SCH MAINTENANCE SERVICES LTD., Applicant v TEAMSTERS LOCAL UNION NO. 395, Respondent

LRB File No. 069-20; 038-20; November 6, 2020
Vice-Chairperson, Barbara Mysko; Board Members: Jim Holmes and Mike Wainwright

Counsel for the Applicant, SCH Maintenance Services Ltd.: Jeff N. Grubb, Q.C. and Amy Groothuis

Counsel for the Respondent, Teamsters Local Union No. 395: Heather L. Robertson

Certification Application – Representation Vote – Objection to Conduct of Vote or Counting of Ballots – Spoiled Ballot – Exercise of Board Agent's Discretion – Extraneous Markings on Ballot – Subsection 23(8) of *The Saskatchewan Employment (Labour Relations Board) Regulations* – Board Upholds Board Agent's Decision.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: These are the Board's Reasons for Decision about an Objection to Conduct of Vote, filed by the Employer, SCH Maintenance Services Ltd., with respect to the counting of the ballots in a representation vote. The Union, Teamsters Local Union No. 395, filed a Certification Application on March 2, 2020. The vote was conducted by mail from March 13, 2020 to April 3, 2020. The counting of the ballots occurred in the presence of scrutineers on behalf of each of the Union and the Employer via Webex on April 17, 2020. During the tabulation, the Board Agent declared that one of the ballots was spoiled. The Board Agent's rejection of that ballot is the subject of the Employer's Objection and the focus of these proceedings.

[2] In *SCH Maintenance Services Ltd. v Teamsters Local Union No. 395*, 2020 CanLII 65801 (SK LRB) [*SCH Maintenance No. 1*], the Board issued reasons in relation to a preliminary matter pertaining to the Board's authority to provide a copy of the ballot or a second opportunity to view the ballot. There, the Board decided to review the ballot and provide a brief description to the parties, and then invite the parties' submissions, first, with respect to whether the Board should determine the matter on the basis of written argument, and then, with respect to whether the Board Agent exercised his discretion reasonably.

[3] Following S*CH Maintenance No. 1*, the Board provided the parties with a description of the contested ballot:

> *There is white-out covering one of the boxes, with a small pen mark extending outside the box at its top right-hand corner, not covered by the white-out.*
>
> *There is an "X" in pen in the other box. That X is repeated multiple times, superimposed on itself.*
>
> *There is a hand printed word "YES" or "NO" in pen, to the right of the box containing the visible "X". That word is consistent with the typed word "YES" or "NO" to the left of that same box that is part of the format of the ballot.*

[4] The Union sought an oral hearing for the purpose of presenting argument with respect to the Employer's Objection. The oral hearing was held via Webex on October 28, 2020. Prior to that hearing, both parties submitted extensive briefs and related authorities, all of which the Board has reviewed and has found helpful.

[5] In short, the issue is whether the Board should override the exercise of the Board Agent's discretion in rejecting that ballot, and thereby decide that it is appropriate to count the contested ballot in the tabulation of the representation vote. For the following reasons, the Board has decided that the Board Agent's decision should stand and the contested ballot should not be counted.

Arguments:

[6] The following is a summary of the parties' arguments.

[7] The Employer argues that subsection 23(8) of the Regulations contains competing directions requiring both that the Board Agent reject a ballot containing identifying marks and accept a ballot that clearly indicates a voter's choice. In assessing the exercise of the Board Agent's discretion, the Board should ask whether the Board Agent's discretion was exercised "fairly and reasonably and consistent with the statutory provisions and the object and intentions sought to be achieved by them": *ATCO Structures & Logistics Ltd v Unite Here, Local 47*, 2015 SKQB 275 (CanLII) at paragraph 31 [*ATCO Structures QB*].

[8] The Board's starting point is to tabulate all ballots unless there is good and specific reason not to tabulate. In this case, there is no good and specific reason. Not every extraneous marking should be taken as an identifying mark. Clause 23(8)(b) makes this clear. Here, the ballot contains

no identifying marks. There is no name, signature, or initials. The voter did not fail to use the appropriate envelopes when packaging the ballot.

[9] The Employer urges the Board to refrain from considering every conceivable hypothetical scenario as a means of disregarding the voter's choice. The notion that the employee may have used an identifying code is unrealistic. One could just as easily construct a variety of hypotheticals in any mail-in ballot situation without the need for any extraneous markings. Just because a ballot is free of extraneous markings and appears facially normal does not eliminate the potential for mischief.

[10] The Board should consider the context. In the Employer's view, the voter obviously made a mistake or changed his or her mind, and then used white-out and additional marks to emphasize his or her preference. In this case, the Board provided no directions to voters to use pencils instead of pens, or instructions to voters about remedying mistakes or changing votes.

[11] Furthermore, the clarity of the voter's choice is not in issue in these proceedings. The Board Agent rejected the ballot because he interpreted the extraneous markings as identifying, and for no other reason. *SCH Maintenance No. 1* confirms that this is the case. Neither party has suggested that the voter failed to mark the ballot in a manner that clearly indicates his or her choice. Therefore, this issue is not properly before the Board.

[12] Even if it were, the Board Agent found that the voter clearly marked his or her choice on the ballot. In his Report, the Board Agent raised a number of issues (excluded employees, missing ballots, and identifying marks), but conspicuously did not raise clarity of choice. This makes sense because the ballot is not ambiguous. The Board should defer to the Board Agent's discretion in finding that the voter marked the ballot in a manner that clearly indicates his or her choice.

[13] The Union takes the position that the vote was properly conducted by video conference, that the scrutineers in attendance had ample opportunity to object or question the visibility of the ballots during the call, and that the Board Registrar made the appropriate decision in rejecting the ballot. The Board's case law suggests that it should apply a deferential approach to reviewing the Board Agent's exercise of discretion. As long as that discretion is exercised reasonably and in a manner consistent with the applicable statutory objectives, the Board should refrain from interfering in the Board Agent's decision.

[14] The Board should discourage a pedantic review of the minutiae of the Board Agent's actions and encourage the expedient resolution of certification applications. If the Board were to override the Board Agent's discretion in this case, it would create a real risk of opening the floodgates to greater delay in certification applications. Here, the delay has only benefited the Employer given that, to this day, no certification order has been issued.

[15] This dispute revolves around a highly unusual and ambiguous ballot. The fact that the parties could come up with so many arguments about only one ballot underscores its ambiguity. The Board should refuse to count a ballot that potentially reveals the voter's identity or raises questions about the voter's choice. Just because the Board Agent could have made a different decision does not render his decision unreasonable. The actions of the voter caused the ballot to be spoiled, not the actions of the Board Agent.

Applicable Statutory Provisions:

[16] The applicable provisions of *The Saskatchewan Employment Act* [Act] are:

> ***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. […]*
> *…*
>
> ***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.

[17] The applicable section of *The Saskatchewan Employment (Labour Relations Board) Regulations* [Regulations] reads as follows:

23*(1) In this section, "agent" means a person appointed pursuant to subsection (3).*

(2) On the filing of an application respecting a matter for which the board is authorized or required to conduct a vote pursuant to the Act or these regulations, the board may:

(a) if the board considers it to be appropriate, direct that a vote of employees be conducted by secret ballot before the application is heard by the board; and

(b) provide any directions respecting the conduct of the vote that the board considers appropriate.

(3) The board may appoint as its agent the registrar or any other person who the board is satisfied is independent from the parties to the application to conduct a vote required or authorized by the Act.

(4) If the registrar is appointed by the board as its agent:

(a) the registrar may delegate to one or more other persons the exercise of any of his or her powers, or the fulfilling of any of his or her duties, as agent pursuant to this section and impose any terms and conditions on the delegation that the registrar considers appropriate; and

(b) the exercise of any powers or the fulfilling of any duties by a delegate mentioned in clause (a) is deemed to the exercise of those powers or the fulfilling of those duties by the registrar.

(5) An agent shall:

(a) act as the returning officer for the vote;

(b) comply with any directions given by the board respecting the vote;

(c) establish a list of employees who are eligible to vote;

(d) determine the form of the ballot to be used in the vote;

(e) determine whether the vote is to be conducted:

(i) at one or more polling places; or

(ii) using a mail-in balloting procedure;

(f) if the vote is to be conducted at one or more polling places, determine the place or places where the vote is to be conducted, together with the dates and hours for conducting the vote;

(g) if the vote is to be conducted using a mail-in balloting procedure, determine the date by which completed ballots must be returned to the returning officer;

(h) prepare a notice of vote in accordance with Form 20 (notice of vote) and issue directions to the employer respecting posting the notice of vote;

(i) appoint any persons whom the agent considers necessary as deputy returning officers and poll clerks; and

(j) if the vote is to be conducted at one or more polling places, invite the employer, any other person and the union named in the application to appoint one scrutineer for each polling place establish pursuant to clause (f) and allow those scrutineers to be present at the polling place during the hours the vote is conducted;

(k) if the vote is to be conducted using a mail-in balloting procedure, determine the place for counting of the ballots and invite the employer, any other person and the union named in the application to appoint one scrutineer to be present while the ballots are counted.

(6) An agent may issue any directions or instructions that the agent considers necessary respecting the conduct of the vote.

(7) No person shall:

(a) fail to comply with any directions or instructions given by an agent respecting the conduct of the vote; or

(b) if the vote is to be conducted at one or more polling places:

(i) interfere, or attempt to interfere, with a person who is voting;

(ii) attempt to obtain information at a polling place as to how a person has voted or is about to vote;

(iii) canvass or solicit votes within 20 metres of a polling place while the vote is being conducted; or

(iv) display, distribute or post a campaign sign, button or other similar material within 20 metres of a polling place while the vote is being conducted.

(8) In counting ballots, the agent:

(a) shall reject every ballot on which anything is written or marked that identifies the person voting or on which no vote is marked; and

> *(b) shall accept a ballot if the employee has marked the ballot in a manner that clearly indicates the choice of the employee and notwithstanding that the employee may have marked his or her vote out of, or partly out of, its proper space or with a mark other than an "X".*
>
> *(9) On completion of the vote, the agent shall:*
>
> *(a) if there is no direction of the board to the contrary and if there is no impediment to doing so, promptly count the ballots and complete Form 21 (Report of Agent of the Board Respecting the Conduct of Vote and Counting of Ballots); or*
>
> *(b) if the agent does not count the ballots promptly after the vote, complete Form 22 (Report of Agent of the Board Respecting the Conduct of Vote).*
>
> *(10) Immediately after completing Form 21 or 22 as required by subsection (9), the agent shall file a copy of the completed Form with the registrar and the registrar shall give a copy of the completed Form to an employer, to a union directly affected by the vote and, if the applicant who filed the application is not an employer or union, to the applicant.*
>
> *(11) An employer, other person or union directly affected by the vote that intends to object to the conduct of the vote or the results from the counting of the ballots shall file an application in Form 23 (Objection to Conduct of the Vote) within three business days after the conduct of the vote or the counting of the ballots, as the case may be.*

Analysis:

[18] There is no issue of timeliness in relation to this Objection. The Employer filed its Objection in accordance with the timeline set out in the Regulations, within three business days after the counting of the ballots.

[19] The central issue is whether the Board should override the Board Agent's exercise of discretion and therefore order that the spoiled ballot be counted.

[20] The Board starts with the premise that 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, pursuant to subsection 6-4(1) of the Act. To facilitate the exercise of the employees' choice, the legislature has mandated that representation votes be conducted by secret ballot. The secret ballot vote serves as a layer of protection from the type of inappropriate conduct that may interfere with the employees' exercise of their rights. To further facilitate the objectives of the Act, the Board has developed policies that are intended to promote fairness to the parties in the conduct of the secret ballot vote and expediency in the processing of certification applications.

[21] The Board's practice is to pay deference to the Board Agent's decision in adopting and carrying out a methodology for conducting the vote and counting the ballots. If the voting process

was fair and permitted all eligible employees a reasonable opportunity to vote the Board will be reluctant to interfere with the Board Agent's exercise of discretion.

[22] The case law provides ample support for adopting a deferential approach to reviewing the Board Agent's decisions and actions. As the Board notes in *ATCO Structures & Logistics Ltd. v UNITE HERE, Local 47*, [2014] CanLII 76053 (SK LRB):

> *[41] A Board Agent must make a judgment call as to how the vote may best be conducted. Absent any proof or suggestion that that judgment was improperly exercised, we would be loath to interfere in the methodology adopted by the agent for the conduct of a vote. No matter what methodology is adopted by the agent, there remains the simple fact that individuals cannot be compelled to complete their ballot and vote.*

[23] In *International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of United States, its Territories and Canada, Local 300 v Inland Audio Visual Limited*, 2014 CanLII 5454 (SK LRB) [*IATSE*], the Board explained the policy reasons for the deferential approach:

> *[20] This Board's decision in the Handy Special Event case is indicative of the discretion granted to our agents in the conduct of representational votes. This discretion arises out of the authority granted pursuant to s. 26(h) of the Regulations. In our opinion, the discretion granted to our agents in the conduct of representational votes promotes efficiency in our proceedings and thus labour relations in the province generally. There can be little doubt that our proceedings would be significantly delayed if the Board attempted to define the parameters for each representational vote. Doing so would defeat the purpose of having pre-hearing votes in the first place by exposing employees to the inevitable pressures and not-insignificant risk of coercion and/or improper influences while waiting for a panel of the Board to determine the appropriate parameters for the vote. In our opinion, timely pre-hearing representational votes are an important policy of the Board and our agents require some degree of discretion to enable these votes to be conducted within the time frame desired by this Board.*
>
> *[21] For the same reason that our agents require discretion in establishing the parameters for representational votes depending on the circumstances of each particular workplace, the decisions they make deserve an element of deference. Our proceedings would become highly pedantic and pressure would mount for our agents to testify if this Board was to adopt an approach of routinely reviewing the minutia of each and every decision made by our agents in the conduct of representational votes. In our opinion, neither of these results are desirable. As we have noted, our agents are called upon to make difficult decisions and they often must do so within short time constraints. While this does not mean that errors will not occur, in our opinion, the lens through which the conduct of a representational vote must be viewed are whether or not the actions of our agents were reasonable in light of circumstances of the particular workplace and the Board's expectation of expediency in the conduct of those votes.*

[24] In *CWS Logistics Limited v United Food and Commercial Workers, Local 1400*, 2018 CanLII 68439 (SK LRB) [*CWS Logistics*], the Board cited *IATSE*, *supra*, and *ATCO Structures QB* in considering when it is appropriate to override the exercise of the Board Agent's discretion

in the counting of the ballots. In *ATCO Structures QB*, Zarzeczny J. confirmed the Board's deferential approach:

> *[31] In its Decision, the Board recognized that so long as its Agent identified a vote process that was fair and permitted all eligible employees reasonable opportunity to vote it should not interfere with the exercise of the Agent's discretion. I have come to a similar conclusion upon this judicial review application. It is not for the court, any more than it is for the Board, to second-guess the discretion exercised by the Board's statutorily appointed Agent in the exercise of those discretions which the Act and the Regulations grant to the Agent. So long as that discretion is exercised fairly and reasonably and consistent with the statutory provisions and the object and intentions sought to be achieved by them, as the Board, in its Decision, found to be the case, the court should not and will not interfere.*

[25] In this case, the Employer emphasizes the statistical significance of the ballot in question, relying on *United Food and Commercial Workers, Local 1400 v ATCO Structures and Logistics Ltd*., 2015 CanLII 80541 (SK LRB), in which the Board found that the Agent had committed two errors in the representation vote, the cumulative effect of which was statistically significant, and upheld the Objection. While the statistical significance may reinforce the critical nature of the Employer's Objection, it does not modify the well-established approach of extending deference when reviewing the exercise of the Board Agent's discretion.

[26] Having regard for the foregoing principles and case law, the Board will now review the Board Agent's exercise of discretion to determine if it was exercised fairly and reasonably and consistent with the statutory provisions and the object and intentions sought to be achieved by them. In considering this question, the Board will review the text, context, and purpose of the statutory provisions in issue.

[27] First, the Board will deal with the issue raised by clause 23(8)(a) of the Regulations, which is that the Board Agent shall reject every ballot on which anything is written or marked that identifies the person voting or on which no vote is marked. Clause 23(8)(a) must be interpreted in a manner consistent with clause 23(8)(b), which requires that the Board Agent accept a ballot marked in a manner that clearly indicates the choice of the employee and notwithstanding that the employee may have marked his or her vote out of, or partly out of, its proper space or with a mark other than an "X".

[28] The Union relies on *Community Natural Foods and Unifor Local 4050 re*, 2015 CarswellAlta 2098 (Alta LRB) [*Community Natural Foods*], which considered the following Alberta rule:

> *2.1 Every eligible person shall be entitled to vote by marking a ballot as directed by the Board. Ballots containing any other markings shall be considered spoiled.*

[29] The Alberta Board explained the policy rationale underlying the rule:

> *7 As noted in Solv-Ex Corp., Re, [1997] Alta. L.R.B.R. LD-013 (Alta. L.R.B.) at page 2, designated marks:*
>
> > *... assist in ensuring the secrecy of the ballots. As each party is entitled to have a scrutineer present at the vote and the ballot count, other marks may enable employees to communicate how they voted to either of the scrutineers. Although there is no suggestion that this practice occurred in this case, the policy is one which the Board feels strongly should be protected. The voter did not comply with the voting instructions. The manner of marking this ballot meant this voter may be able to be identified. We therefore declared the ballot spoiled.*
>
> *8 Secret ballots votes in the labour relations context are particularly important. In I.U.O.E., Local 955 v. Midwest Pipeline Contractors Ltd., [1989] Alta. L.R.B.R. 111 (Alta. L.R.B.) at page 114, the Board made the following observations:*
>
> > *Counsel for the Union argues that the secret ballot is for the elector, who is free to waive that anonymity if he or she wishes. However, the secret ballot is not just for the benefit of the elector. It has other equally important purposes. Firstly it prevents corrupt practices such as the rewarding of those who are observed by scrutineers through the use of identifying marks to have voted in a specific way. Secret ballots also protect the other voters in the group from having their vote ascertained by a process of elimination.*
> >
> > *Considerations such as these that underlie the rule against identifying marks on ballots in the elections acts. These factors are equally or more important in Board-conducted representation votes, where the feelings often run high and where the number of eligible electors is often quite small.*
>
> *9 When deciding disputes about ballots, the Board uses common electoral practices and accepted standards in Canadian elections, "tempered, when appropriate, by any special labour relations context": Airtex Manufacturing Partnership v. U.F.C.W., Local 421-P, [1990] Alta. L.R.B.R. 607 (Alta. L.R.B.), at 616, upheld [1991] Alta. L.R.B.R. 374 (Alta. C.A.). In Airtex, this Board provided this example as being a sensible approach to deciding a disputed ballot:*
>
> > *National Starch and Chemical Co. (Canada) Ltd. [1968] O.L.R.B. Rep. June 286.*
> >
> > *6. ... On representation votes conducted by this Board, ballots should be counted where the choice of the voter is clearly indicated in the face of the ballot and the identity of the voter is not disclosed. Where these two tests are satisfied, even though the ballot has not been marked with an "X", there is no reason to discard the ballot as a spoiled ballot.*

[30] The rule in *Community Natural Foods* states that ballots containing any markings other than those directed by the Board shall be considered spoiled. By comparison, subsection 23(8) of this Board's Regulations states that the Agent "shall reject every ballot on which anything is written or marked that identifies the person voting" and "shall accept a ballot if the employee has

marked the ballot in a manner that clearly indicates the choice of the employee and notwithstanding that the employee may have marked his or her vote out of, or partly out of, its proper space or with a mark other than an 'X'".

[31] The Employer makes the following argument:

> *…Based on the Board Agent's conclusion, any marks outside the applicable boxes would be "identifying". Subsection 23(8)(b) of the Regulation[s], however, specifically contemplates that a ballot that otherwise indicates a clear choice is to be accepted and counted "notwithstanding that the employee may have marked his or her vote out of, or partly out of, its proper space or with a mark other than an "X". In other words the Regulation recognizes that not every marking on a ballot that is outside the applicable boxes is "identifying" so as to spoil the ballot.*

[32] The Employer says that the disputed ballot is not comparable to the ballots rejected on the basis of identification in other cases. There are no names, signatures, initials, or any other writing that objectively identifies the voter, or any issue with the manner in which the ballot was placed in the envelope.

[33] The Board accepts that the extraneous markings do not contain the usual indicia of direct identification, such as names, signatures, or initials. However, even initials may necessitate a degree of interpretation. Such was the case in *Teamsters Local 419 v International Cold Storage Inc*., 2006 CarswellOnt 4900 [*Teamsters Local 419*]. There, the disputed ballot contained what appeared to be initials corresponding with the name of an individual on the voter's list. The provision in issue, clause 8(6) of the Ontario *Labour Relations Act*, *1995*, was less restrictive than the Alberta rule:

> *The representation vote shall be by ballots cast in such a manner that individuals expressing their choice cannot be identified with the choice made.*

[34] In *Teamsters Local 419*, the majority of the Ontario Board explained that the Ontario Board had adopted the *National Starch* test, which derived from *Drury v International Chemical Workers Union, Local 424 and National Starch and Chemical Co.*, [1968] OLRB Rep 285 (Ont LRB) [*National Starch*]:

> *16 We accept and adopt the test in the National Starch decision. It has been followed in a number of cases. Some of those cases have further refined the National Starch test. For example, in A.C.T.E., Local 1704, C.L.C. v. National Communications & Data Co., [1974] O.L.R.B. Rep. 567 (Ont. L.R.B.), the Board observed at paragraph 5 that "[t]he first test is whether or not the ballot as marked by the voter discloses the identity of the voter" (emphasis added). In Prescott-Russell Services to Children & Adults v. O.P.S.E.U., Local 426, [2001] O.L.R.D. No. 3607 (Ont. L.R.B.). the Board scrutinized the disputed ballot to ascertain if it could "indicate or suggest the identity of the voter" (paragraph 3, emphasis*

> *added). And in U.F.C.W. v. Satisfied Brake Products Inc., [2003] O.L.R.B. Rep. 909 (Ont. L.R.B.), where one of the disputed ballots was marked with what appeared to be an illegible signature or series of initials, the Board made it clear that, if a ballot can even potentially disclose the identity of the voter to the parties, though the Board itself might not be able to make any sense of the markings, the ballot is spoiled.*

[35] Despite the correspondence between the initials and the name appearing on the voters' list, the majority acknowledged that the markings may or may not have been the voter's initials but explained why the ballot was nevertheless spoiled:

> *18 We do not agree that the employer's primary and first alternative positions comply with the National Starch test. In order for the ballot in this case to be counted, it must not on its face disclose, or potentially disclose, to the parties the identity of the voter. The markings on this ballot could be (and in our view probably are) initials, and even if we are wrong in that assessment, whatever the markings represent, there is a real risk they disclose the identity of the voter. Moreover, if the extraneous markings on the ballot were intentionally placed there, as say, some form of protest — something we cannot know for certain — then it is conceivable that the ballot's stated preference was not in fact the voter's preference at all. Or suppose the voter marked his preference and initialled the ballot to curry favour with one of the parties? The Board in such a circumstance could not know with certainty whether the marked preference on the ballot was a true reflection of the voter's wishes. The point is, there could be any number of reasons why the voter in this case marked the ballot in the manner that he did. It is not for the Board to speculate as to the voter's real intentions. By placing what appear to be initials on the face of the ballot, the voter has, by his own hand, inadvertently or intentionally, inserted a degree of ambiguity as to what his intentions and his preferences were. We are unable to resolve the ambiguity.*

[36] The ballot was "spoiled because of the potentially revelatory nature of the extraneous markings themselves, and because of the doubt they cast on the voter's preference one way or another".[1]

[37] The dissenting member agreed with the application of the two-fold test in *National Starch* but suggested that secrecy is not absolute. That member would have "given effect to the wishes of the employee by advising the parties of the result of the vote, without showing them the ballot with the extraneous markings".[2]

[38] The Employer relies on the facts as found in *National Starch*. There, two ballots were marked with the word "No" instead of an "X". The Board found that the ballots were not spoiled: "Since there is no other writing on the ballot, we are content that the printed word "No" in no way indicates the identity of the voter in this case".[3] The Board explained its reasoning at paragraphs 5 and 6:

---

[1] At para 19.
[2] At para 32 (In the decision, paragraph 32 is listed as paragraph 5.).
[3] At para 5.

> *5 Having considered the representations of the parties with respect to the objections of the respondent, the Board finds that the ballots described above clearly indicate the wishes of the employees who marked them. While it is preferable that the employees indicate their choice of the specimen answer which appears on the face of the ballot by marking an "X" opposite their choice, such choice may also be clearly indicated by repeating the specimen answer as was done by the two employees in this case. Since there is no other writing on the ballot, we are content that the printed word "No" in no way indicates the identity of the voter in this case.*
>
> *6 While there are a multitude of cases concerning elections under the Election Act, it should be pointed out that this Board is not bound by the provisions of that Act and such cases are not necessarily helpful to the determination of this matter. On representation votes conducted by this Board, ballots should be counted where the choice of the voter is clearly indicated on the face of the ballot and the identity of the voter is not disclosed. Where these two tests are satisfied, even though the ballot has not been marked with an "X", there is no reason to discard the ballot as a spoiled ballot.*

[39] The Employer says a similar result was reached in *Blue Horizon Contracting and CWSU, Local 1611*, 2013 CarswellBC 1487 (B.C. LRB), 2013 CarswellBC 1451 (leave to reconsider denied) [*Blue Horizon*]. There, the disputed ballot contained an appropriate mark in the "No" box, but also contained the word "F**k" over that same box. The Returning Officer indicated an intention to count the ballot; and the Board dismissed the application to challenge the counting of the ballot. The Board characterized the issue as "whether the ballot was cast in such a manner that the person expressing a choice can be identified with the choice expressed".[4] The Board found that the disputed word was not an identifying word and that the writing on the ballot did not enable the voter to be identified. The Board chose to disregard the fact that the employee identified himself after the fact.

[40] The Employer also relies on *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v Fruehauf Trailer Co. of Canada*, 1974 CarswellOnt 659 (Ont LRB) [*Fruehauf*]. Of the three ballots in dispute in that case, two contained a check mark rather than an "X" opposite the form word "YES". In one of the ballots, the word "yes" was written opposite the form word "YES". The Ontario Board relied on *National Starch* and found that each of the three ballots clearly indicated a preference. The issue of identification was not considered and the ballots were counted.

[41] The Employer distinguishes from *Golderado Civil Ltd. and CLAC, Local 151*, 2015 CarswellSask 502 [*Golderado*] and *CWS Logistics Limited*. In the former case, the voters had written their names on the ballots, and the Board upheld the decision to reject the ballots for containing identifying information. In the latter case, the disputed ballots were advanced to the

[4] At para 57.

Board in a manner contrary to the ballot packaging instructions, and the Board refused to second-guess or override the decision of the Agent.

[42] Subsection 23(8) requires that the Board Agent both maintain the secrecy of the vote and respect the wishes of the employees. The markings in this case, as a whole, are not directly comparable to the simple markings considered in *National Starch* or *Fruehauf*. Nor is the Board required to follow the decision of the B.C. Board in *Blue Horizon*. Furthermore, the circumstances in that case were unique. The Board upheld the decision under review in a "bottom line" decision and provided reasons for doing so upon request, explaining that the issue was likely moot due to the filing of a new certification application.

[43] In this case, the Board Agent made a decision about whether the extraneous markings constituted identifying marks. The ballot was highly unusual, unique, and idiosyncratic. The representation vote was to be conducted in an expedient manner, and the Board Agent was required to make a difficult decision under short time constraints. The proposed bargaining unit, and the pool of eligible voters, is relatively small, and the potential for identification relatively high. There was a real risk of permitting or encouraging the rewarding of those who have identified themselves through voting. It was therefore reasonable for the Board Agent to conclude that the cumulative markings were identifying in this case. The fact that anyone "could, in the fullness of time, suggest an alternative process that the Board Agent could have followed to ensure the confidentiality of the [ballot] in question does not make his decision unreasonable".[5]

[44] Lastly, the Employer argues that there is no suggestion of mischief or disclosure of the voter's identity. In the Board's view, the latter suggestion is of no consequence. The Board's policies are intended to prevent such disclosure from occurring in the first place. Whether there was a suggestion of mischief or an actual disclosure is not the question before the Board.

[45] Next, the Board will consider the remaining issues raised directly by clause 23(8)(b) of the Regulations, being that the Board Agent shall accept a ballot if the employee has marked the ballot in a manner that clearly indicates the choice of the employee. The Board Agent shall accept such ballot notwithstanding that the employee may have marked his or her vote out of, or partly out of, its proper space or with a mark other than an 'X'. The Employer insists that the voter has marked the ballot in a manner that clearly indicates his or her choice. Although the Employer says

[5] See, *CWS Logistics* at para 25.

that neither party put in issue the question of clarity of choice, the Union has put this question squarely in issue, both in its brief and in its oral submissions.

[46] It is not correct to say that the related Board decision supports the Employer's argument. *SCH Maintenance No. 1* dealt with a narrow question, which was the Board's authority if any to provide a copy of the ballot or provide a second opportunity to view the ballot. In relation to that question, the Employer argued that there was no way to ascertain whether the voter indicated a clear choice other than by viewing the disputed ballot.[6] The Board found that it was "abundantly clear that it would be inappropriate to provide a copy of the ballot to the parties" due to the stated identifying writing, but decided to provide a description instead.[7] The Board stated, echoing the Employer's argument, that it was "possible that what would remain after reviewing the ballot was "a legal argument, that is, whether the Board Agent can spoil a ballot on which a voter has indicated a choice".[8]

[47] Therefore, after the Employer had argued that there was no way to ascertain whether the voter indicated a clear choice other than by viewing the disputed ballot, the Board provided the parties with a description of the ballot to review. Clarity of choice remained an open question then, as it does now.

[48] The Board Agent was required to consider whether the employee marked the ballot in a manner that clearly indicates the choice of the employee notwithstanding that the employee may have marked his or her vote out of, or partly out of, its proper space or with a mark other than an "X". Here, although the Board Agent did not explicitly state that the ballot was not marked in a manner that clearly indicated the choice of the employee, he did state, descriptively, that it "contained identifying writing and selective white-out".

[49] The Employer argues that the voter made his or her choice clear on the face of the ballot, similar to *National Starch* and *Fruehauf*. These cases are consistent with the statutory requirement not to reject a ballot because the vote was marked out of, or partly out of, its proper space or with a mark other than an "X". That requirement is an important consideration in this case.

---

[6] At para 9.
[7] At para 14.
[8] At para 36.

[50] The Union relies on *Maidstone Manufacturing Inc. v CAW-Canada*, 1995 CarswellOnt 1512, [1995] OJ No 839 (Ont Div Ct), in which the Board had excluded a ballot that contained an "X" in the "NO" circle and a line in the "YES" circle. The Ontario Court of Justice reviewed and upheld the decision on a standard of patent unreasonableness, stating:

> *…In this respect the observations of the Alberta Court of Appeal in the Airtex Manufacturing Partnerships case are relevant and appropriate:*
>
> > *Lastly, it is at least possible that the Board has, or is thought by the Legislature to have, practical expertise about any situational reasons why ballots in shop floor votes may be deliberately spoiled, and this might be a good aid to interpretations. We think in conclusion, that a private gloss defends this decision.*

[51] The Union also relies on *Mohan v OPSEU*, 1982 CarswellOnt 1084, [1982] OLRB Rep 921, in which the Board explained the reasons behind the ballot format and instructions:

> *3 The reasons for this format and instruction are obvious. The Board must determine the freely expressed wishes of the employees and there should be no encroachment upon the secrecy of the balloting. Anything other than a simple answer to the question posed, carries with it the potential for revealing employee wishes which the whole process is designed to keep secret. The Board cannot embark upon an inquiry into "what the employee really meant" without undermining the very secrecy which the voting process purports to guarantee. (See Form 69).*

[52] In this case, the Board is not satisfied that the ballot clearly indicates the choice of the employee. The white-out raises questions about the intentions of the voter. The Employer suggests that the white-out was used to clarify the voter's choice. The Board cannot be certain. According to the voting instruction on the face of the ballot, the voter is instructed to place an "X" in one square only. This instruction is clear and simple. The Employer says that the voter followed this instruction and corrected the ballot. However, given this instruction, it is also reasonably conceivable that there was tampering of the ballot.

[53] In coming to this conclusion, the Board has carefully considered the second part to clause (b) which requires the Board Agent to accept a ballot clearly indicating the choice notwithstanding that the employee marked his or her vote out of, or partly out of, its proper space or with a mark other than an "X". This is not a case, such as *National Starch* or *Fruehauf*, where the employee has simply marked his or her vote in the manner described in clause (b). The white-out and the mark extending beyond the white-out, in particular, are marks not contemplated by that description.

[54] While the Employer urges the Board not to entertain every conceivable hypothetical scenario, it also argues that the Board should adopt what it views as the most conceivable hypothetical scenario (that the employee changed his or her mind or made a mistake) and allow that scenario to inform the Board's conclusions. However, it is not for the Board to determine the most conceivable scenario and substitute what it might have decided for what the Board Agent decided within the normal constraints of a tabulation, as long as the Board Agent's decision is reasonable, including that it is consistent with the governing statute.

[55] The Employer says that the Board can never be certain whether a voter took full possession of the ballot and therefore can never be certain that the vote is the employee's own. Yet the Board assumes that it is. The Board should make the same assumption in this case. The difference, in the Board's view, is that the ballot on its face raises questions about the voter's own voting process and therefore, the voter's preference. Due to this, the Board may conclude that the voter's choice was clear only by engaging in a degree of speculation that in normal circumstances is unnecessary and by disregarding any alternative scenarios that arise through a review of the ballot.

[56] As in *CWS Logistics*, the voting process was "fair and permitted all eligible employees reasonable opportunity to vote".[9] Frankly, it is unclear whether the voter followed the instruction provided on the ballot. It is not for the Board to speculate. It was the action of the voter that caused the spoiling of the ballots, not the actions of the Agent.

[57] Counsel for the Union suggested that the Board should draw an adverse inference for the Employer's failure to call evidence in relation to its Objection. Given the Board's findings, it is unnecessary to do so. However, the Employer raised questions of a primarily legal nature, based on the information gleaned from the ballot and the Board Agent Report. Parties should not be dissuaded from narrowing the issues to those that are of central importance. Therefore, the Board would not have drawn an adverse inference in this case.

Conclusion:

[58] In conclusion, the Board has found that the Board Agent exercised his discretion fairly and reasonably and consistent with the statutory provisions and the object and intentions sought to be achieved by them.

---

[9] At para 25.

[59] The parties have advised that they have reached agreement with respect to the remaining issues raised in the Employer's Reply to the Certification Application. Based on the foregoing, the Board hereby dismisses the Objection to Conduct of Vote and grants the Certification Application. An appropriate order will accompany these Reasons.

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

DATED at Regina, Saskatchewan, this **6th** day of **November, 2020.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson