Saskatchewan
Labour Relations Board

PLATINUM TRACK SERVICES INC., Applicant v CONSTRUCTION AND GENERAL WORKERS' UNION, LOCAL 180, Respondent

LRB File No. 068-19; February 28, 2020
Vice-Chairperson, Barbara Mysko; Board Members: Phil Polsom and Laura Sommervill

For the Applicant, Platinum Track Services Inc.:	Robert Frost-Hinz
For the Respondent, Construction and General Workers' Union, Local 180:	Gary L. Bainbridge, Q.C.

Objection to Conduct of Vote – Certification Application – Representational vote – Employer objects to voter eligibility of entire workforce due to shut down of operations in Saskatchewan.

Third party Master Services Agreement – Third party discretion to require shut down – Project shut down – Overhaul of workforce following filing of application – Late filing of employee list – Vote occurred after shut-down.

Eligibility to vote – Date of filing of application and date of vote – Mail-in ballots – No employees in Saskatchewan on date of vote – Insufficient evidence of continuing interest in the proposed bargaining unit.

REASONS FOR DECISION

Background:

[1] **Barbara Mysko, Vice-Chairperson:** These are the Board's Reasons for Decision in relation to an Objection to Conduct of Vote, heard by the Board on November 12, 2019.

[2] On February 28, 2019, the Construction and General Workers' Union, Local 180 ["Union"] filed a Certification Application in relation to the employees of Platinum Track Services Inc. ["Employer" and "Platinum Track"]. Platinum Track is in the business of railway maintenance and construction, light rail transit, track inspections, track removal, equipment rentals, and welding. The business was incorporated in Ontario and is extra-provincially registered in Saskatchewan. Platinum Track's business activities in Saskatchewan are focused on railway maintenance work.

[3] The Certification Application describes the proposed bargaining unit in this way:

> *All labourers employed by Platinum Track Services INC within the boundaries of the Province of Saskatchewan*

[4] The Certification Application was brought under the Board's general procedure and not under Part VI, Division 13 (Construction Industry). According to the Employer's Reply, as of the date of the filing of the Certification Application, 32 employees were employed in Saskatchewan, including 15 Operators, 12 Trackmen, two Assistant Foremen, two Foremen, and one Supervisor.

[5] Following the Union's filing of the Certification Application, the Employer was required to provide a list of employees to the Board within three business days after being served with the written direction, in accordance with section 22 of *The Saskatchewan Employment (Labour Relations Board) Regulations* [the "Regulations"]. The Employer provided its list of employees on March 12, 2019, and therefore the Direction for Vote was delayed until March 14, 2019. By this point, the Employer's operations in Saskatchewan had been shut down, and the employees had been transferred out of the province. The Employer proceeded to file an Objection to Conduct of the Vote on March 22, 2019.

[6] The Employer's Objection claims, firstly, that none of the employees included on the Notice of Vote were actively employed by the Employer in Saskatchewan as of the date of the Notice of Vote. As they did not have a continuing interest in the bargaining unit, their votes should not be counted. Secondly, certain individuals were employed in a supervisory role and pursuant to subsection 6-11(3) of the Act, should not be included in the bargaining unit.

[7] The Union claims that, between the filing of the Certification Application and the Direction for Vote, the Employer terminated all or substantially all of its employees, seeking to use its own delay as a basis for objecting to the conduct of the vote. The Union claims further that the Employer continues to employ several employees in Saskatchewan that would be subject to a certification order. Under the circumstances, the Board should amend the usual test to determine whether a person is an employee for purposes of a representational vote, and rely solely on the date that the Certification Application was filed. Should the Board rely on the date of the Certification Application, and disregard the date of the vote, it would find that all of the listed employees (except supervisory employees) were eligible to vote. The Union seeks a dismissal of the Objection and a subsequent order that the certification vote be tabulated.

[8] As for supervisory employees, the Union says that this matter is no longer in dispute. It is agreed that the five employees (referred to as Supervisors, Foremen, and Assistant Foremen) listed under Schedule "B" of the Objection do not form a part of the proposed bargaining unit. The proposed bargaining unit comprises Operators and Trackmen, only.

Argument on Behalf of the Parties:

[9] The Employer argues that, to be eligible to vote on the representational question, employees must be working in the proposed unit in Saskatchewan on the date that the certification application is filed and on the date of the vote. In this case, the Employer ceased work in Saskatchewan on March 9, 2019 and the ballots were mailed five days later, on March 14, 2019. By that point, not only were the workers on the employee list ineligible to vote, but they no longer had a continuing interest in the Saskatchewan workplace. All work in Saskatchewan had ceased and the Employer had no intention to retain the listed employees for future work in Saskatchewan. Some delay in providing an employee list is normal and expected. The delay in this case was reasonable, was not motivated by bad faith, and does not justify amending the test for eligibility.

[10] The Union argues that the Board is faced with two alternatives. If the Board finds that the Employer did not cease operations in Saskatchewan as of March 9, 2019, then the consequence is clear. The Objection must fail and the Certification Application proceed. Alternatively, if the Employer did cease operations, then the Board must determine whether an Employer can, "through its own neglect or fault, avoid a certification application by virtue of coincidentally ceasing operations" prior to the conduct of the vote. While the default rule is that employees must be employed on the date of the application and the date of the vote, this rule is not absolute. Where justified, the Board may choose to depart from this rule.

[11] In this case, it is the Employer's failure to comply with the Act, the Regulations and the Board's direction, that have resulted in a major change in the workforce since the date of the Certification Application and prior to the date of vote. According to the Employer, the entire workforce was dismissed and the entire operation ceased. If the Board denies eligibility on the basis of the within facts, then it allows just the type of mischief that the Board should be discouraging – firing employees *en masse* following the filing of a Certification Application. Such mischief is especially accessible to out-of-province employers who have the resources to remove their workforce from the province in the face of a possible certification.

Evidence:

[12] Platinum Track was incorporated in Ontario on January 9, 2014. It is in the business of providing maintenance to Class I railroads and small industrial clients, operating across the country, including in Ontario, Manitoba, Saskatchewan, Alberta, and British Columbia.

[13] Matteo Spoleti [“Spoleti”], the Chief Financial Officer [“CFO”], testified on behalf of the Employer. He manages the business side of the operations, which includes managing its labour relations. He has worked for Platinum Track since April 2014 and has held the CFO position during that entire time. Mike Sousa [“Sousa”] is the President of Platinum Track.

[14] Platinum Track has a Master Service Agreement [“MSA”] through which the Canadian National Railway [“CNR”] may call on it to perform railway maintenance services on an ad hoc basis. Through the MSA, CNR has reserved the right to send workers home on its prerogative. In early 2019, Spoleti received a call from CNR asking for a rail replacement gang around Humboldt, on a job that CNR had not completed. This is the job that Platinum Track was performing when the Certification Application was filed.

[15] The Certification Application was filed with the Board on February 28, 2019. This was a Thursday. On the same day, the Board Officer sent an email to the Employer (via Sousa) advising that it had received the Application and indicating that it required the standard list of employees within three business days. The timeframe of three business days meant that the Employer had until March 5, 2019 to file the employee list. According to Spoleti, on the second business day following the filing of the Certification Application (Monday, March 4), CNR notified Platinum Track that it intended to shut down this job at the end of the existing, regular work schedule. The end of the work schedule was on March 7. By March 5, the Employer had still failed to file any list of employees. During this week, Spoleti, who was in charge of labour relations matters was away on vacation.

[16] Sousa and the Board agent spoke on the phone, and then on March 7, the Board Officer sent another email to the Employer via Spoleti and copying Sousa. Or so he thought. As it turned out, the Board Officer had inadvertently misspelled the email address for Spoleti, by switching two letters of Spoleti’s name. That email, which copied Sousa but apparently did not make it to Spoleti, read as follows:

> *Good Morning,*
>
> *At the request of Mr. Sousa, I am advancing the email below to you. Please provide the demanded information as below as soon as possible as the statutory three business days timeline has expired. Note that this email does not constitute an extension of the deadline for information provided to the Employer in the previous email.*
>
> *Regards,*

[17] Clearly, by this point, the deadline had already expired. It appears, that based on this email, there was an understanding that Spoleti would follow up with the employee list. However, Spoleti did not receive this email at that time.

[18] March 7 was the last day in the regular work schedule, and given the shut-down of the job, there was some work to do on March 8, and so some employees stayed back to complete that work. On or before March 9, the employees left the project and flew out to their respective places of residence. Ontario employees were paid for their travel day. Employees were laid off and issued their records of employment. March 9 was not considered a work day.

[19] As of and after March 9, there were no employees working at that site in Saskatchewan. There were no plans to return to this project. Some employees did not return to Platinum Track at all. Neither the Employer nor the workers would have known about any concrete, prospective work in Saskatchewan at that time. Each year, company management compiles its hypothetical wish list of projects, but the work tends not to be awarded until middle to late April. The first project (as opposed to service request) did not take place until the beginning of May in Ontario.

[20] By March 11, 2019, no employee list had yet been filed. On that date, the Board Officer sent another email to a third representative of the Employer, forwarding the previous emails, and stating:

> *Good morning Kelly,*
>
> *Further to our telephone conversation, I am advancing the emails below to you.*
> *I trust that you can provide the information, accurate to February 28, 2019, to me before the end of business, as agreed during our conversation.*
>
> *Regards,*

[21] On March 12, 2019, the Employer through counsel provided the list of employees employed in Saskatchewan. This was eight business days after the filing of the Certification Application. There was some correspondence between the Union and the Employer on March 13, and then on March 14, 2019, the Board issued the Direction for Vote. Included in the Direction was the following Order:

> *(b) A Notice of Vote, together with a list of the employees eligible to vote, shall be posted in a conspicuous place or places where the employees eligible to vote are engaged about their duties, and shall be posted for a time agreed to by the parties, before the time fixed for the taking of the vote; …*

[22] On March 15, 2019, counsel for the Employer replied to the Board's direction to post, stating in part:

> *In regard to your requirement that the documents be posted, as will be more fully detailed in our Reply, Platinum Track Services for reasons completely unrelated to the present application, no longer operates in the Province of Saskatchewan, does not have a workplace in Saskatchewan, and does not have any employees working in Saskatchewan. As such, we are unable to post the Notice of Vote or Direction to Vote as requested.*

[23] As it turned out, the Employer did not post the Notice of Vote. There were no actual physical premises – no job offices and no trailers – just equipment, and the transport bus would not have been running in Saskatchewan after March 9. The deadline for the return of the ballots expired on April 4, 2019. Only two ballots were returned.

[24] Since March, Platinum Track has returned to perform work in Saskatchewan through service requests, including: in Clavet during May and June, 2019; and, around Congress and in Moose Jaw after Labour Day. A number of employees, whose names appear on the employee list, did return to do some of the later work in Saskatchewan. At the beginning of April, truck drivers referred to as "float services" came to the area around Humboldt to retrieve the equipment from the earlier project. They did not perform railway maintenance.

[25] Julius Francis Kootos Salagobas ["Salagobas"] testified on behalf of the Union. Salagobas reviewed his photos of what he described as work taking place after March 9, 2019. The photos mainly depict equipment with Platinum Track insignia in various locations including Bruno, Congress, and the CP yard in Moose Jaw. As of March 14, Salagobas was not aware of any employees working in Saskatchewan for Platinum Track. Of those individuals who appear in the photos, Salagobas did not speak with any of them, does not know their names, and would not be able to say if they were contractors. It was not until October that he spoke with some employees who were working for Platinum Track in Saskatchewan.

Applicable Statutory Provisions:

[26] The following provisions of the Act are applicable:

> ***6-1****(1) In this Part:*
>
> *(a) "bargaining unit" means:*
>
> *(i) a unit that is determined by the board as a unit appropriate for collective bargaining; or*

(ii) if authorized pursuant to this Part, a unit comprised of employees of two or more employers that is determined by the board as a unit appropriate for collective bargaining;

. . .

(c) "certification order" means a board order issued pursuant to section 6-13 or clause 6-18(4)(e) that certifies a union as the bargaining agent for a bargaining unit[.]

. . .

6-4*(1) Employees have the right to organize in and to form, join or assist unions and to engage in collective bargaining through a union of their own choosing.*

(2) No employee shall unreasonably be denied membership in a union.

. . .

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

(2) When applying pursuant to subsection (1), a union shall:

(a) establish that 45% or more of the employees in the unit have within the 90 days preceding the date of the application indicated that the applicant union is their choice of bargaining agent; and

(b) file with the board evidence of each employee's support that meets the prescribed requirements.

. . .

6-11*(1) If a union applies for certification as the bargaining agent for a unit or a portion of a bargaining unit or to move a portion of one bargaining unit to another bargaining unit, the board shall determine:*

(a) if the unit of employees is appropriate for collective bargaining; or

(b) in the case of an application to move a portion of one bargaining unit to another bargaining unit, if the portion of the unit should be moved.

(2) In making the determination required pursuant to subsection (1), the board may include or exclude persons in the unit proposed by the union.

(3) Subject to subsections (4) to (6), the board shall not include in a bargaining unit any supervisory employees.

(4) Subsection (3) does not apply if:

(a) the employer and union make an irrevocable election to allow the supervisory employees to be in the bargaining unit; or

(b) the bargaining unit determined by the board is a bargaining unit comprised of supervisory employees.

(5) An employee who is or may become a supervisory employee:

(a) continues to be a member of a bargaining unit until excluded by the board or an agreement between the employer and the union; and

(b) is entitled to all the rights and shall fulfil all of the responsibilities of a member of the bargaining unit.

(6) Subsections (3) to (5) apply only on and after two years after the date on which subsection (3) comes into force.

(7) In making the determination required by subsection (1) as it relates to the construction industry within the meaning of Division 13, the board shall:

> *(a) make no presumption that a craft unit is the more suitable unit appropriate for collective bargaining; and*
>
> *(b) determine the bargaining unit by reference to whatever factors the board considers relevant to the application, including:*
>
> > *(i) the geographical jurisdiction of the union making the application; and*
> >
> > *(ii) whether the certification order should be confined to a particular project.*

6‑12*(1) Before issuing a certification order on an application made in accordance with section 6‑9 or amending an existing certification order on an application made in accordance with section 6‑10, the board shall direct a vote of all employees eligible to vote to determine whether the union should be certified as the bargaining agent for the proposed bargaining unit.*

(2) Notwithstanding that a union has not established the level of support required by subsection 6‑9(2) or 6‑10(2), the board shall make an order directing a vote to be taken to determine whether a certification order should be issued or amended if:

> *(a) the board finds that the employer or a person acting on behalf of the employer has committed an unfair labour practice or has otherwise contravened this Part;*
>
> *(b) there is insufficient evidence before the board to establish that 45% or more of the employees in the proposed bargaining unit support the application; and*
>
> *(c) the board finds that sufficient evidence of support mentioned in clause (b) would have been obtained but for the unfair labour practice or contravention of this Part.*

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

6‑13*(1) If, after a vote is taken in accordance with section 6‑12, the board is satisfied that a majority of votes that are cast favour certification of the union as the bargaining agent for a unit of employees, the board shall issue an order:*

> *(a) certifying the union as the bargaining agent for that unit; and*
>
> *(b) if the application is made pursuant to subclause 6‑10(1)(b)(ii), moving a portion of one bargaining unit into another bargaining unit.*

(2) If a union is certified as the bargaining agent for a bargaining unit:

> *(a) the union has exclusive authority to engage in collective bargaining for the employees in the bargaining unit and to bind it by a collective agreement until the order certifying the union is cancelled; and*

(b) if a collective agreement binding on the employees in the bargaining unit is in force at the date of certification, the agreement remains in force and shall be administered by the union that has been certified as the bargaining agent for the bargaining unit.

…

***6-23** On the application of the affected union or an affected employee or on its own motion, the board may:*

(a) require that a vote required pursuant to this Part, or directed to be taken by the board, be supervised, conducted or scrutinized by the board or a person appointed by the board;

(b) establish the manner and time in which the vote is required to be conducted and when and how notice of the vote must be provided to those entitled to vote;

(c) determine, by order, by board regulation or both, general eligibility requirements as to who is entitled to vote;

(d) determine whether a person:

(i) satisfies the eligibility requirements; and

(ii) is an employee or is an employee entitled to vote; and

(e) require that the employer and the union give all eligible employees an opportunity to vote.

[27] The following provision of the Regulations is applicable:

***22**(1) On filing an application pursuant to the Act and these regulations respecting a matter for which the board is authorized or required by the Act to conduct a vote, the registrar may issue a written direction to an employer of employees whom the registrar considers affected by the application requiring the employer to file with the registrar the employer's payroll records respecting those employees.*

(2) The payroll records mentioned in subsection (1) must identify the names, positions and classifications of employees who are employed in the unit or units of employees specified by the registrar in the written direction as at the date specified by the registrar in the written direction.

(3) In addition to the payroll records, an employer to whom a written direction pursuant to subsection (1) is issued shall also file with the registrar the following additional information:

(a) the location of any workplaces at which the employees mentioned in subsection (1) are employed;

(b) any safety restrictions respecting access to the workplaces mentioned in clause (a);

(c) the hours of work of the employees at the workplaces mentioned in clause (a). (4) An employer to whom a written direction pursuant to subsection (1) is issued shall file the payroll records required by this section within three business days after being served with the written direction.

> *(4) An employer to whom a written direction pursuant to subsection (1) is issued shall file the payroll records required by this section within three business days after being served with the written direction.*

Analysis:

[28] As a starting point, the Board accepts the Employer's contention that there were no employees working in Saskatchewan as of March 9, 2019. This leaves only one question, that being, whether the Board should depart from the usual test for voter eligibility on a representational question. The basic criteria for eligibility is that the proposed voter is an employee on the date that the Certification Application is filed and on the date of the vote.[1] For mail-in votes, the date of the vote is deemed to be the date that the ballots are sent out, which in this case was March 14, 2019. The proposed bargaining unit comprises labourers employed by Platinum Track within the boundaries of the Province of Saskatchewan. Here, there were no employees working in Saskatchewan on the date of the vote.

[29] In considering this question, the Board is guided by section 6-4 of the Act, which reads:

> *6-4(1) Employees have the right to organize in and to form, join or assist unions and to engage in collective bargaining through a union of their own choosing.*
>
> *(2) No employee shall unreasonably be denied membership in a union.*

[30] Employee choice is paramount. The key concern in a Certification Application is to assess the employees' wishes in relation to representation on behalf of a bargaining agent.

[31] A first step in a Certification Application is the filing of support evidence pursuant to clause 6-9(2)(a) of the Act, which requires that a union:

> *(a) establish that 45% or more of the employees in the unit have within the 90 days preceding the date of the application indicated that the applicant union is their choice of bargaining agent;…*

[32] Before issuing a certification order in accordance with section 6-9, the Board shall direct a vote of all employees eligible to vote. The Board has developed its own criteria for determining voter eligibility, namely, that an individual must be an employee both on the date of the Certification Application and on the date of the vote. These two prerequisites are designed to encourage voting on behalf of those with a continuing interest in the representational question and a sense of ownership over the outcome of the vote. In this system, there is a degree of

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[1] *Con-Force Structures Ltd. (Re)*, [1992] SLRBD No 40 ["*Con-Force*"].

confidence that the results of the vote legitimize the union's representative status, solidify the relationship between the union and employer, and promote a constructive climate for collective bargaining negotiations. It is this panel's view that any departure from these criteria should be motivated by similar principles.

[33] In *Con-Force Structures Ltd. (Re)*, [1992] SLRBD No 40 ["*Con-Force*"], the Board had to consider whether to depart from the usual rule, and to take into account the existing recall rights, based in the collective bargaining agreement, of laid-off employees. In so considering, then Vice-Chairperson Hobbs outlined the principles that underlie the voter eligibility criteria, at 3 to 4:

> *The Board accepts that the rules it has developed achieve neither perfect predictability nor perfect democracy. They are necessarily, at best, a reasonable compromise intended to give effect to s. 3* [of *The Trade Union Act*, now subsections 6-4 and 6-13(2)(a) of the Act] *by ensuring that the representation question is left in the hands of the people who have a legitimate interest in the issue while, at the same time, providing the direction these people require to convert s. 3 rights into a practical reality. These rules are not entirely inflexible, but there is a substantial onus upon any party who seeks to have the Board depart from them.*
>
> *In Saskatchewan, the general standard for determining voter eligibility when a representation vote is ordered, is that a person must be an employee on the date that the application is filed and on the date of the vote. In the construction industry, this rule is applied strictly and literally, in recognition of the transitory relationship between employers and employees in that industry. Outside the construction industry, there has been some softening of this rule. Some of the more common situations where the Board might make an exception to this rule are where an employee is on Workers' Compensation, maternity leave, sick leave, education leave, or on temporary lay-off. It is a factual question in each of these cases whether an employee's circumstances are such as to justify his participation…*

[34] After reflecting on the underlying principles, Vice-Chairperson Hobbs concluded that it was appropriate to assess, one-by-one, whether each of the disputed employees had a "continuing interest in the representation issue which is sufficient to justify their participation".[2] The Board went on to consider the length and regularity of employment for each disputed individual to determine which of those employees were likely to be recalled to work and were likely to have a sufficient interest in the representational question. In so doing, the Board applied a measure of flexibility to its assessment of the eligibility criteria while giving due consideration to which employees were interested in the representational question.

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[2] *Con-Force* at 6.

[35] The Board in *Con-Force* pointed out that in the construction industry the eligibility criteria are applied in a strict and literal fashion. In applying the criteria in this manner, the Board takes into account the union's representative status in the context of a highly transient workforce. Perhaps to counter this observation, the Union, here, highlights that the within Certification Application is filed under the general certification procedure of the Act, and not under Division 13 (Construction Industry). However, the Union's choice of procedure does not alter the inherently transient nature of Platinum Track's workforce, as disclosed by the process for securing contracts and entering into projects in Saskatchewan. As such, the Board's observations about the strict application of the voter eligibility criteria remain pertinent in this case.

[36] Still, as the Board demonstrated through its eligibility assessment of the construction industry workforce in *Con-Force*, there is some room for departure from the rule. In advocating for such a departure, the Union relies on a second construction industry case, *International Association of Heat and Frost Insulators and Allied Workers, Local 119 v Northern Industrial Contracting Inc*, 2014 CanLII 63991 (SK LRB) ["*Northern Industrial*"]. There, the employer had transferred certain employees out of province while they were on a regularly scheduled leave. The employer in that case argued that the employees had either quit or accepted transfers out of province prior to the conduct of the representational vote.

[37] In this Board's view, *Northern Industrial* presented a clearer set of circumstances than exist here. There, the project in Saskatchewan was ongoing and the employees were expected to return to the Saskatchewan site. Having determined that the transfers were effective after the voting had already begun, it was not necessary for the Board to consider whether those employees had a continuing interest in the workplace. In the present case, the entire workforce was disbanded and no employees, at least at the time of the vote, were expected to return to Saskatchewan for the purpose of working on any specific, existing projects. Most of the employees were dispatched to various projects across Canada within a few weeks of the completion of the Saskatchewan job.

[38] Despite finding that the vote began before the transfers became effective, the Board in *Northern Industrial* went on to declare that it was "unwilling to accept that an employer can unilaterally transfer employees" after a certification application has been filed, and thereby strip the employees of their right to participate in the representational question. The Union argues that this assertion is especially persuasive in the current case, in particular due to the policy concerns underlying the Board's assertion, as disclosed by the following passage:

> *[26] …In coming to this conclusion, we acknowledge that the nature of the disputed employees' relationship with the Employer changed soon after the representational vote began. However, in our opinion, as of February 6, 2013, it had not yet changed; certainly, it had not changed in a manner sufficient to undermine their eligibility to participate in the representational question. Even if we had agreed with the Employer that the disputed employees wanted to be transferred to the Employer's operations in Alberta (a transfer that would have taken them outside of the Union's proposed bargaining unit), that transfer would not have been effective until the expiration of their leave unless they reported to work in Alberta prior to that time; which they did not. Secondly, for policy reasons, we are unwilling to accept that an employer can unilaterally transfer employees working within the scope of a proposed bargaining unit after a certification application has been filed and that such a transfer can be sufficient to disentitle the subject employees from participation in the representational question. While there are undoubtedly a variety of valid reasons for transferring employees from one project to another and sometimes such transfers occur suddenly, in our opinion, there is also a non-trivial potential that some employers could be motivated to transfer certain employees from one protect to another prior to the conduct of a representational vote in a desire to influence the outcome of that vote. Rather than requiring the parties to call evidence and have this Board differentiate between valid business reasons and anti-union animus, it makes far more sense for this Board, as a matter of policy, to disregard unilateral transfers by employers of otherwise eligible employees that occur after a certification application is filed with the Board in determining who is eligible to participate in the representational question and who is not.*
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> *[27] Therefore, in our opinion, irrespective of whether Mr. Breton and Ms. Filion had agreed to be transferred to a project outside of Saskatchewan or unbeknownst to them they had been transferred by the Employer to another project (outside of Saskatchewan), neither form of transfer would have been effective before their leave had concluded, which was August 7, 2013. In both scenarios, the start date for work in Alberta was well after the representational vote began and, thus, they remained eligible to vote.*
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> *[28] As has been noted, the test for eligibility to participate in the representational question as described by this Board in Calvin Ennis v. Con-Force, supra, is an imperfect test. Nonetheless, it remains the best means for this Board to promote the twin goals of democracy and predictability. At the time the representational vote began on August 6, 2013, we are satisfied that both Mr. Breton and Ms. Filion continued to have a substantial connection to the Union's proposed bargaining unit; namely, the Employer's operations in Saskatchewan.*

[39] In relying on the foregoing observations, the Union makes the following apposite points:

> *The Union submits similar considerations should apply here, where it is the employer's own non-compliance with each of the SEA, the Regulations, and the Board's direction that have resulted in a massive change in the workforce between date of application and the date the vote was conducted. This is not a typical scenario; the entire workforce (says the employer) was dismissed; the entire operation (says the employer) had ceased. If one accepts that as true, and denies eligibility on that basis, then it leaves open the very mischief suggested by the Board in Northern Industrial – an employer firing employees en masse after a certification application is submitted, potentially requiring multiple Unfair Labour Practices and much Board scrutiny to evaluate. This is particularly true for an out-of-province employer, who can "pull up stakes" and leave in the face of possible certification.*

[40] The Board must consider whether the same or similar policy concerns compel the Board to amend the eligibility criteria and discard the requirement that the voting individuals be

employees on the date of the vote. If the Board is persuaded to discard the second requirement, then the only remaining requirement is that the voters be employees (not supervisory employees) on the date of the Certification Application. For the following reasons, the Board finds that the decisions in *Con-Force* and *Northern Industrial* are distinguishable.

[41] In *Con-Force*, the Board amended the eligibility criteria by discarding the strict requirement that voters be employees on the date of the vote. In that case, the Board considered instead whether the disputed employees, with recall rights, had sufficient indicia of longevity and continuity to demonstrate continuing interest in the representational question. Unlike in *Con-Force*, there is no similar evidence, here, that the prospective voters had a continuing interest in the representational question at the time of the vote, other than a general right or expectation of recall, extended to all the employees. This relative lack of interest is confirmed by the fact that most of the subject employees moved on to projects in other jurisdictions shortly after the vote in this matter took place. At the same time, there were no similar, concrete projects earmarked for Saskatchewan, at the time of the shut-down.

[42] In *Northern Industrial*, the Board did not amend the eligibility criteria. It did not discard the requirement that voters be employees on the date of the vote. It found that, despite the unilateral transfer, the disputed employees were employees on the date of the vote. It went on to suggest that the Board should disregard, as irrelevant to a question of eligibility, an employer's unilateral transfer of an employee after the filing of a certification application. In the current case, unlike in *Northern Industrial*, there is no room to conclude that the prospective voters were employees of Platinum Track in Saskatchewan on the date of the vote. Nor is there any evidence to suggest that the Employer has unilaterally transferred any or all of the employees out of province, whether to avoid the certification or otherwise. Instead, Spoleti has testified that a third party, with discretion to do so, shut down the existing project. There is no suggestion, despite the coincidental timing, that the Employer orchestrated these events.

[43] Having differentiated between the facts in *Con-Force* and *Northern Industrial* and the facts in the current case, it remains necessary for the Board to consider whether there is a principled reason to depart from the eligibility criteria. The Board's declaration in *Northern Industrial* calls on the Board to be careful not to create, through its decisions, an incentive for employers to attempt to influence a vote by unilaterally transferring employees.

[44] While there was no Employer-driven unilateral transfer of employees in this case, there was an element of Employer control that attracts the Board's scrutiny. The Employer had control over whether and when it would provide the list of employees, and therefore, over when the vote would occur. On February 28, 2019, the Board Officer forwarded the Certification Application to the Employer, stating "I require a list of all employees currently employed within the scope of paragraph 3 of the application, their home addresses, occupations and dates of hire within three (3) business days." Pursuant to section 22 of the Regulations, the Employer is required to file the requested payroll records within three business days after being served with the written direction. The Employer did not raise any concerns about whether the written direction was properly issued pursuant to section 22 of the Regulations, having been sent directly from the Board Officer, copying the Registrar.

[45] By not providing the list within the three days as directed (or within four or five days), the Employer's actions ensured that no vote would take place until after the project was shut down. The Employer says that Spoleti, who was in charge of labour relations, was on vacation out of country during the material times, and that as soon as he was able, he attended to the employee list. Further, Spoleti's absence caused a delay in retaining local legal counsel, resulting in a lesser appreciation of the nature of the Employer's obligations. The Board Officer's follow-up email to Spoleti, dated March 7, suggested that the matter awaited Spoleti's reply. While this panel has been careful to consider the Union's arguments, and the unfortunate timing of these events, we have concluded that there is an air of reality around Spoleti's testimony, attributing the delay to a series of miscommunications and misunderstandings. Despite the apparent lapses in judgment, in, for example, failing to assign the task to another manager, there is no evidence to suggest that the Employer's delay was motivated by anti-union animus.

[46] The Employer argues that a certain amount of delay is normal or expected in the certification process and that the delay here was not unreasonable or caused by bad faith conduct. In support of this position, the Employer relies on *Royal University Hospital*, 1993 CarswellSask 730, [1993] SLRBD No 53 ["*Royal University*"], in which the Board had to address the following scenario:

> *3 The applicant concedes that the disputed employees were not employed upon the date the application was filed and that in normal circumstances they would not be eligible to vote. However, the applicant submits that due to the special circumstances of this case, an exception to the Board's general policy is required and cites the Board's decisions in Little-Borland Ltd., 1986 Feb., Sask. Labour Report, p. 55 and University of Saskatchewan, 1986 April, Sask. Labour Report, p. 34, as instances where the Board has varied the criteria of*

> *eligibility to avoid injustice and unfairness. The special circumstances which the applicant relies upon are the nearly two one-half years between the date when the application was filed and the date the vote was conducted. During this interval there has been a significant turnover among the employee compliment to the extent that 35 of the 81 employees who will be directly affected by the vote, would be ineligible if the Board applied its normal rule.*
>
> *4 The general requirement that an employee must be employed on the date the application is filed, in order to be eligible to vote in a representation vote, was developed both for a reason and with the general or typical application in mind. The reasons for selecting the date of the filing of the application as the basis for the voter's list is that experience has shown the Board that it is advisable to use a date that is as early as possible in the representation process, as this minimizes any opportunity for the Employer to influence the outcome of the vote by tampering with the employee compliment, or even to be perceived as having done so. The later the date is in the process, the more likely it is that every hiring or layoff will be perceived as manipulation and the ensuing litigation would greatly add to the expense and the complexity of the representation issue. Secondly, if the applicants organizing of the employees must stop on the date of filing, then logic suggests and fairness to the applicant requires, that the calculation of whether it has a majority must also be based upon the employee compliment as it existed on that date, regardless of when the calculation is actually done and what changes to the work force occur during the interval. On a typical application, the interval between the date when the application is filed and the date the vote conducted is a matter of weeks or perhaps a few months during which the constituency does not change dramatically.*
>
> [spelling of "compliment" in original decision]

[47] It should be noted that the decision in *Royal University* was not about discarding the requirement that voters be employees on the date of the vote, but about discarding the requirement that they be employees on the date of the certification application. As explained by George Adams, Q.C., referring to *Royal University*, in a passage upon which the Employer relies:

> *The Saskatchewan Board has held that where there is a long delay between the date of application and the date the vote is held, it may permit employees not working on the date of application to vote.[…]* [3]

[48] The usual interval is significantly shorter than the "matter of weeks or perhaps a few months" referenced in this passage. *Royal University* was decided in 1993. Since then, the Board's representational voting policies have evolved, including by instituting a regular practice of conducting mail-in votes with a significant emphasis on timeliness.

[49] Still, the Board agrees with the Employer that the delay does not appear to have been motivated by bad faith or by anti-union animus. Nor was the delay significant. While it ensured that a vote could not occur until after the shut-down, any different result was contingent on a

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[3] Adams Cdn Lab L 7.13, *Canadian Labour Law*, *2nd Ed*. (Thomson Reuters Canada: Westlaw Next) at 7.1650.

window of only a few days. In order to conclude that the voting package would have been mailed prior to the shut-down, the Board would have to make a series of assumptions, including that the prevailing conditions during the week of March 4 were similar to the conditions as of March 11. And, even if the vote was mailed at the earliest possible date, this would have occurred after the project had already been scheduled for shut down.

[50] In the unusual circumstances in this case, the Board must be careful to facilitate and promote conditions that disclose the true representativeness of the bargaining agent. The Board must pay particular attention to whether there is evidence demonstrating that the employees had a continuing interest in the bargaining unit at the time of the vote. Here, there was a complete overhaul of the workforce, outside of the Employer's control, in an exceedingly short timeframe. The relevant workforce is transient and dynamic. In this environment, a strict application of the eligibility criteria is necessary to ensure representativeness. While the caution expressed in *Northern Industrial* is important, for the foregoing reasons the Board finds that the Employer's delay in providing the employee list is not adequate justification for overturning the well-established criteria for determining voter eligibility.

[51] This conclusion is not intended to suggest that the Union was required to bring an unfair labour practice application in this case. Employers are not permitted to ignore the directions of the Board or the Regulations. But the Board has to assess each case on its facts and determine the appropriate consequences for such breach, if any. The representational question should, as stated in *Con-Force*, be "left in the hands of the people who have a legitimate interest in the issue".[4] The existing criteria safeguard this principle. In this case, there is insufficient indicia of direct *or* intentional Employer influence over the conditions of the vote to rationalize re-conceptualizing the Union's relative lack of representativeness in relation to the proposed bargaining unit.

[52] Given the foregoing observations and conclusions, the Board finds that the Employer has established that the voters on the employee list were ineligible to vote in the representational question.

[53] The Board hereby orders:

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[4]At 3-4.

a. That the voters as disclosed on the employee list were ineligible to vote in the representational question;
b. That the Employer's Objection to Conduct of Vote is sustained and the representational vote, dated March 14, 2019, shall not be tabulated; and
c. The Certification Application is dismissed.

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

DATED at Regina, Saskatchewan, this **28th** day of **February, 2020.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson