VARSTEEL LTD. v. UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 5917

LRB File Nos. 248-16 and 267-16; November 26, 2018

Panel: Chairperson, Susan C. Amrud, Q.C.; Members Jim Holmes and Laura Sommervill

For the Applicant: Tom Waller, Q.C.

For the Respondent: Heather Jensen

Application by Employer to Cancel or Amend Certification Order based on abandonment – Section 6-16 does not authorize cancellation of portion of bargaining unit – No proof of material change of circumstances to justify amendment.

Unfair Labour Practice – Employer failed to advise Union when employee hired into bargaining unit – No evidence respecting when employee hired – Employer did not establish grounds for estoppel - Employer ordered to cease and desist contravention of Act.

REASONS FOR DECISION

INTRODUCTION

[1] On November 14, 2016, Varsteel Ltd. ["Employer"] filed an Application to Cancel or Amend the Certification Order issued by this Board on December 1, 2015 to the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 5917 ["Union"]. It asks the Board to remove the employees working at its Estevan location from the bargaining unit and/or cancel the certification order with respect to its Estevan location[1].

[1] LRB File No. 248-16.

[2] On November 29, 2016, the Union filed a Reply to that application and an Unfair Labour Practice Application[2]. The Unfair Labour Practice Application states that the Employer failed, refused or neglected to inform the Union of job postings and new employees within the bargaining unit at the Estevan location and to inform such employees of the requirement to become members of and maintain membership in the Union, as required by *The Saskatchewan Employment Act* ["Act"] and their collective agreement.

[3] The hearing of these applications took place on March 13 and 14, 2017, before then Vice-chairperson Graeme Mitchell and panelists Jim Holmes and Laura Sommervill. Vice-chairperson Mitchell was appointed as a judge of the Court of Queen's Bench on September 21, 2018. The parties agreed that the matters could be concluded by me listening to the recording of the hearing and then issuing this decision in conjunction with the panel.

BACKGROUND

[4] On April 12, 2001, the Board issued a certification order for the Union with respect to the Employer's employees in Regina[3]. On June 26, 2003, the Board issued a certification order for the Union with respect to the Employer's employees in Estevan[4]. On September 30, 2003, those two orders were rescinded and replaced by one certification order that combined them, and applied to the Employer's employees in both Regina and Estevan. That order remained in place until 2015.

[5] In October 2013 the Employer acquired a business in Regina known as Varsteel Metals Processing Centre ["VMPC"]. On April 10, 2015, the Union wrote to the Employer indicating its view that the employees of VMPC were covered by the certification order. The Employer made an application[5] to the Board for a declaration determining whether the 2003 certification order applied to the VMPC employees or for an order requiring a vote of those employees to determine if a majority supported bargaining collectively through the Union. On October 14, 2015, the Board issued a consent order directing a vote by the VMPC employees.

[2] LRB File No. 267-16.
[3] LRB File No. 075-00.
[4] LRB File No. 070-03.
[5] LRB File No. 088-15.

The VMPC employees did not support the Union. A new certification order was issued on December 1, 2015 that described the bargaining unit as follows:

> *all employees employed by Varsteel Ltd;*
>
> *i. in Regina, Saskatchewan including the current premises at 3090 Industrial Drive North and excluding inside and outside sales representatives, foreman, those above the rank of foreman and employees at the metal processing centre at 2300 Industrial Drive North, and,*
> *ii. in Estevan, Saskatchewan, all employees except office staff, salespersons, branch manager and those above the rank of branch manager.*

[6] The parties have very different perspectives on the status of the Estevan employees. In the Employer's opinion, after the certification order respecting the Estevan employees was issued in 2003, it never heard anything from the Union again with respect to Estevan, and was entitled to assume that the Estevan certification and employees had been abandoned by the Union. In its 2015 application, it made the following statement respecting Estevan:

> *c. Within the Province of Saskatchewan, employees at facilities located in Saskatoon, Swift Current, Prince Albert and Estevan and at the Varsteel Metals Processing Centre (VMPC) have not bargained collectively although an application for a certification order has been filed in respect to the operation in Prince Albert.*

[7] The Union's Reply to that application included the following statement in response to paragraph (c):

> *The Respondent [Union] is unable to agree or disagree with the statements made in respect to the Applicant's operations in western Canada and/or number of facilities subject to certification orders etc.*

[8] Following the issuance of the December 1, 2015 certification order, the Employer's lawyer wrote to the Union on January 12, 2016 with a proposal for updating the certification order. The letter included the following statement:

> *The current Certification Order also includes a facility in Estevan. We are advised that the facility in Estevan is a small facility and that the Steelworkers have not pursued collective bargaining at that location.*

[9] The description of the bargaining unit proposed in that letter would have deleted reference to Estevan. The Union's evidence is that it has no record or recollection of receiving this letter either directly from the Employer's lawyer or from their lawyer who, according to the letter, was sent a copy. No response was received by the Employer.

[10] On September 2, 2016, the Employer's lawyer sent another letter to the Union. It proposed the same bargaining unit description. The Union acknowledged that it received this letter but did not respond to it. Just over two months later, the Employer filed this application.

[11] At the hearing the Employer filed a letter dated September 18, 2003 signed by both the Union and Employer, asking the Board to consolidate the certification orders issued on LRB File Nos. 075-00 and 070-03. The Union filed a letter dated the same day from the Union to the Employer that reads as follows:

> *Further to our telephone conversation of September 18, 2003, this will confirm that the Company will maintain status quo at the Estevan plant until such time as an employee is hired into the bargaining unit position. Upon hire the individual will be subject to the Collective Agreement.*

[12] The two individuals who signed the first letter were the sender and recipient of the second letter.

[13] In its Reply to the Employer's current application, the Union provided the following explanation of the second letter:

> *In 2003, after the Employer terminated the employment of any and all employees in the bargaining unit employed at the Estevan location, then Union Staff Representative Michael J. Park wrote to the Employer's Representative, Tom Mansfield to confirm that the company would maintain the status quo at the Estevan plant until such time as an employee is hired into the bargaining unit position and upon hire the individual will be subject to the collective agreement.*

[14] The Employer states it has no knowledge or record of the second letter.

[15] The Collective Agreement between the parties imposes several obligations on the Employer that are relevant here. The Employer must:

(a) deduct union dues from the wages of "each employee in the bargaining unit" and remit them to the Union on a monthly basis, "accompanied by a copy of the payroll for the pay period in which the deduction was made" (Article 4.02);
(b) furnish to the Union, on a monthly basis, "dates, names (in alphabetical order) and locations in respect to new engagements, lay-off lists, compensation and separations from employment with the Company" (Article 4.03);
(c) maintain and supply the Union with a copy of a seniority list that includes "employee name, plant seniority date and job title of all employees occupying jobs covered by this agreement" (Article 12.04);
(d) submit to the Union a copy of all posted notices of job vacancies (Article 12.05).

[16] Articles 2.01 and 2.02 of the collective agreement state:

> *The Company recognizes the Union as the sole and exclusive bargaining agency for its employees, as described in the current Certification issued by the Provincial Department of Labour for the purpose of collective bargaining with respect to rates of pay, hours of employment and other conditions of employment.*
>
> *The terms and conditions set forth in this Agreement shall have full force and effect for all employees in the bargaining unit as described in the preceding Section.*

[17] The Union's uncontradicted evidence was that the union dues, lists required by Article 4.03, seniority lists and copies of posted job vacancies that they received from the Employer never included a reference to employees in Estevan. The Union's evidence was that they assumed this meant that none of the employees in Estevan had a job that fell within the bargaining unit.

[18] This assumption changed when the Employer filed the current application on November 14, 2016. In it the Employer states that there is one employee at its Estevan location who falls within the scope of the bargaining unit established by the Certification Order.

ARGUMENT ON BEHALF OF THE PARTIES

A. Application to Cancel or Amend Certification Order

[19] To be successful in its application, section 6-16 of the Act requires the Employer to prove that the Union has been inactive in promoting and enforcing its bargaining rights for a period in excess of three years.

[20] David Hasley testified for the Employer. He has been the human resources manager for the Employer since March 2004. His evidence was that during his tenure, prior to the Employer filing this application, he has never seen a request from the Union for any information with respect to the Estevan facility: no requests for job postings; no requests for union dues to be deducted; no requests for information of any kind respecting the Estevan operations; no requests by Union representatives to visit the Estevan location. He testified that, even though his job duties included ensuring that the Employer complied with the collective agreement, he had never seen the certification order before 2015. On seeing in 2015 that the certification order included Estevan, he did not tell the Union there was an employee in Estevan within the scope of the bargaining unit; the Employer continued to provide seniority lists and dues to the Union that did not include the Estevan employee. His explanation was that the Employer did not recognize that employee as being part of the Union.

[21] The Employer's position is that the Union must have known there were employees in Estevan who fell within the scope of the bargaining unit. There is regular interaction between Estevan and Regina employees, as the Estevan facility receives the bulk of its inventory from Regina; it is delivered or picked up on a weekly basis.

[22] In the Employer's opinion, the parties have always acted as if the certification order and collective agreements did not apply to Estevan. It says there is not a single example of the Union raising Estevan throughout their 14-year relationship. The Union has failed to promote and enforce its bargaining rights for the Estevan employees for well in excess of three years. Further, there is nothing in the Employer's conduct that would excuse the Union's inactivity. It has not concealed the fact that it was operating an Estevan facility that employed people whose duties would normally fall to Union employees.

[23] The Union argues that the Employer cannot rely on its own breaches of its obligations under the Act, the certification order and the collective agreements to justify this application. The Union says the time period during which the Employer had no employees at the Estevan location within the scope of the bargaining unit cannot count toward the three-year time period mentioned in section 6-16 of the Act.

[24] The Union argues that section 6-16 does not authorize the Board to amend the scope of the bargaining unit or cancel the certification order in relation to only a portion of the bargaining unit. Section 6-16 only gives the Board the authority to cancel the entire certification order. It could only cancel the certification order if there was evidence that the Union has abandoned the entire bargaining unit. The evidence shows that is not the case here, and the Employer does not suggest it is. The Union argues that, given the difference in language between section 6-10, which authorizes an amendment to a certification order with respect to a portion of the bargaining unit, and section 6-16, which does not specifically authorize the Board to cancel a portion of the certification order, the Legislature must be presumed to have intended a difference in the Board's powers.

[25] The Union further argues that the Employer has not met the requirements of clause 6-104(2)(g) of the Act that apply to amendment applications, that is, consent of the Union or proof that the amendment is necessary. The Board has consistently held that in an application to amend a certification order the applicant must first prove a material change in circumstances; the Employer has not done that in this case.

[26] The Union's evidence was that it relied on the Employer to comply with the collective agreements and tell them if it hired an employee in Estevan within the scope of the bargaining unit. The Union representative, Leslie McNabb, commenced her employment with the Union in Regina in February 2015. She found nothing in the Union's files that indicated her predecessors had approached the Employer about Estevan employees. Her explanation/assumption was that the Union and Employer had an agreement, documented in the September 18, 2003 letter, that the Employer would advise the Union if any new Estevan employees fell within the scope of the bargaining unit, and the Union relied on that agreement. She testified that when she asked employees at the Regina location about the Estevan location

she was advised that they did not believe any of the employees in Estevan would fall within the scope of the bargaining unit**.**

B. Unfair Labour Practice

[27] The Union's unfair labour practice application argues that the hiring of an employee within the scope of the bargaining unit at the Estevan location was done in breach of the collective agreement. The Union was not given a copy of the posted job vacancy as required by Article 12.05. The Union was not given notice of the hiring as required by Article 4.03. The new employee has not been added to the seniority list as required by Article 12.04. The Employer has not deducted and remitted union dues with respect to this new employee as required by Article 4.02. These contraventions constitute unfair labour practices under sections 6-41, 6-42, 6-43 and 6-62 of the Act.

[28] The Employer argues that the unfair labour practice application should be dismissed for three reasons.

[29] First, the parties have not applied the certification order to Estevan. The Union has agreed by its conduct that it would not enforce the portion of the certification order that applied to the Estevan employees. Therefore, the Employer was not required to comply with any of its statutory or contractual obligations with respect to those employees.

[30] Second, the application was filed after the 90-day deadline in subsection 6-111(3) of the Act had expired. There is no basis on which the deadline should be waived.

[31] Third, the application should be dismissed on the grounds of estoppel. The Employer was led to believe that the strict wording of the certification order would not be enforced. The Union had an obligation to generally oversee or visit the Estevan site. The Union did not provide any evidence about what steps, if any, it took to represent the Estevan employees from 2003 to 2016.

[32] The Board appreciates the written submissions of counsel which we have read and considered.

RELEVANT LEGISLATIVE PROVISIONS

[33] Section 6-16 of the Act applies to the Employer's application. It requires the Board to cancel a certification order if the Union has been inactive in promoting and enforcing its bargaining rights for three years or more:

> ***Application to cancel certification order – abandonment***
> *6-16(1) An application may be made to the board to cancel a certification order by an employee within the bargaining unit or the employer named in the certification order if the union has been inactive in promoting and enforcing its bargaining rights for a period of three years or more.*
>
> *(2) The board shall cancel the certification order if the board is satisfied that the union has been inactive in promoting and enforcing its bargaining rights in the period mentioned in subsection (1).*

[34] The Employer also relies on clause 6-104(2)(g), which allows the Board to amend an order:

> ***Board powers***
> *6-104(2) In addition to any other powers given to the board pursuant to this Part, the board may make orders:*
>
> *(g) amending a board order if:*
>
> *(i) the employer and the union agree to the amendment; or*
>
> *(ii) in the opinion of the board, the amendment is necessary;*

[35] The Union relies on the following provisions in support of its unfair labour practice application:

> ***Parties bound by collective agreement***
> *6-41(1) A collective agreement is binding on:*
>
> *(a) a union that:*
>
> *(i) has entered into it; or*
>
> *(ii) becomes subject to it in accordance with this Part;*
>
> *(b) every employee of an employer mentioned in clause (c) who is included in or affected by it; and*
>
> *(c) an employer who has entered into it.*
>
> *(2) A person bound by a collective agreement, whether entered into before or after the coming into force of this Part, must, in accordance with the provisions of the collective agreement:*
>
> *(a) do everything the person is required to do; and*

(b) refrain from doing anything the person is required to refrain from doing.

(3) A failure to meet a requirement of subsection (2) is a contravention of this Part.

(4) If an agreement is reached as the result of collective bargaining, both parties shall execute it.

(5) Nothing in this section requires or authorizes a person to do anything that conflicts with a requirement of this Part.

(6) If there is any conflict between a provision of a collective agreement and a requirement of this Part, the requirement of this Part prevails.

Union security clause

6-42(1) On the request of a union representing employees in a bargaining unit, the following clause must be included in any collective agreement entered into between that union and the employer concerned:

"1. Every employee who is now or later becomes a member of the union shall maintain membership in the union as a condition of the employee's employment.

"2. Every new employee shall, within 30 days after the commencement of the employee's employment, apply for and maintain membership in the union, and maintain membership in the union as a condition of the employee's employment.

"3. Notwithstanding paragraphs 1 and 2, any employee in the bargaining unit who is not required to maintain membership or apply for and maintain membership in the union shall, as a condition of the employee's employment, tender to the union the periodic dues uniformly required to be paid by the members of the union".

(2) Whether or not any collective agreement is in force, the clause mentioned in subsection (1) is effective and its terms must be carried out by that employer with respect to the employees on and after the date of the union's request until the employer is no longer required by this Part to engage in collective bargaining with that union.

(3) In the clause mentioned in subsection (1), "the union" means the union making the request.

(4) Failure on the part of any employer to carry out the provisions of subsections (1) and (2) is an unfair labour practice.

(5) Subsection (6) applies if:

(a) membership in a union is a condition of employment; and

(b) either:

(i) membership in the union is not available to an employee on the same terms and conditions generally applicable to other members; or

(ii) an employee is denied membership in the union or the employee's membership is terminated for reasons other than the failure of the employee to tender the periodic dues, assessments and initiation fees uniformly required to be paid by all other members of the union as a condition of acquiring or maintaining membership.

(6) In the circumstances mentioned in subsection (5), if the employee tenders payment of the periodic dues, assessments and initiation fees uniformly required as a condition of acquiring and maintaining membership, the employee:

(a) is deemed to maintain membership in the union for the purposes of this section; and

(b) shall not lose membership in the union for the purposes of this section for failure to pay any dues, assessments and initiation fees that are not uniformly required of all members or that in their application discriminate against any member or members.

Employer to deduct dues
6-43(1) On the request in writing of an employee and on the request of a union or union local representing the employees in the bargaining unit, the employer shall deduct and pay in periodic payments out of the wages due to the employee the union dues, assessments and initiation fees of the employee.

(2) The employer shall pay the dues, assessments and initiation fees mentioned in subsection (1) to the union or union local representing the employee.

(3) The employer shall provide to the union or union local the names of the employees who have given their authority to have the dues, assessments and initiation fees mentioned in subsection (1) paid to the union or union local.

(4) Failure to make payments or provide information required by this section is an unfair labour practice.

Unfair labour practices – employers
6-62(1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following:

(d) to fail or refuse to engage in collective bargaining with representatives of a union representing the employees in a bargaining unit whether or not those representatives are the employees of the employer;

. . .

(r) to contravene an obligation, a prohibition or other provision of this Part imposed on or applicable to an employer.

[36] The following provision also applies to the Union's application:

Powers re hearings and proceedings
6-111(3) Subject to subsection (4), the board may refuse to hear any allegation of an unfair labour practice that is made more than 90 days after the complainant knew or, in the opinion of the board, ought to have known of the action or circumstances giving rise to the allegation.

ANALYSIS AND DECISION

A. Application to Cancel or Amend Certification Order

[37] Subsection 6-4(1) of the Act states:

> *Employees have the right to organize in and to form, join or assist unions and to engage in collective bargaining through a union of their own choosing.*

[38] Starting from this assumption, that union representation is the employees' choice, not the employer's choice, the Board examined the parties' arguments. Both parties agree that, under section 6-16 of the Act, the onus is on the Employer to prove that the Union has been inactive in promoting and enforcing its bargaining rights for a period of three years or more.

[39] The Employer argues that the Board should interpret section 6-16 in a broad, expansive manner, and read in a power to amend a certification order or cancel a portion of it if a union is not taking sufficient action to promote and enforce the bargaining rights of a portion of the bargaining unit. The Board does not agree with the Employer that this would be an appropriate interpretation of section 6-16, particularly based on an employer's application. Section 6-16 is narrowly worded because it is an extraordinary power. The Board agrees with the Union's argument that section 6-16 does not allow the Board to cancel a portion of the certification order on the basis of abandonment. As the Union points out, this is an application by an employer to remove union representation from some of its employees. Accordingly, section 6-16 should be interpreted narrowly.

[40] This Board has opined on many occasions as to the rules of statutory interpretation that guide its decision-making. In its argument, the Union relied on a recent example, *Saskatoon Public Library Board v Canadian Union of Public Employees, Local No. 2669*, 2017 CanLII 6026 (SK LRB). As that decision stated, the starting point for the Board's analysis is to determine the ordinary and grammatical meaning of the words used by the Legislature. Here it is helpful to compare the wording of section 6-16 with the wording of sections 6-9, 6-10 and 6-11 (emphasis added throughout):

Application to cancel certification order – abandonment 6-16(1) An application may be made to the board to **cancel a certification order** by an employee within the bargaining unit or the employer named in the certification order if the union has been inactive in promoting and enforcing its bargaining rights for a period of three years or more. (2) The board shall **cancel the certification order** if the board is satisfied	**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

that the union has been inactive in promoting and enforcing its bargaining rights in the period mentioned in subsection (1).	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. **Change in union representation** **6-10**(1) If a union has been certified as the bargaining agent for a bargaining unit, another union may apply to the board to be certified as bargaining agent: (a) for the bargaining unit; **or** (b) **for a portion of the bargaining unit**: (i) if the applicant union establishes to the satisfaction of the board that **the portion of the bargaining unit** that is the subject of the application should be separately certified as a unit appropriate for collective bargaining; or (ii) if the applicant union is certified as the bargaining agent in another bargaining unit with the same employer or, in circumstances addressed in Division 14, with two or more health sector employers as defined in section 6-82 and the applicant union establishes to the satisfaction of the board that **the portion of the bargaining unit** that is the subject of the application should be moved into the other bargaining unit. **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. **Certification order** **6-13**(1) If, after a vote is taken in accordance with section 6-12, the board is satisfied that a majority of votes that are cast favour certification of the union as the bargaining agent for a unit of employees, the board shall issue an order: (a) certifying the union as the bargaining agent for that unit; and (b) if the application is made pursuant to subclause 6-10(1)(b)(ii), **moving a portion of one bargaining unit** into another bargaining unit.

[41] Especially given the proximity of these provisions, the Board is of the view that the ordinary and grammatical meaning of section 6-16 is that it does not authorize the Board to make an order to cancel a portion of a certification order. The second step, then, is to consider whether this interpretation is harmonious with the other provisions of Part VI of the Act. As noted above, the interpretation suggested by the Employer is contrary to the fundamental principle of Part VI, which is that employees have the right to engage in collective bargaining through a union of their own choosing. It is an unfair labour practice for an employer to interfere with an employee in the exercise of a Part VI right. The Board is satisfied that the narrow interpretation of section 6-16 urged by the Union satisfies the three principles of statutory interpretation postulated in *Sullivan and Driedger on the Construction of Statutes*[6]*:*

> *At the end of the day, after taking into account all relevant and admissible considerations, the court must adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of legislative intent; and (c) its acceptability, that is, the outcome complies with legal norms; it is reasonable and just.*

[42] Both parties referred the Board to *International Brotherhood of Electrical Workers, Local 529 v Saunders Electric Ltd.*, 2009 CanLII 63147 (SK LRB) and, in particular, the following passages:

> *[50] The focus of the inquiry as to whether or not the rights granted to a union by a certification Order have been abandoned is not on the activities of the Employer. The rights granted by the certification Order are for the benefit of employees of the Employer. It is for these employees, on whose application and for whose benefit those rights have been*

[6] Fourth Edition by Ruth Sullivan. Butterworths Canada Ltd. 2002, p. 3.

granted by the Board. The Board must determine if these rights have been abandoned by the Union certified to represent those employees. Activities by an employer which interfere with those rights may amount to an unfair labour practice, but the activities of an employer cannot determine how a union utilizes and enforces the rights which it has been given to represent the employees of an employer.

[51] The Board must not focus its inquiry on the activities of the employer in determining an issue regarding a claim that a Union's rights have been abandoned. In that regard, the criticism of the Board's decision in Mudjatik, supra, by the Alberta Board is fully justified.

[52] Similarly, the concerns of the Court of Appeal in Graham, supra, that the Board failed to deal with the three points raised by Adams as indicia of abandonment of bargaining rights by a union is also of concern in this case since those indicia were also not considered by the Board in the decision under review.

[53] The Board concurs with the Alberta Board in Siemens, supra, and the Ontario Board's approach to abandonment that each case must be determined on its particular facts. There is "limited utility" in having "hard and fast" rules by which abandonment can be determined.

[54] There are, however, some principles which can be distilled from Adams and cases which have dealt with the issue which can be provided for guidance of the labour relations community. These are:

> *1. The onus of proof in abandonment cases is upon the party who asserts the rights have been abandoned;*
> *2. The focus of the inquiry by the Board should be upon the use or lack thereof of the collective bargaining rights granted to the Union under the Act. The activities of the employer, may, in some instances, give rise to an unfair labour practice, but the underlying basis of the principle of abandonment is that a union has failed to exercise the rights granted to it to bargain collectively; and*
> *3. If a failure to utilize collective bargaining rights has been established, then the inquiry must turn to a determination of whether there any other factor or factors which would excuse the inactivity or lack of use of the rights by the Union.*

[43] Even if the Board had held that it had the power to make the order requested by the Employer, the Board is of the view that the Employer has not proven that the Union failed to promote and enforce its bargaining rights for the Estevan employees for a period in excess of three years. The Union's evidence is that it was relying on the undertaking described in the September 2003 letter. It was also relying on the rights, contained in every collective agreement it bargained with the Employer, to receive information respecting hiring of new employees; it relied on the reference to the certification order in the collective agreement for its assumption that it was acting on behalf of both Regina employees and Estevan employees (if there were any within the scope of the bargaining unit). It pointed to the reference to "locations" in Article 4.03 and "plant seniority date" in Article 12.04 as evidence that the Employer knew that its obligations to provide information and union dues to the Union extended to any employees in Estevan within the scope of the bargaining unit. Since 2003 Article 2.01 has referred to the certification order. Mr. Hasley

commenced employment with the Employer in 2004 in a role that required him to ensure the Employer was complying with the collective agreement. Yet, his evidence was that he never made any effort to determine the application of probably the most important Article of the agreement, Article 2.01.

[44] The only evidence before the Board of the presence of employees at the Estevan location who fell within the bargaining unit came from Mr. Hasley. He indicated that there was such an employee in 2015. He did not provide further evidence regarding when this employee commenced work in this position, or whether there were previous employees in this position. Therefore, the evidence before the Board is that, at the date of the Employer's application, November 14, 2016, the alleged abandonment of this employee by the Union could only have been occurring for less than two years.

[45] If the Board had found that a failure to promote and enforce bargaining rights had been established, the next step would have been for the Board to consider whether any factors would excuse the Union's inactivity. Here the evidence is clear. In 2003 there were no employees in Estevan who fell within the scope of the bargaining unit. The Employer agreed (in a telephone conversation documented in the September 18, 2003 letter and in all of the collective agreements entered into since that time) that if, in the future, any of its Estevan employees fell within the scope of the bargaining unit, it would advise the Union. The Employer failed to do so, even after its obligation to do so was brought to its attention in 2015. The Employer cannot use this deliberate non-compliance with its contractual and statutory obligations as the basis for an abandonment argument. Given the cooperative nature of its relationship with the Union with respect to the Regina employees, there was no reason for the Union to believe or suspect that the Employer would fail to live up to its obligations with respect to its Estevan employees. The Board would also dismiss the application on this basis.

[46] The next issue is whether the Board should exercise its discretion to amend the certification order on the basis that an amendment is necessary. In this case it is important to keep in mind that the order that the Employer is asking the Board to amend is a Consent Order granted in 2015. The Employer argues that the material change in circumstances is the parties' agreement, through their conduct, not to apply the order to the Estevan location or employees.

[47] In *Service Workers International Union, Local 299 v Canadian Blood Services*, 2007 CanLII 68757 (SK LRB), after an extensive review, the Board held that the issue of whether there has been a material change in circumstances is preliminary to the consideration of the merits of an amendment application. It explained that the concern of the Board is to prevent applications for amendment from being used as a method of appeal from a previous decision of the Board.

[48] *Sobey's Capital Inc. v United Food and Commercial Workers Union, Local 1400* (2006), 127 C.L.R.B.R. (2d) 42, 2006 CanLII 62961 (SK LRB) confirmed that an application for an amendment to the geographic scope of a certification order requires proof of a material change in circumstances:

> *[39] In further support of our conclusion, we note the similarities between the amendment application before us and those considered in the authorities referred to above. Both Raider Industries, supra, and Impact Products, supra, provide direct authority for the proposition that an amendment concerning a change in the geographic scope of a certification order first requires proof of a material change in circumstances. Furthermore, in our view, this application, which seeks an amendment to the geographic scope of the bargaining unit description in the certification Order, is much the same as an application to amend the scope of exclusions in the bargaining unit description in a certification order, where, as noted above in the Casino Regina and Cuelenaere cases, both supra, a material change in circumstances is required to be shown. We are not prepared to deviate from these lines of authority to establish an exception to the material change rule in the circumstances of this case.*

[49] A recent decision of this Board, *Unifor Canada, Local 594 v Consumers' Co-operative Refineries Limited*, 2015 CanLII 43766 (SK LRB), again undertook an extensive review of this issue, in the context of an application to change the geographic limit of a certification order. The Board confirmed that the applicant must satisfy the Board that there has been a material change in circumstances since the most recent certification order issued and that there is a correlation between the material change and the requested amendment.

[50] In this case the Employer urges the Board that, for the purpose of determining this issue, the September 30, 2003 order should be considered the most recent certification order, not the December 1, 2015 order. The Board does not agree with that suggestion. In any event, the Employer has provided the Board with no evidence of a material change in circumstances that would convince the Board that an amendment is necessary, no matter which order is chosen. The Employer's evidence was that the Estevan location does the same work now that it did in 2003 and 2015; the employees' job duties have been relatively constant over this time; the size of the Estevan facility has been relatively consistent over this timeframe. The Employer provided

no evidence that the Union agreed to their wish that the certification order not apply to their Estevan operations.

[51] The Board finds, therefore, that the Employer's application fails on all grounds and is dismissed.

B. Unfair Labour Practice

[52] Based on the evidence provided at the hearing, there is no dispute that the Employer has engaged in the unfair labour practices itemized in the Union's application. The only issue is whether any of the Employer's defences should be accepted as grounds to nevertheless dismiss the application.

[53] Subsection 6-111(3) of the Act provides that the Board may refuse to hear an unfair labour practice allegation made more than 90 days after the action or circumstances giving rise to the allegation. The Employer argues that the Union's application is out of time.

[54] The first issue for the Board to consider is when did the 90-day period begin to run? When can it be said that the Union knew or ought to have known that the Employer was breaching the Act? The Board outlined the principles that apply to the determination of this issue in *Saskatchewan Polytechnic Faculty Association v Saskatchewan Polytechnic*, 2016 CanLII 58881 (SK LRB) ["*Saskatchewan Polytechnic*"]:

> *[18] From these cases, and the relevant statutory provisions, the following salient principles emerge:*
>
> - *Applications alleging an unfair labour practice must be filed within 90 days after the applicant knew or ought to have known about the misconduct giving rise to the allegation (ss.6-111(3)).*
> - *The 90 day limitation period reflects the fact that time is of the essence in addressing labour relations disputes and timely resolution of such disputes is essential to ensuring amicable labour relations in Saskatchewan (Dishaw, at para. 36; Peterson, at para. 29; SGEU, at paras. 13-14).*
> - *It is important to identify with precision when the 90 day limitation commences. Typically, the alleged misconduct will be founded upon a particular fact situation and the clock starts running from that date (SGEU, at para. 29).*
> - *A complaint may be based on a "continuing policy or practice rather than a discrete set of events". This fact makes it more difficult to ascertain the commencement of the 90*

day limitation period and may make it easier to justify a delay (Toppin, at para. 29; SGEU, at para. 30).

- *The Board will adjudicate applications filed outside the 90 day limitation period provided the other party consents or otherwise waives the application of the limitation period (ss. 6-111(4)).*
- *Where no such consent or waiver is given, the Board possesses discretion to adjudicate the application (ss. 6-111(3); SGEU, at para. 24).*
- *When exercising this discretion, the Board should apply the non-exhaustive list of counter-vailing factors identified in Toppin (SGEU, at paras.26-27; Toppin, at para. 30)*
- *Prejudice is presumed in all late filings; however, if actual prejudice could result from hearing the application it will be dismissed.*

[55] The Employer's view is that, since it has been operating the Estevan location openly since at least 2004, the time frame for filing this application expired more than a decade ago. Alternatively, it argues that certainly after the Application on LRB File No. 088-15 was filed on May 13, 2015 and the subsequent letter sent on January 12, 2016, it cannot be said that the Union did not know or ought not to have known that there were individuals employed at the Estevan location. This would mean that the absolute latest the limitation period would expire would be 90 days after the letter was sent.

[56] The Employer is of the view that there are not sufficiently strong countervailing considerations for the Board to exercise its discretion to waive the time limitation. The principles in *Saskatchewan Polytechnic* refer to a non-exhaustive list of countervailing factors that the Board adopted in that case, based on a framework established by the Alberta Labour Relations Board in *Neville Toppin v United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 48810* [2006] Alta. L.R.B.R. 31, 123 C.L.R.B.R. 253:

Without closing the categories of countervailing considerations that are relevant, the Board will consider the following questions:

(a) Who is seeking relief against the time limit? A sophisticated or unsophisticated applicant?
(b) Why did the delay occur? Are there extenuating circumstances? Aggravating circumstances?
(c) Has the delay caused actual litigation prejudice or labour relations prejudice to another party?
(d) And, in evenly balanced cases, what is the importance of the rights asserted? And what is the apparent strength of the complaint?

[57] With respect to these considerations, the Employer stated: the Union is a sophisticated applicant; there is no reasonable explanation for the Union to not have inquired about the Estevan location for over a decade; the usual practice of the Employer is to destroy records after ten years so the Employer is no longer in a position to refute the Union's claims with documentary evidence and has therefore suffered actual prejudice; and there is evidence to suggest that the Union was not interested in pursuing its bargaining rights in Estevan until the Employer filed its application in this matter (the Employer did not identify what this evidence was).

[58] These arguments by the Employer miss the point that the time began to run when the Union knew or ought to have known that the Employer had hired an employee within the scope of the bargaining unit and refused or neglected to comply with its statutory and contractual duties that then fell to it. No evidence was led by the Employer with respect to when that employee was hired, and this is information that is within its knowledge. The evidence before the Board respecting the Union's knowledge of the existence of this employee is Ms. McNabb's evidence that it occurred when the Union received a copy of the Application to Cancel or Amend Certification Order signed by Mr. Hasley on November 14, 2016 that stated: "There is one employee at the Estevan location that would fall within the scope of the Certification Order". The Unfair Labour Practice Application was filed on November 29, 2016, 15 days later, and therefore well within the timeframe under subsection 6-111(3) of the Act.

[59] The next argument that the Employer urged the Board to apply to deny this application is the doctrine of estoppel. The Employer argued that the Union's course of conduct led it to believe that the Union did not intend to enforce its strict legal rights. The Employer suggested that silence or acquiescence on the part of the Union over a number of years was sufficient to establish estoppel.

[60] The Employer relied for this argument on a recent decision of the Board, *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada Local 179 v Modern Niagara Western Inc.*, 2016 CanLII 1344 (SK LRB) ["*Modern Niagara Western*"]. In that case the union applied for a certification order despite the fact that it had entered into a Memorandum of Agreement with the employer in which it agreed not to do so, during the currency of the Agreement and for six months following its expiry. The Agreement was still in effect at the time of the application. The Board dismissed the application,

stating it would be inequitable and an abuse of the Board's procedures to permit the application to proceed. The Board also noted that the employees in question in that case were already members of the union and, under the terms of the Agreement, enjoyed the same rights, benefits and privileges as union members working for certified employers. The Board does not find that case persuasive in the current matter. In *Modern Niagara Western*, the union had signed an agreement to not make the application, unlike this case where the Employer asks the Board to make assumptions about the Union's intentions that are contrary to the Union's evidence. In *Modern Niagara Western*, the employees enjoyed protection by the union even if the application was dismissed, again, unlike this case.

[61] In *United Food and Commercial Workers, Local 1400 v Westfair Foods Limited*, 1989 CanLII 3919 (SK LA) an arbitrator was asked to apply the doctrine of estoppel and dismiss a grievance that alleged that the grievor, as the most senior employee, should have received the first opportunity to work additional hours that became available when the scheduled employee was unavailable. The employer and union disagreed on the interpretation of the collective agreement as it applied to this issue. The employer's position was that, since it had been rescheduling in accordance with its interpretation for more than three years, the arbitrator should find that the union had acquiesced in its interpretation and therefore should be estopped from challenging it. The arbitrator found that the union was unaware of the employer's practice for most of this time and therefore could not be said to have acquiesced; she found in favor of the grievor. This case is similar to the current application, in that both parties were making assumptions about the other's actions, which turned out to be unfounded. As a result, estoppel was not available.

[62] The Employer also referred the Board to an Ontario arbitration decision, *Continuous Colour Coat Ltd. v United Steelworkers, Local 3950-65 (Vacation Pay Calculation Grievance)*, 2011 CanLII 77073 (ON LA). That case involved a miscalculation by the employer of vacation pay over an extended period of time. As the Employer admits, this decision is not binding on the Board. Even if the Board was to rely on this decision, it does not support the Employer's argument. The arbitrator stated:

> *¶ 113 Estoppel operates to prevent the unfairness that can result when "A" represents to "B" that "A" will not enforce a right or obligation under the contract between them, or that "A" will apply the contract in a particular way; and then subsequently "A" "changes its mind" and either seeks to enforce the particular right or obligation, or seeks to apply the contract differently, after "B" has acted to its detriment in reliance on the representation and in circumstances where the situation cannot be restored. A party that asserts "estoppel" bears the onus of proving that:*

> *1. the other party to the collective agreement made a clear and unequivocal representation concerning the interpretation or application of the agreement;*
>
> *2. the representation was intended to and does in fact affect the legal relations between the parties to the agreement;*
>
> *3. the claimant relied upon the representation by doing something, or foregoing the opportunity to do something, and that it would have acted otherwise but for the representation;*
>
> *4. its reliance is detrimental because the situation cannot be restored to what it was when the representation was made.*
>
> *¶ 114 A representation can be by words or by conduct, and might even include silence or inaction in the face of a notorious longstanding practice contrary to a collective agreement provision. However, it is a question in each case whether all four elements of estoppel have been established, because a failure on any item will mean that the estoppel has not been made out.*

[63] There is no evidence in this case that these four elements of estoppel have been established. There was no "clear and unequivocal representation" by the Union, even by "silence or inaction in the face of a notorious longstanding practice contrary to a collective agreement provision". The fact that Union members in Regina knew there were employees in Estevan is not determinative. The issue is, when did the Union know, or when ought it to have known, that the Employer had hired an employee who fell within the scope of the bargaining unit. The Employer led no evidence on when the employee was hired; as mentioned previously, the evidence before the Board established that the first the Union knew of this employee was when it received a copy of the Employer's application in this matter, November 14, 2016. The Board is not prepared to find that the Union should be taken to have known this earlier, on the basis that its Regina members interacted on a weekly basis with the Estevan employees. A driver delivering steel cannot be expected to undergo an analysis of when an employee was hired who fell outside the exceptions in the certification order[7], or to know that foremen are excluded from the bargaining unit in Regina but not in Estevan. Even the Employer's witnesses admitted that, given there are only three employees in Estevan, there is a lot of overlap in their positions, all employees do a variety of work and it is difficult to determine who is responsible for what work.

[64] In any event, the estoppel found by the arbitrator in *Continuous Colour Coat* did not lead to a dismissal of the union's application. Instead, he declared that the company was

[7] The December 1, 2015 certification order applies to all employees employed by Varsteel Ltd in Estevan except "office staff, salespersons, branch manager and those above the rank of branch manager".

violating the collective agreement and ordered it to cease and desist. He did not, however, order any monetary remedy for the employees who had been underpaid.

[65] Applying that decision to this case would result in the Board issuing a declaration that the Employer has engaged in an unfair labour practice and an order that it cease that unfair labour practice. This is the remedy that the Union is now requesting. At the hearing it abandoned its request that the Board order the Employer to remit to the Union an amount equivalent to the dues that would have been deducted from employees within the scope of the bargaining unit at Estevan had the Employer complied with its obligations pursuant to the Act and the collective agreements.

[66] The Employer suggests that the Union should have been monitoring its business activities and checking with it from time to time to ensure it was complying with its obligations with respect to its Estevan employees. The Union admits that they may have been naïve to rely on the September 2003 letter and the monthly reports they received from the Employer. The Employer states that they have no record now of the 2003 letter, as they destroy all documents after eight years, and therefore have suffered actual prejudice in defending this application. However, the letter would have been in the Employer's records when Mr. Hasley commenced his role as human resources manager in 2004, and he either knew or ought to have known then of its existence. The exercise of more diligence by either party might have prevented the current situation.

[67] There is one final point on which the Board wishes to comment. In 2015, when the Employer's obligations were specifically drawn to its attention, the Employer chose to continue to act contrary to the Act and the collective agreement. This action the Board cannot and does not condone.

[68] This is a unanimous decision of the Board.

[69] The Board, accordingly, makes the following orders:

(a) The Application by the Employer to cancel or amend the certification order is dismissed.

(b) There will be a declaration that the Employer committed unfair labour practices contrary to sections 6-41, 6-42, 6-43 and 6-62 of the Act.

(c) The Employer is ordered to cease and desist the unfair labour practices described in paragraph (b) and to refrain from such actions in the future.

(d) The Employer is ordered to immediately commence compliance with the Act and the collective agreement with respect to the employee at its Estevan location who it has identified as falling within the bargaining unit.

(e) The Employer is ordered to provide the Union with full information with respect to any new employees hired within the scope of the bargaining unit, in Regina and Estevan.

(f) The Employer is ordered to post a copy of the Board's Order and Reasons for Decision at the Employer's facilities in Regina and Estevan, in locations accessible to employees, for at least two weeks, commencing within one week of the date of the Order.

DATED at Regina, Saskatchewan, this 26th day of **November, 2018.**

LABOUR RELATIONS BOARD

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Susan C. Amrud, Q.C.
Chairperson