ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **0899-16-U**

United Food and Commercial Workers International Union, Local 175, Applicant v **Worldpac Canada Inc.**, Responding Party

OLRB Case No: **0932-16-U**

Worldpac Canada Inc., Applicant v United Food and Commercial Workers Union, Local 175, and Brian Stennull, Responding Parties

BEFORE: Geneviève Debané, Vice-Chair and Board Members Edward Chudak and Lori Bolton

APPEARANCES: Jane Mulkewich, Amy Tran and Rick Wauhkonen appearing for United Food and Commercial Workers International Union, Local 175; Bonny Mak, Meredith Brown and Brian Fegan appearing for Worldpac Canada Inc.; and Sarah Molyneaux and Brian Stennull appearing for Brian Stennull

DECISION OF THE BOARD: August 7, 2018

1. Board File No. 0899-16-U is an unfair labour complaint filed on June 24, 2016 by the United Food and Commercial Workers International Union (the "Union") against WORLDPAC Canada, Inc. (the "Union's ULP") alleging breaches of sections 70, 72, 76, 77 and 96 of the *Labour Relations Act*, *1995*, S.O. 1995, c.1, as amended (the "Act").

2. Board File No. 0932-16-U is an unfair labour complaint filed on June 30, 2016 by the WORLDPAC Canada, Inc. (the "Employer" or "Worldpac") against the Union and Brian Stennull (the "Employer's ULP") alleging breaches of sections 76 and 96 of the Act.

3. The evidence heard by the Panel was quite extensive. The Employer called six witnesses. Scott Anger, who was Worldpac's Manager of the Distribution Centre since July 2014; Meredith Brown the Director of Human Resources; Patrick Richelieu, the Vice President of Operations in the US and Canada; Brian Fegan, the Regional Operations Manager; John Sabatino a warehouse employee; John Matthews the Distribution Centre Department Manager (Mr. Stennull had previously directly reported to him prior to December 2014), and Franklin Ortega the Dispatch Department Manager who directly supervises Mr. Stennull since December 2014. Mr. Stennull testified on his own behalf and on behalf of the Union.

4. These applications relate to events that occurred during an organizing campaign in which the Union was seeking membership support from Worldpac's employees in the spring and summer of 2016. Mr. Stennull is employed by Worldpac as a delivery driver and was a key inside organizer who supported joining the Union. These applications were heard together over a number of hearing days before this panel.

5. Both applications relate to identical facts but attempt to characterize them in a different light to support the parties' respective positions. On May 16, 2016 management at Worldpac became aware that two employees, Mr. Stennull and Ms. Maria Ferenci were trying to organize the employees of Worldpac to join a union. It is undisputed that immediately after management at Worldpac found out that Mr. Stennull was soliciting employees to join the Union the Employer, temporarily transferred him to a new delivery route and imposed on him a number of disciplines for various alleged misconduct. On June 12, 2016, the Employer received a written complaint from Mr. Sabatino which alleged amongst other things that Mr. Sabatino was being harassed at work because he was refusing to sign a union membership card. Ms. Brown was tasked with investigating the harassment complaint and met with Mr. Sabatino and another employee Ms. Cabo Chan. She then had a meeting with Mr. Stennull on June 14, 2016 to tell him that that these two employees had filed harassment complaints against him. During this meeting, the Employer alleges that Ms. Brown told Mr. Stennull that he could not disclose to anyone that a harassment complaint had been made against him or disclose the identity of the two complainants. That night Mr. Stennull sent a text message to his co-organizer, Ms. Ferenci, advising her that the Employer was aware of the Union's organizing campaign and that Mr. Sabatino had filed a harassment

complaint. The next day Ms. Ferenci and another employee approached the two complainants to ask them if they had complained about Mr. Stennull. The two complainants became upset and approached management. As a result, Mr. Stennull was suspended with pay pending investigation. Ultimately, the Employer's investigation concluded that Mr. Stennull had engaged in misconduct and the Employer gave him a ten day unpaid suspension. He returned to work on July 8, 2016.

6. The Employer's ULP alleges that Mr. Stennull, while "in the course of soliciting support for the Union" engaged in tactics to intimidate employees who did not wish to support the Union. The Employer alleged that Mr. Stennull told a fellow employee Mr. Sabatino, "Asshole, why don't you sign a card?" The Employer also alleged that Mr. Sabatino had told Mr. Stennull on multiple occasions that he did not wish to sign a card. Despite this Mr. Stennull repeatedly and on a daily basis followed Mr. Sabatino around the workplace in an effort to get him to sign a union card. Further, it is alleged that Mr. Stennull shunned Mr. Sabatino and encouraged others to do so because he did not wish to join the Union.

7. The Employer's ULP further alleged that in mid-May 2016 Mr. Stennull told a fellow employee, Ms. Cabo Chan (who did not testify at the hearing) that he had lost respect for her because she had not signed a membership card and that despite Ms. Cabo Chan's "clear and repeated refusals and requests to be left alone, Mr. Stennull continued to approach Ms. Cabo Chan in order to get her to sign a card." Ms. Cabo Chan is said to have asked another employee to tell Mr. Stennull to stop asking her to sign a card. The next day Mr. Stennull asked Ms. Cabo Chan if she was mad at him. Ms. Cabo Chan told Mr. Stennull that she was not mad at him but asked "Mr. Stennull not to force her to join a union because she did not want to do so."

8. The Employer's ULP asserted that Mr. Stennull did not maintain the confidentiality of the investigation because he disclosed to another employee, Ms. Ferenci that there had been a harassment complaint made against him. The Employer says that it removed Mr. Stennull from the workplace because there were "reasonable grounds to believe that the presence of an employee would affect the investigation". The Employer stated that the Union was liable for Mr. Stennull's breach of the Act and that it cast doubt on the

voluntariness of the cards submitted to the Board in any future certification application.

9. Originally, the Employer's ULP sought as remedies:

a. a declaration that the Union and Mr. Stennull violated section 76 of the Act;
b. a cease and desist order,
c. an order to summarily dismiss any future certification application pursuant to sections 128.1(8) or 11.1 of the Act;
d. an order to rescind any Union membership cards obtained by Mr. Stennull;
e. an order that Mr. Stennull and the Union be liable to pay the employer's costs and fees associated with not only its ULP application but the costs associated with the defence of any future certification application; and
f. that the Union be barred from filing a certification application for one year.

10. The Board notes that the Union has never filed an application to certify any of the employees of working at Worldpac. During closing submissions the Employer only sought a declaration that the Union and Mr. Stennull breached the Act. All other requests for remedies were withdrawn.

11. The Union's ULP alleged that the Employer subjected Mr. Stennull to surveillance and unfair disciplines immediately after management became aware that he was attempting to organize Worldpac's employees, in an effort to intimidate him and interfere with the Union's organizing drive. The Union characterised the Employer's investigation of the harassment complaints as a veiled attempt to determine who was supporting the Union and to obtain confidential information that it was not entitled to know at law. This culminated into the applicant's removal from the workplace and ultimate 10 day suspension. During its closing submissions the Union sought the following remedies;

a. A declaration that the Employer had breached the Act;

b. That the applicant hold a mandatory captive audience one hour paid meeting with employees on the Employer's premises between the hours of 1:00 p.m. to 2:00 pm. Management employees would not be permitted to attend; and

c. Though, originally in the Union's ULP the Union had sought an order from the Board expunging Mr. Stennull's disciplinary record since May 2016, this was not pursued in its closing argument. Instead the Union sought a rescission of the 10 day suspension imposed on Mr. Stennull. The 10 day suspension would be expunged from any record, and the Employer cannot rely on this discipline or the alleged conduct to which employer attributes discipline in the determination of his annual review and corresponding review of pay. Mr. Stennull would be paid 10 days salary.

The Evidence

12. During the course of the hearing the Employer introduced into evidence Mr. Stennull's previous disciplinary record. In this regard, at the commencement of the hearing the Panel advised the Employer that it had some concerns with the relevance of various emails sent by Mr. Mathews about events that occurred in 2012 and 2014. The Employer sought to introduce these into evidence on the 6th day of hearing through Mr. Matthews's testimony. Mr. Stennull had previously reported to Mr. Matthews. He explained that he would send himself emails of behaviours that happened during the course of the day. Mr. Matthews confirmed that these were not formal discipline and referred to these emails as notes to file which Mr. Stennull had never seen or received copies of prior to the hearing. The Employer insisted that these notes were indicative of Mr. Stennull's character and provided some context to the Union's allegations. The Board ruled that it would not permit the Employer to call evidence with respect to Tabs 2-3-4-5-6-9-11 and 24. The Panel was of the view that it would be not be fair to hear this evidence which had limited or no probative value in light of the passage of time and that no formal discipline had ever been imposed. Further, Mr. Stennull was not made aware of their creation and had no opportunity at the time to dispute their validity. Further, the Board had heard extensive evidence with respect to recent events which were demonstrative of Mr. Stennull's character.

The Panel did permit Mr. Matthews to rely on some notes to the extent that they were relevant to the imposition of recent formal discipline.

Previous Discipline

13. Mr. Matthews testified about various issues that arose when Mr. Stennull reported to him. One of these issues related to the filling out of a daily vehicle checklist by drivers each morning. On December 1, 2012, Mr. Matthews, told Mr. Stennull that he had to fill out his vehicle checklist. Mr. Stennull does not recall this conversation.

14. On September 6, 2012, Mr. Stennull received a Corrective Counseling Form-Written Warning, for speeding and smoking in his vehicle.

15. On January 3, 2013, Mr. Matthews, told Mr. Stennull once again that he had to fill out his vehicle checklist. Mr. Stennull allegedly responded that he would hand in his checklist "when someone fucking reads it". Mr. Stennull did not recall this conversation.

16. On March 8, 2013, Mr. Stennull received a Corrective Counseling Form-Final Warning because he refused to work overtime to cover his last route on February 28, 2013.

17. On June 4, 2014, Mr. Stennull received a Corrective Counseling Form- Final Warning because he called a client near the end of his shift to advise that he would not be able to complete a scheduled delivery.

18. On August 29, 2014, Mr. Fegan testified that Mr. Stennull asked him whether he should just file his vehicle checklist in the garbage. Mr. Fegan told him to start properly filling them out and to stop adding requests that were not required. Mr. Stennull agreed that he made this comment. Mr. Stennull said he was frustrated because even if he commented on the checklist that there were issues with the vehicle nothing would get fixed.

19. On December 10, 2014, he received a Corrective Counseling Form for a minor violation because he did not attend a scheduled Saturday shift nor did he call-in to advise that he would be absent.

20. After that last matter, Mr. Stennull's employment record was discipline free for over a period of 1.5 years. However, there were some comments in Mr. Stennull's performance reviews that both parties relied upon in support of their respective positions.

21. Mr. Scott Anger the employer's Operations Manager of the Distribution Centre, described Mr. Stennull as an intelligent employee capable of performing all his daily duties. However, he said that Mr. Stennull is the most difficult employee that he has ever had to deal with because of his combative and aggressive attitude. Mr. Anger is the author of two performance reviews. The March 2015 Performance Review highlighted a number of Mr. Stennull's positive work attributes such as, being "fully competent", and "taking pride in his work." Overall Mr. Stennull met his Employer's expectations but management did comment as follows:

> Teamwork
>
> Brian has shown a lack of desire to work and get along with his teammates. There are often comments made by Brian while in conversation with teammates that are intended to incite discord ("you can get a doctors note for anything", attempting to get a whole season off). Brian rarely makes himself available to help his teammates.
>
> Manager overall comments
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> Overall Brian is a valuable contributor to the WORLDPAC team who knows what his job is and how to get it finished and accurately. One area that Brian needs to improve on is his interaction with his fellow teammates. There are times when Brian appears to purposely create animosity between him and his teammates instead of behaving professionally, respectfully and tactfully. Brian is capable of getting along with his fellow teammates and it is hoped that he will use his skills and experience to be a positive role model in the future.

22. In July 2015, Mr. Stennull called a fellow employee whom he perceived to be aggressive a "little fucker". No discipline was imposed for this comment, however, Mr. Matthews told Mr. Stennull that this had been an inappropriate response.

23. The Board heard evidence of another issue that arose in the workplace in September 2015, regarding Mr. Stennull, however,

Mr. Anger agreed that Mr. Stennull was not given the opportunity to make "full answer and defence" and that no discipline was imposed on him. Mr. Anger said that this issue "fell through the cracks" because the HR advisor was not available.

24. In April 2016, Mr. Stennull received another Performance Review in which he was advised that he needed improvement. There are a number of positive comments such as his "great understanding of technical aspects" and his "quality customer service" which his follow employees should try to match. Management's comments included:

> Brian is willing to help out to cover routes, work through breaks if it means getting the customer their parts on time. Where Brian struggles at times is his interactions with fellow teammates. Brian had a few incidents in 2015 that required management's involvement to resolve. These incidents mainly arouse do to Brian's aggressive, dominant personality which some found intimidating and disrespectful.
>
> I see Brian as an intelligent, do the job right type of person with little patience for those who do not pick things up as fast as Brian assumes they should. We would like to see Brian use his skills and experience to mentor his fellow employees and give them the time they need to master the skills they require.

25. On April 6, 2016, a client sent an email complaining that Mr. Stennull had refused a simple request to place products in a bin instead of on the floor. Mr. Stennull was told that he should follow simple instructions from a customer. No discipline was imposed for this incident.

26. Mr. Stennull was very unhappy with this performance review because he did not receive his full salary increase and sent Mr. Anger an email complaining of this on April 12, 2016.

The Union's organizing campaign

27. In the early months in 2016 Mr. Stennull had a number of complaints with respect to his employment, including that he was required to sometimes work on the weekend. He was also unhappy with his performance appraisal and the fact that he did not receive the full potential salary increase. That's when Mr. Stennull decided to

attempt to organize the workplace. He called different organizations and ultimately together with some other employees met with some representatives of the UFCW. After some meetings with the Union an organizing drive commenced on or about March 21, 2016. The Union gave him membership cards and he says that he approached approximately one third of the employees in an effort to get them to sign a card. Some interested employees also attended meetings with the Union.

28. Though initially slow, Mr. Stennull said that the organizing drive was picking up momentum and that he became a leader. He knew that he was protected under the Act from employer retaliation and harassment for his union activities. He said that he believed that he was protected from being disciplined by his Employer. He also received training from the Union that he could not threaten or intimidate employees to join the Union. He was also told by the Union to be vigilant in determining whether the employer was aware of the drive. He said that this made him paranoid, and that he observed Mr. Fegan on three occasions in the warehouse observing him and asking him if he needed anything. Mr. Fegan remembers seeing Mr. Stennull twice during this time.

29. Mr. Mathews testified that on or about May 15, 2016, Mr. Ortega told him that an employee had confided to him that Mr. Stennull and Ms. Ferenci were asking employees to sign union cards. At 7:39 a.m. on Monday May 16, 2016 Mr. Mathews sent an email to human resources advising of the organizing drive. Mr. Richelieu testified that he became aware of the union organizing drive on May 20, 2016, when Mr. Fegan told him about it over the phone. Mr. Fegan testified that he called Mr. Richelieu on May 16, 2016, and he would not have waited until the end of the week to tell him such important information.

The recent discipline

30. Later in the morning on May 16, 2016, Mr. Stennull was told in a meeting with Mr. Anger and Mr. Ortega that he would be driving a new route. Mr. Stennull explained that from his point of view, it was not uncommon for drivers to be told that they would be driving another route, but it was uncommon that you would be called into an office with two managers to be advised of the change. Further, the reason given was not that there was an employee absence rather it was because the company wanted to start cross-training drivers, for

an indeterminate period of time, so that drivers were familiar with other routes. Mr. Stennull perceived this route to be busier (this is disputed by the Employer) and that this would keep him out of the warehouse for longer periods. The Employer's witnesses explained that the decision to cross-train Mr. Stennull was made prior to management becoming aware that Mr. Stennull was trying to organize the workplace. They testified that cross-training was a company-wide initiative. Mr. Anger took responsibility for the decision to select Mr. Stennull for this transfer. Mr. Stennull believes that he was targeted by the Employer to change his regular route because he was a Union supporter. Mr. Stennull was unhappy that he was told that morning that he would be driving a different route and said that this change made him feel nervous.

31. Also on the morning of May 16, 2016, Mr. Matthews observed that Mr. Stennull did not complete his vehicle checklist. Mr. Anger told Mr. Mathews to keep an eye on him the next day to see if he completed his vehicle checklist. On May 16, 17 and 18, 2016 Mr. Stennull did not complete his vehicle checklist. Mr. Matthews also observed him on May 18, 2016 skipping his morning check and leaving on his first run without checking his vehicle. On May 20, 2016 Mr. Anger and Mr. Mathews met with Mr. Stennull and they advised him that he was being given a written warning for a major violation. This written warning is dated May 18, 2016. Mr. Richelieu said he was made aware of this incident because he is informed of all major safety violations. Mr. Fegan testified that a vehicle checklist infraction would not be reported to Mr. Richelieu but that it could have happened.

32. Mr. Stennull admitted that he did not fill out the vehicle checklist on May 16, 17 and 18, but claimed that he had sometimes not filled in this document for months. He also explained that he sometimes back dates the document. He also did not understand why Mr. Ortega was not present at the disciplinary meeting since he was his direct supervisor. Mr. Stennull was very mad because, from his perspective, his failure to file out the vehicle checklist had never been an issue in the last seven years and he felt that the Employer was out to get him.

33. On his way out of the meeting Mr. Stennull saw Mr. Ortega, who asked him "hey buddy how's it going", to which Mr. Stennull responded "fuck off." Mr. Ortega testified that he had a good working relationship with Mr. Stennull and that prior to this incident there had never been any issues. He was shocked at the comment, and told Mr.

Stennull that it was not cool, to which Mr. Stennull replied "sorry, I sneezed". Mr. Ortega testified that he was not aware the Mr. Stennull was being disciplined that day.

34. Mr. Ortega immediately reported the incident and Mr. Stennull was summoned to a second meeting on May 20, 2016, during which he admitted to having made this comment but said that it was in reply to Mr. Ortega's condescending manner. Mr. Anger characterized Mr. Stennull's conduct in this meeting as unremorseful, condescending and aggressive. Mr. Stennull was immediately placed on an administrative leave of absence pending an investigation. During this meeting Mr. Stennull said "look at me I swear at a manager and I don't even get fired." Mr. Anger said that Mr. Stennull was cocky and confrontational during the meeting and was mocking management for not firing him. Mr. Stennull denies that he was allowed to speak about the incident during this meeting and says that he was told he was being sent home for a couple of days for swearing.

35. Mr. Anger said that he did not know who made the decision to impose the discipline on Mr. Stennull but that he was issued a final warning. This warning issued on May 26, 2016 states, in part, "Foul language directed at a fellow teammate, in this case a manager is unacceptable, against WORLDPAC's policies and will not be tolerated." And later, "Brian will refrain from such conduct. Any repetition of this conduct will result in further discipline up to and including immediate termination from employment for cause." Mr. Richelieu, who was involved in this making this decision, testified that but for Mr. Stennull's involvement in the Union's organizing drive his employment would have been terminated for cause.

36. Around this time, the Employer decided to involve Ms. Brown, the HR Manager at a sister company to conduct meetings with employees to determine if any workplace issues existed. Ms. Brown explained that she was selected because of her availability and that because she was somewhat at arm's length she could provide an honest review of the situation. Ms. Brown conducted approximately 40 to 50 "pulse check meetings" on May 26 and 27, 2016. Ms. Brown stated that she did not ask any employees about the Union.

37. Also occurring on May 26, 2016, Mr. Stennull attended a "pulse meeting" with Ms. Brown to discuss workplace issues in general. From his perspective Mr. Stennull enjoyed the meeting and was happy to have a forum to discuss his various workplace issues. Though he

referred to this meeting as "interrogations" he described his meeting with Ms. Brown as non-confrontational and easy-going.

38. On June 8, 2016, Mr. Stennull allegedly "rammed a garbage bin with a mouse cart." This was done in front of Mr. Matthews who contends that the bin was bumped in an aggressive manner and rolled down the aisle. Mr. Stennull said that he "bumped it out of the way" because it was in his way and that it only moved 3 or 4 feet.

39. On June 9, 2016, Mr. Matthews said he told Mr. Stennull that his actions the day before, when he rammed the garbage bin, were inappropriate and that Mr. Stennull's response was that it was not inappropriate and that he had just recently done it again. Mr. Stennull denied that this conversation occurred.

The Harassment Investigation

40. Around this time, Mr. Sabatino, approached Mr. Anger to tell him that he believed that Mr. Stennull was calling him names and harassing him at work. Mr. Anger told him to put his complaint in writing. On June 12, 2016 Mr. Anger received a letter from Mr. Sabatino regarding the "Post Union Vote Harassment". This letter identified to the Employer a number of employees who supported the Union, including Mr. Stennull. We have reproduced this letter in part below and omitted the sections of the letter that could potentially identify employees' support of the Union, other than the two employees who ultimately made a complaint to the Employer:

> Dear Scott,
>
> I was feeling pressured by a number of coworkers within Distribution to sign and return a union card throughout May and the early part of June. I really didn't want to sign the card so I tried my best to avoid them. It became clear to them that I did not want to unionize when I didn't submit a card by the deadline.
>
> I understand this was an important event for some people in our department but in my opinion, unions are meant to protect employees who are seriously being taken advantage of by their employer. I am not saying management is perfect They make mistakes, too. Unfortunately, there are people in Distribution who want a full day's pay without putting in a full day's worth of work. I can't support bringing a union in to protect people like

this because, in fact, they are taking advantage of the company and their poor work habits negatively impact the people who are trying to do a good job.

Wednesday June 7, 2016:

- Brian Stenull rode by me on a picking cart and said, "Asshole, why didn't you sign a card?" I was alone in the aisle I was working in so while it's possible someone else overheard him say this, I did not actually see anyone in the area at that time.

Thursday, June 9, 2016:

- Omitted

- Cathleen from the UPS side of the department told me that Brian Stenull came up to her and said that "he lost respect for her because she didn't sign a card."

- Omitted

…

Scott, as you are aware, I was harassed by a previous employee, (name redacted), who was eventually terminated. This went on for a long time and created a lot of stress for me. I was being threatened on a regular basis and the threats continued to escalate over this period of time.

I am not going to subject myself to this kind of behavior from my coworkers again, I had the right to choose how I voted with respect to unionizing our department and I chose to withhold my vote.
Nobody has the right to harass me, or anyone else who took this stance, nor should any of us be subjected to pranks, name-calling, threats or any other kind of malicious activity because of that choice, particularly when it is an intentional act to get us fired.

On the same note, I am not giving you this letter to get anyone else fired, I simply want to put an end to the situation before it gets out of hand. I understand some of my coworkers are disappointed in my choice but I have as much of a right to work in a harassment-free environment as they do.

41. After being contacted by management Ms. Cabo Chan submitted a handwritten letter dated June 13, 2016 which details her interactions with Mr. Stennull:

> Brian Stennull keeps bugging me about the Union because they need more people to join. I keep saying no. Maybe he's disappointed because he can't convince me to join the union. He said to me "you know what, I lose respect to you" I answered "so be it" He never stop bugging me, so I decided to talk to E.L. so he can talk to Brian so he will not bug me again about unions. And the next day Brain talked to me and ask me if I'm mad at him? I answered him "No I'm not made at you." I told him "if I don't want to join the Union, I don't want to join the Union. Don't force me."

42. Ms. Brown testified that she found out on June 13, 2016, that harassment complaints had been filed by two employees. She was asked to conduct an investigation into this matter to determine whether Worldpac's Workplace & Harassment Prevention Policy had been breached. She was given copies of Mr. Sabatino's and Ms. Cabo Chan's written complaints. On June 14, 2016, in the presence of Mr. Mathews she met with the two complainants separately.

43. On June 14, 2016, Mr. Stennull received a written warning for the incident on June 8 and 9, 2016, (ramming the garbage with the mouse cart) which the Employer characterized as creating a risk of injury and borderline insubordination with respect to his responses to management. Mr. Stennull explained during his testimony that this was the second time that Mr. Matthews had failed to immediately advise him of a safety risk and instead waited days to impose discipline. Mr. Stennull testified that it this point he became certain that he was being watched by Mr. Matthews for the purposes of building a disciplinary record against him. Mr. Stennull told them at this disciplinary meeting that he was feeling harassed and that he would be seeking legal counsel.

44. Later on June 14, 2016, the Employer called a meeting with Mr. Stennull to advise him that there has been a complaint filed against him because he was harassing employees about signing Union cards. Ms. Brown refused to provide Mr. Stennull with a copy of the complaint because it contained private information about other employees. Mr. Stennull refused to answer any questions because he was of the view that the Employer was not entitled to ask him about his Union activities, including information about membership evidence.

He wanted to consult with a lawyer. Ms. Brown is adamant that she told Mr. Stennull that the harassment complaint was confidential. The meeting was very short. Mr. Stennull for his part says that he does not recall much from the meeting but he was in shock and needed to leave immediately to contact the Union. He does not recall being instructed not to tell anyone about the harassment complaint. After he told Ms. Brown that he felt under duress he was permitted to leave the meeting.

45. Mr. Stennull was in shock and he wanted to advise Ms. Ferenci that the Employer knew about the union organizing drive especially since at the beginning she had been tasked to approach Mr. Sabatino to join the Union. Later on June 14, 2016, after the meeting, Mr. Stennull sent two text messages to Ms. Ferenci which stated "John Sabatino told about the union" and later "Nope he put a harassing claim to hr."

46. Mr. Anger testified that on June 14, 2016, an all employee meeting was convened during which he read them a Memo drafted by the Employer. He later changed his testimony to say that the meeting occurred on June 15, 2016, though he was not certain. No one knew who drafted this Memo. Mr. Richelieu testified that he saw this document "a day or so prior". The Memo states:

> Recently, a number of teammates have come forward with concerns that they were pressured by their fellow co-workers to sign a union card, or were harassed for refusing to sign a union card. We are currently conducting an investigation into these complaints. WORLDPAC respects your right to decide for yourself whether you want to join a union or not. It is also your right to be free from bullying, harassment and intimidation. WORLPAC's Workplace Violence and Harassment Policy prohibits harassment in the workplace and required that all harassment complaints be investigated and appropriate action taken. I am committed to enforcing that policy and have the full support of WORLDPAC's senior management.

47. On June 15, 2016, Maria Ferenci and another employee approached Ms. Cabo Chan and asked her if she had made the harassment complaint. Ms. Cabo Chan and Mr. Sabatino complained to management that employees were asking them if they had complained that Mr. Stennull was harassing them. Ms. Brown was asked to conduct a secondary investigation because of the breach of

confidentiality. Ms. Brown met with these employees some of who became very emotional because they had not meant to cause any distress. Ms. Ferenci told Ms. Brown that Mr. Stennull had sent her text messages which she had deleted.

48. Later on June 15, 2016, Mr. Stennull was told by management that he was suspended with pay pending completion of the harassment investigation because he breached his obligation to maintain the confidentiality of the complaints which had created an escalation of the situation and further upset the complainants. Mr. Stennull was asked to stay away from the workplace in order to "protect the integrity of the investigation."

49. On June 15, 2018, Ms. Brown also sent the following letter to Mr. Stennull:

> As I advised during our meeting on June 14, 2016, I was asked by WORLDPAC to conduct an investigation into concerns regarding your conduct that were raised by two of your co-workers. The purpose of that meeting was to provide you with the details of those allegations and give you an opportunity to respond and otherwise provide input as you see fit. However, before I was able to inform you of any of the details, you indicated that you would not speak with me. You left the meeting without providing any response or input to the allegations.
>
> I am now writing to provide you with a summary of the allegations and again invite you to provide your response and input. I'd be happy to meet with you again in person to go over the allegations and to listen to your side of the story.
>
> **Summary of Allegations**
>
> The following is a summary of the allegations made by John Sabatino:
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> - In May and early June 2016, you repeatedly followed John at the workplace and "pressured" and "pestered" him to sign a union card, including during work hours. You continued to do so even after John declined to sign a union card.

- During work hours on June 7, 2016, you rode by John on a picking cart and said to him, "Asshole, why didn't you sign a card?"

- As a result of his not signing a union card, John has been shunned by you and others.

The following is a summary of the allegations made by Cathleen Cabo Chan:

- You repeatedly asked Cathleen to sign a union card, including on at least one occasion giving her a card and telling her that she had to sign it. You continued to ask Cathleen to sign a union card daily even after she declined.

- You told Cathleen that you had lost respect for her because she did not sign a union card.

- In addition to telling you that she did not want to sign a union card, Cathleen also asked Ernie Lee to ask you to stop approaching her as she did not want to join a union or sign a card. Despite that, you continued to ask Cathleen to sign a union card.

- After Cathleen asked Ernie to ask you to stop asking her to sign a union card, you asked Cathleen if she was mad at you.

  Please be advised that both John and Cathleen characterized your conduct towards them as "harassment" and want it to stop. They indicated that your conduct caused them stress and upset them, even though they have each taken steps to avoid you in the workplace.

50. On Thursday June 16, 2016, Mr. Stennull sent an email to Ms. Brown advising her that he would contact her by the end of the day. He did not do so. The next day, in the afternoon, Ms. Brown sent an email asking Mr. Stennull to contact her at his earliest convenience because she wanted "his side of the story". Mr. Stennull explained that he did not respond because he had not had the opportunity to meet with his lawyer.

51. On Monday June 21, 2016, the Union sent a letter through its counsel to Ms. Brown. In this letter the Union asserts that the Act protects the confidentiality of membership cards and Mr. Stennull's efforts in the organizing campaign. It also denied that Mr. Stennull

pressured or pestered employees into signing Union cards. The Union also took the position that the Employer's harassment investigation was nothing more than a thinly veiled illegal attempt to make enquiries into the identity of Union supporters. Further, the allegations against Mr. Stennull did not establish that he had engaged in a course of vexatious comment or conduct that he knew or ought reasonably have known was unwelcome. The Union asked that all discipline issued to Mr. Stennull since June 14, 2016 be rescinded and that he be returned to work.

52. Ms. Brown testified that she did not take this letter into account because it did not give her any insight into the allegations of harassment. She therefore issued a Report in which she states, in part:

> Factual Findings:
>
> 1. Despite the employees' firm statements that they did not want to sign a card, Brian Stennull did continue to 'pester' them and 'annoy' them during work time on work property.
> 2. Brian Stennull did say to John S., "Asshole, why didn't you sign the card??" on company premises during work time on company property.
> 3. Brian Stennull did say to Cathleen Cabochan – "I've lost all respect for you" due to her refusal to sign the card. Brian Stennull did say to Cathleen Cabochan - "Are you mad at me?" after asking Ernie Lee to tell Brian Stennull multiple times to stop bothering her.
> 4. Maria Ferenci repeatedly stated that Brian Stennull 'harasses' people about the cards, during the workday in the aisles and out on lunch and breaks.
> 5. Attempts to get Brian Stennull's reply to these allegations have not been provided, verbally or in writing
>
> The interviewer attempted to interview Brian Stennull and give him an opportunity to respond to the allegations, first during an in-person meeting on June 14, 2016. Stennull refused to speak with the interviewer and left the interview. On June 15, 2016, the interviewer provided Stennull with a summary of the allegations against him in writing and invited Stennull to schedule a meeting with the interviewer to discuss. The interviewer followed up with Stennull on June 16, 2016 via email, in response to which Stennull advised that he would be in touch by the end of the day that day, but he did not do so. The interviewer

> sent another follow-up email to Stennull on June 17, 2016 and received no response.
> Accordingly, this investigation is being concluded on the basis of only the witness statements we have.
>
> The complainants gave their statements in a straightforward manner, with appropriate recollection of details. Their statements are consistent with each other's. The statements of most of the other witnesses (EMPLOYEE NAMES REDACTED) are also consistent with the complainants'.
>
> EMPLOYEE NAME REDACTED denied allegation that he made the statement that John will be fired for making mistakes. There was no other witness to this allegation. We are unable to reach a conclusive finding regarding this allegation.
>
> Conclusion: Brian Stennull's behavior towards his coworkers was unwelcome, repeated and harassing despite being told by TMs that they do not want to sign a card. He ought to have known that this behavior was unwelcome. The witnesses interviewed offered statements that were consistent with John Sabatino's allegations. There were no surprises. The only outright denial was by EMPLOYEE NAME REDACTED that he made statements about John being fired if he picks the wrong parts.
>
> On that basis, Brian's behavior violated Worldpac's Workplace Violence and Harassment policy. The policy provides that violations of the policy may result in discipline up to and including the termination of employment for cause.

53. Ms. Brown testified that after she sent her report to her superiors she had no involvement in the decision to discipline Mr. Stennull. She did not know whether anyone in management took into consideration the Union's letter to the Employer. Mr. Richelieu testified that in consultation with senior HR advisors that it was decided that even though termination was an appropriate response, that Mr. Stennull would only be given a 10 day suspension because it was considered too risky to terminate him in light of his Union activities.

54. On June 22, 2016, Mr. Stennull was suspended without pay for 10 days. This discipline states, in part:

> Brian repeatedly pestered two teammates, John Sabatino and Cathleen Cabo Chan, to sign union cards even after they told him that they did not wish to sign. Brian said to John, "Asshole, why didn't you sign a card?" Brian also told Cathleen that he had lost respect for her because she would not sign a union card. Brian's conduct was unwelcome and he ought to know that it was unwelcome. Brian's conduct annoyed and caused stress to John and Cathleen, who wish to be left alone by you. Furthermore, such conduct took place during work hours and on company premises, adversely affecting productivity.
>
> When management attempted to interview Brian regarding his conduct, he was given express instructions to keep the complaint and investigation confidential. Despite that, Brian disclosed the investigation to at least one teammate, Maria Ferenci, which resulted in John and Cathleen being approached by teammates and asked about their complaints. This caused John and Cathleen to be upset about their complaints being known and raised concerns about potential retaliatory action.
>
> Brian's conduct towards John and Cathleen, as well as his inappropriate disclosure of the complaints, violated the Workplace Violence and Harassment Policy.
>
> Brian refused to co-operate with the investigation or provide any response to the complaints against him. As a result, the Company had no choice but to conclude its investigation on the basis of only the witness statements it had.

55. On July 8, 2016, Mr. Stennull returned to work, and signed an acknowledgement that he would refrain from engaging in union activities or other non-work related activities during paid work time. Mr. Anger testified that the Employer does not have a policy in the workplace that prohibits union activity. Mr. Stennull is the only employee subject to that prohibition. Since then Mr. Stennull explained that he avoids both Mr. Sabatino and Ms. Cabo Chan and tries not to go into the warehouse.

The Evidence with respect to the harassment complaint and the Employer's ULP

56. Despite the length of the hearing the Panel heard very limited direct evidence with respect to the Employer's ULP and the harassment complaints. The only direct witnesses to these allegations, were Mr. Sabatino, Ms. Cabo Chan and Mr. Stennull.

57. Ms. Cabo Chan was not called as a witness. Mr. Matthews testified that Ms. Cabo Chan did not wish to testify because there was too much stress at work already. The Employer chose not to compel Ms. Cabo Chan to testify.

58. Mr. Sabatino works as an order picker in the shipping department. He explained that he made a written complaint on June 7, 2016. He testified that Mr. Stennull asked him to sign a union membership card on two or three occasions. During cross-examination he clarified that Mr. Stennull asked him to join the Union three times over the course of six weeks. Another employee had given him a membership card. He told Mr. Stennull, "leave it with me if a sign a card I will give it back to" the other employee. He said that as he was working in an aisle when Mr. Stennull told him "Hey, asshole why didn't you sign the card." He said that he was working alone in the aisle and no one else heard the comment. He said that Mr. Stennull seemed disappointed and upset. Mr. Sabatino said that this comment disappointed him and did not make him feel good but that he went back to work. He said that he has been called names before but in a joking manner. Mr. Sabatino agreed that he has sworn at work in the past jokingly, and out of temper and frustration. During cross-examination he conceded that he had never told any of his co-workers that he did not want to join the union and that he was undecided. He confirmed that he never asked anyone to stop asking him to join the Union. He said that on one occasion Ms. Ferenci asked him if he had "ratted" them out.

59. Mr. Stennull testified that some of the warehouse employees were approaching Mr. Sabatino to sign a membership card, however, he remained undecided. Mr. Stennull's co-organizers asked him to speak with Mr. Sabatino. Mr. Stennull agrees that he spoke with Mr. Sabatino about joining the union asking him why he could not make up his mind. One day he heard Mr. Sabatino complaining to another employee who had signed a card about some workplace issues. Mr. Stennull said that he told him in a joking manner "just sign the card asshole." Mr. Stennull testified that employees routinely swear in the warehouse and that Mr. Sabatino has the mouth of "a pirate".

60. With respect to Ms. Cabo Chan, Mr. Stennull said that she would take her smoke breaks outside near his truck so he would take the opportunity to talk to her about joining the Union. She told him that her uncle told her not to join the Union. Mr. Stennull told her to bring her uncle to a Union meeting. An employee told Mr. Stennull to stop bugging her about the Union. Mr. Stennull apologized to her because he did not want there to be any hard feeling between them.

The Legislation

The Act

61. The relevant sections of the Act provide as follows:

> Freedoms
>
> 5. Every person is free to join a trade union of the person's own choice and to participate in its lawful activities.
>
> 11.1 (1) Subsection (2) applies where a trade union, council of trade unions or person acting on behalf of a trade union or council of trade unions contravenes this Act and, as a result, the true wishes of the employees in the bargaining unit were not likely reflected in a representation vote.
>
> Same
>
> (2) In the circumstances described in subsection (1), on the application of an interested person, the Board may, despite subsection 10 (1),
>
> (a) 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
>
> (b) dismiss the application for certification if no other remedy would be sufficient to counter the effects of the contravention. Considerations
>
> (3) On an application made under this section, the Board may consider,
>
> (a) the results of a previous representation vote; and

(b) whether the trade union appears to have membership support adequate for the purposes of collective bargaining.

Bar to reapplying

(4) If the Board dismisses an application for certification under clause (2) (b), the Board shall not consider another application for certification by the trade union as the bargaining agent of any employee that was in the bargaining unit proposed in the original application until one year after the application is dismissed.

Unfair Practices

70 No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

Employers not to interfere with employees' rights

72 No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

(a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;

(b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or

> (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.
>
> No interference with bargaining rights in the bargaining unit or any of them. 1995, c. 1, Sched. A, s. 73.
>
> …
>
> 76 No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

62. The *Occupational Health and Safety Act*, RSO 1990, c. O.1 defines workplace harassment as "engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome".

63. The Employer referred to the Board's decision in *Teamsters Union Local 1000*, v *Pop Shoppe (Toronto) Limited*, [1976] O.L.R.B. Rep. 299 which discusses the analysis that the Board must engage in when determining whether an employer's actions contravene the unfair labour provisions of the Act, at paras. 4-6:

> 4 Section 79 (4a) of The Labour Relations Act places the legal burden upon the employer in complaints such as the one before us, to satisfy the Board, on the balance of probabilities, that it has not violated the Act. In order for the Board to find that there has been no violation of the Act it must be satisfied that the employer's actions were not in any way motivated by anti union sentiment; the employer s actions must be devoid of "anti union animus". (See the *Bushnell* case [1944] OR (2d) at page 442). The employer cannot, engage in anti union activity under the guise of just cause or under the guise of business reasons. Regardless of the viable non-union reasons which exist the Board must be satisfied that there does not co-exist in the mind of the employer an anti union motive. The employer

best satisfies the Board in this regard by coming forth with a credible explanation for the impugned activity which is free of anti union motive and which the evidence establishes to be the only reason for its conduct. (See Barrie Examiner [1975] OLRB. Rep. Oct, 745 and The Corporation of the City of London [1976] OLRB Rep. Jan. 990).

5 In cases such as these the Board is very often required to render a determination based on inferential reasoning. An employer does not normally incriminate himself and yet the real reason or reasons for the employer's actions lie within his knowledge. The Board, therefore, in assessing the employer's explanation must look to all of the circumstances which surround the alleged unlawful acts including the existence of trade union activity and the employer's knowledge of it, unusual or atypical conduct by the employer following upon his knowledge of trade union activity, previous anti union conduct and any other "peculiarities", (See *National Automatic Vending Co. Ltd.* case 63 CLLC 16,278). If, having regard to the circumstantial evidence, the Board cannot satisfy itself that the employer acted without and union motivation, the Board must find that the employer has violated the Act. These determinations, however, are most difficult and require an incisive examination of all the evidence. Not only must the Board "see through" the legitimate reasons which often co-exist with the unlawful, but at the same time the Board must be capable of distinguishing between the unlawful and the unfair. The Board cannot find, and neither should it automatically infer, that an employer who has engaged in conduct which is unfair has violated the Act even if the unfair treatment is coincidental with an organizing campaign. However, because of the nature of the proceedings and the frequent requirement for inferential reasoning the Board would be delinquent if it did not consider, for purposes of drawing an adverse inference, unfair treatment during an organizing campaign of itself or in conjunction with the other circumstantial evidence. The Board, therefore, must be acutely sensitive to all of the circumstances and must not be unduly swayed by either the co-existence of unfair treatment or by the co-existence of legitimate reasons for the employer's conduct in determining if The Labour Relations Act has been violated.

6 The Board found Mr. Ohara to be a most unsatisfactory witness whose testimony in the main lacked credibility.The

Board has reviewed the evidence as it relates to Mr. Ohara and is satisfied that the employer had "just cause" for his discharge. The Board is not satisfied, however, that the company was devoid of anti union sentiment when it decided to terminate Mr. Ohara. *Firstly*, the Board has viewed the company's conduct in light of its previous finding of anti union activity in the lay-off of the five bargaining unit employees on January 23rd and February 9th respectively. Its decision to lay-off the bargaining unit employees in clear violation of the Act casts a shadow upon its conduct in the immediately following period. *Secondly*, the Board has compared the company's response to absenteeism in the period prior to unionization to its response after certification and has noted a marked difference. Whereas prior to the advent of the union the company was, in the words of Mr. Elliot, "very loose" with respect to absenteeism and lateness (as evidenced by the time cards) the company not only kept records of these matters in the period following certifications but terminated the two grievors because of their absenteeism. The keeping of employee records in the period following certification is a neutral activity; it does not point either to or against anti union motive and can be considered as a normal precaution to be undertaken by a company which has sought legal advice. If however, the conduct of the company which is ostensibly based on the employee's record is markedly different than its conduct prior to the keeping of records (i.e. prior to the advent of the union) then such conduct is to be viewed with suspicion. If, in the instant case, the employer had been very strict with respect to absenteeism and lateness in the period preceding the union, then its continued strict approach coupled with the keeping of employee records would not be viewed with suspicion. In the instant case, however, the employer's termination of Mr. Ohara is not consistent with its historical approach to absenteeism and the only intervening factor which can account for the change is the union activity of the bargaining unit employees. *Thirdly*, and perhaps most importantly, Mr. J. Zavitz, the company official who made the decision to terminate Mr. Ohara as evidenced in Mr. Wild's memo to file (see paragraph 2 of this decision), did not appear to testify. Although Mr. Wild made the recommendation it was Mr. Zavitz who made the actual decision and having regard to his compliance in the unlawful lay-off of the company's bargaining unit employees and his obvious displeasure at the certification of the trade union, the Board is not satisfied that in making

> the decision to terminate Mr. Ohara he was not at least in part motivated by a desire to rid the company of a union supporter. The Board would note at this point that the warning memorandum which was forwarded to Mr. Ohara is not sufficient to erase all doubts as to the true motivation of the company. It supports the company's contention of just cause but at the same time is itself to be viewed suspiciously because of the company's previous lax approach to these matters.

64. The Employer also referred to the Board's decision in *I.A.M.* v. *Treco Machine & Tool Ltd.*, [1983] O.L.R.B. Rep. 619:

> 13 The onus of establishing the legitimacy of its actions and of demonstrating that anti-union motivation formed no part in its decisions is upon the employer. The key element in that onus is the presence or absence of anti-union animus. The Board is aware that the past conduct of the company cannot predetermine the issue of animosity; nevertheless, it is relevant and necessary for the Board to take into account the course of conduct of the employer in its ongoing relationship with the union in order to be able to reach a proper decision with respect to its transfer of Wall and the question of his wages (see *Radio Shack*, [1979] OLRB Rep. Dec. 1220). The Board is also aware of the fact that every employee remains subject to the legitimate actions of his employer in adjusting his work force to meet the genuine needs of his enterprise. Thus, not every move that adversely affects an employee who is active in the union is prohibited, nor is such an employee entitled, unless the collective agreement so provides, to special consideration, provided, of course, that no taint of anti-unionism is attached to what might appear to be a business-like action.

65. The Employer submitted that the test, is whether the employer has established on a balance of probabilities that its actions towards Mr. Stennull were free of anti-union animus. This analysis requires the Board to determine whether the reasons given by the employer for its actions are the only reasons for the discipline and whether there is any taint of anti-union animus.

66. The Employer also relied on *Centro Mechanical Inc.* [1996] O.L.R.D. No 3178 were the Board states at paragraphs 48 to 51:

48 I am mindful of the fact that construction job sites are neither tea parties nor labour relations laboratories, and that it is unreasonable to expect that employees will not be exposed to various social and other pressures, perhaps severe pressures, in the context of the union organizing campaign (indeed, I have said so in *Bruno Plumbing & Contracting Inc.*, Board File No. 2037-94-R, October 24, 1994, unreported, and, in a non-construction context, in *Can-Eng Metal Treating Ltd.*, [1988] OLRB Rep. May 444). In that respect, employees may find themselves exposed to salesmanship, electioneering or propaganda from those who favour or from those who oppose an application for certification.

49 The Act does not immunize or protect employees from this. Many years ago a "silent period" was tried as part of the certification process and was rejected by the Board as unworkable. The Board does not police etiquette or social relations.

50 However, this does not mean that either a trade union or anyone else can do whatever they wish with respect to an application for certification. The Act protects employees from undue influence by prohibiting everyone from using intimidation or coercion to compel them to support a particular side or to exercise their rights under the Act in a particular way. A trade union enjoys a considerable amount of latitude in the conduct of its affairs generally, and specifically in the way it approaches certification. But a trade union is a law onto itself only within the parameters of the laws which govern everyone in this province, in this case the *Labour Relations Act*. Accordingly, while a trade union has the right to enforce its constitution and by-laws and to expect that its members will abide by its constitution and by-laws and have regard to both their rights and obligations, that constitution and those by-laws do not take precedence over the Act.

51 In this case, the applicant used its constitution for an improper purpose: to intimidate or coerce Bruno Battiston. Loris Battiston and Brogno into doing something they clearly did not want to do; that is, to support an application for certification of Centro. Bruno Battiston and Brogno resisted the applicant's attempts to intimidate and coerce them for months until the applicant escalated its efforts to the point that they felt they had no alternative and they could no longer resist the UA's threat to their personal and

> economic well-being in circumstances in which they felt they had no option but to do as Telford and others asked.

67. The Board further states at paragraph 53:

> 53 In arriving at this conclusion, I have applied an objective test which the Board has long applied in both situations by asking: was it more likely than not that the applicant's conduct was such that a reasonable employee of average intelligence and fortitude would have his/her ability to exercise his/her rights under the Act and to express his/her wishes with respect to being represented by the union in his/her dealings with his/her employer compromised, such that the representation vote taken does not likely reflect the trues wishes of the employees in that respect? Applying such an objective test does not mean that the Board cannot have regard to the subjective evidence of the persons effected, and I did so in this case.

68. With respect to remedy the Employer relied on the Board's decision in *Mississauga Long Term Care Facility Inc.* 2015 Can LII 73926 (ON LRB), in which the Board declined to order a one-hour paid meeting on the employer's premises. One of the factors considered by the Board was whether the organizing campaign has stalled prior to any employer breaches of the Act. The Board was also mindful that the workplace was a long term care residence and that this would present special challenges for the employer in arranging such a meeting. The Board was satisfied in that case that the remedies ordered by the Board were sufficient to remedy any breaches of the Act.

69. The Union relied on three cases in support of its position that the Board should order a one hour meeting on its premises. *K-Mart Canada Ltd.* [1981] O.L.R.B. Rep. 60, *Percon Construction Inc.* [2014] O.L.R.D. No. 3769 and *PRP Senior-Living Inc.* [2013] O.L.R.B. Rep. 363.

70. Mr. Stennull, who is a party in this proceeding, because he is accused by his Employer of having violated section 70 of the Act, focused his arguments on the meaning that section. In *Chinook Chemicals Company*, [1989] O.L.R.B. Rep October 1021, the Board stated at paragraphs 24 and 25:

> 24. The terms "intimidation" and "coercion" are not defined in the Act, and the Board has not attempted an exhaustive

definition of them in any of its decisions. In the *Corporation of the City of Thunder Bay,* [1983] OLRB Rep. May 781, the Board observed that:

> 59. Section 70 of the Act prohibits any interference with the rights of individuals under the Act amounting to compulsion by means of intimidation or coercion. Without exhaustively defining the meaning of those terms it appears to the Board that at a minimum they must relate to conduct which, directly or indirectly, deprives an individual of his free choice in the exercise of his rights under the Act. While that might include acts or threats which are physical or economic, the section is aimed at preventing interference with an individual's rights by some form of pressure or force that removes their ability to choose.

A threat that his or her employment or employment opportunities will be reduced or eliminated unless he or she exercises rights in a particular way has generally been regarded as creating the sort of pressure which removes an employee's ability to choose.

> 25. It seems to us that one person's assertion to another that there will be an adverse result if he or she follows a certain course of action would not ordinarily be described as a "threat" unless the adverse result were something which the speaker appeared to be in a position to bring about and which would not have been a consequence of the course of action in question but for the apparent intention of the speaker to make it so in order to influence the other's behaviour. The first of these conditions is met here: Mr. Lemaire was in a position to affect whether Mr. Bourgon drove the acid run at the time he made the statements complained of. It is the second condition which is problematic in this case. Because of the economic impact its terms would have on Mr. Lemaire, his taking over the full-time driving of his truck was an entirely logical and predicable consequence if the proposed agreement were implemented, whether Mr. Bourgon voted for the agreement or not and no matter how Mr. Lemaire felt about him or the union.

71. Mr. Stennull also relied on the Board's decision in *Davis Distributing Limited*, [1997] Can LII 15467 (ON LRB) were the Board discusses the tensions caused in the workplace during an organizing drive at paragraphs 6 to 9:

6. In deciding whether improper conduct by a union organizer casts doubt on the voluntariness of membership evidence, the Board is conscious of the heavy reliance that it places on membership evidence filed by a trade union in certification applications. In order to protect the integrity of a certification process which depends on such evidence, the Board takes care to ensure that where improper conduct is alleged, it is satisfied that it does not cast doubt on the reliability of that evidence: see, for example, *Can-Eng Metal Treating Ltd.*, [1988] OLRB Rep. May 444.:

7. At the same time, the Board is also concerned that it not impose artificial standards of behaviour that are contrary to normal human interaction. The Board has stated that it does not act as a censor of the social pressures which are common to an organizing campaign on the part of those who either support or oppose the union. It would not be a surprise if some employees find the choice a difficult one, if some employees find it harder than others to resist peer pressure from one side or another, or if some employees make a decision which they later regret. It would not be a surprise to find that some statements made during an organizing drive turn out to be wrong, are rude or annoying, or cause distress. The Board assumes that the average employee engaged in a debate about the merits of unionization with other employees has a cer-tain level of ability to make up his or her own mind and to act in accordance with his or her own volition.

8. In order to remain realistic about the social pressures that accompany an organizing drive, the Board has stated that it will treat as qualitatively different improper conduct on the part of union officials and improper conduct by a fellow employee. Further, the Board distinguishes between physical threats and threats to job security, and comments which do not contain those elements either directly or by implication: see The Kendall Company (Canada) Limited, [1975] OLRB Rep. Aug. 611 and Dupont of Canada Ltd., [1961] OLRB Rep. Jan. 360. The Board has also distinguished between misrepresentations which are not fundamental in that they do not relate to the effect or purpose of the membership evidence, and those that do: see Masters Con-struction Ltd., [1988] OLRB Rep. Feb. 162.

> 9. In this context, the Board ultimately looks to whether the conduct at issue would deter the reasonable employee, in other words, whether the reasonable employee faced with those circumstances would be able to make his or her own decision about union representation.

72. The Board goes on to conclude at paras. 13 and 24:

> 13. Even accepting for the purposes of this decision that Mussai was told that there were only five people left who had not signed with the union, this would not have led us to discount either Mussai's membership card or to doubt the reliability of any of the other membership evidence. Without anything more, a misrepresentation or exaggeration as to the level of union support amounts to no more than salesmanship. Where a misrepresentation does not relate to the effect or purpose of the membership evidence, is about something which the reasonable employee can take steps to verify and is made in a context where there would be no reason to either believe or disbelieve the statement without further confirmation, it cannot in itself cast doubt on the voluntariness or reliability of the membership evidence. (See, for example, *Masters Construction Ltd., supra).* The Board's function is not to test the accuracy of every statement made during an organizing drive by partisans on either side. Even if a misrepresentation causes an employee to feel under pressure to sign a union card, there is a qualitative difference between social pressure and intimidation, particularly when there are likely all sorts of pressures bearing on an individual making this kind of choice, from both sides.
>
> …
>
> 24. On the evidence, therefore, we do not find that there was any intimidation or coercion by Lundrigan of McCready. We also find no intimidation or coercion in the content of other conversations between McCready and other employees. Other aspects of McCready's interaction with other employees on the night that she signed her card also fall far short of constituting intimidation or coercion. The fact that she was approached by up to four employees one night, for example, does not constitute undue pressure within the context of an organizing drive.

Analysis

The Employer's ULP

73. The Board will first deal with the Employer's ULP and whether it has established on a balance of probabilities that Mr. Stennull and the Union committed unfair labour practices during the organizing drive.

74. As reviewed, the only direct evidence on this issue was tendered through Mr. Sabatino and Mr. Stennull. There was no significant, or material difference in their evidence with respect to their interactions. Though in its pleading's the Employer made other allegations, ultimately, at this hearing the evidence established that Mr. Stennull, at most, approached Mr. Sabatino three times over the course of six weeks in an effort to get him to sign a union card, and ultimately asked him, "Hey, asshole why didn't you sign the card."

75. The Board's task is to determine on an objective standard whether Mr. Stennull's conduct constitutes intimidation and coercion to compel Mr. Sabatino to join the Union. The Board's case-law clearly distinguishes between the actions of a paid union organizer as opposed to an employee union supporter. As cited above, the Employer has to establish that the conduct in question, at a minimum, directly or indirectly deprives an individual of the ability to make a free choice.

76. Mr. Stennull was an employee who was exercising his rights under the Act to organize his workplace. As such, he was not in a position of power and/or control over his co-workers and he could not affect their terms and conditions of employment. In our view, the evidence tendered by the Employer falls short of establishing that Mr. Stennull or the Union intimidated and coerced Mr. Sabatino to join the Union such that he interfered with Mr. Sabatino's ability to choose whether or not to become a member. The entire purpose of an organizing campaign is for employees to approach other employees in an effort to convince them to join a union. No evidence was tendered to support any inference that employees were threatened with any consequences in the event that they did not join the Union.

77. Mr. Stennull does not dispute that he did call Mr. Sabatino an "asshole". However, this comment though rude cannot objectively be described as either intimidating or as a threat. Even Mr. Sabatino did not testify that he felt intimidated or coerced by Mr. Stennull's rude comment. He only said that he was disappointed. However, as

previously stated by the Board, section 76 of the Act does not exist so that the Board can impose artificial standards of behaviors on employees during organizing campaigns.

78. As such the Employer's ULP is dismissed. We would go further and state that ultimately, the evidence tendered by the Employer in support of its ULP was so lacking and devoid of merit that had this been the only facts pled the application would have been dismissed in writing on a *prima facie* case basis and without a hearing.

The Union's ULP

79. The Board heard much evidence which, in hindsight, turned out to be largely irrelevant to the issues to be decided in this case. In its pleadings the Union sought declarations that all of the discipline imposed on Mr. Stennull by the Employer since May 2016 be rescinded by the Board. However, in its closing submissions the Union only requested that the 10 day suspension be removed from his record.

80. That said however, the Employer also sought to rely on Mr. Stennull's previous disciplines in support of its position that the 10 day suspension was not motivated by anti-union animus. Indeed, the Board will often look at recent previous misconduct when asked to consider whether or not an employer's actions were motivated by anti-union animus. It is rare that an employer will explicitly state that it is disciplining an employee because of their union organizing efforts. However, this is one of those rare cases where the Employer's motives to suspend Mr. Stennull for 10 days are clearly articulated in the suspension letter and clearly relate to Mr. Stennull's efforts to unionize his workplace. The Employer disciplined Mr. Stennull for repeatedly pestering two work colleagues to sign union cards which the employer said annoyed and stressed those employees.

81. A lot of emphasis was placed by the parties in their argument and evidence on the "unwelcome" portion of the definition of harassment and whether the two complainants had told Mr. Stennull that they did not wish to sign a union card. Indeed, the ten day suspension states: "Brian's conduct was unwelcome and he ought to know that it was unwelcome." However, no evidence was called at the hearing to support the Employer's assertion that Mr. Stennull continued to try to solicit support for the Union from the two complainants after they told him that they did not wish to join the Union. Indeed, during the hearing, Mr. Sabatino testified that he had

never told anyone that he did not wish to sign a membership card. Since Ms. Cabo Chan did not testify there was no evidence before this Board that she told Mr. Stennull that she did not wish to sign a Union card or that she did not want to be approached by Mr. Stennull with respect to this issue.

82. However, the full definition of harassment is,"engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome". In this case, Mr. Stennull had a legitimate, and indeed protected right to approach his co-workers in an effort to convince them to join the Union. Repeatedly asking or even pestering a colleague to join a union cannot be considered "vexatious comment or conduct" within the meaning of workplace harassment.

83. A union organizing campaign, as has been repeatedly stated by this Board, can cause tensions and stress in a workplace. A group of employees may support the union while another group may not. This is not a novel situation and the Board has established case-law that defines the permissible boundaries with respect to acceptable conduct governing union organization drives, with respect to employer, union and employee rights and obligations.

84. An employer must be careful not to become embroiled in the dispute between these two groups of employees. That said however, an employer has the right and the duty to manage its workplace within the limitations imposed by the law. This includes determining whether it is appropriate to investigate allegations of harassment. An employer is not bound by an employee's subjective perception that certain conduct constitutes harassment or is stressful to them. When an employee alleges that they are being harassed into joining a union, the employer must ensure that any investigations do not interfere with the other employees' rights to join and form a union. The employer must first consider whether the conduct complained of is union activity that is protected by the Act. The employer must also consider whether the conduct complained of, on its face, falls within the meaning of harassment and whether an investigation is warranted in the circumstances. The Employer must also consider the severity of the conduct complained of, on an objective standard, in light of the fact that section 76 of the Act demarks the degree of impermissible conduct during organizing campaigns as threats and intimidation.

85. The employer must balance its obligations to both groups of employees to determine the appropriate course of action. In deciding whether an investigation is warranted the employer must also consider that employees who are in the process of actively seeking to organize a workplace usually try to conceal this fact from their employer and may not be truthful or candid during an interview and there may be little value to an investigation. Further, the employer must also remember that section 119(1) of the Act not only protects the secrecy of union membership cards but also whether an employee is or is not a member of a trade union.

86. In this case, the Employer did not appropriately consider the obligations that it owed Mr. Stennull pursuant to the Act. This is despite the fact that the Union wrote a letter to the Employer to advise it that Mr. Stennull's interactions with his colleagues were in the context of a campaign to organize a Union which is protected activity under the Act.

87. The Employer in this case decided to conduct a formal investigation into the harassment complaint and interview witnesses. During the course of this investigation the Employer received a plethora of information that it was not entitled to know, including which employees supported and did not support the Union campaign. That said neither, Mr. Sabatino nor Ms. Cabo Chan told Ms. Brown that they feared for their health and safety in the workplace. Further, the Employer had no rule in place that prohibited employees from engaging in organizational campaigns in the workplace.

88. When Ms. Brown met with Mr. Stennull we accept that he was completely taken aback and in shock that he was being asked about his union organizing efforts. He quite properly refused to answer any questions and left the meeting so that he could consult with the Union and a lawyer. The Employer asserts that it told Mr. Stennull at that meeting that he could not tell anyone that harassment complaints had been received and it claims that Mr. Stennull breached confidentiality.

89. In the context of the Union's organizing campaign Mr. Stennull was "wearing two hats", that of an employee of Worldpac but also as an agent of the Union. This agency relationship is the reason why the Employer asserted in its ULP that the Union was responsible for Mr. Stennull's conduct during the organizing campaign. The Panel asked counsel to consider whether or not the Employer's request to keep the complaint confidential interfered with the Union's organizing

campaign. In response counsel advised that perhaps in hindsight this confidentiality requirement should have been modified.

90. Since May 2016, the Employer was aware that two key employees, Mr. Stennull and Ms. Ferenci, were in the process of trying to certify the workplace. Immediately after this meeting Mr. Stennull told Ms. Ferenci that the employer knew about the campaign because Mr. Sabatino had filed a harassment complaint. In our view this was an appropriate communication to Ms. Ferenci. Not only was she a co-union organizer who needed to know that the Employer was aware of the Union's campaign, she also needed to know that employees were complaining that they were being harassed into joining the Union. In our view, the Employer's direction that Mr. Stennull not discuss this harassment complaint with anyone interfered with the Union's organizing campaign since it attempted to create a wall between Mr. Stennull, Ms. Ferenci and the Union that prevented them from discussing relevant and crucial information. Because of this interference we find that the Employer was not entitled to discipline Mr. Stennull for his communication with Ms. Ferenci.

91. The Employer did not consider the context in which Mr. Stennull told Ms. Ferenci about the harassment complaint and that this communication was related to the Union's organizing campaign. It also did not consider that Mr. Stennull did not approach the two complainants directly. Regardless, Mr. Stennull was removed from the workplace.

92. Ultimately, the Employer imposed a 10 day suspension. The evidence tendered before this Board was that Mr. Stennull approached one employee three times in six weeks in an effort to join the Union. This is not conduct that warranted any discipline. Indeed, we find that the imposition of this discipline and the removal of Mr. Stennull from the workplace interfered with the Union's organizing drive.

93. As such we find that it is appropriate that the Board rescind the 10 day suspension imposed on Mr. Stennull. It was appropriate for the Employer to consider disciplining Mr. Stennull for having called Mr. Sabatino an "asshole", a comment that Mr. Stennull agrees that he said. We are also sensitive to the fact that Mr. Stennull had recently told Mr. Ortega to "fuck off", another comment that he agrees that he said. During the hearing the Board heard evidence about the fact that though swearing is common in the workplace it is different when an employee "swears at someone". However, in our view, in light of the

Employer's interference in the Union's organizing campaign and the serious allegations of misconduct that were made by the Employer against Mr. Stennull, which were unproven at this hearing, we decline to uphold any purported discipline for this comment.

94. The other remedy requested by the Union is that it be permitted to have a meeting at the workplace with employees. We find that this is a reasonable request which must be granted to rectify the Employer's interference in the Union's efforts to organize this workplace.

95. Mr. Stennull testified that after these events the Union's organizing campaign stalled. He was scared to discuss the Union at work, though admittedly there were some discussions in the washroom with employees. He was also made a responding party to the Employer's ULP which accused him of having violated the Act and in which the Employer was seeking reimbursement for its legal fees. The Employer's conduct caused a chilling effect on the Union's organizing campaign which must be remedied by this Board. In our view it is appropriate for the Union to have a meeting with employees at the Employer's premises. However, the Board is not prepared for the Union to hold a "captive audience meeting". Employees who wish to attend this meeting may do so but will not be compelled to attend by this Board.

Order

96. The Board:

a. Declares that the Employer violated sections 70, 72 and 76 of the Act;

b. Orders that the 10 day suspension imposed on Mr. Stennull be rescinded by the Employer. The Employer must reimburse Mr. Stennull for any loss of income that resulted from this discipline. This discipline is void, and must be expunged from Mr. Stennull's employment record and cannot be relied upon by the Employer for any purpose including determining any pay increases;

c. Directs the Employer to permit representatives of the applicant to have a one hour meeting during

paid working time and without loss of pay, on the Employer's premises for up to one hour in duration from 1:00 p.m. to 2:00 p.m. and without the presence of or monitoring by any member of management. This meeting must be held within one calendar month of the date of this decision;

d. Directs Worldpac to post a copy of this decision, together with Appendix "A" which is a notice to employees for a period of no less than six weeks from the date of this Decision.

97. The Board is seized with respect to the implementation of this decision.

"Geneviève Debané"
for the Board

Appendix "A"
The *Labour Relations Act, 1995*
NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

This Notice has been posted in accordance with an Order of the Ontario Labour Relations Board following a hearing.

After hearing evidence the Board determined that your Employer violated the Labour Relations Act, 1995 by interfering with the Union's organizing campaign in the spring and summer of 2016. As a result of your Employer's breaches of the Labour Relations Act, the Board:

a. Declares that the Employer violated sections 70, 72 and 76 of the Act;

b. Orders that the 10 day suspension imposed on Mr. Stennull be rescinded by the Employer. The Employer must reimburse Mr. Stennull for any loss of income that resulted from this discipline. This discipline is void, and must be expunged from Mr. Stennull's employment record and cannot be relied upon by the Employer for any purpose including determining any pay increases;

c. Directs the Employer to permit representatives of the applicant to have a one hour meeting during paid working time and without loss of pay, on the Employer's

premises for up to one hour in duration from 1:00 p.m. to 2:00 p.m. and without the presence of or monitoring by any member of management. This meeting must be held within one calendar month of the date of this decision; and

d. Directs Worldpac to post a copy of this decision, together with Appendix "A" which is a notice to employees for a period of no less than six weeks from the date of this Decision.

Moreover, employees should know that employees in Ontario have these rights which are protected by law:

> An employee has the right to join a trade union of his or her own choice and to participate in its lawful activities.
>
> An employee has the right to oppose a trade union, or subject to the union security clause in the collective agreement with his or her employer, refuse to join a trade union.
>
> An employee has the right to cast a secret ballot in favour of, or in opposition to, a trade union if the Ontario Labour Relations Board directs a representation vote.
>
> An employee has the right not to be discriminated against or penalized by an employer or by a trade union because he or she is exercising rights

under the *Labour Relations Act, 1995*, as amended.

An employee has the right not to be penalized because he or she participated in a proceeding under the *Labour Relations Act, 1995*, as amended.

An employee has the right to remain neutral, to refuse to sign documents opposing the union or to refuse to sign a union membership card.

It is unlawful for employees to be fired or in any way penalized for the exercise of these rights. If this happens, a complaint may be filed with the Ontario Labour Relations Board.

It is unlawful for anyone to use intimidation to compel someone else to become or refrain from becoming a member of a trade union, or to compel someone to refrain from exercising rights under the *Labour Relations Act, 1995*, as amended.

This is an official notice of the Board and must not be removed or defaced.

DATED August 7, 2018