2012 CarswellAlta 1864
Alberta Labour Relations Board

ARAMARK Remote Workplace Services Ltd. and Health Care and Service Employees' Union, No. 301 (CLAC), Re

2012 CarswellAlta 1864, [2012] Alta. L.R.B.R. LD-079, [2013] A.W.L.D. 374, [2013] A.W.L.D. 379, 2013 C.L.L.C. 220-013, 220 C.L.R.B.R. (2d) 73

An application for certification as bargaining agent brought by the Health Care and Service Employees' Union No. 301 affiliated with the Christian Labour Association of Canada affecting ARAMARK Remote Workplace Services Ltd.

An unfair labour practice complaint brought by the United Food and Commercial Workers Canada Union, Local No. 401 and Hilton Warwick affecting the Health Care and Service Employees' Union No. 301 affiliated with the Christian Labour Association of Canada (CLAC) and ARAMARK Remote Workplace Services Ltd.

Nancy E. Schlesinger V-Chair, Ploof Member, Schuster Member

Heard: September 21, 2012; September 24, 2012
Judgment: November 1, 2012
Docket: CR-04647, GE-06448

Counsel: Counsel — not provided

Subject: Public; Labour

Related Abridgment Classifications

Labour and employment law
I Labour law
I.3 Unfair labour practices
I.3.b Employer practices
I.3.b.i Interference with union activities
I.3.b.i.F Miscellaneous

Labour and employment law
I Labour law
I.5 Bargaining rights
I.5.c Certification
I.5.c.iii Objections to application
I.5.c.iii.A Grounds
I.5.c.iii.A.5 Employer influence or domination

Headnote

Labour and employment law --- Labour law — Bargaining rights — Certification — Objections to application — Grounds — Employer influence or domination

Labour and employment law --- Labour law — Unfair labour practices — Employer practices — Interference with union activities — Miscellaneous

LABOUR RELATIONS

Certification — Grounds for refusal of — Employer support — Employer provided catering and housekeeping services to Alberta work lodges — Union sought bargaining rights over all employee unit at single lodge — Two employees in proposed bargaining unit objected — Objectors alleged: requirements of s. 34 of Labour Relations Code (Alta.) not met; other relevant matters justified dismissal, and; applicant employer dominated — Second union and third individual filed unfair labour practice ("ULP") complaint — ULP complaint alleged union violated s. 148(1)(a)(ii) and 148(1)(b) — ULP complaint alleged employer selected employees to start instant camp iin manner constituting unlawful support of applicant union — Individual ULP complainant worked at separate employer site, certified by applicant — ULP complaint referred to as "relevant matter" under employees' objection to certification application — Objections allowed — Certification application dismissed — Fact that employer sent staff to new lodge site alone not a relevant matter under s. 39 — Employer aware applicant and second union were organizing in area — Employer costed new site on basis of certification by applicant union — Employer knew applicant union likely to organize new site — Employer directed supervisor to select new site's employees based on willingness and instruction to sign cards with applicant — At least three employees sent to new site with instructions from employer to sign applicant union cards — Employer breached s. 148(1)(b) — Application undermined under s. 34(2) — Breach of s. 148(1)(b) a relevant matter — Certification application not permitted to proceed — Employer's actions at least partially motivated by desire to block second union's application — Employer's overall response to certification application amounted to abuse of process — Employer provided inaccurate information to Board Officer — Information resulted in inappropriate exclusion of employees — Employer's actions justified imposition of costs — Employer ordered to pay lump sum of $4,000

LABOUR RELATIONS
Remedies — Costs — Employer provided catering and housekeeping services to Alberta work lodges — Union sought bargaining rights over all employee unit at single lodge — Two employees in proposed bargaining unit objected — Objectors alleged: requirements of s. 34 of Labour Relations Code (Alta.) not met; other relevant matters justified dismissal, and; applicant employer dominated — Second union and third individual filed unfair labour practice ("ULP") complaint — ULP complaint alleged union violated s. 148(1)(a)(ii) and 148(1)(b) — ULP complaint alleged employer selected employees to start instant camp iin manner constituting unlawful support of applicant union — Individual ULP complainant worked at separate employer site, certified by applicant — ULP complaint referred to as "relevant matter" under employees' objection to certification application — Objections allowed — Certification application dismissed — Fact that employer sent staff to new lodge site alone not a relevant matter under s. 39 — Employer aware applicant and second union were organizing in area — Employer costed new site on basis of certification by applicant union — Employer knew applicant union likely to organize new site — Employer directed supervisor to select new site's employees based on willingness and instruction to sign cards with applicant — At least three employees sent to new site with instructions from employer to sign applicant union cards — Employer breached s. 148(1)(b) — Application undermined under s. 34(2) — Breach of s. 148(1)(b) a relevant matter — Certification application not permitted to proceed — Employer's actions at least partially motivated by desire to block second union's application — Employer's overall response to certification application amounted to abuse of process — Employer provided inaccurate information to Board Officer — Information resulted in inappropriate exclusion of employees — Employer's actions justified imposition of costs — Employer ordered to pay lump sum of $4,000

Table of Authorities

Cases considered by *Nancy E. Schlesinger V-Chair*:

I.A.M. & A.W., Local 99 v. O.E.M. Remanufacturing Co. (2011), 2011 CarswellAlta 23, *(*sub nom. *O.E.M. Remanufacturing Co. v. I.A.M., Local 99)* 189 C.L.R.B.R. (2d) 25, *(*sub nom. *IAMAW Local 99 v. O.E.M. Remanufacturing Co.)* [2011] Alta. L.R.B.R. 1 (Alta. L.R.B.) — considered

***UFCW**-Can, Local 401 and Health Care and Service Employees' Union, Local 301 (CLAC), Re* (2012), 2012 CarswellAlta 1594, [2012] Alta. L.R.B.R. LD-069 (Alta. L.R.B.) — referred to

Statutes considered:

Labour Relations Code, R.S.A. 2000, c. L-1
Generally — referred to

s. 12(2)(i) — considered

s. 16(8) — referred to

s. 17(1) — referred to

s. 34 — considered

s. 34(1) — considered

s. 34(2) — considered

s. 38 — considered

s. 38(1) — considered

s. 39 — considered

s. 148(1)(a)(ii) — considered

s. 148(1)(b) — considered

s. 149 — referred to

***Nancy E. Schlesinger V-Chair*:**

1 This decision addresses objections to a certification application raised by two employees affected by the application. The decision also addresses an unfair labour practice complaint that is said to impact the certification application.

2 The certification application at the centre of these matters was brought by the Health Care and Service Employees' Union No. 301 affiliated with the Christian Labour Association of Canada ("CLAC") for a unit of "*All employees at the Nexen Black Diamond Kinosis 5641"*. The employer affected by the application is ARAMARK Remote Workplace Services Ltd. (the Employer"). We refer to CLAC and the Employer jointly as the Respondents.

3 Objections to the application were filed by two employees in the unit applied for — Crystal Simpson and Steven Guse. We refer to Ms. Simpson and Mr. Guse jointly as the Applicants. They object to CLAC's certification application on the basis that: the requirements of section 34 of the *Labour Relations Code* (the "*Code*") have not been met; there are other relevant matters under section 39 that justify the dismissal of CLAC's certification application; and CLAC is dominated by an employer or influenced by an employer so that its fitness to represent employees for the purposes of collective bargaining is impaired (see section 38(1)).

4 An unfair labour practice complaint was filed by Hilton Warwick, an individual who works for the Employer at a different site, in a bargaining unit represented by CLAC. The complaint was filed jointly with the United Food and Commercial Workers Canada Union, Local No. 401 ("**UFCW**"). About two weeks after CLAC filed its certification application, **UFCW** filed a certification application for a similar[1] unit. We refer to Mr. Warwick and **UFCW** jointly as the Complainants. The sections raised in the complaint are: 148(1)(a)(ii) and 148(1)(b). The Complainants also raised a number of subsections under section 149, but they were withdrawn during closing argument. The Complainants' request for standing in the certification application was rejected by this Board: see, ***UFCW**-Can, Local 401 and Health Care and Service Employees' Union, Local 301 (CLAC), Re*, [2012] Alta. L.R.B.R. LD-069 (Alta. L.R.B.).

5 Because the unfair labour practice complaint is raised as a "relevant matter" by the Applicants under section 39, there is overlap between the objections raised in the certification application and the unfair labour practice complaint. Both matters were heard by a panel of the Board (Schlesinger, Ploof, Schuster) on September 21 and 24, 2012. For the reasons that follow we find that CLAC's certification application must be dismissed.

Facts

6 The Employer provides catering and housekeeping services to approximately 20 different lodges in the Regional Municipality of Wood Buffalo. It has a number of bargaining relationships. **UFCW** was recently certified for "All employees excluding office and clerical" at the Employer's Sunday Creek Lodge and Leismer Lodge. CLAC holds two certificates for lodges serviced by the Employer at Nexen **Long Lake** ("**Long Lake** Lodges"). It also holds a certificate for Nexen Kinosis Camp No. 5620. The Employer also has a voluntary recognition agreement with another union that is not affected by the matters before us.

7 Around July 9, 2012, the Employer obtained a contract to provide services for a new lodge called the Nexen Black

Diamond Kinosis 5641 (”Black Diamond Lodge”). The lodge was scheduled to open on July 15, 2012 and would house employees working for Nexen’s contractors.

8 The Black Diamond Lodge was built on the same spot that was formerly the location of the Nexen Kinosis Camp No. 5620. But, earlier this year, that camp was moved to a new location just outside the gates of the **Long Lake** Lodges. The new Black Diamond Lodge was built on the former Kinosis lodge site. CLAC’s certificate continued to apply to the relocated Nexen Kinosis Camp No. 5620 (now called “North Camp”). The new Black Diamond Lodge was not unionized.

9 Don Geiger, a business representative for CLAC, had known for some time that the Employer would be awarded the new contract to service the Black Diamond Lodge and was keen to organize it. **UFCW’s** interest in organizing camps in the Fort McMurray area was no secret and Mr. Geiger, understandably, wanted to be first in line with a certification application. Several weeks before the July opening, Mr. Geiger approached Terence Walton, the Employer’s District Manager, to see when the Black Diamond Lodge would open. He was told July 15. Thus, the Employer was well aware that CLAC was interested in organizing the Black Diamond Lodge and might be there to organize it around the time it first opened.

10 Mr. Geiger also kept in regular contact with Joyce Harris, CLAC’s shop steward at **Long Lake**. She was also **Long Lake’s** head camp attendant and, in that supervisory capacity, she was kept abreast of when the Black Diamond Lodge would open since she was likely to have to provide staff to help get the new lodge ready for occupancy.

11 Given the short notice for the opening of the Black Diamond Lodge, Mr. Walton arranged for the services of a contractor to help clean bunkhouses. Because of on-going construction, not all the Black Diamond rooms were available at the outset. But, the overall capacity of the camp was 700 to 800 beds. On July 14, Mr. Walton decided to see whether any of the **Long Lake** employees might be willing to work some hours at the Black Diamond Lodge to help ready it for its opening the next day. He decided to engage the assistance of **Long Lake** staff because the **Long Lake** camp was nearby and the Employer’s business plan for Black Diamond was based on CLAC’s collective agreement for the **Long Lake** Lodges. This was not the first time **Long Lake** staff had been asked to help out at other sites operated by the Employer.

12 Ms. Harris supervised the housekeeping staff at **Long Lake**. There was nothing to suggest she has authority to hire or fire employees or any power of effective recommendation in that regard. She knew from past experience that the Employer would likely require some of the **Long Lake** housekeeping staff to help ready the Black Diamond site. She picked out four individuals from **Long Lake** who could be spared on July 14 to go over to Black Diamond for a few hours. She let Mr. Walton know which employees she had selected and then drove the employees over to Black Diamond.

13 At some point on July 14, Ms. Harris informed Mr. Geiger that she would be at Black Diamond that day with staff. He attended the Black Diamond site early to wait for the employees from **Long Lake** to arrive. Ms. Harris told the four employees she took over that there would be a CLAC representative at the site and they could sign cards of support for CLAC if they wished to do so. Once employees arrived at Black Diamond, there was little work they could do because they had to sit through orientation sessions first. But, over the days that followed, three of the four housekeeping employees from **Long Lake** Lodge attended the Black Diamond site to help with the workload. Ms. Harris assisted with the work as well.

14 Mr. Walton tasked one of the Employer’s sous chefs, Joe Johnston, with finding available **Long Lake** kitchen staff willing to spend some time readying the Black Diamond kitchens. Mr. Johnston is a member of CLAC’s bargaining unit at **Long Lake**. He supervises the kitchen area but has no authority to hire or fire employees and no power of effective recommendation over those kinds of decisions. Mr. Johnston says he was instructed during a discussion with Mr. Walton to find five people to go to Black Diamond to sign union cards.

15 Mr. Walton denies giving any such direction to Mr. Johnston. In fact, in response to a question about whether he told Mr. Johnston anything about having employees sign up with CLAC, Mr. Walton’s response was: “Absolutely not.” Mr. Walton says he merely asked Mr. Johnston to find five people to send over to Black Diamond to work for a few hours. Mr. Walton admitted that, given the amount of union activity in the area and knowing of CLAC’s interest in organizing the Black Diamond location, he had some concern that union organizers might approach the staff of the contractor hired by the Employer to help clean the Black Diamond site. With this in mind, he says he may have told Mr. Johnston that if anyone was approached by a union while they were at Black Diamond, he was to let Mr. Walton know.

16 On cross-examination, Mr. Johnston admitted that he did not understand “union protocol” and might have misunderstood what was going on. He said he might have taken what Mr. Walton said from “the wrong angle”. He went so far as to concede at one point that perhaps Mr. Walton might have simply said that employees could sign union cards if they wanted to do so. (But, as noted above, Mr. Walton denied saying anything to Mr. Johnston about signing CLAC cards.) Later in his evidence, Mr. Johnston repeated his belief that he had been directed by Mr. Walton to find people to send to the Black Diamond Lodge for the purpose of signing union cards. Mr. Johnston understood the union cards being referred to were CLAC cards. He could not recall any direction about reporting union activity to Mr. Walton. While Mr. Johnston

acknowledged that there was a manpower crunch at Black Diamond, he did not understand the focus of Mr. Walton's instructions to be directed at asking people to work some hours at Black Diamond, although he admitted this might have also been expected. Instead, he understood the focus to be on whether employees were willing to sign CLAC cards.

17 Given these instructions (or his understanding of them), Mr. Johnston approached Hilton Warwick, a second cook at **Long Lake**, and asked him to go to the Black Diamond Lodge and "hang around for a few minutes to sign a union card and come back." Mr. Warwick was told he would be paid for his time and transportation would be provided. Mr. Warwick said he was willing to go to Black Diamond to work, but was not willing to sign a card. Mr. Johnston said that was fine and he would find someone else to go. At the time this conversation took place, Troy Huffman was present. Mr. Huffman is a member of management. Mr. Huffman never said anything to contradict Mr. Johnston's comments.

18 In addition to Mr. Warwick, Mr. Johnston asked about seven other **Long Lake** kitchen employees whether they would attend the Black Diamond site on July 14 for the purpose of signing union cards. There is no evidence that anyone other than Mr. Johnston asked kitchen staff to go over to the Black Diamond site that day. We draw the inference that whoever was at Black Diamond from the **Long Lake** kitchen on July 14 was recruited to go there by Mr. Johnston in the presence of Mr. Huffman. Our review of the evidence before us puts the number of such recruits at, at least, three.

19 What do we make of the conflicting evidence about Mr. Walton's instructions? Mr. Johnston struck us as unsophisticated in matters relating to unions. Other than being a member of the CLAC bargaining unit, he has no ties to CLAC. He also struck us as an affable person who tends to agree quite easily with things that are suggested to him. It would strike us as odd that Mr. Johnston would, on his own, come up with the idea of having employees from **Long Lake** go over to Black Diamond to sign CLAC cards. He had to come up with the idea of having employees sign union cards from somewhere. The most likely source is Mr. Walton.

20 In our view, it is a stretch to conclude that Mr. Johnston would have mistakenly taken a comment that employees could sign union cards if they wanted to as somehow being a direction that he was to seek out only those employees willing to sign union cards and send them to the Black Diamond site. While Mr. Johnston was impressionable during cross-examination, he returned during his testimony to assert that Mr. Walton told him to find five people willing to go to Black Diamond to sign union cards. We also find Mr. Huffman's presence to be significant. If Mr. Johnston was doing something that management did not want him to do, Mr. Huffman could have easily corrected the misunderstanding. That he did not do so is telling.

21 We do, however, accept that Mr. Johnston might have misunderstood the thrust of Mr. Walton's instructions in this way. The evidence supported the view that the Employer was facing pressure to ready the Black Diamond Lodge for occupancy on short notice. Ms. Harris testified that she expected housekeeping staff would be required. She sent staff over and those employees continued to work at that lodge intermittently over the following weeks. The Employer also hired a cleaning contractor and quickly set about hiring new employees who started work July 16. All of this supports the view that Mr. Walton was also looking for **Long Lake** kitchen employees who were willing to spend some time working at Black Diamond. But, we accept Mr. Johnston's evidence that he was instructed to find employees who were also willing to sign CLAC cards.

22 Mr. Geiger met with approximately 10 employees at the Black Diamond Lodge during their lunch break on July 14. He knew most of them as being employees from **Long Lake**. Based on the cards signed that day, he filed a certification application with the Board on Monday, July 16, 2012. The application estimated a bargaining unit of nine employees.

23 In accordance with the Board's usual practice, a Board Officer conducted an investigation into the certification application. Based on the information provided by the Employer and CLAC, the Board Officer concluded that the unit consisted of 11 employees (using the Board's Voting Rules). He found that CLAC had established 40% support in the unit applied for and recommended that a vote be conducted. That vote has since been held and the ballot box has been sealed pending the outcome of the matters before us.

24 Unbeknownst to the Board Officer, who was relying on the information provided by CLAC and the Employer, the Employer hired a number of individuals to work at Black Diamond the day before CLAC filed its certification application. That group of individuals included the Applicants, Ms. Simpson and Mr. Guse. They and several other employees worked their first shift at Black Diamond on July 16, the date the certification application was filed with the Board. Under the Board's Voting Rules, they should have been included in the bargaining unit for the purposes of calculating the 40% support and they should have been entitled to vote.

25 In his report, the Board Officer also notes that there was no intermingling of employees between the Employer's various lodges. As the evidence above clearly demonstrates, this was in fact not correct. Almost all the employees shown as eligible to vote on the Voters' List prepared by the Board Officer were employees of **Long Lake** who were sent to Black Diamond for a short time to help it get ready for opening. This approach of having employees from one lodge occasionally

help out at another lodge was not unusual for the Employer.

26 In the weeks following the filing of CLAC's certification application, Black Diamond Lodge's employee complement swelled. It was slated to be a 700 to 800 bed camp with bunkhouses opening up as construction was completed. By the time **UFCW** filed its certification application on July 30, 2012, the number of employees at Black Diamond was found (in a different Board Officer's report) to be 31. The total employee complement by the time of hearing was 55 or 56. We understand this is the total anticipated workforce for the Black Diamond Lodge. The unfair labour practice complaint and the Applicants' objections to CLAC's certification application were filed on July 30, 2012. The objections raised concerns about the voting constituency determined by the Board Officer.

27 During its opening statement, the Employer admitted that during the Board's Officer's investigation of CLAC's certification application, it provided inaccurate information to the Board Officer that led him to believe there were 11 employees in the bargaining unit. (The Employer now estimates there were approximately 20 employees who worked on the date of application.) We heard no evidence about the reasons for the mistaken information provided to the Board Officer other than Mr. Walton's speculation that the wrong document might have been relied on by the person who provided information to the Board Officer. She no longer works for the Employer and was not called as a witness. We also heard this was a busy time for the Employer because the new camp was opening.

28 It is clear that Mr. Walton reviewed the Board Officer's report when it was issued on July 26, 2012. He was also aware that new employees started work July 16. Mr. Walton made it clear to us that he was busy at the time and we take from his evidence that he did not conduct a careful review of the Board Officer's report. Objections to the Board Officer's report were due July 30, 2012. The Employer and CLAC never filed any objection to the report. The Employer did not inform the Board about the inaccurate information it had provided to the Board Officer until the start of the hearing before the Board on September 21, 2012.

Legislation

34(1) Before granting an application for certification, the Board shall satisfy itself, after any investigation that it considers necessary, that

(a) the applicant is a trade union,

(b) the application is timely,

(c) the unit applied for, or a unit reasonably similar to it, is an appropriate unit for collective bargaining,

(d) the employees in the unit the Board considers an appropriate unit for collective bargaining have voted, at a representation vote conducted by the Board, to select the trade union as their bargaining agent, and

(e) the application is not prohibited by section 38.

(2) Before conducting a representation vote the Board shall satisfy itself, on the basis of the evidence submitted in support of the application and the Board's investigation in respect of that evidence, that at the time of the application for certification the union had the support, in the form set out in section 33(a) or (b), of at least 40% of the employees in the unit applied for.

38(1) A trade union shall not be certified as a bargaining agent if its administration, management or policy is, in the opinion of the Board,

(a) dominated by an employer, or

(b) influenced by an employer so that the trade union's fitness to represent employees for the purposes of collective bargaining is impaired.

39 When the Board is satisfied with respect to the matters referred to in section 34(1) and satisfied, after considering any other relevant matter, that the trade union should be certified, the Board shall grant a certificate to the applicant trade union naming the employer and describing the unit in respect of which the trade union is certified as the bargaining agent.

148(1) No employer or employers' organization and no person acting on behalf of an employer or employers' organization shall

(a) participate in or interfere with

. . .

(ii) the representation of employees by a trade union,

(b) contribute financial or other support to a trade union.

Decision

29 The Applicants raise a number of reasons why CLAC's certification application should be dismissed. We list them below:

- CLAC does not have the requisite 40% support in the unit applied for under section 34. Here the Applicants take issue with the inclusion of the **Long Lake** employees in the bargaining unit applied for, saying they are not employees in the unit for the purposes of the application.
- Under section 39, there are "other relevant matters" that make certification in appropriate:
  - The application is premature because of the build-up of the workforce after the application was filed;
  - The **Long Lake** employees who voted have no real interest in the unit and no continuing interest in the workplace and would dilute the wishes of those who do;
  - The unfair labour practices under sections 148(1)(a)(ii) and (b); and
  - The Employer manipulated the bargaining unit constituency even if no unfair labour practice is proven.
- CLAC is employer-dominated or unfit to be certified as a bargaining agent under section 38.

The unfair labour practice allegations focus mainly on the sending of **Long Lake** staff to the Black Diamond site to sign their support for CLAC.

1. Unfair Labour Practice Allegations and Section 39

30 Since the unfair labour practice complaints are said to amount to an "other relevant matter" under section 39, we begin by addressing the allegations of a breach of sections 148(1)(a)(ii) and 148(1)(b).

31 We accept Mr. Walton's evidence, confirmed by Ms. Harris, that the Employer was under pressure to get the Black Diamond Lodge up and running and **Long Lake** personnel were sent over to help with that process. Occasional help from other lodges during peak times was consistent with the past practice of the Employer that we heard about from Ms. Harris. That the Employer was under some pressure to get things ready was also consistent with the Employer's hiring of a contractor to help it clean the site and with the quick hiring of new employees on July 15 to start work the following day. We also accept the evidence that some of the **Long Lake** employees continued to work at Black Diamond over the weeks that followed. Thus, we reject the suggestion that the mere sending of **Long Lake** staff to the Black Diamond site triggers a concern under section 39.

32 However, we find that the way the Employer went about selecting the **Long Lake** kitchen staff to work at Black Diamond amounted to unlawful support for a trade union contrary to section 148(1)(b). Section 148(1)(b) is "aimed at ensuring that bargaining agents are chosen by employees, not the employer, and that the bargaining agent maintains an independence from the employer that is consistent with its obligation to act on behalf of employees in collective bargaining and contract administration": see *I.A.M. & A.W., Local 99 v. O.E.M. Remanufacturing Co.*, [2011] Alta. L.R.B.R. 1 (Alta. L.R.B.) at para. 124.

33 Mr. Walton knew that **UFCW** and CLAC were organizing in the Fort McMurray area. The Employer had costed its

Black Diamond operations based on the CLAC collective agreement. It was convenient to have CLAC organize the Black Diamond site. Mr. Walton knew that CLAC was likely to attempt to organize the Black Diamond Lodge around July 15 from his discussion with Mr. Geiger earlier in the summer.

34 This was the context within which (as we find above) Mr. Walton directed Mr. Johnston to seek out those employees willing to sign CLAC cards and send them over to the Black Diamond Lodge to work. We conclude this was done to facilitate a CLAC certification application — an application that served the Employer's interests. While we accept this was not the sole purpose for having **Long Lake** employees attend the Black Diamond Lodge, it was part of the reason and it amounts to unlawful employer support for a trade union, contrary to section 148(1)(b). That it was Mr. Johnston (an employee in the bargaining unit) who asked employees whether they were willing to sign cards as opposed to a manager is irrelevant. Mr. Johnston was acting on the direction of Mr. Walton.

35 Even if our conclusions on the conflicting evidence are incorrect and Mr. Walton never gave Mr. Johnston instructions to find employees to sign union cards, we would nonetheless find a breach of section 148(1)(b). When a supervisor is carrying out the directions of management and makes a mistake like the one the Respondents suggest Mr. Johnston made here, the Employer cannot be absolved of liability under the *Code*. Employees would have reasonably perceived Mr. Johnston to have been acting on behalf of management at the time he spoke to them. His actions were effectively endorsed by the Employer through Mr. Huffman's presence. Whether Mr. Walton gave the direction or not, the message to employees was clear — management wanted employees at the Black Diamond site to be represented by CLAC and they were being enlisted to help make that happen.

36 How does this finding affect CLAC's certification application? We find above that at least three employees from the **Long Lake** kitchen were sent to the Black Diamond Lodge on July 14 having received similar instructions from Mr. Johnston. Any support given by these employees for CLAC's certification application must be discounted. That is enough to undermine CLAC's application under section 34(2). We also find the breach of section 148(1)(b) amounts to an "other relevant matter" that justifies dismissing CLAC's certification application. The breach strikes at the very foundation of the employee support for CLAC's application. We will not allow the certification application to proceed in the circumstances.

37 Next, we consider the alleged breach of section 148(1)(a)(ii). **UFCW** filed a certification application for employees at the Black Diamond Lodge on July 30, 2012. Its application has been put on hold pending the outcome of CLAC's application. As framed in **UFCW's** pleadings, the Employer knew **UFCW** was actively organizing the lodges and would have expected that **UFCW** would make an attempt to organize the Black Diamond Lodge. The complaint alleges the Employer took steps to prevent this from happening, thereby interfering with **UFCW's** representation of employees.

38 As we note above, the Employer knew that **UFCW** and CLAC were actively organizing lodges in the area. CLAC's certification application was convenient for the Employer and the Employer facilitated CLAC's certification efforts by sending people over to the Black Diamond Lodge who were willing to sign CLAC cards. It is not difficult to infer that the Employer's actions were, in part, motivated to reduce the possibility of **UFCW** filing a successful certification application. In this way, the Employer's actions interfere with **UFCW's** representation of employees. See *PPF Local 488 and IBEW Local 424 v Firestone Energy Corporation et al* [2009] Alta.L.R.B.R. 135, upheld *Firestone Energy et al v PPF Local 481, IBEW 424 et al*, [2012] Alta.L.R.B.R. 115 (Q.B.), where the Board found a breach of section 148(1)(a)(ii) when the new collective agreement was negotiated with the intent and effect of eliminating the possibility of successful building trades unions organizing.

39 **UFCW** also suggests the Employer intentionally sought to undermine its certification application by providing misleading information to the Board Officer. It is difficult to come to that conclusion based on the evidence we heard. We have little evidence regarding why inaccurate information was provided to the Board Officer. (And, as we note later in this decision, CLAC's application might have been better served had the Employer provided accurate information to the Board Officer at the outset and made timely objections to the Board Officer's report.) What we can draw from the evidence is that CLAC's application suited the Employer's business plan and the Employer considered itself too busy to spend much time looking into the application or the Board Officer's report. Given these facts, we are unable to find that the Employer intentionally sought to undermine **UFCW's** certification application by providing misleading information to the Board Officer

40 We also do not find section 38 to have application to the facts here. While we are satisfied there has been unlawful support in the present case, there is no evidence before us that would demonstrate that CLAC's administration, management or policy is dominated by the Employer or is influenced by the Employer so that its fitness to represent employees has been impaired.

2. CLAC's Certification Application Lacks Requisite Support

41 Even if we had found no breach of section 148(1)(b), we would have dismissed CLAC's certification application based on a lack of the requisite 40% support.

42 In response to the Applicants' objection raising the build-up principle, the Respondents rely on exhibit 7. It contains a list of those employees the Employer now believes worked on the date of application based on its more careful review of its payroll records. The list includes the same 11 employees who the Board Officer found were included in the unit. It adds an additional nine people, most of whom started work on the date CLAC's certification application was filed. The increase in the number of employees in the bargaining unit applied for from 11 to 20 is the result of the inaccurate information provided to the Board Officer for the purposes of his investigation and the Employer's provision of more complete information to us at the start of our hearing.

43 Using exhibit 7, the Respondents say the number of employees at the time CLAC's certification application was filed for the purposes of assessing the build-up argument is 20 rather than 11. They use these new numbers to say the increase in the workforce to 31 (by the end of July) and about 55 or 56 (by mid-September) is not significant enough to engage the build-up principle.[2] The Respondents ask us to dismiss the build-up objection and either order a supplemental Board Officer's report or issue ballots to the individuals who were not earlier identified as being included in the bargaining unit by the Board Officer. We view the Respondents' position as effectively asking us to allow them to present nine late objections to the Board Officer's report.

44 Even assuming we were prepared to exercise our discretion to consider the late objections, we would not have considered two of those objections. One of the individuals on exhibit 7 is Joyce Harris. She appears nowhere in the Board Officer's report. But, she was clearly an employee who the Employer must have known spent some time working at Black Diamond shortly before and after the certification application was filed (if not the date of the application itself). CLAC suggests a second person listed on exhibit 7, Clint Sheppard, should not have been included on the Board Officer's Voters' List because there is no evidence he worked on the date of application. The Employer admits it is unsure if Mr. Sheppard worked at the Black Diamond site on that day or not. What is significant for our purposes is that the Board Officer concluded that Mr. Sheppard was included in the bargaining unit.

45 Neither CLAC nor the Employer brought a timely objection regarding the Board Officer's failure to include Joyce Harris and his inclusion of Clint Sheppard on the Voters' List. The Employer and CLAC cannot at the start of the hearing, which was close to eight weeks after the deadline for filing objections to the Board Officer's report, contest that report as it relates to Ms. Harris and Mr. Sheppard. However busy the Employer might have been in July, there is no excuse for failing to bring a timely objection with respect to Ms. Harris and Mr. Shepherd. Even if we were prepared to take into account the new information provided under exhibit 7 (which we effectively view as nine late objections to the Board Officer's report), we would not have allowed the objections as they relate to Ms. Harris and Mr. Sheppard. Without those two objections, CLAC's certification application fails because it lacks the requisite 40% support having regard to the other employees listed in exhibit 7. (Discounting the support obtained contrary to section 148(1)(b) undermines CLAC's support even further.)

Remedy

46 Based on our findings above, the Employer provided unlawful support to CLAC contrary to section 148(1)(b). This breach undermines the employee support for CLAC's certification application and amounts to an "other relevant matter" under section 39. We dismiss CLAC's application as a result. In addition, we find the Employer interfered with **UFCW's** representation of employees contrary to section 148(1)(a)(ii).

47 The Complainants' request for costs against the Employer is dismissed. Section 12(2)(i) of *Code* allows the Board to award costs "if an application, reference or complaint, or a reply or defence to it, is, in the opinion of the Board, trivial, frivolous, vexatious or abusive." The Board also has the power to award costs as part of a make whole order issued under the *Code's* remedial provisions. This second type of award is directed at providing a remedy in circumstances involving particularly egregious breaches of the *Code*: see *Information Bulletin No. 23*. As expressed during closing argument, the request for costs as it relates to the complaints is, in large measure, based on the differences between Mr. Johnston's testimony and what was set out in the Employer's written response to the complaints. This discrepancy is not enough to justify an award of costs under sections 12(2)(i), 16(8) or 17(1).

48 Part of the request for costs made at the close of the hearing was directed at the way the Employer responded to CLAC's certification application. There is no doubt that the inaccurate information provided by the Employer to the Board Officer created much confusion here. In the span of two weeks between the time of CLAC's certification application and **UFCW's** application, the workforce appeared to undergo a dramatic transformation. The Employer's information resulted in the erroneous exclusion from the certification process of a number of employees who had an interest in CLAC's application.

It left the Board Officer and those affected by the application unable to appreciate the full context within which the application was filed. The timely disclosure of accurate information to the Board Officer might have prevented some of the objections that were filed.

49 Not only did the Employer fail to provide accurate information to the Board Officer at the outset, it also failed to take steps to carefully review the Board Officer's report and correct the mistaken information in a timely way. And, when the Employer raised more complete information weeks later at the start of the hearing, it attempted to use the new information for its own benefit. We find the Employer's overall response to CLAC's certification application amounts to an abuse of the Board's process, justifying an award of costs against the Employer in favour of the Applicants under section 12(2)(i) of the *Code*. The award is directed at those additional legal fees and disbursements incurred as a result of the Employer's failure to provide accurate information to the Board Officer. (We understand these costs may have been incurred by **UFCW** as opposed to the Applicants, but the costs are nonetheless compensable.) We see no advantage to requiring the affected parties to discern the precise amount of these additional costs in a case where such costs may be difficult to isolate. For that reason, we award a lump sum of $4000.

Footnotes

1	**UFCW's** application excludes office and clerical employees.
2	Without the inclusion of the employees listed in exhibit 7, CLAC's application runs afoul of the build-up principle because the workforce for the purposes of the certification application (*i.e.*, 11 employees) is not sufficiently representative of the ultimate workforce in place some weeks later: see generally discussion in *Unite Here Local 47 v SNC Lavalin O&M Logistics Inc.*, [2012] Alta. L.R.B.R. LD-036.