before the vote occurred. The Employer also relies on the fact that no employees were laid off before the vote. It says this is a signal that whether they supported the Union or not made no difference to their employment status.

58 Concerning the allegation that Schneider's terms and conditions of employment were changed, it says there was evidence from Schneider that there was some confusion in the Kelowna office about whether they were to be communicating with Schneider. It says the office staff was told not to communicate with Schneider about Union matters and they misunderstood and stopped communicating with him in all respects. As well, it says that Waunch was concerned as Schaffer told him Schneider was going to work out of the Kelowna Hospital project and then he learned from

Graham that Schneider was going to quit. The Employer says the impact on Schneider with respect to the computer issues was short lived and there was no evidence that any employee in the bargaining unit was aware of the confusion.

59 Concerning the meeting regarding the layoff after the vote, the Employer says that it made it clear whether employees would be recalled depended upon if the Union was certified, the dispatch rules which are based on a seniority list and if the Union did not succeed in getting certified non-union recall would depend on the numbers as Rambow usually kept them at 50% apprentices and 50% journeymen. It says Philips' evidence was evasive and contradictory. It says his suggestion that Waunch had a list with only five names and union identification makes no sense. It says the list was simply the names of the employees to be laid off as Waunch did not know them well. It also says there is no basis to suggest that the layoffs or future recalls would be based on anti-union sentiment.

60 In conclusion, the Employer says there is no basis for any finding that it committed any unfair labour practices, much less any which would warrant a remedial certification. It says the remedy of automatic certification should only be granted if it can be said that but for the unfair labour practices, the Union would have obtained certification through a vote. The Employer submits that if the Board finds that Schneider or the Union did not commit any unfair labour practices, then the vote should be counted, assuming there is sufficient support for the vote to have been held, taking into account the challenges. The Employer says even if the Board finds that Rambow committed unfair labour practices, a declaration to that effect is sufficient and the vote should be counted. Alternatively, if the Board concludes a declaration is insufficient, the Board can order a new vote.

61 The Union submits that this is a case about an employer that, from the moment it learned about the organizing drive, was willing to do anything to defeat the application. It says the Employer made threats to job security and there is no chance that the vote will reflect the true wishes of the employees. It says the unfair labour practice complaints filed by the Employer are merely an attempt distract the Board from the unfair labour practices committed by the Employer. It says the Employer committed the most serious type of conduct, other than terminating the employment of Union supporters, which is to tie union support to a lack of job security. It says this is the type of conduct that leads to a remedial certification being granted by the Board.

62 The Union submits that the facts are similar to the facts in *Scho's Line Painting Ltd.,* BCLRB No. B219/2010, 187 CLRBR (2d) 174 ("*Scho's Line Painting*") and *Peter Ross 2008 Ltd.,* BCLRB No. B104/2012 ("*Peter Ross*"), where the Board determined a remedial certification was the appropriate remedy. The Union submits that the facts in this case are also on the high end of the spectrum as there were implied or express threats made to the job security of the employees linked to supporting the Union. The Union submits that the conference call meeting on July 24, 2012 was a captive audience meeting and threats were made during the meeting. It says these facts lead to a remedial certification.

63 The Union also submits that the Board has found that due to the amendments to Sections 6(1) and 8 of the Code, it must provide serious remedial responses for coercion and intimidation: *Scho's Line Painting,* at paragraph 24; *Convergys* at paragraph 45.

64 The Union submits that the threats made during the conference call meeting are only half of the complaint. It says the Employer also made repeated inquiries of the employees to determine if they supported the Union. It submits that this is a further serious violation of the Code: *The Delta Optimist et al.*, BCLRB No. 26/80, [1980] 2 Can LRBR 227; *Islands Manufacturers Ltd.,* BCLRB No. B44/2008 (Leave for Reconsideration denied in BCLRB No. B141/2008) ("*Islands West Manufacturers*").

65 The Union submits that as the unfair labour practice complaints were filed after the application for certification was filed, there is no need for the Board to consider whether there was a loss of momentum under the factors in *Cardinal Transportation B.C. Incorporated*, BCLRB No. B344/96 (Reconsideration of BCLRB Nos. B463/94 and B232/95), 34 C.L.R.B.R. (2d) 1.

66 The Union submits that the Employer's unfair labour practices are at the high end of the spectrum with threats to job security and repeated inquiries to the employees as to whether they supported the Union. It says the vote will not reflect the true wishes of the employees and a remedial certification should be granted.

67 The Union submits that the Employer's letter of August 1, 2012 is not an apology. It says that Waunch is telling the long term Kelowna employees that they will not have a job in Kelowna if the Union application is successful due to some new people supporting the Union in Victoria. The Union submits this is a threat to the job security of the employees in Kelowna.

68 The Union submits that the Employer also made threats during the layoff which took place after the vote. It says it does not go to the remedy of a remedial certification but seeks an order from the Board that the employees who were laid off should be given the right to be recalled first.

69 Concerning the changes to Schneider's terms and conditions of employment, the Union submits that the Employer has changed its reasons for Schneider's e-mail being suspended. It says the Employer first claimed in evidence through Waunch that the e-mail was suspended because he had learned that Schneider was going to quit. It says the explanation has now changed to there being some confusion concerning whether employees could talk to Schneider. The Union says the reason Schneider's e-mail was cut off is because Waunch viewed him as the Union's ringleader.

70 Concerning the unfair labour practice complaints filed by the Employer, it says there has been no breach of Section 9 by either the Union or Schneider. The Union submits that Schneider was not acting on behalf of the Union. It says it does not matter if employees perceived him to be a Union organizer. The Union also says, in any event, there was no evidence that any employee perceived him as an organizer. The Union

says the same principles apply as when the Board is determining if a person is acting on behalf of the employer in an unfair labour practice complaint. It says the correct test is set out in *Sears Canada Inc. (Victoria)*, BCLRB No. B216/97 (Leave for Reconsideration of BCLRB No. B302/96 and BCLRB No. B303/96), at paragraph 41:

> ...There must be some objective evidentiary link to an employer other than simply the subjective perceptions of employees, even if it 'must be pieced together from a pattern of circumstantial evidence' (*Forano Limited*, [1974] 1 Can LRBR 13), in order to conclude that an individual is acting on behalf of an employer in opposing an organizing drive.

71 The Union submits that there must be more than a bald allegation that Schneider was acting on behalf of the Union. It also says comments made by individual employees not attributed to the Union are merely personal opinion and do not establish a breach of Section 9 by the Union: *Sacpry Investments Ltd.,* BCLRB No. B237/96 at paragraph 141. The Union submits that union membership does not equate to being an agent of the union: *Fullowka v. Pinkerton's of Canada Ltd.,* [2010] SCJ No. 5.

72 Concerning the unfair labour practice complaints made against Schneider personally, Schneider submits that he has not breached the Code. Schneider says he did not make any statement that amounts to intimidation or coercion. He relies on *British Columbia Lottery Corporation,* BCLRB No. B289/2003 (Leave for Reconsideration of BCLRB No. B82/2003), at paragraph 46.

> The Board has noted that "[p]romises and puffery, and hyperbole and exaggeration are common features of representational campaigns" and that '[t]o the extent that a party has the opportunity of responding to allegations in a representational campaign, the less likely it is that a Section 9 complaint will succeed': *7-Eleven Canada Inc.*, BCLRB No. B91/2000 at paragraphs 240 and 254 ("*7-Eleven*"). While a misrepresentation may 'cross the line' from being merely a persuasive statement to constituting coercion or intimidation, in order to do so the misrepresentation must be 'so outrageous or inflammatory that it places undue or excessive pressure' upon employees with respect to the issue of union representation: *British Columbia Housing Management Commission*, BCLRB No. B3/93 ("*BC Housing*").

73 Schneider says the circumstances where a promise of beneficial consequences might constitute intimidation or coercion are likely to be very rare: *7-Eleven Canada Inc.,* BCLRB No. B91/2000, at paragraph 197. As well, to be a breach of Section 9, it must be for the purpose of coercing someone to join or not join a union: *Victor Maylon,* BCLRB No. B207/95. He says he did nothing that amounted to coercion or intimidation for the purpose of making someone join a union. He says there were no promises or

threats made to Kish or Schaffer. As well, he says the incident concerning Lothrop had nothing to do with joining or not joining the Union. He also notes that the incident with Lothrop occurred after the representation vote and conversations with Kish and Schaffer happened after the Union filed its application for certification.

74 The Union submits that the allegations raised by the Employer concerning the Boston Pizza meeting were not borne out in the evidence. It says Schneider did not obtain signatures on any membership cards at that meeting, or at any time. It says he merely attended the meeting like any other employee.

75 The Union submits there were no unfair labour practice complaints committed by the Union or Schneider and if the Board finds there were, they do not warrant the remedy sought by the Employer which is to dismiss the application without counting the vote. It also says there is no basis for denying an order for a remedial certification based on Section 133(1)(c) of the Code.

76 In reply, the Employer submits that the Union is asking for a punitive certification, not a remedial certification. It says the Board must look at the totality of the circumstances and determine if the true wishes of the employees would be known through the vote. It says there are no other cases where an apology was given prior to the vote and that must be taken into account. The Employer also says any comments about layoffs were retracted.

77 The Employer says the cases of *Scho's Line Painting* and *Peter Ross* are distinguishable from the facts in this case as they both involved angry employers who made very different statements than those made in this case. The Employer says there are not many cases where the Union has already applied for certification and then sought a remedial certification. It says in the cases that are post application, the Board should read between the lines that the Union likely had a high level of support. It says if the level of support is close to 50% in this case, then the Board is unlikely to be comfortable to say that the Union would have succeeded in the vote but for the unfair labour practices. The Employer says unless the Union has signed a substantial amount of cards, like 80%, then the Board cannot come to that conclusion.

78 Concerning the unfair labour practices filed by the Employer, it says Schneider was not making promises or puffery, he was offering financial inducements for a yes vote for the Union.

IV. ANALYSIS AND DECISION

79 I turn first to the unfair labour practices complaints filed by the Union. The Employer learned of the organizing campaign on July 23, 2012 and held a captive audience meeting concerning unionization the next day. It was not an optional meeting. It was on paid time and all employees had to attend. During this meeting, Waunch advised the employees that if they decided to go “down that road”, meaning voting to certify the Union, there will probably be layoffs. Even though, as asserted by the Employer, this was only one sentence in a five minute conversation, and the Employer

also said during the same conversation on numerous occasions that it was the employees' choice if they wanted to unionize, the Employer's statement to the employees in a captive audience meeting that there will probably be layoffs if the union is certified is an unfair labour practice. It is a threat to job security tied to union support.

80 In *Peter Ross 2008 Ltd.*, BCLRB No. B59/2012 (Leave for Reconsideration of BCLRB No. B187/2011), the original panel's decision that comments made by the Employer were not a violation of Section 9 was overturned by the reconsideration panel. In the reconsideration decision, the Board found:

> We are satisfied that, in the present case, the Original Decision erred in finding that remarks made by the principal of the Employer to a vulnerable group of employees in a captive audience meeting held shortly before a certification vote, the gist of which were that "it would likely be more difficult to secure contracts for the Employer if the employees voted to certify the Union" and that therefore "the Union would likely detrimentally affect the business" (para. 91), and which "viewed objectively,... could have led employees to the conclusion that less work for the Employer might mean less work for them" (para. 96), were not coercive or intimidating because the threat to the employees' job security was implied, not "a direct threat of layoffs" (para. 94).
>
> We note the Original Decision stated that the remarks "were not expressed as threats but were a legitimate expression of Ross' belief" (para. 96). However, the fact that remarks are the legitimate or honest expression of an employer's beliefs or views does not preclude a finding that they are also coercive or intimidating. A direct or implied threat to job security does not fail to be coercive or intimidating merely because it is based on honestly held beliefs or views of an employer about unionization.
>
> (paras. 12 and 13)

81 In the concurring reasons of the Chair, he found

> It is an error of law and policy under the Code to find that the remarks at issue in the context of this case could only contravene Section 9 of the Code if they are either "directly tied to employees' security of employment by a direct threat of layoffs" or "the manner of communication is coercive or intimidating" (para. 94). Remarks which undermine employees' security of employment can be found to be coercive or intimidating under Section 9 of the Code without directly threatening layoffs or being delivered in a manner which is itself coercive or intimidating. The Board must be willing to draw appropriate inferences in the particular context and circumstances of a case: *Forano Limited,* BCLRB No. 2/74, [1974] 1 Canadian LRBR 13 ("*Forano*").

> ...
>
> There is a further material error of law and policy in paragraph 96 of the Original Decision. The paragraph deals with Ross' comments which "...viewed objectively...could have led employees to the conclusion that less work for the Employer might mean less work for them...". Those comments are found to not be coercive because, "[t]hey were not expressed as threats but were a legitimate expression of Ross' belief".
>
> The comments spoke to the employees' job security, as clearly "less work" for the employees means less job security. The Original Decision in effect notes this as being the case when the comments are "viewed objectively" and certainly it is to be inferred and accepted that the employees in their self-interest would understand this.
>
> In that context, it is not an answer to the allegation of coercion under Section 9 of the Code that the remarks reflected Ross' true thoughts, i.e., "were a legitimate expression of Ross' belief". Under Section 8 of the Code, a person is free to express their views on workplace matters "provided that the person does not use intimidation or coercion". It is thus an error in paragraph 96 of the Original Decision to find that the remarks at issue were not coercive or intimidating because they reflected the actual views of the principal of the Employer. Outside of a determination of a deliberate lie, the proper focus of whether the comments are coercive or intimidating should be on the impact of the comments on the employees in the particular circumstances of the case.
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> (paras. 55, 58-60)

82 Even if Waunch believes his statements to be true, the proper focus is on the impact of the comments on the employees. I agree with the Employer that Waunch's statement concerning layoffs during the meeting was not said in an angry manner. The tone of the conference call was conversational and the statement concerning layoffs was made in a matter-of-fact way. However, this does not negate the fact that the employees were called into a mandatory meeting, told that the Employer knew the Union is attempting to organize them, Rambow had long term work, and even though it is their choice, if they choose to "go down that road", there will probably be layoffs. This is a threat to job security tied to union support. As such, it is coercive and intimidating and not protected by Section 8. It is therefore a violation of Sections 6(3)(d) and 9 of the Code.

83 In this case, the Employer also made inquiries of all employees concerning whether or not they supported the Union. In the conference call, the Employer told the employees it did not mind if the employees wanted a union but they should let Norman know. Norman was a foreman. As noted above, I have found he would be in the

bargaining unit. However, it is clear from this conversation that any information provided to Norman was for the purpose of him passing the information on to Waunch. Further, that morning, Norman went around the worksite with pen and paper asking all the employees if they supported the Union. It was not disputed by the Employer that all employees would have seen Norman as collecting information for Waunch. Further, when Schneider told Norman he should not be asking as it was illegal, Norman responded that he was going to do what Waunch told him to. When the employees would not tell Norman if they supported the Union, Waunch then had Norman circulate the Freedom of Choice form and asked them to sign and return it to the Employer to advise whether or not they supported the Union. I find this is an employer investigation concerning union support.

84 In *Islands West Manufacturers Ltd.,* the Board found:

> Inquiring about union support or asking questions to determine who the union organizers are is not the expression of a view. Section 8 does not apply to these questions.
>
> In *Delta Optimist,* the Board found that an employer cannot conduct an investigation concerning union support:
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> …
>
> Similarly, in *Viva Pharmaceuticals Inc.*, BCLRB No. B9/2002, 81 C.L.R.B.R. (2d) 1 ("*Viva*") at para. 86, the Board stated that inquiries concerning union support are not permitted:
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> > Certain types of conduct will almost certainly be found to constitute an interference with the employees' freedom of association. Asking employees if they have signed a union card or support the union falls into this category: see *Cardinal Transportation B.C. Incorporated,* BCLRB No. B344/96 (Reconsideration of BCLRB Nos. B463/94 and B232/95), (1996), 34 CLRBR (2d) 1, at para. 203.
>
> (paras. 135-137)

85 I find in this case that the Employer's inquiries concerning Union support are a breach of Section 6(1) of the Code as it interferes with the selection and administration of a trade union. It was clearly an investigation by the Employer to determine which employees supported the Union.

86 In *Islands West Manufacturers,* at paragraphs 147 and 148, the Board found that the Employer's questions concerning union support were also intimidating and coercive and resulted in a violation of Sections 6(3)(d) and 9 of the Code:

> A key circumstance in this case is the fact that the Employer asked employees for information about the Union. Due to the power imbalance between employees and their employer, an inquiry by an employer about union support likely implies the threat of adverse consequences if the employee is supportive of the union: *Delta Optimist* at p. 14:
>
> > Undoubtedly, it is possible for an employer to ask about an employee's union affiliation without committing a coercive or intimidatory act. However, given the authority exercised by an employer in the employer/employee relationship, an employer's expressed interest in this subject will often convey to the employee the distinct impression that the employee's future opportunities, and perhaps even employment security, will be in jeopardy unless the employee remains uninterested in trade-union representation. If an employer's inquiry into an employee's trade-union affiliation does convey that impression – and it can be conveyed in a variety of ways – the inquiry itself plainly implies the threat of adverse consequences if the employee is supportive of a trade-union. It is for that reason that such an inquiry does amount to a coercive act which could reasonably have the effect of inducing an employee to refrain from supporting or to abandon support of a trade-union.
>
> In the circumstances of this case, I find the Employer's inquiries about who was behind the Union were intimidating and coercive. I find it is reasonable to infer that the inquiry could have effect of inducing an employee to refrain from supporting or abandoning support of a trade union. In particular, I find the Employer has breached Sections 6(3)(d) and 9 of the Code ….

87 In this case, the Employer made persistent inquiries immediately following a captive audience meeting where it told the employees there would probably be layoffs if the Union was certified. The Employer also made the inquiries in an authoritarian manner by having the foreman directly ask each of them if they supported the Union. When the vast majority did not answer, the Employer did not respect this decision by the employees. It then distributed the Freedom of Choice form which commenced with the statement "the following is answered without intimidation or coercion on myself". When Norman distributed the form for Waunch, he told the employees to fill it out and get it back to him as soon as possible. In these circumstances, I find that the investigation conducted by the Employer concerning union support is also a violation of Sections 9 and 6(3)(d) as, on an objective basis, it would be intimidating and coercive to the employees.

88 I therefore find that the Employer has committed unfair labour practices by conducting this investigation and has breached Sections 6(1), 6(3)(d) and 9 of the Code.

89 The Union also filed an unfair labour practice complaint alleging the Employer breached Section 6(3)(a) of the Code by changing the terms and conditions of Schneider's employment. The majority of the allegations originally set out in the Union's application were not established in the evidence. The only change to his working conditions that was established during the hearing is that Schneider ceased receiving work related e-mails for a brief period of time. Although the Employer provided different explanations as it first said Schneider's e-mail was cut off as he was quitting and then said it was result of confusion by the office staff, I do not find that there is sufficient evidence that persuades me that Schneider's email was suspended because he was a union supporter.

90 Before considering remedy for the Employer's breaches of the Code, I turn to the unfair labour practice complaints filed by the Employer. Despite the objections of the Union, I consolidated the Employer's unfair labour practice complaints with the Union's unfair labour practice complaint as I accept the Employer's argument that the totality of the circumstances must be considered when the remedy of a remedial certification is sought by the Union.

91 Concerning the meeting at the Boston Pizza restaurant, the Employer's allegations as set out in its unfair labour practice complaint were not established in the evidence. Schneider did not run the meeting and did not coerce any person into signing a membership card. The purpose of the meeting was to answer questions raised by the employees concerning the Freedom of Choice form. Noon responded to all of the questions. At the meeting, Noon also obtained membership cards from employees who had previously signed cards. The Employer accepted the stipulation that the Union asked employees who had signed cards before to sign a new card because of the poly party application. I find there was no coercion by the Union in obtaining these cards under these circumstances.

92 As noted above, I find that Schneider was not organizing for the Union. The Union did not request his assistance in organizing and he did not obtain any membership cards for the Union. He is a union supporter and made his views known to other employees. However, he never made any representations that he was acting on behalf of the Union and I find objectively no reasonable employee would have perceived him as acting on behalf of the Union in this organizing drive. I therefore find any comments made by Schneider are his personal opinion and not attributable to the Union.

93 In *7-Eleven,* at paragraph 197, the Board stated the following concerning promises of beneficial consequences amounting to intimidation or coercion contrary to Section 9 of the Code:

> I would not want to rule out the possibility that a promise of beneficial consequences might constitute coercive pressure for two reasons. First, there is often a negative side to such a promise. The employees will not receive the benefit if they do not perform as requested. That may be construed as an implicit threat. Secondly, the promise of a substantial benefit to a person in a particularly vulnerable position may create inexorable pressure to join (or not join) a union as the case may be. While I do not necessarily subscribe to the language of the Healthcare Services Upjohn Ltd., supra, case, the pressure created by a promise of beneficial consequences may be just as intense and irresistible as a threat of negative consequences, and just as surely may deprive employees of any real choice. Such circumstances are likely to be rare.

94 Concerning Schneider's conversation with Schaffer, it did not relate to signing a membership card. It was a conversation between two co-workers who were friends. It was Schneider's experience that he paid less than he expected when he rejoined Local 170 after being expelled for not paying dues. Whether or not Schneider suggested to Schaffer his back dues could be wiped out, or that he could get a break from the Union, I find Schneider was simply attempting to convince a friend and co-worker to vote for the Union by letting him know that rejoining the Union may not be as expensive as he thought. It is not a promise of beneficial consequences that amounts to coercive or intimidating pressure by Schneider.

95 Concerning the conversation with Kish, it also did not relate to signing a membership card. It was also a conversation between two co-workers who were friends. Schneider was invited to Kish's wedding. During the conversation, when Kish said he did not want to talk about the Union as it stresses him out and his wedding was coming up, Schneider offered to pay his initiation fee as part of his wedding gift. This is not a promise of beneficial consequences that constitutes intimidation or coercion. For both of these incidents, I am not persuaded that the offers by Schneider would have created pressure such that employees were deprived of any real choice.

96 The Employer also alleges that Schneider assaulted Lothrop and this constitutes an unfair labour practice as it is coercion and intimidation. Under Section 9 of the Code, a person must not use coercion or intimidation of any kind that could reasonably have the effect of compelling or inducing a person to become or to refrain from becoming or to continue or cease to be a member of a trade union. Even though Schneider's behaviour was violent and inappropriate, I am not persuaded that it could reasonably have the effect of compelling Lothrop or any person viewing it to join the Union or continue to be a member of the Union. As well, it is relevant that the incident occurred after the vote.

97 I therefore dismiss the Employer's unfair labour practice complaints.

98 I turn now to the remedies sought by the Union. The primary remedy the Union seeks is a remedial certification. As noted by the Board previously, the amendments to Sections 6(1) and 8 allow employer action that was previously not permitted. Therefore,

when the Employer has committed actions that are of a more serious nature that are not protected by Section 8, the Board's remedial responses must reflect the serious nature of the conduct. In *Scho's Line Painting,* at paragraph 24, the Board stated:

> ... it is worth noting that since *Cardinal* there have been amendments to Sections 6(1) and 8 of the Code, as well as developments in the Board's policy. A significant policy development and one that has some bearing in the present case, is the following observation by the reconsideration panel in *Convergys Customer Management Canada Inc.,* BCLRB No. B111/2003 (Leave for Reconsideration of BCLRB No. B62/2003), 90 C.L.R.B.R. (2d) 287:
>
> > As noted, the amendments to Sections 6(1) and 8 mean that many matters that were previously proscribed are now permitted. The remaining proscriptions relate to matters of a more serious nature (i.e. coercion and intimidation). The Board's remedial responses must reflect that change. (para. 45)

99 The test in *Cardinal* was established by the Board during the time when the Board operated on a card based system where it issued the certification based on the evidence of support reflected in the membership cards. A union would not seek a remedial certification if it had obtained majority support as it would be certified based on the signed membership cards. Under the card based system, unions sought remedial certification when unfair labour practices occurred during the organizing drive. Thus, the factors in *Cardinal* fit within that statutory framework. In particular, the factors of "the level of membership support prior to and subsequent to the employer's unfair labour practice" and "the point or stage in the organizational drive of the employer's interference" are aimed at determining if the organizing drive has lost momentum due to an unfair labour practice committed by an employer. I find they are not relevant in this case. In this case, the Union applied for certification at the same time as the commission of the initial unfair labour practice by the Employer. Therefore, the unfair labour practices occurred after the certification application was filed but before the representation vote took place. In these circumstances, the primary concern is whether the ballots cast at the representation vote will reflect the true wishes of the employees.

100 The Employer notes there are not very many cases where the Union seeks a remedial certification after it has already filed an application for certification. It says in those cases, one must read between the lines and assume that the Union had a high level of support in the range of 80%. The Employer submits that if the amount of support is close to 50%, the Board cannot get to the conclusion that the Union would have been certified but for the unfair labour practices. It says when looking at the level of support, the Board must be comfortable to say that the Union would have succeeded in the vote but for the unfair labour practices.

101 The exact amount of union support in an application for certification is kept confidential by the Board. I note that as this is a poly party application, threshold support is 50% of the bargaining unit. However, I do not accept the Employer's argument that if support is close to 50% the Board cannot come to the conclusion that the Union would have been certified but for the Employer's unfair labour practice complaint. The Board's policy concerning remedial certifications does not require there be a "high" level of support before a remedial certification will be granted. As noted by the Board in *Cardinal,* at paragraph 314:

> Section 14(4)(f) deletes the previous wording contained in s. 8(4)(e) which stated that the Board was required to determine whether 'the true wishes of the employees cannot be ascertained'. In addition, s. 14(4)(f) contains the following words: 'the union would likely have obtained the requisite support'. The significance of this amendment is to reduce the test from the higher standard required under *Forano* [BCLRB No. 2/74, [1974] 1 Can LRBR 13] (where majority support needed to be 'very likely') to the less rigorous test established in *Beechwood* [BCLRB No. 32/77, [1977] 2 Can LRBR 218] where the union "would likely have obtained" the requisite support. This test requires the Board to inquire '...whether it is reasonable to assume that the union would have achieved majority support in the absence of employer interference': *Beechwood*, *supra,* at p. 231. The words 'would likely' establish a test that, but for the employer's unlawful conduct, it is more probable than not that the union would have achieved the requisite support (which we interpret to mean majority support). <u>This test requires the Board, as stated in *Beechwood,* to make a prediction of majority support based on such issues as the level of membership support, seriousness of the employer's interference, and the effect of that interference on the employees.</u>
>
> (para. 314; emphasis added)

102 Thus, the determination of whether a remedial certification is the appropriate remedy has always been a consideration of a multiple of factors and not only the level of support the Union had prior to the commission of the unfair labour practices.

103 The other factors in *Cardinal* are:

- the seriousness of the employer interference and the reasonable effect (assessed objectively) of that interference on employees;

- if less than a majority of employees are members of the trade union whether there is adequate or sufficient support to conduct collective bargaining, (i.e. negotiation, representation, etc.)

- the "totality of the conduct" of the employer; and

- the specific nature of the employer and the employees.

104 Concerning the factor of the seriousness of the employer interference, the Employer has committed a serious unfair labour practice by telling the employees there will probably be layoffs if the Union is certified. As found in *Cardinal,* at paragraph 321, threats of layoffs are one of the ultimate economic weapons used to deny employees' exercise of their freedom of association:

> …There are generally two circumstances where the Board's preparedness to employ remedial certification increases significantly: the discharge of employees who are active in the organizational campaign; and employer threats of layoff, shutdowns or partial closures. This kind of employer conduct involves the use of the ultimate economic weapon (discharge or termination of employees' jobs) in order to deny employees' exercise of freedom of association. No employer should have the benefit of these 'drastic' and unlawful measures…

105 The Employer also committed an unfair labour practice that directly affected every employee by asking each employee if they supported the Union, and when the vast majority did not respond, asking each employee to sign the Freedom of Choice form advising whether or not they supported the Union. I have found that these circumstances were intimidating and coercive and resulted in a breach of Sections 6(3)(d) and 9 as well as Section 6(1). This is another serious unfair labour practice.

106 The combination of telling the employees there will probably be layoffs if the Union is certified in a captive audience meeting and the persistent and authoritarian manner in which the Employer attempted to find out which employees would likely vote for the Union amounts to egregious conduct contrary to the Code.

107 Concerning the reasonable effect, assessed objectively, of these unfair labour practices, the Union argues that there is no chance that a vote will reflect the true wishes of the employees and the only appropriate remedy is a remedial certification. It relies on the following statements in *Scho's Line Painting,* at paragraphs 21 and 22:

> The Employer's position is that a vote is an appropriate remedy in the circumstances, particularly in view of the claim that employees expected a vote. I acknowledge that a vote, coupled with conditions affording union access or other complementary remedies, is often sufficient to restore a union's position and the employees' freedom to choose union representation.
>
> The trouble with a vote in this case lies in the particular nature of the contravention and its impact on employees. The

> Employer committed a serious unfair labour practice by tying the threat of adverse job consequences to the employees' support for union representation. What makes this type of contravention so harmful and so difficult to remedy by means of a vote, is that it effectively alters the question employees' confront at the ballot box from, "Do you want [the union] to represent you in collective bargaining...", to "Do you want to keep your job?". Holding a vote in these circumstances is hardly consistent with the Board's Section 2(c) duty to protect the employees' free democratic franchise.

108 The Employer argues that the *Scho's Line Painting* case is distinguishable as it concerned an angry employer who threatened to shut down part of its business. Each case is decided on its own facts. However, I find that the same concern raised in *Scho's Line Painting* arises on the facts in this case. The Employer has threatened the employees' job security if they support union representation. Immediately after saying there would probably be layoffs if the Union is certified, the Employer conducted a persistent and authoritarian investigation to determine which employees supported the Union. I find in these circumstances the question at the ballot box has been changed from "Do you want the Union to represent you in collective bargaining?" to "Do you want to be laid off?". The effect of the Employer's unfair labour practice has been to deprive the employees of their freedom to choose whether or not to be represented by a union. I find that the vote conducted on August 3 and 7, 2012 would not be reflective of the true wishes of the employees and even if a new vote was ordered, it would continue to not be reflective of the true wishes of the employees.

109 When considering the factor of the totality of the conduct of the Employer, the letter sent by the Employer to all of the employees should be considered in the totality of the circumstances. The Employer asserts it is an apology and assured the employees their jobs were not in jeopardy prior to the representation vote.

110 In the letter Waunch said:

> I had no idea that I can't talk to my employees about their union preference and do apologize.
>
> ….
>
> I have been charged by the Union with an unfair labour practice because of the freedom of choice document I gave you and the conference call I held. I gave you the freedom of choice form because I wanted to find out why you were applying for union representation. We have always had an open door policy at our company where we could talk openly about things like this.

111 As noted above, due to the power imbalance between employees and their Employer, the inquiry itself implies the threats of adverse consequences if the employee

is supportive of a trade union. In this case, the Employer did not without consideration casually ask an employee if they supported the Union. The Employer directly, or through Norman, asked every single employee and then circulated a form in which all employees were to indicate if they supported the Union or not, sign it and return it to the Employer. The apology from the Employer later stating that it did not know it could not legally do this does not negate this threatening conduct. As well, the Employer's explanation in its letter that it wanted to know why the employees were applying for union representation is not consistent with its actions. The form does not ask why the employees were applying or try to open a dialogue with the Employer. It simply asks do you want to join the Union or not and are your dues up to date or not.

112 In the letter, concerning the comments about the layoffs, Waunch said:

> I never intended to threaten employees with the loss of their jobs because they supported the union and I would never do that.

113 However, Waunch also said in the letter:

> It seems odd that a few people that I haven't met and that have worked for us less than three months can have an impact on a company like ours. I hold no remorse against these people no matter what happens with the vote. They will still have their jobs. The problem I do have is that I have tendered these projects using our values and I may not be able to survive this hit by the Unions nor will I ever be able to get a job in Kelowna for the families I do support. It just doesn't make sense.

114 The Employer asserts that the comments concerning not being able to survive the hit by the unions or being able to get a job in Kelowna are protected by Section 8 of the Code. The Union asserts the comments are coercive and intimidating and a further violation of the Code. Whether or not these comments would be protected by Section 8 of the Code, the letter is not an apology which negates the unfair labour practice committed during the conference call when Waunch told the employees there would probably be layoffs if the Union was certified. In the letter, the Employer tells the employees in Kelowna that their job security is threatened by the "union" people on the Victoria 443 Project. This is not an apology and an assurance that employees' jobs are not in jeopardy. Even if it is not a breach of the Code as it is protected by Section 8, it does not assure the employees that their jobs are not in jeopardy as asserted by the Employer.

115 I also find that the fact that the employees on the Victoria 443 Project were aware that Cornhill and Mooney were not laid off despite being union supporters does not negate the seriousness of the unfair labour practice of telling employees there would be layoffs if the Union was certified.

116 Concerning the factor of whether, if less than a majority of employees are members of the trade union whether there is adequate or sufficient support to conduct collective bargaining, this factor has seldom been addressed by the Board in previous cases. It is most relevant in cases where the union has lost momentum early in an organization campaign and thus there may be a concern regarding support for collective bargaining. This is not a case where the Union had minimal support at the time of the unfair labour practices. As noted above, the Union applied for a poly party certification which requires 50% threshold support.

117 Concerning the specific nature of the Employer and the employees, there is nothing particularly vulnerable about the employees or unique concerning the Employer.

118 As set out in *Cardinal,* at paragraph 314, the Board must make a prediction of majority support based on such issues as the level of membership support, seriousness of the employer's interference, and the effect of that interference on the employees. Even though the Union only had close to 50% support, it is not necessary for the Union to establish that it would be “very likely” that it would have succeeded at a representation vote but for the Employer’s unfair labour practices. I need only be satisfied that it is more probable than not that the Union would have obtained the requisite support. The Employer has committed very serious unfair labour practices. It has advised the employees there will probably be layoffs if the Union is certified and then embarked on an investigation where it asked each employee, more than once, whether they supported the Union. The reasonable effect on the employees of these unfair labour practices is if they supported the Union, they would be intimidated or coerced into not voting for the Union. The question at the ballot box has become "Do you want to be laid off?" instead of "Do you want the Union to represent you in collective bargaining?". The Employer’s apology letter made prior to the representation vote does not assure the employees that their jobs are not in jeopardy. On the contrary, the letter to all employees states that the Employer “may not be able to survive this hit by the Unions” nor “be able to get a job in Kelowna for the families I do support”.

119 The Employer submits that an automatic certification in this case would be a punitive certification rather than a remedial certification. I do not agree. In this case, the Employer has committed serious unfair labour practices which amounted to intimidation and coercion of employees. I find a representation vote would not reflect the true wishes of the employees. A declaration of unfair labour practices and scheduling another representation vote would thus not be a sufficient remedy in this case. When considering the level of membership support, the seriousness of the Employer’s interference and the effect of that interference on the employees, I conclude the Union would likely have obtained the requisite majority support but for the serious unfair labour practices committed by the Employer. I therefore order a remedial certification.

V. CONCLUSION

120 I dismiss the unfair labour practice complaints against the Union and Schneider.

121 I make the declaration that the Employer has breached Sections 6(1), 6(3)(d) and 9 of the Code and order a remedial certification. I further order that any collective agreement negotiated by the parties be submitted to the employees for ratification.

122 I do not grant the Union the remedy that the apprentices laid off on August 8, 2012 be recalled first as the layoffs were for legitimate purposes.

123 In light of my decision to issue a remedial certification, it is not necessary to determine the issues concerning the challenged ballots.

LABOUR RELATIONS BOARD

"ALLISON MATACHESKIE"

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ASSOCIATE CHAIR, ADJUDICATION