BRITISH COLUMBIA LABOUR RELATIONS BOARD

PLAYTIME PEARDONVILLE VENTURES LTD.

(the "Employer")

-and-

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL NO. 2952

(the "Union")

PANEL:	G.J. Mullaly, Vice-Chair
APPEARANCES:	James Halliday, for the Employer Colin Gusikoski, for the Union
CASE NO.:	60279
DATES OF HEARING:	February 2, 3 and 4, March 2, 3, and 4, 2010
DATE OF DECISION:	May 25, 2010

DECISION OF THE BOARD

I. INTRODUCTION

1 The Union complains under Sections 4, 6(3)(a) and (d) of the *Labour Relations Code* (the "Code") alleging that the Employer's decision to dismiss four employees (the "Terminated Employees") after a successful decertification campaign was motivated in whole or in part by the fact that they were Union supporters. The Employer disputes the Union's contention.

II. BACKGROUND

2 The Employer or related companies operate gaming centres at various locations in the Province, including Victoria, Langley and Abbotsford. What is now the Employer's Abbotsford gaming centre ("Chances Abbotsford"), was for many years until 2006, a bingo hall operated by the Abbotsford Bingo Association (the "Association").

3 The Union was certified to represent the Association's employees (except its office employees) in 1997. In or about May 2006 the Association disposed of its business to the Employer, which was declared a successor under Section 35 of the Code in August 2006.

4 By September 2008 the Employer received approval to convert its Abbotsford bingo hall into a "Chances" gaming center which would also include slot machines. The facility was closed from mid-September 2008 until June 1, 2009 for renovations. The employees who had been laid off during the renovations and additional newly hired staff were trained from June 1 to 16, 2009. The following day Chances Abbotsford was opened to the public.

5 One of the newly hired staff members was Jim Brenner. He was initially hired to be a Shift Manager although he had no previous experience in the gaming industry. Later he was made the Facilities Manager, replacing Dave Togeretz, who became a Shift Manager. The other members of the Chances Abbotsford management team are Lincoln Reid, a Regional Manager, and Paula Malatinka, the other Shift Manager.

6 On July 16, 2009, Certain Employees filed a decertification application. A representation vote was held on July 27, 2009 but the ballot box was sealed pending the outcome of an unfair labour practice complaint the Union filed. Certain Employees filed a submission in response to the Union's complaint. The signatories to that submission were Stephanie Ponak, Jerry Dixon and Cindy Somerville. On September 17, 2009, the Board granted the Union's application to withdraw its complaint and the ballots cast in the representation vote were counted on September 21, 2009. Somerville was the scrutineer for Certain Employees. A majority of the ballots cast favoured decertification and the Union's certification was cancelled the following day.

7 (The 2009 decertification application was the third such application in recent years. Certain Employees had applied unsuccessfully in 2005 and September of 2008. The 2005 application was dismissed as the result of the outcome of a representation vote; the 2008 application was dismissed because the Certain Employees who applied were found to not have the requisite support to do so: *Certain Employees of Playtime Peardonville Ventures Ltd*., BCLRB No. B155/2008, 161 C.L.R.B.R. (2d) 130. Two employees—Dixon and Somerville—appeared for Certain Employees in the 2008 proceeding.)

8 The Terminated Employees—Gail Scherban, Connie Wiebe, Virginia Sill and Roberta McKenna—were all members of the unit of Chances Abbotsford employees that the Union had been certified to represent.

9 By August 2009 Chances Abbotsford was losing money on the bingo side of its operation because of declining attendance. The Employer's President, Tom Nellis, directed Reid "to correct the bottom line". Reid decided to accomplish this by reducing the hours of the bingo operation, thus allowing for the elimination of positions on the bingo side. Because the 2009 decertification campaign was underway by that time, Reid delayed implementing his restructuring plan. On September 23, 2009, the day after the Union was decertified, Reid wrote a memo to Nellis (the "September 23 Memo") describing how he proposed to proceed now that he knew what the "landscape" was:

> You will note that we are now about on par with Langley wages who offer the same level of programming. Obviously, we're not turning in the same volume and it is now time to cut. To do this I propose the following:
>
> - The first order of business was to wait for the decertification vote to find out what the landscape would be. We now have that piece of the puzzle and can move forward with our plans.
>
> - With business volume down we'll be moving to a shorter bingo day and therefore less hours. We'll adopt the Campbell River model and move to ten hour work days. ...
>
> - To reduce our wage cost we will be forced into laying people off. We could lay off junior employees who would cost us less money (2 weeks severance) but our focus will be to eliminate more tenured employees for a multiple of reasons.
>
> o First they make more money and cost more in wage burden.

> - Second we can replace them with a higher quality person in both customer service and skill set.
>
> - If we replace with people more qualified I believe there will be future potential to amalgamate positions.

10 Reid testified that although the recently hired Brenner was delegated the task of recommending which employees should be dismissed, before Brenner did so he and Reid had discussed a long list of employees (including the Terminated Employees) and agreed upon the criteria to be used for recommending employees for dismissal. According to Reid, when Brenner later sought Reid's approval for his recommendations, Reid did not ask Brenner to justify them because he knew Brenner's thoughts about the Terminated Employees and other employees from their previous discussions.

11 An e-mail that Reid wrote to Nellis on October 2, 2009 (the "October 2 e-mail") reveals that by that date Reid had decided how many people would be "let go" and why:

> As you know we'd like to move forward with a bingo hours of operation change as of November 1, 2009. To get down to those staffing levels a number of cuts will need to be made and people will need to be let go.
>
> A 4 on 4 off rotation only requires 2 people in each position instead of the 3 we currently use. For that reason we need to remove at least 1 coordinator, 1 cashier, and 1 caller. However for weak job performance we'd also like to add a second coordinator to that mix. Of course all of these are senior employees so the severance price tag is almost $18,000.

12 Ultimately, the Terminated Employees were the four employees chosen for dismissal. In late October 2009 they were informed that they were being permanently laid off, effective immediately.

III. POSITIONS OF THE PARTIES

13 The Union submits that the layoffs of the Terminated Employees were contrary to Section 6(3)(a)(ii) of the Code because they were terminated and discriminated against because of their participation in the promotion and administration of the Union. It also submits that because the terminations could reasonably be expected to have the effect of compelling or inducing other employees to refrain from becoming or continuing to be a member of a trade union, they also amounted to breaches of Section 6(3)(d) of the Code.

14 The Employer maintains that it had a good reason to dismiss the Terminated Employees and that its decision to do so was not motivated in any way by an anti-union *animus*.

IV. ANALYSIS AND DECISION

15 Section 6(3)(a)(ii) of the Code prohibits the dismissal of an employee because he or she "participates in the promotion, formation or administration of a trade union". If an employer is alleged to have contravened Section 6(3)(a) it bears the burden of proving that it did not: Section 14(7) of the Code. The Board discussed what an employer must do to discharge this burden in *North Shore Neighbourhood House*, BCLRB No. 436/84:

> In *Forano Limited*, BCLRB No. 2/74, the Board, in dealing with an unfair labour practice complaint arising out of the discharge of employees, stated:
>
> > "...The crux of such an unfair labour practice case is the employer's motivation in the discharge, something which rarely will be disclosed by admissions. Employers don't ordinarily advertise their anti-union activities. Such intention must be pieced together from a pattern of circumstantial evidence."
> >
> > (at 2)
>
> In *Crown Zellerbach Canada*, BCLRB No. 10/82, the Board stated:
>
> > "If union membership can be found to be a proximate cause for the dismissal, even if there existed other proximate causes, the union's complaint will be upheld. Thus the existence of a reasonable justification for the employer's dismissal action does not end the Board's inquiry into an unfair labour practice complaint. The existence or the absence of a good reason for the employer's decision is only a factor which may help the Board in determining whether an employer has violated the unfair labour practices provisions of the Code.
> >
> > By virtue of Section 8(6) of the Labour Code [now Section 14(7) of the Code], the burden of proving that it did not contravene Section 3(3)(a) [now Section 6(3)(a)] lies on the employer. The employer's burden of proof is not met merely by proving that it had reasonable grounds for its actions and that it in fact acted upon those grounds.
> >
> > > '...it must go further, and must convince the Board, either by evidence or necessary inference, that it did not also act upon the 'union activity' ground; that this last prohibited ground was not a factor.'"

> [*Rempel Bros. Concrete Ltd*., BCLRB No. 11/81, at p. 8]
>
> (at 6-7)

In *Sooke River Hotel*, BCLRB No. L111/82, the Board stated:

> "But, as emphasized earlier, in cases of this nature, the Employer need not merely demonstrate sound economic business reasons for its layoff decision. It must also argue successfully that, on the balance of probabilities, the layoff decision was not motivated *in any way* by the Union's presence." (pp. 5-6, emphasis in the original)

16 The Board also discussed the burden imposed by what is now Section 14(7) of the Code in *West Langley Forest Products Ltd.,* BCLRB No. 453/84 (Leave for Reconsideration Dismissed: BCLRB No. 43/85):

> In weighing the evidence adduced by the Union against that of the Employer, the Panel must be mindful of the burden placed upon the Employer by the statute, pursuant to Section 8(6) [now Section 14(7)], to establish facts which can reasonably be supported, showing that the Employer's motives in the discharge of employees was in no way tainted by anti-union sentiment. Once an employer has put forward a credible explanation, which is on the face, free of anti-union *animus*, the Union must then present evidence proving the presence of anti-union motive or, from which the Board is able to reasonably infer the presence of such a motive. (p. 11)

17 I find that the Employer put forward a credible explanation, free on its face of anti-union *animus*, for its decision to terminate *some* employees; I find that it established that the bingo business was in decline and that Reid's decision to 'correct the bottom line' by eliminating positions was not tainted by an anti-union *animus*. However, whether the Employer's choice of particular people for dismissal was also untainted is a separate issue.

18 Each of the Terminated Employees gave unchallenged evidence that they were Union supporters and had opposed the 2008 and 2009 decertification campaigns. Because each of their circumstances differed somewhat I will consider each of their terminations separately, asking in each case whether the Employer proved that it is more likely than not that its decision to dismiss *that* employee was not in any way influenced by the fact that the employee was a Union supporter.

SILL

19 I find that even on the Employer's account of its decision process, Sill's dismissal is puzzling unless an anti-union motivation is inferred. Brenner acknowledged in his evidence what Reid's October 2 e-mail states on its face: that the Employer's new bingo shift rotation only required the elimination of three positions: one coordinator position, one cashier position and one caller position. However, although the Employer dismissed *two* coordinators—Sill and McKenna—Reid only used "weak job performance" to explain *one* of those dismissals (McKenna's) in the October 2 e-mail. Thus, on Reid's own account, Sill's dismissal is not accounted for by either "weak job performance" or the need to eliminate one coordinator (since *that* was being accomplished by the dismissal of McKenna for "weak job performance").

20 Brenner testified that he recommended Sill for termination in part because she was "unengaging" with customers and staff. I find this evidence to be inconsistent with the credible and unchallenged evidence given by the Terminated Employees. Sill testified that in 18 years of employment she had never been approached about sub-standard performance, not getting along with colleagues, or not adequately dealing with customers. Nor had she ever been made aware of any deficiencies in her day to day work. McKenna gave unchallenged evidence that in 2008, just before the facility closed for renovations, Togeretz told her that she and Sill were the two best coordinators, were doing a good job and got the paperwork out correctly.

21 Although Reid conceded that he knew that Sill (and Scherban) were strong Union supporters and that Sill had been the Union's Chief Shop Steward before the decertification, he testified that the fact that Sill and Scherban had supported the Union did not have any effect on his decision to approve their "layoffs". However, for the following reasons I did not find Reid to be a credible witness and hence I do not accept his evidence about his motivation in dismissing Sill and Scherban.

22 Reid testified that although he was aware of the 2009 decertification campaign, he didn't care one way or the other if there was a union in the workplace, had not wanted a decertification application at that time and had done nothing to encourage it. Applying the principles set out in *Faryna* v. *Chorney*, [1952] 2 D.L.R. 354 (B.C.C.A.) ("*Faryna* v. *Chorney*") I do not find this evidence to be credible.

23 The Union's certification was cancelled on September 22, 2009. Reid wrote the September 23 Memo the following day. In it he justified a proposed increase in the house administration team by telling Nellis, among other things, that such an increase would enable shift managers to have a higher floor presence—something that had already proved beneficial:

> By increasing our drop/admin team we have reduced the administrative load on our shift managers. This will allow them to spend more time working with *our staff* and guests to provide a *higher floor presence* and guest service level. It will further allow them the opportunity to look for ways to improve sales and bottom line instead of spending the day on back of house issues. *A key*

> *success story to this already is Abbotsford's decertification, without our floor presence, availability to staff, and coaching there is no possible way we could have achieved such a landmark success so quickly.* (emphasis added)

24 Reid's credibility was also diminished by what I find to have been his less than candid explanation of the "landmark success" reference in the September 23 Memo. He initially testified that the reference to "a key success story" in the September 23 Memo was not about wanting to be union or non-union but about the fact that the new employees believed they would be treated fairly even without a union. He later conceded that the words "landmark success" in the September 23 Memo referred *in part* to the decertification, as well as the new employees' perception that the Employer would treat them fairly even without a union present. Considering the content of the September 23 Memo as a whole and particularly the passage from it quoted above, I find that the words "landmark success" only refer to the decertification; the additional meaning attributed to those words by Reid has no foundation in the words he used.

25 I find Reid's evidence that he was indifferent to the outcome of the 2009 decertification campaign and had not wanted a decertification application at that time to also be undermined by the fact that on September 21, 2009 after the ballots cast in the representation vote had been counted, he congratulated Somerville, one of the employees who had spearheaded the decertification campaign. Once again, Reid's attempt to explain his actions did not enhance his credibility. He explained he had congratulated Somerville "for her hard work" and because she had "put a great deal of time and effort in". I infer that if Reid really had not wanted a decertification application in 2009 he would not have congratulated one of the people who had successfully spearheaded the 2009 decertification campaign when it was revealed that the campaign had succeeded.

26 (Reid did not explain how he had known that Somerville had put a great deal of time and effort into the decertification campaign. However, the fact that he *did* know is consistent with the evidence of all the Terminated Employees that during the 2009 decertification campaign, the employees spearheading it had spent an unusual amount of time in the Shift Managers' office.)

27 Another reason for finding that Reid was not a credible witness stems from the evidence he and other witnesses gave about an incident that occurred in 2008. Reid denied that in 2008, during a conversation with Dixon, McKenna and Togeretz, he suggested that if the Abbotsford employees were dissatisfied with the Union they could emulate what the Langley employees had done and decertify. Reid also denied leaving the conversation to get a copy of an Employer newsletter that reported the decertification of its Langley operation. Although Reid denied showing Dixon and McKenna a newsletter for the purpose suggested to him, he gave no evidence of ever having shown Dixon and McKenna a copy of an Employer newsletter for any *other* reason.

28 Togeretz testified for the Employer after Reid. He was asked in direct examination whether he recalled Reid being present during a discussion between Dixon and McKenna. He answered that it happened daily. Togeretz was then asked whether in one of those discussions Reid had ever produced an Employer newsletter. Togeretz answered 'yes' and went on to describe a conversation between himself, Reid, Dixon and McKenna about a power surge in Abbotsford. According to Togeretz, Reid left that conversation and returned with a copy of an Employer newsletter that contained an amusing article written by Togeretz about an earlier power outage in Victoria caused by a crow. Togeretz testified that Reid showed the newsletter "to all of us."

29 McKenna's evidence differed from the evidence given by Reid and Togeretz. She testified that in 2008, with Togeretz listening at the office window, Dixon was complaining to her about the Union's representation. Reid came down from upstairs and joined the conversation. After a few minutes Reid said there was something in an Employer newsletter that could help. Reid asked McKenna if she had read the newsletter and she replied that she could not remember. Reid then went and got a copy of an Employer newsletter that reported the decertification of its Langley operation. He gave it to Dixon and McKenna to read and when they had finished doing that he took it back.

30 In McKenna's cross-examination it was suggested to her that Reid had left the conversation to get an Employer newsletter containing Togeretz's crow story. McKenna denied this suggestion. In response to the suggestion that the Employer newsletter brought back contained the crow article, McKenna replied that she did not know, she had only read the decertification article.

31 When I apply the principles set out in *Faryna* v. *Chorney* to choose between the differing accounts of the Employer newsletter incident, I find McKenna's account to be credible and the accounts of Reid and Togeretz to not be.

32 Reid denied that he had retrieved an Employer newsletter at all; he did not try to suggest that McKenna had confused a retrieval done for one purpose (showing McKenna and Dixon an amusing article about a crow) with a retrieval done for a different purpose (suggesting how Dixon could deal with her dissatisfaction with the Union). To this extent there is a tension between his evidence and the evidence of Togeretz. I find that if in 2008 Reid had shown Dixon and McKenna a newsletter for *either* purpose he is not likely to have completely forgotten that in less than two years. When I take into account Reid's lack of candour about the meaning of the September 23 Memo and the fact that Togeretz and McKenna at least agree that Reid retrieved a newsletter for *some* purpose, I conclude that Reid's denial he had done so is not credible.

33 Assuming that Togeretz and McKenna were testifying about only one incident, I find McKenna's account to be in "harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that

place and in those conditions" (*Faryna* v. *Chorney*, p. 357).[1] I reach this conclusion because McKenna's account of what Dixon and Reid were talking about *before* Reid went and got the newsletter was credible and not challenged in cross-examination. Given McKenna's credible and unchallenged evidence that before Reid went to retrieve a newsletter, Dixon had been complaining about the Union and Reid had said there was something in an Employer newsletter that could help, I find it more likely than not that the article he showed Dixon and McKenna when he returned was about the decertification of the Langley operation, not an amusing article about a crow causing a power outage in Victoria.

SCHERBAN

34 Scherban was the cashier that the Employer dismissed. She was six years junior to the two cashiers it retained (Dixon and Verna Domshy). Thus, if reducing costs had been the Employer's primary concern, it would have saved more money by terminating Dixon or Domshy. Moreover, unlike Dixon (who had been one of the primary organizers of the 2008 and 2009 decertification campaigns) and Domshy (who was not a Union supporter), Scherban and the other Terminated Employees were not given the option of retaining their jobs or taking a severance package. If eliminating the additional costs associated with long service employees had really been the Employer's primary concern, it is hard to understand why *any* such employees were given the option—which both Dixon and Domshy took—of retaining their jobs.

35 Brenner testified that Scherban was chosen for termination in part because she was not good on customer service. I do not find this evidence to be credible because it is inconsistent with a substantial amount of credible and unchallenged evidence. Scherban herself gave unchallenged evidence that in 14 years of employment she had never been approached about not adequately dealing with customers. This evidence was consistent with the credible testimony of the other three Terminated Employees who all gave unchallenged evidence that Scherban was good with customers. The other Terminated Employees' evidence is also consistent with the contents of letters of reference and a commendation Scherban had previously received. In 2003, Arthur Villa, a General Manager of the Abbotsford Bingo Association (who is now employed by the Employer, albeit in a different capacity) wrote that:

> Gail is an honest, reliable and conscientious employee who has made a valuable contribution to our company. She has demonstrated the capacity to handle staffing and customer service challenges in a positive manner. She learns systems quickly and adapts well to change. Ms. Scherban is a very capable woman who completes her assigned tasks above and beyond the requirements. Her interpersonal skills are good, and she is well liked by customers and staff. I personally consider Gail to be an outstanding

[1] If Reid showed Dixon and McKenna newsletters on more than one occasion, the fact that Togeretz may have accurately described one of those incidents would provide no reason for doubting McKenna's account of the *other* incident.

> individual and employee. She has been a great asset to Abbotsford Bingo.

36 More recently, in August of 2008, Togeretz, then the Manager of the Facility, wrote a reference for Scherban which states, in part:

> Gail Scherban joined Playtime Community Gaming Centre in May 1996, since then she has proved to be a most reliable and effective team member.
>
> Gail is professional and efficient in her approach to work and very well-liked by her colleagues and our patrons. She is well-presented and able to work independently and as part of a team.
>
> Gail's contributions to the areas of the business in which she has been involved have been much appreciated.
>
> I believe that Gail will make a valuable addition to any organization that she may join. I recommend her without hesitation.

37 The following month Scherban was congratulated in the Employer's newsletter for receiving a Gold Service Star. The article encouraged Scherban (and the other Gold Service Star recipients) to "Keep up the great guest service!"

38 When I consider all the evidence I conclude it is more likely than not that Reid's admitted knowledge that Scherban was a strong Union supporter played some part in his decision to approve her dismissal.

WIEBE

39 Wiebe was employed as a caller. The other two callers at the time of Wiebe's termination were Ponak (one of the primary organizers of the 2009 decertification campaign) and Jodi Kermode, who Wiebe testified was not a Union supporter.

40 Wiebe gave unchallenged and credible evidence that everyone knew she opposed the Union's decertification. Wiebe also gave unchallenged and credible evidence that she had made her position known to the Shift Manager, Paula Malatinka who she was on friendly terms with.

41 Brenner testified that when deciding who to recommend for termination he initially considered people with more than 10 years employment for layoff, but "as I expanded the criteria—performance, fit and flexibility—the list became narrow". In fact, however, had these really been the criteria that Brenner used, Wiebe would not have been considered at all—she had been employed for just over five years at that time. Moreover, one of the callers who the Employer retained—Kermode—had been employed for almost four years more than Wiebe.

42 Brenner testified that he chose Wiebe because she had a fairly large wage and moving her to another position would result in a significant pay reduction. He also testified that Wiebe had "serious performance issues, customer service issues" and was "a very poor fit." According to Brenner, Wiebe was "indifferent" to staff, management, and customers and "less than engaged". The only example he gave to substantiate these claims was the fact that Wiebe had once said that some task was not her job as a caller.

43 I find Brenner's evidence about Wiebe's work performance to be inconsistent with the unchallenged and credible evidence of all of the Terminated Employees. Wiebe's evidence was that she had only ever had one performance issue—she once missed a bingo because the intercom volume was not up—something she stated could happen to anyone. Wiebe also testified that she had never been approached about not getting along with colleagues, adequately dealing with customers or any deficiencies in her day to day work.

44 Wiebe's evidence in this respect was confirmed by the unchallenged and credible evidence of the other three Terminated Employees who testified that they had never observed Wiebe failing to get along with colleagues or adequately dealing with customers. This evidence was consistent with Wiebe's unchallenged evidence (i) that during her termination meeting Togeretz had told her she was not being terminated because of anything she had done and (ii) that when she had earlier asked him for feedback, he had told her she was "doing great, keep up the good work."

45 I note that although Brenner justified his recommendation to terminate Wiebe in part on the basis that moving her to another position would result in a significant pay reduction for her, she was not given that choice. Moreover, if he really believed that Wiebe had "serious performance issues, customer service issues" and was "a very poor fit" it is hard to see how the cost of moving her to another position would even have been considered by him.

46 When I consider all the evidence I conclude that it is more likely than not that Wiebe's support for the Union played some part in the Employer's decision to dismiss her.

MCKENNA

47 The fourth person Brenner recommended for termination was McKenna. Given her unchallenged and credible evidence I find that she was known to be a Union supporter. McKenna testified that during the 2008 decertification campaign she had been approached by Dixon to support decertification and she refused. McKenna also testified that she was not even approached to support the 2009 decertification campaign.

48 McKenna also gave unchallenged evidence that during the 2008 decertification campaign, Togeretz, then the Facility Manager, asked her why she had not signed a decertification card yet. (In his evidence Togeretz had replied 'Not that I can recall' to a series of questions about his alleged involvement in the 2008 decertification campaign,

including his alleged questioning of McKenna. I do not find Togeretz to have been a credible witness in this respect. Another witness, Scott Pede, gave unchallenged and credible evidence that confirmed Togeretz's involvement in the 2008 decertification campaign.)

49 Brenner testified that his choice of McKenna had been his "toughest choice" because she was "absolutely phenomenal" with customers. Brenner also conceded that she was "conscientious" and had good interpersonal skills. However, according to him, McKenna had a "significant struggle" with her position, i.e., her consistent need for overtime to correct balancing errors.

50 I find that when all the evidence is considered, the Employer did not do enough to establish that its decision to choose McKenna for dismissal was not influenced in part by her support for the Union.

51 In this regard I note that when McKenna was asked in cross examination how often she had problems balancing, she gave unchallenged evidence that it had happened in June 2009 when the Chances Abbotsford reopened but later it worked out well most of the time. If McKenna had consistently needed to work overtime to correct balancing errors I infer that this is something the Employer could have proven with documentary evidence; it led no such evidence.

52 McKenna's evidence about the frequency of her balancing problems was consistent with other unchallenged evidence about her work performance that she gave. She testified that she had never been approached about substandard performance and no deficiencies in her work had ever been noted. To the contrary, as noted above, she gave credible and unchallenged evidence that in 2008, just before the closing for renovations, Togeretz told her that she and Sill were the two best coordinators, were doing a good job and getting out paperwork done correctly.

53 Even if the Employer had proved that McKenna consistently needed to work overtime to correct balancing errors that would not have sufficed to discharge the onus on it. That is because it did not maintain McKenna had been dismissed because she was incompetent, but simply that there was at least one other coordinator who was *better*. In its final argument the Employer put its position this way:

> Mr. Brenner had to make a decision which of a group of employees, all of who could do the job, to let go from the classifications affected by the restructuring. He…chose [the Terminated Employees] not because they were incompetent but because the remaining employees were *better*. (emphasis added)

54 As noted above, Brenner recommended the dismissal of two of the Employer's three coordinators; the coordinator the Employer retained was Nora Williams. Wiebe, Scherban and Sill all gave unchallenged and credible evidence that Williams supported decertification and I infer from the Employer's involvement in the 2008 decertification campaign and its "coaching" during the 2009 decertification campaign that it would have known that. Thus, given the position the Employer took, to have provided a credible

explanation, free on its face of anti-union *animus* for its decision to dismiss McKenna rather than Williams, the Employer would have to have led credible evidence that Williams *was* a better employee than McKenna or at least that it had good reason to think so. I find that it did not do that.

55 Brenner testified that Williams was kept because she was one of the best coordinators and had excellent customer service skills. He conceded that she had "struggled" in 2008 (before Brenner had been hired) but maintained that she had significantly improved her performance since then.

56 Brenner's evidence was not supported by the evidence of the other members of management who testified—people who I infer would have been in a better position to know about the respective abilities and deficiencies of McKenna and Williams. Reid had worked at the Abbotsford operation since March 2006, Togeretz began working there in October of following year. In contrast, Brenner, at the time of McKenna's dismissal, had worked for the Employer for less than five months and had no previous experience in the gaming industry.

57 Neither Reid or Togeretz gave any evidence that Williams was a better coordinator than McKenna. In cross-examination, Togeretz conceded that Williams had sworn at him and been disrespectful to other staff. Although he testified that he had never observed Williams being disrespectful to customers, he did say that she provided poor customer service.

58 Togeretz's evidence in this respect accorded with the unchallenged and credible evidence given by each of the Terminated Employees. Scherban testified that Williams was often rude to customers, co-workers and management. Scherban said Williams' work ethic was "as long as it is done, it does not matter how correct". Scherban also testified that a lot of employees had problems with Williams, that she had run-ins with quite a few of them and had one employee (Mellissa Sequin) in tears many times.

59 Sill testified that Williams has an attitude problem and is rude to staff, customers and management. McKenna testified that Williams could be fairly nasty at times if she wanted to be; that she would not speak to you when you were working with her and that two cashiers had reported not liking to work with her. Wiebe testified that Williams is very rude and yells a lot, and once called Wiebe an idiot.

60 When I consider all the evidence, I find the Employer has not provided a credible explanation, free on its face of anti-union *animus*, that its choice to dismiss McKenna rather than Williams was not in any way influenced by the fact that McKenna was a Union supporter.

61 The Employer argues, and I accept, that it was not required to show proper cause or indeed any cause for its dismissal of the Terminated Employees; it was able to terminate any employee, at any time, for any reason with notice. I also agree with the Employer that it is not open to the Board to judge the correctness of its decisions from a business or human resources point of view. However, I have not done that. I have only

been concerned with whether the Employer provided a *credible* explanation, free on its face of anti-union *animus*, for its choice of each of the Terminated Employees for dismissal.

62 The Employer also argues, and I agree, that even if the Board finds some anti-union *animus* during the decertification drive it does not necessarily follow that the same *animus* colored the layoff decisions. However, the dismissals of the Terminated Employees occurred just a little over a month after the Union was decertified and the fact that the Employer was not (contrary to what Reid maintained) indifferent to the outcome of the decertification campaign is a relevant consideration when deciding whether the Employer proved that the Terminated Employees' recent support for the Union played no part in its decision to dismiss *them* rather than other employees.

63 The Employer argues that it is a "long jump from general anti-union *animus* to outright animosity to individual union supporters". While this may be true the issue in this case was not whether the Employer harboured outright animosity towards the Terminated Employees. Rather, the issue was whether the Employer proved that the Terminated Employees' support for the Union had not in any way influenced its decision to choose them, rather than other employees, for dismissal.

64 The Employer argues that there was no evidence that Brenner had an anti-union *animus*. I agree. However, Brenner only recommended the Terminated Employees for dismissal. I find that Reid, who approved the recommendations, did have an anti-union *animus*. Brenner's recommendations had followed his discussion with Reid about a long list of employees (including the Terminated Employees) and the criteria Brenner was to use for recommending employees for dismissal.

65 The Employer's final argument concerns the remedy sought by the Union: an order that the Terminated Employees be reinstated. The Employer maintains that:

> If you reinstate all these employees to their former positions, there is no question that other employees in those classifications will have to be let go. However, in a very real sense you would also be stating that simple union support is enough to give employees absolute job protection. Since all the employees are competent in their jobs, choosing a union supporter for removal would simply bring the employer back to you under exactly the same circumstances they are facing today. The employer would be compelled to use, as its sole criteria, the fact that the employee being removed did not support the union. Paradoxically, you would be compelling the employer to rectify a section 6 violation by violating section 6.

66 I do not accept this argument. Section 6 of the Code does not require that union supporters not be considered for termination when an employer makes a *bona fide* decision to reduce the size of its workforce; all Section 6 requires is that when an employer is deciding whether or not to dismiss an employee, that it not be influenced in any way by the fact that the employee is a union supporter (if he or she is).

V. CONCLUSION

67 For the reasons given above I find that the Employer did not prove it is more likely than not that the Terminated Employees' support for the Union played no part in the Employer's decision to dismiss them. Accordingly, I find that the Employer contravened Section 6(3)(a)(ii) when it dismissed the Terminated Employees. I order that they be reinstated and made whole. If the parties are unable to agree on how much compensation the Terminated Employees are entitled to, the Board will decide that issue.

LABOUR RELATIONS BOARD

"G.J. MULLALY"

G.J. MULLALY
VICE-CHAIR