Manitoba Labour Board
Suite 500, 5th Floor - 175 Hargrave Street Winnipeg, Manitoba, Canada R3C 3R8
T 204 945-2089 **F** 204 945-1296
www.manitoba.ca/labour/labbrd

ORDER NO. 1632
Case No. 132/15/LRA

IN THE MATTER OF: ***THE LABOUR RELATIONS ACT***

- and -

IN THE MATTER OF: An Application by

N.W.,

Applicant,

- and -

United Steelworkers, Local 9074,

Certified Bargaining Agent,

- and -

WINNIPEG DODGE CHRYSLER LTD.,

Respondent/Employer.

BEFORE: C.S. Robinson, Chairperson
D. Strutinsky, Board Member
S. Oakley, Board Member

This Decision/Order has been edited to protect the personal information of individuals by removing personal identifiers.

INTERIM SUBSTANTIVE ORDER

WHEREAS:

1. On July 3, 2015, the Applicant filed, with the Manitoba Labour Board (the "Board"), an Application Seeking Cancellation of Certificate No. MLB-7036 issued on June 20, 2014 (the "Application"). In the Application, the Applicant alleged that the United Steelworkers, Local 9074 (the "Union") lost the support of a majority of the employees in the bargaining

unit. Individual letters from members of the bargaining unit were filed in support of the Application.

2. On July 9, 2015, the Employer filed its Nominal Roll pursuant to Rule 12(3) of the *Manitoba Labour Board Rules of Procedure* (the "*Rules*").

3. On July 29, 2015, following an extension of time, counsel for the Union filed its Reply. The Reply contested that the Applicant had provided sufficient particulars to establish a *prima facie* case that the majority of the employees in the bargaining unit supported the Application. Further the Reply alleged that the Applicant and Winnipeg Dodge Chrysler Ltd. (the "Employer") had committed unfair labour practices. The Union requested a variety of remedies in regard to the unfair labour practices and requested that the Application be dismissed without a hearing.

4. On July 29, 2015, the Board informed the Union that if it was its intent to advance independent unfair labour practice allegations, then a proper application would need to be filed.

5. On July 30, 2015, counsel for the Union filed an application alleging unfair labour practices (the "Unfair Application") and an amended Reply to the Application stating that the Application and the material filed in support thereof did not represent the voluntary wishes of the employees, and requested that the Board conduct a hearing into the matter. Counsel requested that the hearing into the Application be heard together with the hearing into the Unfair Application.

6. On August 6, 2015, following consideration of material filed, the Board ORDERED that a Representation Vote be conducted with each individual ballot sealed and the ballot box being sealed pending the Board's determination on all outstanding issues.

7. On August 17, 2015, the Board conducted the Representation Vote. At the conclusion of the vote, a Fair Vote Certificate was signed by all parties.

8. On August 25, 2015 the Board conducted a Case Management Conference respecting the Application and the Unfair Application, during which counsel for each of the Union, the Employer, and the Applicant made submissions. Following the Case Management Conference, it was determined that the matters should be heard together with the evidence being applied *mutatis mutandis*. Counsel further agreed that this was an appropriate circumstance for the Chairperson to extend the time frame required for the hearing of the Application, in accordance with Rule 29.1(2) of the *Rules*. Accordingly, the Chairperson **DETERMINED** that exceptional circumstances required the extension of time for the hearing of the Application.

9. On November 4 and 5, 2015, continuing on January 11, 12, 13, 14 and 18, 2016, the Board conducted the hearing, at which time counsel for the Union, the Employer and the Applicant, each presented evidence and argument.

10. The Board has determined that the following facts are relevant to the disposition of this case:

    a) On June 20, 2014, the Union was certified to represent employees in a unit described as "All employees employed by Winnipeg Dodge Chrysler Ltd. in the Service Department except Foremen, Tower Operators and those excluded by the Act." Certificate No. MLB-7036 was issued pursuant to Subsection 40(1)1 and, as a result of an unfair labour practice, the Board granted the remedy of discretionary certification pursuant to Section 41 of the *Act*.

    b) The Applicant is employed by the Employer as a Service Advisor. He commenced his employment in November of 2013, following an interview with the Employer's then Service Manager. The Applicant testified that he was not asked any questions about unions or his views about unions by the Employer or anyone acting on behalf of the Employer during the interview or thereafter.

    c) The Service Advisor position is included in the bargaining unit. Service Advisors deal with customers when they bring their cars in to be serviced. Typical duties of the position include communicating with customers, obtaining information regarding their vehicle, writing work orders, preparing quotes, and liaising with Service Technicians. During the course of his working day, the Applicant spends the majority of his time at his desk, but also attends at the Automotive Shop and the Parts Department from time to time. The Applicant has no supervisory or managerial duties.

    d) There is a familial relationship between the Applicant and the Employer's General Manager. They are second cousins removed. There is a significant difference in their ages and they do not have a social relationship with one another. The General Manager was not involved in the process that led to the hiring of the Applicant. Furthermore, the Applicant testified that he did not reveal that he was related to the General Manager during his interview. Although the Applicant acknowledged that he may have told one or two people in the workplace about the familial relationship, having heard evidence from several employees during the course of the hearing, it does not appear that this fact was common knowledge in the workplace.

    e) There was significant turnover of employees since June of 2013 when the Union filed the Application for Certification that resulted in the Board issuing Certificate No. MLB-7036.

f) The Applicant indicated that he first learned that the Union represented employees of the Employer in the Spring of 2014. He testified that he has a negative view of unions because of previous experience in a unionized position during which he became dissatisfied with the representation by that union.

g) The Board heard evidence regarding the origination, preparation and circulation of individual letters of support for the decertification of the Union.

h) The Applicant did not do the initial research into seeking decertification. Another employee led the effort to research the decertification process, determined the open period during which decertification could be initiated under the *Act*, and compiled the relevant information in a binder. However, the Applicant was amongst a group of employees in the workplace who did not wish to have the Union represent them and they were resolved to seek decertification at the earliest opportunity. There is no evidence that this group of employees was influenced or pressured by the Employer in their views in this regard. When the first open period for decertification arrived, the Applicant contacted the Board seeking information regarding the decertification process. The Applicant testified that he also discussed the matter with the employee who completed the initial research and that employee provided him with a copy of a document titled "Individual Letter of Support for a Decertification in Manitoba" (hereafter referred to as the "ILS"), obtained from a website.

i) The ILS is divided into two parts. The first part, which includes blank spaces in which to include information related to the decertification, provides the following:

> **Note to signer: Read this document carefully before signing.**
>
> I, the undersigned employee of (Employer's name) no longer wish to be represented by the (Union name and Local if applicable). I hereby support the cancellation of Certificate No. (Certificate Number from the Labour Board). I authorize (Applicant's name) to apply on my behalf in this matter to request that the Manitoba Labour Board grant a vote to determine the wishes of the employees in the bargaining unit.

j) The second part of the ILS provides space for the name and signature of the employee, the date, time and place that the ILS was signed, and the signature of a witness.

k) The Applicant gave evidence, which was corroborated, that he agreed to be the person to make the Application as he had an upcoming weekday off and could attend at the Board to deliver the required material.

l) The decertification drive commenced in the latter part of June 2015. Within a few days, the Applicant received signed ILS documents from 25 employees in the bargaining unit which, on the date of Application (July 3, 2015), included 34 employees. This level of support exceeds the 50% support required under subsection 50(2) of the *Act* for a Representation Vote to be conducted.

m) Detailed evidence regarding the preparation and circulation of the ILS was provided at the hearing in support of the Application. The Applicant testified that he completed the first part of the ILS by providing the information in the spaces provided and then made a sufficient number of copies of the document at home. He personally circulated the vast majority of copies of the ILS to employees. Another employee who supported the decertification drive circulated a small number of the ILS documents. Each of the signed copies of the ILS was returned personally by the employees to the Applicant.

n) The decertification drive occurred primarily in the workplace. The copies of the ILS were handed out in the workplace by the Applicant and the other employee who was involved in the circulation. The Applicant testified that he attempted to circulate the copies of the ILS and have discussions with his fellow employees about the matter during periods when he and the employees were on lunch, having a break, or following the workday. A number of employees testified that the workplace is casual and break times are flexible and based upon work demands. There is no evidence that the Applicant or the other employee who circulated copies of the ILS disrupted the ongoing operation of an employer's workplace by distributing the copies or discussing the proposed decertification of the Union during the working hours at the workplace. Brief discussions took place between the Applicant (and the other employee who circulated copies of the ILS) and the employees to whom the copies of the ILS were provided. With the exception of one short meeting with a small group of Express Lane technicians, all of the discussions regarding the ILS were one on one. The discussions about the ILS occurred largely, but not exclusively, while individuals were on lunch or breaks. The conversations did not include any misleading information about the consequences of decertification or any reference to Employer involvement, support, or pressure. There is no evidence of anyone from management being in the vicinity when copies of the ILS were circulated or when discussions regarding the decertification occurred.

o) A majority of the ILS filed in support of the Application did not indicate when and/or where the employees signed the ILS. In addition, some signatures were not directly witnessed. Some individuals signed the document and later handed it to the Applicant. Others signed in front of the Applicant. There were some minor

inconsistencies between witnesses called by the Applicant in relation to the distribution and signing of the ILS. However, all of the employees called by the Applicant confirmed that they freely signed the ILS and that they did not wish to be represented by the Union.

p) The Applicant testified that his decision to seek decertification of the Union was not in any way influenced by the Employer. The Applicant denied having any discussions about the ILS or the decertification with the General Manager or anyone else in a management position with the Employer.

q) There is no evidence that the Employer or any person acting on behalf of the Employer was aware of the circulation of the ILS in the workplace. The General Manager specifically denied any knowledge that employees were seeking to decertify the Union in the workplace.

r) Nine employees (including the Applicant) testified regarding the circumstances of receiving the ILS and the circumstances of their signing of the document. None of those employees saw any member of management when they received or discussed the ILS. They each testified that they signed the ILS freely and voluntarily. The employees testified about their motivation for signing the ILS and, while those reasons varied, none of the witnesses claimed to have been intimidated, threatened, coerced, pressured, or influenced in any manner by the Employer to sign the ILS or support the decertification. Only one of these employees who testified said that they knew of the familial relationship between the Applicant and the General Manager at the time that they signed the ILS, and that employee did not assert that his decision was influenced by that knowledge.

s) An employee who was previously in a position outside of the bargaining unit was moved into a position as a Service Advisor in the bargaining unit on or about June 15, 2015 for legitimate business reasons entirely unrelated to the decertification drive.

11. The Board, following consideration of material filed, evidence and argument presented at the hearing into the matters, **DETERMINED** that:

a. The tests and principles enunciated by the Board in *Integrated Messaging Inc.* [2001] M.L.B.D. No. 17 and subsequently reaffirmed, indicate that any application for the cancellation of a certificate involves a two-stage process and that, during the first stage of this process, the onus is on the applicant to satisfy the Board, on the balance of probabilities, that any petition filed represents the voluntary wishes of its signatories. Further, in order to satisfy this onus, the Board requires cogent evidence regarding the origination, preparation and circulation of a petition or other documentation in support of the application, in the present case the ILS. The Board

again reaffirms the criteria summarized in paragraphs 44 to 46 of the *Integrated Messaging* case, particularly the requirement cast on an applicant to call witnesses to give evidence, based on personal knowledge and observations relating to the circumstances of the origination and preparation of a petition or other documentation in support of the application and the manner in which each signature was obtained. That being said, there is no requirement in the legislation, nor has the Board ever indicated that every employee who indicates support for the decertification of a union must, in all cases, be called as a witness in the hearing of the application.

b. As was noted in *Integrated Messaging, supra*, where management or employees who are associated with management are involved in the circulation of a petition supporting decertification, the Board has declined to accept that the evidence in support of an application reflects the voluntary wishes of employees.

c. There is no evidence of direct involvement by the Employer in the origination, circulation or discussion of copies of the ILS or, more generally, the decertification drive.

d. However, the Applicant's familial relationship with the General Manager was raised as an issue in the present case. Where the Board determines that the circulator of a petition or individual letters in support of an application for decertification would be reasonably perceived as closely associated with management and/or that the average employee would be concerned that management would come to know whether they supported the decertification application or not, the evidence in support of the application will not be accepted as a voluntary expression of employee wishes.

e. In decertification and revocation of bargaining rights cases, the involvement of someone with a familial relationship to management calls for careful scrutiny. As the Ontario Labour Relations Board noted in *R.W.D.S.U. v. Eddie Black's Ltd.*, [1985] O.L.R.B. Rep. 1359 at paragraph 10, citing *Otto's Deli*, [1980] O.L.R.B. Rep. Nov. 1673 at 1681:

> We do not think that we should readily draw inferences from the mere existence of a family relationship. Is some circumstances, relatives may be reasonably perceived as having a special relationship with the employer which could influence an employee's choice with respect to trade union representation, but we do not think that this is always the case, nor are we prepared to automatically assume that the existence of a family relationship necessarily evidences a community of interest with the employer. It may be that there is a presumption turning in that direction but we are all aware that family relationships do not always exhibit the solidarity which counsel suggests. The involvement of family members is

not irrelevant, but it is not the only factor to be considered especially where, as here, the inferences to be drawn from it are unclear. Of equal significance in our view is the general atmosphere prevailing in the work place, and the impact this would likely have on employee perceptions.

f. The Applicant is the second cousin removed of the General Manager. They both denied having a social relationship. Although the familial relationship was known to some people in the workplace, the evidence indicated that the Applicant did not widely disseminate such information and it does not appear to have been common knowledge to other employees. In this regard, only two of the employees who testified at the hearing knew of the relationship, and neither of them claimed to have been influenced by it. The evidence also does not support the contention that the Applicant was picked to lead the decertification drive because of the familial relationship. The other leaders of the decertification efforts testified that they did not know of the relationship at the time that the Applicant took on the responsibility to circulate copies of the ILS and file the Application.

g. The average employee would not perceive the Applicant as being management or associated with management. The facts do not support a conclusion that the Applicant's involvement in the decertification drive, including but not limited to, circulating copies of the ILS to employees, would impact employee perceptions or suggest the Employer was involved with, promoted or supported the decertification.

h. The Applicant was hired into his position in the bargaining unit. The Employer did not, as asserted by the Union is its Reply, facilitate a transfer of the Applicant into the bargaining unit in order for him to file the present Application or to attempt to coerce employees on account of his familial relationship with the General Manager. The Applicant was never employed by the Employer in a position outside of the bargaining unit and he has never had any supervisory authority. Nor was the Applicant hired by the Employer with the hope or expectation that he would attempt to persuade employees to not support and/or decertify the Union.

i. The Applicant concedes that copies of the ILS were circulated in the workplace and discussions with employees occurred during working hours. As was noted in the *Integrated Messaging* case at paragraph 61, "while this is not prohibited by the *Act*, and would not in itself be sufficient to fatally taint a petition, it is one factor to be considered".

j. There is no express prohibition about having discussions in the workplace regarding union matters. Subsection 33(2) of the *Act* provides the following caution:

> **Disruption of operations**
> 33(2) Nothing in this Part authorizes any person to disrupt the ongoing operation of an employer's workplace by attempting, during the working hours of an employee at the workplace, to persuade the employee
> (a) to become, or continue to be; or
> (b) to refrain from becoming or continuing to be;
> a member of a union.

k. Soliciting support for a decertification in the workplace during working hours is closely scrutinized because it may raise questions about the voluntariness of that support. The primary concern is that it might appear to employees that openly circulating information like a petition or an ILS related to a decertification drive could give the impression that the effort to decertify is endorsed or supported by management. However, every situation must be evaluated in light of the evidence adduced. In the present case, the Board accepts that the Applicant and another employee had a series of brief conversations with employees that largely occurred during lunches or breaks. These conversations were discreet and apparently not held in the presence of managers. There was no indication that such efforts were known to, supported, or condoned by the Employer. Moreover, during the period that copies of the ILS were circulated and discussed, the evidence did not indicate that the efforts caused any disruption in the workplace. The Board is satisfied that the fact that the decertification drive took place in the workplace would not lead a reasonable employee to conclude that the effort to decertify was endorsed or supported by management and, accordingly, we are satisfied that it did not affect the voluntariness of the support for the Application.

l. Certain omissions from nearly every ILS, with respect to when and/or where the document was signed, were also an issue in this case. The failure of many of the employees to fully complete the relatively short and straightforward ILS, while curious, is not, in the circumstances of this case, fatal to the Application. The Board recognizes that applications of this type are often prepared and filed by lay people who lack a sophisticated understanding of the legislation and the relevant jurisprudence. While the Board must vigilantly scrutinize the voluntariness of the support for such applications, perfection is not the standard required and minor defects in supporting documentation should not result in automatic dismissal. It should be noted that there is no statutory requirement with respect to the evidence of employee support for an application for decertification. In the present case, the Applicant called witnesses who testified regarding the origination and preparation of the ILS and the manner in which the signatures were obtained. To the extent that the failure of the individual employees to fully complete the ILS constitutes a defect, that

defect has been cured by the evidence of the witnesses called in support of the Application.

m. A further issue arose with respect to the witnessing of the employee signatures on the ILS form. The failure to properly witness signatures appearing on a petition in support of an application for decertification is a deficiency that has resulted in the Board dismissing such applications. In the present case, the Applicant was candid about the fact that not all employee signatures on the copies of the ILS were personally witnessed. However, it must be recalled that this application does not involve an employee petition as was the case in *Integrated Messaging, supra* or *Betel Home Foundation and I.U.O.E., Local 987D* [2008] M.L.B.D. No. 2. The fact that the present Application utilized individual signed copies of the ILS as opposed to a petition is a significant distinguishing factor. Here, each ILS was personally returned to the Applicant by the employee who signed the document. As such, even though some employees took the ILS and later signed it while the Applicant was not present, the act of personally returning the signed ILS to the Applicant provided the necessary measure of authenticity in relation to those forms and the signatures.

n. Ultimately, the Board is satisfied that the wording on the ILS was sufficient to identify the purpose underlying the Application and to appoint the Applicant as the representative of the employees who elected to sign. We are satisfied as to the voluntariness of the wishes of the employees, having heard detailed evidence with respect to the circumstances of the origination and preparation of the ILS and the manner in which the signatures were obtained. There was no evidence of misleading or inaccurate information being provided to employees regarding the consequences of decertification. And, of critical importance, the Board is satisfied that the Employer was not directly or indirectly involved in any aspect of the decertification and did not do anything to influence or attempt to influence any employee to support the decertification.

o. The Application is timely in accordance with subsection 49(2) of the *Act*.

p. The Applicant has established that 50% or more of the employees in the unit represented by the bargaining agent support the Application made under section 49 of the *Act*. Accordingly, the Representation Vote conducted by the Board shall be counted to determine the Application.

<u>T H E R E F O R E</u>

The ballots cast in the Representation Vote (including those of the Applicant and M.T. who are both employees in the bargaining unit) shall be counted forthwith.

As a result of the foregoing determinations, a Board Officer shall contact the parties immediately in order to arrange a time when the parties are to attend at the Board's offices for the purpose of counting the ballots to determine the wishes of the affected employees. A final order of the Board reflective of the results of the vote will follow in due course.

DATED at **WINNIPEG**, **Manitoba** this 7th day of April, 2016, and signed on behalf of the Manitoba Labour Board by

"Original signed by"
C.S. Robinson, Chairperson

"Original signed by"
D. Strutinsky, Board Member

"Original signed by"
S. Oakley, Board Member

RM/lo/lo-s