FAROOQ AZAM ARAIN, Applicant v. UNITED STEEL and FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, Respondent and COMFORT CABS LTD.

LRB File No. 260-17; March 2, 2018

Chairperson, Kenneth G. Love, Q.C.; Members: Aina Kagis and Brenda Cuthbert

For the Applicant:	Larry Seiferling, Q.C.
For the Respondent United Steel:	Heather Jensen
For the Respondent Comfort Cabs Ltd.:	Robert Frost-Hinz

Section 6-17 – Application for Decertification – Board Agent determines that required 45% threshold for the conduct of a vote not achieved by application. Applicant requests that matter be referred to the Board for determination.

Calculation of Application threshold – Board reviews process and procedures utilized by Board Agent in determination of support threshold. Board finds that policy followed by Board Agent is no longer applicable and should be disregarded in calculation.

Calculation of Application threshold – Board reviews process and procedures used by Board Agent in determination of support threshold. Board determines that initial numbers for calculation of the statutory threshold should be determined approximately based upon records of employment during the same period for which support documents are valid.

REASONS FOR DECISION

Background:

[1] Farooq Azam Arain ("Arain") filed an application for decertification of a group of employees of Comfort Cabs Ltd. ("Comfort") represented by the United Steel and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (the "Steelworkers").

[2] In filing his application, Arain provided evidence of support for his application. On review of this support, and lists of employees provided by both Comfort and the Steelworkers, which the Board's Agent determined to be less than the statutory threshold of 45% and, therefore, did not meet the threshold for the Board to order a vote of the employees.

[3] The Board's Agent calculated the level of support by carefully examining the evidence of support, which was filed with the application, and rejected any evidence of support which were duplicates or which did not match any person listed on the employee lists. He also obtained two employee lists. One was from Comfort and listed all employees who were employed within the previous thirty days. The Steelworkers provided a list of additional employees based upon their dues submissions which listed employees they considered should be members of the bargaining unit.

[4] In addition to the rejected support evidence, there were also a number of employees who contacted the Board Agent to withdraw their support.

[5] There were, therefore, three (3) possible numerators for the support calculation and two (2) possible denominators. For ease of reference, we have assigned each of those possible numbers a letter as follows:

A = The total number of persons for whom support evidence was filed.
B = The number of support evidence rejected.
C = The number of support evidence withdrawn prior to the application being filed with the Board.
D = The number of employees as provided by Comfort.
E = The number of employees as provided by the Steelworkers.

[6] The Board's Agent calculated the support percentage based upon the following formula:

$$\frac{A - (B + C)}{D}$$

The Board's Agent utilized this formula based upon longstanding Board policy which consistently removed invalid support (item B) and withdrawn support (item C). The denominator would then consist of the employees as listed on the response from the Employer. With respect to withdrawn support, he relied upon the Board's policy regarding withdrawal of support as

published on the Board's website. That policy, under the FAQ – Frequently Asked Questions says:

> ***Can I withdraw my support card filed on an application for certification or an application for the cancellation of an Order ?***
>
> *An individual may seek to withdraw his or her support card by forwarding an original signed and dated request to this effect to the applicant and to the Board at:1600-1920 Broad Street, Regina, Saskatchewan S4P 3V2*
>
> *Please note that the Board has a policy of not considering evidence of support or withdrawal of support filed with it after an application for certification or rescission is received (see s. 6-107 of* ***The Saskatchewan Employment Act****).*

[7] In his choice of denominator, the Board Agent relied upon section 6-17(1)(a) which says:

> *6-17(1) An employee within a bargaining unit may apply to the board to cancel a certification order if the employee:*
>
> *(a) establishes that 45% or more of the employees in the bargaining unit have within the 90 days preceding the date of the application indicated support for removing the union as bargaining agent;…*

[8] The calculation made by the Board's Agent resulted in a support percentage of less than 45%. He advised Arain's counsel and the Steelworkers' counsel of the result of the calculation, advising that the application had failed to satisfy the support threshold and that he would be placing the application before a panel of the Board, *in camera*, with a recommendation that it be summarily dismissed. Additionally, the Board's Agent recalculated the support percentage utilizing the number of employees as provided by the Steelworkers. That calculation also resulted in a support percentage of less than 45%.

[9] Counsel for Arain objected to the matter being dealt with by the Board, *in camera*, and requested that the Board deal with the issue at an oral hearing. The Board heard the matter on January 9, 2018 in its hearing room in Saskatoon.

Relevant statutory provisions:

> ***6-17****(1) An employee within a bargaining unit may apply to the board to cancel a certification order if the employee:*
>
> > *(a) establishes that 45% or more of the employees in the bargaining unit have within the 90 days preceding the date of the application indicated support for removing the union as bargaining agent; and*
> >
> > *(b) files with the board evidence of each employee's support that meets the prescribed requirements.*
>
> *(2) On receipt of an application pursuant to subsection (1), the board shall direct that a vote be taken of the employees in the bargaining unit.*
>
> *(3) If a majority of the votes cast in a vote directed in accordance with subsection (2) favour removing the union as bargaining agent, the board shall cancel the certification order.*
>
> *(4) An application must not be made pursuant to this section:*
>
> > *(a) during the two years following the issuance of the first certification order; or*
> >
> > *(b) during the 12 months following a refusal pursuant to this section to cancel the certification order.*
>
> ***6-111****(1) With respect to any matter before it, the board has the power:*
>
> > ***.....***
> >
> > *(v) to order, at any time before the hearing or proceeding has been finally disposed of by the board, that:*
> >
> > > *(i) a vote or an additional vote be taken among employees affected by the hearing or proceeding if the board considers that the taking of that vote would assist the board to decide any question that has arisen or is likely to arise in the hearing or proceeding, whether or not that vote is provided for elsewhere; and*
> > >
> > > *(ii) the ballots cast in any vote ordered by the board pursuant to subclause (i) be sealed in ballot boxes and not counted except as directed by the board;*

Arain's Arguments:

[10] The Applicant drew a distinction between the provisions of the *SEA* dealing with obtaining a certification by a union and the provisions dealing with decertification by an employee. The Applicant argued that the Board could only consider evidence of support filed with the application and could not consider any additional information. They argued that once filed, support should not be able to be withdrawn and the support percentage should be determined based upon what was filed with the application.

[11] The Applicant argued that no investigation with respect to support or the maintenance of that support was necessary or required in respect of applications for decertification. All that should be required is that there was sufficient number of members of the bargaining unit showing that they supported the application.

[12] In the alternative, the Applicant argued that the Board should exercise its authority to order a vote at any time pursuant to section 6-111(v) of the *SEA*.

Steelworker's Arguments:

[13] The Steelworkers argued that the calculations made by the Board's Agent should be confirmed. The Steelworkers argued that published Board policy permitted the revocation of support.

[14] The Steelworkers argued that the threshold percentage was not discretionary and needed to be achieved before a vote could be ordered. The Steelworkers further argued that the Board's policy in this respect was common across Canada.

[15] The Steelworkers also argued that the Board should zealously guard the identity of both those filing support and those choosing to withdraw their support. The Steelworkers argued the report of the Board's Agent showing the application failed for lack of support should be accepted and the application dismissed.

Analysis:

[16] There are four (4) issues for the Board to consider with respect to this application. The first is whether or not the Board Agent was correct in disregarding the evidence of support, which was withdrawn prior to the filing of the application. The second is which of the two (2) lists of members of the bargaining units should be utilized for the calculation of the support percentage. The third issue is whether or not the Board's Agent was correct in disregarding support evidence which was duplicative or from persons not on either employee list. The final issue is whether or not the Board should exercise its discretion under section 6-111(v) of the *SEA* to order a vote in these circumstances.

Should Supporters be Permitted to Withdraw Their Support?

[17] The Board's policy with respect to withdrawal of support originates under the former *Trade Union Act* which was repealed and replaced with the *SEA*. The question is whether, under the revised rules which require a secret ballot vote for certification or decertification, does such a policy remain appropriate. The Applicant argues that it is not. The Union argues that it is. For the reasons which follow, we agree with the position taken by the applicant in this case.

[18] Under the former[1] provisions of *The Trade Union Act*, the certification process, but not the decertification process, was a "card check" system. That is, a trade union would submit a set of support cards and if those cards showed that 50% +1 of the employees of an employer supported the application, it would be granted. Additionally, where the level of support reached 25%, the Board would order a vote to determine if the employees were supportive of the trade union's application. Decertifications were a totally different story. If sufficient support was submitted the Board would order a vote.

[19] It was not until amendments were made to *The Trade Union Act* in 2008 that a secret ballot vote was implemented for both certifications and decertifications upon demonstration of a 45% support level. These provisions were carried forward into the *SEA*.

[20] The ability to withdraw support prior to the filing of an application made sense under the "card check" system because there was no other opportunity for someone who felt that they may have made a hurried decision, or signed the card under peer or other pressure to indicate their true position to the Board prior to a certification being issued. With the 2008 amendments and their carry forward to the *SEA,* this ability to withdraw became unnecessary because employees had the opportunity to express themselves confidentially and secretly through the voting process.

[21] With the introduction of the secret ballot process, the check valve of the repudiation of support is no longer necessary and can be removed from the Board's process. If an individual wishes to withdraw their support they will have that opportunity when the Board conducts its voting process, assuming, of course, the threshold is initially met.

[1] Prior to amendments made in 2008.

[22] In *Affinity Credit Union v. UFCW, Local 1400*[2] referenced by the applicant, the Court of Appeal confirmed the Board's decision to order a vote based upon a denominator which, as a result of a challenge to the list of voters, fell below the statutory threshold. At paragraphs [17] – [19], Madam Justice Ryan-Froslie said:

> *[17] The subsection requires the Board to be satisfied that at least 45% of the employees in the appropriate union support an application for certification before a vote can be ordered. The relevant point in time for the Board to make that determination is "the time of the application". The subsection also provides the basis upon which that determination is to be made, namely: "… the evidence submitted in support of the application and the Board's investigation in respect of that evidence".*
>
> *[18] The application form for certification is prescribed by the Regulations and Forms, Labour Relations Board, Sask Reg 163/72 (repealed by Sask Reg 27/2014). That Form is consistent with the Board's interpretation of s. 6(1.1) as it requires the union to set out the "approximate" number of employees in the proposed bargaining unit as opposed to the exact number of such employees. Indeed, depending on the nature and size of the bargaining unit, the exact number of employees may be very difficult, if not impossible, to determine without a hearing. Subsection 6(1.1) does not provide for such a hearing. It refers only to the Board's investigation of the evidence filed in support of the application.*
>
> *[19] In this case, the evidence submitted in support of the application consisted of UFCW's estimate of the number of employees in the bargaining unit, and the names of the employees who supported its application for certification accompanied by their consent. On its face UFCW's evidence of support exceeded the 45% threshold set out in s. 6(1.1). The Board did not conduct an in depth investigation of that evidence, but s. 6(1.1) does not require it to do so.*

[23] The Court confirmed that the Board is not required to make an "in depth" analysis of the support evidence prior to ordering a vote. On the face of the evidence which it had, the application showed sufficient support. The Board ordered a vote.

[24] That case was somewhat different than the case here. In this case, the initial determination is that the application failed for insufficient support.

[2] 2014 CanLII 42400 (SK LRB), 2014 SKQB 241 (CanLII) & 2015 SKCA 14 (CanLII)

Which of the Two (2) Lists Should the Board Agent have Utilized?

[25] In this case, we have two (2) lists provided to the Board Agent. The first, supplied by Comfort, was based upon Comfort's understanding of who should be considered to be on the Steelworker's seniority list based upon, we were told at the hearing, an arbitration decision. That list included only those persons who had worked within the last thirty days.

[26] The Steelworkers provided a list of employees that they thought should be added to the employees listed by the Employer and which roughly comprised employees who had worked in the previous ninety days.

[27] The provisions under review allow for support cards to have been signed within ninety days of the submission of the application. Any cards signed more than ninety days prior to the application would be "stale" and cannot be considered as evidence of support. Under the pre-2008 provisions of *The Trade Union Act*, unions had up to six (6) months to gather support. That was reduced to ninety days by the amendments made to that *Act* in 2008 and that was carried forward to the *SEA*.

[28] It is clear that if support cards are valid for ninety days, that the list of employees should list any employee who may be eligible to submit a support card. Accordingly, we are of the view that the better employment list to be utilized was the list as provided by the Steelworkers.

[29] In making this determination, we want to be clear that challenges to the list of employees are routinely made by both employers and unions. When challenges are made, the Board will convene a hearing to determine those persons comprising the bargaining unit and who are entitled to vote. When such challenges occur, the Board's policy is to "double envelope" any challenged votes which will be considered only after determination of their eligibility by a panel of the Board. That was the case in the *Affinity Credit Union v. UFCW, Local 1400* case referenced above. As noted by Madam Justice Ryan-Froslie in paragraph 18 set out above:

> *Indeed, depending on the nature and size of the bargaining unit, the exact number of employees may be very difficult, if not impossible, to determine without a hearing. Subsection 6(1.1) does not provide for such a hearing. It refers only to the Board's investigation of the evidence filed in support of the application.*

[30] The list of employees provided by the Steelworkers, in our opinion, more closely aligns with the requirement that employees who have been employed within the previous ninety days are a better approximation of who should be employees for the purposes of voting.

Was the Board Agent Correct in Rejecting Certain Support?

[31] This issue was not strenuously argued by either side, but is included in this analysis out of an abundance of caution. I do not think that anyone seriously challenges the Agent disregarding duplicate support evidence or evidence from persons not on the employee lists.

[32] If the Board did not reject such evidence, it could lead to situations where support lists routinely were padded to achieve the necessary goal and resources of the Board would be routinely expended in conducting votes which were not certain to succeed. The Board also routinely and randomly checks support filed to verify that it was indeed completed by the person named thereon.

[33] We support the Board Agent's actions in this regard.

What is the Effect of the Above on the Calculations?

[34] Based on the above determinations, the calculation of the support percentage should be calculated on the following formula:

$$\frac{A - B}{E}$$

[35] This formula yields a support percentage of 45.42 % which satisfies the threshold requirement. Accordingly, a vote will be ordered and there is no need to consider whether to order a vote pursuant to section 6-111(v). Given the effluxion of time since this application was made, the Order for Vote will contain a provision that all ballots be double enveloped and not opened or tabulated until further order of the Board.

DATED at Regina, Saskatchewan, this **2nd** day of **March, 2018.**

LABOUR RELATIONS BOARD

Kenneth G. Love, Q.C.
Chairperson

DISSENT

1. With respect, I, Aina Kagis, Board Member, disagree with the majority decision in this matter.

2. My disagreement arises from the decision's analysis of the first question posed in paragraph 17: whether "the Board Agent was correct in disregarding the evidence of support which was withdrawn prior to the filing of the application."

3. Chair Love, writing for the majority, determines that revocation of support received by the Board before the Applicant filed his application for decertification should be ignored. Chair Love asserts that changes to *The Trade Union Act* in 2008 carried forward into the SEA, renders the timely revocations void, notwithstanding the Board's long-standing policy, extant as of the hearing date, to accept such revocations of support.

4. First, it is unfair to ignore a clearly articulated policy to the detriment of those relying on its applicability – in this case, employees of Comfort Cabs who apparently changed their minds about their support of the decertification application and advised the Board accordingly.

5. Second, the logic by which Chair Love arrives at his conclusion is flawed. He writes at paragraph 21

> *The ability to withdraw support prior to the filing of an application made sense under the "card check" system because there was no other opportunity for someone who felt that they may have made a hurried decision, or signed the card under peer or other pressure to indicate their true position to the Board prior to a certification being issued. With the 2008 amendments and their carry forward to the SEA, this ability to withdraw became unnecessary because employees had the opportunity to express themselves confidentially and secretly through the voting process.*

6. However, the amendments to the certification process on which Chair Love relies to dismiss the revocations had no effect on applications for decertification. The process for decertification remained unchanged in the 2008 amendments and remains unchanged to this day: if the Board received such an application in 2007, or receives one today, the Board ordered/orders a vote, provided that the application and support evidence were/are submitted properly and that the support evidence represented/represents 45% or more of the employees in the bargaining unit.

7. The decertification process has not changed. How can it be argued that a policy that applied previously no longer applies because a separate and distinct process (certification) has changed?

8. I believe this is not a conclusion that can be logically supported. I would dismiss the application on both grounds:

    a. *The Board's policy with respect to revocations remains in effect; and*

    b. *No part of the decertification process was changed by <u>The Trade Union Act</u> amendments in 2008 nor in their <u>SEA</u> iteration, therefore the policy with respect to revocations should remain unchanged as well.*

9. This is not to say that I agree with Chair Love's analysis as it applies to the certification process. It is only to say that, on the basis of the logic Chair Love himself employs, the analysis certainly does **<u>not</u>** apply to the decertification process.

10. I submit all of this with respect.

Aina Kagis, Board Member