Saskatchewan
Labour Relations Board

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 179, Applicant v RELIANCE GREGG'S HOME SERVICES, Respondent

LRB File No. 260-19; November 16, 2020
Vice-Chairperson, Gerald Tegart; Board Members: Bert Ottenson and Don Ewart

Counsel for the Applicant: Greg D. Fingas

Counsel for the Respondent: Eileen V. LIbby, Q.C

Application for certification within 12 months after the dismissal of a similar application – Board not exercising its authority under s. 6-111(1)(m) and (n) of *The Saskatchewan Employment Act* to refuse to entertain the application or bar a similar application.

Application for certification – eligibility of an employee to vote – employee temporarily assigned to a different work unit when application made – employee eligible to vote.

REASONS FOR DECISION

Introduction:

[1] Gerald Tegart, Vice-Chairperson: This is an application by the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 179 ("the union") for an order determining that a unit of employees employed by Reliance Gregg's Home Services ("Reliance Gregg's" or "the employer") is an appropriate unit of employees for the purpose of bargaining collectively, determining that the union represents a majority of the employees in the unit and requiring the employer to bargain collectively with the union. The application is dated and was filed on November 21, 2019, two days after this Board issued its decision in LRB Files Nos. 001-19 and 011-19. That Board decision was the culmination of a series of applications and decisions related to three certification applications by the union covering the same unit of employees and filed November 16, 2017. The Board ultimately dismissed those certification applications.

[2] The employer opposes the current application for certification and asks the Board to exercise its authority under s. 6-111(1)(m) and (n) of *The Saskatchewan Employment Act* ("the Act") to refuse

to entertain the application, since it was made less than 12 months since the three earlier applications were dismissed by the Board on November 19, 2019.

[3] The union asks that the certification application be dealt with on its merits and that, in tabulating the vote taken subsequent to the filing of the application, the vote of one identified employee be excluded. The employer opposes the exclusion of that employee.

[4] The hearing of this matter proceeded by Webex on August 12, 13 and 14 and September 22 and 23, 2020.

Evidence and Findings of Fact:

[5] Six witnesses gave oral evidence. The union called Brett Gregg, Andy McGhee and Cody Summers.

[6] Mr. Gregg is employed by Reliance Gregg's as a service technician in the unit of employees that is the subject of the certification application. He began work with the predecessor company to Reliance Gregg's more than 13 years ago and continued to work as an employee of Reliance Gregg's when that company was acquired by Reliance Comfort Limited Partnership ("Reliance Comfort") and became its Saskatoon division. He provided evidence respecting the employer's operations and his role in the 2017 applications for certification and the current application.

[7] Mr. McGhee is also employed as a service technician in the unit of employees relevant to the application and has worked there since 2014. He also gave evidence with respect to the employer's operations and the activities related to the certification applications.

[8] Mr. Summers has been the union's business development representative for Saskatchewan for about 5 years. He was actively involved in the 2017 certification applications and again in the current application.

[9] The employer called Kathy Ziglo, Adam Kieffer and Rahim Shamji.

[10] Ms Ziglo is presently the manager of new homes construction at Reliance Gregg's. She has worked in several management positions over the course of the past few years. She provided testimony respecting the history and structure of Reliance Gregg's and the nature of the company's work. She testified as to the impact the 2017 certification applications and the current application have had on the employer's ability to manage its operations and to make organizational and management changes, based on its understanding of the restrictions it operated within when

applications were outstanding. She also gave evidence concerning employee Colton Bergen and the facts giving rise to the union's assertion that his vote should be excluded in the tabulation of the votes.

[11] Mr. Kieffer has been the Reliance Gregg's service manager since 2014, having transferred from the Toronto division of Reliance Comfort at that time. He testified mainly regarding Colton Bergen's status as a worker around the time of the vote.

[12] Mr. Shamji is the manager of labour relations for Reliance Comfort. He has extensive experience in labour relations with Reliance Comfort and at least one previous employer. He is based at the Reliance Comfort head office in Ontario, but has general responsibility for labour relations matters in all of its divisions, including at Reliance Gregg's. He was involved in the Reliance Gregg's response to and management of the 2017 certification applications as well as the present application. He gave evidence concerning the company's management of its role during the applications and the impact the applications have had on the company.

History

[13] Reliance Comfort began as a water heater company in Ontario, but has expanded its services and locations to include divisions in Ontario, Manitoba, Saskatchewan, Alberta and British Columbia. It now provides residential heating, air conditioning, water heater, plumbing, and electrical services. There are two divisions in Saskatchewan – one based in Regina and the second, Reliance Gregg's, based in Saskatoon. Reliance Gregg's provides its services to customers within Saskatoon and the surrounding area.

[14] While part of Reliance Comfort, each division, including Reliance Gregg's, operates as a distinct business to a large degree, although many corporate services are provided by Reliance Comfort.

[15] Reliance Gregg's was previously a privately owned company operating in Saskatoon. It was acquired by Reliance Comfort and became its Saskatoon division in 2016.

[16] On November 16, 2017, the union filed three applications to certify bargaining units of the employer's plumbers, steamfitters, pipe-fitters, welders, gas-fitters, refrigeration mechanics, instrumentation mechanics, and sprinkler-fitters, including all apprentices, journeypersons and foreman in those trades ("the 2017 certification applications").

[17] Significant delays, not attributable to either party, occurred before the Board issued its decision on the applications on December 18, 2018, in *United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 179 v. Reliance Gregg's Home Services*, 2018 CanLII 127680 (SK LRB). The Board determined that two units of employees were appropriate for bargaining. The first would be a journeyman unit comprised of "journeyman plumbers, steamfitters, pipe-welders, gas-fitters, refrigeration mechanics, instrumentation mechanics, sprinkler fitters and foremen connected with these trades employed by Reliance Gregg's Home Services, a division of Reliance Comfort Limited Partnership in the City of Saskatoon, in the Province of Saskatchewan." The second was an apprentice unit comprised of "[a]ll apprentice plumbers, apprentice steamfitters, apprentice pipe-welders, apprentice gas-fitters, apprentice refrigeration mechanics, apprentice instrumentation mechanics, and apprentice sprinkler fitters."

[18] Following the Board's decision, the ballots were counted. The majority of journeymen had voted in favour of certification, while the majority of apprentices had voted against. Consequently, the Board issued a January 8, 2019, order certifying the union as the bargaining agent for a unit of journeymen.

[19] The employer and union commenced collective bargaining in February of 2019 and held multiple meetings, but did not achieve an agreement before the Board rescinded the certification order on November 19, 2019.

[20] Reliance Gregg's applied to the Board for reconsideration of its certification decision respecting the journeyman unit, on the basis that the Board had erred by treating journeymen as supervisory employees based on their job title, instead of their duties. The Board's November 19, 2019, decision in *Reliance Gregg's Home Services, A Division of Reliance Comfort Limited Partnership v United Association of Journeyman and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada*, 2019 CanLII 120618 (SK LRB) found the two bargaining units determined by the Board in its original decision should be combined into one unit including both. When the votes that had been tabulated with respect to each of the two original units were combined and applied to the newly determined combined unit, the vote for certification failed. Based on this, the Board rescinded the January 8, 2019, certification order respecting the journeyman bargaining unit.

[21] Two days later, on November 21, 2019, the union filed the current application for certification related to the combined unit determined by the Board in its then recent decision.

[22] The Board issued a Direction for Vote, requiring a vote based on all eligible employees within the bargaining unit as of November 22, 2019. The Notice of Vote listed 22 eligible voters, including Colton Bergen, and imposed December 16 as the date by which all votes must arrive in the Board office.

[23] The current application for certification was originally scheduled to be heard by the Board in March of this year. An application to intervene was filed by a third party in late February and the hearing was consequently adjourned pending determination of the application to intervene. As noted earlier, we heard this matter August 12, 13 and 14 and September 22 and 23, 2020.

Impact on the employer

[24] Once Reliance Comfort had acquired Reliance Gregg's in 2016 it began to integrate it into the overall Reliance Comfort organization, although, as noted above, each division operates independently to a significant degree. These efforts were hampered to some degree by the limitations the employer believed it was bound by because of the 2017 certification applications as well as the period in 2019 when collective bargaining was taking place. Consequently, from the filing of those applications on November 16, 2017, until now, the evidence advanced by the employer indicates the employer believed it could not make many of the management and operational changes it would otherwise have introduced.

[25] The only time during this period when the company was not affected to some degree by the 2017 certification applications, the collective bargaining process or the current application, was the two-day period from November 19 to 21, 2019, between the time the Board issue its reconsideration decision and the filing of the current application. During that brief period the employer began steps to consult with employees with a view to implementing operational changes.

[26] Again as noted above, the lengthy period from the filing of the 2017 certification applications to their final determination on November 19, 2019, was due in significant part to matters beyond the control of the parties, as well as the Board's reconsideration of its original decision on the applications.

[27] The changes the employer was considering, and was, according to its understanding of the restrictions that applied, unable to make, included wage increases, scheduling, shift structures, sales commissions, and payment of overtime. Some of these changes would have worked to the benefit of the employees in the affected work unit, while others are not seen as desirable by some

employees. Mr. McGhee testified that the rush to file the current application was due in part to concerns that the employer would move to implement some of these changes, and the employees wanted their voices to be heard.

Eligibility of Colton Bergen

[28] Both parties presented evidence concerning employee Colton Bergen and his status as an employee on November 21 and 22, 2019. Mr. Bergen is a journeyman HVAC technician who was hired at Reliance Gregg's in October of 2018. He left his employment there in July of 2020. During most of October and November of 2019 he was working in the Vancouver division of Reliance Comfort. According to Reliance Gregg's business records, he was working in Vancouver on the day the current application was filed. He returned to Saskatoon on November 24 and recommenced working out of the Reliance Gregg's operations in Saskatoon on November 25.

[29] Reliance Comfort's divisions commonly share employees for temporary assignments based primarily on the volume of work in each division at any given time. As well as his assignment in Vancouver, Mr. Bergen has also worked temporarily in Winnipeg and Windsor.

[30] Among the exhibits introduced on behalf of the employer is an email from Patrick Laplante, the Vancouver operations manager, to the workforce planning unit on November 15, asking to have Mr. Bergen's schedule extended to stay in Vancouver for "another week". Mr. Kieffer, to whom Mr. Bergen reported in Saskatoon, testified that Vancouver had requested assistance during this period due to cold weather there, and that Reliance Gregg's was experiencing a slower period. He also testified that the decision to have Mr. Bergen return to Saskatoon on November 24 was not based on the current certification application, but because Vancouver didn't ask to have him remain there.

[31] Mr. Kieffer acknowledged that he had, at some point, asked Mr. Bergen if he might be interested in a permanent move to Vancouver, but that Mr. Bergen wasn't interested.

Relevant legislative provisions

[32] The following provisions of the Act are relevant to the determination of this application:

> *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.*
>
> *…*
>
> *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.

…

(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.

…

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

…

(m) to bar from making a similar application, for any period not exceeding 12 months after the date an unsuccessful application is dismissed:

(i) an unsuccessful applicant;

(ii) any of the employees affected by an unsuccessful application;

(iii) any person or union representing the employees affected by an unsuccessful application; or

(iv) any person or organization representing the employer affected by an unsuccessful application;

(n) to refuse to entertain a similar application, for any period not exceeding 12 months after the date an unsuccessful application is dismissed, that is submitted by anyone mentioned in subclauses (m)(i) to (iv)….

Analysis and reasons

Application of s. 6-111(1)(m) and (n)

[33] The employer asks the Board to exercise its discretionary authority under s. 6-111(1)(n) of the Act to refuse to entertain the union's current application for certification because the Board considered a similar application, i.e. the 2017 certification applications, in the reconsideration decision issued November 19, 2019. The employer also asks the Board to bar a further certification application until November 19, 2020, through the exercise of its authority in clause (m) of that subsection.

[34] The employer argues that such an order would alleviate the prejudice the employer has faced as a result of the 2017 certification applications along with the current application.

[35] The union says there should be a strong presumption that the application will be allowed to proceed and the votes tabulated, and argues there is nothing in the present facts that justifies a departure from that presumption.

[36] It should first be noted that the authority granted by s. 6-111(1)(m) and (n) is additional to that granted to the Board under s. 6-12(3), which is specific to certification votes and is not engaged by the facts underlying this application.

[37] Both parties pointed us to this Board's decision in *United Food and Commercial Workers, Local 1400 v. Affinity Credit Union*, 2009 CanLII 44419 (SK LRB) ("*Affinity 1*"), where the Board considered similar legislative provisions in *The Trade Union Act*, specifically s. 18(m) and (n) of that Act. The Board stated (at para. 32):

> *…Under clauses 18(m) and (n) … the onus would fall upon the party wishing to have the Board invoke its powers under these sections to satisfy the Board that it should invoke those provisions and bar or refuse to entertain the application. The Employer called no evidence and provided no overarching reason why the rights of the employees under s. 3 of the (Trade Union Act) should be overridden. The authority in clauses 18(m) and (n) should be exercised sparingly by the Board and only in the clearest and most compelling cases when they would be used to counter the rights granted to employees under s. 3.*

[38] S. 3 of *The Trade Union Act* included the employee right to organize and bargain collectively now reflected in s. 6-4(1) of the Act.

[39] The Board added (in paras. 33 and 34):

> *Section 3 is a substantive right and one with which the Board will not interfere without clear and compelling reasons or industrial relations prejudice to one of the parties (or potentially others). When the competing interests of the rights of employees to have their application for certification is considered opposite the reasons and rational advanced by the Employer, the rights of the employees must prevail.*
>
> *For those reasons, the Board declines to exercise its authority under either of clause 18(m) or (n) to bar or refuse to hear the current applications.*

[40] In the Board's subsequent decision in *Affinity Credit Union: UFCW Local 1400 v Affinity Credit Union*, 2010 CarswellSask 517 at paras 13-18 (Sask LRB) ("*Affinity 2*"), the employer asked the Board to decline to consider an application six months after a certification application was dismissed because the employees voted against certification. The Board referred to its earlier decision in *Affinity 1*, reinforcing the principles stated there (at paras. 14 to 17):

> *In our earlier decision concerning these parties, we noted that ss. 18(m) and (n), placed the onus upon the party wishing to have the Board invoke its powers under these sections, to satisfy the Board that it should invoke those provisions and bar or refuse to entertain the application. The Employer accepted that onus and called Ms. Lolita Humm as its witness with respect to the matters under consideration here. In that decision, the Board also noted that the authority in ss. 18(m) and (n) should be exercised sparingly by the Board and only in the clearest and most compelling cases when they would be used to counter the rights granted to employees under s. 3.*
>
> *As we noted in that earlier decision, s. 3 is a substantive right and one with which the Board will not interfere without clear and compelling reasons or industrial relations prejudice to one of the parties (or potentially others). When the competing interests of the rights of employees to have their application for certification is considered opposite the reasons and rationale advanced by the Employer, the rights of the employees must prevail.*
>
> *In the circumstances of this case, the Board declined to exercise its authority under ss. 18(n) to refuse to hear the current applications. The Employer failed to satisfy the Board that there was sufficient rationale for the Board to interfere in the right of employees to choose a bargaining representative in accordance with s. 3. While the Board's resources are scarce, and in appropriate circumstances, it may well determine to exercise its discretion under ss. 18(n) to avoid unnecessary or prolix procedures or applications, this is not one of those cases.*
>
> *The Employer argued that another vote at this time would cause disruption in the workplace. That disruption, in and of itself, is not sufficient rationale to refuse to conduct a vote to determine the wishes of the employees. The Employer also urged "judicial economy", that is that the Board should not promote multiple applications or allow unions "multiple kicks at the can". With respect, we cannot agree. While, as noted above, the Board has finite resources, and in appropriate circumstances, it will economize those resources, this application is not such a case.*

[41] Reliance Gregg's has acknowledged that it has not located a case in which this Board exercised its discretion to refuse to consider a certification application pursuant to s. 6-111(1)(n) or its predecessor provision. However, it argues that there does not appear to be a case where evidence of actual prejudice to the employer was presented.

[42] There isn't complete agreement between the parties on the extent to which the employer's desire to make operational changes at Reliance Gregg's was hampered by the ongoing circumstances related to the union's attempts to exercise the employees' rights to organize. The disagreement includes the extent to which the restrictions imposed on the employer were rooted in the Act. However, we accept the employer's evidence that it believed it was operating under restrictions that prevented it from making certain unilateral changes regarding the management and operation of the Saskatoon division, and that the employer considered this to be a significant disadvantage and significantly prejudicial to the employer.

[43] The relatively long delay between the filing of the 2017 certification applications and the final determination in November of 2019 had an impact on the employer, in the sense that the operational changes it sought to make were consequently set back. That delay also had an impact on the employees, as it prolonged the determination of their right to organize. Had the Board reached the decision to dismiss the 2017 certification applications, as it ultimately did in November of 2019, in the ordinary course, without the delays that occurred in both 2018 and 2019, a new certification application in November of 2019 would have been unremarkable and the vote would likely have been taken and tallied several months ago.

[44] The changes the employer wishes to make, and has been unable to, are based on business decisions. The Board has no reason to doubt the importance to the employer of making these changes, and accepts that some of the intended changes could benefit employees, in particular those related to increasing wages and benefits. However, consistent with the reasoning set out by the Board in *Affinity 1* and *Affinity 2*, the Board will require compelling reasons before it will tip the balance in favour of the implementation of the employer's business decisions over the employees' rights to organize. The Board is not satisfied that the restrictions Reliance Gregg's has experienced and may continue to experience due to the exercise of these employee rights would justify the Board's exercise of its discretion under s. 6-111(1)(m) and (n).

[45] It might seem that the Board's reluctance to apply s. 6-111(1)(m) and (n) in the absence of truly compelling reasons may render these provisions potentially meaningless in relation to certification applications. However, in addition to the obvious possibility that compelling reasons may emerge in any given case involving a certification application, we should be mindful that these clauses are relevant to all applications that come before the Board, not just certification applications. And, of course, there is always the additional potential application of s. 6-12(3), mentioned earlier.

Eligibility to vote

[46] The present application was filed on November 21, 2019, and the Direction for Vote stipulated that the vote was to be conducted among all eligible employees who were employed within the unit as applied for as of November 22, 2019.

[47] Colton Bergen was included in the employer's list of eligible employees and in the Direction for Vote. The union gave notice by email dated November 29 that it objected to his inclusion and continues to maintain Mr. Bergen was employed in the Vancouver division on November 21 and 22.

[48] The employer acknowledges Mr. Bergen was working in Vancouver on those dates, but argues that he remained an employee attached to the proposed bargaining unit at Reliance Gregg's throughout the time he worked in Vancouver, including those dates.

[49] In support of its position, the union refers us to the decisions of this Board in *International Association of Heat and Frost Insulators and Allied Workers, Local 119 v Northern Industrial Contracting Inc*, 2014 CanLII 63991 (SK LRB) ("*Northern Industrial*") and *Platinum Track Services Inc. v Construction and General Workers' Union*, 2020 CanLII 19807 (SK LRB) ("*Platinum*").

[50] In *Northern Industrial,* the Board set out the following principles (at para. 20):

> *As was noted by this Board in Calvin Ennis v. Con-Force Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 1985, et.al., [1992] 2nd Quarter Sask. Labour Report 117, LRB File Nos. 185-92 & 188-92, the general standard for determining voter eligibility when a representational vote is ordered is that, subject to exceptional circumstances, a person must be an employee working within the scope of the subject bargaining unit on the date of the application and must remain an employee until the date of the vote. As the Board noted in that case, this rule achieves neither perfect democracy nor perfect predictability. Rather, it represents a compromise intended to give effect to s. 3 of the Act (by ensuring that the representational question is left in the hands of the people who have a legitimate interest in the issue) while, at the same time, it provides a bright line from which the parties can plan their affairs with a reasonable degree of certainty and predictability.*

[51] In *Platinum*, the Board referred extensively to the decision in *Northern Industrial* and provided the following additional guidance (at para. 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 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.*

[52] What does it mean to be an "employee working within the scope of the subject bargaining unit" (in the language of *Northern Industrial*) or to be "employed within the unit" (in the language of the Direction for Vote)?

[53] It has sometimes been said that, to be eligible, the employee must be present in the workplace on the day of the application and the day of the vote, but that there will be exceptions to this standard rule, for example where an employee is absent on maternity leave, sick leave, education leave or for other similar reasons. This strict standard is most commonly applied in the construction industry

because of the transitory relationship between employers and employees in that industry: see *Clean Harbors Industrial Services Canada Inc. and IBEW, Local 2038*, 2014 CarswellSask 801 at paras 81-82 (Sask LRB).

[54] There is no question here that Mr. Bergen was employed by Reliance Comfort in one of its divisions on the relevant dates. But, can it be said he was employed in, or an employee in, the proposed bargaining unit at Reliance Gregg's at that time?

[55] Whether we begin with the strict standard of presence in the workplace and consider exceptions, or consider what it means to be employed in a workplace at a given time applying the same principles underlying those exceptions, we would reach the same conclusion in relation to Mr. Bergen and his employment relationship with the employer, whether that's Reliance Gregg's or Reliance Comfort.

[56] While he was not physically working in the proposed bargaining unit at the time of the current certification application, we accept the employer's position that there was an intention on both the employer's part and Mr. Bergen's that he would return to Saskatoon once he was no longer required in Vancouver under the temporary loan arrangement made between the two divisions, and that he retained his connection to the proposed bargaining unit throughout his absence along with his legitimate interest in the outcome of the certification vote. There is no compelling evidence that Mr. Bergen ever intended to leave his Saskatoon position and relocate to a position in the Vancouver division, nor that the employer intended to transfer him. His work in Vancouver was consistent with a well-established practice among the divisions of Reliance Comfort to lend employees on a temporary basis.

Conclusion:

[57] The Board will not exercise its discretion under s. 6-111(1)(m) and (n) of the Act to refuse to entertain the application or to bar a similar application within the stipulated twelve-month period.

[58] Employee Colton Bergen was an eligible voter when the vote was taken. His vote, if he voted, will be counted.

[59] Therefore, the ballots held in the possession of the Board Registrar pursuant to the Direction for Vote issued on November 28, 2019, in the within proceedings will be unsealed and the ballots

contained therein will be tabulated in accordance with *The Saskatchewan Employment (Labour Relations Board) Regulations*.

[60] The results of the vote will be placed into Form 21, and that form will be advanced to a panel of the Board for its review and consideration.

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

DATED at Regina, Saskatchewan, this 16th day of November, 2020.

LABOUR RELATIONS BOARD

"Gerald Tegart"
Gerald Tegart
Vice-Chairperson