BRITISH COLUMBIA LABOUR RELATIONS BOARD

0720941 B.C. LTD.

(the "Employer")

-and-

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 115

(the "Union")

PANEL:	Elena Miller, Vice-Chair
APPEARANCES:	Colin Edstrom, for the Employer Brett Matthews, for the Union
CASE NO.:	68861
DATES OF HEARING:	September 9 and 11, 2015
DATE OF DECISION:	September 15, 2015

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 The Union alleges the Employer breached Sections 6(1), 6(3) and 9 of the *Labour Relations Code* (the "Code") when it terminated the employment of an employee, Shay Martineau ("Martineau"), on September 1, 2015. The Employer denies it breached the Code in terminating Martineau's employment.

2 As it was alleged the termination occurred during the Union's drive to organize the Employer's employees, the complaint was heard on an expedited basis under Section 5(2) of the Code. Evidence for the Employer was given by its sole owner and operator, Jay Adams ("Adams"). Evidence for the Union was given by Martineau and the Union's organizer, Rob Duff ("Duff").

II. FACTUAL BACKGROUND AND EVIDENCE

3 The Employer is a labour subcontractor which provides truck driver and swamper teams to Emterra Waste Management, a company that provides waste pick-up and disposal services to several communities on Vancouver Island. For each team, the truck driver drives the disposal truck along an assigned route while the swamper rides along and empties bins of garbage, recycling or yard waste into the truck along the route. At the end of the route the truck is emptied at the appropriate disposal site.

4 It is not disputed that the Union began an organizing drive of the Employer's employees on August 17, 2015. The Union signed a number of cards shortly after the organizing drive began, more cards shortly before the September 1, 2015 termination of Martineau, and one more card shortly after that date.

Evidence of Jay Adams

5 Adams testified that he runs all aspects of his business, which he began in 2005. His two sons, Michael Adams and Dustin Adams, work for him as "route coordinators" or "lead hands", but he says he has no managers as he is solely responsible for all hiring, firing and disciplining of employees. He is "100 per cent" involved in the day-to-day running of the operation, including maintenance, customer service and all aspects of managing the employees.

6 Employees generally work regular weekly shifts, either Monday through Friday or Tuesday through Friday. Adams schedules the shifts and informs the drivers which swamper will be working with them on a given shift. The swampers begin their work days by waiting at the Employer's fuel dock for the drivers to pick them up and take them out on the route for the day.

7 Adams testified he currently has eight drivers and seven swampers, although one driver and two swampers are "off on WCB". When he is short of employees, he obtains temporary labour from a company called Labour Unlimited. He currently has three such temporary labourers from Labour Unlimited working for him.

8 Adams hired Martineau to work as a swamper on June 15, 2015. His pay was $11 per hour. The Employer's "Employee Information" sheet for Martineau, which was signed by Adams and Martineau, lists him as "part time temp". Adams testified both that he hired Martineau on a temporary basis to "help with the heavy yard work season" for the summer, and that Martineau was subject to a 90-day probationary period (which would have expired mid-September).

9 Adams brought Martineau's personnel file to the hearing. Adams agreed that in a document in the file which set out terms and conditions of employment, there was no reference to probation or probationary status. He said that all his employees are on a probationary period of three months or 90 days.

10 Adams agreed with Union counsel that there was a tab in Martineau's file headed "Discipline" and that it was blank. Adams agreed Martineau received no written warnings or other, greater discipline.

11 However, Adams said he recalled giving Martineau a verbal warning in August after Dustin Adams allegedly reported to Adams that Martineau had proposed or indicated to him that he would work slowly to increase his hours of work (and therefore his pay). Adams said he recalled giving Martineau this verbal warning while they were at the fuel dock. He said he could not remember the date but thought it was about a month before the hearing. He agreed that he made no notation of this conversation in Martineau's discipline file. He agreed he had been on vacation since August 4, but said he often worked while on vacation.

12 In his direct examination on the first day of the hearing, Adams testified that he had "two reasons" for terminating Martineau's employment on September 1, 2015. The first was that he was a temporary employee, and the second was because of poor performance. This included the information from his son Dustin Adams that Martineau had proposed working slowly on purpose to create more hours. Adams said that, in addition to this information, he had seen the route sheets for the last couple of weeks. From that and what his other son and assistant lead hand Michael Adams had said, Martineau was not getting to the dump on time at the end of his route. Adams said that he looked at the daily route sheets and could see that Martineau was "deficient" and did "60% of what's expected".

13 When asked in direct examination why he decided to terminate Martineau on September 1, 2015, he said it was because of "the way things were going in the last few weeks", "all the times being behind" and that he had "had enough". When asked why he did not advise Martineau that the termination was because of poor performance, he said it was because he "didn't want to create animosity" and that he had been threatened by employees in the past and did not want that to happen again.

14 Adams testified in direct examination that he was not aware of the Union's organizing campaign until he got the Board's notice of the Union's complaint on Friday, September 4, 2015. He said he had no knowledge of it before. He said Dave Elmquist ("Elmquist") (whom the Union alleges questioned Martineau about his Union activities on the morning of September 1, 2015) was a regular driver employee, not a manager or supervisor. He said Elmquist had been an employee for nine years and that they had a "professional" relationship. In the past they had "had beers" together but it had "been years" since the last time that occurred.

15 In answer to questions from the Employer's counsel in direct examination, Adams said Elmquist did not mention to him that the Union was organizing prior to Martineau's termination and did not mention to him that Martineau was in support of the Union prior to that date. Adams further said he did not ask Elmquist to speak with Martineau or any of the employees to find out if they supported the Union. He said he did not consult with Elmquist on the decision to terminate Martineau and he reiterated that he was unaware of any Union organizing activity at the time he decided to terminate Martineau.

16 In cross examination, Adams agreed that while summer is a busy time for the Employer, fall can be a busy season too. He agreed that, on September 1, 2015, when he terminated Martineau, there had been no recent loss of work, no slow down, and no lack of work. He agreed that he currently employed three Labour Unlimited employees and that they cost him $17 per hour whereas Martineau cost $11 per hour. He agreed that therefore the Employer had incurred expense in terminating Martineau's employment. He said it was a "short-term expense for a long-term investment" because sometimes the labourers from Labour Unlimited are good workers and he hires them on as employees.

17 Adams denied Union counsel's suggestion that the conversation he had testified occurred between himself and Martineau at the fuel dock had not happened. He said it had happened at the fuel dock, although he could not remember the date. He agreed he had been mostly on vacation since August 4, 2015 but said it "may have been before" that date. He agreed that he had not made any record of the alleged conversation, and did not speak to Martineau any time after that about his performance or any deficiencies in his work. Adams said he did not terminate Martineau because of that conversation but because his work was below standard. When asked what that standard was, Adams said he expected his teams to dispose of garbage at a rate of 1.8 tonnes per hour and recycling at a rate of 1 tonne per hour.

18 Adams said in cross-examination that he terminated Martineau "because he was temporary" but that he would have let him go even if he had not been temporary because "his production was not at status quo". He agreed a team could be slow for a number of reasons, including the driver, but the swamper generally determined the speed of the truck, and he had determined that it was Martineau as the swamper who was slow.

19 Adams' evidence was that on the evening of September 1, 2015, when he sent Martineau a text message terminating his employment, Adams was away from the office, on vacation in Rosedale near Chilliwack. He said he often performed work by dealing with issues by phone and text message while he was on vacation. When asked why he decided to terminate Martineau's employment that night, he said he just decided he had "had enough" that night; "that was when I pulled the trigger".

20 Adams did not bring route sheets to the hearing. The Union asked the Employer at the hearing to produce the route sheets for Martineau's period of employment, and the Employer indicated the request would be onerous to fulfill and would require delay, as there would be several hundred pages of documentation. The Union then modified its request to request production of route sheets for the period from August 17, 2015 to September 1, 2015, the two weeks prior to Martineau's termination. These were produced for the second day of the hearing.

21 The Union cross-examined Adams with respect to the route sheets, reviewing all route sheets provided which showed Martineau was the swamper. In particular it reviewed Martineau's route sheets for the week of August 25, 2015, the last weekly shift Martineau worked before being terminated on September 1, 2015. The Union reviewed Martineau's sheets for his work as a swamper on Tuesday, August 25, Wednesday, August 26, Thursday, August 27, and Friday, August 28, 2015. Adams agreed that on none of those days was there any evidence of poor performance. The route sheets indicated the routes had been completed on time, and calculations showed the amount of material disposed of met the standards Adams had described on the first day of the hearing.

22 Adams agreed with the Union that further calculations based on information contained in the route sheets disclosed showed that the material disposed of by some other teams recorded on the route sheets did not meet the standards Adams had described the previous hearing day. Adams indicated there could be legitimate reasons why those standards were not met, such as technical problems with a truck.

23 Adams agreed that Martineau was not scheduled to work for the three days following his last shift worked (Saturday, August 29 through Monday, August 31, 2015). Martineau began his next shift on Tuesday, September 1, 2015, and Adams terminated him that evening, before the end of that day's shift. Adams agreed that the termination occurred before he had Martineau's route sheet for that day.

24 Adams agreed there was nothing in the route sheets produced that showed Martineau was slow or that he was working at "60%". Adams agreed he was in town and at work in the days before September 1, 2015, but he did not terminate Martineau then. When asked on the second day of the hearing why he made the decision to terminate after he had gone on vacation, contrary to his evidence on the first day of the hearing, he stated that actually he was merely "out of town" and not on vacation on September 1, 2015, and his vacation started September 3, 2015.

25 In re-direct, Adams pointed out that none of the route sheets produced for the hearing for the period August 17, 2015 to September 1, 2015 bore his signature. He said that he had not reviewed any of those route sheets before deciding to terminate Martineau. He did not indicate which route sheets he had been referring to when he had testified on the first day of the hearing that he had concluded Martineau was a poor performer after reviewing the route sheets. Adams' evidence in re-direct was that he "looked at the whole picture" in deciding to terminate Martineau, and the main reason he decided to terminate him was because he "didn't develop fast enough for me before the 90 days were up" and he was "not working to my satisfaction".

Evidence of Martineau

26 Martineau confirmed that he began working for the Employer as a swamper in mid-June 2015. He testified he does not recall being told he was on probation, but he does recall Adams telling him his employment was "temporary" and "part-time".

27 Martineau said he knew the owner's sons, Michael Adams and Dustin Adams, were route coordinators, but he never worked with Michael Adams. He said Dustin Adams drove him to a route in Campbell River. He last spoke with or saw Dustin Adams more than a month ago. He said he never had a conversation with Dustin Adams about working slowly in order to be paid for more hours. He said he "wouldn't tell the boss's son I was slacking".

28 Martineau testified he never had a conversation with Adams about what he is alleged to have said to Dustin Adams. He said he had only seen Adams at the fuel dock about three times and had only spoken with him there a couple of times. He said the idea of stretching out the work day by working slowly never came up, and the first he heard of that idea was at the Board hearing (from Adams' testimony).

29 Martineau testified that, on the morning of September 1, 2015, he came to work as usual and waited to be picked up by a driver at the fuel dock. Elmquist, an experienced driver, was fueling up at the fuel dock and spoke to him. He "seemed a little short with me", Martineau said, and when Martineau asked if he was with Elmquist that day, Elmquist said "Yah" and indicated for him to get in his truck.

30 When Martineau got in the truck, he was surprised to see another swamper was already sitting in the middle seat of the truck. Martineau said that when Elmquist got in the truck and began driving, Elmquist asked Martineau: "How about that Union?". Martineau testified he responded: "What about the Union?" and Martineau said, "I heard you were talking to them". Martineau indicated he responded to the effect that yes he had but he was not sure about it. He said Elmquist then spoke strongly against having the Union, saying Adams would close the company and they would all be out of work.

31 Martineau says that Elmquist then dropped him off back at the fuel dock without any work having been performed during the drive. He says that before he got out, Elmquist asked him how he would be getting the employees together, and Martineau said he responded "I don't know what you mean", and got out of the truck.

32 Martineau said that while Elmquist was driving him around in the truck and questioning him about his connection with the Union, another driver radioed to ask Elmquist why he took Martineau when Martineau was supposed to swamp for him. When Martineau got out of Elmquist's truck at the fuel dock, the other driver picked him up and the two of them then performed their work that day.

33 Martineau testified a mistake made by another employee required employees to work a longer than usual day. Before he completed his shift that day at 7:45 p.m., he received a text message from Adams terminating his employment. It is not disputed the text messages exchanged that evening were as follows:

> 7:04 p.m. Adams: Hi Shay. Thanks for all your help but as you know the job was temporary. I won't need you anymore after today. Thanks Again.
>
> 7:10 p.m.: Martineau: The job was temporary? I don't get any notice?
>
> 7:13 p.m. Adams: Yes it was temporary and no I'm sorry you don't get any notice. If you remember you signed off on temporary work. I will get your ROE and final pay ready. Please text me your hours.
>
> 7:47 p.m.: Martineau: 7:30 7:45
>
> 8:40 p.m.: Adams: Thank you.

Evidence of Duff

34 Duff, the Union's organizer, testified the Union's drive to organize the Employer's employees began on August 17, 2015, after he "reached out" to a number of employees and the response was "fairly good". He met with a number of crews at different locations, and gave them general information and started signing cards. He said he "talked to a couple people" and they would talk to employees and give them Duff's contact information. The result was that cards were signed, the earliest on August 19, 2015.

35 Duff said he was getting "relatively good feedback", that the response was "fairly positive" and that the drive was "moving fairly smoothly". He said that before September 1, 2015, he had a number of "leads" on future card signings, and that "momentum was there" for the organizing drive. Some people needed more time to think about joining while other people needed less time. However, he testified, "it fell silent" after September 1, 2015. He signed one card after Martineau's termination but it took "extra effort" to get that person to sign because they were scared. He said that trying to get employees to sign a card was "like chasing a shadow now".

36 On cross-examination, Duff agreed that employees are often initially excited about signing cards when a campaign begins but, after that initial excitement, the campaign can slow down. However, he said it "depends what's going on, on the

ground", and that sometimes a meeting with a small group will be followed by a meeting with a larger group of employees at which more cards will be signed. Also, when people sign is affected by when they are available, for example, if they are on vacation.

37 When asked whether one of the reasons why it was "silent" after September 1, 2015 might have simply been because people were still on vacation, he indicated he did not think so. He said he had employees he had expected to meet who failed to return his calls after that date. He said this was because they were fearful of having the same treatment after Martineau was terminated. He agreed that, when he said people were scared, it was the people who had already signed cards. He did not hear further from those who had not yet signed because they had not returned his calls. He agreed he was speculating that the reason they were not returning his calls is because they were fearful but he added that he did not think it was because they were simply on vacation.

III. POSITIONS OF THE PARTIES

38 The Employer submits it does not dispute Martineau was terminated at a time when the Union was carrying out an organizing drive of the Employer's employees, but submits there is no evidence the Employer knew of the organizing drive or that Martineau's termination was connected with it or otherwise motivated by anti-union animus. The Employer notes Adams testified that he was not aware that the Union was involved in an organizing drive prior to terminating Martineau's employment and that Elmquist did not advise him the Union was organizing the Employer's employees. Adams also testified that prior to the termination, Elmquist never mentioned to Adams that Martineau was in support of unionization, and Adams said he did not ask Elmquist to speak with Martineau about the Union or consult with Elmquist on the decision to terminate Martineau.

39 The Employer noted that Adams reviewed his text messages for September 1, 2015, and there were no text messages between Adams and Elmquist on that day.

40 With respect to Martineau's evidence about the conversation he had with Elmquist in his truck on the morning of September 1, 2015, the Employer submits the contents of that conversation are "immaterial" because there is no basis for concluding Elmquist was an agent of the Employer or acting at the Employer's behest. As an employee who would be part of the Union's proposed bargaining unit, Elmquist was entitled to express his views on unionization. It is not a contravention of the Code for two employees to debate or discuss the pros and cons of unionization.

41 The Employer accepts that, in relation to the Union's complaint pursuant to Sections 6(3)(a) and 6(3)(b) of the Code, Section 14(7) places the burden of proof on it to show that it did not terminate Martineau's employment for reasons of anti-union animus. However, the Employer submits it cannot be found to have had such reasons if it did not know of the Union's organizing drive: *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 at para. 31; *0720941 B.C. Ltd.*, BCLRB No. B211/2008, 161 C.L.R.B.R. (2d) 1 ("*072*") at para. 114. The Employer submits the

evidence of Adams that he had no knowledge of the Union's organizing campaign was "uncontested" in that he "never resiled from this position" and the Union provided "no evidence" that he knew. The Employer submits speculation and "bald allegations" are not enough to establish that the Employer's decision to terminate Martineau's employment was tainted by anti-union animus.

42 Alternatively, the Employer submits, if it is found to have knowledge of the organizing drive, which is denied, there is no evidence this motivated the termination. The Employer submits that the Union "theorizes" that Elmquist spoke with Adams after his conversation on the morning of September 1, 2015 with Martineau, but the Union did not show a link between the conversation between Elmquist and Martineau and Adams' decision to terminate Martineau's employment. The Employer submits the Union speculates that Elmquist contacted Adams, but mere speculation is not sufficient.

43 With respect to the Section 6(1) complaint, the Employer notes the burden of proof is on the Union to establish a breach of this provision by the Employer. The Employer submits that a breach of this provision will not be found "where a termination of employment was not motivated by anti-union animus regardless of whether an Employer has proper cause", citing *072* at paragraph 120. The Employer submits that, as the Union has not established the termination of Martineau was the result of anti-union animus, its complaint under Section 6(1) must fail.

44 With respect to the question of whether there was proper cause for Martineau's termination, the Employer submits that, as set out in *White Spot Limited,* BCLRB No. B437/93 (Reconsideration of BCLRB No. B120/93), 21 C.L.R.B.R. (2d) 146 ("*White Spot*"), the standard of proper cause is a lower standard than the arbitral standard of "just cause". Accordingly, the Employer submits, it must only "positively establish a *bona fide* reason for its conduct" by "putting forward a reasonable explanation which is on its face free of anti-union animus".

45 In that regard, the Employer submits Martineau was hired as a temporary part-time employee and was terminated within the 90-day probationary period without notice as allowed under provincial employment standards legislation. It says he was "not offered an indefinite position because he was deemed to exhibit performance issues and his employment was temporary". It further submits the Employer "was willing to incur any additional short-term costs as a result of the termination" of his employment "because it wanted a more efficient employee". It submits Martineau "did not provide any evidence that he was suitable for the position or that he was not a poor performer". It submits that in the circumstances the Employer provided a reasonable explanation for its decision to terminate Martineau's employment and accordingly met the "proper cause" standard.

46 The Union submits this is a "prototypical case" of an employee being terminated during a union organizing drive without proper cause and for reasons of anti-union animus, contrary to the Code. In such cases, the employer almost inevitably denies it knew about the organizing drive or that the termination had anything to do with it. Since there is rarely direct evidence of anti-union animus, the Board must be prepared to rely

on circumstantial evidence to decide whether the termination is tainted by anti-union animus: *Forano Limited*, BCLRB No. 2/74, [1974] 1 Canadian LRBR 13 ("*Forano*"). The Union submits that in this case what the Employer refers to as "speculation" is powerful circumstantial evidence the Employer terminated Martineau when Adams learned he was a supporter of, and perceived organizer for, the Union.

47 The Union submits there are "two competing theories" for why Adams terminated Martineau on September 1, 2015. The Union's theory is that when Martineau got into work that morning, Elmquist took him for a drive to question him about his suspicions that Martineau was a Union supporter and was organizing the employees to meet with the Union, and that he communicated this information, directly or indirectly to Adams, causing Adams to decide to terminate Martineau that evening. The Employer's theory is that it was simply an extraordinary coincidence that Adams terminated Martineau the evening of the day when Martineau confirmed to Elmquist that he was a Union supporter. The Union submits the Employer's theory requires the Board to find Adams' explanation for the termination credible. The Union submits it is not. It provides a number of arguments for why the Employer's explanation is not credible and Adams' testimony should be regarded as unreliable, which are discussed below.

IV. ANALYSIS AND DECISION

48 It is well established that it is a breach of the unfair labour practice provisions of the Code (Sections 6(1), 6(3) and 9) for an employer to terminate the employment of an employee during a union organizing drive because he or she is a union supporter. As explained in *Forano*:

> An employer cannot fire someone for his union membership or activities. That does not mean that employees are immune from discharge during organizational campaigns since they can be fired for proper cause. It does mean that some such legitimate cause must be the actual reason for the discharge… . If the real purpose of a firing was the union involvement, an employer may not search for some arguable justification in the employee's earlier behaviour and advance this as the cause, *ex post facto* [after the fact]. The crux of such an unfair labour practice case is the employer's motivation in the discharge, something which rarely will be disclosed by admissions. Employers don't ordinarily advertise their anti-union activities. Such intention must be pieced together from a pattern of circumstantial evidence. Under s. 8(7) of the Code [now Section 14(7)], the employer is required to come forward and show that its motivation did not contravene [the Code]… . (p. 14)

49 As further explained in *White Spot*:

> During the period of transition brought about by the certification process, an employer maintains the right to manage and operate its business as before; however, its actions become subject to scrutiny by the Board. Any employer initiatives motivated

> in part by anti-union animus will be contrary to the protections against unfair labour practices contained in the Code. The statutory freeze provisions (including the proper cause standard which now commences with a union's organizing campaign) serve a complimentary role: they are intended to avoid the chilling effect which completely unregulated employer actions could have on the representation of employees by a trade union.
>
> At the same time, throughout the statutory freeze, the parties have not concluded a collective agreement which will only then mandate the standard of "just and reasonable cause" (see s. 84 of the Code). This means that the employer's actions are not yet subject to scrutiny against the yardstick of the arbitral regime and the approach established in *Wm. Scott, supra*.
>
> Where a complaint is filed under s. 6(3)(b) – or, for that matter, under any of the statutory freeze provisions – the issue is whether the employer had proper cause for its actions… .
>
> In the context of discipline or discharge, we are satisfied that use of the adjective "proper" implies some reasonable relationship between the alleged employee misconduct and the chosen employer response. The test is whether the employer can advance a reasoned explanation which objectively demonstrates a rational connection between the alleged misconduct and the discipline which was imposed. For example, in a discharge case, the question is not whether the employee has given "cause" or "some cause" for the imposition of discipline; the Board must determine whether there existed "proper cause *for discharge*". (pp. 157-158, emphasis in original)

50 The Board in *White Spot* went on to note that the Board will examine all the circumstances in deciding whether proper cause for discharge is established, adding: "Of course, the presence of anti-union animus will continue to defeat any argument of proper cause" (p. 159).

51 Thus, as set out in *Forano* and *White Spot*, the fact of the Union's organizing campaign in the present case did not preclude the Employer from discharging Martineau, as long as the decision was not tainted by anti-union animus and was for proper cause. These requirements are captured by Section 6(3)(a) and (b) of the Code, and Section 14(7) provides that, in these circumstances, "the burden of proof" that the Employer did not contravene these provisions in discharging Martineau "lies on the employer".

52 In the present case, the Employer accepted that, as its decision to terminate Martineau occurred during the course of the Union's organizing drive, it bore the proof of establishing the termination was for proper cause and was not tainted by anti-union animus. In that regard, it relied on the testimony of its sole owner and operator, Adams, who testified the decision to terminate Martineau was his alone, that he was unaware of

the Union's organizing campaign at the time he terminated Martineau, and that the termination was not because Martineau was a Union supporter but rather because he was a temporary employee and still within a 90-day probationary period, and Adams was dissatisfied with Martineau's job performance.

53 The Employer submits the only evidence of the Employer's motivation for terminating Martineau is that given by Adams, who denied knowledge of the Union's drive and anti-union animus in deciding to terminate Martineau. However, as the Union submits, the Board has recognized that, where an employer is motivated in whole or in part by anti-union animus, that "rarely will be disclosed by admissions" since employers "don't ordinarily advertise their anti-union activities": *Forano*. Accordingly, such intention "must be pieced together from a pattern of circumstantial evidence": *ibid.* The Union submits that, in the present case, the timing and circumstances of the termination lead to the inexorable conclusion it was motivated by anti-union animus. It submits this is made more evident by the absence of proper cause for the termination.

54 As noted in *White Spot*, the burden of proof is on the Employer to establish proper cause for Martineau's termination. In that regard, Adams testified in his direct evidence on the first day of the hearing that he terminated Martineau for "two reasons": because he was a temporary employee and for poor performance. He added that he also considered Martineau to be a probationary employee and therefore one who could be terminated without notice during his first 90 days of employment.

55 The Union took issue with much of Adams' testimony in this regard. It noted that, although Martineau's employment was stated to be "part time temp" on his "Employee Information" sheet, and Adams indicated in his testimony that Martineau had been hired to help with the "heavy yard work season" for the summer, his employment in fact appeared to be of a continuing or ongoing nature. There was no evidence from either Adams or Martineau of an agreement or expectation that Martineau's employment would terminate at the end of the summer, and Adams did not cite the end of the summer as the reason for the termination. Moreover, Adams' testimony that he considered Martineau to be on probation for the first 90 days of his employment suggests he contemplated continuing Martineau's employment beyond the summer if he passed his probationary period.

56 Even if I accept that Adams viewed Martineau's employment as "temporary" and "probationary" in nature in the sense that his employment could be terminated without notice simply because he was no longer needed at the end of the summer, the evidence did not establish that this was the reason his employment was terminated. Adams conceded there was no downturn, slow down, or shortage of work to explain his decision to terminate Martineau's employment on September 1, 2015. To the contrary, the work continued unabated and Adams had hired labourers from Labour Unlimited since terminating Martineau's employment, at a cost of $17 per hour compared to the $11 per hour for Martineau.

57 Adams' explanation for incurring greater labour costs by terminating Martineau was that he sometimes found the temporary labourers he hired from Labour Unlimited were good performers whom he could then offer to employ directly. I find, however, that this explanation for terminating Martineau's employment is credible only if Adams' second reason for terminating Martineau is established, namely, that he terminated Martineau because of poor performance. If Martineau's performance was not poor as Adams alleged, the Employer has not provided a rational explanation in the circumstances for terminating him on September 1, 2015. There was no shortage or slowdown of work, and hiring a replacement from Labour Unlimited was more expensive than continuing to employ Martineau as a swamper.

58 With respect to the position that he terminated Martineau because he was dissatisfied with his work performance, Adams conceded Martineau's discipline sheet in his personnel file was blank. However, he alleged that he had given Martineau a verbal warning after hearing from his son, Dustin Adams, that Martineau had proposed working slowly. Adams at first indicated he thought the conversation with Martineau occurred about a month before the hearing, in August. When it was pointed out that he had testified he had been on vacation since August 4, 2015, he said he had nonetheless been performing work by phone and email. He then added that the conversation, which he alleged took place at the fuel dock at work, might have happened before he went on vacation.

59 For his part, Martineau denied having any such conversation with either Dustin Adams or Adams, noting that he was unlikely to have discussed "slacking off" with the boss's son. On a balance of probabilities, I find it not likely that Martineau had a conversation with Dustin Adams, the son of Adams, about how he could deliberately work slowly in order to be paid for more hours of work. I further find Adams' testimony as to when the conversation allegedly occurred was vague and shifting, whereas Martineau's testimony was clear and consistent that no such conversations took place. I prefer the evidence of Martineau on this issue.

60 I further note that, even if I had accepted that such a conversation occurred between Adams and Martineau, it would have occurred a month or more before the decision to terminate. Adams agreed he did not subsequently have any discussions about performance with Martineau other than this one alleged conversation. He agreed he made no notation about it, and it was evident that, if the conversation did occur, it was not significant enough for Adams to recall when it happened. I find the conversation as described by Adams, even if it did occur, does not support the Employer's position that the reason Adams terminated Martineau's employment on September 1, 2015 was because of dissatisfaction with his poor work performance.

61 In addition to alleging this conversation, Adams also stated that he concluded Martineau was a poor performer from reviewing the route sheets. He stated on the first day of the hearing that he reviewed the route sheets daily. He further said he had seen the route sheets for the last couple of weeks, and could see that Martineau was "deficient" and did "60% of what was expected". However, when route sheets from

August 17, 2015 to September 1, 2015 were produced on the second day of the hearing at the request of the Union, and the Union's counsel reviewed them in detail with Adams, he agreed they did not establish Martineau's performance was deficient, that he failed to get loads to the dump, or that he did "60% of what was expected". Indeed, the route sheets established Martineau's performance in the two weeks prior to his termination met the standards Adams had described on the first day of hearing.

62 In re-direct, Adams attempted to explain away this evidence by stating that these were not the route sheets he had relied on in concluding that Martineau's performance was poor. However, he did not indicate what route sheets he had relied on, and his testimony in that regard on the second day of the hearing was directly contradictory to the evidence he gave on the first day. On the first day of the hearing, he stated he had relied on a review of the route sheets and had found a "60%" deficiency in Martineau's productivity. On the second day, he stated the decision to terminate was based not on the route sheets but on his "overall" assessment that Martineau was not performing to his satisfaction. No evidentiary basis was provided for this alleged assessment after the evidentiary basis initially cited for his decision to terminate (the route sheets) did not withstand scrutiny.

63 In these circumstances, I find the Employer has not established proper cause for Martineau's termination. The evidence did not support Adams' claim that he terminated Martineau because of an assessment that his performance was unsatisfactory. He claimed to have arrived at this assessment from a review of Martineau's route sheets, but the route sheets produced did not support this testimony and Adams did not indicate that he meant other route sheets. Rather, he changed his testimony from the first day on the second day as to the explanation for his decision to terminate. His explanation became a vague claim that it was because of an "overall" assessment that Martineau's performance was not to his satisfaction. Not only was this claim unsupported by evidence, but also I find the change in his evidence revealed his testimony to be unreliable on the central issue of the Employer's motivation for terminating Martineau's employment.

64 In its closing argument, the Union pointed out a number of other self-serving "shifts" in Adams' evidence that it submitted rendered his testimony unreliable. For example, the Union noted, Adams initially stated he was on vacation on September 1, 2015, the day he terminated Martineau's employment. However, when he was asked why he did not make the decision in the preceding week when he said he had been working, but rather made the decision, allegedly without any triggering reason, while on vacation, Adams then testified that actually he was merely "out of town" on September 1, 2015, and his vacation did not begin until September 3, 2015.

65 I find this was an example of Adams' testimony changing in the midst of the hearing in a way that undermined his credibility as a witness. There were other examples where Adams' evidence changed during the course of his testimony. For example, he initially indicated he was mostly, if not entirely, on vacation from August 4, 2015 until the day after the Labour Day weekend, September 8, 2015. He later testified that he continued to do work by phone and text messaging while on vacation. He

subsequently further modified his evidence by stating that in fact he had been at work for days at a time in August. These changes in his evidence were self-serving in that they occurred when it was advantageous to explaining why he had decided to terminate Martineau's employment on September 1, 2015. In the result, I find I cannot place reliance on Adams' evidence when it comes to his explanations of the reasons for his decision to terminate Martineau's employment.

66 As noted above, the Employer bears the onus of establishing its termination of Martineau's employment was for proper cause and not tainted by anti-union animus. I find the Employer has not established proper cause for the termination. While it claims to have terminated Martineau for poor performance, the evidence that was said to support this claim did not in fact do so. Perhaps for this reason, in his final reply argument, Employer's counsel argued that Martineau had been terminated "without cause", but that this was not improper because he was a temporary, probationary employee. Union's counsel submitted this argument was an admission that Martineau had been terminated without proper cause, in breach of the Code. The Employer denied it was an admission of a breach.

67 I find it unnecessary to decide whether this argument was an admission of a breach, because I find in any event that, on the evidence presented at the hearing, the Employer did not establish proper cause for terminating Martineau. Adams' explanation for his decision to terminate Martineau was contradicted by the route sheet evidence and his own inconsistent statements about why he allegedly concluded Martineau's performance was unsatisfactory and decided to terminate him on September 1, 2015. I conclude the Employer has not established Adams' decision to terminate Martineau was because of poor performance or for any other proper cause.

68 In the circumstances, I find the absence of proper cause for termination strongly supports an inference that the decision to terminate was tainted by anti-union animus. The evidence established that Martineau had worked without discipline or performance issues from the date of his hire. He worked his Tuesday to Friday shift in the last week of August without incident, and had the following Saturday to Monday off work. When he came to work on the morning of the first day of his next shift, Tuesday, September 1, 2015, he was picked up and taken for a drive by a long-term driver for the Employer, Elmquist. During the drive, Elmquist sought and obtained confirmation from Martineau that he was a Union supporter. Elmquist also implied that he believed Martineau was helping to "get the employees together", in other words, assisting with organizing for the Union.

69 I agree with the submission of Employer's counsel that, as a potential employee in the bargaining unit, Elmquist was entitled to express his views about unionization. (However, I also note that under Section 8 of the Code, such views must not be expressed in a manner that is intimidating or coercive.) I further agree with Employer's counsel that the evidence did not establish the Union's initial claim that Elmquist was acting as an "agent" or "on behalf of" the Employer when he questioned Martineau about his Union involvement and expressed views about what would happen if the workplace unionized. Nonetheless, it is clear that Elmquist took steps that morning to

satisfy a suspicion or belief that Martineau was a Union supporter, and was able to obtain information from Martineau confirming that suspicion or belief.

70 Martineau's undisputed evidence was also that Elmquist spoke strongly against the Union's organizing drive. Adams' evidence was that Elmquist had worked for the Employer for nine years, that they had a "professional" relationship, and that in the past they had "had beers" together. The Employer was a small company run almost single-handedly by Adams. Adams indicated he communicated regularly and frequently with his drivers. Although there were no text messages between Adams and Elmquist on September 1, 2015, Adams testified that Elmquist "was not much for text messaging". An attempt was made at the hearing to check Adams' cell phone records for that date, but it was not possible to access that information at the expedited hearing (Adams' record of calls on his cell phone did not go back to that date). Nonetheless, there was no basis in the evidence for concluding that Elmquist could not have phoned Adams that day, or that the information Elmquist confirmed that day about Martineau being a Union supporter could not have been communicated to Adams that day.

71 I find the circumstantial evidence reviewed above, including the absence of proper cause for termination and the otherwise inexplicable timing of the decision to terminate Martineau on the evening of September 1, 2015, while Adams was out of town and away from work, the evening after his long-serving driver had taken steps that morning to confirm Martineau was a Union supporter, establishes on a balance of probabilities that Adams' decision to terminate Martineau's employment on September 1, 2015 was motivated, in whole or in part, by knowledge or belief that Martineau was a Union supporter. As such, it was tainted by anti-union animus.

72 For the reasons given, I am therefore persuaded the Union has established the Employer breached Section 6(3)(a) and (b) of the Code in terminating Martineau's employment. I am further persuaded that the improper termination of Martineau in the midst of the Union's organizing campaign would objectively have had a coercive or intimidating effect on other employees, such as to reasonably compel or induce them to refrain from becoming members of the Union, contrary to Section 9. I am also satisfied terminating Martineau without proper cause and for anti-union reasons in the midst of an organizing campaign would have objectively had the effect of interfering with the formation, selection or administration of the Union, contrary to Section 6(1).

V. REMEDY

73 In its application, the Union seeks a number of remedies. Of those remedies, I am persuaded that it is appropriate to declare that the Employer has breached Sections 6(1), 6(3) and 9 of the Code, and to order that the Employer immediately cease and desist from further violations of the Code. I am further persuaded to grant an order reinstating Martineau to employment with full back pay, and an order that the Employer post a copy of the Board's decision in a conspicuous place at the plant, and mail a copy to each of its employees.

74 To further remedy the broader effect of the termination on the other employees and the Union's organizing campaign, contrary to Sections 6(1) and 9, I am persuaded to grant a further remedy requested by the Union. The Union is to be provided an opportunity on Employer paid time, of at least one hour, to meet with employees in a room at the Employer's place of business in the absence of management personnel and persons related to the owners of the Employer (Adams and his sons).

75 I remain seized in the event any issues arise with respect to implementation of the above orders.

76 The Union seeks an order that the Employer "pay to the Union costs for its repeated breaches of the Code in defiance of the Board's earlier order". In the present case, I have found the termination of Martineau breached the Code. The Board's "earlier order" in *072* was issued approximately seven years ago. Given the lengthy passage of time, I am not persuaded the circumstances should invoke the Board's rarely exercised jurisdiction to grant costs of proceedings for repeated breaches of the Code in defiance of Board orders. Accordingly, this remedial request is declined.

77 Finally, the Union seeks a further remedy of remedial certification. The parties agree that the Board's test for remedial certification is set out 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. The parties disagree on whether the circumstances of this case justify the granting of this remedy.

78 The Union argued, in essence, that nothing short of remedial certification would remedy the egregious breach of the Code by the Employer. It placed reliance on an earlier decision of the Board, *072*, in which the Employer was found to have committed a breach of the Code in somewhat similar circumstances. It submitted the Union's organizing drive in this case had good momentum until the Employer "hit early and hit hard" with the termination of Martineau, which had a severe chilling effect on the organizing drive. It relies on the evidence of Duff in that regard, and submits that, but for the Employer's unfair labour practice, the Union would have achieved certification.

79 The Employer submits, in essence, that if the termination of Martineau is found to have been in violation of the Code, the Board's test for the extraordinary remedy of remedial certification is not met. The Employer notes that the Union was able to sign a membership card after the termination and submits that the evidence does not establish that the wishes of the employees cannot be expressed by a representation vote.

80 Having considered the evidence and the arguments of the parties, and the other remedies that have been ordered, I am not persuaded it is appropriate to grant, in addition, remedial certification as a remedy for the breach in this case. However, I observe that any breach of the order that the Employer cease and desist from further violations of the Code may lead the Board to find a further remedy appropriate, which could include remedial certification. I further note that, under Sections 8 and 9 of the Code, a person may express views on union representation, but expressing such views in a coercive or intimidating manner that could reasonably have the effect of compelling

or inducing someone to refrain from becoming (or to become) a union member is a breach of the Code.

VI. CONCLUSION

81 For the reasons given, I find the Employer has violated the Code's unfair labour practice provisions in terminating Martineau's employment, and I make the remedial orders set out above, which include reinstatement of Martineau to employment with full back pay.

LABOUR RELATIONS BOARD

"ELENA MILLER"

ELENA MILLER
VICE-CHAIR