Saskatchewan
Labour Relations Board

THE CORPS OF COMMISSIONAIRES, NORTH SASKATCHEWAN DIVISION, Applicant v UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Respondent

LRB File No. 031-21; August 6, 2021
Vice-Chairperson, Barbara Mysko; Board Members: Aina Kagis and Mike Wainwright

Counsel for the Applicant, The Corps of Commissionaires, North Saskatchewan Division: Gordon D. Hamilton

Counsel for the Respondent, United Food and Commercial Workers, Local 1400: Heath Smith

Reconsideration Application – First Stage – Whether Threshold for Reconsideration has been Met – Threshold for Reconsideration Has Been Met on Basis of *Remai* Criteria # 2 & 4.

Original Application to Cancel Certification Order – Section 6-16 of *The Saskatchewan Employment Act* – Statutory Time Period for Abandonment – Original Application Dismissed – Employer applies for Reconsideration of Dismissal.

Hearing was Held in First Instance – Crucial Evidence was not Adduced for Good and Sufficient Reasons – Issue of Consistency with Past Decisions and ensuring Board Properly Applied Enabling Statute – Board not Persuaded that the Decision was Precedential.

REASONS FOR DECISION

[1] Barbara Mysko, Vice-Chairperson: The Employer, the Corps of Commissionaires, North Saskatchewan Division, has filed an application for reconsideration of the Board's decision in LRB File No. 253-19, dated February, 2021: *United Food and Commercial Workers Union, Local 1400 v Corps of Commissionaires*, 2021 CanLII 15152 (SK LRB). The Corps is a non-profit organization that was founded to provide employment opportunities to veterans of the military and police forces and that provides a variety of services, the most prevalent of which is its security services.

[2] The Union is certified, pursuant to the certification order dated March 26, 2002, as the exclusive bargaining agent on behalf of the employees of the Corps providing services with respect to the City of Saskatoon asset management division whose principal place of work is City Hall, Frances Morrison Library, J.S. Wood Branch Library and Avenue P Greenhouses, in Saskatoon. The certification order was issued pursuant to the decision in *United Food and Commercial Workers, Local 1400 v Corps of Commissionaires*, [2002] Sask LRBR 188, LRB File

No. 276-00. In that decision, the Board found that there was a deemed successorship pursuant to section 37.1 of *The Trade Union Act* from Inner-Tec Security Consultants Limited to the Corps. As a result of that decision, the Corps was bound by the applicable certification order dated April 24, 1991 and by the collective agreement between Inner-Tec Security Consultants Limited and the Union.

[3] In the original application, the Corps alleged, in response to an unfair labour practice application filed by the Union, that the Union had abandoned its bargaining rights, and sought that the certification order be cancelled. Section 6-16 sets out a threshold of three years during which the union has been inactive in promoting and enforcing its bargaining rights, at which point an application for cancellation may be made. In the original decision, the Board found that there were no employees in the bargaining unit for a specified period of time, and therefore the required timeline to establish abandonment pursuant to section of 6-16 of *The Saskatchewan Employment Act* [Act] had not been satisfied. During the hearing of the matter, no collective agreement was put in evidence, and the parties, in their written arguments, relied on the time periods during which the Corps was actually providing services at the sites.

[4] The Corps seeks reconsideration of the finding that the Union had not abandoned the bargaining unit and the decision, further to its alternative argument, that holding a representation vote is not appropriate under the circumstances. The Corps seeks reconsideration of these findings on three bases. First, there are new and additional facts that have become known to the Corps, were in the possession of the Union, and not disclosed during the course of the hearing. Second, the Board's conclusions with respect to abandonment are incorrect in law and fact, and inconsistent with past jurisprudence of this Board. Third, the decision is precedential and amounts to a significant policy adjudication with respect to abandonment and successorship.

[5] The Board set this matter down for consideration of the first stage of the reconsideration test, to be followed if necessary, with a hearing with respect to the second stage. For the following reasons, the Board has decided that the threshold for reconsideration has been met and that it is appropriate to proceed to hear the second stage of this reconsideration application.

[6] The Board has authority to reconsider its prior decisions pursuant to section 6-115 of the Act:

> ***6-115****(1) Every board order or decision made pursuant to this Part is final and there is no appeal from that board order or decision.*
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> *(2) The board may determine any question of fact necessary to its jurisdiction.*

> *(3) Notwithstanding subsections (1) and (2), the board may:*
> *(a) reconsider any matter that it has dealt with; and*
> *(b) rescind or amend any decision or order it has made.*
>
> *(4) The board's decisions and findings on all questions of fact and law are not open to question or review in any court, and any proceeding before the board must not be restrained by injunction, prohibition, mandamus, quo warranto, certiorari or other process or proceeding in any court or be removable by application for judicial review or otherwise into any court on any grounds.*

[7] The authority to reconsider a Board decision is applied sparingly. The opportunity to reconsider a decision is not to be treated like a hearing *de novo* or an appeal. It is not an opportunity for counsel to correct mistakes that were made in the original hearing.

[8] The Board's approach to reconsideration applications is well established. The first stage requires the Board to decide whether any of the threshold grounds have been satisfied so as to justify reconsideration of the decision. The principles underlying the use of the Board's discretion to reconsider were articulated by the Board in *Remai Investment Corp. v Saskatchewan Joint Board, RWDSU*, [1993] Sask Lab Rep 103 (SK LRB) [*Remai*], as follows:

> *Though the Board has the power under Section 5(i) to reopen decisions it has arrived at, this power must be exercised sparingly, in our view, and in a way which will not undermine the coherence and stability of the relationships which the Board seeks to foster.*
> *. . .*
>
> *In the three jurisdictions we have alluded to above - Canada, British Columbia and Ontario - the recognition of the need to balance the claim for reconsideration against the value of finality and stability in decision-making is reflected in the procedures adopted by labour relations tribunals. In all of them, the procedure followed in connection with an application for reconsideration departs from the procedure employed for other kinds of applications. In all three cases, the applicant is required to establish grounds for reconsideration before a decision is made whether a rehearing or some other disposition of the matter is appropriate.*
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> *We have concluded that such a two-step approach is appropriate in cases of this kind. We do not agree with counsel for the Employer that we were mistaken in requiring that an applicant who seeks reconsideration of a decision of the Board must persuade us that there are solid grounds for embarking upon that course.*
> *. . .*
> *In other jurisdictions, particularly in British Columbia, there has been extensive discussion of the criteria which labour relations boards might use to determine whether an applicant has been able to establish that there are grounds which justify the reopening of a decision. In their decision in the case of Overwaitea Foods v. United Food and Commercial Workers, No. C86/90, the British Columbia Industrial Relations Council set out the following criteria:*
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> > *In [Western Cash Register v. International Brotherhood of Electrical Workers, [1978] 2 CLRBR 532], the Board articulated four criteria in which it would give favourable consideration to an application for reconsideration. Subsequent decisions (Construction Labour Relations Association of British Columbia, BCLRB*

> *No. 315/84, and Commonwealth Construction Co. Ltd., BCLRB No. 61/79, [1979] 3 Can LRBR 153), added a fifth and sixth ground:*
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> > *1. If there was no hearing in the first instance and a party subsequently finds that the decision turns on a finding of fact which is in controversy and on which the party wishes to adduce evidence; or,*
> >
> > *2. if a hearing was held, but certain crucial evidence was not adduced for good and sufficient reasons; or,*
> >
> > *3. if the order made by the Board in the first instance has operated in an unanticipated way, that is, has had an unintended effect on its particular application; or,*
> >
> > *4. if the original decision turned on a conclusion of law or general policy under the Code which law or policy was not properly interpreted by the original panel; or,*
> >
> > *5. if the original decision is tainted by a breach of natural justice; or,*
> >
> > *6. if the original decision is precedential and amounts to a significant policy adjudication which the Council may wish to refine, expand upon, or otherwise change.*

[9] The six criteria from *Western Cash Register*, *supra*, have been adopted by the Board as the threshold grounds for determining whether to reconsider a Board decision. In the current application, the Corps relies on the second, fourth, and sixth of these grounds.

[10] The first ground relied upon by the Corps, which is the second *Remai* criterion, is that certain crucial evidence was not adduced at the original hearing for good and sufficient reason. The Board described the requirements of the second ground in *Remai* at 7:

> *The requirements expressed in these cases seem to us to represent sensible standards by which to decide whether a decision will be reconsidered on the basis of new evidence. The evidence must not only be crucial, but there must be some convincing and reasonable explanation for not putting the evidence forth at the original hearing. In this sense, the standard framed as one of showing "good and sufficient reason" in the British Columbia cases seems to us to be preferred to the "due diligence" criterion set out in the Detroit River Construction case. Though "due diligence" may be one requirement, it seems to us conceivable that there might be other reasonable explanations for a failure to put evidence before the Board.*

[11] With respect to this ground, the question before the Board is whether the evidence is crucial and whether there is a convincing and reasonable explanation for not presenting the evidence at the original hearing, or in other words, whether there is a good and sufficient reason.

[12] Among this evidence is the Union's collective agreement with another security company, SSG, bearing an expiry date of October 31, 2013. This collective agreement describes the nature

of the bargaining unit at Article 1.01: “This Agreement shall cover all employees of SSG Security working in the Municipal sites in Saskatoon.” The Union provided this agreement to the Corps, attached to a letter dated March 9, 2021, which states:

> *I have attached a copy of the last collective agreement with SSG. Safe Security Group, the previous Unionized employer certified at the locations you are now providing services to, was operating under the previous collective agreement which had been in place at the time of the Order of the Labour Relations Board dated November 7th, 2002. The collective agreement in place in 2002 has been subsequently renewed by the Unionized Companies who have provided services under this certification since 2002. As you know, SSG lost the sites and did not conclude the renewal of the collective agreement. Notwithstanding, the Collective Agreement continues to apply, and transfers to the Commissionaires, North Saskatchewan Division, hence the obligation to provide the maintenance of membership as I had requested.*

[13] The Corps states that the letter, and the accompanying collective agreement, disclose crucial facts that warrant the reconsideration of the decision. In the decision, the Board found that there were no employees in the bargaining unit from 2003 until July 10, 2016, after the Corps had resumed providing security services at the sites in question. The Union, however, did not disclose this collective agreement, which, within the context of the applicable successorship provisions, suggests that there were employees within the bargaining unit. At the hearing, the Union took the position that there were no employees in the bargaining unit. The finding that there were no employees in the bargaining unit was crucial to the outcome on the application to cancel the certification order. The Corps’ additional information showing that there was an active bargaining unit in 2012 and 2013 undermines the Board’s reasoning, which was based on fallacious evidence.

[14] The Corps states further that the expiry of the collective agreement in 2013 suggests that the Union has been inactive in promoting its collective bargaining rights for at least six years. If the Corps had been in possession of this information, it would have been able to establish that the Union had abandoned its rights in accordance with the timeline set out in section 6-16 of the Act.

[15] The original decision was issued on February 26, 2021. In the decision, the Board observed that no collective agreement had been put in evidence. The Union sent this letter to the Corps two weeks after the decision was issued. Obviously, that collective agreement was in the Union’s possession but it was not produced at the hearing of the original matter. While collective agreements are to be filed with the minister, there is no rational or principled justification for the failure to produce this collective agreement at the original hearing.

[16] At the reconsideration hearing, the Union's explanation was not only unsatisfactory; it was puzzling and disconcerting. The letter attaching the collective agreement states, "[t]he collective agreement in place in 2002 has been subsequently renewed by the Unionized Companies who have provided services under this certification since 2002." It goes on to say that the collective agreement continues to apply and transfers to the Corps. In response to questions from the panel, counsel for the Union stated that the letter contained a "misstatement" and that the collective agreement was not binding on other parties but was binding on the Corps. He then contradicted this earlier statement by suggesting that the agreement was simply a "tool for the process of collective bargaining".

[17] The question with respect to this ground is whether the evidence is crucial and whether there is a good and sufficient reason for not presenting the evidence at the original hearing. The Board agrees that the collective agreement, together with the letter, is crucial, and that there is good and sufficient reason for the Corps not to have put this evidence before the Board, as required at this stage. The meaning of the letter is clear. It describes the collective agreement as binding, not as a sample or a tool.

[18] In drawing this conclusion, the Board does not mean to suggest that the collective agreement is necessarily determinative. The reconsideration application takes place in two stages, and therefore, the Board should be careful not to prejudge the issue and suggest that the existence of any evidence will prove the case for one party or another. A finding that evidence is crucial is a finding that applies to the first stage of the reconsideration within the context of the information that has been presented to the Board at that stage.

[19] For the foregoing reasons, the first ground supports reconsideration of the underlying decision.

[20] The Corps also relies on the fourth and sixth grounds. The fourth ground allows for reconsideration if the decision turned on a conclusion of law or general policy under the Code which law or policy was not properly interpreted by the original panel. The sixth ground allows for reconsideration if the original decision is precedential and amounts to a significant policy adjudication which the Board may wish to refine, expand upon, or otherwise change. The Board in *Kennedy v Canadian Union of Public Employees, Local 3967*, 2015 CanLII 60883 (SK LRB) provided a helpful explanation of both of these grounds:

> *[20] The fourth permissible ground for an application for reconsideration permits the Board to re-examine a prior decision in circumstances where the original decision turned on a*

> *conclusion of law or general policy which was not properly interpreted by the Board in the first instance. […] While it understandable why some applicants may see this ground as a general right of appeal on questions of law, a closer examination reveals that the scope of this particular ground is quite narrow. As Chairperson Bilson noted in the Remai Investment Corporation decision, this ground arose out of larger jurisdictions, where it is common for multiple panels to hear similar kinds of applications at the same time. These jurisdictions desire to maintain a uniform approach by their panels and, if divergence occurs on important issues of law and policy, this ground permits these boards to revisit its prior decisions if necessary to maintain uniformity. As a result, this ground is generally restricted to circumstances where there is an inconsistency between the decisions rendered by different panels on an important issue of law or policy. However, this ground has also been relied upon by the Board to re-examine a prior decision in circumstances where it is alleged the Board misapplied or misconstrued its enabling statute. […]*
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> *…*
>
> *[25] The final permissible ground for an application for reconsideration deals with circumstances where the original decision was precedential and amounted to a significant policy adjudication. Simply put, this ground permits the Board to take a "second look" when it makes major new policy adjudications or when it departures [sic] from past jurisprudence on a significant issue. However, in both cases, the matters in issue must have significant impact on the labour relations community in general. […]*
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> *[citations removed]*

[21] The fourth ground is relevant where there is an inconsistency between the decisions rendered by different panels on an important issue of law or policy, or in some cases, where it is alleged the Board misapplied or misconstrued its enabling statute.

[22] The Corps states that the Board used the incorrect date when it assessed the duration of the time period applicable to the application to cancel the certification order. Based on the law of successorship, the expiry date of the collective agreement is the appropriate starting date for purposes of making that assessment. The finding that the Corps was a successor employer in *Corps No. 1*, [2002] Sask LRBR 188 meant that the Corps had acquired the essential elements of the business. The Board did not consider, and should have considered, the impact of intervening employers and the Union's obligation to represent employees through the successive employers who held the security contract. This occurred because the Union withheld information with respect to the related bargaining relationships.

[23] The Board finds that it is appropriate to re-examine the underlying decision to ensure that it is consistent with past decisions, and that the enabling statute has been properly applied. The Board is not, however, persuaded that this decision is precedential, given the unusual circumstances of the hearing of this matter, including the nature of the evidence and argument.

[24] For all of these reasons, the second stage of this reconsideration application will proceed on the dates currently scheduled for the hearing of the matter. This panel will remain seized.

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

DATED at Regina, Saskatchewan, this **6th** day of **August, 2021.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson