Saskatchewan
Labour Relations Board

CONSTRUCTION & GENERAL WORKERS LOCAL UNION 180, Applicant v KDM CONSTRUCTORS LP, Respondent

LRB File No. 045-21; August 26, 2021
Vice-Chairperson, Barbara Mysko; Board Members: Aina Kagis and Mike Wainwright

Counsel for the Applicant, Construction & General Workers Local Union 180: Crystal L. Norbeck

Counsel for the Respondent, KDM Constructors LP: Steve Seiferling

Reconsideration Application – Underlying Certification Application – Division 13 – Construction Industry – Union Does not Meet Onus – Certification Application Dismissed.

Procedure on Reconsideration Application – Two-Stage Process – First Stage to be determined by Written Submissions – Assessment of Threshold Grounds – *Remai* Criteria #2, #5, #6 – No basis to Reconsider Decision.

REASONS FOR DECISION

Introduction:

[1] Barbara Mysko, Vice-Chairperson: The Union has filed an application to reconsider the decision in *Construction & General Workers Local Union, No. 180 v KDM Constructors Inc.*, 2021 CanLII 25131 (SK LRB), LRB File No. 056-20. In that decision, the Board dismissed the Union's certification application to represent employees working as labourers for KDM in Saskatchewan, having found that the Union had failed to meet its evidentiary onus.

[2] The certification application was filed pursuant to Part VI, Division 13 of the Act, which permits collective bargaining to occur in the construction industry by trade. The work in question was being performed by labourers at the BHP Jansen potash mine site. The Union argued that the labourers' work was being performed in support of the overall construction of the potash mine.

[3] These Reasons relate to the first stage of the usual two-stage process on an application for reconsideration. The first stage requires that the Board decide whether any of the threshold grounds, known as the *Remai* criteria, have been satisfied so as to justify reconsideration of the decision. Of the six existing *Remai* criteria, the Union relies for its reconsideration request on the second, fifth, and sixth grounds.

[4] For the current purposes, the parties agreed that the matter could be bifurcated such that the Board would consider the first stage of the reconsideration application by written submissions only, and then, if necessary, proceed to the second stage of the application by way of a *viva voce* hearing. The Board is charged with considering the first stage of the reconsideration application on the basis of the materials that have been filed, including the briefs provided by the parties.

Arguments of the Parties:

Union:

[5] The Union has raised three bases for reconsidering the decision. The first and the second are interrelated, arising from the Board's determination that the evidence was insufficient to establish the nature of the work as falling within the construction industry.

[6] The first basis for reconsidering the decision is that crucial evidence was not adduced for good and sufficient reasons. The Union elected not to adduce evidence with respect to the nature of the overall project due to an absence of any dispute between the parties about whether that work fell within the construction industry, as defined in Part VI, Division 13 of the Act. The Union would have adduced that evidence if the issue had been identified as being in dispute or under consideration.

[7] The second basis is that the decision is tainted by a breach of natural justice. The decision rests on the Board's insistence on receiving evidence on an issue that was not before it, without providing notice of same to the Union.

[8] Lastly, the decision is precedential and amounts to a significant policy adjudication which the Board may wish to refine, expand upon, or otherwise change. Contrary to previous cases, the Board declined to consider the overall context of a hybrid workplace in deciding whether the work fell within the construction industry. In past decisions, the Board has taken into consideration a broader scope of work, and has not simply focused on the work performed as of the date of the certification application.

Employer:

[9] The Employer asks that the application for reconsideration be dismissed.

[10] On the first point, there were no good and sufficient reasons to justify the failure to adduce evidence. The Union and the Employer participated in a hearing and both were represented by

counsel. The Union called evidence about the work being performed on the site. The Employer presented evidence through its Project Manager, which included the agreement outlining the Employer's scope of work on the site.

[11] The Union cannot say that it was caught by surprise by the Board's decision. The Employer's reply to the certification application made clear that it was taking issue with whether the work being performed was in the nature of construction work. It is entirely untrue that there was an absence of any dispute with respect to the nature of the work.

[12] There was no breach of natural justice. The nature of the work was in issue. Both parties adduced evidence and presented argument on the point. It cannot reasonably be said that the Board ventured into issues that were not before it.

[13] The decision is not precedential, and does not amount to a policy adjudication. The issues before the Board were the nature of the work and the appropriateness of the bargaining unit, not "the issue of a hybrid workplace". The Union has raised this latter issue only now in the context of the current application.

[14] The Union in this application has knowingly made misleading and inaccurate statements. The Employer is requesting an order of costs fixed in the amount of $2,500.

Applicable Statutory Provisions:

[15] The applicable statutory provision is as follows:

> ***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.*
>
> *(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.*

Analysis:

[16] The Board first described the preconditions for an application for reconsideration in *Remai Investment Corp. v Saskatchewan Joint Board, R.W.D.S.U.*, [1993] SLRBD No 50 (Sask LRB), LRB File No. 132-93 [*Remai*], at 4-5:

> *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.*
>
> *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:*
>
> > *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:*
> >
> > > *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.*

[17] To this day, the Board continues to rely on the six *Remai* criteria to assess an application for reconsideration. The applicant has the onus to establish that one or more of the *Remai* criteria have been met so that the Board may exercise its discretion to reconsider a decision pursuant to subsection 6-115(3) of the Act.

[18] The Board's "decisions are to be considered final in all but exceptional circumstances": *Amalgamated Transit Union, Local 615 v City of Saskatoon*, 2018 CanLII 127679 (SK LRB). Therefore, the authority to reconsider a Board decision is applied sparingly. It is not meant to substitute for a hearing *de novo* or an appeal. Its purpose was explained in *Kennedy v Canadian Union of Public Employees, Local 3967*, 2015 CanLII 60883 (SK LRB) [*Kennedy*]:

> *9 The Board's authority and willingness to reconsider its prior decisions is often confused with a right of appeal. However, as Chairperson Bilson noted in the Remai Investment Corporation decision and as this Board has confirmed in numerous decisions since then, the power to re-open a previous decision must be used sparingly and in a way that will not undermine the coherence and stability of the relationships the Board seeks to foster. In other words, while the Board has authority to reconsider its own decisions, doing so is neither a right of appeal nor an opportunity for an unsuccessful applicant to re-argue and/or re-litigate a failed application before the Board. [] This Board's willingness to reconsider its prior decision is founded in the periodic need for the Board to address important policy issues arising out of our jurisprudence and/or to avoid injustices. However, the Board must balance the need for policy refinement and error correction with the overarching need for finality and certainty in our decision-making process. As a result, both our approach to reconsideration applications and the criteria upon which we rely establish a high threshold for any applicant seeking to persuade this Board to review a previous decision.*
> *[citations removed]*

[19] Having considered these general principles, the Board will proceed to decide whether any of the threshold grounds raised by the Union justify reconsidering the decision.

If a hearing was held, but certain crucial evidence was not adduced for good and sufficient reasons; and if the original decision is tainted by a breach of natural justice

[20] The Union's arguments with respect to the second and fifth grounds are interrelated.

[21] The second ground, as outlined in *Remai*, is that a hearing was held but certain crucial evidence was not adduced for good and sufficient reasons. To frame its argument, the Union relies on the following description 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.*

[22] In the current case, the proposed crucial evidence is that which relates to the nature of the overall project undertaken at the BHP mine site. The Union insists that there was no issue in dispute with respect to the nature of the overarching work. It was reasonable for the Union to treat the matter as uncontested and to elect not to call evidence. Despite this, the Board received evidence about the overarching work, acknowledged this fact, but then failed to ascribe any content to that evidence. The Board failed in concluding that the matter was a disputed issue that required additional evidence or any consideration, and in the alternative, it failed by neglecting to raise the issue with the parties.

[23] The Union relies on three prior cases which it says provide support for its argument, for the following reasons:

a. a decision may be reconsidered if the Board has misapprehended the positions taken before it in the first hearing: *C.U.P.E., Local 287 v North Battleford (City)*, [2003] Sask LRBR 288, 2003 CarswellSask 974 [*North Battleford*];
b. it may be a breach of natural justice for the Board to decide matters that were not raised or contested in the hearing before it: *SEIU-West v Alison Deck and Saskatchewan Health Authority*, 2019 CanLII 57387 (SK LRB) [*Deck*];
c. it may be a breach of natural justice for the Board to decide matters that a party has not had an opportunity to address in the course of the hearing: *Construction Workers Union, Local 151 v Saskatchewan Labour Relations Board and Technical Workforce Inc.*, 2017 SKQB 197 (CanLII) [*Construction Workers Union*].

[24] In considering the merits of the second ground, the Board accepts that the test consists of two parts, including that the evidence be crucial and that there be a good and sufficient reason for the applicant not to have presented the evidence at the original hearing. There is no question whether the evidence of the overall project, generally, is crucial; the Board's decision rests on the fact that the Union did not meet its evidentiary onus that the labourers' work was being performed in a manner that demonstrated the requisite connection with the overall construction project.

[25] The question is whether there was good and sufficient reason. The first justification for the deficiency in the evidence is that the matter was not in dispute. The second is that the Board failed to raise the issue with the parties. A related issue is that the Board failed to give any weight to the relevant evidence it did receive.

[26] These justifications overlook the statutory regime which lies at the center of the dispute. The applicant had sought certification pursuant to the construction industry provisions contained in Division 13. The Employer's main objection to the application was that the work did not fall within the construction industry. Therefore, the Union bore the evidentiary onus to prove that the work being performed fell within the construction industry, and to be specific, that it met the statutory definition of construction industry, pursuant to section 6-65.

[27] The Board's review of the relevant regime is found at paragraphs 72 to 106 of the decision, beginning with an analysis of the definition of construction industry:

> *[72] Next, section 6-65 states that construction industry means the industry in which the activities of constructing, erecting, reconstructing, etc. of any work or any part of a work are undertaken. In the absence of a definition, the specified terms outlined in subclause (i) are to be given their ordinary meaning. According to subclause 6-65(a)(ii), construction industry includes all activities undertaken with respect to all machinery, plant, fixtures, facilities, equipment, systems and processes contained in or used in connection with a work, but does not include maintenance work. The word "all" in reference to "activities" and in reference to machinery, etc. calls for a broad interpretation of "activities" and of each of machinery, plant, fixtures, facilities, equipment, systems and processes.*
>
> *[73] The activities in the construction industry include "all activities" as described in subclause (ii). The activities are included if they have the necessary relationship with machinery, etc., and if machinery, etc. have the necessary relationship with the work or part of a work as expressed by the phrases "contained in" and "used in connection with". The phrase "contained in" suggests that the necessary relationship is based on whether machinery, etc. exists within the limits of the work or part of a work. The phrase "used in connection with" suggests that the necessary relationship is based on the use of the machinery, etc. in relation to the work or part of a work.*
>
> *[74] If the necessary relationship exists, then an activity will be included in the definition of construction industry unless the work is excluded for being maintenance work.*

[28] The Board described the connections that are to be established for the work to be found to fall within the construction industry.

[29] The Board acknowledged the existence of the general evidence, and explained why it was insufficient to demonstrate the requisite connections:

> *[112] The next step is for the Board to apply the statutory definition of construction industry to the activities and the work. However, in reviewing all of the evidence before it, the Board*

> *has identified a lack of clear, convincing, and cogent evidence with respect to the overall work on site, beyond that performed by KDM. Granted, the Board can accept that there is construction work taking place on the BHP site. However, the specifics of the construction work, and the relationship between that construction work and the activities of the labourers, are unclear.*
>
> *…*
>
> *[124] In our view, the general nature of the evidence about the overall project prevents the Board from being able to adequately perform a contextual assessment. Given the nature of the work being performed by the labourers, this is of particular concern. This is not a case in which the connection is obvious; therefore, the contextual assessment must be undertaken carefully.*

[30] The Union relies on *North Battleford* for the proposition that a decision may be reconsidered if the Board has misapprehended the positions originally taken by the parties. In *North Battleford*, the Board had "labored under the misapprehension of fact that the bylaw enforcement officers were members of a new classification…in which case it would not have been necessary to establish such majority support". Due to the Board's misapprehension, the decision, which amended the certification order to add the officers without evidence of majority support, operated in an unintended manner. The decision was reconsidered and the application granted. There is no similar misapprehension in the current case.

[31] The Union relies on *Deck* for the proposition that it may be a breach of natural justice for the Board to decide matters that were not raised or contested in the hearing before it. However, the circumstances in *Deck* were measurably different from the current case, as demonstrated at paragraph 19 of that decision:

> *[19] The first ground on which the Union relies in its Application for Reconsideration is that a breach of natural justice occurred when the Board included a direction in paragraph #1 of the Board Order that the Union file a grievance on behalf of Emily Retzlaff. Ms. Retzlaff was not a party to the original application. She did not give evidence at the hearing. She had no notice of a potential remedy requiring that a grievance be filed on her behalf. She is affected without having had a right to be heard with respect to whether she wanted a grievance to be filed on her behalf. As part of the Union's Application for Reconsideration, it provided the Board with evidence that she does not want a grievance to be filed on her behalf.*

[32] In *Deck*, the Board was satisfied that the Union was denied a fair opportunity to be heard, and an order was granted removing reference to Ms. Retzlaff from the original Board Order. There is no infringement, here, on the parties' right to be heard. The parties had full notice that the definition of construction industry, and its application, was in issue in this case.

[33] In *Construction Workers Union*, the Board found that the union's dispatch method weighed in favour of the build-up principle being applied to the construction industry, generally, and in that case, specifically. At the hearing of the matter, no evidence had been adduced concerning the Union's dispatch method, nor had any of the parties addressed the topic of the dispatch method. Furthermore, there had been no evidence with respect to the representative status of the employees, and despite this, the Board found that there was no dispatch of union members to the worksite.

[34] In *Construction Workers Union*, the Court found that a high level of procedural fairness applies to the Board's processes, and concluded that the Board had denied the parties the right to be heard on the stated issues. The Union relies on the following excerpt as descriptive of the Board's approach in the current case:

> *[66] The failure of the Board to identify to the parties the issues and give the parties an opportunity to call evidence or present argument on those issues was a breach of procedural fairness and natural justice. The Board here developed a new line of authority in coming to a key finding without disclosing that these were pivotal issues and without seeking evidence or submissions about the issues from the parties at the hearing. As well, the position of the Board was somewhat novel and not supported by the jurisprudence of the Board. The parties could not be reasonably expected to address the issues without some identification by the Board that it was relevant.*

[35] The Board in that case had made findings of fact in the absence of evidence and was found to have developed a new line of authority, including by taking a novel "position". Here, the Union bore the onus to prove that the work met the definition, and to that end, had argued that the labourers' work was being performed in support of the overall construction of the potash mine (see, Decision, para 126). Given the context, the parties could reasonably have been expected to address the relationship between the work of the labourers and the alleged overall construction industry work occurring at the mine site.

[36] It bears noting that the Board is a creature of statute, meaning that the Board has only those powers conferred upon it by statute. The statute should be the starting point for a party that is preparing its case before the Board. In the current case, the characterization of the work, and specifically whether it met the statutory definition, was clearly in issue. The Board had to determine whether the evidence was sufficient to find that the applicant had met the evidentiary onus. It was not for the Board to alert a party to the specific aspects of the statutory definition that it did not adequately address.

[37] As explained in *Remai* at 7, a reconsideration application is not an opportunity for a party to correct mistakes made in the original hearing:

> *The possibility of reconsideration is not offered to make it possible for the parties to mend their mistakes or experiment with a different strategy at a second hearing – an opportunity which advocates everywhere would no doubt welcome. The jurisdiction to reconsider a decision is intended instead to redress an injustice which would be perpetrated by failing to take into account evidence which, for reasons beyond the control of the party making the application, was not presented at the first hearing.*

[38] For the preceding reasons, the Union has not established that the decision should be reconsidered on the basis of either of the second or fifth grounds. There was no good and sufficient reason for the failure to adduce the evidence as described. Nor has the Union persuaded the Board that it committed a breach of natural justice in the original hearing.

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

[39] Under this ground, the Union's argument pertains to the Board's conclusion, captured at paragraph 127:

> *[127] Finally, it is possible that KDM's past projects are construction projects. However, these projects are not the focus of the application; it would not be appropriate for the Board to order certification of the bargaining unit on the basis of the past projects in the absence of a determination on KDM's current and likely most significant project to date.*

[40] The Union says that a substantial change in precedent that occurs without notice is a basis for a reconsideration: *Commonwealth Construction Co. v C.A.I.M.A.W.*, 1979 CarswellBC 2016 (BC LRB). In the present case, the work that formed the basis for the certification application included work performed on other sites within the construction industry. The Board declined to consider this evidence, despite the fact that this work clearly fell within the construction industry.

[41] The Union states that the Board's prior, related case law does not suggest that the relevant work is to be restricted to that which was performed by the employer at the time that the certification application is filed. In the hearing of this matter, the parties made arguments based on related cases, such as *International Brotherhood of Electrical Workers, Local 2038 v Tesco Electric Ltd.*, 2002 CanLII 52910 (SK LRB) and *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). Neither of these cases is limited to a review of the work in the manner as described by the Board in its decision.

[42] In other, unrelated cases, the Board has limited its analysis to the date at which the certification application was filed. For instance, in cases involving an objection to the conduct of the vote, the Board has considered the evidence of voter eligibility as of the application date for legitimate purposes, such as providing certainty and preventing manipulation of evidence. The decision in the current case appears to import the test for voter eligibility into certification applications for the purpose of determining whether a bargaining unit is appropriate.

[43] By setting this precedent, the Board has artificially limited the scope of its analysis. This precedent could have an impact not only on unions, but also on employers who face certification applications at a time when the work being performed is in an exceptional state.

[44] The Board will consider whether this ground provides a basis for reconsidering the decision. To this end, the Board in *Kennedy* provided an explanation of the scope of the final ground:

> *[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. See: Construction Labour Relations Association v. Canadian Association of Industrial Mechanical and Allied Workers, Local 17, [1979] 3 Can. L.R.B.R. 153. See also: Saskatchewan Government Employees' Union v. Mary Banga, [1994] 1st Quarter Sask. Labour Rep. 291, LRB File No. 014-94.*

[45] The decision in the current case did not set a precedent or make a significant new "policy adjudication".

[46] The Union says that the Board has imported the test for voter eligibility into the assessment of the unit's appropriateness by limiting that assessment to the evidence at the date of filing. However, the Board's reasons reveal no such approach. The Board considered the evidence before it, including what was rather general evidence from Chief Bellerose about "a few past projects", and decided that it would not be appropriate to order a construction industry certification on the basis of those projects. At paragraph 127, the Board states that the other projects were not the focus of the application and that it would not be appropriate for the Board to grant a certification order on the basis of those projects to the exclusion of sufficient evidence with respect to the "current and likely most significant project to date". Nowhere does the Board indicate that it is drawing a "bright line" such that it will consider only those circumstances that were occurring at the time of the application. The Board made its decision on the basis of the facts before it.

[47] Nor did the Board set any precedent with respect to so-called hybrid workplaces. The Board considered *Atlas Industries*, [1998] SLRBD No 5 and later case law, including *Reliance Gregg's*, but did not suggest that any existing precedent should be or was to be overturned. Again, the Board made its decision on the basis of the facts before it.

[48] In conclusion, the Union has not persuaded the Board that it would be appropriate to re-open the decision for reconsideration. The application is therefore dismissed.

[49] The request for an order of costs against the Union is unwarranted and is not granted.

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

DATED at Regina, Saskatchewan, this **26th** day of **August, 2021.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson