Saskatchewan
Labour Relations Board

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS), Applicant v JSN MOTORS INC., Respondent

LRB File No. 102-21 and 092-21; November 24, 2021
Vice-Chairperson, Barbara Mysko; Board Members: Shawna Colpitts and Mike Wainwright

Counsel for the Applicant, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers): Heather M. Jensen

For the Respondent, JSN Motors Inc.: Amjad Saleem

Reconsideration Application – Underlying Certification Application – Electronic Support Evidence – Certification Application Dismissed.

First Stage of Reconsideration Application – Assessment of Threshold Grounds – *Remai* Criteria #1, #3, #4, #5, and #6 – Threshold Met on Basis of *Remai* Criterion #6.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: The Board has been asked to reconsider the dismissal of a certification application filed pursuant to section 6-9 of *The Saskatchewan Employment Act* [Act]. On July 22, 2021, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union [Union] filed the certification application, seeking to certify an all-employee unit of employees working for JSN Motors Inc. [Employer] in Saskatoon, Saskatchewan. The Employer filed a reply but raised no objections to the certification application.

[2] When applying for certification pursuant to section 6-9 of the Act, a union is statutorily required to establish a minimum threshold of support by employees in the unit and file with the Board evidence of each employee's support. The Board requires that the evidence of support consist of a separate support card, which is personally signed and dated, from each employee. The Board accepts only those support cards the originals of which are physical rather than electronic. Originals must be delivered to the Board.

[3] In 2021, amendments were made to what are now *The Saskatchewan Employment (Labour Relations Board) Regulations, 2021* [Regulations] to allow for the filing of forms or other documents by electronic means without the filing of a paper copy. With these amendments, the Board has permitted parties to file applications and replies by electronic means without the filing of a paper copy. Applicants for certification orders are permitted to file support evidence by electronic means at the time of application, to be followed by the filing of the original, physical support cards at a later date.

[4] On the certification application in issue, the Union filed electronic support evidence. The Union took the position that the evidence met the statutory requirements and that the application should be processed by the Board. Upon receipt of the application, the Board Registrar wrote to the Union to advise that the Board does not accept electronic support evidence and suggested that the Union withdraw the application and refile to avoid a potential dismissal for failure to meet the support threshold. The Union proceeded with the certification application with electronic support evidence, and it was dismissed by the Board on August 3, 2021.

[5] The Union has now filed this reconsideration application seeking that the Board proceed to a *viva voce* hearing to receive evidence on the suitability of the electronic support evidence. The Board's approach to reconsideration applications consists of two stages. In the first stage, the Board considers whether the applicant has met any of the threshold grounds, known as the *Remai* criteria, to justify reconsideration of the decision. If so, then the Board proceeds to the second stage.

[6] At Motions' Day on September 7, 2021, the Board set deadlines for the filing of written briefs in relation to the threshold grounds. The Union filed a brief, which the Board has reviewed and has found helpful. The Employer has not filed a brief or made any submissions.

Analysis and Decision:

[7] Section 6-114 of the Act states that an order or decision in a matter arising pursuant to Part VI is binding and conclusive of the matters stated in the order or decision. Section 6-115 states that every order or decision made pursuant to Part VI is final and there is no appeal from that order or decision. It also sets out the Board's authority to reconsider a decision:

> ***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.*

[8] In assessing the merits of a reconsideration application, the Board continues to rely on the criteria which were first described in *Remai Investment Corp. v Saskatchewan Joint Board, R.W.D.S.U.*, [1993] 3rd Quarter Sask Labour Rep 103, LRB File No. 132-93 [*Remai*], at 107-8:

> *…*
> *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.*

[9] The Union 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. Of the six *Remai* criteria, the Union relies for its reconsideration request on the first, third, fourth, fifth, and sixth grounds.

[10] 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]*

[11] The Board will proceed to consider each of the criteria relied upon by the Union, in turn.

[12] Criterion no. 1 requires that there be no hearing in the first instance and that a party subsequently find that the decision turns on a finding of fact which is in controversy and on which the party wishes to adduce evidence. There was no hearing in the first instance. However, there is no finding of fact that is in controversy. The Board Registrar advised the Union that the electronic support evidence was unlikely to satisfy the policy of the Board. The Union proceeded with its application in the absence of evidence in compliance with Board policy.

[13] Criterion no. 3 asks whether the order made by the Board operated in an unanticipated way or had an unintended effect on the application. The Union says that the order has had the effect of arbitrarily and unreasonably denying employees access to their freedom of association. It says that, in the context of the pandemic, the dismissal of the application has the unintentional effect of placing barriers to certification in circumstances in which personal contact exposes organizers and employees to personal health risks.

[14] It cannot be said that the Board's order operated in an unanticipated way. The Board is aware of the significance of certification applications to employees. Its policy, including the practice thereof, with respect to the form of support evidence is long-standing.

[15] More specifically, the proposed bargaining unit consists of three employees. The Union had 90 days preceding the date of the application to gather the support of the employees in this small bargaining unit. The Union has not suggested that there was any specific personal health risk impacting the organizing of this small bargaining unit.

[16] Criterion no. 4 permits reconsideration if the order turned on a conclusion of law or policy that was not properly interpreted. There is no law or policy that was not properly interpreted. Section 6-9 of the Act states:

> ***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.*
>
> *(2) When applying pursuant to subsection (1), a union shall:*
> *(a) establish that 45% or more of the employees in the unit have within the 90 days preceding the date of the application indicated that the applicant union is their choice of bargaining agent; and*
> *(b) file with the board evidence of each employee's support that meets the prescribed requirements.*

[17] Subsection 6-111 of the Act states:

> ***6-111****(1) With respect to any matter before it, the board has the power:*
> *. . .*
> *(f) subject to the regulations made pursuant to this Part by the Lieutenant Governor in Council:*
> *(i) to determine the form in which evidence of membership in a union or communication from employees that they no longer intend to be represented by a union is to be filed with the board on an application for certification or for cancellation; and*
> *(ii) to refuse to accept any evidence that is not filed in the form mentioned in subclause (i);*

[18] Section 6-126 of the Act sets out the powers of the Board to make regulations:

> ***6-126*** *The board may make regulations:*
> *(a) prescribing rules of procedure for matters before the board, including preliminary procedures;*
> *(b) prescribing forms that are consistent with this Part and any other regulations made pursuant to this Part;*
> *(c) prescribing any other matter or thing that the board is required or authorized by this Part to prescribe by regulation.*

[19] Subsection 3(2) of the Board's Regulations permits a document to be filed by electronic means but only if the "electronic copy" is in a "format satisfactory to the board":

> ***3****(1) Subject to subsection (2), if a Form or other document, other than a proof of service, is required to be filed with the board pursuant to these regulations, the completed original of the Form or document must be filed.*
>
> *(2) A Form or other document may be filed with the board by electronic means, but only if the electronic copy of the Form or other document is in a format satisfactory to the board.*
> *…*

[20] *The Saskatchewan Employment (Labour Relations Board) Regulations*, now repealed, stated:

> ***3****(1) Subject to subsection (2), if a Form or other document, other than a proof of service, is required to be filed with the board pursuant to these regulations, the completed original of the Form or document must be filed with the registrar.*
>
> *(2) A Form or other document may be filed with the board by electronic means, but only if:*
> *(a) the electronic copy of the Form or other document is in a format satisfactory to the board; and*
> *(b) a paper copy of the Form or other document is received by the board within five business days after the date the electronic Form or document was received by the board.*
> *…*

[21] Some information on the Board's policy is provided on the Board website in an article entitled, "*The Saskatchewan Employment Act*: How does the process work to secure a Union in the Workplace?". At page 2, it is explained that:

> *The evidence of support card must be an original and not a copy.*
>
> *There must be a separate card for each person.*
>
> *The signed support card must be personally signed and dated.*
>
> *The cards must be signed no more than 90 days prior to the application being filed with the Board.*

[22] The instructions contained at question no. 5 in Form 2 of the Board's Regulations state that "the cards will be returned" to the applicant, implying that the original cards are expected to be physical:

> *(At the same time as you submit your application, also submit your membership cards or other evidence of employee support, together with a sample of the cards submitted and a list of the names, occupational classifications, addresses and dates shown on the cards. This material will be treated as strictly confidential, and the cards will be returned to you as soon as the application is disposed of.)*

[23] The Board has the authority to determine the form of evidence used in demonstrating support for a union seeking certification. Pursuant to this authority, the Board has made a policy determination that the form of support card evidence is to consist of physical, rather than

electronic, originals. Although it has not been reduced to a formal, written policy statement, the Board has made this determination within the scope of its authority.

[24] Next, criterion no. 5 permits reconsideration if the order was tainted by a breach of natural justice, or in other words, a breach of the duty of procedural fairness. There was no such breach. It is well established that the content of natural justice, or procedural fairness, varies with the circumstances. The Board Registrar advised the Union of the Board's policy, provided the Union with an opportunity to re-file with non-electronic support evidence, and the Union proceeded with its application. It was recognized in *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 (para 40) that transparency in the administrative process may take place in various ways.

[25] The Board is not required to provide an opportunity for a hearing to a party in every case. The Union, in its application, presented no reason why the Board should consider not applying its long-standing policy on an exceptional basis, and to hold a hearing for that purpose. Furthermore, there was no departure from policy, no ambiguity as to why the Board dismissed the application, and no question as to what could be done differently to avoid the same result.

[26] This is not a case, such as that relied upon by the Union in *International Woodworkers of America v the 77 Rogers Group Ltd.*, [1979] February Sask Labour Report 35, in which there was an established exception to the general policy under consideration. Nor is it a case, such as *United Brotherhood of Carpenters and Joiners of America, Local 1990 v Work Force Construction Ltd. (o/a Quadra Construction)*, [1988] Fall Sask Labour Report 42, in which the once established exception was no longer being followed.

[27] The Board acknowledges that it did not specifically invite representations on the deficiency, as was done in *International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers No. 206 v Metal Fabricating and Construction Ltd.*, [1988] Fall Sask Labour Rep 53, LRB File No. 072-88. Under the circumstances, the Board is not persuaded that it breached natural justice by dismissing the application without seeking representations on a policy that had been explained to the Union.

[28] Next, the Board will explain why it has decided to proceed to the second stage of the reconsideration application based on criterion no. 6. Criterion no. 6 allows for reconsideration if the original decision is precedential and amounts to a significant policy adjudication that the Board

may wish to refine, expand upon, or otherwise change. The Board in *Kennedy* explained the rationale for this criterion:

> *[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 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.*

[29] To our knowledge, this is the first certification application before this Board in which the applicant has relied on electronic support evidence. This case presents a novel opportunity to consider a contemporary issue with a potentially significant impact on the labour relations community.

[30] The recent past has given way to significant advancements in technology, some of which have resulted in major efficiencies in the Board's procedures. The Board is now willing to consider re-opening its existing policy of restricting original support evidence on certification applications to physical cards, and to determine whether it is appropriate to refine, expand upon, or otherwise change that policy.

[31] Finally, shortly after issuing the order dismissing this certification application, the Board began consultations with respect to its policy. The Board has now suspended its consultations process to permit the current matter to proceed.

[32] Given the foregoing conclusions, the Board will proceed to the second stage of the reconsideration application on the date that has been tentatively scheduled for a hearing for that purpose. The Union will be permitted to present evidence at the hearing. This panel will be seized.

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

DATED at Regina, Saskatchewan, this **24th** day of **November, 2021.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson