ONTARIO LABOUR RELATIONS BOARD

1861-08-U United Brotherhood of Carpenters and Joiners of America, Local 2041, Applicant v. **DES Building Contractors Inc.** and Paul DeSouza, Responding Parties.

1862-08-R United Brotherhood of Carpenters and Joiners of America, Local 2041, Applicant v. **DES Building Contractors Inc.**, Responding Party.

BEFORE: Mark J. Lewis, Vice-Chair,

APPEARANCES: D. Wray and Joe McMahon appearing for the applicant; Paul Lalonde and Paul DeSouza appearing for the responding parties.

DECISION OF THE BOARD: June 23, 2010

1. Board File No. 1862-08-R is an application for certification filed under the construction industry provisions of the *Labour Relations Act, 1995,* S.O. 1995, c.1, as amended (the "Act") and Board File No. 1861-08-U is an application filed under section 96 of the Act in which the applicant (the "Union") seeks relief for alleged violations of the Act by the responding employer (the "Employer" and/or "DES") and Paul DeSouza. The Union acknowledges that it did not file the requisite membership evidence in order to obtain a representation vote with its application for certification but seeks relief under section 11 of the Act based upon the various alleged violations of the Act by DES and DeSouza, and, in particular, based upon the alleged termination of two employees.

The General Context

2. DES is a drywall contractor which has carried on business, primarily in the ICI sector of the construction industry in and around Ottawa, since approximately 2005. It was founded by Paul DeSouza and Erin Mills but the business is effectively managed and controlled by DeSouza with Ms. Mills having very little involvement in its day to day activities.

3. In the summer of 2008, Thomas Tremblay and Dave Rodrigue were employed by DES as journeymen lathers/drywallers. Tremblay had commenced his employment with the company in or about November, 2007 and Rodrigue, who had worked for DES before, had started his latest period of employment with this employer in or about February, 2008. In August, 2008 both men, along with various other employees, were working at DES's Westin Hotel jobsite on Colonel By Drive in Ottawa. Prior to August 20th, first Tremblay and subsequently Rodrigue had been in contact with representatives of the Carpenters' Union and had, at the very least, agreed to speak to their fellow employees about unionization.

4. At some time before 11 a.m. on August 20, 2008, both Tremblay and Rodrigue, who had started work as usual earlier that morning, left the Westin Hotel jobsite and went to the Union's hall. Neither man ever returned to work for DES although both the Employer and the

Union claim there was contact between them and DeSouza later that day (although they very much disagree about the nature of that contact).

5. The Union's position is that on August 20th, after meeting with representatives of the Union, Rodrigue returned a phone message that DeSouza had left (on Tremblay's cellular phone) and it was agreed that the three of them would meet at a local Tim Horton's later that day to discuss what was going on. It asserts that at this meeting Rodrigue and Tremblay told DeSouza of their contact with, and support for, the Union and that DeSouza then immediately fired them as a result. Further, the Union claims that DES then made a number of inappropriate deductions from their final pay cheques in order to further punish them for their involvement with the Union. Finally, the Union asserts that following, and as result of, the terminations, it has been unable to interest any of DES's remaining employees in joining the Union, although it made attempts to do so.

6. Not surprisingly, DES's version of events is somewhat different. It claims that prior to leaving the jobsite on the morning of August 20th Rodrigue and Tremblay told various co-workers, including their foreman, that they were quitting. Having been informed of this, DeSouza, who knew nothing of any involvement with the Union, called Tremblay and left a message to find out what was going on and in an attempt to get both men back to work. DES claims that there was no meeting at a Tim Horton's but asserts that Rodrigue called DeSouza in the late afternoon and told him that they had both quit because they wanted to join the Union but they did not want to *hurt* his company (DES). DES agrees that thereafter certain deductions were made from both men's final pay cheques but asserts that all of these deductions were legitimate as they related to amounts which each man owed to the company for various reasons and in any event had nothing to do with their involvement with the Union. Finally, DES asserts that there is simply no evidence to suggest that any ongoing organising efforts which the Union may have made were unsuccessful because of what happened to Rodrigue and Tremblay.

The Decision

7. In these matters there are a number of significant evidentiary and legal issues in dispute which can be analysed and determined sequentially. Obviously the most important of these disputes between the parties concerns whether the two employees quit of their own accord or were terminated because of their involvement with the Union. This primary issue also directly involves the questions of what, and when, DeSouza knew about Tremblay and Rodrigue's contact with the Union. Thereafter, there is a disagreement concerning the reasons for the deductions having been made from the pay cheques. Given the nature of the Union's allegations and the provisions of section 96(5) of the Act, DES bears the burden of proof with respect to these issues and, in view of the totality of the evidence which I heard, determining these issues concerning the alleged violations of the Act largely comes down to a question of my findings as to the credibility of the various witnesses. Finally, given the Union's request for section 11 relief, if I find that as a result of the events of August 20th (and/or thereafter) the Act was violated it is necessary to consider what, in any, effect such violations may have had on the remaining employees *vis-à-vis* the Union's organising efforts. With respect to the Section 11 issues, it is the Union which bears the onus.

What Did DeSouza Know by the morning of August 20th?

8. There was no dispute that for sometime prior to the summer of 2008 the Union had been *interested* in DES and that DeSouza was aware of this ongoing interest. DeSouza's evidence was that prior to these applications being filed Union representatives would regularly

visit his company's jobsites and try to talk to the employees. Based on his evidence, it is also clear that he was kept well informed of the Union's activities, by his employees and others, and had often talked to his employees about the Union, both individually and in groups.

9. Three employees gave evidence in these proceedings: Tremblay (called as a witness by the Union); Dan Whissell (called by DES), who was DES's foreman on the Westin Hotel jobsite; and Lucas Straczyk (also called by DES), a drywall taper and boardman who worked on the Westin Hotel jobsite. Prior to moving to the Westin Hotel jobsite all of these men, along with others, including Rodrigue, had worked together on DES's Staples jobsite in Smith Falls.

10. All three of the employees confirmed that on and/or prior to August 20th, Rodrigue and Tremblay had been talking to their fellow employees about the Union. Whissell's evidence was that he could recall such conversations starting while they were still on the Smith Falls jobsite and continuing after they moved to the Ottawa site. He testified that Rodrigue and/or Tremblay had specifically told other employees that he/they wanted to join the Union. Straczyk's evidence was that Rodrigue and Tremblay told him (along with another employee, Eric Bass) that they wanted to join the Union during the *extended* coffee break that the four of them took on the morning of August 20th. Tremblay's evidence was that he had first had contact with a Carpenters' Union representative (from Kingston) when he was on the Smith Falls jobsite and that he had general conversations with other employees about the Union at that time. He also stated that on Monday, August 18th, while working on the Westin Hotel jobsite, Rodrigue had used his (Tremblay's) phone to call the Union's organiser in Ottawa, Joe McMahon ("McMahon"), to let him know they were both interested in joining the Union in Ottawa. Finally, Tremblay testified that he and Rodrigue had talked to other employees about joining the Union while working on the Westin Hotel jobsite, including a conversation with Straczyk and Bass on the morning of August 20th. Notwithstanding the evidence set out above, Whissell and Straczyk both claimed they never told DeSouza about Rodrigue and Tremblay's interest in the Union and DeSouza's evidence was that he never knew that these two men had any interest in joining the Union until he received Rodrigue's phone call, at around 4 or 5 p.m., on the afternoon of August 20th.

11. I find the evidence of all three of DES's witnesses not credible with respect to this point. In a small construction company an employee expressing an interest in joining a union is not normally a neutral or ordinary event. This general conclusion is clearly confirmed in this case given the specific circumstances of DES in the summer of 2008. Both Whissell and Straczyk testified that DeSouza had told them prior to August 20th that he wanted his company to remain non-union and both men had been told that they were not to talk to union representatives while they were working. According to Straczyk, the first time he saw a union representative on site (in Smith Falls) he felt it sufficiently important to phone DeSouza directly that very day and tell him, while Whissell testified that it was when he was promoted to his new position (foreman) on the Westin Hotel jobsite that DeSouza had told him that he wanted the company to stay non-union. While on the Westin Hotel jobsite, Whissell who was becoming increasingly frustrated with Rodrigue and Tremblay, was in contact with DeSouza, by phone if not in person, on a daily basis and apparently often spoke to him (DeSouza) about the attitude and work habits of these two men. Further, Straczyk's August 20th conversation with Rodrigue and Tremblay about the Union occurred only a matter of minutes before DeSouza arrived on the jobsite and spoke (privately) to Straczyk. In these circumstances, it is inconceivable that Whissell and/or Straczyk would not have told DeSouza what Rodrigue and Tremblay were saying about the Union and their explanation (to the extent that they gave one) as to why they did not mention this, namely that they did not think DeSouza would be interested, is equally incredible. Accordingly, I find that it is more likely than not that DeSouza was told what Rodrigue and Tremblay were saying about the

Union prior to both of them leaving the site on the morning of August 20th and that as a result DeSouza at the very least suspected that both men were interested in joining and/or supporting the Union. Accordingly, I conclude that DeSouza was not honest, about what he knew or suspected about Tremblay and Rodrigue's involvement with the Union, when giving his evidence before me.

Did Rodrigue and Tremblay Quit?

12. There is no dispute that on August 20, 2008, at or about 10 a.m., DeSouza arrived at the Westin Hotel loading dock with various materials which were needed for the job. At this time he saw Straczyk, Bass, Rodrigue and Tremblay in the loading dock area on an extended coffee break, something which Whissell had complained to DeSouza about when they had spoken on the phone a few minutes prior to DeSouza arriving at the jobsite. There is also no question that DeSouza was angry when he arrived on the site that morning. All of the relevant witnesses agreed that DeSouza did not speak to Rodrigue or Tremblay that morning but they also all agreed that he did speak to Straczyk. Whissell's, Straczyk's and DeSouza's evidence was somewhat inconsistent as to exactly what DeSouza did once the van was unloaded. DeSouza claimed that he went to find Whissell and they talked about his (Whissell's) frustration with the breaks that the rest of the crew were taking and threatened to quit. Whissell claimed that DeSouza never came to see him that morning but he did confirm that he was angry about the amount of time-off Rodrigue and Tremblay were taking. Straczyk claimed that he saw DeSouza drive away without talking to anyone (often than Straczyk himself) as soon as the unloading was done.

13. All of the witnesses agreed that at some point around 11 a.m. (but clearly after DeSouza had left) Rodrigue and Tremblay left the jobsite, taking their tools with them. Tremblay's evidence was that the two of them felt nervous given how angry DeSouza had been and because DeSouza had not come to talk to them about what work they should do that day, as was normal. Tremblay stated that this was why he and Rodrigue concluded that *something strange and unusual* was going on and they wanted to get off the site and go to see the Union as soon as possible. He claimed they did not tell anyone that they were leaving the site and that they took their tools with them because they were not sure if they were coming back that day and that they always took their tools home with them at the end of each work day.

14. Whissell's evidence was that Rodrigue and Tremblay came to see him before they left the site and told him they were quitting because *they'd had enough of Paul* (DeSouza). He said he was angry about this and he tried to get them to stay but they would not. Both Whissell and Straczyk (who saw the two men leave but did not talk to them) stated that it was unusual to see Rodrigue and Tremblay take their tools with them given that there was a tool lock-up on site. Whissell testified that he then phoned DeSouza and told him about the two employees having quit and that DeSouza said he'd talk to them and try to get them back to work. DeSouza stated that he left messages on Tremblay's cellular phone at approximately 11 a.m. and at some point later in the afternoon but that he had no contact with either man until Rodrigue phoned him (using Tremblay's phone) at about 4:30 or 5:00 that afternoon. According to DeSouza, during this phone call Rodrigue explained that he and Tremblay *wanted to join the Union but that they didn't want to hurt his company* (DES) *so they had to leave before they joined.* DeSouza's evidence was that he was not happy about this situation, because he needed drywallers for DES's ongoing work, but that there was nothing he could do about it.

15. Conversely, Tremblay stated that after they left the site he and Rodrigue phoned McMahon and thereafter met with McMahon and others at the Union's hall. He stated that they explained to the representatives of the Union what had happened that morning and that while this

meeting was going on DeSouza phoned him and left a message. According to Tremblay, DeSouza sounded very angry and the message was laced with profanities but, although he *wanted to know what was going on*, made no reference to the two of them having quit. The Union's lawyer then advised Tremblay and Rodrigue to phone DeSouza back and to arrange to meet with him. McMahon confirmed all of Tremblay's evidence on these points and emphasised that Rodrigue and Tremblay never told him (or the other Union representatives) that they had quit and that the message which DeSouza had left, although *full of cussing and swearing*, made no reference to the two employees having quit.

16. According to Tremblay, Rodrigue phoned DeSouza as soon as they left the Union's hall and they arranged to meet at an Ottawa Tim Horton's just after lunch that day. During this meeting Tremblay claimed they told DeSouza that they had spoken with McMahon and that they were interested in joining the Union. After this Tremblay claimed that DeSouza threw his hands into the air and said he *didn't want to see either of them on any of his sites again.* Tremblay said that they then phoned the Union and told McMahon what had happened and that they had been fired by DeSouza. McMahon confirmed that Rodrigue had phoned him at around 2 p.m. and told him they had met with DeSouza and been fired. As noted above, DeSouza was adamant that there never was a meeting of the three of them that afternoon, at Tim Horton's or anywhere else. He did, however, state that three or four months prior to the first scheduled day of hearing for these matters Rodrigue had phoned him and told him that *he* [Rodrigue] *had spoken with the lawyers and he didn't understand why this was going on because he had told the truth.*

17. Most of the discrepancies in the testimony of the various witnesses as to what exactly happened on August 20th are comparatively minor and/or could have been explained by possible misunderstandings or the natural fading of individuals' recollections due to the passage of time. For example, it is entirely possible that Whissell could have been genuinely convinced that Rodrigue and Tremblay had quit either because they just left the site without telling anyone what they were doing or because they had said something that led him to believe they were leaving permanently as opposed to leaving for a short period or the remainder of the day, as Tremblay claimed. However, this is very clearly not the case with respect to the alleged Tim Horton's meeting. Either that meeting happened or it did not and, therefore, either DeSouza or Tremblay must have lied in giving their evidence. Deciding this question is made more difficult in that, for reasons which do not have to be set out in detail herein, Rodrigue, the only other person who was supposedly at the alleged meeting, did not give evidence but (as agreed to by the parties) no negative inference is to be drawn from his failure to do so.

18. Ultimately, having considered all of the evidence, I find, on the balance of probabilities, that this meeting happened as described by Tremblay and, in particular, I find that DeSouza terminated both men at the meeting after being told about their interest in the Union. By his own admission, DeSouza was trying to meet with (or at least speak to) Tremblay and Rodrigue quite urgently that day to find out what was happening. Further, Tremblay and Rodrigue had been told by the Union's lawyer to go and meet with DeSouza. When the fact that all three men had a definite interest in meeting with each other is considered together with my earlier findings that DeSouza was not truthful in his evidence about his knowledge of Tremblay and Rodrigue's support for the Union, it leads to the conclusions that, in giving their evidence, Tremblay was telling the truth about this meeting and DeSouza was not. Accordingly, I find that Tremblay and Rodrigue were terminated by DES because of their support for the Union and in violation of sections 70, 72 and 76 of the Act.

Amounts Deducted from the Final Pay Cheques

19. Subsequent to the terminations, Tremblay and Rodrigue went to DES's offices to get their final pay cheques. There was no dispute that certain amounts were deducted from these cheques. I heard no evidence to contradict DeSouza's testimony concerning the legitimacy of the deductions (amounting to $800.00) from Rodrigue's cheques. Therefore, I conclude that these deductions were made for legitimate reasons, relating to tools provided to Rodrigue by DES and long distance phone calls made by him from DeSouza's house, and in no way violated the Act.

20. The situation with Tremblay is slightly different. Ultimately, there was no real dispute that DES had properly deducted $50.00 paid to Tremblay in advance to cover parking for days after August 20th and $80.00 for a battery which DES had bought for him and which he could have returned, but which he chose to keep, following his termination. Further, having considered all of the evidence, I conclude that DES legitimately deducted $50.00 from Tremblay's final cheque as being the outstanding portion of an amount which had been advanced to him to cover wedding expenses, even if the money he was loaned was not used to cover the costs of wedding photographs as DeSouza believed. However, I do not believe DeSouza's evidence concerning the $200.00 allegedly deducted to cover the cost of a fax machine which Tremblay had broken. While there was no dispute that Tremblay had damaged a fax machine (belonging to the general contractor) at the Smith Falls jobsite, and that DES had replaced it, this had apparently occurred at some point in May. There was absolutely no credible explanation as to why, if DES legitimately believed that DeSouza should personally pay for the new fax machine, it waited until the last half of August to deduct any money from him. Accordingly, I find that this deduction was only made because of Tremblay's support for the Union and therefore was done in violation of sections 70, 72 and 76 of the Act.

Relief Under Section 11 of the Act

21. Having found that DES violated the Act as alleged by the Union, I turn now to the question of the appropriate remedy under section 11 which provides as follows:

> **11.** (1) Subsection (2) applies where an employer, an employers' organization or a person acting on behalf of an employer or an employers' organization contravenes this Act and, as a result,
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> (a) the true wishes of the employees in the bargaining unit were not likely reflected in a representation vote; or
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> (b) a trade union was not able to demonstrate that 40 per cent or more of the individuals in the bargaining unit proposed in the application for certification appeared to be members of the union at the time the application was filed.
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> (2) In the circumstances described in subsection (1), on the application of the trade union, the Board may,
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> (a) order that a representation vote be taken and do anything to ensure that the representation vote reflects the true wishes of the employees in the bargaining unit;
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> (b) order that another representation vote be taken and do anything to ensure that the representation vote reflects the true wishes of the employees in the bargaining unit; or

> (c) certify the trade union as the bargaining agent of the employees in the bargaining unit that the Board determines could be appropriate for collective bargaining if no other remedy would be sufficient to counter the effects of the contravention.
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> (3) An order under subsection (2) may be made despite section 8.1 or subsection 10(2).
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> (4) On an application made under this section, the Board may consider,
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> (a) the results of a previous representation vote; and
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> (b) whether the trade union appears to have membership support adequate for the purposes of collective bargaining.

22. In applying the provisions of section 11 to these specific circumstances, DES suggests that it cannot be concluded that it was the violations of the Act which resulted in the Union being unable to obtain the forty percent membership threshold as there is no evidence that any other employees were aware that Tremblay and Rodrigue had been terminated because of their support for the Union. In this respect, DES relies upon the Board's Decision in *K.D. Clair Construction Ltd.*, 2008 CanLII 7517 (ON L.R.B.) in which it stated:

> 9. …
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> In our view, the burden on the applicant in making an application under section 11 in this case is to establish that it was *not able* to demonstrate 40 percent or more support among the employees in the bargaining unit *as a result* of the unfair labour practices committed by the responding party.
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> 10. The only unfair labour practice activity occurred beginning in the afternoon of November 14, 2007 when the responding party terminated the employment of Eric Sieders during a telephone conversation and later the employment of Mike Puhl at 8 o'clock that evening at a union meeting, one hour after the applicant had called the meeting of employees to begin. The only employee who showed up at that meeting was Mr. Puhl.
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> 11. The applicant filed its application for certification under section 11 the next day.
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> 12. The applicant did not assert that any other employee had known about the terminations of Messr. Puhl and Sieders before the applicant had filed its application for certification. There was no suggestion on the facts that prior to making the application, the applicant sought to obtain more membership evidence from the employees in the bargaining unit.
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> 13. The only assertion that the applicant's organizing campaign was unsuccessful due to the responding party's unfair labour practices was because "its organizers believed that their organizing campaign was halted by the employer's actions."
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> …

> 15. In our view, the applicant, by failing to take any steps to attempt to obtain further membership support from the responding party's employees when the discharge of Messrs. Sieders and Puhl had not come to the attention of any other employee in the bargaining unit prior to making the application for certification, has not established that the responding party's unfair labour practice resulted in the applicant's inability to demonstrate that forty percent or more of the employees of in the bargaining unit appeared to be members of the applicant at the time the application was filed.

23. I do not disagree with the Board's analysis and conclusions in *K.D. Clair Construction Ltd., supra,* but the facts in that case are so different from the facts before me that they offer no real support to DES's position. As the above quoted paragraphs make clear, the union in *K.D. Clair Construction Ltd., supra* filed its application for certification less than twenty-four hours after employees had been terminated and having taken absolutely no steps to continue its organizing activities. Here, the application for certification was filed over three weeks after the August 20th terminations (on September 16, 2008) and, despite DES's submissions, there was in fact no clear evidence that Tremblay and Rodrigue ever told any of their fellow employees that they were quitting. Therefore, what all of the remaining employees would have been aware of in the weeks immediately prior to this application being filed is that Tremblay and Rodrigue, who had previously expressed support for the Union to their fellow employees, were suddenly no longer employed by DES at a time when it clearly needed drywallers.

24. Further, according to McMahon's clear and undisputed evidence the Union tried to sign-up more of DES's employees, without success, in the period between the terminations and the filling of its application for certification. In this respect, McMahon's testimony that the two DES employees that he tried to talk to during this period on DES's Bayshore jobsite responded to him by saying *we're not talking to you, we want to keep our jobs* is clear evidence in support of the Union's position that the remaining employees were well aware of why Tremblay and Rodrigue were no longer with DES. Finally, and again unlike *K.D. Clair, supra*, where the union supporters were invited back to work almost immediately, the Union's organizing efforts in this case were also hampered because of its limited access to DES's employees, after August 20th, when McMahon found it increasingly difficult to get onto jobsites where DES was working (apparently because general contractors suddenly began to object to his presence) and its two inside organizers were no longer employed by DES.

25. In view of the above, the situation in this case is virtually identical to that dealt with by the Board in *1443760 Ontario Inc. operating as Swing Stage Equipment Rentals Ottawa,* 2007 CanLII 22573 (ON L.R.B.) and in which it stated:

> 58. I must decide on these facts whether a representation vote along with other remedies such as declarations and time for union meetings and, perhaps, damages, could result in the ascertainment of the true wishes of the employees who are the subject of this application. I can only certify without a representation vote if I find that "no other remedy would be sufficient to counter the effects of the contravention".
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> 59. The Board's case law under predecessor remedial certification provisions is that the Board will generally certify when the contravention involves termination of employees for union activity (see *Domus, supra* and *Pietro, supra*).
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> 60. As the Board said in *Domus, supra,* at paragraph 34:

> 34. … In these circumstances, the Board can, in our view, apply section 9.2 [now s.11] of the Act. The employer, through its conduct, has in effect "poisoned the well" by ensuring that the employees at the Queen Street site are unlikely to be able to express a voluntary view on the issue of union representation. Once the well is poisoned in this manner it becomes impossible to ascertain the true wishes of "the employees" as a group, and the legislative remedy provided for in section 9.2 [now s.11] may be applied by the Board. …

61. Paragraphs 55 and 56 of the *Pietro, supra,* decision state:

> 55. Threats to the job security of employees or, as here, actual discharges, linked to support for the union have long been considered by the Board to be unfair labour practices which have such a strong and deep rooted impact that even a representation vote in which ballots were confidentially cast would not reflect the true wishes of employees. Indeed, as the Board recently stated in *Wal-Mart Canada Inc.*, [1997] OLRB Rep. Jan./Feb. 141, at paragraph 49 therein:
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> > ... This case is a classic example of a situation in which the conduct of the employer changes the question in the minds of the employees at the vote ... from one of union representation to one of "do you want to retain your employment" (see in this regard *Stratton Knitting Mills Limited*, [1979] OLRB Rep. Aug. 801; *Manor Cleaners Limited*, [1982] OLRB Rep. Dec. 1848; *Knob Hill Farms Limited*, [1987] OLRB Dec. 1531; and *Beaver Lumber*, [1992] OLRB Rep. May 553).
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> 56. To similar effect, in the construction industry context, the Board recently stated in *Balkan Glass & Aluminum Inc.*, [1996] OLRB Rep. Sept. 717, at paragraph 21 therein:
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> > ... We are satisfied that the nature of the contravention here is such that a representation vote would not likely reflect the true wishes of the employees in the bargaining unit. The Board has in the past automatically certified an applicant where the actions of an employer have been of the nature of threats to close the business should the employees support the union. Here threats such as these were followed by lay-offs designed to convey to employees the direct and immediate cost of their failure to comply with the employer's directions in this respect. The message to employees would be clear: that the employer would actively take steps to ensure that employees were penalized should they support the union, that those steps included immediate discharge, and that a vote for the union would be an invitation to further reprisals. In these circumstances, the Board concludes that the true wishes of employees would not likely be reflected through a representation vote.
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> …

62. This approach is relevant to the facts of these applications. From the time Mr. Normoyle found out about the organizing drive, Mr. McCarthy

> never worked at Swing Stage again. The significance of Mr. McCarthy's absence at work on the day following the October 2 meeting could not have been lost on the employees. Mr. Normoyle learned of the campaign and correctly assumed or was advised of Mr. McCarthy's role. Mr. McCarthy immediately lost his job. Under the cloud of this termination, these employees cannot be expected to freely exercise a choice that would reflect their true wishes. Mr. McCarthy was one of four employees, he was the union organizer and the employees knew that and worked together with him. In a small group such as this there is a reasonable concern by employees that the employer will find out if an employee voted for the union and take punitive action against those who do so. This sentiment was reflected in Mr. Fagan's comment about the employees getting to keep their jobs. There was a clear message to employees: if you are involved with the union, you will lose your job. The employer's action violates the most fundamental right of an employee under the Act to freely choose whether or not to become a member of a trade union.
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> …
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> 64. In this case, the employees cannot freely express their wishes in a representation vote in the context of a discharge of an individual associated with union activity. The actions of the employer served two purposes. It stopped the union organizer from having access to employees and it sent a message to employees that support for the union meant job loss. A representation vote with ancillary relief will not be sufficient to counter the effect of the employer's contravention. There is no certainty for employees entering the polls that the employer will not do to them what it did to Mr. McCarthy. There is nothing the Board can do as remedy that could make the employees believe that their job security is not tied to their support for the union. The Board cannot fashion a remedy that will reverse the effect on employees of that job threat. Accordingly, the remedy of certification is the only one sufficient to address the breach in this case.

26. Accordingly, and for the same reasons relied upon by the Board in *Swing Stage Equipment Rentals Ottawa, supra,* the Union's application for certification under section 11 of the Act is hereby granted.

27. The appropriate bargaining unit for which the applicant is entitled to be certified has already been determined by the Board in paragraph 6 of its September 22, 2008 decision concerning these applications.

28. A certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the United Brotherhood of Carpenters and Joiners of America and the Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, in respect of all carpenters and carpenters' apprentices in the employ of DES Building Contractors Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

29. Further, a certificate will issue to the applicant trade union in respect of all carpenters and carpenters' apprentices in the employ of DES Building Contractors Inc. in all sectors of the construction industry in the City of Ottawa and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

30. The responding party is directed to forthwith post copies of this decision, in a location or locations where they are most likely to come to the attention of those employees who may be affected by it. These copies are to remain posted for a period of 30 days from the date of this decision.

31. Further, in view of my findings set out above, DES is directed to pay to the Union, in trust for Mr. Tremblay, the sum of $200.00, representing the amount which I have determined was deducted from his paycheque in violation of the Act, forthwith, and I will hereafter remained seized to deal with any additional remedies with respect to the discharge of Mr. Tremblay and Mr. Rodrigue.

"Mark J. Lewis"
for the Board