UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant v. ATCO STRUCTURES AND LOGISTICS LTD., Respondent

LRB File Nos. 239-14 & 027-15; October 9, 2015
Vice-Chairperson, Steven D. Schiefner; Members: Hugh Wagner and Ken Ahl

For the Union: Drew S. Plaxton
For the Employer: Daniel R. Bokenfohr

CERTIFICATION – Practice and Procedure – Objection to conduct of representational vote – Trade union files certification application with Board – Board orders pre-hearing vote and appoints agent to conduct vote – Agent conducts representational vote using mail-in balloting procedure – Employer files objection to conduct of vote arguing that agent committed reviewable error in establishing the parameters for the vote and in conduct of the vote – Board reviews test for reviewing decisions of agent in representational votes – Board concludes that two (2) errors occurred in representational vote – Board finds all errors were innocent and not statistically significant on their own – However, Board finds that cumulative effect of both errors affected a statistically significant number of employees and ballots – Board Orders new representational vote.

***Saskatchewan Employment Act*, ss. 6-9, 6-11, 6-12 & 6-112.**
***Saskatchewan Employment (Labour Relations Board) Regulations*.**

REASONS FOR DECISION

Background:

[1] **Steven D. Schiefner, Vice-Chairperson:** On October 23, 2014, the United Food and Commercial Workers, Local 1400 (the “Union”) filed a certification application with the Saskatchewan Labour Relations Board (the “Board”) seeking to represent a unit of employees employed by ATCO Structures and Logistics Ltd. (the “Employer”). The Union’s certification application was assigned LRB File No. 239-14.

[2] At the time the Union filed its application, the Employer was just finishing construction of and operating a large workforce housing complex at a potash mine under construction in central Saskatchewan. This particular potash mine is owned by BHP Billiton

Canada Inc. and is located near Jansen, Saskatchewan. As indicated, the Employer was both operating the housing complex (i.e.: providing housing/guest services) and finishing construction of the complex and concomitant facilities when the Union filed its application. Although the Union did not indicate that construction workers were to be excluded in its original Certification application, the Union seeks to only represent those employees of the Employer providing housing/guest services. The Employer resists the Union's applications on a number of grounds, including the potential for the Union's application to sweep in construction workers. In response, the Union filed an amended certification application on November 25, 2014 seeking to expressly exclude construction workers from its desired bargaining unit, as well as to clarify the identity or proper name of the Employer. On January 29, 2015, the Union wrote to the Board seeking a third amendment, this time seeking to clarify the geographic scope of the bargaining unit desired by the Union. The Employer takes the position that the amendments proposed by the Union and, in particular the amendment to exclude constructions workers, are impermissible because they would result in a change to the essential character of the Union's original application.

[3] As is the Board's practice, a pre-hearing representational vote was conducted to capture the wishes of the affected employees. During the voting process, the Employer identified a number of concerns with the conduct of that vote both to the Union and to our staff. On the other hand, the Employer did not formally file its objection until well after the votes were tabulated. The Employer's objection to the conduct of the representational vote was assigned LRB File No. 027-15. In response, the Union firstly objects to any employers being granted standing to object to the conduct of a representational vote arguing that this Board's decision in *National Elevators and Escalator Association v. CLR Construction Labour Relations Association of Saskatchewan Inc.*, 2015 CanLII 43775 (SK LRB), LRB File No. 004-15, precludes employers from having standing to participate in an application for bargaining rights. In the alternative, the Union argues that the Employer's objection was filed too late.

[4] The two (2) applications were heard concurrently by the Board. The hearing began on March 12, 2015; took eight (8) days to conclude; and involved many interstitial procedural rulings, ranging from production of documents, to standing for interested parties, to the admissibility of evidence. The Employer called Ms. Michelle Arpin, the Lodge Manager for the housing complex; Ms. Katherine Branfield, a housekeeper; and Geoff Eustergerling, the Employer's Senior Advisor for Labour Relations. The Union called Richard (William) Demarais, a member of the kitchen staff; Christopher A. Foster, another member of the kitchen staff; and Mr.

Darren Piper, the Union's Organizing Coordinator for Saskatchewan. The hearing concluded on August 14, 2015.

[5] In these proceedings, this Board has been called upon to make a number of difficult determinations. However, the primary issues in dispute can be summarized as follows:

1. Whether or not the Union should be permitted to amend its certification application to cure the defects and/or irregularities in its original application? Does excluding construction workers result in a substantially different application? What is the appropriate geographic scope of the bargaining unit which the Union seeks to represent?
2. Whether or not employers have standing to participate in applications for bargaining rights in general and, if so, whether or not employers have status of a kind that permits them to object to the conduct of a representational vote?
3. Whether or not the Employer's objection to the conduct of the vote in the within application was too late?
4. Whether or not a defect or error occurred in the conduct of the representational vote and, if so, what if any remedy should be granted?

[6] Having considered the evidence in these proceedings, we find that each of the amendments sought by the Union to its Certification application are reasonable, appropriate and ought to be granted, including the amendment to exclude construction workers. In our opinion, these amendments either clarify or correct technical irregularities in the Union's application. Granting these amendments will permit this Board to determine the real questions and issues raised in dispute in these proceedings. We are not satisfied that granting any of the desired amendments would be contrary to law or policy. With respect to the geographic scope of the desired bargaining unit, we adopt the historic practice of this Board of defining the geographic scope of bargaining units in the non-construction sector based on municipal boundaries.

[7] With respect to the Employer's standing in these proceedings, we are not persuaded that employers are precluded from participating in applications seeking to obtain bargaining rights as suggested by the Union. To the contrary, we are satisfied that employers have a sufficient interest in the outcome of the representational question to justify both their

participation in applications for bargaining rights and their right to object if they believe an error has occurred in the conduct of a representational vote or the tabulation of the ballots. While there are certain aspects of the representational question from which employers are appropriately excluded (including, for example, the representational choice), these exclusions do not bar employers from otherwise participating in certification applications. In our opinion, employers have standing in all applications involving the acquisition, alteration or revocation of bargaining rights. Furthermore, they have the right to expect that bargaining certifications are not obtaining or altered without due process and compliance with all applicable laws.

[8] In our opinion, the Employer's delay in filing its objection was not fatal to its application for two (2) reasons. Firstly, on the issue of the duration of the vote, the employer made its concerns knowing to both the Union and our staff on a timely basis and no prejudice has been suffered as a result of the late filing of the formal objection to the conduct of the vote. Secondly, on the issue of the acceptance of late ballots, relevant information did not come to light until after the hearing had commenced. In our opinion, the Employer could not reasonably be expected to object on a timely basis in the absence of relevant information.

[9] With respect to the representational vote, in our opinion, two (2) defects occurred in the voting process. Firstly, the duration provided for the voting period was insufficient for the employment circumstances of the affected employees. Secondly, when an extension was granted to the voting period, notice of that extension was not communicated by our staff to all affected employees. While each of these errors was innocent and neither alone would have been statistically significant, in our opinion, the combined effect of the two (2) errors was that a statically significant number of employees and ballots may have been affected. As a consequence, we find that the integrity of the voting process cannot reasonably be maintained. While no fault can be found in the occurrence of these errors, certainly no fault on the part of the Union, we find that a new representational vote must be conducted.

[10] These are our reasons for these determinations.

Facts:

[11] BHP Billiton Canada Inc. ("BHP Billiton") is in the process of constructing a large potash mine near the community of Jansen, Saskatchewan (the "Jansen Project"). To do so, BHP Billiton has acquired various land holdings and other interests in the Rural Municipalities of

Leroy No. 33 and Prairie Rose No. 309. The construction of the requisite mine shafts and concomitant surface and subsurface infrastructure will involve thousands of workers and will take years to complete. These activities are all occurring on properties owned by BHP Billiton commonly referred to as the "*battery limits*".

[12] Recognizing that there was insufficient housing in the vicinity of the Jansen Project to accommodate the anticipated workforce, BHP Billiton contracted with the Employer to construct and, at least initially, operate an onsite housing complex. While the housing complex is known as the "*Discovery Lodge*", it is commonly referred to as simply the "*camp*". The Discovery Lodge, much like the Jansen Potash project itself, is large, impressive and modern. The camp is intended to house, feed and provide recreational opportunities for up to 2,600 guests; all of whom work at the potash mine. The camp includes a gymnasium, a theatre, various dormitories, and a modern dining facility. In addition, there are parking areas, roads, and green space, together with a water and waste water treatment plant. In Mr. Arpin's words, "*the camp is like a small town*".

[13] The Employer, through its construction division, built the Discovery Lodge in four (4) phases. While the camp was under construction, the Employer provided lodging services to its own construction workers, firstly in temporary facilities, then in the main camp as the phases became operational. As construction of the camp progressed, the Employer began providing housing/guest services to other employees and contractors working on the Jansen Potash Project.

[14] Part of the Employer's contract with BHP Billiton is for the Employer to operate the Discovery Lodge for a period of time after construction. In doing so, the Employer will be providing kitchen, laundry, cleaning and recreational services to its guests; maintaining the Discovery Lodge, together with the parking and surrounding areas, and operating a water and waste water treatment plant. To operate the camp and provide guest services, the Employer employs cooks and kitchen staff, housekeepers, janitors and a range of maintenance and security staff. All of these employees are employed through the Employer's Lodge Services division.

[15] Mr. Piper testified that the Union was approached by a couple different groups of employees of the Employer during the summer of 2014; all of whom were interested in being

represented by a trade union. Two (2) of the employees with whom Mr. Piper met were Mr. Richard Demarais and Mr. Christopher Foster. Access to the battery limits is restricted. As a consequence, Mr. Piper met with Mr. Demarais, Mr. Foster and other interested employees off site. Mr. Piper explained to these individuals the procedure for employees interested in being represented by the Union, including how to have employees complete support cards.

[16] In September of 2014, Mr. Demarais and Mr. Foster began obtaining support evidence from other employees. Simply put, they approached other employees at the camp and asked them if they were interested in signing support cards for the Union. The support evidence was given to Mr. Piper and the Union prepared an application to obtain bargaining rights on behalf of these employees. The Union filed a certification application with the Board on October 23, 2014.

[17] In its application, the Union sought to represent the following unit of employees:

> *All employees employed by ATCO Structures & Logistics Services Ltd. and ATCO Structures & Logistics Ltd., in or in connection with its place of business located in or around the Rural municipality of Jansen, Saskatchewan, at the Jansen Lake Project, except: head chef, head housekeeper, office staff, maintenance manager, and anyone above the rank of manager.*

[18] In its application, the Union estimated that there were approximately eighty-three (83) employees in the bargaining unit and claimed to represent a majority of these employees.

[19] At the time the Union filed its application, the Employer continued to have some construction workers at the workplace. However, the number of construction workers was decreasing as construction on the camp was nearing completion. At the time the Union filed its certification application, approximately seventy-two (72) construction workers remained onsite.

[20] As is the Board's normal practice, staff from the Board contacted the Employer on October 23, 2014 to advise that a certification application had been received. In doings so, our staff contacted the Employer's Human Resource Department by both email and telephone. At the same time, the Board's staff also began their investigation into the sufficiency of the Union's application and the conduct of a potential representational vote. To do so, staff contacted the worksite and spoke with an onsite supervisor. From these contacts, staff ascertained that the Employer had two (2) groups of employees onsite; firstly, construction workers; and secondly,

employees who were provided lodging/guest services. As a consequence, our staff asked the Employer to provide two (2) lists of employees; one (1) list for construction workers; and one (1) for non-construction employees. Apparently, at some point during the early processing of this application, our staff was informed that the Union was not seeking to represent any construction workers because, although construction workers were identified by the Employer, they were not included in the list of eligible voters.

[21] After reviewing the employee lists with the parties, excluding construction workers, removing employees performing managerial functions, and identifying some missed names, a list of eligible voters was determined by our staff. From this list, the size of the bargaining unit that the Union sought to represent was determined to be approximately ninety-two (92) employees, excluding construction workers. Having been satisfied that the Union had filed sufficient evidence of support for this unit and that the Union's Certification application otherwise appeared to be in order, a Direction for Vote was issued by Chairperson Love on October 30, 2014 pursuant to s. 6-12 of *The Saskatchewan Employment Act*, SS 2003, c S-15.1 (the "*Act*").

[22] In his Order, Chairperson Love directed that a vote by secret ballot be conducted among all employees who were employed within the bargaining unit as of October 2[3], 2014, to determine whether or not the employees wished to be represented by the Union for the purpose of collective bargaining with the Employer. The Board's Register (or his designate) was appointed as the Board's agent for purposes of conducting the vote. Chairperson Love further directed that the vote be conducted in accordance with s. 23 of *The Saskatchewan Employment (Labour Relations Board) Regulations*, RRS c S-15.1, Reg 1 (the "*Regulations*") and that a Notice of Vote together with a list of eligible employees be posted in a conspicuous place at the Employer's workplace. Soon thereafter a decision was made by the Registrar to conduct the vote by mail-in ballots.

[23] At some point during this process, the Registrar was erroneously informed that the majority of employees working at the workplace worked a 14/7 work schedule. In other words, our staff were informed that the subject employees worked for fourteen (14) days at the camp and then would go on leave for seven (7) days. The work schedules for employees working in remote locations is important because many of these employees will remain onsite for the entire period of their work shift. When a mail-in balloting procedure is used, voting packages

are normally mailed to voters at their home address. Knowing the work schedules of employees allows our staff to establish the parameters for the vote such that employees have sufficient time to obtain, complete and return their ballots to the Board.

[24] Although the information provided by the onsite supervisor regarding the work schedules of the affected employees was incorrect, it appears to have been an innocent error. While some employees work a 14/7 schedule; most worked a 21/7 schedule. In other words, the majority of eligible voters worked for twenty-one (21) days straight before they went on their leave. The erroneous information provided regarding the employee's work schedule was used by the staff in determining the parameters for the representational vote. A Notice of Vote was issued by the Board's Registrar on October 31, 2014 (the "first Notice of Vote") and, in this document eligible voters were provided a fourteen (14) day period within which to return their ballots. Voting packages were prepared concomitant with this notice and mailed to eligible voters on October 31, 2014. In the information provided by our staff, eligible voters were instructed that their ballot "*must reach [the Board's] office no later than … November 14, 2014*".

[25] The Employer was directed by the Registrar to post a copy of the first Notice of Vote in conspicuous places in the workplace. While a number of bulletin boards are located in conspicuous places at the Discover Lodge, there are restrictions on the use of these boards because they are visible to guests of the camp; not just employees of the Employer. Ms. Arpin understood that the Employer was not permitted to post "*union related*" notices on bulletin boards in "*public places*" (i.e. where employees of other employers could see them). As a result, the Employer elected to only post a copy of the Notice to Vote in the laundry room. While the laundry room is open to all employees of the Employer, it is not commonly used by all employees. While Ms. Arpin testified that the bulletin board in the laundry room was a general communication board for the Employer's employees, it would appear that only laundry and maintenance staff regularly use or access this area. On the other hand, it should be noted that each of the ninety-two (92) eligible voters was provided with a copy of the first Notice of Vote in their individual voting package.

[26] On November 10, 2014, the Employer's counsel wrote to our staff expressing the concern that the voting period set forth in the first Notice of Vote was too short and would not provide an appropriate opportunity for some employees to vote because they would be at the camp for the entire period of the vote and the ballots were being mailed to their home. This

appears to be the first time that our staff were informed that many of the affected employees work a 21/7 schedule.

[27] At about this same time, it came to the attention of both the Union and the Employer that certain individuals may have been missed from the original voters list. After some discussion between the parties, it was agreed that three (3) employees were eligible to vote but had been inadvertently missed from the voters list. In response, the Registrar issued a second Notice of Vote on November 12, 2014. This document was essentially the same as the first Notice of Vote except that the three (3) missing names had been added to the list of eligible voters and the return date for their ballots was identified as November 26, 2014. The second Notice of Vote was mailed directly to the three (3) individuals who were missed from the first Notice of Vote, together with their voting packages.

[28] The second Notice of Vote was not mailed to any of the original ninety-two (92) eligible voters and it was not posted in the workplace. While the second Notice of Vote was provided to counsel for both the Employer and the Union, the Employer was not instructed to post the second Notice in the workplace.

[29] Ms. Arpin testified, while approximately 70% of the Employer's employees are local (i.e.: they live within a two hour drive of the camp), the majority of them live at the camp when they work. At the time of the vote, only those employees who lived within a fourty-five (45) kilometer radius were permitted to commute to and from work. While employees are permitted to leave the camp, they are required to be back to the camp by 11:00 pm each evening and/or at least eight (8) hours before they start their next shift. As a consequence, while employees have the right to leave the camp while they are off duty, it is not practical for them to do so; particularly if they have very far to travel.

[30] Ms. Arpin also testified that, after the first Notice of Vote was received by the Employer, managers were asked to inform employees that a certification application had been received and a representational vote would be taking place. In doing so, managers were cautioned not to comment to any employees on how to vote. Soon after the voting process began, management began hearing complaints from employees that the voting period was too short. Ms. Arpin testified that managers were informed to tell employees to contact the Board if they felt there was a problem with the vote. No evidence was tendered as to whether or not any

employees contacted our staff regarding the issue. Certainly no employees have filed an objection to the conduct of the vote.

[31] The ballot packages were sent to eligible voters by registered mail in the Canada Post mail system. As a result, our staff receives information from Canada Post indicating each time someone signed for and picked up a voting package. In addition, Canada Post places a date stamp on each return envelope when that envelope first enters one of Canada Post's central sorting locations. While this information does not indicate when the envelope was first mailed by the recipient (i.e. at a local Post Office), it is reasonable to assume that it was placed in the mail system just prior to that date. Finally, the Registrar tracks when ballots are received at the Board's office by placing a date stamp on the outer envelope.

[32] In total, ballot packages were sent to ninety-five (95) eligible voters; ninety-two (92) with the first Notice of Vote; and three (3) more with the second notice of Vote.

[33] With respect to the ballots distributed with the first Notice of Vote (i.e.: issued on October 31, 2014), the Canada Post's records indicate that by November 14, 2014 (the return date as identified in the first Notice of Vote), sixty-one (61) ballot packages had been signed for by either the recipient or someone on their behalf. In other words, by the close of polls as identified in the first Notice of Vote, thirty-one (31) voting packages had not been picked up by anyone. Seven (7) of these ballots were signed for after November 14, 2014 and twenty-four (24) ballot packages were returned without anyone signing for them.

[34] With respect to the ballots distributed with the second Notice of Vote (i.e. issued on November 12, 2014), the Canada Post's records indicate that all three (3) ballot packages were signed for by or on behalf of the recipient.

[35] When ballots are returned to the Board in a mail-in balloting procedure, they arrive in a self-addressed and postage paid, return envelope. In total, thirty-four (34) ballots were returned to the Board in the representational vote. Of these ballots, only twenty (20) were returned to the Board within the time period prescribed by the Registrar in the Notices of Vote. For example, only eighteen (18) ballots were received by the Register prior to November 14, 2014 (the return date for the first Notice of Vote). With respect to the second Notice of Vote, two (2) ballots were returned. In other words, fourteen (14) ballots were received outside of the

parameters established by the Register for the conduct of this particular representational vote. However, it should be noted that seven (7) ballots were received within three (3) business days of the return date, which is a common grace when a mail in balloting procedure is used. Periodically, there are unanticipated delays in the delivery of mail through the Canada Post system. A modest grace period is common when a mail-in ballot procedure is used. On the other hand, seven (7) ballots were received by the Board well outside of the parameters established by the Board's agent.

[36] At the time and place selected for tabulation of ballots, scrutineers are permitted to examine the return envelopes before they are opened by our staff. Doing so permits the scrutineers to view when the ballots were received by the Board, as well as Canada Post's date stamp. Parties have the right to object to any ballot that is late (i.e.: is not received within the parameters established for that particular vote) if they desire to do so. The practice of our staff is to require parties objecting to late ballots to do so before tabulation begins. If an objection is raised with respect to late ballots, several options exist for the parties to consider. For example, the parties can, and often do, agree that late ballots should be included in the tabulations; particularly if they are post marked prior to the deadline and/or if they arrived within three (3) days of the established deadline. However, another option is for our staff to tabulate the ballots behind a screen and determine if the disputed ballots are statistically significant. If they are and the objecting party wishes to maintain their objection, the tabulation does not continue and the matter is referred to a panel of the Board for determination. On the other hand, if the disputed ballots are not statistically significant, then tabulation takes place at that time as the disputed ballots will not affect the outcome of the representational vote.

[37] Tabulation of the ballots in these proceedings took place on December 5, 2014. The tabulation occurred at the Board's offices in Regina. Mr. Piper attended on behalf of the Union and Mr. Eustergerling attended by telephone on behalf of the Employer. Mr. Eustergerling testified that, at the commencement of the tabulation, the parties were advised by the Board staff that some ballots had been received during the previous week (meaning November 24, 2014 to November 28, 2014). However, the parties were not advised as to how many ballots were received late nor when those ballots were received. While Mr. Eustergerling could have ascertained this information himself had he been present for the tabulation of ballots, because he was attending by phone, he did not have an opportunity to personally observe the ballots. Neither Mr. Eustergerling nor Mr. Piper objected to the inclusion of the late ballots and, as a

result, these ballots were included in the tabulation. At the conclusion of the tabulation, both Mr. Piper and Mr. Eustergerling were advised by our staff that, if they wished to object to the conduct of the representational vote, they were required to file their objection with the Board no later than December 8, 2014.

[38] Upon completion of the tabulation, the Board's agent prepared a report respecting the conduct of the vote and counting of ballots (the "Agent's Report"). The Agent's Report is dated December 5, 2014 and indicates the following:

No. of Eligible Voters:	95
No. of Ballots Cast:	34
No. of Votes for Union:	30
No. of Votes against Union:	3
No. of Spoiled Ballots:	1
No. of Employees Not Voting:	61

[39] On December 10, 2014, counsel for the Employer wrote to the Registrar indicating that the Employer wished to object to the conduct of the representational vote on the basis that voting period established by the Registrar was too short; the same objection that it had raised with our staff at the outset of the process. More particularly, the Employer took the position that a fourteen (14) day voting period for employees who work a 21/7 work schedule did not provide a reasonable opportunity for all employees to participate in the representational question. In response, counsel for the Employer was advised by the Registrar that, if it wished to pursue this objection, the Employer would be required to file a formal objection to the conduct of the vote (i.e. Form 23 in the *Regulations*). The Employer objection to the conduct of the vote was filed with the Board on February 13, 2014.

[40] During her testimony, Ms. Arpin produced the work schedules for the Employer's employees. Our review of the schedules indicates that approximately nineteen (19) employees were scheduled to work every day for the period of October 31, 2014 to November 14, 2014 (i.e.: the voting period in the first Notice of Vote). These individuals include three (3) eligible voters who worked in maintenance, namely Regan Anjel, Michael Davis, and Chris Foster. This also includes six (6) more employees who worked in the kitchen, namely Thomas Molyneux, Amy Frank, Sylvia Biron, Caroline Kosmos, Tyler Cooper, and Andrew Congram. Finally, this also includes ten (10) employees who worked in housekeeping, namely Katherine Branfield, Shaun Lacquette, Lindsey Tipewan, Jessica Maxwell, Ashley Ross, Joseph Ogolla, Mohamud Sheikh,

George Anthoney, Charlene Jackson and Caroline Granquist. The Report of the Agent who conducted the vote indicates that ballots were received and counted from five (5) of these individuals, namely George Anthoney, Thomas Molyneux, Andrew Congram, Regan Anjel and Charlene Jackson. However, this panel does not have information as to when these particular employees received their ballots or when those ballots were received by the Board. In any event, our review of the work schedules and voters who returned their ballots would indicate that fourteen (14) employees worked every day of the voting period and did not return ballot packages.

[41] However, the number of employees who were potentially affected by the voting period increases if it is assumed that it took Canada Post three (3) days to deliver voting packages to eligible voters. While many employees were on leave when the representational vote began (i.e.: on October 31, 2014), many were required to return to work soon thereafter. For example, five (5) employees were scheduled to be back at the camp by November 3, 2014, including Tanya Cyr, Naomi Rasmussen, John Clements, Joanna Grimard, and Ivan Moccasin. In addition, two (2) more employees were scheduled to be back at the camp by November 4, 2014, including Lindsey Sunderland and Hannah Bird. The records from the tabulations of the vote indicate that ballots were not received by any of these seven (7) employees.

[42] To illustrate the problem for employees arising out of the length of the voting period selected by our Agent, the Employer called Ms. Katherine Branfield. Ms. Branfield testified that she is an employee of the Employer and that she worked at the Discovery Lodge every day between (and including) October 30, 2014 and November 14, 2014. Ms. Branfield also testified that, while she was at the camp, her husband informed her that a notice had been delivered to their home indicating that a certified letter was at the local post office for her. Ms. Branfield indicated that her husband has mobility issues and was unable to go to the post office on her behalf. Ms. Branfield first heard about the representational vote at a “tool box” meeting in the workplace. Employees were informed that a representational vote would be taking place and that the last day to vote would be November 14, 2014. When Ms. Branfield became aware that voting packages were being sent to her home, she asked her boss, Leona Bird, for information about what to do because she was not scheduled to be off work until November 15, 2014. Ms. Branfield testified that she lived in Yorkton, Saskatchewan, which is approximately a two (2) hour drive from the camp. Ms. Branfield testified that she did not bother to pick up her voting package

from the post office when she went home on November 15, 2014 because she understood that voting had already ended.

[43] Mr. Eustergerling testified that he received the second Notice of Vote on or about November 12, 2014. However, he was not instructed to post that notice in the workplace and so he did not give any instructions to anyone onsite to post it. Mr. Eustergerling understood the purpose of the second Notice of Vote was to add three (3) people to the voters list so that these individuals could be provided with voting packages. As a consequence, Mr. Eustergerling did not give any instructions to the onsite managers to provide any additional information to employees when the second Notice of Vote was issued. In other words, while the Employer informed employees during their weekly “tool box” meetings that a representational vote was taking place when the first Notice of Vote was issued, no additional or updated information was provided by the Employer to employees when the second Notice of Vote was issued; nor was the second Notice of Vote posted in the workplace.

[44] However, Mr. Piper testified as to his understanding that the second Notice of Vote extended the voting period for all eligible voters; not just the three (3) employees that were being added to the list of eligible voters. Mr. Piper was aware that some employees were concerned about difficulties in voting during the period originally established for the vote and felt that the extension would provide enough time for anyone who wanted to vote to do so. As a consequence, Mr. Piper informed Mr. Foster and Mr. Demarais to let everyone know that the voting period had been extended until November 26, 2014. Both Mr. Foster and Mr. Demarais testified that they did so. Both testified that they told everyone they saw at the workplace that the voting period had been extended and encouraged them to vote if they had not already done so. In cross-examination, both Mr. Foster and Mr. Demarais denied that they only told supporters of the Union about the extension. Mr. Demarais testified that he told everyone because he assumed “*that everyone supported the union*”.

[45] On November 25, 2014, the Union filed an amended Certification application. In this document, the Union seeks two (2) changes to its application. Firstly, the Union seeks to delete the reference to “*ATCO Structures & Logistic Services Ltd.”* as a named employer. Secondly, the Union seeks to add an express exclusion for “*construction workers*” to the description of the bargaining unit. While the first amendment is not opposed by the Employer, the second amendment is. In subsequent communication with the Board, the Union also identified a

third amendment to its Certification application; this time in relation to the geographic scope of the desired bargaining unit. In its original application, the Union sought bargaining rights with respect to the Employer's places of business "*located in or around the Rural Municipality of Jansen, Saskatchewan, at the Jansen Lake Project*". The Union now seeks bargaining rights with respect to the Employer's places of business "*in the Province of Saskatchewan*". In the alternative, the Union seeks bargaining rights with respect to the Employer's places of business "*in the Rural Municipalities of Leroy No. 33 and Prairie Rose No. 309*".

[46] At the time the Union filed its certification application, the Employer still had a number of construction workers at the site. These individuals include carpenters and labourers; both of whom fall within the scope of other certification Orders issued by this Board.

[47] Mr. Eustergerling testified that, while both construction and non-construction employees are employed by the Employer, construction workers are employed in the Employer's construction division; whereas the non-construction employees work in other divisions. For example, the non-construction employees working at the camp are employed within the Employer's Lodge Services Division. The Employer operates more than one camp in Saskatchewan. At the time of the hearing, Ms. Arpin was the manager of the Discovery Lodge. Other managers supervise the Employer's camps at other locations. All camp managers in Saskatchewan report to Mr. Aman Bhalla, who (at the time of the hearing) was the Director of Lodge Services for Saskatchewan. None of the construction workers working at the camp were employed in this division or reported to Mr. Bhalla.

[48] Mr. Eustergerling testified that the Employer was confused when they first saw the Union's certification application because the unit the Union was seeking to represent did not exclude construction workers. As a consequence, the Employer assumed that the Union was seeking to represent "*all*" of its employees, including construction workers. The inclusion of construction workers in the Union's application raised two (2) issues for the Employer; firstly, the Employer felt that including construction workers with non-construction workers would result in a bargaining unit that was not appropriate for collective bargaining; and secondly, the Employer's construction workers were already represented by other unions and thus the Union's certification application amounted to a raid. In cross-examination, Mr. Eustergerling admitted that, as soon as the Employer's concerns were made known to the Union, the Employer was informed that the Union was not seeking to represent the Employer's construction workers.

[49] With respect to the geographic location of the Employer's operations, the evidence indicated that the battery limits of BHP Billiton's operations at the Jansen Project are located in the Rural Municipalities of Leroy No. 33 and Prairie Rose No. 309. No evidence was tendered as the precise location of the Employer's operations within the two (2) municipal boundaries.

Relevant statutory provision:

[50] Section 6-112 of *The Saskatchewan Employment Act* defines this Board's authority with respect to irregularities, defects and errors in proceedings before the board and to permit a party to amend material that has been filed with the Board:

> ***Proceedings not invalidated by irregularities***
> *6-112(1) A technical irregularity does not invalidate a proceeding before or by the board.*
> *(2) At any stage of its proceedings, the board may allow a party to amend the party's application, reply, intervention or other process in any manner and on any terms that the board considers just, and all necessary amendments must be made for the purpose of determining the real questions in dispute in the proceedings.*
> *(3) At any time and on any terms that the board considers just, the board may amend any defect or error in any proceedings, and all necessary amendments must be made for the purpose of determining the real question or issue raised by or depending on the proceedings.*
> *(4) Without limiting the generality of subsections (2) and (3), in any proceedings before it, the board may, on any terms that it considers just, order that the proceedings be amended:*
> *(a) by adding as a party to the proceedings any person that is not, but in the opinion of the board ought to be, a party to the proceedings;*
> *(b) by striking out the name of a person improperly made a party to the proceedings;*
> *(c) by substituting the name of a person that in the opinion of the board ought to be a party to the proceedings for the name of a person improperly made a party to the proceedings; or*
> *(d) by correcting the name of a person that is incorrectly set out in the proceedings.*

[51] The following provisions of *The Saskatchewan Employment Act* are relevant to the conduct of a representational vote:

> ***Acquisition of bargaining rights***
> *6-9(1) A union may, at any time, apply to the board to be certified as bargaining agent for a unit of employees appropriate for collective bargaining if a certification order has not been issued for all or a portion of that unit.*
> *(2) When applying pursuant to subsection (1), a union shall:*

(a) establish that 45% or more of the employees in the unit have within the 90 days preceding the date of the application indicated that the applicant union
is their choice of bargaining agent; and
(b) file with the board evidence of each employee's support that meets the prescribed requirements.

Determination of bargaining unit

6-11(1) If a union applies for certification as the bargaining agent for a unit or a portion of a bargaining unit or to move a portion of one bargaining unit to another bargaining unit, the board shall determine:
(a) if the unit of employees is appropriate for collective bargaining; or
(b) in the case of an application to move a portion of one bargaining unit to another bargaining unit, if the portion of the unit should be moved.
(2) In making the determination required pursuant to subsection (1), the board may include or exclude persons in the unit proposed by the union.
(3) Subject to subsections (4) to (6), the board shall not include in a bargaining unit any supervisory employees.
(4) Subsection (3) does not apply if:
(a) the employer and union make an irrevocable election to allow the supervisory employees to be in the bargaining unit; or
(b) the bargaining unit determined by the board is a bargaining unit comprised of supervisory employees.
(5) An employee who is or may become a supervisory employee:
(a) continues to be a member of a bargaining unit until excluded by the board or an agreement between the employer and the union; and
(b) is entitled to all the rights and shall fulfil all of the responsibilities of a member of the bargaining unit.
(6) Subsections (3) to (5) apply only on and after two years after the date on which subsection (3) comes into force.
(7) In making the determination required by subsection (1) as it relates to the construction industry within the meaning of Division 13, the board shall:
(a) make no presumption that a craft unit is the more suitable unit appropriate for collective bargaining; and
(b) determine the bargaining unit by reference to whatever factors the board considers relevant to the application, including:
(i) the geographical jurisdiction of the union making the application; and
(ii) whether the certification order should be confined to a particular project.

Representation vote

6-12(1) Before issuing a certification order on an application made in accordance with section 6-9 or amending an existing certification order on an application made in accordance with section 6-10, the board shall direct a vote of all employees eligible to vote to determine whether the union should be certified as the bargaining agent for the proposed bargaining unit.
(2) Notwithstanding that a union has not established the level of support required by subsection 6-9(2) or 6-10(2), the board shall make an order directing a vote to be taken to determine whether a certification order should be issued or amended if:
(a) the board finds that the employer or a person acting on behalf of the employer has committed an unfair labour practice or has otherwise contravened this Part;

(b) there is insufficient evidence before the board to establish that 45% or more of the employees in the proposed bargaining unit support the application; and

(c) the board finds that sufficient evidence of support mentioned in clause (b) would have been obtained but for the unfair labour practice or contravention of this Part.

(3) Notwithstanding subsection (1), the board may refuse to direct the vote if the board has, within the 12 months preceding the date of the application, directed a vote of employees in the same unit or a substantially similar unit on the application of the same union.

[52] Certain provisions of *The Saskatchewan Employment (Labour Relations Board) Regulations* are also relevant to the conduct of a representational vote. The provisions include sections 22 and 23:

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.*

Analysis:

Should the Union be permitted to amend its certification application?

[53] As noted, the Union seeks to amend its certification application to correct what it describes as non-substantive errors and/or technical irregularities. These include the identity of the employer, the geographic scope of the bargaining unit, and the exclusion of construction workers from the description of the bargaining unit. While the Employer does not dispute the removal of the reference to "*ATCO Structures and Logistic Services Ltd.",* it takes the position that the other amendments are substantive; that the Union's original application is patently defective; and that the desired amendments would result in an entirely new and different application and thus may not be granted.

[54] Having considered the evidence in these proceedings, we find that each of the amendments sought by the Union to its Certification application are reasonable, appropriate and ought to be granted. In our opinion, these amendments either clarify or correct technical irregularities in the Union's application. Finally, granting these amendments will permit this Board to determine the real questions and issues raised in dispute in these proceedings.

The Identity of the Employer:

[55] The Union no longer seeks bargaining rights with respect to ATCO Structures and Logistic Services Ltd. and the Employer does not oppose the amendment to delete the reference to this employer. The amendment does not affect the essential character of the original application. Simply put, it is merely a housekeeping matter. As will be discussed later in these Reasons for Decision, it is often difficult for trade unions to determine the identity of employers in the construction sectors prior to filing a certification application, particularly so when employers operate through a number of related companies. However, there is little utility in maintaining an application against a related employer if that employer has no meaningful interest in the matters in dispute between the parties.

Geographic Scope of the Bargaining Unit:

[56] There is no "*Rural Municipality of Jansen*" in Saskatchewan. As a consequence, an irregularity exists in the Union's original application. The Union seeks to amend its application to obtain a province-wide geographic scope or, in the alternative, a municipal certificate. The Employer, on the other hand, argues that any bargaining rights granted to the Union ought to be confined to the Discovery Lodge.

[57] Having considered the evidence, we are satisfied that it is appropriate to amend the Union's certification application to clarify the geographic scope of the bargaining unit. No prejudice was argued by the Employer nor observed by this Board. In our opinion, the geographic scope of the bargaining unit ought to be consistent by the municipal boundaries within which the Employer operates at the Jansen Project. As the Employer declined the Board's offer to produce evidence as to the precise location of its operations within the two (2) municipalities, we have little choice but to assume that it operates in both.

[58] Apart from the construction sector and a few exceptions (not arising in these proceedings), this Board has consistently held a preference for defining the geographic boundaries of certification Orders by the municipal boundaries within which the subject employer operates. See: *Retail, Wholesale and Department Store Union v. Sunnyland Poultry Products Ltd.*, [1993] 2nd Quarter Sask. Labour Rep. 214, LRB File No. 001-92; and *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Roca Jack's Roasting House and Coffee Company Ltd.*, [1997] Sask. L.R.B.R. 244, LRB File No. 016-97. See also: *Unifor Canada, Local 594 v. Consumers' Co-operative Refineries Limited*, 2015 CanLII 43766 (SK LRB), LRB File No.

247-14. Using municipal boundaries is, generally speaking, a pragmatic means of achieving a number of important labour relations goals. It has been the historic preference of this Board and it is the approach we adopt in the present application.

[59] The geographic scope of the bargaining unit shall be circumscribed by the municipal boundaries of the Rural Municipalities of Leroy No. 33 and Prairie Rose No. 309.

Exclusion of Construction Workers

[60] The Union now seeks to expressly exclude construction workers from its certification application and takes the position that it was obvious from the beginning that it never intended to include construction workers within the bargaining rights that it sought to acquire. The Employer, on the other hand, argues that the bargaining unit description in the Union's application did not expressly exclude construction workers and, as the Employer employs construction workers at the worksite, the Union's application is patently defective. More importantly, however, the Employer argues that it would be inappropriate for this Board to now permit the Union to amend its application to exclude construction workers.

[61] In taking its position, the Employer relies on this Board's decision in *Construction and General Workers' Union, Local 180 v. Aecon Construction Group Inc.*, 2014 CanLII 42399 (SK LRB), 247 C.L.R.B.R. (2d) 1, LRB File No. 031-14, as standing for the proposition that an amendment should not be permitted where the effect of doing so would be to create an entirely new application. The Employer also relies on the decision of the Alberta Labour Relations Board in *UNITE HERE, Local 47 v. ATCO Structures & Logistics Ltd.*, 2014 CanLII 68669 (AB LRB), 254 C.L.R.B.R. (2d) 256, as standing for the proposition that the exclusion of construction workers would create a substantially different application.

[62] The Employer takes the position that trade unions must complete their research before they file their applications and must ensure that they accurately and carefully describe the unit they seek to represent. The Employer argues that it is the responsibility of a trade union seeking to acquire bargaining rights to make an appropriate application and, if they err in the description of the bargaining unit, then they need to start over and make a new application. Simply put, the Employer argues that errors of this kind in a unit description are fatal to a certification application.

[63] In our opinion, the Employer's objection to the Union's desire to expressly exclude construction workers is not well-founded. While the decision of the Alberta Board in *UNITE HERE, supra*, appears to be on point, a closer examination illuminates some significant differences. Firstly, the statutory framework within which the Alberta Board operates is different. The Alberta Board's authority to permit amendments; particularly amendments to certification applications; is more restrictive than that enjoyed by this Board. For example, the Alberta Board can only permit amendments to bargaining units if the resultant unit is reasonably similar to the unit originally applied for. This is a statutory constraint on that Board's authority to amend or alter the description of a unit. Such is not the case in Saskatchewan. Secondly, in the *UNITE HERE* decision, the Alberta Board found that the unit applied for by the applicant union was specifically intended to include certain trades. Thus, the Alberta Board found that a unit excluding all construction workers would be fundamentally different than the unit originally applied for. Such is not the case in this application.

[64] Unlike our colleagues in Alberta, this Board enjoys substantially broader authority to permit defects, errors and technical irregularities to be cured, including in the description of a bargaining unit. Furthermore, it is not apparent on the face of the Union's application that it was seeking to acquire bargaining rights with respect to any of the Employer's construction workers. There is no reference to trades in the unit description; nor any of the exclusions that would typically be found in bargaining units involving construction workers. The Employer's construction workers are employed in a different division than the employees that the Union seeks to represent. Finally, the same result could have been achieved without mentioning construction workers by describing the bargaining unit as "*all employees employed in the Lodge Services Division of ATCO Structures & Logistics Ltd.*"

[65] As this Board has noted in many cases, it is not unusual for employers in the construction sector to operate within a complex corporate structure utilizing subsidiaries or related companies to deliver their services and/or to support their operations. See: *International Union of Painters & Allied Trades, Local 739 v. PAFHQ Construction GP Ltd.*, 2013 CanLII 83873 (SK LRB), 238 C.L.R.B.R. (2d) 57; *International Brotherhood of Electrical Workers Local Union 2038 v. Clean Harbors Industrial Services Canada, Inc. & BCT Structures Inc.*, 2014 CanLII 76047 (SK LRB), 254 C.L.R.B.R. (2d) 111; and *Prairie Artic Regional Council of Carpenters, Drywallers, Millwrights and Allied Workers v. EllisDon Corporation, et. al.*, 2014 CanLII 42398 (SK LRB), 247 C.L.R.B.R. (2d) 255. It is not unusual for employers to

compartmentalize their operations through corporate divisions and for subsidiary or related companies to operate under and promote a common corporate brand. As a consequence, the true identity of an employer in the construction sector is not always readily apparent; even to the employees. For example, this Board has observed that related companies, subsidiaries, and corporate divisions are sometimes differentiated by subtle distinctions not readily apparent to an external observer. While it is incumbent upon applicant trade unions to use due diligence in preparing their applications and in describing the bargaining unit they seek to represent, not every defect or error in an application is fatal. In our opinion, a certain level of imprecision in identifying employers and in describing bargaining units in certification applications is the corollary of the corporate complexity and obscurity within which many employers in the construction sector desire to operate.

[66] Having considered the evidence in these proceedings, we are not satisfied that permitting the Union to amend its application to expressly exclude construction workers would result in a substantive change to the essential character of its application or would otherwise be contrary to law or policy. No actual prejudice was argued by the Employer nor could be found by this Board in granting the amendment. As soon as the issue was identified (i.e.: that the Employer employed both construction and non-construction employees within a common corporate structure), the Union clarified that it was not seeking to represent the Employer's construction workers.

<u>The Employer's standing to object to the conduct of the representational vote</u>:

[67] The Union takes the position that the Employer has no standing to object to the conduct of the representational vote for two (2) reasons. Firstly, the Union argues that this Board's decision in *National Elevators and Escalator Association v. CLR Construction Labour Relations Association of Saskatchewan Inc.*, 2015 CanLII 43775 (SK LRB), LRB File No. 004-15, precludes employers from having standing to participate in an application for bargaining rights. In the alternative, the Union argues that the Employer's objection was filed too late.

Do employers have standing in applications seeking to acquire bargaining rights?

[68] While the Union argues that this Board's decision in *National Elevators and Escalator Association* decision was wrongly decided, the Union takes the position that it is a current decision of the Board and it stands for the proposition that employers have no standing to participate in an application for bargaining rights. In this decision, the International Union of

Elevator Constructors, Local No. 102 (the "elevator constructors union") sought standing in an application by the National Elevator and Escalator Association seeking to displace the CLR Construction Labour Relations Association of Saskatchewan Inc. as the representative employer's organization for the elevator erector trade division. The Board declined to grant standing to the elevator constructors union to participate in these proceedings on the basis that the union had no direct interest in the outcome of the determination other than the party with whom they would be bargaining. The Board went on to note that, in light of the limited issues in dispute, the union's assistance was not necessary. In coming to these conclusions, the Board made the following observations:

> *[16] As would be the case in respect of the choice of a trade union by employees, an employer has no right to assist or influence the choice of trade union by its employees. Similarly, a trade union has no right to assist or influence the choice of an REO by employers. By extension, the Union cannot, therefore, be a party to this application, which is solely between CLR and the Applicant.*

[69] The Union argues that the obvious corollary of the above conclusion is that employers have no standing to participate in an application for bargaining rights. With all due respect, we are not persuaded by this argument. Firstly, the Board did not indicate in the *National Elevators and Escalator Association* decision that trade unions are precluded from all applications dealing with the designation of representative employer organizations. Rather, the Board concluded that the elevator constructors union did not have any direct interest in the matters in dispute in that particular application and that its intervention was not necessary in light of limited issues in dispute between the parties.

[70] Secondly, in certification applications, employers are named as parties by the applicant trade unions, they are subject to the jurisdiction of this Board; and are bound by any Orders we grant. Employers have a pre-existing relationship with the subject employees and are equal partners in the continued health and prosperity of the employment relationship, whether the workers are organized or not. As a consequence, we are satisfied that employers have a sufficient interest in the outcome of the representational question to justify both their participation in applications for bargaining rights and their standing to object if they believe an error has occurred in the conduct of a representational vote. While there are certain aspects of the representational question from which employers are appropriately excluded (including the representational choice), the conduct of the representational vote is not something from which

employers need be excluded. Furthermore, as named parties in our proceedings, employers have the right to expect that bargaining certifications are not obtaining or altered without due process and compliance with all applicable laws.

[71] For purposes of clarity, we find that employers have standing in all applications involving the acquisition, alteration or revocation of bargaining rights. While there are certain aspects of the representational question from which employers are appropriately excluded, these exclusions do not bar employers from otherwise participating in any applications wherein the representational question arises.

Was the Employer's objection to the conduct of the vote in the within application filed too late?

[72] Section 23(11) of *The Saskatchewan Employment (Labour Relations Board)* Regulations stipulates that a party that intends to object to the conduct of a representational vote (or tabulation of the ballots therefrom) must do so within three (3) business days. On the other hand, s.30 of those same *Regulations* provides that non-compliance does not render any proceeding void unless the Board directs otherwise. In other words, this Board has discretion as to whether or not to accept and hear a late-filed objection. In exercising this discretion, the Board is mindful of the need to resolve certification and revocation applications on a timely basis and to avoid protracted proceedings when the representational question is at issue. In our opinion, the reasons for late filing and the nature of the objection are relevant considerations in exercising this discretion.

[73] The Employer did not formally file its objection to the conduct of the representational vote until February 13, 2015, well outside of the deadline prescribed by our *Regulations*. On the other hand, the first of the Employer's objections (i.e. that the voting period was too short in light of the employment circumstances of the eligible voters) was first identified by the Employer as early as November 10, 2014. The concern was repeated by Counsel for the Employer on December 10, 2014 and January 14, 2015.

[74] In our opinion, the Employer's delay in filing its objection was not fatal to its application for two (2) reasons. Firstly, on the issue of the duration of the vote, the employer made its concerns well known to both the Union and our staff on a timely basis and no prejudice has been suffered as a result of the late filing of the formal objection to the conduct of the vote regarding that issue. Secondly, on the issue of the acceptance of late ballots, relevant

information did not come to light until after the hearing had commenced. In our opinion, the Employer could not reasonably be expected to object on a timely basis in the absence of relevant information. Finally, the errors alleged by the Employer have the potential of being statistically significant to the outcome of the representational vote.

[75] In our opinion, the Employer's objection to the conduct of the representational vote in the within proceedings should be heard and determined on its merits. With all due respect, neither party can claim the high moral ground, so to speak, in the quality, precision or timeliness of the material they filed with the Board in these proceedings.

Whether or not a defect or error occurred in the representational vote and if so, what if any remedy should be granted?

[76] The Employer argues that our Agent committed reviewable error. As noted, the Employer argues that the original parameters for the conduct of the representational vote were flawed because the deadline for voting was too short. In addition, the Employer argues that, because the second Notice of Vote was not provided to all eligible voters, the deadline for voting was not properly extended. Counsel for the Employer acknowledges that our agents are not expected to be perfect in all the decisions they make in conducting a representational vote. However, the Employer argues that the effect of the errors that occurred in this particular vote was statistically significant. In the alternative, the Employer argues that the errors were such that they undermined the integrity of the voting process. The Employer asks this Board to set aside the result therefrom and direct that the new representational vote be conducted to determine the wishes of the employees in the bargaining unit.

[77] The Union, on the other hand, argues that this Board should not interfere with the results of the representational vote. The Union takes the position that the Employer does not have "*clean hands*" in alleging errors on the part of the Board's agent because each of these errors find their genesis in the actions of the Employer. Firstly, the Employer's staff gave the wrong information to the Board as to the work schedule of employees and then did not correct that information on a timely basis. Secondly, when the error was discovered, the Employer could have cured the defect by giving employees time off to vote. Thirdly, the Employer could have given notice of the extension to employees by posting the second Notice to Vote in the workplace. Finally, the Employer did not object to the inclusion of late ballots prior to tabulation and therefore this objection should not now be heard.

[78] In the alternative, the Union argues that the errors that occurred were not statistically significant; nor did they affect the integrity of the vote. The Union notes by November 14, 2014 (the deadline prescribed in the first Notice of Vote), sixty-one (61) had picked up their ballots. Finally, the Union notes that neither it nor the employees did anything wrong. They followed all applicable procedures and complied with all directives from the Board. To which end, the Union argues that employees should not be penalized because of the Employer's omissions and innocent mistakes made by our staff.

[79] Both this Board and the Saskatchewan Court of Queen's Bench have recently had occasion to consider the test to be applied in reviewing the decisions made by our Agents in the conduct of representational votes. These decisions will be known to the Employer as it was a party to both proceedings. Firstly, in *ATCO Structures & Logistics Ltd. v. UNITE HERE, Local 47,* [2014] CanLII 76053 (SK LRB), 254 C.L.R.B.R. (2d) 280, LRB File No. 169-14, Chairperson Love made the following observations:

> *[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 accessible 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.*

[80] The Employer sought judicial review of the Board's decision. See: *ATCO Structures & Logistics Ltd. v. UNITE HERE, Local 47 & Saskatchewan Labour Relations* Board,

QBG 224/2015 (decision dated September 10, 2015). In dismissing, the Employer's judicial review application, Justice Zarzeczny made the following observations upholding the Board's approach:

> *[31] In its Decision, the Board recognized that so long as its Agent identified a vote process that was fair and permitted all eligible employees a reasonable opportunity to vote it should not interfere with the exercise of the Agent's discretion. I have come to a similar conclusion upon this judicial review application. It is not for the court, any more than it is for the Board, to second-guess the discretion exercised by the Board's statutorily appointed Agent in the exercise of those discretions with the Act and the Regulations grant to the Agent. So long as that discretion is exercised fairly and reasonably and consistent with the statutory provisions and the objects and intentions sought to be achieved by them, as the Board, in its decision, found to be the case, the court should not and will not interfere.*

[81] In our opinion, no fault can be found in our Agent's decision to conduct the within representational vote by mail-in ballots. The Employer's workplace is closed to the public and access is restricted. It is common to conduct representational votes by mail-in ballots in closed, remote camps and our Agent's decision to do so for this particular workplace falls well within the range of acceptable outcomes.

[82] On the other hand, we are satisfied that two (2) defects occurred in the voting process. Firstly, the duration provided for the voting period was insufficient for the employment circumstances of the affected employees. Secondly, when an extension was granted to the voting period, notice of that extension was not communicated to all affected employees by our staff. As a result, late ballots were included in the tabulation of the representational vote. We will deal with each of these issues in turn.

Duration of the Voting Period:

[83] No one seriously disputed that an error occurred in establishing a fourteen (14) day voting period for this particular representational vote. The original deadline for the vote was based on erroneous information provided by a supervisor in the workplace. Unfortunately, our staff were not informed that most of the eligible voters were working a 21/7 work schedule until after the parameters for the vote had been established and voting packages had been mailed to ninety-two (92) voters. The Union argues that the Employer was the source of this erroneous information and thus they should not be permitted to object to any defect arising out of its own mistake. While we understand the Union's frustration, we are not persuaded. Firstly, it would

appear that the erroneous information was innocently given by a supervisor in the workplace. Certainly, some of the employees did work a 14/7 schedule. However, there was no evidence that the Employer was grossly negligent, intentionally misled our staff or otherwise attempted to sabotage the voting process. If such had been the case, the Union's argument would have been well-founded. Secondly, the Employer ultimately communicated the correct information to our staff and our staff had ample opportunity and sufficient discretion to cure the defect by extending the voting procedure for everyone.

[84] As this Board has noted in a number of decisions, while our agents have considerable discretion in defining what method of voting should be used and in establishing the parameters for the vote, it is a fundamental requirement of representational votes that all those eligible to vote must be given a reasonable opportunity to do so. In *International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of United States, Its Territories and Canada, Local 300 v. Inland Audio Visual Limited*, 2014 CanLII 5454, 240 C.L.R.B.R. (2d) 284, made the following observations regarding the duties imposed upon our agents when mail-in balloting are used for representational votes:

> *[16] The agents who have been appointed by the Board to supervise these representation votes utilize both traditional polling and mail-in balloting procedures depending on the circumstances of a particular workplace. In International Union of Heat and Frost Insulators and Allied Workers, Local 119 v. Northern Industrial Contracting Inc., 2013 CanLII 67367 (SK LRB), LRB File Nos. 183-13 & 227-13, this Board found that mail-in balloting is an acceptable voting procedure. In coming to this conclusion, the Board noted that the use of mail-in balloting represents a deviation from the accepted polling procedures associated with traditional polling, including the fact that no fixed polling place is utilized and that scrutineers can not be present during the voting process, as eligible voters complete their ballots at the location of their choosing. Nonetheless, the Board concluded that the benefits of mail-in balloting justified the use of this alternate voting procedure. The benefits cited by the Board were efficiency and increased voter participation.*
>
> *[17] However, in doing so, the Board also expressed its expectation that, when a mail-in balloting process is used, our agent will use reasonable efforts to ensure that the list of eligible voters is accurate, as is the mailing addresses for eligible voters.* ***In the Board's opinion, our primary goal, irrespective of the voting procedure utilized by our agents, is to ensure that all eligible voters have a reasonable opportunity to participate in the representation question. While this goal is tempered by the desire for efficiency and the need for finality in determining the representational question, there can be no doubt of this Board's primary concern is that employees are afforded an adequate opportunity to vote on the fundamental question of whether or not they wish to be represented by a trade union in their future dealings with their employer****.* ***(Emphasis added)***

[85] In our opinion, it is incumbent upon our agents to establish parameters for representational votes that will ensure that all eligible voters have, at least, a reasonable opportunity to exercise their franchise. While it would be impracticable for our agents to devise voting parameters that account for the individual life circumstances of every eligible voter, generally speaking, the goal is to ensure that the vast majority are readily able to exercise their franchise. In this particular representational vote, the parameters established for the vote did not do so. Simply put, the prescribed deadline for returning ballots to the Board was too short. In light of the work schedules in this particular workplace, the voting period did not provide sufficient time for many employees to obtain, mark and return their ballots.

[86] From our review of the evidence, it would appear that up to twenty-one (21) employees could have been affected by the short voting period. Fourteen (14) employees worked the entire duration of the voting period and did not submit ballots. Another seven (7) individuals did not submit ballots and it would have been difficult for them to vote within the period of time that was made available to them. On the other hand, the Union's margin of victory in the representational vote was twenty-seven (27). As a consequence, this error alone, while significant, would not have been sufficient to undermine the integrity of the vote. On the other hand, it was not the only error that occurred.

Extending the Voting Period without Notice to Eligible Voters:

[87] As we have indicated, upon being informed that many of the affected employees worked a 21/7 work schedule, it would have been well within our Agent's discretion to extend the voting period for everyone. However, if that was the intent of our Agent, an updated Notice of Vote should have been mailed to the original ninety-two (92) voters and that notice should have been posted in a conspicuous place in the workplace. As neither of these things occurred, in our opinion, the voting period was not extended for these voters.

[88] In coming to this conclusion, we are aware that a second Notice of Vote was issued and our Agent was correct in doing so upon learning that three (3) employees had been missed from the original voters list. However, as this second Notice of Vote was not sent to all eligible voters; nor was the Employer instructed to post it in the workplace; in our opinion, it did not extend the voting period for the original voters. It was only applicable to the three (3) individuals who received that Notice.

[89] From our review of the evidence, it would appear that fourteen (14) ballots were received outside the parameters originally established for the vote. However, we note that seven (7) of these ballots were received within three (3) days of the voting deadline; leaving just seven (7) ballots clearly being received outside the established parameters for the representational vote.

[90] While late ballots are not unusual when a mail-in balloting procedure is used, under the unique circumstances that occurred with this vote, they represented a particular problem. Firstly, the voting period was too short and it would have been difficult for many voters to obtain, complete and return their ballots within the period of time originally prescribed. Secondly, it would appear the Union and its organizers were the only ones informing employees that the voting period had been extended. While we can find no fault in the actions of the Union or in the efforts of Mr. Demarais and Mr. Foster to encourage voters to vote, the voting process must be supervised and conducted by a neutral third party. To maintain the integrity of the voting process, an official notice from our staff should have been provided directly to affected voters or, at least, posted in the workplace. In our opinion, the integrity of the voting process was compromised when the Union and its organizers were the only ones informing employees that the voting period had been extended.

Particulars of Late Ballots not made known to the Scrutineers:

[91] As indicated, it is not unusual for ballot envelopes to arrive late when a mail-in balloting procedure is used and several options are available for the parties if such is the case. In some cases, late ballots are included in the tabulation and in other cases they are excluded. In either event, a party seeking to object to the inclusion (or exclusion) of late ballots is expected to raise that objection before the ballots are tabulated. Mr. Eustergerling was the Employer's scrutineer and he did not object to the inclusion of any of the late ballots. The Union argues this should bar the Employer from now objecting to the inclusion of late ballots. We are not persuaded by this argument.

[92] While our staff informed the scrutineers that late ballots had been received and they followed their normal practice of allowing the scrutineers to examine the return envelopes prior to tabulation, this procedure was ineffectual for this particular case. Because Mr. Eustergerling was participating by phone, the procedure did not communicate important information to the Employer's scrutineer. For example, Mr. Eustergerling did not become aware;

nor was he informed; that fourteen (14) ballots had been received late; or when they were received by the Board, let alone post marked by Canada Post. As a result, it was not possible for the Employer to make a timely objection. While the problem arose because Mr. Eustergerling elected to participate in the tabulation by phone, in our opinion, under the circumstances, our Agent was required to verbalize the information that Mr. Eustergerling would have seen had he been present, including how many late ballots had been received when they were stamped by Canada Post, and when they were received by the Board.

Conclusions Regarding the Conduct of the Representational Vote and Tabulation of Ballots:

[93] In our opinion, each of the above described errors was innocent. Having considered the evidence, we can ascribe no fault to our staff, the Union or the Employer. Furthermore, none of these errors alone would have been statistically significant. However, when considered cumulatively, we find that up to twenty-eight (28) voters and/or ballots could have been affected. In our opinion, the combined impact of these errors, even if they were innocently made, was statistically significant. As a consequence, we find that the integrity of the voting process cannot reasonably be maintained. For these reasons, we find that a new representational vote must be conducted.

Conclusions:

[94] Having considered the evidence in these proceedings, we find that the result of the representational vote conducted by our staff in these proceedings must be set aside and a new representational vote conducted. For purposes of clarity, when the representational vote takes place, eligible voters shall consist of those employees of the Employer who were working within the scope of the bargaining unit on October 23, 2014 and who continue to work within the scope of the unit on the date of the vote.

[95] Because the Union's reputation may have been injured by the delay in processing their certification application, we directed that the Union shall be entitled to provide an informational package to all employees in the workplace prior to the vote. Should they desire to do so, the Union's information shall be distributed to employees in sealed envelopes at a "tool box" meeting or provided directly to affected employees in their rooms in the camp. In the alternative to having the Employer distribute this information, the Union, at their election, may mail such information directly to employees. If the Union elects to write to employees at their

home address, the Employer shall promptly provide the Union with current mailing addresses for all employees of the Employer.

[96] We remain seized with respect to any issue arising out of implementation of these Reasons for Decision.

[97] Board member Ken Ahl concurs with these Reasons for Decision. However, Board member Hugh Wagner dissents.

DATED at Regina, Saskatchewan, this **9th** day of **October, 2015**.

LABOUR RELATIONS BOARD

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Steven D. Schiefner,
Vice-Chairperson

DISSENT OF HUGH WAGNER

[98] I have read the Reasons for Decision of the majority. While, I do not disagree with the account of the evidence in this case, I do not agree in the result.

[99] Based on the facts of this case, it is my opinion/decision that, in conducting the representation vote in question, there is no evidence that either ballot option for the subject employees to select, or its timing, was favoured or advanced by the apparent flaws in the process adopted and adapted.

[100] Looking back, I might say that I would have done this or that differently, but as I assess the evidence of this case, everything done by the Board's staff was done honestly based on the information they received and exchanged in an evolving situation.

[101] The Board's staff are charged with making decisions and conducting a representational vote to capture the wishes of the majority of employees who vote in an often fluid and time-pressured situation which relies on information the Board staff receive (largely from the Employer's agents).

[102] Bearing the above facts in mind, I am also mindful that one of the express purposes of the *Act* is to give life to the representational wishes of employees. Therefore, it strikes me strange that the results of the November/December 2014 representation vote would be overturned in the absence of any evidence of objection to the representational vote or its outcome from any of the subject employees. In this case the result of the vote was overwhelmingly in favour of the Union.

[103] Even if the thesis of my above dissent is not accepted, I submit that by reasonable measure of the evidence, due process or natural justice, the Employer's objection to the conduct of the representational vote should fail on the basis of timeliness. Despite having all of the usual opportunities to object to the conduct of this vote within the parameters provided by the Board, its regulations or the *Act*, the Employer did not object to the conduct of the vote in a timely manner until some two months after the results of the representation vote were known to all.

[104] For these reasons, I dissent from the decision of the majority. In my opinion, the Employer's objection should fail. Accordingly, I would also order that the results of the 2014

representational vote conducted should stand and the Union should be certified as the chosen representative of the employees in question.

Hugh Wagner,
Board Member