

**EMPLOYERS GONE WILD, VOLUME 1:
ONTARIO LABOUR RELATIONS BOARD ORDERS
REMEDIAL CERTIFICATION DUE TO
EMPLOYER'S INTIMIDATION TACTICS**

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INTRODUCTION

The Ontario Labour Relations Board (the “Board”) has the power to award remedial certification where an employer’s conduct makes it unlikely that a certification vote would determine the true wishes of the employee. This paper reviews *Labourers’ International Union of North America, Ontario Provincial District Council v. 450477 Ontario Ltd. (Chartrand Equipment)*, [2010] O.L.R.D. No. 573 (“*Chartrand*”), a recent decision where remedial certification was awarded due to an employer’s extreme misconduct. The final section of the paper will list some do’s and do not’s for employers to follow during union organizing drives.

HISTORY

Prior to 1998, the Board had the power to award remedial certification where the employer contravened the *Labour Relation Act, 1995* (the “*Act*”) and it was unlikely that the vote would reflect the employee’s true wishes. These provisions were amended from time to time up until 1998, such that the Board’s ability to award remedial certifications was limited to situations where “adequate” bargaining support could be proven. As such, the tool was not regularly utilized by the Board.

In 1998, the Board’s power to award remedial certification was removed from the *Act*. Instead, the Board was given the power to do “anything” to ensure that a new representation vote reflected the employee’s true wishes.

In 2005 the *Act* was amended once again, at which time the Board’s power to order remedial certification was restored. The Board now has the discretion to certify a union or to order another representation vote where the following two conditions are met:

1. The employer, employer organization or an agent of either has contravened the *Act*; and
2. The result of the contravention is that a representation vote did not likely reflect the true wishes of the bargaining unit employees about being represented by the union, or the union was unable to demonstrate at least 40% support.

As part of this process, the Board may consider the results of a previous representation vote in determining whether or not the union appears to have the membership support adequate for collective bargaining.

Since 2005, the power to award remedial certification has been used on a few occasions by the Board. For example, in the following case, the employer's actions prejudiced the union's ability to ascertain the true wishes of the employees to the point that the Board decided that it was left with no other choice but to order remedial certification.

THE CHARTRAND DECISION

Chartrand Equipment is a construction company in the Timmins area. In July 2006, the Ontario Provincial District Council of the Labourers' International Union of North America (the "Labourers") decided to attempt to organize Chartrand's employees. This attempted organization did not last very long.

On the first day of the organizing drive, the union representatives were approached by one of the employer's foreman in his vehicle. The union representatives, seeking to avoid a confrontation, attempted to drive away. The foreman attempted to block the union representatives' departure. He was unsuccessful. The foreman then decided to chase after the union representatives. The streets of Timmins had now transformed into a labour relations version of the Dukes of Hazzard.

The foreman contacted two other foremen. The three employer trucks then chased the union representatives, with one of the employer trucks in front of the union's vehicle, while the other two followed behind. Soon after, all four vehicles exited the highway, and continued the chase through the streets of downtown Timmins.

The union representatives ran out of luck in downtown Timmins, as the employer trucks managed to box in the union's vehicle. Once all the vehicles were stopped, the employer's foremen got out of their vehicles and approached the union organizers. One foreman grabbed a 2 x 4 piece of wood out of his truck and smashed the driver's side mirror of the union representative's vehicle. He then told the union representatives "if I catch you on my sites again, I'll f*cking kill you" and to "stay the f*ck away from our men". The foremen then drove away, while the union representatives, in all likelihood, were left to determine the extent to which they had soiled themselves.

The union had scheduled a meeting for the Chartrand employees at the Cedar Meadows Resort in Timmins for that night. The employer discovered that the meeting was taking place and, prior to the scheduled start of the meeting, a convoy of employer trucks, driven by the foremen, arrived at the hotel. Two employees attending at the meeting, not surprisingly, became fearful and hid from the foremen. No other Chartrand employees attended the meeting.

Guy Chartrand, one of the owners of Chartrand, then joined his foremen at the hotel bar. Guy, bought dinner and drinks for all of his foremen, as congratulations on a "job well done". The employer representatives remained at the hotel until closing time, at which time Mr. Chartrand paid for taxis home for his drunken foremen.

That night, at approximately 9:00 p.m., the Union filed an application for certification even though it had membership evidence on behalf of less than the required 40% of persons in the proposed bargaining unit. The union sought remedial certification, based on the conduct of Mr. Chartrand and the foremen.

At the hearing, the Board decided to certify the Union without a vote, due to the threats, violence and intimidatory behaviour of the foremen. At paragraphs 57-59 of the decision, the Board commented:

...the Board does not believe either Chartrand brother played a direct role in the Chase...They are not the type to do "dirty work" themselves. However, they appear quite willing to have others do it for them, or at least to reap the benefits from it. Having unleashed loose cannons like Jason Suski and Denis Corbeil as their agents, the Chartrand brothers must accept the consequences of their decision.

Moreover, the conduct of the Chartrand brothers after they learned about the Chase reinforced the impression which a reasonable employee would have that Corbeil and Suski were acting on behalf of the Employer while engaging in the Chase. The witnesses made it clear that knowledge of the Chase had rapidly

reached the ears of bargaining unit employees. Dwayne Sutherland knew about it from speaking with Gilles Boileau, and Tim Patterson knew about it the next morning. The Union's supporters amongst the bargaining unit employees had heard about it and told Ian Copps they were scared because of it. However, Guy and Yvon Chartrand did nothing to disavow the Chase, or disassociate the Employer from it. Instead, Guy hosted a night long session of dinner and drinks at the CM where Corbeil and Suski partied with Guy until they closed the bar and took a cab to their homes. Nothing could make it more clear to bargaining unit employees that the Employer endorsed the actions of its working foremen on the Chase.

...No reasonable employee could be expected to sign a Union membership application after the Chase and the Employer's show of force at the CM. Those actions brought an effective and complete halt to the Union's organizing campaign, and prevented the Union from reaching the 40 per cent membership threshold needed for a representation vote.

Subsequently, the Board stated:

...the true wishes of employees in a bargaining unit cannot be expressed in a representation vote when they associate support of the trade union with the threat of violence. That is the case here.

HOW TO AVOID REMEDIAL CERTIFICATION

It is likely that most employers do not need to be advised not to chase down union representatives and attack their trucks with pieces of lumber. However, it is important to take away from this decision that when employers interfere with the union's ability to obtain the true wishes of the

employees who it seeks to represent, it is possible that the Board will order certification without a vote and without an employer's opportunity to campaign in a lawful manner. Therefore, while employers often react to each certification drive with annoyance and/or frustration, they must remain rational and respond to a certification drive in a lawful manner. Foremen and managerial employees must also be trained in the proper way to respond to an organizing drive. That way, employers can avoid being the poster child for the next employer's gone wild segment.

In the following sections, we have listed the do's and don't's during an organizing campaign.

WHAT AN EMPLOYER CAN DO DURING A UNION ORGANIZING CAMPAIGN

1. You may tell employees that they are free to join or not to join any Union without prejudice to their relationship with the Employer.
2. Employees can be reminded to consider carefully all aspects of a decision to join a union and not to be swayed by emotional appeals or persistent pressure of any kind. The decision affects the employee, his family, and his colleagues.
3. Employees can be informed that they are entitled to fully understand the obligations associated with Union membership before signing a card.
4. Employees may be informed of their rights. They do not have to talk to Union organizers at work, at home, or over the phone if they do not wish to do so. They do not have to attend Union meetings unless they wish to, nor do they have to supply their names or addresses or any other personal information to anyone unless they wish to do so.
5. You may explain to employees that signed cards may be used to get a vote even if the employees subsequently change their minds.
6. Employees may wish to know that under the law, once a Union is certified, it will represent all employees in the unit including those who are not Union members. Employees who are not members are equally bound by any collective agreement which may be entered

into by the Union and the employer. All employees will be required to pay Union dues under a collective agreement.

7. You may inform employees, without exaggerating, of the possible disadvantages of Union membership - costs of dues, initiation fees, fines, assessments, loss of income if a strike occurs, picket line duties, and intervention of a third party between employer and employee.
8. Employees should understand that members of management have always been willing to discuss any subject of interest to them.
9. You may inform employees as to how their working conditions, wages, and benefits compare with other employers, whether unionized or not. Employees can also be reminded of the value of benefits they presently enjoy.
10. You may tell employees of factual personal experiences with unions if asked by employees, without making any type of implied threat or prediction.
11. You may correct any untrue or misleading statements contained in Union propaganda.
12. You may tell employees that the Union cannot guarantee anything. The Union, if certified, only gets the right to negotiate. It cannot force the Employer to give more than the Employer is willing and able to give.
13. You do not have to tolerate solicitation for membership, or other similar activity, by outsiders or employees on the premises during working hours. You may enforce existing no solicitation rules in the plant during working hours.
14. A Union organizer is not entitled to the use of Employer bulletin boards for Union notices or propaganda, nor to a list of the names and addresses of employees.
15. You may enforce Employer rules reasonably and impartially and in accordance with customary practice.

16. You may continue to make assignments of work, overtime, etc., in line with customary practice and without reference to the employees' participation or non-participation in Union activities.
17. You may continue to discipline for just cause so long as such action follows customary practice and is taken without regard to Union support or non-support on the part of employees.
18. You can tell employees that if they are restrained, coerced, intimidated, or threatened by anyone on behalf of the Union, this activity is unlawful and should be reported to their supervisor.
19. You may express your views and give facts on issues involved in the organizing campaign insofar as these directly affect you, and you have the right to reply to propaganda directed against you. Take care that such expressions of views do not constitute and may not be reasonably construed by employees to be an attempt by means of intimidation, threats, or other coercive means, to interfere with their freedom to join a Union of their choice.

WHAT AN EMPLOYER CANNOT DO DURING A UNION ORGANIZING CAMPAIGN

1. You cannot threaten loss of jobs, layoffs, reduction of income, reduction of hours, or discontinuance of any privileges or benefits presently enjoyed.
2. You cannot threaten to, or actually withhold usual merit or promotional increases because of Union activity.
3. You cannot threaten to close down the workplace or to reduce operations if a Union is certified.
4. You cannot threaten to, or actually discharge or discipline an employee because of his activities outside working hours on behalf of the Union.
5. You cannot engage in any partiality favouring non-Union employees over employees active on behalf of the Union - e.g. do not assign "dirty work" to Union supporters or isolate them on night shifts.
6. You cannot promise any employees a pay increase, promotion, benefit or special favour if they refuse Union membership.

7. You cannot ask current employees or job applicants whether they belong to a Union or have signed a Union card.
8. You cannot interrogate employees about internal Union affairs such as meetings, etc. Attend Union meetings or watch meeting room entrances to identify or record employees attending. Do not engage in surveillance of employees' Union activities.
9. You cannot make rules against employee participation in Union activities outside working hours.
10. You cannot state that management will not deal with the Union or negotiate over certain issues or that a strike is inevitable. Do not suggest or imply that bargaining through a Union will be futile.
11. You cannot suggest to employees that they commence a petition against the Union or take part in any way in sponsoring or aiding the formulation of a petition - e.g. drafting a petition for employees to sign, providing secretarial help or duplicating equipment.
12. You cannot solicit grievances and complaints and attempt to rectify them.
13. You cannot grant employees wage increases or special concessions in order to help defeat the Union.
14. You cannot give financial support or other assistance to employees who are opposing the Union.
15. You cannot visit the homes of employees for the purpose of urging them to reject the Union.
16. You cannot offer to recognize a staff association or establish some type of employee committee as a competing and preferred candidate to the Union.