



**ATCO STRUCTURES & LOGISTICS LTD., Applicant v. UNITE HERE, LOCAL 47,  
Respondent**

LRB File No. 169-14; November 27, 2014

Chairperson: Kenneth G. Love, Q.C.; Board Members: Bert Ottenson and Allan Parenteau

For the Applicant: Daniel R. Bokenfohr  
For the Respondent: David G. Mercer

**Objection to the Conduct of a Vote – Board conducts certification vote by mail-in ballot – Following a one vote majority vote in favour of certification Employer objects to the conduct of the vote.**

**Mail-in ballot – Employer alleges that mail-in ballot was an unreasonable exercise of authority by Board Agent given the nature of the workplace – Evidence is all *ex post factum* and would require the Board to second guess decisions taken by Board Agent – Board declines to do so.**

**Inability to vote – Employees provide evidence that they had been unable to vote – Reasons given were related to their personal situation and were not caused by mail-in process or actions of the Board agent.**

**Eligibility to vote – Employer urges Board to reconsider eligibility rule in mail-in ballots – Board declines to provide exception or reconsider the rule.**

**REASONS FOR DECISION**

**Facts:**

[1] **Kenneth G. Love, Q.C., Chairperson:** Unite Here, Local 47, (the “Union”) applied to be the certified bargaining agent for a unit of employees of Atco Structures & Logistics Ltd. (the “Employer”) by an application filed June 12, 2014. A vote of the employees of the Employer was conducted by mail-in ballot, with ballots mailed by registered mail to employees

on July 3, 2014, which ballots were to be returned to the Board not later than twenty-one (21) days from the date of mailing, which was July 24, 2014.

**[2]** Ballots that were returned to the Board by July 24, 2014 were counted by the Board on July 31, 2014. The results, as certified to the Board by the Board Agent were:

No. of eligible voters	49
No. of votes for the Union	16
No. of votes against the Union	15
No. of spoiled ballots	0
No. of ballots cast	31
No. of employees not voting	18

**[3]** On August 5, 2014, the Employer filed an objection to the conduct of the vote by the Board. The objection was on the following grounds:

1. *The use of a mail-in ballot to home addresses for a workforce that does not return to their home during a 21 day rotation.*
2. *Short time frame to respond depending on an employee's 21 day rotation.*
3. *Eligible voters reported they did not receive a ballot.*
4. *Employees omitted from the list of eligible voters; and*
5. *Employee on the eligible voters list who resigned the day after the ballots were mailed.*

**[4]** At the hearing, the Employer led evidence from some of the employees affected by the vote as well as Ms. Andrea Edwards, a Support Services Advisor for the Employer. Ms. Edwards provided the Board with tables showing the shifts worked by employees. She noted that the shift rotation was twenty-one (21) days on and seven (7) days off. There were two (2) departments affected, the Kitchen and Housekeeping. Each department has four (4) different rotation schedules for their twenty-one (21) days on and seven (7) days off.

**[5]** Ms. Edwards expressed her opinion that an on-site vote could have been conducted by the Board, if such vote was conducted on two (2) consecutive Tuesdays. She acknowledged, however, that even if the vote was conducted in this manner, someone might still be missed if there was a change in schedule, illness or other reason.

**[6]** After the conduct of the vote and the counting of the votes, counsel for the Employer asked her to prepare a list of employees showing where they were during the voting period. She also acknowledged that she did not write or phone anyone regarding conducting an on-site poll vote on two (2) consecutive Tuesdays.

**[7]** Ms. Edwards testified that she was not involved in the preparation of the voters list information provided to the Board. She did, however, ensure that the Notice of Vote was placed in every employee's room and posted in the workplace.

**[8]** Ms. Edwards also testified concerning Crystal Stucken, who was an employee listed on the voter's list. Ms. Stucken had a family issue and requested that she be allowed time off to attend to that issue. Ms. Edwards testified that she reviewed the work schedules, but was unable to accommodate Ms. Stucken's request. She testified that Ms. Stucken did not take the news well and left the workplace. She wasn't sure if Ms. Stucken intended to quit her employment or what her status was. She ultimately did not return to the workplace and was sent<sup>1</sup> a Record of Employment ("ROE") which listed "Quit" as the reason for issuance of the ROE. Ms. Stucken was paid for both July 3 and July 4, 2014.

**[9]** The Board also heard from Lise Dugas, the Manager of Human Resources and Labour Relations for the Employer. She testified that she spoke to the Board's Agent with respect to the proposal to conduct the vote by mail, suggesting to him that a mail-in ballot would not work in this situation. She testified that she was advised that the Board's regulations provided for a mail-in ballot and the Board insisted that the poll be conducted in that fashion,

**[10]** Ms. Dugas testified that she was responsible to prepare the list of employees who were eligible to vote. She testified that she initially requested the necessary information from Human Resources. Ms. Dugas further testified that she did not realize that the information she would receive would be inaccurate because Employee's start dates were recorded in that data set by the first pay date, not the hire date. She testified that, when she realized there were errors in the data she provided, she kept in touch with the Board regarding those errors.

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<sup>1</sup> But not until September 12, 2014

[11] Ms. Dugas testified that she received a hand written document on August 4, 2014 from some employees who felt that they had not had a fair opportunity to vote.

[12] At the commencement of the hearing, the Board accepted an Affidavit from Andrea Ward, an employee, subject to the Union having a right to cross-examine the deponent should it determine that to be necessary or desirable. In the final result, the Union did not ask that Ms. Ward be made available for cross-examination.

[13] The Affidavit of Ms. Ward states that she was unable to receive her ballot at her address in Calgary because she traveled on her days off. She deposed that during the period she was off work (July 17 to 23, 2014) she traveled to British Columbia to visit her father who was visiting from Africa. Ms. Ward also deposed that she asked her cousin, who resided at her mailing address, to receive her ballot and vote for her. Unfortunately, her cousin was on vacation during the time in question and was therefore not able to vote for her as requested.

[14] Mr. Dustin McKinney testified as well. He was a baker assistant in the kitchen department of the workplace. He testified that his mailing address was a post office box in Millet, Alberta. He testified that he was off work from July 15 to 21, 2014 and returned home. He testified that he shares the post office box with his parents, but he does not have a key for the box.

[15] Mr. McKinney testified that while he was home, he did not attend at the post office to check for mail. He testified that he had spent most of his time at the lake and relied upon his mother to let him know that he would have registered mail. Mr. McKinney also testified that he would not want or authorize his mother to pick up registered mail addressed to him.

[16] Mr. McKinney testified that he contacted the Board's office on October 7, 2014 to complain that he did not receive a ballot. An employee of the Board reviewed the registered mail records and advised him that the ballot sent to him was received by the post office in Regina on July 3, 2014 at 5:52 PM. It traveled to Calgary and arrived there on July 4, 2014 at 10:07 PM. On July 7, 2014, the post office in Millet attempted delivery of the item by leaving a notice card regarding the delivery. That notice advised that the item would be returned if not collected within ten (10) days.

**[17]** Mr. McKinney further testified that he was the person who collected the statements from the employees which were sent to Ms. Dugas.

**[18]** The Board also heard from Mitchell McGarret, who was also a kitchen department employee. His ballot was sent to his home in Barrie, Ontario where he resided with his mother. He testified that he called his mother and told her that he wanted to vote. The ballot was received in Barrie, but he testified that he was told by his mother that she was unable to pick up his registered mail. Mr. McGarret had initially been left off the employee list provided to the Board by the Employer. When the error was discovered, his name was added to the voter's list and a ballot was mailed out.

**[19]** The Board also heard from Shellaine Wahebin. She testified that she was at home from July 1 to 6, 2014. She testified that she did not check to see if she had received her ballot during that period. She testified that after she returned to work, she asked her family members if anything had arrived for her. They said nothing had been received. She returned home on her next shift rotation on July 25, 2014 and found that her ballot had been left sitting on the top of the refrigerator at her home.

**[20]** Mr. Jian Lin also testified. He is also a kitchen employee. He testified that he had moved his residence, but failed to update his mailing address with the Employer. He testified that he did, however, receive a ballot, and instructed his wife to open it, and complete the ballot in accordance with his directions and return it to the Board. He testified, however, that upon his return home he found the ballot had not been mailed by his wife as instructed. He testified that upon seeing the ballot sitting there, he said, "guess I didn't vote".

**[21]** The final witness the Board heard from was Toni Bitternose. She testified that she called her grandmother once a week to determine if she got a ballot. She also testified that on her days off during the voting period, she did not check for mail, but slept the first day (because she works the night shift) and then left immediately thereafter for Winnipeg.

**Relevant statutory provision:**

[22] Relevant provisions of the Act are as follows:

***The Saskatchewan Employment(Labour Relations Board) Regulations.*****Required information - conduct of vote**

22(1) *On filing an application pursuant to the Act and these regulations respecting a matter for which the board is authorized or required by the Act to conduct a vote, the registrar may issue a written direction to an employer of employees whom the registrar considers affected by the application requiring the employer to file with the registrar the employer's payroll records respecting those employees.*

(2) *The payroll records mentioned in subsection (1) must identify the names, positions and classifications of employees who are employed in the unit or units of employees specified by the registrar in the written direction as at the date specified by the registrar in the written direction.*

(3) *In addition to the payroll records, an employer to whom a written direction pursuant to subsection (1) is issued shall also file with the registrar the following additional information:*

(a) *the location of any workplaces at which the employees mentioned in subsection (1) are employed;*

(b) *any safety restrictions respecting access to the workplaces mentioned in clause (a);*

(c) *the hours of work of the employees at the workplaces mentioned in clause (a).*

(4) *An employer to whom a written direction pursuant to subsection (1) is issued shall file the payroll records required by this section within three business days after being served with the written direction.*

**Conduct of votes**

23(1) *In this section, "agent" means a person appointed pursuant to subsection (3).*

(2) *On the filing of an application respecting a matter for which the board is authorized or required to conduct a vote pursuant to the Act or these regulations, the board may:*

(a) *if the board considers it to be appropriate, direct that a vote of employees be conducted by secret ballot before the application is heard by the board; and*

(b) *provide any directions respecting the conduct of the vote that the board considers appropriate.*

(3) *The board may appoint as its agent the registrar or any other person who the board is satisfied*

*is independent from the parties to the application to conduct a vote required or authorized by the Act.*

(4) *If the registrar is appointed by the board as its agent:*

(a) *the registrar may delegate to one or more other persons the exercise of any of his or her powers, or the fulfilling of any of his or her duties, as agent pursuant to this section and impose any terms and conditions on the delegation that the registrar considers appropriate; and*

(b) *the exercise of any powers or the fulfilling of any duties by a delegate mentioned in clause (a) is deemed to the exercise of those powers or the fulfilling of those duties by the registrar.*

- (5) An agent shall:
- (a) act as the returning officer for the vote;
  - (b) comply with any directions given by the board respecting the vote;
  - (c) establish a list of employees who are eligible to vote;
  - (d) determine the form of the ballot to be used in the vote;
  - (e) determine whether the vote is to be conducted:
    - (i) at one or more polling places; or
    - (ii) using a mail-in balloting procedure;
  - (f) if the vote is to be conducted at one or more polling places, determine the place or places where the vote is to be conducted, together with the dates and hours for conducting the vote;
  - (g) if the vote is to be conducted using a mail-in balloting procedure, determine the date by which completed ballots must be returned to the returning officer;
  - (h) prepare a notice of vote in accordance with Form 20 (notice of vote) and issue directions to the employer respecting posting the notice of vote;
  - (i) appoint any persons whom the agent considers necessary as deputy returning officers and poll clerks; and
  - (j) if the vote is to be conducted at one or more polling places, invite the employer, any other person and the union named in the application to appoint one scrutineer for each polling place establish pursuant to clause (f) and allow those scrutineers to be present at the polling place during the hours the vote is conducted;
  - (k) if the vote is to be conducted using a mail-in balloting procedure, determine the place for counting of the ballots and invite the employer, any other person and the union named in the application to appoint one scrutineer to be present while the ballots are counted.
- (6) An agent may issue any directions or instructions that the agent considers necessary respecting the conduct of the vote.
- (7) No person shall:
- (a) fail to comply with any directions or instructions given by an agent respecting the conduct of the vote; or
  - (b) if the vote is to be conducted at one or more polling places:
    - (i) interfere, or attempt to interfere, with a person who is voting;
    - (ii) attempt to obtain information at a polling place as to how a person has voted or is about to vote;
    - (iii) canvass or solicit votes within 20 metres of a polling place while the vote is being conducted; or
    - (iv) display, distribute or post a campaign sign, button or other similar material within 20 metres of a polling place while the vote is being conducted.
- (8) In counting ballots, the agent:
- (a) shall reject every ballot on which anything is written or marked that identifies the person voting or on which no vote is marked; and
  - (b) shall accept a ballot if the employee has marked the ballot in a manner that clearly indicates the choice of the employee and notwithstanding that the employee may have marked his or her vote out of, or partly out of, its proper space or with a mark other than an "X".
- (9) On completion of the vote, the agent shall:
- (a) if there is no direction of the board to the contrary and if there is no impediment to doing so, promptly count the ballots and complete Form 21 (Report of Agent of the Board Respecting the Conduct of Vote and Counting of Ballots); or

(b) if the agent does not count the ballots promptly after the vote, complete Form 22 (Report of Agent of the Board Respecting the Conduct of Vote).

(10) Immediately after completing Form 21 or 22 as required by subsection (9), the agent shall file a copy of the completed Form with the registrar and the registrar shall give a copy of the completed Form to an employer, to a union directly affected by the vote and, if the applicant who filed the application is not an employer or union, to the applicant.

(11) An employer, other person or union directly affected by the vote that intends to object to the conduct of the vote or the results from the counting of the ballots shall file an application in Form 23 (Objection to Conduct of the Vote) within three business days after the conduct of the vote or the counting of the ballots, as the case may be.

### Employer's arguments:

[23] The Employer raised four (4) points in argument. These were:

1. Given the type of workplace, was the use of a mail-in ballot reasonable?
2. Were the procedures utilized and the three (3) week turn around time reasonable?
3. Did the Board Agent act reasonably in respect to the issues raised?
4. Was Crystal Stocken eligible to vote?

[24] In support of these arguments, the Employer relied upon the principles derived from *International Association of Heat and Frost Insulators and Allied Workers, Local 119 v. Northern Industrial Contracting Inc.*,<sup>2</sup> *International Alliance of Theatrical Stage Employees v. Inland Audio Visual Limited*<sup>3</sup> and *U.F.C.W., Local 1400 v. Handy Special Events Centre*.<sup>4</sup>

[25] The Employer argued that the primary goal of a vote of employees is to allow all eligible employees the reasonable ability to participate in the vote and to allow as many as possible to vote. The Employer argued that a mail-in ballot was a departure from the normal procedure, arguing that in hindsight, the Board should have adopted the consecutive Tuesday voting pattern.

[26] The Employer argued that the Board should have done more to assist those employees who called the Board for assistance and who tried to vote.

<sup>2</sup> [2013] CanLII 67367 (SKLRB)

<sup>3</sup> [2014] CanLII 5454 (SKLRB)

<sup>4</sup> [2013] S.L.R.B.D. No 13, 225 C.L.R.B.R. (2<sup>nd</sup>) 111, LRB File Nos. 064-12 and 081-12



[27] The Employer argued that in respect of Crystal Stocken, the Board should reconsider its rule enunciated in *Northern Industrial Contracting* that employees were eligible to vote if they were employed during the period provided for the vote. The Employer argued that a vote from an employee who quit and, as a result, had no further connection to the workplace should not be the deciding vote.

**Union's arguments:**

[28] The Union argued that the evidence provided was all *ex post factum*. None of this information was available to the Board Agent during the conduct of the vote. The Union noted that any evidence regarding Ms. Stocken having quit was hearsay.

[29] In respect of Mr. McGarrett, the Union noted that it was the Employer who had initially left him off the voter's list. In respect to Mr. McKinney, he failed to check his mail and spent the time he was home at the lake. In respect to Ms. Wahebin, the Union noted that the ballot was discovered "sitting on her fridge". In respect to Mr. Lin, the Union noted that he failed to update his address, but even when the ballot was received, his wife failed to return it. In respect to Ms. Bitternose, the Union argued that there was no evidence that she did not receive a ballot and that she slept during her time off and then left for Winnipeg.

[30] The Union argued that any objections should have been raised at the commencement of the voting process, and, in the case of Ms. Stocken, objection should have been taken during the counting of the vote.

[31] The Union argued that there was no significant magnitude of errors to call the result of the vote into question.

**Analysis:**

[32] For the reasons which follow, we are of the opinion that the results of the vote must stand and the Union's certification granted.

[33] In a free and democratic society, the right to vote is a cherished right. While there is the right to vote, that right is often not utilized by those who possess the right. Voter turnout is

often quite low for elections held for federal, provincial and municipal offices. Apart from making voting compulsory, getting individuals to exercise their mandate is difficult.

[34] Since amendments were made to *The Trade Union Act*<sup>5</sup> in 2008, the Board has been required to conduct votes in respect of applications for the acquisition of bargaining rights, a change in bargaining rights and a cessation of bargaining rights. As a result, the Board has developed significant jurisprudence with respect to the conduct of votes.

**Given the type of workplace, was the use of a mail-in ballot reasonable?**

[35] In *International Association of Heat and Frost Insulators and Allied Workers, Local 119 v. Northern Industrial Contracting Inc.*<sup>6</sup>, the Board considered the propriety of mail-in ballots. In that case, the Respondent Employer challenged the Board's authority to conduct ballots by mail. At paragraph 15, the Board said:

*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.*

[36] At the time that this decision was made, the Board did not have the specific references to a mail-in balloting process which is now contained within *The Saskatchewan Employment (Labour Relations Board) Regulations*<sup>7</sup>. Nevertheless, the Board upheld the ability of its agents to utilize a mail-in ballot in appropriate circumstances.

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<sup>5</sup> Now replaced by the provisions of *The Saskatchewan Employment Act*

<sup>6</sup> [2013] CanLII 67367 (SKLRB)

<sup>7</sup> Chapter S-15.1 Reg 1

[37] It is pure speculation, with the benefit of hindsight for the Employer to now argue that an on-site poll conducted on consecutive Tuesdays **may** have allowed greater voter participation. Unfortunately, the Board agent did not have the benefit of this information, nor was the prospect raised with him other than a general discussion regarding conducting the vote by mail-in ballot.

[38] Board Agents exercise discretion with respect to how a vote is conducted. The process used must be fair, and permit all employees eligible to vote, to cast their ballot. The process usually utilized by the Board is either a poll vote at the workplace or a mail –in ballot. On occasion, a hybrid is utilized.

[39] A mail-in ballot is most appropriate where the worksite is not easily assessable and remote. Generally speaking, a poll vote will be conducted where there is easy access to the worksite and employees are all able to vote.

[40] Neither system is perfect. On many occasions, the Board has tried, with limited success, to accommodate employees who work shifts, or where the workplace employs significant numbers of casual or part-time workers who do not work except on weekends or in the evening.

[41] A Board Agent must make a judgment call as to how the vote may best be conducted. Absent any proof or suggestion that that judgment was improperly exercised, we would be loath to interfere in the methodology adopted by the agent for the conduct of a vote. No matter what methodology is adopted by the agent, there remains the simple fact that individuals cannot be compelled to complete their ballot and vote.

[42] The Employer argues that we should “second guess” the methodology chosen by the Board Agent. We must decline to do so.

**Were the procedures utilized and the 3 week turn around time reasonable?**

[43] This question has perhaps already been answered by the analysis above. The agent is free to choose the methodology that best achieves the conduct of the vote, including the return of the ballots within three (3) weeks from their being mailed. There was no evidence

(other than the hindsight suggestions and speculation by the Employer) that a better result could have been achieved. Again, we must decline to “second guess” the agent’s determinations regarding how the vote should be conducted.

**Did the Board Agent act reasonably in respect to the issues raised?**

[44] There were two issues raised. The first was the complaint to the Board by Dustin McKinney that he did not receive a ballot. The investigation conducted by the Board revealed that a ballot had indeed been sent to him and received at Millet post office. A notice card was given by the post office to alert him that a registered letter had been received. On not being picked up, the registered letter was returned unopened.

[45] We find that Mr. McKinney’s evidence was disingenuous. In his written statement, Mr. McKinney suggests that he “never received an opportunity to vote” because he “never received a parcel card to let me know it was there”. However, he testified that he would not authorize his mother to pick up the mail for him, that he did not check himself to see if there was mail for him, and spent all of his time while at home “at the lake”. From this, we conclude that he did not make reasonable efforts to exercise the opportunity to vote that he was given.

[46] The second issue was that raised by Mr. McGarrett. His situation was somewhat similar to Mr. McKinney’s situation except that he was initially excluded from the voter’s list by the Employer, not by the Board agent. When the error was discovered, a ballot was mailed to him, but the evidence was that his mother could not collect the registered mail for him. It was received, but unforeseen circumstances prevented him from being able to cast his ballot. This was not a failure of the methodology or as a result of any actions by the Board agent. The Board agent did not act unreasonably.

**Was Crystal Stocken eligible to vote?**

[47] The Board has determined in *International Association of Heat and Frost Insulators and Allied Workers, Local 119 v. Northern Industrial Contracting Inc.*,<sup>8</sup> that employees who are employed on the date of application and who remain employed when the voting process

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<sup>8</sup> [2014] CanLII 63991 (SKLRB)

commences, that is, the date ballots are mailed to employees, are eligible to vote.<sup>9</sup> Based upon that determination, Ms. Stocken was eligible to vote.

**[48]** The Employer argues that we should reconsider this rule. We would decline to do so. It is important to have a rule that determines eligibility to vote on mail-in ballots. The rule is intended to prevent mischief by Employers in transferring or laying off employees during the voting process. The test, as noted in paragraph 28 of the decision, is an imperfect test. Nevertheless, as noted therein, it remains as the best means for this Board to promote the twin goals of democracy and predictability.

**[49]** For the benefit of the labour relations community, there must be a “bright line” test for eligibility to vote. If the Board vacillates or does not specify the rule, the result is both uncertainty and the necessity to litigate every different factual situation which may arise. That does not promote either predictability or judicial economy.

### **The Employee Evidence**

**[50]** In all of the cases raised by employees, it was not the actions of the Board Agent that prevented them from casting a ballot, but rather it was their own actions. In the case of Ms. Ward, it was travel to British Columbia. In the case of Mr. McKinney, it was his inaction in checking for mail and his refusal to allow his mother to pick it up. In the case of Mr. McGarrett, it was due to initially the Employer leaving him off the employee list, and then by his failure to authorize his mother to pick up the registered mail. In the case of Ms. Wahebin, it was the result of someone leaving the mail on her fridge and not telling her. In the case of Mr. Lin, it was due to his wife not mailing the ballot back. In the case of Ms. Bitternose, it was due to her sleeping the first day and then leaving for Winnipeg, without making any inquiry regarding the ballot.

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<sup>9</sup> See paragraph [26] *et seq.*

**[51]** For these reasons, the application is denied. The result of the vote will stand. An order certifying the Union as the bargaining representative for the employees of the Employer will accompany these Reasons.

**DATED** at Regina, Saskatchewan, this 27th day of November, 2014.

**LABOUR RELATIONS BOARD**

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Kenneth G. Love, Q.C.  
Chairperson