SBH MANAGEMENT LAWYERS

UPDATE

Stringer Brisbin Humphrey's Electronic Newsletter

STIR THE SLEEPING GIANT: REMEDIAL CERTIFICATION REARS ITS HEAD IN 2010!

By: Jeffrey Murray and Kelly McDermott

Any employer that has ever been involved in a union organizing drive has probably been cautioned about the Ontario Labour Relations Board's power to automatically certify a union if an employer goes "too far".

In 1998, the Board's power to order remedial certification was taken away by the then Conservative government, only to be restored by the current Liberal government in 2005. Employers prepared for the worst, but the worst never came. In fact, from 2005 to 2009, the Board exercised this power sparingly against construction employers and not at all against industrial employers.

However, 2010 saw a resurgence of remedial certification orders. These cases should remind non-union employers that the Board is not afraid to certify a union where it finds that no other remedy is available to reverse an employer's anti-union conduct.

2010 Remedial Certification Orders

There are three notable 2010 cases where the Board has ordered remedial certifications:

1. ***Labourers' International Union of North America, Ontario Provincial District Council v. 450477 (Chartrand Equipment)***

In this case, foremen employed by a construction company, intimidated and were violent towards union representatives during an organizing campaign. The foremen chased union organizers in their cars, threatened them, and infiltrated an off-site union-organizing meeting during non-working hours. Although the foremen were in the proposed bargaining unit, the Board found that the employer had directed them to stop the union at all costs. As such, they were deemed to be acting on behalf of management. The Board concluded that remedial certification was warranted because no reasonable employee could be expected to sign a union membership card after this disgraceful and pathetic conduct.

2. ***United Brother of Carpenters and Joiners of America, Local 2486 v. Southend Drywall & Acoustics Ltd.***

In this case, the Board found that a construction employer terminated an employee for his union activities during a union organizing campaign. The Board acknowledged that the employee had ongoing attendance issues, but found that the employer only acted on these issues once it discovered the employee was spearheading a union organizing drive.

The Board noted that anti-union animus need only "taint" an employer's actions to make them unlawful. The Board reinstated the employee and ordered a remedial certification because terminating the union organizer had two irreparable effects: 1) cutting off the union's access to the employees; and 2) warning other employees that union organizing means job loss.

3. *Communications, Energy and Paperworkers Union of Canada v. Boehmer Box LP*

In this case, the Board found that an industrial employer sent anti-union letters to employees during a union organizing drive. In these letters, the employer linked unionization both directly and indirectly to the risk of plant closure and job loss. Further, an anonymous memorandum was sent to employees detailing the closure of several unionized manufacturers in the area. The Board found that the employer encouraged or facilitated the dissemination of this anonymous memorandum.

The Board concluded that while employers are free to cast aspersions against trade unions, they must be careful not to suggest or even speculate that unionization will undermine the viability of the company and compromise employee job security. The Board found that the employer did not exercise sufficient care in this case. As such, the Board ordered remedial certification even though the union had already lost a certification vote.

Lessons For Employers

These cases should remind employers that: 1) remedial certification remains a viable remedy in both the construction and industrial sectors; 2) union-organizing drives should be approached in a methodical, professional manner; and 3) all managerial employees should be trained on the "dos" and "don'ts" of organizing drives.

The above cases remind us that employers should not:

1. Threaten, either directly or indirectly, the loss of jobs, plant closure, layoffs, reductions of income, reduction of hours or discontinuance of any privileges or benefits presently enjoyed by employees. This applies even if the employer's concerns are honestly held.

2. Threaten to, or actually discharge or discipline, an employee because of their union activities. If there is a valid reason to discipline or discharge such an employee, the employer must prove that: 1) the valid reason formed the sole basis for its decision; and 2) anti-union animus did not, in any way, taint that decision. The Board is often suspicious when a union organizer is terminated for behaviour that has been long standing and unaddressed.

3. Direct employees to engage in unlawful behaviour on behalf of the employer to thwart a union organizing campaign.

For a more comprehensive list of "dos" and "don'ts" during a union organizing drive and advise on developing a strategy for dealing with union organizing drives, please contact us.

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