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; September 8, 2014
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 – Eligibility to vote – Dispute arises over eligibility of two employees to vote – While all parties agree disputed employees were working on day trade union's application was filed with Board, Employer argues that employees either quit or accepted transfers out of the province prior to conduct of representational vote – Trade Union argues that employees did not quit and that transfer to new work site was not effective until after representational vote began – Board notes 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 – Board concludes that disputed employees did not quit nor did they intend to sever their employment relationship with employer – Board satisfied that disputed employees were on leave portion of their normal shift at time representational vote began – Board concludes that, while disputed employees were transferred to project in another province, that transfer was not effective until after representational vote began – Board concludes that disputed employees were eligible to participate in representational question.

REASONS FOR DECISION

Background:

[1] Steven D. Schiefner, Vice-Chairperson: On July 24, 2013, the International Association of Heat and Frost Insulators and Allied Workers, Local 119 (the "Union") filed a certification application[1] with the Saskatchewan Labour Relations Board (the "Board") seeking to represent its traditional craft unit of insulators (i.e.: insulators, insulator apprentices and insulator foremen) employed by Northern Industrial Contracting Inc. (the "Employer"). Satisfied on the

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

face of the Union's certification application that it 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, wherein an agent of the Board was appointed to conduct a representational vote to determine whether or not the (in-scope) employees of the Employer wished to be represented by the Union for purposes of collective bargaining. The appointed agent determined that a mail-in balloting procedure should be utilized in the within proceedings and ballot packages were mailed to eligible voters on August 6, 2013.

[2] While a number of issues were in dispute at the outset of these proceedings, by the conclusion of the hearing, only one (1) issue required determination by the Board; namely, the eligibility of two (2) employees to participate in the representational question. The disputed employees were Mr. Pierre-Andre Breton and Ms. Cynthia Filion.

[3] The Employer called Mr. Sheldon Dobish, the President of Northern Industrial Contractors, and Mr. Scott Christianson, a foreman who was working for the Employer in Saskatchewan at times relevant to these proceedings. The Union called Mr. Breton to testify. Ms. Filion was unable to testify for medical reasons.

[4] For the reasons that follow, we find that both of the disputed individuals were eligible to participate in the representational question.

Facts:

[5] The Employer is an industrial contractor working in western Canada, with a head office located in Alberta. The Employer's primary field of expertise is the installation of insulation in industrial settings. Originally, the Employer was awarded a contract at the Agrium Potash Mine near Vanscoy, Saskatchewan (the "Vanscoy site"), to install insulation. The Employer began working on site in July of 2012. Upon the successful completion of its first contract, the Employer was awarded other contracts for additional work at the Vanscoy site, which work continued through into 2013. At the time the Union filed its certification application with the Board, the Employer was working on a project that involved installing insulation and cladding on duct works at the mine. For this particular contract, the Employer had four (4) employees at the Vanscoy site, including a foreman, a Journeyman insulator and the two (2) disputed employees. At that time, Ms. Filion was a 2nd year apprentice insulator and Mr. Breton was a 4th year apprentice.

[6] At about the same time as the Union filed its certification application, the Employer's foreman at the Vanscoy site, Mr. Christianson, became aware of a clarification in the specifications of the project it has been awarded. Originally, the Employer understood that the specifications for the particular contract it had been awarded called for insulation covered with aluminum cladding. However, on or about the end of July, 2013, Mr. Christianson received a clarification that the contract specifications called for steel (not aluminum) cladding. The difference being that steel cladding is harder to install. Upon receiving this information, Mr. Christianson re-evalulated the skills he felt would be needed to complete the project. While Mr. Christianson was wholly satisfied with the work being performed by both Mr. Breton and Ms. Filion, he concluded that their skills at installing steel cladding were below that required to complete the contract. As a consequence, the foreman sent a request to the project manager for employees of a higher skill level; specifically, a Journeyman Insulator and a Journeyman Sheet Metal Worker.

[7] Both Mr. Breton and Ms. Filion were working at the Vanscoy site for the Employer on July 24, 2013, the day the Union filed its certification application with the Board. Their last day of work at the Vanscoy site was July 31, 2013. At that time, they had just completed a fourteen (14) day work rotation and were going on seven (7) days of leave. When they left the Vanscoy site, they assumed they were returning; they left their tools at the site; and left their vehicle and motor home in Saskatchewan when they returned to Quebec. Mr. Christianson did not advise either of the disputed employees that he had asked for a change in employees assigned to the project. Firstly, at that point in time, Mr. Christianson had not been informed that his change request had been granted. Secondly, he knew (or at least assumed) that both employees would simply be assigned to another of the Employer's projects; albeit not at the Vanscoy site.

[8] After Mr. Breton and Ms. Filion left the Vanscoy site, a number of things happened. Firstly, the Employer's project manager for the Vanscoy site approved Mr. Christianson's request for a change in employees. Secondly, a conversation occurred between Mr. Christianson and Mr. Breton about unionization. Mr. Christianson informed Mr. Breton of his understanding (erroneous as it turns out) that the Vanscoy site was a non-union site and that there could be negative consequences for the Employer if it were unionized. Mr. Breton testified that he had worked most of his career for the Employer and that he did not want to do anything

that would injure the Employer's ability to bid for or work on projects at the Vanscoy site. On or about August 5, 2013, Mr. Breton sent the following email to Ms. Lynn Mould, an assistant in the Employer's Human Resource office:

> ***From**: **pabreton1** [mailto:pabreton1@hotmai.com]*
> ***Sent:** Monday, August 05, 2013 9:44 AM*
> ***To:** Lynn Mould*
> ***Subject:** Job*
>
> *Hi lynn, me and cynthia took the decision to not go back to vanscoy and meg energy. We signed for the local 119 sask. Union and as we seen its going to make northern in trouble and that's not what we want. So we will take an extra week off from now in quebec and I guess the only thing we have to do is quit northern so they wont be in trouble. Let me know whats happen :)*

[9] Ms. Mould responded to Mr. Breton's email on August 6, 2013 as follows:

> ***De**: Lynn Mould <lynn.mould@northern-insulation.ca>*
> ***Date:***
> ***Á:** pabreton1 <pabreton1@hotmail.com>*
> ***objet:** RE: Job*
>
> *Hello Pierre and Cynthia,*
>
> *Sorry for not getting your emails till today, we are off at 12:30 on Friday's and given the long weekend we were not back till this morning. It's unfortunate that you have made the decision to quit. They really wanted you at Meg, as I have said they needed you there due to your experience of having been there before, and a shortage of hands. The offer still stands if you choose to change your mind. Don't hesitate to call if you have any further questions or concerns.*
>
> *Thank you and regards*
>
> *Lynn Mould*
> *Recruiter/HR Assistant*
> *Northern Industrial Insulation Contractors*

[10] Mr. Breton responded later that same day with the following clarification of his earlier communication:

> ***From:** pabreton1 [mailto:pabreton1@hotmai.com]*
> ***Sent:** Tuesday, August 06, 2013 5:22 PM*
> ***To:** Lynn Mould*
> ***Subject:** TR: RE: Job*
>
> *I think we are a little bit lost in our way..i think we took the wrong word when a said quit…do you guys have any work somewhere else in Alberta?*

[11] Ms. Mould responded as follows:

> ***From:*** *lynn.mould@northern-insulation.ca*
> ***To:*** *pabreton1@hotmail.com*
> ***Subject:*** *RE: TR: RE: Job*
> ***Date: Thu, 8 Aug 2013 14:32:55 +0000***
>
> *Yes of course, they really need you at meg. The pipeline has opened up and needs a lot of manpower. Please let me know as soon as you can.*
>
> *Thank you!*
>
> *Lynn Mould*
> *Recruiter/HR Assistant*
> *Northern Industrial Insulation Contractors*

[12] The disputed employees were on leave until August 7, 2013. Thereafter, they took a few extra days of time off and returned to Saskatchewan in mid August, 2013. Although both Mr. Breton and Ms. Filion were hoping to work a little longer at the Vanscoy project, they were no longer required and did not, in fact, work any more days on that project. Rather, they were asked to and did report to work for the Employer at another project in Alberta. Mr. Breton and Ms. Filion gathered their tools from the Vanscoy site and reported to work for the Employer for a contract that it has been awarded at a site in Alberta operated by Meg Energy.

Argument of the Employer:

[13] The Employer takes the position that neither of the two (2) disputed employees were eligible to participate in the representational question. While admitting that they were both employees working within the scope of the Union's proposed bargaining unit on the date the Union filed its certification application, the Employer takes the position that both Mr. Breton and Ms. Filion severed their employment relationship with the Employer (by quitting) or were transferred out of the scope of the bargaining unit prior to the conduct of the representational vote.

[14] The Employer relies on this Boards' decision in *United Brotherhood of Carpenters and Joiners of America, Local 1985 v. Gabriel Construction Ltd.*, [2001] Sask. L.R.B.R. 869, LRB File No. 167-01, as standing for the proposition that, for the disputed employees to remain

eligible to participate in the representational question, they must continue to have a substantial connection with the subject workplace until the conduct of the representational vote. The Employer takes the position that, by the time the representational vote began (August 6, 2013), the disputed employees no longer had a substantial connection with the proposed bargaining unit; being the Employer's operations in Saskatchewan. In the first instance, the Employer argues that Mr. Breton's email of August 5, 2013 indicated that the disputed employees quit, severing their employment relationship with the Employer both within and outside of Saskatchewan. As such, the Employer argues that neither Mr. Breton nor Ms. Filion were eligible to participate in the representational question.

[15] Secondly, the Employer argues that, even if the disputed employees didn't mean to quit, they clearly expressed their desire to no longer work for the Employer at the Vanscoy site even if they did so for erroneous reasons. As that project was the only project the Employer was working on in Saskatchewan, the disputed employees voluntarily removed themselves from the bargaining unit. The Employer argues that this, too, ought to exclude them from participating in the representational question because, by the time the representational vote began, they no longer had a substantial connection with the Employer's operations in Saskatchewan.

[16] Thirdly, the Employer argues that, even if the disputed employees wanted to return to work at Vanscoy site, there was no longer any work for them there at that site because they did not have the right skill sets for the balance of the Employer's contract. In this regard, the Employer notes that neither Mr. Breton nor Ms. Filion returned to work at the Vanscoy site. Rather, they were dispatched to the Employer's operations in Alberta. In any event, the Employer argues that prior to August 6, 2014, the disputed employees no longer had a substantial connection with the Union's proposed bargaining unit; being the Employer's operations in Saskatchewan.

Argument of the Union:

[17] The Union argues that neither Mr. Breton nor Ms. Filion quit or desired to quit working for the Employer at any time relevant to these proceedings. Rather, the Union argues that, while Mr. Breton used the word "quit" in his first email, he did not mean to quit or to communicate that he and Ms. Filion desired or intended to quit. Simply put, while relatively proficient, English is not Mr. Breton's first language and he used the wrong word. The Union

notes that Mr. Breton immediately clarified his desire to maintain his (and Ms. Filion's) employment with the Employer when communicating with Ms. Mould.

[18] The Union also argues that, while the disputed employees were willing to be transferred to another of the Employer's project, including projects in Alberta, they maintained a desire to return to the Vanscoy project and did, in fact, return to that project, hoping to continue working for the Employer. Furthermore, the Union notes that Mr. Breton and Ms. Filion were on the leave portion of their normal shifts when the representational vote began. The Union takes the position that, even if the disputed employees were transferred to another project, they remained within the scope of the Union's proposed bargaining unit, at least, until the leave portion of their shift was concluded (if not longer).

[19] For the foregoing reasons, the Union argues that the two (2) disputed employees should not be excluded from the representational question.

Analysis and Conclusion:

[20] 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, subject to exceptional circumstances, a person must be an employee working within the scope of the subject bargaining unit on the date of the application and must remain an employee until the date of the vote. As the Board noted in that case, this rule achieves neither perfect democracy nor perfect predictability. 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.

[21] All parties agreed that both Mr. Breton and Ms. Filion were employees working within the scope of the Union's proposed bargaining unit when the Union filed its certification application. The only issue was whether or not the disputed employees continued to be "employees" at the time of the representational vote.

[22] As this Board noted in our Preliminary Determination[2], when voting is conducted by mail-in balloting, voting is deemed to have commenced as of the date ballots are mailed to eligible employees. This is the point in time when voting theoretically begins; it is analogous to the opening of polls in a traditional polling scenario. As ballots were mailed to employees on August 6, 2013, both Mr. Breton and Ms. Filion must have continued to be employees (working within the scope of the proposed bargaining unit) as of that date to remain eligible to participate in the representational question.

[23] On August 6, 2013, both Mr. Breton and Ms. Filion were on the leave portion of their normal shift; a leave that arose out of their work within the scope of the Union's proposed bargaining unit. For purpose of clarity, the fact that the disputed employees were on leave at the time the representational vote began did not disentitle them from participation in the representational question. Rather, the Employer argues that events occurred while the disputed employees were on this leave that severed their employment relationship with the Employer or, at least, the Employer's operations in Saskatchewan. In this regard, the Employer relies upon the email communication of Mr. Breton dated August 5, 2013 and argues that their decision to quit, together with the fact that the disputed employees were transferred by the Employer to other work outside the jurisdiction and the fact that they never return to work in Saskatchewan after the representation vote, ought to be sufficient for this Board to disentitle them from participating in the representational question.

[24] Firstly, we were not persuaded that disputed employees severed their employment relationship with the Employer while they were on leave or that they wanted to be transferred to the Employer's operations in Alberta. Mr. Breton testified in English in these proceedings and, while his English was good, it was apparent to the Board that his command of the language was imprecise. In our opinion, Mr. Breton's email of August 5, 2013 was the expression of a contingent willingness to be transferred to another of the Employer's projects; with the contingency being, the potential that the actions of Mr. Breton and/or Ms. Filion in supporting the Union could represent a problem for the Employer at the Vanscoy site. In our opinion, Mr. Breton's communications, when taken as a whole, do not demonstrate either a desire to sever his employment relationship with the Employer or an unequivocal desire for either himself or Ms. Filion to not return to the Vanscoy site. Mr. Breton (and presumably Ms. Filion)

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[2] See: Reasons for Decision – Preliminary Matters in *International Association of Heat and Frost Insulators and Allied Workers, Local 118 v. Northern Industrial Contracting Inc.*, 2013 CanLII 67367 (SK LRB), LRB File Nos.

were erroneously led to believe that support for the Union could cause contractual problems for the Employer.[3] In our opinion, the desire expressed by Mr. Breton in his email was not a desire to not return to Vanscoy; it was a desire to not cause problems for the Employer. It was clear from the evidence that they would have willingly returned to work for the Employer at that site; that is where they thought they would be returning when they began their leave and that is where they left their tools. The reasons the disputed employees did not return to the Vanscoy site was because they were no longer needed for that project and they were transferred by the Employer to another project in Alberta where their skills could be put to better use.

[25] As indicated, there is no dispute that the disputed employees were working within the scope of the Union's proposed bargaining unit on the day the Union filed its application. The evidence is also clear that Mr. Breton and Ms. Filion were on the leave portion of their normal shift when the representational vote began; a leave that arose out of their work within the scope of the Union's proposed bargaining unit. Furthermore, we have found that, while on that leave, they did not sever their employment relationship with the Employer's operations in Saskatchewan. However, while Mr. Breton and Ms. Filion were on leave, the Employer initiated a process to have them transferred to another of its projects in Alberta and they did not, in fact, return to work at the Vanscoy site. The question to be determined by this Board is when was that transfer effective? More specifically, was the transfer of Mr. Breton and Ms. Filion effective prior to August 6, 2013 (i.e.: the day voting began)? Simply put, was the transfer of the disputed employees sufficient to sever their employment relation with the Employer's operations in Saskatchewan and, thus, disentitle them to participate in the representational question?

[26] Even though the nature of their employment relationship was about to change, on August 6, 2013 (at the point in time that the representational vote began), in our opinion, Mr. Breton and Ms. Filion were employees of the Employer working within the scope of the Union's proposed bargaining unit (*albeit* on the leave portion of their shift). In coming to this conclusion, we acknowledge that the nature of the disputed employees' relationship with the Employer changed soon after the representational vote began. However, in our opinion, as of February 6, 2013, it had not yet changed; certainly, it had not changed in a manner sufficient to undermine their eligibility to participate in the representational question. Even if we had agreed with the

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183-13 & 227-13 (Decision dated October 28, 2013).

[3] It should be noted that Mr. Christianson was neither an agent of the Employer nor did he occupy a position of management at the time he expressed his erroneous opinions to Mr. Breton. Mr. Christianson was a member of the

Employer that the disputed employees wanted to be transferred to the Employer's operations in Alberta (a transfer that would have taken them outside of the Union's proposed bargaining unit), that transfer would not have been effective until the expiration of their leave unless they reported to work in Alberta prior to that time; which they did not. Secondly, for policy reasons, we are unwilling to accept that an employer can unilaterally transfer employees working within the scope of a proposed bargaining unit after a certification application has been filed and that such a transfer can be sufficient to disentitle the subject employees from participation in the representational question. While there are undoubtedly a variety of valid reasons for transferring employees from one project to another and sometimes such transfers occur suddenly, in our opinion, there is also a non-trivial potential that some employers could be motivated to transfer certain employees from one protect to another prior to the conduct of a representational vote in a desire to influence the outcome of that vote. Rather than requiring the parties to call evidence and have this Board differentiate between valid business reasons and anti-union animus, it makes far more sense for this Board, as a matter of policy, to disregard unilateral transfers by employers of otherwise eligible employees that occur after a certification application is filed with the Board in determining who is eligible to participate in the representational question and who is not.

[27] Therefore, in our opinion, irrespective of whether Mr. Breton and Ms. Filion had agreed to be transferred to a project outside of Saskatchewan or unbeknownst to them they had been transferred by the Employer to another project (outside of Saskatchewan), neither form of transfer would have been effective before their leave had concluded, which was August 7, 2013. In both scenarios, the start date for work in Alberta was well after the representational vote began and, thus, they remained eligible to vote.

[28] As has been noted, the test for eligibility to participate in the representational question as described by this Board in *Calvin Ennis v. Con-Force, supra*, is an imperfect test. Nonetheless, it remains the best means for this Board to promote the twin goals of democracy and predictability. At the time the representational vote began on August 6, 2013, we are satisfied that both Mr. Breton and Ms. Filion continued to have a substantial connection to the Union's proposed bargaining unit; namely, the Employer's operations in Saskatchewan.

Union's proposed bargaining unit. As a consequence, these statements have been treated by the Board merely as communications between employees.

[29] For the foregoing reasons, the Employer's objection to the conduct of the representational vote must be dismissed. In our opinion, both Mr. Breton and Ms. Filion are eligible to participate in the representational question and their ballots shall be counted with the rest.

[30] Board members Ken Ahl and Bert Ottenson both concur with these Reasons for Decision.

DATED at Regina, Saskatchewan, this 8th day of September, 2014.

LABOUR RELATIONS BOARD

Steven D. Schiefner,
Vice-Chairperson