Mazzei Electric Ltd. (Re)

British Columbia Labour Relations Board Decisions

British Columbia Labour Relations Board

Panel: Rene-John Nicolas, Vice-Chair

Decision: November 18, 2022.

Case No.: 2022-000691

[2022] B.C.L.R.B.D. No. 132 | 2022 BCLRB 132 | 111 C.L.R.B.R. (3d) 213

Mazzei Electric Ltd. (the "Employer"), and International Brotherhood of Electrical Workers, Local 230 (the "Union"), and The Attorney General of British Columbia (the "Attorney General")

(77 paras.)

Appearances

Gradin D. Tyler, for the Employer.

Brandon Quinn, for the Union.

Jeremy Lovell and Mark Seebaran, for the Attorney General.

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 The Employer alleges the Union breached Section 7(1) of the *Labour Relations Code* (the "Code") by attempting to persuade its employees to join the Union at the Employer's places of employment during working hours (the "Application").

2 The Union denies it breached Section 7(1) of the Code. In the alternative, if the Union breached Section 7(1) of the Code, it says Section 7(1) of the Code is unconstitutional because it violates Sections 2(b), 2(c), and 2(d) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the "*Charter*").

3 The Union filed and served notice of a constitutional challenge to Section 7(1) of the Code on the Attorney General and the Attorney General of Canada in accordance with the *Constitutional Question Act*, R.S.B.C. 1979, c. 63. The Attorney General of Canada did not seek to intervene in this matter. The Attorney General responded to the *Charter* challenge. It says Section 7(1) of the Code is constitutional. The Employer adopts that position.

II. BACKGROUND

4 The Employer and the Union each made factual assertions in their written submissions. While there were some areas of disagreement, neither party took the position that material facts were in dispute such that an oral evidentiary hearing was required. I agree and rely on the parties' written submissions for the following factual background to the Application.

5 The Employer is an electrical services contractor that provides a range of services on multi- and single-family residential projects, commercial projects, and industrial projects of all sizes, as well as residential and commercial electrical services. The Employer services large areas across British Columbia, including Vancouver Island, the Okanagan, and Northern British Columbia.

6 The Employer employs electricians in a variety of classifications, including Journeyman, Service Electrician, and Foreman.

7 The Employer says its employees are assigned to various worksites depending on where the Employer is under contract to provide ongoing project services, or where other services have been requested by clients to address specific issues. As a result, the place of employment of an employee may vary from one day to the next.

8 The Employer says its employees operate primarily from Employer-owned vans stocked with equipment and supplies, except when assigned to a specific project on a longer-term basis.

9 The Employer says it provides its employees with cell phones to facilitate work assignments, ongoing communication with operations and management, and for safety purposes. The Employer says it uses these cell phones to communicate with employees, and employees use these cell phones to communicate with each other, about work-related matters. As a result, it says employees are expected and required to check text messages or answer phone calls they receive during their workdays. The Employer says employees do not wait until they are on break to check their work cell phones for text messages or calls. Indeed, the Employer says employees are not expected to check their work cell phones or return work-related calls when they are on breaks.

10 On May 18, 2022, Russell Alexander, an organizer for the Union (the "Union Organizer"), sent messages to some of the employees of the Employer. This included sending a text message to the work cell phone numbers of three employees and a message sent to another employee's personal Instagram account.

11 The Employer says it became aware the Union had sent messages to its employees during their workday, when several employees approached management to report being contacted by the Union.

12 The Employer says the messages were sent at various times during the workday on May 18, 2022, when employees were working at various worksites.

13 The Union agrees the Union Organizer sent messages to some employees on May 18, 2022. The Union says the messages were sent while the Union Organizer was at the Union Hall. The Union further says the Union Organizer assumed the recipients would not read and respond to personal text messages while working.

14 The Union says the Union Organizer did not know the work schedule of the Employer's employees but was generally aware they worked from around 7:00 a.m. to 3:00 or 3:30 p.m., with a 30-minute lunch break and two 15-minute coffee breaks. The Union says the Union Organizer understood that some employees choose when to take their own breaks, while others have break times set by their worksite. It says the Union Organizer understood the lunch break was typically sometime between 11:30 a.m. and 12:30 p.m. There would typically be one coffee break sometime in the morning and one sometime in the afternoon, but at other times, employees did not take those breaks and instead ended work 30 minutes early.

15 The Union says the Union Organizer was aware that some of the employees had Employer-supplied work cell phones but understood that some employees used their personal cell phones at work. The Union says the Union Organizer was not aware of which employees had work cell phones and was not aware that employees could only use their cell phones, whether Employer-provided or personal, for work-related purposes while at work.

16 I now turn to describe the four messages that came into the possession of the Employer. The Union attached copies of these messages to its response to the Application and does not dispute their veracity.

17 The Union Organizer sent the first message at approximately 10:36 a.m. on May 18, 2022 to an employee's personal Instagram account ("Recipient 1"). The message to Recipient 1 was as follows:

> Hey man! Got something to run by you. I'm the south island union rep now and there are a lot of rumblings at ***mazzei*** that workers want to unionize the company. You'd all get our jman rate of $42.89/hr and our service rate is $48.04/ hr plus pension and benefits...what do you think
>
> (reproduced as written)

18 At approximately 12:19 p.m., Recipient 1 responded to the message, and further messages between Recipient 1 and the Union Organizer were exchanged. The Union Organizer indicated to Recipient 1 that the Union intended to create a WhatsApp group chat for employees who were supportive of the organizing campaign.

19 The Union says the Union Organizer did not know whether Recipient 1 was using Instagram on a personal cell phone or an Employer-provided cell phone.

20 The Union Organizer sent a text message to another employee at approximately 12:38 p.m. ("Recipient 2"). The text message to Recipient 2 was as follows:

> Hey [redacted]! It's Russ from the IBEW, I still have you down as interested in joining as we spoke not too long ago. I am actually just starting a campaign to unionize ***mazzei*** as I have a ton of support already from the workers. This would make everyone instant members and our rates would kick in. $42.80/hr for journeyman and $48.04 for service electricians and Foreman. Pension and benefits not top of that...what do you think?
>
> (reproduced as written)

21 The Union says Recipient 2 did not receive the text message because the number texted was not that of Recipient 2. Instead, someone else received the text message and forwarded it to the Employer.

22 The Union Organizer sent the same text message he sent to Recipient 2 to another employee ("Recipient 3") with the addition of the following statement: "[t]his would also speed track you on a list to Kitimat as you'd be a member". The Union says someone other than Recipient 3 received the text message. That other individual responded by asking where the Union Organizer obtained the phone number. The Union Organizer indicated that he was looking for Recipient 3, to which the individual responded, "[l]ose this number". The Union says the resulting text chain was forwarded to the Employer. The Union says it is unaware of whether this other individual was an employee of the Employer, and it does not believe Recipient 3 ever received the text message.

23 The Union Organizer also sent a text message to a fourth employee at 3:01 p.m. ("Recipient 4"). The Union says the Union Organizer never received a response from Recipient 4. The text message to Recipient 4 was as follows:

> Hey [redacted] This is Russ from the IBEW. I am actually getting word from some workers at ***mazzei*** that they are interested in unionizing ***mazzei*** as everyone would instantly become members and get our rates and benefits. Everything is kept in house until we have the numbers so it's all confidential. Would you be in favour of this? Our journeyman rate is $42.89/hr and our service electrician and foreman rate is $48.04/hr with benefits and pension/ RRSPS on top of that. We also pay our apprentices very well.
>
> (reproduced as written)

24 The Union says the Union Organizer did not know whether each of the four recipients was at work or on break when he sent the digital messages described above. He did not know if each recipient was at the Employer's place of employment. He did not expect to receive a response from the recipients right away when he sent the digital messages. Instead, he assumed the recipients would not be reading the messages while working and would respond to them when they were free.

III. POSITIONS OF THE PARTIES

A. Employer

25 The Employer says the Board has long held that Section 7(1) is intended to protect the right of employers to manage their enterprise and control their workforce without disruption to business operations arising from union organizing during working hours: *Jim Pattison Industries Ltd. (Courtesy Chevrolet)*, BCLRB No. 39/79, [1979] 2 Can LRBR 517 ("*Jim Pattison*"); *Erickson Gold Mining Corporation*, IRC No. C183/89 ("*Erickson*"); and *Granville Island Hotel & Marina Ltd.*, BCLRB No. B95/95.

26 The Employer says the Board's enforcement of Section 7(1) is not discretionary. It says the Board must enforce the prohibition in Section 7(1) when an employer has not consented to union organizing at its place of employment during work hours: *Coast Mountain Buslink Company Ltd.*, BCLRB No. B410/99 ("*Coast Mountain*"), para. 70.

27 The Employer says the Board summarized the requirements to establish a breach of Section 7(1) of the Code in *Gateway Casinos LP*, BCLRB No. B195/2006 ("*Gateway Casinos*"). The Employer says disruption to its operations is not a required element of Section 7(1) of the Code: *Lansdowne Dodge City Ltd.*, BCLRB No. B165/97, para. 58.

28 The Employer says the requirements to establish a breach of Section 7(1) are met on the facts of this case: the Employer did not consent to the Union attempting to organize its employees at their place of employment during working hours; the Union Organizer was acting on the Union's behalf; the purpose of the messages he sent was to attempt to persuade the employees to join the Union; the employees were at the locations at which work is performed when they were contacted by the Union; and the messages were sent during working hours, as they were sent during the workday rather than before or after the workday or during the lunch hour.

B. Union

29 The Union says the facts of this case do not establish a breach of Section 7(1) of the Code because that provision requires a union representative to be physically present at an employer's place of employment.

30 Alternatively, if Section 7(1) does not require a union representative to be physically present at an employer's place of employment, the Union says the Employer has not pled facts that establish the impugned communications were received or read while the recipients were working, or that the Employer's operation was in any way disrupted.

31 Relying on *Allison Elizabeth Symons and Shelby-Marie Kossowski-Bessette*, BCLRB No. B46/2017 ("*Symons*"), the Union says Section 7(1) of the Code is not engaged when an employee decides to take a break to engage with a union organizer because that type of contact is not taking place during working hours. The Union also says, "it is incumbent on the employee (not the union) to decide whether to use break time to have a discussion". The Union further relies on *Symons* in support of the proposition that an employee is responsible for advising a union whether they are working or not, particularly where a union does not know the employee's schedule. The Union says further that it is assumed an employee is on break if they choose to communicate with a union.

32 More broadly, the Union says, in cases like this, employees are responsible for determining whether to engage with a union organizer during their workday:

> In a case like this, it is incumbent on an employee to determine whether or not to look at the message while they are working. Even if they do look, it is up to them when and how to respond to the message. If they want to take a break and respond, they can. If they want to wait until the end of the day, they can. If they do not want to respond at all, they can. Alexander is entitled to assume that any response he receives was written on the employee's free time. ...
>
> (underlining in original)

33 If the Board finds the Union breached Section 7(1) of the Code, the Union says, in the further alternative, that

Section 7(1) of the Code is unconstitutional as it infringes on Sections 2(b), 2(c), and 2(d) of the *Charter*, and such infringement is not justified under Section 1 of the *Charter*.

C. Attorney General

34 The Attorney General says Section 7(1) of the Code is constitutional. It says the Union failed to establish that Section 7(1) of the Code infringes Sections 2(c) and 2(d) of the *Charter*. The Attorney General concedes that Section 7(1) of the Code infringes on the freedom of expression protected under Section 2(b) of the *Charter*. However, it says that infringement is justified in accordance with Section 1 of the *Charter*.

35 The Attorney General says the Board should decide the Employer's application without considering the constitutionality of Section 7(1) of the Code if it can do so. It says the Board should consider the Union's constitutional claim only if it finds both that the Union has violated Section 7(1) of the Code, and there is no reasonable interpretation of Section 7(1) that accords with the impugned provisions of the *Charter*.

36 The Attorney General also notes in its submissions that the facts of this case "share...significant common facts" with *Symons*, and *Symons* involved "a very similar unfair [labour] practices complaint" as the Application.

37 Although the Attorney General does not take a position on the Board's interpretation of Section 7(1) of the Code, it says "the Board has the expertise and authority to apply [S]ection 7(1) in novel or changing circumstances, such as evolving communication technology, in a way that achieves the objective of the section in a *Charter* compliant way".

D. Employer Reply

38 The Employer says its employees are required to check their work cell phones for text messages or phone calls during their workday as these cell phones are for work-related purposes. The Employer says employees do not wait until their breaks to check these cell phones for text messages.

39 The Employer maintains that its employees were not on breaks when they were contacted by the Union Organizer. It says it is not incumbent on those employees to take a break before checking their text messages. As such, the Employer says the "Union cannot escape the consequence of their offending actions by placing blame on the employee recipients for checking text messages during company time, as they are required to do".

40 The Employer says that "[a]t the very least, [the Union Organizer] is aware, in general terms, of the schedule of employees of the Employer, including the lunch hour". In any event, the Employer says the Union Organizer "was, at best, wilfully blind to the fact that he was communicating with employees of the Employer during their workday (and not on a break), while they were at their place of employment".

41 The Employer says the Union Organizer's lack of knowledge about its employees' precise work schedules is not a defence against the alleged Section 7(1) breach:

> Similarly, the fact that [the Union Organizer] does not know the exact schedule of the employee recipients of his text messages does not provide him with *carte blanche* to send text messages to them on their company-owned cellular phones during their workday, outside of the generally accepted lunch hour, with impunity. To the extent those messages amount to attempts to persuade the employees to join the Union and were received on company time while the employee recipients were at a worksite, they are in clear violation of the *Code*.
>
> (italics in original)

42 The Employer says *Symons* is distinguishable from the circumstances of this case because, in that case, the impugned employees were contacted on their personal cell phones or initiated a phone call with the union organizer.

43 The Employer maintains that disruption to its operation is not required to establish its claim under Section 7(1) of the Code.

44 With respect to the Union's two other positions, the Employer says Section 7(1) of the Code does not require a union organizer to be physically present at an employer's place of employment to establish a breach of Section 7(1) of the Code. Also, like the Attorney General, it says Section 7(1) of the Code does not infringe the *Charter*.

IV. ANALYSIS AND DECISION

45 Section 7(1) of the Code states:

> Except with the employer's consent, a trade union or person acting on its behalf must not attempt, at the employer's place of employment during working hours, to persuade an employee of the employer to join or not join a trade union.

46 The Board's interpretation of Section 7(1) of the Code is informed by the balance the Legislature sought to achieve between, on the one hand, permitting the exercise of expressive and associational rights while employees choose or change union representation and, on the other hand, ensuring that an employer's operations are not unduly impacted by the exercise of these expressive and associational rights.

47 As such, the Board has long accepted that the purpose of Section 7(1) of the Code is to protect "an employer's right to manage its enterprise and control its workforce without disruption from employee[s] exercis[ing their] organizing rights": *Jim Pattison*, p. 520. However, the Board also recognizes that this purpose is balanced against other Code rights related to expression and association while employees choose or change union representation.

48 In *Coast Mountain*, the employer argued that Section 7(1) of the Code imposed an absolute restriction on union organizing at its workplace during working hours. The Board rejected this position, noting that it had previously held that Section 7(1) allows union organizing at the workplace while employees are on a break from work. The Board stated its "approach to the Code, as reflected in this interpretation, also reflects the balance intended by the Legislature between a meaningful right to seek representation, whether initially or by a change of union representative, and the employer's right to operate its enterprise with a minimum of disruption": *Coast Mountain*, para. 62.

49 The Board in *Coast Mountain* further stated that the right of the employees under Section 2 of the Code to freely choose union representation "incorporates the necessary and integral right to disseminate information and engage in discourse for the purpose of campaigning and organizing activities which underlie the fundamental right in the Code to seek representation or to change bargaining representatives", and that was one of the principles that "[came] into play in [that] case": paras. 68-69. The Board in *Coast Mountain* added:

> ...inconvenience to passengers of having to occasionally overhear a union-oriented conversation is not a matter of concern. Nor is inconvenience to supervisors or managers of concern. Such employee interaction is a fact of life with this Employer and the Legislature has long recognized that some disruption or inconvenience may well be inevitable.
>
> (para. 78)

50 Thus, the Board recognizes that, while the purpose of Section 7(1) of the Code is to protect employers from disruption to their operations due to union organizing in the workplace, Section 7(1) does not preclude union organizing in the workplace but merely places certain limits on it. Furthermore, those limits are interpreted in light of the protected right to engage in union organizing under Section 2 of the Code. Accordingly, Section 7(1) does not provide absolute protection from disruption. As noted by the Board in *Coast Mountain*, some disruption "may well be inevitable": para. 78.

51 I find the Board's comments in *Coast Mountain* underpin its interpretive approach to the elements of Section 7(1) of the Code. This is evident in both the Board's decisions prior to and following *Coast Mountain*.

52 Starting with *Jim Pattison*, and as alluded to in *Coast Mountain*, the Board held that Section 7(1) of the Code does not prohibit all union organizing at the workplace. It interpreted the phrase "during working hours" as excluding the times during the workday when employees are on a work break:

> ...the section only prohibits certain conduct "during working hours". The conduct in question, i.e., attempting to persuade employees to either join or not join a trade-union, if it is timely, may take place "at the employer's place of employment". Therefore, employees do not contravene the section if they attempt to persuade others to join a trade-union during the lunch hour or other work breaks. Nor do persons who are not employees violate the section by attempting to persuade employees to join a union during those periods in the working day that are designated work breaks.
>
> (pp. 519-520)

53 Indeed, the proposition that Section 7(1) does not prohibit union organizing at the workplace, as long as it takes place when employees are not working during lunch hours, coffee breaks, or immediately before or after a work shift begins or ends, is long-established in the Board's jurisprudence.

54 Furthermore, the question of whether an employee is working or on a break is determined with reference to the individual employee in question:

> Questions could arise concerning what constitutes "working hours". We reject the notion, argued for by the company, that since its operations are continuous, all hours are working hours. The question must be answered by reference to the particular employee. If employees are away from their work stations, having a lunch break or coffee break, we do not consider that time to be during "working hours", notwithstanding that other employees may still be working. ...
>
> *Cominco Ltd.*, BCLRB No. 72/81, [1981] 3 Can LRBR 499 ("*Cominco*"), p. 507

55 The Board has also made clear that union organizing is not necessarily limited to "designated" break times but can also occur at other times an employee is permissibly on a break from work. In *Erickson*, union organizers spoke with an employee at the workplace who was not on a designated work break, but who had flexibility as to when he could take a rest break, and had decided to take a rest break and to talk with the organizers. This was found not to be a breach of the Code:

> ... Walker testified that he worked twelve hours shifts with a designated lunch break; rest breaks were taken whenever the work load permitted. Given the flexibility in Walker's work schedule, the Panel must conclude that when Walker decided to stop work and talk to the organizers, he was taking a rest break. The inference drawn by the Panel is also supported by Walker's evidence that the performance of his duties on that day were not delayed or disrupted by the conversation with the organizers. Furthermore, there is no evidence Walker took additional rest breaks during his February 19, 1989 shift.
>
> (pp. 4-5)

56 I find that the Board's comments in *Erickson* apply to the communications between the Union Organizer and Recipient 1 over Instagram. I find sending a message to an employee's personal Instagram account is not a breach of Section 7(1) of the Code. As noted above, it is not disputed that employees have some flexibility to choose when to take their lunch break and more flexibility to choose when to take their 15-minute breaks. As such, I conclude that Recipient 1 chose to take a break and engage with the Union Organizer over Instagram.

57 That conclusion is further supported by the fact that Recipient 1 chose to engage with the Union Organizer over Instagram. The Employer does not assert that employees are required to monitor Instagram while at work. The Employer does not claim its employees were required to answer messages on Instagram while at work. Furthermore, the Union Organizer did not know Recipient 1 would review Instagram messages at work. In these circumstances, the fact that Recipient 1 chose to access their personal Instagram account while at work does not make the Union's message a breach of Section 7(1) of the Code.

58 Consistent with the recognition that Section 7(1) of the Code does not provide employers with absolute or

complete protection from disruption in the workplace due to union organizing, the Board has held that where employees have flexibility as to when they can take work breaks, it is not a breach of Section 7(1) for a union organizer "merely to inquire whether someone is on a break, whether a break is upcoming or whether the individual can take a break later": *Securiguard Services Limited*, BCLRB No. B261/2000 ("*Securiguard*"), para. 46.

59 In *Securiguard*, the panel found a breach of Section 7(1) of the Code because, after making the inquiry, the union organizers continued to speak with the employee when they should have understood from his response that he was on duty and not taking a break to speak with them. Thus, a breach of Section 7(1) occurs when attempts to organize are made while an employee is at work and not on a break, but it is not a breach for an organizer merely to inquire whether an employee is on a break or is able to take a break to speak with them.

60 In *Symons*, the panel considered *Securiguard*, as well as other cases discussed above, and found that the union organizers could "inquire as to whether or not the employee was on a work break or whether a break was upcoming" and that union organizing "is not prohibited where an employee can voluntarily decide when to take a break or end their break, similar to deciding to answer a call on one's personal cell phone": para. 45.

61 In *Symons*, the union was alleged to have breached Section 7(1) of the Code when its organizers called and texted employees on their personal cell phones while they were at work. However, the panel concluded this was not a breach because "it was incumbent on the employee to either not answer her personal cell phone while working or hang up once she realized it was a call from [u]nion organizers": para. 45.

62 The panel in *Symons* further noted that, in calling an individual's personal cell number, a union organizer "would not necessarily know whether the individual was at work or on a break when they answered the call": para. 47. Where the employee who received the call was at work but was "apparently able and decided to break from work to answer a call on her personal cell phone", the panel found no breach of Section 7(1): para. 47.

63 The panel in *Symons* also found no breach of Section 7(1) where the union organizer texted an employee while they were at work "asking if she would have some time to talk or whether they could meet at a coffee shop": para. 48. The panel found the text message was "an inquiry such as described in *Securiguard* and does not offend Section 7(1)": para. 48. With respect to the fact that the employee responded to the text message and then telephoned the union organizer, the panel found the employee "in essence voluntarily [decided] to take a break to do so", and the union organizer "did not have control over the timing of the call": para. 48, citing an earlier Board decision, *Pelican Bay Restaurant Inc.*, BCLRB No. 46/84. In these circumstances, the panel found the union organizer did not breach Section 7(1).

64 In my view, the decision in *Symons* is consistent with earlier Board decisions concerning circumstances in which a union will be found to have breached Section 7(1) of the Code. As the panel in *Symons* noted, it is well-established that union organizing may take place during work breaks. This includes not only during designated work breaks but also when an employee who has flexibility chooses to take a break from work to engage with the union organizer. Since this is permitted, the Board has found it is not a breach of Section 7(1) for a union organizer merely to inquire whether an employee is on a break or would have time to talk later.

65 If the employee indicates they are at work, not on a break, and they do not wish to take a break to talk, then it would be a breach of Section 7(1) of the Code for the union organizer to continue to communicate or engage with the employee: *Securiguard*. However, merely inquiring whether an employee is willing to engage in a discussion about joining a union does not breach Section 7(1), even if that employee is at work and on duty: *Securiguard* and *Symons*. I find this is so whether the inquiry occurs in person, as was the case in *Securiguard*, or via phone or text message, as was the case in *Symons*, and is the case with respect to the remaining messages before me.

66 The Employer submits *Symons* is distinguishable because in that case, the union's inquiries were made to employees' personal cell phones, while in the present case, the Union Organizer's text messages were sent to employees' work cell phones.

67 With respect to the messages sent to employees' work cell phones, I note the Union does not necessarily concede that all messages went to work cell phones as opposed to personal cell phones that employees may have used or accessed while at work. In my view, however, whether the messages breached Section 7(1) of the Code does not turn on whether they were sent to the employees' personal or work cell phones.

68 In the present case, the Employer says it requires its employees to attend to messages on their work cell phones except when they are on break. Accordingly, it says, the Union Organizer's messages to its employees' work cell phones necessarily breached Section 7(1) of the Code because employees were obliged to attend to them while they were on duty at work. However, I find that the Union Organizer's messages to Recipients 2, 3, and 4 in this case were of the same nature as the inquiries in *Securiguard* and *Symons*.

69 The evidence shows the Union Organizer sent one short text message to Recipient 2 and Recipient 4. There is no evidence or assertion the Union Organizer sent multiple messages to these employees. An additional text message was sent to Recipient 3 to confirm the Union Organizer's intended recipient of the text message. I find that these text messages were, in essence, invitations to engage with the Union Organizer at a time of the employees' choosing.

70 The surrounding context of the Union's text messages persuade me that they were meant to be an invitation to engage. The communications were text messages. The chosen medium of communication was not a face-to-face interaction at the employees' place of employment or even a phone call where one could reasonably expect more prolonged interaction between employees and the Union Organizer that employees could not easily disengage from.

71 Furthermore, I find the Board's comments in *Symons* noting that it is incumbent on employees to "hang up once [they] realized it was a call from [u]nion organizers" apply with greater force to text messages: para. 45. I find that Recipients 2, 3, and 4 would have or ought to have realized immediately that the text message was from the Union. The Union Organizer introduced himself as being from the Union at the outset of each text message. At that point, it was incumbent on the employees to disengage from the text message if they did not want to take a break from work.

72 I find the fact that the employees in this case would have had to check their work cell phones on receiving the Union's message does not change the outcome. There is no suggestion this is the kind of workplace where employees' work cannot be interrupted by the need to attend to a message on their work cell phone. I find the brief inconvenience of viewing the Union's message is akin to the inconvenience of being asked about taking a break, and it does not give rise to a breach of Section 7(1) of the Code. This finding is consistent with the Board's view that Section 7(1) of the Code does not provide employers with absolute protection against disruption; instead, some inconvenience may well be inevitable given the need to balance competing rights under the Code: *Coast Mountain*.

73 On balance, considering the Union's conduct in relation to the purpose of the prohibition in Section 7(1) of the Code, I find the inquiry from the Union in the text messages to Recipients 2, 3, and 4, in these particular circumstances, was not a breach of Section 7(1): *Securiguard* and *Symons*.

74 Finally, I address the assertion that the messages were sent to phone numbers of cell phones owned and provided by the Employer. I find the fact that the Employer owns and provides the cell phones to employees for work use is akin to the fact that the Employer owns or rents the workplace and provides it for work use by employees.

75 The Board has continually held that Section 7(1) of the Code does not prohibit a union from persuading employees to join the union on employer property, provided that the attempt to persuade is not during working hours: *Jim Pattison*. Indeed, the Board has found that Section 7(1) can apply even where union organizing takes place off the property of the employer, but where the employee performs work: *Securiguard* and *Gateway Casinos*.

Accordingly, I find the application of Section 7(1) does not differ because the Union's inquiries were sent to employees' work cell phone numbers.

76 For the reasons given, I find it is not established that the Union breached Section 7(1) of the Code as alleged by the Employer. In light of this conclusion, I find it unnecessary to deal with arguments of the Union concerning the application of Section 7(1) where the union organizer is not physically present at the workplace. It is also unnecessary to address the *Charter* challenge, as it was made in the alternative in the event I had found the Union breached Section 7(1). As the Attorney General notes, *Charter* challenges should not be addressed where the matter can be decided on other grounds.

V. CONCLUSION

77 For the reasons above, I dismiss the Application.

LABOUR RELATIONS BOARD

RENE-JOHN NICOLAS
RENE-JOHN NICOLAS
VICE-CHAIR

End of Document