INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ALLIED WORKERS, LOCAL 119, Applicant v. NORTHERN INDUSTRIAL CONTRACTING INC., Respondent

LRB File Nos. 183-13 & 227-13; October 28, 2013
Vice-Chairperson, Steven D. Schiefner; Members: Ken Ahl and Bert Ottenson

For the Applicant Union: Mr. Larry W. Kowalchuk
For the Respondent Employer: Mr. Larry F. Seiferling, Q.C.

CERTIFICATION – Practice and Procedure – Objection to Conduct of Representation Vote – Trade union files certification application with Board – Executive Officer orders pre-hearing vote and appoints agent to conduct vote – Agent conducts vote using mail-in balloting procedure – Employer argues that mail-in balloting procedure not permitted by regulations enacted pursuant to Trade Union Act and that irregularities in conduct of vote tainted voting process – Board satisfied that agent had authority to modify procedure prescribed in the regulations sufficient to enable mail-in balloting – Board also satisfied that, under the circumstances, any non-compliance that occurred was not sufficient to render the representational vote void.

CERTIFICATION – Practice and Procedure – Eligibility to vote – Trade union argues that employees should be eligible to vote if they were employed on the date of application irrespective of whether or not they continued to be employed on date of voting – Employer argues that use of mail-in balloting created confusion as to whether or not employees were eligible to vote – Board confirms requirement that, to be eligible to participate in a representational vote, employees must be employed both on the date the certification application is filed with the Board and when the vote is conducted – Board determines that, when a mail-in balloting procedure is used, employees must continue to be employed when voting process begins, being the date ballots are mailed to eligible voters.

Regulations and forms, Labour Relations Board, s. 26 & 35.

REASONS FOR DECISION – PRELIMINARY MATTERS

Background:

[1] Steven D. Schiefner, Vice-Chairperson: These proceedings involve an objection to the conduct of a representational vote conducted in a certification application

pending before the Saskatchewan Labour Relations Board (the "Board"). The objection was filed by the subject employer[1], being Northern Industrial Contracting Inc. (the "Employer"). The trade union is the International Association of Heat and Frost Insulators and Allied Workers, Local 119 (the "Union").

[2] On July 24, 2013, the Union filed a certification application[2] with the Board seeking to represent its traditional craft unit of insulators (i.e.: insulators, insulator apprentices, and insulator foreman) employed by the Employer. In its application, the Union estimated that there were three (3) employees in the unit. Satisfied on the face of the Union's application that the Union enjoyed the support of a sufficient number of employees within the proposed bargaining unit, the Board's Executive Officer issued a direction for vote on July 30, 2013. The direction for vote read in part as follows.

> *DIRECTION FOR VOTE*
>
> *THE LABOUR RELATIONS BOARD, pursuant to Sections 5(a), (b) and 6 of The Trade Union Act, HEREBY ORDERS:*
>
> *(1) That a vote by secret ballot be conducted among all employees, who were employed within the said unit as of July 24, 2013, to determine whether or not the said employees wish to be represented by the Union, for the purpose of bargaining collectively with their Employer;*
>
> *(2) That Fred Bayer, Board Registrar, or his designate, is appointed Agent of the Labour Relations Board for the purpose of conducting the vote directed to be taken herein by this Order; and*
>
> *(3) That the Agent of the Board shall conduct the said vote in accordance with Saskatchewan Regulations 163/72, Clause 26 of those Regulations subject to the following conditions:*
>
> *(a) the form of the ballot shall be as follows:*

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[1] The named employer in the trade union's certification application was Northern Industrial Insulation Contractors Inc. However, all parties agreed that the actual employer was Northern Industrial Contacting Inc.

[2] Application bearing LRB File No. 183-13.

Saskatchewan Labour Relations Board

SECRET BALLOT

Do you want to be represented by the International Association of Heat and Frost Insulators and Allied Workers, Local 119 for the purpose of bargaining collectively with your Employer?	*YES* ☐ *NO* ☐

PLACE AN "X" IN ONE SQUARE ONLY

(b) a Notice of the Vote, together with a list of the employees eligible to vote, shall be posted in a conspicuous place or places where the employees eligible to vote are engaged about their duties, and shall be posted for a time agreed to by the parties, before the time fixed for the taking of the vote; and

(c) upon the completion of the vote, the Agent of the Board shall file a report in accordance with Clause 27 of the Saskatchewan Regulations 163/72.

[3] On or about August 6, 2013, the appointed agent determined that a mail-in balloting procedure should be utilized and issued a notice of vote which read in part as follows:

NOTICE OF VOTE

To: All Insulators, Insulator Apprentices and Insulator Foremen employed by Northern Industrial Insulation Contractors Inc. in the Province of Saskatchewan.

TAKE NOTICE THAT, pursuant to a direction of the Labour Relations Board dated July 30th, 2013, a true copy of which is annexed hereto, a vote will be conducted by secret ballot through a mail in process for a period of twenty-one (21) days subsequent to the date the package is advanced to the eligible voter, by the Registrar of the Labour Relations Board to determine whether or not the employees to whom this notice is directed to wish to be represented by the International Association of Heat and Frost Insulators and Allied Workers, Local 119, for the purpose of bargaining collectively with their Employer.

SECRET BALLOT

This vote will be conducted by secret ballot under the direct supervision of an agent of the Labour Relations Board through a mail in balloting process.

HOW TO VOTE

This package includes a ballot at page two (Mauve Ballot). You may mark your ballot, fold it and it must be placed in the small envelope provided. Then the small envelope must be placed in the larger white envelope containing your name and occupation, which is then to be placed into the third self addressed envelope for

> *deposit into a postal box. It must reach this office no later than 21 days from the date upon which it was mailed to you (August 6, 2013) that being August 27th, 2013.*
>
> *ELIGIBLE VOTERS*
> *Those eligible to vote shall be the persons whose names appear below, and who, at the time of voting, are still in the employment of the employer referred to above.*
>
> *Pierre-Andre Breton Cynthia Filion Jamie Bergenow*
>
> *"Fred Bayer"*
> *Returning Officer*
> *Labour Relations Board*

[4] The Notice of Vote identified the names of three (3) individuals as being eligible to vote subject to the condition that they continued to be employed "*at the time of voting*" and mailed voting packages (i.e.: ballots) to these three (3) individuals. On or before the close of balloting on August 27, 2013, all three (3) ballots were returned to the Board's agent.

[5] On September 5, 2013, counsel for the Employer filed an objection to the conduct of the vote conducted by the agent of the Board. Counsel identified two (2) general areas of concern with the voting process. The first concern was that the voting procedure used by the Board's agent did not comply with the requirements of section 26 of the *Regulations and forms, Labour Relations Board*, being Saskatchewan Regulations 163/72 (effective August 1, 1972), as amended by Saskatchewan Regulations 225/81 and 104/83 (the "Board's *Regulations*" or the "*Regulations*"). The Employer took the position that the use of a mail-in balloting process was neither anticipated by, nor permitted by, the Board's *Regulations*. For example, the Employer noted that section 26 of the *Regulations* directed the Board's agent to establish polling places and permitted the Employer to have a scrutineer present during the voting process. However, because a mail-in balloting procedure was used, no specific polling place was established and the Employer was denied the opportunity to have a scrutineer present during the voting process. Simply put, the Employer argued that the Board's *Regulations* dictate that representational votes must be conducted at a specified polling place and at a specified date and time(s) and that eligible employees must attend at the appointed place and at that time to vote and that both the subject trade union and employer have the right to have scrutineers present during the voting process to ensure that no irregularities in the voting process occur. The Employer took the position that no other voting process is anticipated by or permitted under the *Regulations*. As the voting procedure utilized by the Board's agent did not conform with these requirements, the Employer argues that the voting procedure was irretrievably tainted and must be quashed.

[6] The second concern was that the voting process was initiated too quickly by both the Board's Executive Officer and our agent. The Employer argued that errors occurred in the list of eligible voters and that it was denied a fulsome opportunity to express its facts and opinions to its employees on the subject of collective bargaining because the voting occurred so quickly. With respect to eligible voters, the Employer argued that there was another employee (described by the Employer as a "foreman") working within the scope of the Union's bargaining unit that was not included on the list of eligible voters and was not provided a ballot by the Board's agent. In addition, the Employer argued that two (2) of the employees identified as eligible were no longer employed by the time the vote was conducted and thus should have not been on the list of eligible voters. The Employer argued that the Board's agent should have taken more time to consult with the Employer because doing so would have ensured that no errors occurred in establishing the voter's list. In addition, the Employer argued that it should have had input on the question of whether or not a mail-in balloting procedure should be utilized. The Employer argued that there was no obvious reason why the traditional voting procedure was not utilized to conduct this representational vote. Finally, the Employer noted that *The Trade Union Act*, R.S.S. 1978, c.T-17 (the "*Act*") was amended to 2008 specifically to give employers the right to communicate facts and opinions to employees, including facts and opinions on the subject of collective bargaining. The Employer took the position that the voting process was initiated before the Employer had a fulsome opportunity to exercise its rights under the *Act*. The Employer argued that these additional concerns demonstrated that the voting process used by the Board's agent was fundamentally flawed and must be set aside.

[7] The Union, on the other hand, took the position that clause 26(h) of the Regulations authorized the Board's agent to modify the voting procedure as he deemed necessary, up to and including the utilization of a mail-in balloting procedure. The Union also noted that mail-in balloting has been used by this Board for a number of years and is an accepted method of conducting representational votes.

[8] The Union argued that the Employer's desire to provide facts and opinions to its employees was merely a thin veil over its true objective of dissuading employees from supporting the Union. The Union took the position that employers have no legitimate role in an employee's decision as to whether or not they wish to be represented by a trade union. The Union argued that the potential that employers will attempt to persuade its employees from

supporting unionization is the very reason that representation votes are conducted quickly. The Union argued that this Board should infer an anti-union animus from any desire on the part of an employer to communicate with employees prior to a representational vote.

[9] With respect to the list of eligible voters, the Union argued that, in certification applications, the Board should not require both that an employee be employed within the scope of the bargaining unit on the date the Union files its application and that he/she continue to be so employed on the date the vote is conducted. The Union argued that imposing a requirement that an employee remain employed until the date the vote is conducted both permits employers to influence the result of a representational vote by laying off all or a portion of its workforce prior to the conduct of the vote and disenfranchising employees, who for their own reasons, may choose to end their employment relationship prior to the conduct of the representational vote. The Union argued that, in certification application (or at least in the present application), the only date this Board should utilize to determine eligibility to vote ought to be the date the Union filed its certification application.

[10] With respect to the individual that the Employer suggested was missed from the voters list, the Union argued that there could have been a number of valid reasons that this person was excluded from the voters list, including the potential that he was out-of scope at the time the Union filed its certification application and was only moved by the Employer into a position within the scope of the Union's bargaining unit after the certification application was filed in furtherance of the Employer's desire to influence the result of the representational vote.

[11] In reply, the Employer disputed the Union's suggested that the only relevant date for determining eligibility on representational votes is the date a certification application is filed with the Board. The Employer noted that the practice of this Board has always been to require that, to be eligible to participate in a representational vote, employees must be employed both on the date a certification application is filed with the Board and on the date of the vote. While the Employer argued that the use of a mail-in balloting procedure may have caused confusion in determining the "date of the vote", there is no reason to discard the requirement that employees must continue to work within the scope of the bargaining unit until the date of the vote to maintain their eligibility to participate in the representational question.

[12] The Employer's objection to the conduct of vote was heard by the Board on October 15, 2013 in Regina Saskatchewan. By agreement of the parties, no witnesses were called.

Relevant statutory provision:

[13] Sections 26 and 35 of the *Regulations and Forms, Labour Relations Board*, read as follows:

> ***26*** *Where, pursuant to the provisions of the Act, the board directs a vote to be taken by secret ballot, the chairman shall appoint an agent to conduct a vote, and such agent shall, subject to such conditions as may be prescribed in the direction and with reasonable dispatch:*
>
> *(a) determine the list of employees eligible to vote;*
>
> *(b) determine the form of the ballot;*
>
> *(c) determine the date or dates and hours for taking the vote;*
>
> *(d) determine the number and location of the polling places;*
>
> *(e) prepare a notice or notices of the vote according to Form 13 and direct posting thereof;*
>
> *(f) act as returning officer and appoint such deputy returning officer or officers and poll clerk or clerks as may be necessary;*
>
> *(g) invite the employer affected and any trade union whose name appears on the ballot each to appoint one scrutineer for each polling place and permit each scrutineer to be present at the polling place during the hours for the taking of the vote and while the ballots are being counted;*
>
> *(h) give special directions or instructions as he may deem necessary for the proper conduct of the vote.*
>
> *. . .*
>
> ***35*** *Noncompliance with any of these regulations shall not render any proceedings void unless the board shall so direct.*

Analysis and Conclusion:

[14] In 2008, *The Trade Union Act* was amended to institute a requirement that employees vote prior to certification being granted by this Board. A representational vote was not mandatory under the legislation prior to 2008. While the Board had the authority to order that

a representational vote be conducted prior to the amendment, the long standing jurisprudence of the Board was to accept card evidence of support and to only direct a representational vote in a certification application in limited circumstances (not relevant to the present application). With the 2008 amendment to the *Act*, Saskatchewan adopted a mandatory vote regime, wherein the Board must now direct that a representational vote be taken (by secret ballot) in certification applications to determine what trade union, if any, has the support of a majority of employees in a workplace. In doing so, the legislature moved Saskatchewan from what had previously (and somewhat inaccurately) been referred to as an "automatic certification" system to a "mandatory vote" system. Since that time, the Board has appointed agents to supervise our representational votes and our agents are given some discretion in how these votes are conducted.

[15] The agents who have been appointed by the Board to supervise our representation votes utilize both traditional polling and mail-in balloting procedures depending on the circumstances of a particular application. Both procedures have been used since Saskatchewan adopted a mandatory voting system. The Employer argues that utilizing a mail-in balloting procedure is inconsistent with the express provisions of the Board's *Regulations*. With all due respect, we are not persuaded by this argument. Section 26 of the *Regulations* prescribes procedures to be followed by the Board's agents in the conduct of our representation vote. However, clause 26(h) of those *Regulations* also grants our agents the discretion to modify these procedures and to institute special directions or instructions if he/she deems it necessary for the proper conduct of the vote. Mail-in balloting is an accepted voting procedure in many jurisdictions, including Federal and other elections, and has been successful utilized by this Board for the past number of years. In our opinion, the agents we appointed to conduct our pre-hearing representational votes have the option to utilize a mail-in balloting procedure if they deemed it necessary to do so in the circumstances of that application.

[16] Even if clause 26(h) does not grant sufficient discretion to our agents to utilize a mail-in balloting procedure, s. 35 of the *Regulations* provides that such non-compliance does not render the proceedings void unless we so direct. With all due respect, the use of a mail-in balloting procedure does not involve a substantial variance from the requirements set forth in s. 26 of the Board's *Regulations*, save in two (2) respect. Firstly, a polling place is not utilized. Rather employees vote wherever they chose to complete their respective ballots. Secondly, it is not possible for the parties to have scrutineers present during the voting process, as employees complete their ballot in the location of their choosing. In our opinion, neither of these variances

from the voting requirements specified in the *Regulations* is insufficient for this Board to declare the results of the mail-in balloting procedure void*, per se*. It is a reality of any mail-in balloting procedure that polling places are not established and that the parties are unable to have scrutineers present during the voting process. However, the benefits of special balloting procedures, including mail-in balloting, are well recognized in elections throughout this country. These benefits include, *inter alia*, efficiency and increased voter participation. In our opinion, the controls instituted by our agents provide a measure of assurance similar to that previously provided by scrutineers. These controls include the agents' efforts to ensure that the list of eligible voters is accurate[3], as is the mailing address of eligible voters. Granted, these controls are not the same as having scrutineers present during the voting process. However, in our opinion, the benefits of utilizing mail-in balloting outweigh the concerns about the reduced role of scrutineers in the process. To which end, we note that the Employer continues to have the right to have a scrutineer present during the tabulation of the results when mail-in balloting is used.

[17] The Employer also argues that the decision to conduct a representational vote was taken too quickly. For example, the Employer argued that it did not have a fulsome opportunity to provide facts and opinions to its employees prior to the conduct of voting. The Employer's position was that employees would benefit from information from both applicant trade unions and affected employers before being called upon to decide the representational question. With all due respect, we are not persuaded that employers need more time prior to the conduct of a representational vote for the purpose of communicating with its employees than we currently provide. It has long been recognized by labour boards in other jurisdictions that representational votes ought to be conducted as soon as possible following the receipt of an application wherein the representational question arises. Pre-hearing votes are an accepted means of capturing the wishes of employees on a timely basis and preserving that information for the point in time when the Board is able to make its determination on the representational question. See: *United Steel Workers v. Robert Buyaki & Edgewood Forest Products Inc,* [2013] CanLII 29666 (SK LRB), LRB File No. 062-13.

[3] The list of eligible voters established by our Board agents tend to be over-inclusive; permitting the Board to make final determinations on eligibility if necessary.

[18] In the present application, the Employer believes that its employees would benefit from its facts and opinions. In the *Buyaki* case, *supra*, the trade union believed that the subject employees needed to know the results of pending grievances proceedings before being called upon to decide the representational question. On other occasions, this Board has been asked to delay the conduct of representational votes pending the results of first collective agreement applications. See: *Colin Lesyk v. United Food and Commercial Workers, Local 1400 & Barrich Farms, et. al*., 2009 CanLII 44583 (SK LRB), [2010] 181 C.L.R.B.R. (2d) 47, LRB File Nos. 094-09 & 111-09. See also: *Gordon Button v. United Food and Commercial Workers, Local 1400 & Wal-Mart Canada Corp.*, 2010 CanLII 90104 (SK LRB), LRB File Nos. 096-04, 038-05, 001-09, 166-10, 177-10 &184-10. In each of these cases, the Board has declined these requests and has articulated its policy that representational votes ought to be conducted as soon as possible and without delay following the receipt of an application wherein the representational question arises.

[19] This Board has little doubt that most employers would appreciate a fulsome opportunity to communicate with their employees prior to a certification vote, just as trade unions would appreciate the same opportunity prior to a vote on a rescission application. However, as this Board noted in the *Buyaki* case, *supra*, pre-hearing votes are utilized for the express purpose of shielding employees from the undue influences and the inevitable pressures associated with campaigns in the workplace pending representational determinations by the Board. While there may well be information that may be of benefit to employees in deciding the representational question, the longer the delay between the filing of a certification (or a rescission) application and the conduct of the representational vote, the greater the potential for undue influences and coercion to occur, intentional or otherwise. In our opinion, it is far more important that employees be shielded from these influences and the inevitable pressures associated with a representational campaign in the workplace than any attempt to optimize the information available to employees in the belief that employees are unable to decide the representational question for themselves without more information. For these reasons, this Board has adopted a general policy that pre-hearing votes should be used and that they should be conducted with reasonable dispatch.

[20] To be specific, our policy objective is to have representational votes conducted within days (preferably as few as 5 to 10 days) following the receipt of any application whether the representational question arises (and where the application appears on its face to be in order

and meets the threshold requirements of the *Act*). In our opinion, doing so captures the wishes of employees on a timely basis and provides the best protection from undue influences and coercion, intentional or otherwise. Should an employer desire to communicate facts or opinions to their employees, the process used currently by the Board provides a modest opportunity to do so. In light of the not-insignificant risks associated with an employer attempting to communicate with employees about collective bargaining at this sensitive period of time, in our opinion, the amount of time provided is sufficient. Certainly, in the present application, the Employer would have had more than a sufficient period of time within which to communicate its views to its employees if it desired to do so.

[21] With respect to the issue of the list of eligible voters, the parties, by agreement, did not provide evidence to the Board as to the employment status of any of the subject employees. As a consequence, we are unable to rule on any specific issue of eligibility. However, we can provide the parties with the following guidance, which may be of assistance.

[22] With respect to the individual that the Employer believed should have been on the voters lists (and provided a mail-in ballot package), this Board would need evidence that he/she was performing duties within the scope of the Union's bargaining unit at the time the Union filed its certification application with the Board and that the duties of this position continued to fall within the scope of the Union's bargaining unit until the time of the representational vote. While many factors may influence our determination, it is sufficient to say that this Board's jurisprudence with respect to the application of the managerial exclusion is relatively well settled. In the event this individual should have been included on the list of eligible voters, the Board's determination as to how to cure this defect will likely be influenced by the statistical significance of his vote. Beyond these observations, there is little more guidance this Board can provide on the subject without evidence. As a consequence, we leave this matter in the hands of the parties. If the parties are unable to come to an agreement on the status of this individual, leave is granted to return to the Board for a determination.

[23] The Union asked that eligibility to participate in the representational question in the present application should be determined based solely on employment status as of the date the Union's application was filed with this Board. While we understand the Union's desire for the Board to adopt such a policy, in our respectful opinion, doing so would represent an unhelpful departure from the long standing principles that have been established by this Board. As was

noted by this Board in *Calvin Ennis v. Con-Force Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 1985, et.al.*, [1992] 2nd Quarter Sask. Labour Report 117, LRB File Nos. 185-92 & 188-92, the general standard for determining voter eligibility when a representational vote is ordered is that a person must be an employee on the date of the application and on the date of the vote. As the Board noted in that case, everyone is well aware that this rule neither achieves perfect predictability nor perfect democracy. Rather, it represents a compromise intended to give effect to s. 3 of the *Act* (by ensuring that the representational question is left in the hands of the people who have a legitimate interest in the issue) while, at the same time, it provides a bright line from which the parties can plan their affairs with a reasonable degree of certainty and predictability.

[24] Having considered the arguments of the parties, we are not persuaded that it would be appropriate or is necessary in law or policy to modify this test in the present application. Therefore, to be eligible to participate in the representational vote in the Union's certification application, employees must be employed on the date of the application and on the date of the vote. Absent evidence, this Board can make no determination as to whether or not the ballots marked by these two (2) individuals ought to be included in the tabulation of representational vote. We also leave this issue in the hands of the parties. If the parties are unable to come to an agreement on the status of these individuals, leave is granted to return to the Board for a determination.

[25] However, to aid the parties in attempting to resolve the issue of eligibility, further guidance may be of assistance. In our opinion, when voting is conducted by mail-in balloting, voting is deemed to have commenced as of the date ballots are mailed to employees. This is the point in time when voting theoretically begins; it is analogous to the opening of polls in a traditional polling scenario. While we admit that using this point in time is somewhat arbitrary, in our opinion, this point in time provides clarity (brightens the line, so to speak) and represents the kind of reasonable compromise that has come to be the hallmark of our other governing eligibility in a representational vote. For purposes of clarity, in the present application, to be eligible to participate in the representational question, the employees must have been employed within the scope of the Union's bargaining unit as of July 24, 2013 (the date when the Union's application was filed with the Board) and must have continued to be so employed as of August 6, 2013 (the date ballots were mailed to employees) to maintain their eligibility.

DATED at Regina, Saskatchewan, this 28th day of October, 2013.

LABOUR RELATIONS BOARD

Steven D. Schiefner,
Vice-Chairperson