UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS), Applicant v **FAROOQ AZAM ARAIN and COMFORT CABS LTD., Respondents**

LRB File No. 060-18; August 23, 2019

Chairperson, Susan Amrud, Q.C.; Board Members: Maurice Werezak and Don Ewart

For United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers)	Heather M. Jensen
For Farooq Azam Arain	Larry Seiferling, Q.C.
For Comfort Cabs Ltd.	Robert Frost-Hinz

Application for reconsideration dismissed – Original decision did not misinterpret law when it determined that section 6-17 of *The Saskatchewan Employment Act* does not contemplate consideration of revocations of support.

Application for reconsideration dismissed – No breach of natural justice – Board rightly disregarded policy that was inconsistent with proper interpretation of the Act – Parties were not denied an opportunity to be heard on any issue.

Application for reconsideration dismissed – Even if original decision was precedential, no grounds established to refine, expand upon, or otherwise change it.

REASONS FOR DECISION

Background:

[1] Susan Amrud, Q.C., Chairperson: These Reasons address an Application for Reconsideration brought by United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) [“Union”].

[2] The history of the application currently before the Board started on December 14, 2017 when Farooq Azam Arain ["Arain"] filed an Application to Cancel the Certification Order ["Decertification Application"] granted by this Board on April 3, 2014 with respect to the Union and Comfort Cabs Ltd. ["Employer"][1]. With the Decertification Application Arain filed support cards from more than 45% of the employees. Before the Decertification Application was filed, the Board received letters from several employees revoking their support for the Decertification Application evidenced by those support cards. On January 2, 2018 the Board Agent advised the parties that, taking into account those revocations, the Decertification Application did not have the necessary 45% support. Arain asked for an oral hearing to be held on the issue of whether the necessary support existed for a vote to be ordered. After a hearing, the Board ordered, on March 2, 2018 ["Original Decision"], that a vote be taken on the Decertification Application. The vote was conducted on April 4, 2018. The ballot box remains sealed; the votes have not been counted. The Board is now asked to reconsider the Original Decision.

[3] The hearing of the Application for Reconsideration took place on May 10, 2018, before then Vice-chairperson Graeme Mitchell and panelists Maurice Werezak and Don Ewart. Vice-chairperson Mitchell was appointed as a judge of the Court of Queen's Bench on September 21, 2018. The parties agreed that the matter could be concluded by Chairperson Amrud listening to the recording of the hearing and then issuing this decision in conjunction with the panel.

Argument on behalf of the Union:

[4] The Union objects to the Original Decision on a number of bases. It says the Original Decision was a substantial change to the Board's policies, and the decision to change those policies retroactively was inconsistent with the Board's duty of procedural fairness. It says the Original Decision does not properly interpret Part VI of *The Saskatchewan Employment Act* ["Act"] or labour relations policy.

[5] The Union cited the long-standing *Remai* factors that the Board considers in determining whether to reconsider a decision:

> *1. If there was no hearing in the first instance and a party subsequently finds that the decision turns on a finding of fact which is in controversy and on which the party wishes to adduce evidence.*
> *2. If a hearing was held, but certain crucial evidence was not adduced for good and sufficient reasons.*
> *3. If the order made by the Board in the first instance has operated in an unanticipated way, that is, has had an unintended effect on its particular application.*

[1] LRB File No. 260-17.

> *4. If the original decision turned on a conclusion of law or general policy under the code which law or policy was not properly interpreted by the original panel.*
> *5. If the original decision is tainted by a breach of natural justice.*
> *6. If the original decision is precedential and amounts to a significant policy adjudication which the Council may wish to refine, expand upon, or otherwise change.*[2]

The Union is of the view that factors four to six are satisfied in this matter.

[6] With respect to factor four, the Union objects to a number of conclusions drawn by the Board. The Original Decision made a determination that the policy that required the Board Agent to take into account revocations in calculating the 45% threshold should no longer be followed. The Union is of the view that this was not a proper interpretation of the law. It said that decision would mean that the Board would no longer require evidence indicating that, as of the date of the application, employees support the Decertification Application. This, it says, is inconsistent with the Board's mandate to facilitate stable labour relations. It is also inconsistent with a purposive interpretation of the Act.

[7] The Union says the Original Decision means the Board Agent must prefer the written evidence filed by Arain over other information gathered by the Board Agent. This approach, it says, ignores employee choice. The Board did not, as it is required to do, interpret section 6-17 in the context of the Act as a whole.

[8] The Union rejects the suggestion that the implementation of a statutory requirement of a secret ballot vote provides a better indication of employee support for the Decertification Application, or cures any issue with the determination of the 45% threshold. The Union argues that having a vote is not a neutral and cost-free exercise; it is highly disruptive to a workplace and working relationships and requires considerable resources of the Board and unions. Ordering votes where less than the required threshold is met harms stable labour relations without promoting employee choice of bargaining agent. It argues that because the vote process has no quorum or minimum participation levels, to ignore employee wishes at the application stage removes an important protection. Under the Original Decision, meeting the threshold is assumed. To rely on support cards that the Board knows have been withdrawn and no longer reflect support for the Decertification Application is a waste of the Board's resources. All of these reasons, the Union argues, indicate that the Act was not properly interpreted and the Original Decision operates in a manner contrary to the purposes of the Act.

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[2] *Remai Investment Corporation (o/a Imperial 400 Motel) v. Saskatchewan Joint Board, Retail, Wholesale and Department Store Union & Sharon Ruff*, [1993] 3rd Quarter Sask. Labour Rep. 103.

[9] The Union rejected the reliance in the Original Decision on the statutory change in 2008 that now requires a secret ballot vote in every decertification application that meets the 45% threshold. It states that the Board has always, as a matter of policy, ordered votes when the required threshold of support is filed in a decertification application.

[10] The ability to revoke support is an important safeguard of employee confidentiality. The Board policy of accepting revocations protects employees from coercion and intimidation. The Board should not adopt an interpretation of the Act that ignores evidence that indicates that some of the support cards do not reflect the true wishes of the employees who signed them.

[11] With respect to factor five, the Union argues that it is unfair and a breach of natural justice for the Board to retroactively change the policy of accepting revocations. Employees are entitled to conduct themselves in reliance on the Board's published policies as they existed at the time the employees acted. Retroactively changing Board policies undermines respect for the rule of law.

[12] The Union also argues that it was a breach of natural justice for the Board to make a decision based on grounds not argued, thus denying the parties a right to be heard.

[13] With respect to factor six, the Union argues that the decision to change how the threshold for a vote is calculated is precedential and amounts to a significant policy change and policy adjudication that is not consistent with sound labour relations policy, the Act or the Board's published policies. Procedural requirements and thresholds before decertification applications will be entertained serve the important labour relations principle of protecting unions from attack. The 45% threshold is important. The Board relied on evidence it knew was inaccurate to make a decision. The Union relied on *Canadian Imperial Bank of Commerce v Jordan Rooley*, 2015 CIRB 759 (CanLII) ["*Rooley*"] as establishing a connection between the Board's need to protect employee confidentiality and the Board's investigation of support evidence.

[14] The Union takes issue with the list of employees used by the Board in calculating whether the threshold was met. It argues that the list used is a further departure from established practices in that it advocates using a list of employees other than all employees employed as of the date of the Decertification Application.

[15] The Union argues that making a decision that the 45% threshold had been met, when the Board Agent found the opposite, is contrary to the direction of the Court of Appeal in *United Food and Commercial Workers, Local 1400 v Affinity Credit Union*, 2015 SKCA 14 (CanLII) ["*Affinity*"].

[16] The Union also addressed Arain's argument that the issue of whether the threshold was met is moot because ballots have now been cast. The Union is of the view that the Board has jurisdiction to rescind the order for the vote on a decertification application, and has in fact done so, in *Ross (Re)*, [2006] SLRBD No. 6 when, on reconsideration, the Board determined that the required threshold for a vote had not been met.

Argument on behalf of Arain:

[17] Arain also referred the Board to the *Remai* factors and emphasized the Board's longstanding position that a reconsideration application is not an opportunity to re-litigate a matter. Reconsideration is not an appeal or an opportunity to re-argue the case from a revised perspective. He argues that the Union's arguments on this application are exactly the same as they were at the original hearing. Nothing was missed or misunderstood by the Board in the Original Decision.

[18] Arain disagrees with the Union's assertion that factor four applies, and argues that the Original Decision properly interpreted the law. He agrees with the assertion that the secret ballot vote is the check and balance on the support evidence. Once the Decertification Application was filed, along with support cards signed by more than 45% of the members of the bargaining unit, the requirements for a vote to be ordered were met.

[19] With respect to factor five, the Original Decision clearly considered the parties' positions. The fact that the Original Decision did not accept the Union's arguments does not mean that the parties were denied a right to be heard.

[20] With respect to factor six, Arain states that the Union cannot come back to the Board now and claim that the matter should be reheard, simply because it does not like the decision. Calculation of the 45% threshold is not an exact science. It is up to the Board not the Registrar to make a determination whether the threshold has been met. The best way to ensure confidentiality of employees' wishes, and to ensure that the expression of those wishes is not tainted by coercion or intimidation, is to hold a secret ballot vote. The change in language from subsection 6(1.1) of

The Trade Union Act to section 6-17 of the Act (by removing the reference to the Board investigating the support evidence filed by an applicant) makes the *Affinity* decision inapplicable.

[21] Arain also argues that since the vote has already taken place, the issue of whether a vote should take place is moot, and the Application for Reconsideration should also be dismissed on that basis. Arain urges the Board to count the vote.

Argument on behalf of the Employer:

[22] The Employer indicated that it adopts Arain's submissions, and urged the Board to proceed to count the vote.

Relevant Legislative Provisions:

[23] The Board was referred to the following provisions of the Act as being relevant to this matter:

> ***Application to cancel certification order – loss of support***
> *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.*
>
> ***Board powers***
> *6-104(2) In addition to any other powers given to the board pursuant to this Part, the board may make orders:*
>
> . . .
>
> > *(f) rescinding or amending an order or decision of the board made pursuant to clause (b), (c), (d) or (e) or subsection (3), or amending a certification order or collective bargaining order in the circumstances set out in clause (g) or (h), notwithstanding that a motion, application, appeal or other proceeding respecting or arising out of the order or decision is pending in any court;*
> >
> > *(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.

No appeals from board orders or decisions
6-115(3) Notwithstanding subsections (1) and (2), the board may:

(a) reconsider any matter that it has dealt with; and

(b) rescind or amend any decision or order it has made.

[24] Section 33 of *The Saskatchewan Employment (Labour Relations Board) Regulations* sets out the procedure to be followed on an application for reconsideration:

Application for reconsideration
33(1) In this section, "application for reconsideration" means an application pursuant to subsection (2).

(2) An employer, union or other person directly affected by a decision or order of the board may apply to the board to reconsider that decision or order.

(3) An application for reconsideration must:
(a) be in writing; and
(b) be filed and served within 20 days after the date of the decision or order with respect to which reconsideration is sought.

(4) An application for reconsideration must contain the following information:
(a) the full name and address for service of the party making the application for reconsideration;
(b) the file number assigned by the registrar for the decision or order of the board with respect to which reconsideration is sought;
(c) the reasons the applicant believes the board ought to reconsider its decision or order;
(d) a summary of the law on which the applicant intends to rely.

(5) An application for reconsideration must be served by the applicant on any other parties named in the decision or order with respect to which reconsideration is sought.

Analysis and Decision:

[25] Arain referred the Board to *Kennedy v Canadian Union of Public Employees, Local 3967*, 2015 CanLII 60883 (SK LRB) ["*Kennedy*"], a recent decision of the Board that considered the *Remai* factors. It set out the starting point for reconsideration applications as follows:

[8] In the years since Chairperson Bilson's seminal decision, the Board's approach to reconsideration applications has become well established. First, an applicant must make out a case for reconsideration on one of the permissible grounds set out by the Board. If the applicant makes out a case for reconsideration, then the Board undertakes a review of that decision on those grounds.

[9] The Board's authority and willingness to reconsider its prior decisions is often confused with a right of appeal. However, as Chairperson Bilson noted in the Remai Investment

> *Corporation decision and as this Board has confirmed in numerous decisions since then, the power to re-open a previous decision must be used sparingly and in a way that will not undermine the coherence and stability of the relationships the Board seeks to foster. In other words, while the Board has authority to reconsider its own decisions, doing so is neither a right of appeal nor an opportunity for an unsuccessful applicant to re-argue and/or re-litigate a failed application before the Board. See: Grain Services Union (ILWU – Canada) v. Saskatchewan Wheat Pool, Heartland Livestock Services (324007 Alberta Ltd.) and GVIC Communications Inc., [2003] Sask. L.R.B.R. 454, LRB File No. 003-02; and Saskatchewan Government and General Employees' Union v. Government of Saskatchewan, [2011] CanLII 100993 (SK LRB), LRB File No. 005-11. This Board's willingness to reconsider its prior decision is founded in the periodic need for the Board to address important policy issues arising out of our jurisprudence and/or to avoid injustices. However, the Board must balance the need for policy refinement and error correction with the overarching need for finality and certainty in our decision-making process. As a result, both our approach to reconsideration applications and the criteria upon which we rely establish a high threshold for any applicant seeking to persuade this Board to review a previous decision.*

[26] The Union objects to two decisions made by the Board, and asks this panel of the Board to reverse those decisions: the list of employees used in calculating whether Arain met the 45% threshold and the direction that revocations will no longer be accepted or considered in determining whether the 45% threshold has been met. The Union invited the Board to rely on *Remai* factors four, five and six to determine that the Original Decision should be reconsidered.

[27] With respect to factor four, the Union argues that the Board did not properly interpret the law it applied to the facts of this case. *Kennedy* provided the following explanation of factor four:

> *[20] The fourth permissible ground for an application for reconsideration permits the Board to re-examine a prior decision in circumstances where the original decision turned on a conclusion of law or general policy which was not properly interpreted by the Board in the first instance. See: International Brotherhood of Electrical Workers, Local 213 v. Western Cash Register (1955) Ltd., [1978] 2 Can. L.R.B.R. 532. While it understandable why some applicants may see this ground as a general right of appeal on questions of law, a closer examination reveals that the scope of this particular ground is quite narrow. As Chairperson Bilson noted in the Remai Investment Corporation decision, this ground arose out of larger jurisdictions, where it is common for multiple panels to hear similar kinds of applications at the same time. These jurisdictions desire to maintain a uniform approach by their panels and, if divergence occurs on important issues of law and policy, this ground permits these boards to revisit its prior decisions if necessary to maintain uniformity. As a result, this ground is generally restricted to circumstances where there is an inconsistency between the decisions rendered by different panels on an important issue of law or policy. However, this ground has also been relied upon by the Board to re-examine a prior decision in circumstances where it is alleged the Board misapplied or misconstrued its enabling statute. See: United Food and Commercial Workers, Local 1400 v. Wal-Mart Canada Corp., [2009] CanLII 13640 (SK LRB), 173 C.L.R.B.R. (2d) 171, LRB File No. 069-04; and Saskatchewan Government and General Employees' Union v. Government of Saskatchewan, supra.*

[28] Did the Original Decision misapply or misconstrue the Act? The short answer is no. The Union argues that where a decertification application does not establish the required threshold of support for a vote, the longstanding policy and practice of labour boards across Canada is to not order a vote. That continues to be the law. The Original Decision did not modify that requirement. What it modified was the process to be followed by the Board Agent in making that assessment, so that the process is consistent with the Act.

[29] In 2008, *The Trade Union Act* was amended to require that votes be held on decertification applications when an applicant filed evidence of support from at least 45% of the employees in the bargaining unit. The Board had a policy of requiring votes in decertification applications before the legislation changed. At that time, it had full discretion to set the rules it applied to those cases. However, in 2008, the requirement to hold votes on decertification applications was codified, and the Act now sets the rules that apply to those votes, including setting out what the Board is to take into account in calculating whether the threshold has been met.

[30] The second issue raised by the Union was whether there was a breach of natural justice. First, the Union suggests that it was not afforded an opportunity to make argument on the issue of which list of employees was the appropriate list. The Original Decision reflects that this was clearly a live issue in the first hearing. The fact that the Board chose a list that the Union disagrees with does not lead to a conclusion that there was a breach of natural justice.

[31] The second breach of natural justice alleged by the Union was the decision to not apply the Board's previous policy of taking into account revocations received by the Board before the date it receives a decertification application. The Union argued that to change the policy retroactively is a breach of natural justice. For this argument it referred the Board to *Decision No. 1647 04*, [2005] OWSIATD No 2122, a decision of the Ontario Workplace Safety and Insurance Appeals Tribunal. In that case, however, the policies were statutorily authorized, and the Appeals Tribunal was required by the *Workplace Safety and Insurance Act* to apply them when making decisions. The Tribunal determined that its policies were more than a "mere informal guideline"[3] and that "a policy which, by virtue of section 126 of the WSIA, has a mandatory aspect, is more than just a guideline. In these circumstances, the rules of statutory interpretation should apply to Board policy"[4]. The same cannot be said about the Board policy referred to in this matter.

[3] At para 88.
[4] At para 97.

[32] The Act does not give the Board authority to make policies, or give any such policies the force of law. The most that can be said about the Board policies is that they are an attempt to reflect the proper interpretation of the law. In this case the Original Decision found that the policy no longer reflected a proper interpretation of the law subsequent to the amendments to the legislation in 2008. The fact that it was ten years after the amendments before a party challenged the accuracy of the policy, causing the Board to make a ruling on the issue, does not affect the proper interpretation of the law. The Original Decision found that the policy was inconsistent with the Act. The policy cannot override or contradict the Act. The original panel, having found the policy was inconsistent with the Act, rightly directed that the policy was to be disregarded.

[33] The Board finds no breach of natural justice in the Original Decision.

[34] The third factor relied on by the Union in this matter, factor six, asks the Board to consider whether the Original Decision was precedential and amounts to a significant policy adjudication that the Board may wish to refine, expand upon, or otherwise change. *Kennedy* made the following comment about this factor:

> *[25] The final permissible ground for an application for reconsideration deals with circumstances where the original decision was precedential and amounted to a significant policy adjudication. Simply put, this ground permits the Board to take a "second look" when it makes major new policy adjudications or when it departures [sic] from past jurisprudence on a significant issue. However, in both cases, the matters in issue must have significant impact on the labour relations community in general. See: Construction Labour Relations Association v. Canadian Association of Industrial Mechanical and Allied Workers, Local 17, [1979] 3 Can. L.R.B.R. 153. See also: Saskatchewan Government Employees' Union v. Mary Banga, [1994] 1st Quarter Sask. Labour Rep. 291, LRB File No. 014-94.*

[35] Applying this argument first to the choice of the list of employees, the Board finds that the Original Decision did not set a precedent. The choice of list was discretionary; it was considered to be the most appropriate on the facts of this matter.

[36] Applying factor six to the decision to disregard the revocations, it could be argued that this decision was precedential, but that does not automatically lead to a conclusion that the decision should be changed. The Board reviewed the wording in section 6-17 of the Act that applies to calculating the 45% threshold in decertification applications:

> *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.*

[37] There is no reference in these provisions to an investigation by the Board Agent as there was in the previous provisions. There is no reference in these provisions to evidence being submitted by anyone other than an applicant. The Board needs only to be satisfied that the indications of support filed by an applicant come from "45% or more of the employees in the bargaining unit". This requirement provides the authority to the Board Agent to reject cards signed by persons not on the employee lists and duplicate cards.

[38] In *Affinity*, the Court of Appeal upheld the Board's decision not to rescind a direction to vote:

> *[14] In reaching its decision, the Board took into account the purpose of s. 6(1.1) which it found was "to prevent employees from being asked to decide the representational question if an applicant can not [sic] demonstrate that a sufficient threshold of employees in the workplace support the applicant's initiative" (para. 24). The Board described the provision as a "shield" to protect the workplace from the disruption associated with applications for certification. Consequently s. 6(1.1) enjoins the Board from directing a representational vote unless it is satisfied the Union's application is accompanied by "sufficient evidence of support", that is 45% of the employees in the bargaining unit. The operative time for making that determination is when the application is filed with the Board. The majority found s. 6(1.1) directs the decision to order a vote be based "on the applicant's application, together with any investigations [sic] conducted by the Board" (para. 22). Based on its interpretation, s. 6(1.1) anticipates that, at the time that determination is made, the Board will not have the full spectrum of information that would normally be available after a hearing, nor will that information have been tested. In other words, s. 6(1.1) is a preliminary step in the certification process which does not require exact numbers.*

[39] It is to be noted that, at the time of that decision, subsection 6(1.1) of *The Trade Union Act* read as follows:

> *6(1.1) No vote shall be directed pursuant to subsection (1) unless the board is satisfied, on the basis of the evidence submitted in support of the application and the board's investigation in respect of that evidence, that at the time of the application at least 45% of the employees in the appropriate unit support the application.*

[40] The reference to "the board's investigation in respect of that evidence" does not appear in section 6-17. Therefore, the Court of Appeal's reference to an investigation of the evidence does

not apply in this matter. The same comment can be made with respect to *Rooley*, which relied on legislation significantly different than section 6-17 in making its decision.

[41] The Board is not persuaded that there is anything in the Original Decision that requires the Board to take a "second look" at its findings.

[42] As this Board has found on numerous occasions, the power to re-open a previous decision must be used sparingly. The Board is not satisfied that the Union has proven that this is an appropriate case in which to grant a reconsideration.

[43] The Application for Reconsideration is dismissed.

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

DATED at Regina, Saskatchewan, this **23rd** day of **August, 2019.**

LABOUR RELATIONS BOARD

Susan C. Amrud, Q.C.
Chairperson