



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

LRB File No. 069-20; August 31, 2020

Vice-Chairperson, Barbara Mysko; Board Members: Mike Wainwright and Jim Holmes

Counsel for the Applicant,

SCH Maintenance Services Ltd.:

Jeff N. Grubb, Q.C. and Amy
Groothius

Counsel for the Respondent,

Teamsters Local Union No. 395:

Heather L. Robertson

**CERTIFICATION – Practice and Procedure – Objection to Conduct of Vote –
Board orders pre-hearing vote and appoints agent to conduct vote –
Tabulation by Video Conference – Spoiled Ballot – Identifying Information –
Authority of Board to Provide Opportunity to Review Ballot.**

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: On March 2, 2020, the Teamsters Local Union No. 395 [Union] filed a certification application for a bargaining unit of employees of SCH Maintenance Services Ltd. [Employer].¹ On March 17, 2020, the Employer filed its Reply to the certification application agreeing to the geographic scope of the bargaining unit but disputing the list of excluded positions.

[2] The representation vote was conducted by mail-in ballot between March 13 and April 3, 2020. On April 17, 2020, the Registrar conducted a tabulation via Webex pursuant to the Board's Covid-19 process. One scrutineer representing each of the Union and the Employer was present at the tabulation.

[3] In the Board Agent Report, dated April 17, 2020, the Board Agent outlined the results of the vote as follows:

<i>No. of Eligible Voters</i>	23
<i>No. of Votes for the Union</i>	8
<i>No. of Votes against the Union</i>	7

¹ LRB File No. 038-20.

No. of Spoiled Ballots	1
No. of Ballots Cast	16
No. of Employees not Voting	7

[4] Under the heading “Additional comments”, the Board Agent indicated the following:

...One ballot was marked spoiled as it contained identifying writing and selective white-out...

[5] The scrutineer for the Union signed the Board Agent Report. The scrutineer for the Employer was provided an opportunity but did not sign. On April 22, 2020, the Employer filed an Objection to Conduct of the Vote indicating:

1. *By tabulating the votes during a video conference rather than in-person, the Employer’s scrutineer was not able to fully see the ballot ruled “spoiled” by the Board Agent and the Board agent did not indicate whether the ballot ruled “spoiled” included a proper marking of either “yes” or “no” such that it is unknown whether the ballot had been marked in a manner that clearly indicates the choice of the employee or that the intention of the vote could be discerned.*
2. *The Employer requests that the Board Agent or the Labour Relations Board provide a copy of the ballot ruled “spoiled” by the Board Agent to the Employer with a copy to the Union, to determine whether the employee has marked the ballot in a manner that clearly indicates the choice of the employee.*
3. *If the ballot ruled “spoiled” clearly indicates the choice of the employee voting, then the Board Agent improperly and unreasonably made that ruling during the vote tabulation and that unreasonable decision must be overturned and the ballot counted or in the alternative a new representation vote ordered.*
4. *The outcome of the disputed ballot and whether it is properly spoiled is of statistical significance to the outcome of the representation vote.*
5. *Such further and other representations as may be permitted by the Labour Relations Board during a hearing into the application.*

[6] On May 5, 2020, the Union filed a Reply to the Objection to Conduct of the Vote. In its Reply, the Union states:

3. *The following statements are specifically denied:*

(a) The Employer has stated their scrutineer was not able to fully see the ballot ruled “spoiled” by the Board Agent. The Union disputes this:

The Employer and Union had ample opportunity to object or question the visibility of the ballots during the video call.

(b) The employer has suggested that the Board Agent or Labour Relations Board provide a copy of the ballot ruled “spoiled”. The Union disputes this and takes the position of it not being necessary. A reasonable ruling has already been made by the Board Agent.

[7] On the July Motions' Day, the Employer's Objection came up for scheduling. The Employer repeated its request for a copy of the ballot, as set out in point no. 2 of its Objection, on the grounds that viewing a copy of the ballot could dispose of the entirety of the Objection. Further to this request, I requested written submissions from the parties on the Board's authority, if any, to provide a copy of the ballot or provide a second opportunity to view the ballot. Both parties have provided helpful submissions, which the Board has reviewed and considered in their entirety.

Argument on Behalf of the Parties:

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

[9] The Employer argues that providing a copy or an opportunity to view the ballot could dispose of the entirety of the Objection, therefore promoting and facilitating the efficient resolution of the dispute. It may be that the Board Agent decided to spoil the ballot notwithstanding whether the employer had indicated a clear choice on the ballot. There is no way to ascertain whether the voter indicated a clear choice other than by viewing the disputed ballot. The Board is authorized to conduct an investigation, which may include reviewing the disputed ballot and then providing it to the parties. The Board has a broad discretionary authority, and providing a copy of the disputed ballot provides no additional information other than what in the normal course is viewed by a scrutineer during a tabulation.

[10] The Union acknowledges that the Board has a discretionary authority to provide a copy or an opportunity to view the ballot, but says that the Board should not exercise this authority due to the potential for compromising the integrity of the secret ballot. Both of the parties had scrutineers present at the tabulation and those scrutineers had sufficient opportunity to make inquiries about the Board Agent's spoiling of the ballot at that time. The Board Agent has determined that the identifying writing necessitated the spoiling of the ballot. With the passage of time, a review of this ballot is more likely to undermine the secrecy of the vote.

Applicable Statutory Provisions:

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

6-22(1) All votes required pursuant to this Part or directed to be taken by the board must be by secret ballot.

(2) A vote by secret ballot is not required among employees in a bargaining unit consisting of two employees or fewer.

(3) *An employee who has voted at a vote taken pursuant to this Part is not competent or compellable to give evidence before the board or in any court proceedings as to how the vote was cast.*

(4) *The results of the vote mentioned in subsection (1), including the number of ballots cast and the votes for, against or spoiled, must be made available to the employees who were entitled to vote.*

[...]

6-103(1) *Subject to subsection 6-97(3), the board may exercise those powers that are conferred and shall perform those duties that are imposed on it by this Act or that are incidental to the attainment of the purposes of this Act.*

(2) *Without limiting the generality of subsection (1), the board may do all or any of the following:*

(a) *conduct any investigation, inquiry or hearing that the board considers appropriate;*

(b) *make orders requiring compliance with:*

(i) *this Part;*

(ii) *any regulations made pursuant to this Part; or*

(iii) *any board decision respecting any matter before the board;*

(c) *make any orders that are ancillary to the relief requested if the board considers that the orders are necessary or appropriate to attain the purposes of this Act;*

(d) *make an interim order or decision pending the making of a final order or decision.*

[...]

6-104(2) *In addition to any other powers given to the board pursuant to this Part, the board may make orders:*

(g) *amending a board order if:*

(i) *the employer and the union agree to the amendment; or*

(ii) *in the opinion of the board, the amendment is necessary;*

[...]

6-111(1) *With respect to any matter before it, the board has the power:*

(e) *to receive and accept any evidence and information on oath, affirmation, affidavit or otherwise that the board considers appropriate, whether admissible in a court of law or not;*

[...]

6-112(3) *At any time and on any terms that the board considers just, the board may amend any defect or error in any proceedings, and all necessary amendments must be made for the purpose of determining the real question or issue raised by or depending on the proceedings.*

[12] The following provisions of *The Saskatchewan Employment (Labour Relations Board) Regulations* [*Regulations*] are applicable:

23(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".*

Analysis:

[13] This matter comes to the Board as a preliminary question. The Board is not being asked to consider whether to count the disputed ballot. The Board is not currently being asked to make a determination about the Board Agent's exercise of his discretion.

[14] The Board has now had an opportunity to review the Report of the Board Agent in this matter. The Report makes clear that the Board Agent determined that one ballot was spoiled because it contained identifying writing. That being the case, it is abundantly clear that it would be inappropriate to provide a copy of the ballot to the parties. Maintaining the secrecy of the ballot is of central importance to the representational voting process. There is simply no avenue for the Board to grant the Employer's request without potentially compromising the integrity of the secret ballot process.

[15] The question of whether the Board can provide the parties with another opportunity to view the ballot raises some different considerations. In a tabulation, the Board Agent fulfills the important objective of safeguarding fair process to the extent permitted by the scrutineers' participation while maintaining the necessary confidentiality. The Board Agent provides the scrutineers with opportunities to view ballots to the extent appropriate to fulfill their role as scrutineers and at the same time, to protect the integrity of the secret ballot.

[16] Where the Board Agent finds that there is identifying writing on a ballot, he or she has to make a determination about the appropriate manner of presenting the ballot such that he or she is providing the necessary information to the parties while safeguarding the secrecy of the vote.

The Board Agent must exercise a degree of discretion in an attempt to achieve both an appropriately fair process and a sufficiently secret ballot.

[17] The Board has previously outlined the circumstances in which it would be appropriate to override the Board Agent's discretion. Recently in *CWS Logistics Limited v UFCW, Local 1400*, 2018 CanLII 68439, the Board cited with approval *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) at paragraph 21:

...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.

[18] In short, the Board overrides the Board Agent's discretion only in cases where it finds that the Board Agent acted unreasonably.

[19] The vote in this certification application took place by mandatory secret ballot in accordance with subsection 6-22(1) of the Act. The secrecy of the vote is underscored by the prohibition, pursuant to subsection 6-22(3), on an employee's competency or compellability to give evidence as to how the vote was cast, and by subsection 23(8) of the Regulations, which states:

23(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;

[20] The Board agrees with the Union's observation as follows:

Section 23(8) of the Regulations above is consistent with the integrity of the secret ballot vote to maintain anonymity for employees who choose to exercise their right to vote. One of the purposes of a secret ballot vote is for the protection of employees who are particularly vulnerable during unionization drives and during the Application for Certification. This goal is particularly relevant in the case of certification votes which contain a relatively small number of voters. ...

[21] While subsection 6-22(4) makes clear that the results of the vote must be made available to the employees who were entitled to vote, this does not permit the Board to reveal or facilitate the disclosure of a voter's identity.

[22] However, the Employer relies on clause 23(8)(b) of the Regulations which states:

23(8) *In counting ballots, the agent:*

[...]

(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".

[23] The Employer suggests that this clause overrides the prohibition on counting ballots on which anything is written or marked that identifies the person voting. The Board is not at this stage being asked to comment on this interpretation of the Regulations.

[24] Helpfully, the Alberta Labour Relations Board in *Community Natural Foods and Unifor Local 4050*, 2015 CarswellAlta 2098, outlined its rationale in relation to ballots containing extraneous markings:

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.

[25] In *Teamsters Local 419 v International Cold Storage Inc.*, 2006 CarswellOnt 4900 [*Teamsters Local 419*], the Ontario Labour Relations Board considered a disputed ballot that was found spoiled because, in the opinion of the Returning Officer, it disclosed the identity of the voter. In that case, the Board reviewed the disputed ballot prior to the commencement of the hearing and advised the parties that it clearly disclosed the wishes of the voter but that it also contained what appeared to be initials. The Board set out the following test:

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.²

[26] The Board confirmed that, even where a ballot may potentially disclose the identity of the voter, it should not be counted. The Board relied on a line of case law that confirms this approach:

15 The parties agreed that the test to be applied in situations such as this was articulated in the seminal case of Drury v. International Chemical Workers Union, Local 424, [1968] O.L.R.B. Rep. 285 (Ont. L.R.B.). In that application for terminating bargaining rights, two ballots were not marked with an "X" as they should have been, but rather with the word "No" in the box beside the "No" option on the ballots. The Board determined that the ballots were not spoiled because they clearly disclosed the wishes of the two voters, and, since there were no other markings on the ballot, the Board was "satisfied the printed word 'No' in no way indicates the identity of the voter in this case" (paragraph 5). The Board went on to articulate the test for a spoiled ballot:

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. (paragraph 6)

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.

[...]

19 The ballot, therefore, is 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 the other. The Board's firmly established case law clearly holds that spoiled ballots are not to be counted. To discount the disputed ballot in this case is hardly a triumph of form over substance, or the sequacious application of the Board's jurisprudence.

[27] As the Union concedes, in some cases it is appropriate for the Board to allow the parties to view a ballot where the ballot is in dispute. For example, in *Interior Drywall Design Inc., v*

² At para 6.

Carpenters District Council of Ontario, (UBCJA), 2016 CarswellOnt 12777 [Interior Drywall], the disputed ballot did not contain any extraneous writing or identifying markings. There, the Board reproduced the ballot in its written decision.

[28] Even so, the Board had received correspondence from the voter, after the fact, who in that correspondence indicated a preference for a particular union. The Board decided to disregard that correspondence, citing similar concerns with the potential for breaching the prohibition on disclosing the identity of the voter.

[29] In this case, the Employer relies on sections 6-104(2)(g), 6-111, and 6-112 to ground its suggestion that the Board can and should provide a copy or an opportunity to review the ballot at this stage. No relevant board order has been made, and therefore clause 6-104(2)(g) is inapplicable. Clause 6-111(1)(e) relates to the Board's power to receive and accept evidence and information, not the Board's authority to provide a copy or opportunity to review a ballot. Lastly, clause 6-112(3) speaks to amending defects or errors in proceedings. Even if applicable to the current circumstances, the power to do so does not predetermine whether the Board considers the fact of doing so "just".

[30] The Board agrees with the Union that, under the current circumstances, it would be highly unusual and entirely inappropriate to allow the parties to view the ballot a second time. Doing so could compromise the integrity of the secret ballot vote and undermine Board policies and procedures that have long been in place for the purpose of upholding that integrity.

[31] As mentioned, the Board has not made a determination about the reasonableness of the Board Agent's decision to spoil the ballot. Expediency in certification application is of utmost importance. The Board agrees with the Employer in one respect - this matter could be more easily disposed of, and the Objection determined, not by allowing the parties to view the ballot but by the Board exercising its custodial role over the representational vote by viewing the ballot and determining whether the Board Agent reasonably exercised his discretion in deciding that the ballot was spoiled. In this way, the Board could meet both parties halfway, and resolve the matter in a more expeditious manner.

[32] The Union cites cases in which the Board (albeit not the Saskatchewan Board) proceeded in a similar fashion. In *Teamsters, Local 419*, the Ontario Board described its approach:

4 Prior to the commencement of the hearing in this matter, we reviewed the disputed ballot. When we convened the hearing, we advised the parties that the ballot clearly disclosed the wish of the voter. That is, the voter marked an "X" in one of the Yes or No

circles. We did not disclose which circle was marked. We also advised the parties that the ballot contained what appeared to be initials, which appeared to correspond to the name of an individual on the voters' list.

[33] The Ontario Board took the following approach in *Interior Drywall*:

3 In the course of counting an issue arose as to whether a ballot was, in fact, a "spoiled ballot". The parties agreed that written submissions would be filed concerning this issue. The Board has now received and reviewed the written submissions filed by the parties and this decision is the Board's determination as to whether the ballot in dispute is a "spoiled ballot".

[34] The Board acknowledges that if it reviews the ballot for the purpose of determining whether the Board Agent properly exercised his discretion to spoil the ballot, as with *Teamsters, Local 419*, the Board could then be in possession of detailed information not directly in front of the parties. The alternative, of course, is to provide the parties with no additional information.

[35] The Board is left with the choice of, in every case in which identifying writing is noted on a ballot, accepting the Board Agent's exercise of his discretion without any review of the ballot; or reviewing the ballot and if necessary, providing a description to the parties, as was done in *Teamsters, Local 419*. In the first case the Board risks relinquishing its supervisory and custodial role over the vote. In the second case, the Board risks opening the Board Agent up for review in instances in which identifying writing is said to have been observed. In the Board's view, the second scenario strikes the appropriate balance of respecting the Board Agent's role generally, while ensuring procedural fairness to the parties and promoting an expedient resolution of this dispute.

[36] On this basis, the Board will review the ballot and provide a brief description to the parties. It is possible that what will remain is a legal argument, that is, whether the Board Agent can spoil a ballot on which a voter has indicated a choice. If the Board observes no identifying information, then the calculus might change. The Board will then invite the parties' submissions, first, with respect to whether the Board should determine the matter on the basis of written argument, and then if so, with respect to whether the Board Agent exercised his discretion reasonably.

[37] The dates scheduled for the hearing of the Objection to Conduct of the Vote will continue to be held for the parties.

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

DATED at Regina, Saskatchewan, this **31st** day of **August, 2020**.

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson