Government of Saskatchewan

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Attention: Mr. Gary L. Bainbridge, QC

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1000 – 350, 7 Avenue S.W.
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Attention: Mr. Damon Bailey, QC

Dear Messrs. Bainbridge and Bailey:

Re: LRB File Nos. 185-17 & 191-17 – *International Union of Operating Engineers, Hoisting & Portable & Stationary, Local 870 v Energy Crane Service*

OVERVIEW

[1] The International Union of Operating Engineers, Hoisting & Portable & Stationary, Local 870 [Union] has commenced two (2) applications. The first application – designated LRB File No. 185-17 – is a certification application. The Union seeks certification as the exclusive bargaining agent for group of employees described in that application as follows:

> *All Operating Engineers, Operating Engineer Apprentices, Mechanics and Mechanic Apprentices Employed by Energy Crane in the Province of Saskatchewan.*

[2] The second application – designated LRB File No. 191-17 – is an unfair labour practice application. In it, the Union contends that Energy Crane Service [Employer] terminated Mr. Kurt Jackson, a known union sympathizer, in the course of an ongoing union drive contrary to clause 6-62(1)(g) of *The Saskatchewan Employment Act*, SS 2013, cS-15.1 [*SEA*].

[3] The Employer filed formal Replies disputing both applications. Respecting the Union's certification application, the Employer contended that it should be dismissed as premature. It argued that the "build up" principle should apply as the current employee group of approximately six (6) individuals represented only one-third of the employees who will be working for the Employer at Chinook Power Plant in Swift Current, Saskatchewan. In addition, it contended that the disputed employee, Mr. Cory Robinson, is a member of the proposed bargaining unit, and should be able to cast a ballot in the certification vote.

[4] Respecting the Union's unfair labour practice application, the Employer denied the Union's allegations. It contended that Mr. Jackson was a probationary employee at

the time of his initial termination, and, in any event, was re-instated a couple of weeks prior to the conclusion of the certification vote.

[5] On September 21, 2017, the Board issued a Direction For Vote. This vote by way of secret ballot was completed on October 5, 2017. The ballots received were sealed and remain so, pending the disposition of these applications.

[6] A panel of this Board comprised of Members John McCormick and Steven Seiferling, and myself as Vice-Chairperson convened to hear these applications. At that hearing, three (3) witnesses testified. Mr. Kurt Jackson testified on behalf of the Union. Mr. Jesse Myshak, President of the Employer, and Mr. Cory Robinson who at all times relevant to this application was an employee at the Chinook Power Plant worksite, testified on behalf of the Employer. At its conclusion, we reserved our decision.

[7] For reasons that follow, subject to a successful result on the secret vote, the Union's Certification Application is granted. However, its' Unfair Labour Practice Application is dismissed. This Letter Decision will deal first with the Certification Application and then the Unfair Labour Practice Application.

THE CERTIFICATION APPLICATION – LRB FILE NO. 185-17

[8] As noted above, the Union seeks to be certified as the exclusive bargaining agent for the following unit of employees:

> *All Operating Engineers, Operating Engineer Apprentices, Mechanics and Mechanic Apprentices Employed by Energy Crane in the Province of Saskatchewan.*

[9] Three (3) issues arise on this particular application:

1) Is the Union's certification application premature as alleged by the Employer?

2) If not, is the bargaining unit proposed by the Union an appropriate one for purposes of section 6-11 of the *SEA*?

3) Is Mr. Cory Robinson an employee within the meaning of the *SEA*, and eligible to be included in any proposed bargaining unit?

A. <u>Onus</u>

[10] The Union bears the onus on both the Certification Application and the Unfair Labour Practice Application to demonstrate on a balance of probabilities that it should be certified as the exclusive bargaining agent for the proposed unit. It is well-settled that in order to satisfy this burden of proof, the Union must present evidence that is "sufficiently clear, convincing and cogent". See: *F.H. v McDougall*, 2008 SCC 53, [2008] 3 SCR 41, at paras. 46 and 49.

B. <u>Is the Union's Certification Application Premature</u>?

[11] The Employer bases its prematurity objection on the operation of the "build-up" principle. It asserts that at the time the Union filed its application – September 14, 2017 – there were only five (5) or six (6) employees working at the Chinook Power Plant. However, the Employer asserts that by October 2017, approximately one (1) month after the Union had filed its application, there would be a "total of approximately eighteen (18) crane operators and mechanics" employed at that site. See: Employer's Reply dated September 26, 2018, at paragraph 5(d). It must be noted, however, that no independent evidence was led at the hearing to substantiate the Employer's sworn statement.

[12] For its part, the Union submitted that generally speaking the build-up principle should be sparingly applied. It relied primarily on this Board's decision in *KACR v International Union of Operating Engineers, Hoisting, Portable & Stationary Local 870 et al.*, 1983 Carswell Sask 1011, 3 CLRBR (NS) 60; *Re JVD Mill Services Inc.*, [2011] SLRBD No. 1, 192 CLRBR (2d) 1, 2011 CanLII 2589, and *Re K-Bro Linen Systems Inc.*, [2015] SLRBD No. 14. Its principal argument against the relevance of the build-up principle is that the proposed bargaining unit is a craft unit confined to a single construction site in Saskatchewan, and not a broader unit comprising a number of diverse and different job classifications scattered across the province. Its alternative argument is that if the build-up principle is relevant, it should not be an impediment to the Union's application unit because the proposed build up is modest – from five (5) or six (6) employees to 18 employees, a three (3) fold increase. In order to defeat a certification application on the basis of prematurity, a much greater disparity between the number of employees seeking union representation at the time of the application and the number of employees who ultimately will be drawn into the bargaining unit must be demonstrated.

[13] It is true that this Board is reluctant in applying the build-up principle. The Board's general caution made a number of years ago in *K.A.C.R.*, *supra*, remains valid. There former Chairperson Ball stated:

> *[30] Notwithstanding the terms of Section 5(a) of The Trade Union Act [now section 6-11(1) of the SEA], counsel for the Nipawin Hydro Electric Employees Association contends that the Board should find that the unit applied for is not appropriate because of the "build up principle". This principle holds that an application for certification may be premature because at the time of application a substantial and representative segment of the work force in the proposed bargaining unit is not yet employed. The theory is that a present small group of employees should not determine whether there is, and who is to be, a bargaining agent for a larger group to be employed later. The Saskatchewan Labour Relations Board adopted that reasoning in an industrial setting in in Noranda Mines Ltd. (1969) 70 C.L.L.C. 16,011 and its approach was confirmed by the Supreme Court of Canada in a decision reported at 1969 69 C.L.L.C. 14, 205.*
>
> *. . . . .*
>
> *[33] It is only rarely that the buildup principle has been applied in the construction industry by a jurisdiction in Canada even without the kind of statutory prohibition contained in Section 5(a) of The Trade Union Act.*

> *The reason for that is because of the fluctuation nature of the work force as opposed to a rapidly expanding but relatively permanent work force in an industrial setting…(citation omitted).*

[14] Recently, in *United Food and Commercial Workers, Local 1400 v K-Bro Linen Systems Inc.*, [2015] SLRBD No. 14, 2015 CanLII 43773, 262 CLRBR (2d) 215 [*K-Bro Linen*] at paragraph 39 invoked the venerable decision of the Ontario Board in *Emil Brant and Peter Waselovich*, [1957] 57 CLLC 18,057 [*Brant*]. There the Ontario Board grappled with the conflict between establishing for all time a stable bargaining unit against the rights of future employees who will be immediately drawn into that unit upon commencing their employment with the employer. The Ontario Board stated:

> *In cases such as the present, the Board is faced, among other things, with the task of balancing the right, on one hand, of persons presently employed to collective bargaining and the right, on the other hand, of future employees to select a bargaining agent of their own choice. In the case of the first mentioned group, a refusal to certify or direct an immediate vote, as the case may be, tends to deprive them of their right to collective bargaining and, incidentally, their right to strike, for an indefinite period of time. But in the case of the latter group, an immediate certification or direction for a vote prevents them from exercising their right to select their own bargaining agent for a considerable period of time because of the provisions of The Labour Relations Act relating to termination of bargaining rights.*
>
> *Faced with this conflict of interests, the Board has, in the past, in some cases, refused to certify or order an immediate vote—and has directed that a vote be taken at a later date—where, on all the evidence, it appeared to the satisfaction of the Board that the employees did not constitute a substantial and representative segment of the work force to be employed. Of course, in such cases it must be established that there is a real likelihood that the increase in the workforce will take place within a reasonable period of time and, if it appears that the build-up depends on factor beyond the control of the employee such as the saleability of products, the presence of sufficient workers, or the availability of materials for say, the purpose of plant expansion, the Board instead of directing a vote to be held in the future, may certify or order an immediate vote depending on the membership position of the applicant.*

[15] In *K-Bro Linen*, *supra*, the Board also endorsed the earlier decision of the Alberta Board in *Unite Here, Local 47 v SNC Lavalin O & M Logistics Inc.*, 2012 CanLII 26870 (AB LRB) [*Unite Here*]. There the Alberta Board ruled that the build-up principle should not derail a certification application for prematurity unless the "build-up is so 'dramatic' in terms of numbers or classifications" that it raises legitimate concerns about "the 'essential representative character' of the Union". See: *Unite Here*, *supra*, at paragraph 22.

[16] It is also important to recall that for purposes of determining whether or not the build-up principle is engaged there should be evidence demonstrating at the time a certification application is filed, what the build-up in the workforce is likely to be. See: *Construction Workers Union, Local 151 v Saskatchewan Labour Relations Board and Technical Workforce Inc.* (2017), 3 CLRBR (3d) 76 (SKQB), at paragraphs 83-83.

[17] Applying the foregoing principles to this matter, the Board concludes that the Union's application should not be dismissed on the basis of prematurity. Assuming without deciding that the build-up principle operates in the circumstances of this case, it is apparent from the Employer's evidence that the expected increase in the number of employees at the Chinook Power Plant – from five (5) or (6) to approximately 18 – is not so significant or "dramatic", to use the Alberta Board's language in *Unite Here*, *supra*, as to raise concerns about the representativeness of the Union, should it succeed in the vote which is currently sealed.

[18] Accordingly, the Employer's preliminary objection to the Union's certification application as being premature is rejected.

C. Is the Bargaining Unit Proposed by the Union an Appropriate Unit?

[19] When determining what qualifies as an appropriate bargaining unit in a particular case, the Board should scrutinize the proposed bargaining unit from the perspective of whether it is an appropriate unit for purposes of future collective bargaining with an employer. The central question to be answered is whether the proposed unit is an appropriate unit, not the optimal one. See generally: *North Battleford Community Safety Offices Police Association v North Battleford (City)*, 2017 CanLII 68763 (SK LRB) [*North Battleford*], at paragraph 55, and *Canadian Union of Public Employees v Northern Lakes School Division No. 6422*, [1996] SLRBRD No. 7, [1996] SLRBR 115, at paragraphs 116-117.

[20] In addition, this Board's preference generally speaking is for larger, more broadly based bargaining units. See: *North Battleford*, *supra*, at paragraph 56, and *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v O.K. Economy Stores (A Division of Westfair Foods Ltd.)*, [1990] Fall Sask. Labour Rep. 64, at page 66. All employee units satisfy this preference.

[21] Neither the Union nor the Employer made submissions specifically respecting the appropriateness of the proposed unit. We might assume that the Employer did not object to proposed unit should its preliminary objection fail. In any event, this Board is not bound in any way by a union's description of the proposed union set out in its certification application. See *e.g.*: *Workers United Canada Council v Amenity Health Care LP*, 2018 CanLII 8572 (SK LRB) [*Amenity Health Care*], at paragraph 62, and *Canada Post Corporation v Canadian Union of Postal Workers*, 2009 CIRB 438 (CIRB), at paragraphs 20-21.

[22] After reviewing the Union's formal application, the Employer's Reply document and the evidence presented at the hearing, the Board is satisfied that the Union has demonstrated that the proposed unit is an appropriate one. Accordingly, we order that should the counting of the vote currently under seal be successful, the Union's certification application is granted and the following unit qualifies as an appropriate bargaining unit for purposes of the *SEA*:

> *All operating engineers, operating engineer apprentices, mechanics and mechanic apprentices employed by Energy Crane Service in the Province of Saskatchewan.*

D. Is Mr. Cory Robinson An "Employee" for Purposes of the *SEA*?

[23] The Notice of Vote issued by this Board on September 21, 2017 identified six (6) eligible voters. The Union takes exception to the inclusion of Mr. Cory Robinson among those voters. The Union bases its objection on two (2) alternative bases. First, it asserts that Mr. Robinson fulfills managerial responsibilities and, as a result, must be excluded from the bargaining unit by virtue of clause 6-1(1)(h) of the *SEA*. Second, and in the alternative, the Union asserts that Mr. Robinson is a supervisory employer as defined in clause 6-1(1)(o) of the *SEA*. In that circumstance, while Mr. Robinson is ineligible to become a member of the proposed bargaining unit. We will deal with each objection in turn.

1. Does Mr. Robinson Fulfill Managerial Functions?

[24] Sub-clause 6-1(1)(h)(i) of the *SEA* set outs exclusions to the statutory definition of "employee". It reads:

> ***6-1****(1)(h)* ***"employee"*** *means:*
>
> *(i) a person employed by an employer other than:*
>
> *(A) a person whose primary responsibility is to exercise authority and perform functions that are of a managerial character; or*
>
> *(B) a person whose primary duties include activities that are of a confidential nature in relation to nay of the following and that have a direct impact on the bargaining unit the person would be included in as an employee but for this paragraph:*
>
> *(I) labour relations*
> *(II) business strategic planning;*
> *(III) policy advice;*
> *(IV) budget implementation or planning[.]*

[24] The Union asserts that Mr. Robinson should be excluded from the bargaining unit on the basis of sub-clause 6-1(1)(h)(i)(A), *i.e.*, his "primary responsibility" is to perform managerial functions. It submits that Mr. Robinson is the *de facto* supervisor at the job-site. Although he performs little to no work "on the tools", he is management's "eyes and ears" in the workplace. He assigns work to various employees; decides which employees are entitled to work over-time work, and provides his assessment of their performance to Mr. Myshak.

[25] The Union relied upon a number of authorities, most notably *SEIU, Local 333 v Metis Addictions Council of Saskatchewan Inc.*, [1993] 3rd Quarter Sask. Labour Rep. 49 [*Metis Addictions Council*]; *Mackenzie Society Ventures Inc. (Re)*, [1998] SLRBD No. 33; *SGEU v Saskatchewan Liquor and Gaming Authority et al.*, [1997] SLRBD No. 68, 43 CLRBR (2d) 251; *British Columbia Telephone Co. (Re)*, [1977] 2 Can. LRBR 385 (CIRB), and *Wheatland Regional Centre Inc. (Re)*, [2015] SLRBD No. 41.

[26] The Employer disagrees and submits that Mr. Robinson performs no true managerial responsibilities. It submits that Mr. Robinson has no responsibility for hiring or firing employees, for scheduling employees, or budgeting. For example, he did not assign employees to perform over-time work. Rather, he simply canvassed employees about their availability and willingness to perform such work, and then passed this information on to management. The Employer insisted that Mr. Robinson primarily performed duties that qualified as "classic crane operator work".

[27] The Employer relied upon a number of authorities, especially *International Brotherhood of Electrical Workers, Local 2038 v Croft Electric Ltd.*, 2007 CarswellSask 839, 146 CLRBR(2d) 50 (SK LRB); *A-Lert Canada Ltd. (Re)*, [1996] SLRBR No. 13 (SK LRB), and *Paul LaLond Enterprises Ltd. (c.o.b. Ashley Cabinets & Windows (Saskatoon) (Re)*, [2000] SLRBD No. 60 (SK LRB).

[28] This Board has on a number of occasions indicated that a narrow interpretive approach should be adopted when determining whether an individual fulfills managerial functions. Very recently, in *Amenity Health Care*, *supra*., at paragraph 110, the Board endorsed the following statement of principle from the Canadian Industrial Labour Relation Board's decision in *General Teamsters Union, Local 979 v Garda Security Screening Inc.*, 2017 CIRB 856:

> *[44] The Board's analysis for determining whether certain positions perform management functions must be understood in the overall context of labour relations purposes and principles. The statutory exclusion contained in the Code for those performing managerial functions has always been premised on the need to avoid a conflict of interest arising between one's duty to his/her employer and one's loyalty to his/her union. This potential conflict is greater when the authority of the manager extends to having actual authority over the employment conditions of other employees and ultimately, their continued employment. This is the context in which the Board considers whether an employee has the requisite level of decision-making authority to justify an exclusion; it relates to both the employment relationship and its interplay with collective bargaining.*
>
> *[45] The Board has adopted a narrow interpretation of the managerial exclusion in order to give greater effect to the principles of freedom of association and access to collective bargaining, which continue to serve as the foundation to fundamental labour relations rights under the Code. The Board will not want to deny access to collective bargaining to any more employees than is necessary. The Board is further supported in its approach by the recent decision of the Supreme Court of Canada in which it determined that the exclusion of the Royal Canadian Mounted Police members from the collective bargaining regime was unconstitutional. [Emphasis added.]*

[29] Recognizing the legal burden which rests on the Union to present clear and convincing evidence that Mr. Robinson fulfilled managerial responsibilities, and taking into account the interpretive approach set out in the previous paragraph, the Board has concluded he should not be excluded from the definition of "employee" on the basis of a managerial exception. The evidence from both Mr. Robinson and Mr. Myshak, in our

opinion, demonstrated that Mr. Robinson did not carry out any managerial function. There was simply no evidence which came close to demonstrating that Mr. Robinson "ha[d] a significant degree of decision-making authority in relation to matters which affect the terms, conditions or tenure of employment of other employees", to quote from *Metis Addictions Council*, *supra*, at page 59.

[30] Accordingly, the Board rejects the Union's assertion that Mr. Robinson carries out managerial functions, and for that reason, does not qualify as an "employee" for purposes of the *SEA*. We turn now to consider in the alternative whether Mr. Robinson may be characterized as a supervisory employee.

2. Is Mr. Robinson a Supervisory Employee for purposes of the *SEA*?

[31] The definition of "supervisory employee" is found in clause 6-1(1)(h) of the *SEA*. It reads as follows:

> ***6-1****(1)(o)* ***"supervisory employee"*** *means an employee whose primary function is to supervise employees and who exercises one of more of the following duties:*
>
> *(i) Independently assigning work to employees and monitoring the quality of work produced by employees;*
> *(ii) assigning hours of work and overtime;*
> *(iii) providing an assessment to be used for work appraisals or merit increases for employees;*
> *(iv) recommending disciplining employees;*
>
> *but does not include an employee who:*
>
> *(v) is a gang leader, lead hand or team leader whose duties are ancillary to the work he or she performs;*
> *(vi) acts as a supervisor on a temporary basis; or*
> *(vii) is in a prescribed occupation[.]*

[32] The Union submits in the alternative that Mr. Robinson qualifies as a "supervisory employee". On this aspect of its application, the Union pointed to the testimony of Mr. Kurt Jackson to the effect that all of the workers at the job site looked to Mr. Robinson as their supervisor. He made work assignments on occasion, liaised with the workers, and identified himself on certain documents as "supervisor". At least one of those documents – a Disciplinary Action Form relating to Mr. Jackson – was entered into evidence as Exhibit U-1, for example. In conclusion, the Union asserted that even though Mr. Robinson may have performed some work as a crane operator, this did not mean he could not also be a supervisory employee.

[33] The Employer also rejected this alternative position advanced by the Union. It relied upon the testimony of both Mr. Robinson and Mr. Myshak. This evidence demonstrated that Mr. Robinson's primary duties were those of a crane operator. He had no responsibility for hiring or firing employees nor was he involved in disciplining employees, in spite of the fact that he had signed a disciplinary action form. Mr. Myshak characterized Mr. Robinson as more of a conduit between management and the workers at the worksite. He stated, and Mr. Robinson, confirmed that they had had some

discussion about Mr. Robinson being promoted to a supervisory position once work at the site ramped up; however, that plan never materialized.

[34] On this aspect of this application, the Employer relied principally on *International Union of Operating Engineers Hoisting and Potable and Stationary, Local 870 v Rural Municipality of Estevan No. 5*, [2002] Sask. LRBR 94, [2002] SLRBD No. 14 (SK LRB).

[35] In *Amenity Health Care*, *supra*, this Board had its first opportunity to interpret clause 6-1(1)(o) of the *SEA*. In the course of its Decision, the Board explained the interpretive process to be followed. As it is the first time the Board addressed this question, our analysis is reproduced in full below:

> ***[104]*** *The definition of "supervisory employee" found in clause 6-1(1)(o), together with the statutory prohibition on including supervisory employees in the same bargaining unit as employees whom they supervise absent an irrevocable election located in sub-section 6-11(3), are very recent innovations in Saskatchewan. These changes to our labour relations regime first came into force with the proclamation of the SEA on April 29, 2014. Prior to that, The Trade Union Act was only concerned with whether an employee held a position which was managerial in nature and, for that reason, must be excluded from any proposed bargaining unit.*
>
> ***[105]*** *To date, the Board has considered the effect of clause 6-1(1)(o) in only one case: Saskatoon Public Library Board v Canadian Union of Public Employees, Local No. 2669 et al. [2017 CanLII 6026 [Saskatoon Public Library]. The issue in that case was narrow, namely can employees that now qualify as "supervisory employees" as defined in the SEA be removed from an existing bargaining unit certified under The Trade Union Act which included employees whom they supervised. The Board concluded as a matter of statutory interpretation the SEA did not permit such applications and, as a result, it lacked jurisdiction to adjudicate them.*
>
> ***[106]*** *In the course of his Decision, Chairperson Love commented upon the interpretation of clause 6-1(1)(o). For present purposes, two (2) principles emerge from his analysis. First, the modern rule of statutory interpretation applies. This rule, most recently restated by the Supreme Court of Canada in Tran v Canada (Public Safety and Emergency Preparedness) holds that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".*
>
> ***[107]*** *As the Board in Saskatoon Public Library concluded this approach to statutory interpretation is also consistent with section 10 of The Interpretation Act, 1995 which states that "[e]very enactment shall be interpreted as being remedial and shall be given the fair, large and liberal construction and interpretation that best ensure the attainment of its objects".*

[109] *Second, the Board made the very important point that section 6-11 does not deprive "supervisory employees" from unionizing. As Chairperson Love stated in Saskatoon Public Library:*

> *[46] "Supervisory employees", as described in section 6-1 (o) are still "employees" under the SEA and are entitled to the benefit of section 6-4. Those employees are not excluded from a bargaining unit, but rather cannot be included within the same bargaining unit with employees whom they supervise. This creates a situation where additional bargaining units may result because of this requirement.*
>
> *[47] The application before this Board suffers from the same confusion which persisted in the Human Services Committee [of the Saskatchewan Legislative Assembly]. Supervisory employees are not, by definition, "excluded" from the bargaining unit. The definition of "employee" in section 6-1 (h) continues to include, what are not defined as supervisory employees, within that definition. . .*
>
> *[48] Had the legislature wished to exclude supervisory employees from any bargaining unit they would have, in our opinion, amended section 6-1 (h) to include supervisory employees among those persons who are excluded from the definition of "employee". If excluded, those persons would not be employees under the Act and therefore would have not access to the scheme of collective bargaining established under the SEA. The legislature did not do that. Rather, they expressly provided for access to the SEA by supervisory employees and for the continuation of their rights and obligations under any certification in section 6-11(5) for the entering into of an irrevocable election by an employer and an union, and for the establishment of a bargaining unit comprised of supervisory employees in section 6-11(4).*

[109] *This holding has implications for the interpretive approach to these particular provisions. Counsel for the Union submits that these provisions should be interpreted as narrowly as possible, in the same way this Board, and others, has interpreted the managerial exclusion. In her Written Submissions, counsel stated that this "Board's longstanding policy in favour of more inclusive bargaining units supports interpreting the supervisory employee language in a restrained (rather than a liberal or large) manner"*

. . . . .

[110] *Since "supervisory employees", unlike employees in a managerial capacity, are not deprived of protections under the SEA, including the right to organize and to seek certification, the Board's interpretive approach to these provisions need not be unduly narrow. This is consistent with this Board's holding in Saskatoon Public Library in relation to supervisory employees, generally. While it is true that the purpose underlying subsection 6-11(3) is to avoid conflicts of interest or divided loyalties in the workplace, which is the same as that underlying the managerial exemption, it does not follow that the narrow interpretive approach for determining whether an employee qualifies as a manager should operate when assessing if a disputed employee exercises*

> *supervisory functions. The concerns identified in Garda, for example, do not arise with the same stringency. As a consequence, clause 6-1(1)(o) should be construed in its "grammatical and ordinary sense harmoniously with the scheme of the [SEA]", to quote from Tran.*
>
> ***[112]*** *Admittedly, clause 6-1(1)(o) of the SEA is curiously drafted. That said, applying the interpretive principles identified above, it is necessary to begin by considering this provision as a whole. It opens by stating that a "supervisory employee" is one whose primary or principal employment function is to supervise other employees, and goes on to identify four (4) "duties" which are functions traditionally performed by supervisors. The SEA definition only requires that the employee in question fulfills one (1) of these four (4) duties in order to qualify as a prima facie "supervisory employee".*
>
> ***[113]*** *That does not end the matter, however. The provision goes on to exclude three (3) groups of employees. These are employees who but for this statutory exclusion would otherwise qualify as supervisory employees, namely: "a gang leader, lead hand or team leader whose duties are ancillary to the work he or she performs"; "a supervisor on a temporary basis", or employees who fall within a prescribed occupation. For present purposes, it is the exclusion found in sub-clause 6-1(1)(o)(v) that is relevant – "a gang leader, lead hand or team leader whose duties are ancillary to the work he or she performs" (emphasis added).*
>
> ***[114]*** *How, one may ask, can an employee whose "primary function" it is to supervise employees, at the same time claim those duties are "ancillary to the work he or she performs"? While this inquiry appears illogical on its face, it is the inquiry upon which the SEA requires all counsel and this Board to embark?*
>
> ***[116]*** *As is apparent such an inquiry involves two (2) stages. The first stage asks whether the primary function of the employee in question is to supervise fellow employees. Second, if the answer to this question is "yes", then it is necessary to determine whether those supervisory duties performed by a team leader are "ancillary" to "the work he or she performs"? The Board undertakes this inquiry below. [Emphasis added.]*

[36] Taking into account the evidence presented at the hearing, the Board has concluded that the Union failed to demonstrate that Mr. Robinson's primary responsibility was to perform at least one (1) of the four (4) duties enumerated in sub-clauses 6-1(1)(o)(i) – (iv) of the *SEA*, set out above. In our considered view, the evidence demonstrated that Mr. Robinson carried out the duties of a crane operator. He testified, for example, that he was initially hired to keep watch on the buggy of a crane during its operation, and then drove the fuel truck at the worksite. He described this job as "ground work".

[37] On cross-examination, Mr. Robinson described himself as acting as the "eyes and ears" for Mr. Myshak who was not physically present at the worksite. He would alert him to problems if and when they arose, and, on occasion, would receive directions as

how to deal with them. As well, he did competency assessments on four (4) employees who operated a crawler crane. This assessment consisted of Mr. Robinson following a simple check-list provided by the Employer. Mr. Myshak acknowledged this but stated clearly that this did not qualify as a work appraisal and did not affect an employee's terms and conditions of employment.

[38] It is apparent that duties performed by Mr. Robinson which might fall within sub-clauses 6-1(1)(1)(o)(i) to (iv), if any, were not his primary responsibilities at the worksite at all times relevant to this application.

[39] Accordingly, for these reasons, the Board concludes that the Union has failed to demonstrate on a balance of probabilities that Mr. Robinson falls within the definition of "supervisory" employee in the *SEA*.

3. <u>Conclusion</u>

[40] As a result, the Board concludes that Mr. Robinson is neither a manager nor a supervisory employee for purposes of Part VI of the *SEA*. Accordingly, he is eligible to be a member of the bargaining unit, and to have his ballot counted for purposes of the vote.

THE UNFAIR LABOUR PRACTICE APPLICATION – LRB FILE NO. 191-17

A. <u>Relevant Statutory Provisions and Legal Principles</u>

[41] In its Unfair Labour Practice application, the Union invokes clause 6-62(1)(g) of the *SEA*. This particular statutory provision reads as follows:

> *6-62(1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer to do the following:*
>
> *. . . . .*
>
> *(g) to discriminate with respect to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including termination or suspension or threat or termination or suspension of an employee, with a view to encouraging or discouraging membership in any activity in or for or selection of a labour organization or participation of any kind in a proceeding pursuant to this Part[.]*

[42] Whenever clause 6-62(1)(g) is invoked, the operation of subsection 6-62(4) is also engaged. This subsection creates a rebuttal presumption as follows:

> ***6-62****(4) For the purposes of clause (1)(g), there is a presumption in favour of an employee that the employee was terminated or suspending contrary to this Part if:*
>
> *(a) an employer or person acting on behalf of the employer terminates or suspends an employee from employment; and*
>
> *(b) it is shown to the satisfaction of the board or the court that employees of the employer or any of them had exercise or*

> *were exercising or attempting to exercise a right pursuant to this Part[.]*

[43] Clause 6-62(1)(g) is the successor to clause 11(1)(e) of *The Trade Union Act*, RSS 1978, cT-17 [*TUA*]. Its objective is to prohibit employers from using coercion or intimidation, and from discrimination in the treatment of its employees because of their support for a union, because of their desire to be unionized, or because they are exercising a right bestowed upon them by the *SEA*.

[44] In *Saskatchewan Government Employees Union v Regina Native Youth and Community Services Inc.*, [1995] 1st Quarter Sask. Labour Rep. 118 (SK LRB) [*Regina Native Youth*], for example, the Board explained the policy rationale underlying clause 11(1)(e) of the TUA, statements of principle that apply equally to clause 6-62(1)(g). In particular, the Board stated at pages 123-4, and 125-6:

> *It is clear from the terms of Section 11(1)(e) of The [TUA] that any decision to dismiss or suspend an employee which is influenced by the presence of trade union activity must be regarded as a very serious matter. If an employer is inclined to discourage activity in support of a trade union, there are few signals which can be sent to employees more powerful than those which suggest that their employment may be in jeopardy. The seriousness with which the legislature regards conduct of this kind is indicated by the fact that the onus rests on the employer to show that trade union activity played no part in the decision to discharge or suspend an employee.*
>
> *This Board has held employers to a stringent standard in this regard. It is highly unlikely that an employer will confess to anti-union sentiment as one of the grounds for discharge in the first instance, and the Board must look beyond the rationale which provided when the announcement of termination is made….*
>
> *. . . . . .*
>
> *On the other hand, the Board has been at pains to make it clear that Section 11(1)(e) does not impose an absolute embargo on disciplinary actions or business decisions by the employer. In Saskatchewan Joint Board Retail, Wholesale and Department Store Union v Versa Services, LRB File Nos. 090-94, 091-94 and 092-94, the Board made the following comment:*
>
> > *Stringent as this test is, it does not and cannot mean that employees who are engaged in protected activity cannot be discharged for just cause. For example, in Metal Fabricating Services Ltd., (1990) Spring, Sask. Labour Rep. p.70, the Board considered the lay-off of employees in the normal course of business for just cause or for economic reasons. The presumption that arises in such situations is rebuttal, not conclusive.*
>
> *In determining whether an employer is able to meet the difficult test of showing that activity in support of a trade union was not a factor in a decision to terminate the employment of an employee, the Board has considered a wide range of factors, including the involvement of the*

> *employee in trade union activity, the knowledge the employer had of the activity, other conduct of the employer which might betray anti-union feeling, the timing of the decision, and various other considerations. In this respect, it is not the task of the Board to decide whether there was just cause for the termination. In The Newspaper Guild v The Leader Post decision [LRB File Nos. 251-93, 252-93 & 253-93] the Board made this point:*
>
> > *For our purposes, however, the motivation of the Employer is the central issue, and in this connection the credibility and coherence of the explanation for the dismissal put forward by the Employer is, of course, a relevant consideration. We are not required, as an arbitrator is, to decide whether a particular cause for dismissal has been established. Nor, like a court, are we asked to assess the sufficiency of a cause or of a notice period in the context of common law principles. Our task is to consider whether the explanation given by an employer holds up when the dismissal of an employee and some steps taken in exercise of rights under The [TUA] coincide. The strength or weakness of the case an employer offers in defence of the termination is one indicator of whether union activity may also have entered the mind of the Employer.*

[45] Furthermore, it is important to underscore that employer retaliation for union activity triggers the application of section 2(*b*) of the *Canadian Charter of Rights and Freedoms*. See *e.g.*: *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service Workers International Union (United Steelworkers) v Evraz Wasco Pipe Protection Corporation*, 2016 CanLII 98635, 293 CLRBR(2d) 216 (SK LRB), at paragraph 54.

B. Analysis

[46] In order to place the issue on this Unfair Labour Practice application in context, it is helpful to set out the chronology of events relevant to it. The following chart which references evidence received during the hearing, attempts to do that.

DATE	EVENT
August 15, 2017	Kurt Jackson attended orientation sessions in Edmonton AB in preparation for going to the Chinook Power Station Projection at Swift Current, Saskatchewan.
August 17, 2017	First day Mr. Jackson was on site in Saskatchewan. He worked five (5) days a week. Generally, he worked eight (8) hours days and, on occasion, worked an additional two (2) hours of over-time. At all times relevant to this application, he was a probationary employee.
September 14, 2017	The Union filed its Certification Application with this Board.
September 15, 2017	Mr. Jackson is laid off ostensibly to make room for Mr. Richard Burt. Mr. Burt was not a new hire, rather the Employer had initially hired him in February 2017. In the course of his employment, Mr. Burt had rotated between the Employer's head office in Stony Plain AB, and the Chinook Power Station at Swift Current SK.

September 19, 2017	The Union filed this Unfair Labour Practice application challenging Mr. Jackson's lay-off.
September 21, 2017	This Board issued a Direction for Vote. That same day, the Board's Registrar issued a Notice of Vote. The closing date of this secret vote by mail in ballot was October 5, 2017. The list of eligible voters includes Mr. Jackson and Mr. Robinson.
September 22, 2017	The Employer re-hires Mr. Jackson and advises him to report to the worksite on September 25, 2017.
September 26, 2017	The Employer filed its Reply to the Union's Unfair Labour Practice Application.
October 5, 2017	The period for sending in mail-in ballots closed.

[47] The Union asserts that Mr. Jackson's initial lay-off was motivated by anti-union animus. It argues that at that time the Employer knew of the Union's Certification Application, as it had been served on the Employer the day before the impugned lay-off. As well, the Union contends that the Employer knew Mr. Jackson was a union supporter. Finally, the Employer chose to re-instate Mr. Jackson very shortly after it received notice of the Union's Unfair Labour Practice application. Taken together, the Union asserts that the Employer has failed to rebut the presumption set out in subsection 6-62(4) of the *SEA*, and seeks from this Board an Order finding the Employer committed an unfair labour practice, and directing restitution to Mr. Jackson for the short time he was unemployed following his lay-off.

[48] The Employer denies that its decision to lay-off Mr. Jackson on September 15, 2017 was motivated by anti-union animus. It argued that Mr. Burt was a long-time employee, and it was always intended that he would return to the Chinook Power Station worksite after fulfilling some responsibilities at the company's head office in Stony Plain. As well, Mr. Jackson was a probationary employee, having only been employed for approximately three (3) weeks. The fact that Mr. Jackson was a union supporter did not factor into the Employer's decision to lay him off.

[49] For reasons that follow, the Board has concluded that the Union's Unfair Labour Application should be dismissed. While the circumstances of this case fall close to the line, in the Board's opinion, Union has not demonstrated on a balance of probabilities that Mr. Jackson's lay-off was based on anti-union animus. Accordingly, it is not necessary to consider whether if it had, the Employer rebutted the presumption created in subsection 6-62(4).

[50] First, it is true that at the time he was laid off Mr. Jackson was a probationary employee. On its face clause 6-62(1)(g) of the *SEA* does not differentiate between permanent and probationary employees. See e.g.: *International Brotherhood of Electrical Workers, Local 2038 v Active Electric*, 2018 CanLII 38245 (SK LRB) [*Active Electric*], at paragraph 77. That said, the Board does not dispute that during an employee's probationary period, employers have considerable flexibility to lay off workers. Nonetheless in such circumstances, the Board must be vigilant to ensure that "the probationary period [does] not serve as a pretext for an employer to discharge individuals for discriminatory or other illegal motivations". See: *Active Electric*, *ibid*. The Board does not believe that has occurred in the circumstances of this case.

[51] Second, Mr. Myshak testified that Mr. Burt was a permanent employee, and it was always intended that he would be transferred from the Employer's head office to the Chinook Power Plant worksite. At the time, the Employer determined that a spot needed to be found for Mr. Burt. Mr. Jackson was laid-off to open up a spot in spite of the fact that he was one of the more senior employees at the worksite. Mr. Myshak testified that he determined that Mr. Jackson should be laid-off because at that time, he was operating a RT Crane which was a piece of equipment another individual would not have much difficulty in learning to operate.

[52] Third, the evidence at the hearing respecting the Employer's knowledge of Mr. Jackson's union activities was not strong. In his testimony, Mr. Jackson stated he had been involved in the organizing drive but did not elaborate upon how active in that drive he had been. Neither Mr. Robinson nor Mr. Myshak testified about Mr. Jackson's union activities or their knowledge of them.

[53] Fourth and most significantly, Mr. Jackson was re-hired almost two (2) weeks prior to the close of voting by secret mail-in ballot. This factor is important because the policy rationale underlying clause 6-62(1)(g) is principally to prevent employer retaliation against union activity by its employees. As this Board has often stated there are few weapons more potent for discouraging union activity and support, than terminating a known union support in the course of a union's organizing drive. See *e.g.*: *Regina Metis Council*, *supra*, at page 123.

[54] In this case this mischief had been considerably alleviated since Mr. Jackson was re-hired into the workplace only a few days after the Direction for Vote was issued by this Board. If there was a pall cast over the workforce following Mr. Jackson's initial lay-off – of which the Board heard no evidence – it was largely, if not entirely, mitigated by his re-hire a few days later.

[55] The Board acknowledges that the coincidence of Mr. Jackson's re-hire on the heels of the Union's filing this Unfair Labour Practice Application, raises suspicion. However, in order ultimately to find that these actions were motivated by anti-union animus there must be more than suspicion, there must be clear evidence of such animus. In the Board's view evidence of this kind is lacking here.

C. <u>Conclusions on the Unfair Labour Practice Application</u>

[56] Accordingly, for these reasons the Union's Unfair Labour Practice must be dismissed.

ORDERS OF THE BOARD

[57] The Board makes the following Orders pursuant to sections 6-9; 6-11, and sub-section 6-103(1) of the *SEA*:

1. **THAT** subject to a successful result on the secret vote, the Union's Certification Application designated as LRB File No. 185-17 is granted, and the following unit qualifies as an appropriate bargaining unit:

> *All operating engineers, operating engineer apprentices, mechanics and mechanic apprentices employed by Energy Crane Service in the Province of Saskatchewan.*

2. **THAT** Mr. Cory Robinson should not be excluded from the proposed bargaining unit, and in the event he participated in the vote, his ballot should be tabulated.

3. **THAT** the Union's Unfair Labour Practice Application designated as LRB File No. 191-17 is dismissed.

4. **THAT** the ballots held in the possession of the Board Registrar pursuant to the Direction for Vote issued on September 21, 2017 in the within proceedings be unsealed and the ballots contained therein tabulated in accordance with The Saskatchewan Employment (Labour Relations Board) Regulations.

5. **THAT** the results of the vote be placed into Form 21, and that form be advanced to a panel of the Board for its review and consideration.

[58] An appropriate Board Order will accompany this Letter Decision.

[59] This is an unanimous decision of the Board.

Yours very truly,

Graeme G. Mitchell, QC
Vice-Chairperson