Saskatchewan
Labour Relations Board

SHEET METAL AIR RAIL TRANSPORTATION (S.M.A.R.T.), LOCAL 296, Applicant v VENT PRO MECHANICAL INC., Respondent

LRB File No. 129-20; February 25, 2021
Vice-Chairperson, Barbara Mysko; Board Members: Hugh Wagner and Brian Barber

Counsel for the Applicant,
Sheet Metal Air Rail Transportation,
(S.M.A.R.T.) Local 296: Greg Fingas

Counsel for the Respondent, Vent Pro Mechanical Inc.: Steve Seiferling

Certification Application – Representation Vote – Mail-in Ballot Process – Objection Raised as to Eligibility to Vote – Lay-offs – End of Project – Relevance of Prior Anti-Union Conduct – Employed on Date of Application and Date of Vote – Three Employees are Eligible to Vote – Tabulation Ordered.

REASONS FOR DECISION

Background:

[1] **Barbara Mysko, Vice-Chairperson:** These are the Board's Reasons for Decision in relation to a Certification Application brought by Sheet Metal Air and Transportation, Local 296 [Union] in relation to a bargaining unit of employees of Vent Pro Mechanical Inc. [Vent Pro], described as:

> *All Journeyman Sheet Metal Workers, Sheet Metal Workers, Sheet Metal Worker Apprentices, Sheet Metal Foreman, Journeyman Welders, Welders, Welder Apprentices employed by Vent Pro Mechanical within the Province of Saskatchewan.*

[2] There are six employees in the proposed unit.

[3] The parties agree that there is one central issue and one subsidiary issue: Who was eligible to vote in the representation vote? And, is a single person bargaining unit appropriate?

[4] The facts underlying the dispute are largely uncontested. The parties filed an agreed statement of facts, for which the Board is grateful, and two witnesses were called for the Union. Vent Pro called no witnesses.

[5] Vent Pro is a heating, ventilation, and air conditioning company based in Saskatoon. It has operated in Alberta and Saskatchewan for the past six years. In the summer of 2020, Vent Pro hired a number of employees to complete a contract in Martensville, Saskatchewan. Six employees were employed to complete the work, and performed work during the following dates:

- Anthony Hofstra [“Hofstra”] – August 4-21 – 94 hours;
- Clifton Thall [“Thall”] – August 4-20 – 92 hours;
- David McDougall [“McDougall”] – August 4-20 – 83 hours;
- Greg Howat [“Howat”] – August 4-20 – 86 hours;
- Jared Cochrane [“Cochrane”] – August 4-21 – 92 hours;
- Mark Sklar [“Sklar”] – August 4-present (still employed).

[6] Vent Pro issued records of employment [ROE] to these employees, ending on August 15, 2020, from the sole proprietorship, Vent Pro Mechanical. A second set of ROEs was issued to five of the six employees, through Vent Pro Mechanical Inc., following completion of the project. There were two sets of ROEs because the company had incorporated in the middle of August, and then had transferred the employees to Vent Pro Mechanical Inc., effective August 16, 2020. A corporate profile report was entered into evidence. It shows Todd Despins [Despins] as the sole Director of Vent Pro.

[7] The certification application was filed on August 12, 2020. Notice was provided to Despins on that same date. On August 21, 2020, a Direction for Vote was issued and an agent of the Board was appointed to conduct a representation vote to determine whether the employees wished to be represented by the Union for the purpose of collective bargaining. On that same date, the Board mailed out the ballots, with a return date of September 11, 2020. The representation vote was conducted by the standard mail-in ballot process.

[8] Vent Pro states that, if the date of the mail-out is the date of the vote, only three employees are eligible to vote. These employees are Sklar, Cochrane, and Hofstra. The remaining employees were not employed on the relevant dates and their votes should not be tabulated. However, if the date of the vote falls on a date after August 21, 2020, then Sklar is the only employee eligible to vote, and the certification application should be dismissed. According to Vent Pro, a single person bargaining unit is not appropriate for collective bargaining.

[9] Pursuant to the Board’s Covid-19 policies, a Webex hearing was held in relation to this matter on January 20 and 21, 2021.

Evidence:

[10] The Union called Howat and Trent Marshall [Marshall].

[11] Howat was the first witness. Howat is a journeyperson sheet metal worker and a journeyperson carpenter. He has been a member of the Union for 25 years. In 2013 he worked as the organizer for the Union.

[12] Howat learned of this job from another Union member. He then spoke to Despins. He was told to show up for orientation on August 4 but the orientation was postponed by one day. Once he started, he worked on odd jobs, mostly performing aspiration work. Howat received subsistence pay to compensate for his commute to work and a wage increase when he took on additional responsibility. Ultimately, Howat and McDougall were responsible for work orders on the job.

[13] At the time of hire, Despins was aware that Howat was a Union member. Five of the six employees within the proposed bargaining unit are Union members.

[14] Howat had no involvement in organizing the site or filing the certification application, but he did advise the employees that a vote against the Union could count against their future work prospects.

[15] Thomas King [King], a business representative for the Union, filed the certification application. King and Despins worked together on a past job. In a meeting about the certification application, King indicated to the employees that he did not get along with Despins. After that meeting, Howat and Thall went to Despins' house to pick up their pay cheques. While they were there they told Despins that King didn't like him very much.

[16] At some point, although it was unclear when, Despins told Howat that he would love to be unionized but it was not in his best interests because this was a once a year job.

[17] The certification application was filed, and Despins was notified of same, on August 12. On that same day, Howat was laid off for approximately an hour and a half. The following texts, from Despins, were entered into evidence:

> *Wed, Aug 12, 3:44 PM*
> *Hey Greg, thanks for your services last week but we won't need you for the following week. You can pick up your tools tomorrow, in Sutherland, or I can run them [to] you. Let me know what you want to do.*

Wed, Aug 12, 5:28 PM
Greg, I found some More work orders, we can keep you on if you interested.

[18] Previous to this, Howat had had no indication that he would be no longer needed on the job site. Upon receipt of the first text, Howat called Despins and told him to leave his personal tools in the trailer so that he could pick them up, and then left Prince Albert, where he was spending his day off, to travel to Martensville.

[19] By the time he arrived, Despins apologized to Howat and paid him for an hour of travel (but not for a three-hour call-out). When Howat returned to the site on the Monday, he continued working on all of the same work orders as before. No one else had been laid off.

[20] On August 19, Despins informed Howat that his work would be complete the next day. Howat said that he was a bit surprised by this because he thought there was enough work for another couple of days, but that's how it goes on an industrial site. Sometimes you are selected to stay to the end and sometimes you are one of the people who is let go. Besides, although there was one remaining work order, it was a small task that Despins would complete after the materials had arrived. It was impossible to perform the remaining work because the materials had not arrived.

[21] So, in short, after August 20, the work orders were completed. On August 20, Despins treated the employees to a pizza lunch. Each of Howat, McDougall, and Thall would not be coming back. After August 20, three people were left to attend to some clean up. Howat was not aware of any other sheet metal work done on site.

[22] Howat believes that he received his ballot in or around August 24.

[23] Marshall was the second witness. He has been a sheet metal worker for over 30 years. He is the President of the Union. Marshall and Despins are friends. They have been acquainted since they worked for the same unionized employer in or around 2005-2006. Marshall was the journeyman and Despins was the apprentice. Since then, they have worked together on other jobs, and Marshall has rented out his house to Despins.

[24] Around the beginning of August, Despins called Marshall to get a reference for Howat. Marshall told him that Howat was capable of doing the work. That was about it. Marshall later told Howat to obtain clearance to work on a non-union job.

[25] Marshall had no knowledge of the certification application until Despins called to talk about it. This was on the same day that Despins was served. Despins was evidently quite upset about the whole thing. He asked whether this was how the Union normally went about doing things. He asserted that he was going to lay off Howat because he was a Union spy. Marshall assured him that Howat was not a spy; that he was not even employed by the Union. Besides, that wouldn't look good; it wasn't a good idea.

[26] Despins asked about the Union's activities on the site. Marshall knew nothing about that, but explained that the Union would find out about a job only if the employees had contacted the office and asked for assistance.

[27] Sometime after that conversation, Despins called Marshall back and advised that he had re-hired Howat.

Argument:

Union:

[28] The Union relies on the test for determining the eligibility of the employees to vote in the representation question, as set out in *International Association of Heat and Frost Insulators and Allied Workers, Local 119 v Northern Industrial*, 2013 CanLII 67367 [*Northern Industrial No.1*] and *International Association of Heat and Frost Insulators and Allied Workers, Local 119 v Northern Industrial Contracting Inc*, 2014 CanLII 63991 (SK LRB) [*Northern Industrial No.2*]. For an employee to be eligible to vote, he or she should be employed on the date of the application and the date of the vote. Barring exceptional circumstances, this test should be applied. Nothing in this case justifies upending the existing jurisprudence in this area.

[29] At the same time, the Board is keenly interested in ensuring that unilateral employer actions in transferring employees do not result in the manipulation of the pool of potential voters. Such unilateral action justifies a departure from the strict application of the voter eligibility test. The test cannot be held up as a shield to be used by employers who have unilaterally altered the composition of the voter pool.

[30] There is no justification for excluding from the tabulation the votes of those employees who were working on the date that the balloting packages were mailed out, being August 21. This was the date of the vote. Further, the August 20 ballots should be included in the tabulation because of the employer's anti-union conduct and because of the overlap in interest between the employees laid off on August 20 and the employees laid off on August 21. Vent Pro decided which

employees to let go. But all of these employees had an interest not only in the terms and conditions to be applied to their work at the time of the application, but also in the hiring process for future, anticipated work.

[31] Despins laid Howat off as a direct act of retaliation based on his belief that Howat was a union spy, only to reverse course later that same day. In most cases, an assessment of anti-union animus must be made based on inferences arising from the whole of the circumstances. In this case, the Board has the benefit of direct and stark evidence upon which it can draw such a conclusion. This evidence should taint with anti-union animus the release of the three employees on the date just prior to the ballots being mailed out.

Vent Pro:

[32] Vent Pro acknowledges that the usual test for voter eligibility is that the employee is employed as of the date of the application and as of the date of the vote. On this, the law is clear. In the *Northern Industrial* cases, the Board concluded that in a mail-in ballot the date of the vote is the date that the ballots are mailed. Applying this test, the three eligible voters were Sklar, Hofstra, and Cochrane.

[33] However, Vent Pro also says that the ability to vote with respect to a certification application requires a "sufficient connection" to the workplace. In *SGEU v Canora Ambulance Care (1996)*, 2014 CanLII 28134 [*Canora Ambulance*], the Board stated that the test to be applied in determining if a person is an employee is whether the employee had a sufficiently substantial employment relationship both in terms of their connection to the workplace and their monetary interest.

[34] Vent Pro argues that only one employee, Sklar, has a sufficient connection to the workplace for the purpose of having voting rights. The other employees would have received their voting packages after they were no longer employees of Vent Pro because the packages were mailed out on August 21, 2020. All of the employees except for Sklar were voting during a time when they had no connection to the workplace whatsoever. By the time they had begun voting, the work had already been completed.

[35] Given these tests, either a maximum of three people are eligible to vote, or possibly only one. Vent Pro urges the Board to apply the substantial connection test and find that only one person was eligible. If that is the Board's finding, then it should dismiss the application because one person does not constitute a "unit" for bargaining under the Act.

Analysis:

Who was eligible to vote in the certification application?

[36] Generally speaking, for an employee to be eligible to vote in a certification application the employee must be employed within the scope of the proposed bargaining unit both on the date of the application and the date of the vote. In *Northern Industrial No.1*, the Board described the long standing principles underlying the assessment of a person's eligibility to participate in the representation question:

> *[23] The Union asked that eligibility to participate in the representational question in the present application should be determined based solely on employment status as of the date the Union's application was filed with this Board. While we understand the Union's desire for the Board to adopt such a policy, in our respectful opinion, doing so would represent an unhelpful departure from the long standing principles that have been established by this Board. 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 a person must be an employee on the date of the application and on the date of the vote. As the Board noted in that case, everyone is well aware that this rule neither achieves perfect predictability nor perfect democracy. 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.*
>
> *[24] Having considered the arguments of the parties, we are not persuaded that it would be appropriate or is necessary in law or policy to modify this test in the present application. Therefore, to be eligible to participate in the representational vote in the Union's certification application, employees must be employed on the date of the application and on the date of the vote. Absent evidence, this Board can make no determination as to whether or not the ballots marked by these two (2) individuals ought to be included in the tabulation of representational vote. We also leave this issue in the hands of the parties. If the parties are unable to come to an agreement on the status of these individuals, leave is granted to return to the Board for a determination.*

[37] It is this Board's standard practice to conduct a representation vote using a mail-in ballot process. Clearly, a mail-in ballot process that takes place over a period of days or weeks raises a question about how the Board is to ascertain the date of the vote for the purpose of assessing voter eligibility. Fortunately, the Board has provided clear direction on this point. In *Northern Industrial No. 1*, the Board decided that when voting is conducted by mail-in ballot it is deemed to have commenced on the date that the ballots have been mailed to the employees:

> *[25] However, to aid the parties in attempting to resolve the issue of eligibility, further guidance may be of assistance. In our opinion, when voting is conducted by mail-in balloting, voting is deemed to have commenced as of the date ballots are mailed to*

> *employees. This is the point in time when voting theoretically begins; it is analogous to the opening of polls in a traditional polling scenario. While we admit that using this point in time is somewhat arbitrary, in our opinion, this point in time provides clarity (brightens the line, so to speak) and represents the kind of reasonable compromise that has come to be the hallmark of our other governing eligibility in a representational vote. For purposes of clarity, in the present application, to be eligible to participate in the representational question, the employees must have been employed within the scope of the Union's bargaining unit as of July 24, 2013 (the date when the Union's application was filed with the Board) and must have continued to be so employed as of August 6, 2013 (the date ballots were mailed to employees) to maintain their eligibility.*

[38] In the present case, the evidence is that, although the Board mailed the ballots on August 21, Howat received his ballot on August 24 - after he was no longer an employee. Does this evidence make a difference to the Board's determination of the date of the vote? In short, it does not. To answer this question fully, however, it is worth reviewing the underlying reasons for the voter eligibility rule.

[39] In *Northern Industrial No. 1*, the Board recognized that while the selection of the mailing date is somewhat arbitrary it also provides clarity to the parties. In *Northern Industrial No. 2*, the Board observed that while the test is imperfect "it remains the best means for this Board to promote the twin goals of democracy and predictability" (para 28). The Board's reasoning was upheld on judicial review: *Northern Industrial Contracting Inc v International Association of Heat and Frost Insulators*, 2015 SKQB 204 (CanLII) [*Northern Industrial QB*].

[40] There, Scherman J. recounted the union's argument that the voting date could have been selected on the basis of any number of events, but that only one of those events, the mailing of the ballots, would not vary according to the individual employee. The other events were variable and therefore likely to undermine the clarity achieved by selecting the mailing date.

[41] Scherman J. found that, in defining the eligibility rule, it was reasonable for the Board to have considered policy implications and practical factors, including the benefit of adopting a bright line rule. More particularly, he noted that the Board's policy had the effect of decreasing the opportunity for employers to attempt to influence the outcome of the vote:

> *[31] …The Board was entitled to consider policy implications in its choice of voting date. The policy consideration the Board enunciated logically operates so as to support the Board's decision to select the ballot mail-out date as the date of the vote. Its decisions on policy considerations are entitled to particular deference by me. By stipulating that the ballot mail-out date (the earliest of the possible dates) as the vote date, the Board decreased the opportunity for interventionist employers to attempt to influence the vote outcome by strategic transfers.*

[42] In *Atco Structures & Logistics Ltd v Unite Here, Local 47*, 2014 CanLII 76053 (SK LRB) [*Atco Structures*], the Board again considered the eligibility rule, and underlined the same policy rationale as had been described in the *Northern Industrial* cases:

> *[47] The Board has determined in International Association of Heat and Frost Insulators and Allied Workers, Local 119 v. Northern Industrial Contracting Inc.,[8] that employees who are employed on the date of application and who remain employed when the voting process commences, that is, the date ballots are mailed to employees, are eligible to vote.[9] Based upon that determination, Ms. Stocken was eligible to vote.*
>
> *[48] The Employer argues that we should reconsider this rule. We would decline to do so. It is important to have a rule that determines eligibility to vote on mail-in ballots. The rule is intended to prevent mischief by Employers in transferring or laying off employees during the voting process. The test, as noted in paragraph 28 of the decision, is an imperfect test. Nevertheless, as noted therein, it remains as the best means for this Board to promote the twin goals of democracy and predictability.*
>
> *[49] For the benefit of the labour relations community, there must be a "bright line" test for eligibility to vote. If the Board vacillates or does not specify the rule, the result is both uncertainty and the necessity to litigate every different factual situation which may arise. That does not promote either predictability or judicial economy.*

[43] The timeline in *Atco Structures* is similar to the timeline in the current case. In *Atco Structures*, the ballots were mailed one day, and one of the employees worked for the last time on the next. The Board found that this employee was eligible to vote.

[44] Vent Pro insists that the Board should apply the substantial connection test, as per *Canora Ambulance*, and find that only one employee was substantially connected to the workplace and eligible to vote. However, *Canora Ambulance* involved the potential "sweeping in" of employees, and it was in that context that the substantial connection test was applied. There, the certification application preceded an amalgamation and successorship. Applying the substantial connection test, the Board considered whether the employees at one location would be swept in or, instead, were sufficiently substantially connected such that they were eligible to vote on the representation question. In a successorship scenario, the substantial connection test ensures the enfranchisement of employees who have the threshold connection. Vent Pro appears to be urging the disenfranchisement of employees who it believes do not have the threshold connection, but in a different context in which there is a different test.

[45] To modify the test in the manner suggested by Vent Pro would invite the mischief that the Board was attempting to avoid when it established the bright line rule. It would permit the parties to lead evidence about the date that voting occurred or did not occur in the context of a mail-in vote. This would undermine the existing clarity and predictability in the conduct of the vote and

would be counterproductive to the maintenance of a system designed to facilitate the timely resolution of certification applications.

[46] The ensuing unwieldiness is demonstrated by considering a few questions. What is the Board to infer from the evidence around the August 24 date? Does this mean that all packages were received on the same date? If not, is the Board to deal with this one employee differently from all of the others? If so, should the Board expect in future hearings to receive evidence from voters about the receipt of their packages? If not, should the Board be taking into account standard postal delivery dates?

[47] In the Board's view, there is significant value in adopting and maintaining clear and consistent policies with respect to the conduct of the vote. The resulting predictability assists the parties in planning, resolving disputes, and facilitating the certification process. In certifications, timeliness is of utmost importance to the fulfillment of employees' rights, and is an important guiding principle in the Board's voting policies. As expressed in *Atco Structures*, it does not advance the Board's objectives to invite litigation on every fact situation that might arise.

[48] Therefore, the employees who were employed on August 21, 2020, the date that the ballots were mailed out, are eligible to vote. The fact that the employees might have received their ballots after this date does not change the analysis.

[49] Next, in *Northern Industrial No. 2*, the Board made an important policy statement about its approach to circumstances in which an employer has unilaterally transferred an employee working within the scope of a bargaining unit after a certification application has been filed:

> *[26] … Secondly, for policy reasons, we are unwilling to accept that an employer can unilaterally transfer employees working within the scope of a proposed bargaining unit after a certification application has been filed and that such a transfer can be sufficient to disentitle the subject employees from participation in the representational question. While there are undoubtedly a variety of valid reasons for transferring employees from one project to another and sometimes such transfers occur suddenly, in our opinion, there is also a non-trivial potential that some employers could be motivated to transfer certain employees from one protect* [sic] *to another prior to the conduct of a representational vote in a desire to influence the outcome of that vote. Rather than requiring the parties to call evidence and have this Board differentiate between valid business reasons and anti-union animus, it makes far more sense for this Board, as a matter of policy, to disregard unilateral transfers by employers of otherwise eligible employees that occur after a certification application is filed with the Board in determining who is eligible to participate in the representational question and who is not.*

[50] The Union says that Howat's initial lay-off is a clear and direct act of retaliation. That evidence, along with the evidence of anti-union animus, should be treated by the Board like a

unilateral transfer. In *Northern Industrial*, the Board commented that unilateral transfers of employees who are otherwise eligible should be disregarded, and those employees should be permitted to vote. This approach is preferable over requiring a union to call evidence and requiring the Board to differentiate between valid business reasons and anti-union animus. While there is no unilateral transfer here, the anti-union conduct should result in the Board treating the second round of lay-offs in an equivalent fashion.

[51] The Union also relies on *Saskatchewan Government & General Employees' Union v Valley Hill Youth Treatment Centre Inc*., 2013 CanLII 98136 (SK LRB) [*Valley Hill*], in which the Board found that the employer violated clause 11(1)(e) of *The Trade Union Act* for having terminated the employment of the organizer of the union drive taking place within the workplace. There, the Board noted at paragraph 56 that employers are expected to "conduct themselves with an appropriate degree of balance and with due respect for the right of employees to determine their own destiny under the Act".

[52] The Union asks the Board to find that the lay-offs on August 20 were tainted with anti-union animus. However, while Despins' reaction to the union organizing drive was egregious, he sought out and received advice and then corrected his behavior. His behavior deserves rebuke, but it does not mean that the Board should disregard the surrounding evidence. This was a job of short duration. By August 20, the work orders were essentially spent. The two individuals who were in charge of the work orders, plus an additional employee, were laid off on the same date, on August 20. Other than the clean-up, the remaining work was minimal; it could not be performed in the absence of materials. It would have to be performed at a later shutdown.

[53] There is no probative pattern in terms of the union affiliation of the employees and the order in which they were laid off. Instead, the lay-offs on August 20 included the two individuals in charge of the work orders, which makes sense under the circumstances. The lay-offs on August 21 included additional employees with union affiliations. The Board is not able to draw an inference that anti-union animus was behind the second set of lay-offs. Nor is there evidence that the job was terminated prematurely.

[54] For the foregoing reasons, the Board finds that only the three employees who remained employed as of August 21, 2020 are eligible to vote in the representation question (Hofstra, Cochrane, and Sklar).

[55] Given the Board's conclusion on the issue of eligibility, it is not necessary to decide the issue of the appropriateness of a single-person bargaining unit. However, single person bargaining units, especially in the construction industry, are not uncommon. For this reason, we provide the following observations.

[56] The Board's recognition of single person bargaining units is consistent with the overall purpose of Part VI, expressed in subsection 6-4(1), being that "[e]mployees 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". The definition of "unit" in Part VI is: "'unit' means any group of employees of an employer or, if authorized pursuant to this Part, of two or more employers." In this definition "any group of employees" is distinguished from "any group…of two or more employers". The word "employees" is used in place of the phrase "two or more employers".

[57] The absence of the qualifier "two or more" in respect of the first group reflects a deliberate choice not to restrict "any group of employees" to a particular size. This interpretation is supported by subsection 6-22(2), which states that a vote by secret ballot is not required among employees in a bargaining unit "consisting of two employees or fewer". The Board must assign meaning to the phrase "or fewer"; otherwise, it is superfluous. Only a bargaining unit of one is fewer than two.

[58] In conclusion, the Board makes the following Orders:

(a) That the ballots held in the possession of the Board Registrar pursuant to the Direction for Vote issued on August 21, 2020 in the within proceedings be unsealed and the ballots of the eligible employees be tabulated in accordance with *The Saskatchewan Employment (Labour Relations Board) Regulations*.

(b) That the result of the vote be placed in Form 21, and that form be advanced to a panel of the Board for its review and consideration.

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

DATED at Regina, Saskatchewan, this **25th** day of **February, 2021.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson