Saskatchewan
Labour Relations Board

AMALGAMATED TRANSIT UNION, LOCAL 615, Applicant v BATTLEFORDS TRANSIT SYSTEM, Respondent

LRB File Nos. 010-22 and 016-22; October 28, 2022
Chairperson, Susan C. Amrud, K.C.; Board Members: Don Ewart and Phil Polsom

For Amalgamated Transit Union, Local 615: Simon Blackstone
Alec Stromdahl

For Battlefords Transit System: Brent Matkowski

Application for bargaining rights – Employee on sick leave with continuing tangible connection to workplace entitled to vote – Previously casual employee not proven to be on sick leave, no continuing tangible connection to workplace, not entitled to vote – Employee who commenced work five days after certification application filed not entitled to vote.

Application for bargaining rights – Once vote is held, that is proper test of employee wishes – Retrospective evaluation of whether 45 percent support initially filed not necessary or appropriate.

Unfair Labour Practice – Section 6-5 and clauses 6-62(1)(a), (g) and (i) of *The Saskatchewan Employment Act* – Employer added warning to employee contact list that it was not to be shared, after it was shared with Union organizers – Employer revised schedule to remove hours of work from some employees after hiring additional employee – Employer asked employees to complete questionnaire respecting health benefits – Onus on Union – Union did not prove interference with employees of reasonable intelligence, resilience and fortitude in exercise of Part VI rights – Application dismissed.

Unfair Labour Practice – Clause 6-62(1)(b) of *The Saskatchewan Employment Act* – Employer did not interfere with administration of Union – Integrity of Union not threatened – Application dismissed.

REASONS FOR DECISION

Background:

[1] Susan C. Amrud, K.C., Chairperson: These Reasons for Decision address two applications filed with the Board by Amalgamated Transit Union, Local 615 ["Union"] with respect to Battlefords Transit System ["Employer"]. The first application, filed on January 26, 2022, is an Application for Certification[1]. The second application, filed on February 7, 2022, is an Unfair

[1] LRB File No. 010-22.

Labour Practice Application[2] alleging that the Employer contravened section 6-5 and clauses 6-62(1)(a), (b), (g) and (i) of *The Saskatchewan Employment Act* ["Act"].

[2] Pursuant to an Application for Pre-hearing Production of Particulars or Documents or Things[3] filed by the Union, the Board issued an Order and Reasons for Decision on March 29, 2022 requiring the Employer to disclose numerous documents to the Union.

[3] The certification application and unfair labour practice application were heard together, by Webex, on April 21 and 22, August 12, September 7 and 13, 2022. The Union called two witnesses who are employees of and bus drivers for the Employer: John Campbell and Allan Medd. The Employer called two witnesses: Liana Clinton, the manager of the Employer, and John Logan, employee of and bus driver for the Employer.

[4] With respect to the certification application the parties disagree about the number of employees in the potential bargaining unit. The Union says there are 7 employees; the Employer says there are 10 employees. The three people at issue are Shelly Potts, Lionel Boyer and John Logan. A vote was held by mail-in ballot commencing March 16, 2022 and all 10 potential employees were given an opportunity to vote. The ballots received are sealed pending the determination of who was entitled to vote.

[5] In the unfair labour practice application the Union alleges interference by the Employer in the organizing drive through a threat of discipline, removing hours of work from Union supporters, and offering an inducement in the form of health benefits.

Evidence:

[6] Determining the evidence was challenging in this matter. The Board did not find Medd to be a reliable witness. He changed his evidence during his testimony. Clinton, also, was not a reliable witness. She appeared, in her evidence and in her interactions with her employees, to tell people what she thought they wanted to hear. She also changed her evidence during her testimony. Set out below are the Board's findings respecting evidence. In arriving at these conclusions, the Board analyzed the evidence presented at the hearing, in light of the principles relied on by the Board in *Hartmier v Saskatchewan Joint Board Retail Wholesale and Department Store Union and Retail, Wholesale and Department Store Union, Local 955* [4] ["*Hartmier*"].

---

[2] LRB File No. 016-22.
[3] LRB File No. 037-22.
[4] 2017 CanLII 20060 (SK LRB) at para 170.

[7] The Employer operates a public transit service in the city of North Battleford and a paratransit service in North Battleford and the town of Battleford. It employs a manager (Clinton), office administrator (Susan Boyer)[5] and several drivers.

[8] Clinton started work as manager of the Employer on March 1, 2021. At that time she received 1.5 days training. She testified that the Employer's board of directors is a policy board; she makes the day-to-day decisions on operations, hiring, scheduling, etc. She testified that she has not previously worked in a unionized workplace and was unfamiliar with what her responsibilities were as a manager in this situation. On the other hand, she voluntarily disclosed that she had obtained legal advice on the issue as early as January 13, 2022.

[9] Medd started work for the Employer on August 3, 2021. He is the only full time driver. He was involved in the Union organizing drive. He spoke to the other drivers about unionizing. According to Medd, one driver, Kevin Spicer, initially expressed support, but on January 7, 2022 advised Medd he had changed his mind and was going to alert Clinton to the organizing drive. Clinton admitted that Spicer advised her on January 11th that Medd was trying to organize a union. Susan Boyer told her the same thing on January 12th.

[10] The drivers are paid either $18 or $19/hour. They receive no benefits. Medd testified that he has been raising the issue of benefits with Clinton since his first day of work. She advised him that when she finished her probation, she would try to get the employees benefits. This would require board approval. Clinton testified that obtaining benefits for the employees was also a priority for her. She informally raised the issue of benefits with the Employer's board in October 2021. One of the board members suggested she contact the City of North Battleford human resources office. She testified that she made that call a couple of months later. The information she received from them was that their plan was not appropriate for the drivers, and they advised her to try the Chamber of Commerce. She testified that she eventually connected with the person in charge of that plan. An email dated January 25, 2022 to Clinton from the person at Sun Life who could provide her with information about benefits plans started with the comment: "Thanks for reaching out today."[6] It was clear from the email that this was the first time she had contacted him. He asked for some information, and she prepared a questionnaire for the employees to canvas their interest. On January 27, 2022, Clinton texted the drivers advising them she was

[5] She is also Lionel Boyer's spouse.
[6] Exhibit E21.

going to have the Chamber of Commerce look at putting together some possible health care packages for them. She asked them to fill out the questionnaire.[7]

[11] When the Employer's budget for 2022 was approved in October 2021, it contained no money for benefits. The evidence was unclear about whether this would affect Clinton's ability to move forward with a health care plan. On January 25, 2022, when Medd asked Clinton about his previous request to be paid additional money for training new drivers, she replied: "the budget this year is extremely tight and I already plan to request that the most recent hires be brought up to the $19/hr cap and that we raise the wage cap as well"[8]. There was no mention of benefits.

[12] The Employer was in the practice of posting in the workplace a contact list of names and phone numbers of employees. Medd provided this information to the Union so that they could contact employees about the organizing drive. Two drivers and Susan Boyer complained to Clinton about their phone numbers being shared with the Union. Subsequently Clinton posted a new contact list[9] to which the following comment had been added:

> ***THIS INFORMATION IS FOR INTERNAL USE ONLY.***
>
> *YOU MAY NOT GIVE OUT PERSONAL CONTACT INFORMATION TO THIRD PARTIES AND, AS AN EMPLOYEE OF BATTLEFORDS TRANSIT SYSTEM, YOU SIGNED AN OATH OF CONFIIDENTIALITY RESTRICTING YOU FROM DISCLOSING PERSONAL INFORMATION RECEIVED THROUGH YOUR POSITION WITH BATTLEFORDS TRANSIT SYSTEM.* ***FAILURE TO UPHOLD THIS POLICY WILL RESULT IN DISCIPLINARY ACTION.***

[13] When employees commence work with the Employer they are required to sign an Oath of Confidentiality. When Clinton commenced work as manager, the Oath of Confidentiality[10] read as follows:

> *I RESPECT THE PRIVACY OF THE PEOPLE I SERVE AND THE CONFIDENTIAL INFORMATION PERTAINING TO THE BATTLEFORDS TRANSIT SYSTEM(S). I USE INFORMATION GAINED IN PROFESSIONAL RELATIONSHIPS IN A RESPONSIBLE MANNER.*
>
> *CONFIDENTIAL INFORMATION HAS BEEN DEFINED AS THOSE PERSONAL FACTS OR CONDITIONS PERTAINING TO ANY CLIENTS AND THEIR SITUATIONS THAT HAVE BEEN COMMUNICATED TO ME OR MY COMPANY. ANY SUCH INFORMATION PERTAINING TO CLIENTS AND THE OPERATION OF THE BATTLEFORDS HANDI-BUS WILL BE HELD IN THE STRICTEST CONFIDENCE BY ME AND MY COMPANY.*

---

[7] Exhibit U3.
[8] Exhibit U6.
[9] Exhibit U4.
[10] Exhibit E14.

> *IT IS THE RIGHT AND EXPECTATION OF OUR CLIENTS THAT SUCH INFORMATION IS RESPECTED AND SAFEGUARDED BY ME AND MY COMPANY.*

[14] In response to the complaints she received from three employees about the sharing of their phone numbers with the Union, Clinton revised the Oath. The changes found in the new version are as follows:

> *I RESPECT THE PRIVACY OF THE PEOPLE I SERVE AND THE CONFIDENTIAL INFORMATION PERTAINING TO THE BATTLEFORDS TRANSIT SYSTEM(S). I USE INFORMATION GAINED IN PROFESSIONAL RELATIONSHIPS IN A RESPONSIBLE MANNER.*
>
> *CONFIDENTIAL INFORMATION HAS BEEN DEFINED AS THOSE PERSONAL FACTS OR CONDITIONS PERTAINING TO ANY EMPLOYEES AND CLIENTS AND THEIR SITUATIONS THAT HAVE BEEN COMMUNICATED TO ME OR MY COMPANY. ANY SUCH INFORMATION PERTAINING TO EMPLOYEES, CLIENTS AND THE OPERATION OF THE BATTLEFORDS ~~HANDI-BUS~~ TRANSIT SYSTEM BUSES WILL BE HELD IN THE STRICTEST CONFIDENCE BY ME AND MY COMPANY.*
>
> *IT IS THE RIGHT AND EXPECTATION OF OUR EMPLOYEES AND CLIENTS THAT SUCH INFORMATION IS RESPECTED AND SAFEGUARDED BY ME AND MY COMPANY.*[11] [underlined words added; crossed out words deleted]

[15] Clinton testified that Potts stopped working in November 2021; the handi-bus schedules for November 2021 to March 2022[12] indicate her last day of work as November 19, 2021. Her time sheet for the following week (November 22nd to 26th)[13] is marked "sick" for November 22nd, 24th, 25th and 26th, but working three hours on November 23rd. This information is confirmed by the Record of Employment completed by the Employer for her on December 9, 2021, which also indicated the reason for issuing it was "illness or injury", and the expected date of recall was unknown.[14] The Employer filed text messages and a time sheet indicating that Potts worked seven hours on April 6, 2022.[15] Clinton testified that Potts has worked additional shifts since then.

[16] Lionel Boyer's last day of work as a driver was November 26, 2021. Medd testified that Clinton told him she had terminated Boyer because of an incident involving Medd and Boyer. On November 9, 2021, Clinton texted Medd, talking about Lionel Boyer: "I would let him go right now if I didn't need him for, like, two more weeks. I understand that he's problematic which is why I have been scrambling to hire someone, and I did this afternoon. He starts on Monday and will take over Lionel's shifts once he's trained".[16] The transit schedules filed in evidence for October

---

[11] Exhibit E19.
[12] Exhibit E35.
[13] Exhibit E49.
[14] Exhibit E51.
[15] Exhibits E52 and E53.
[16] Exhibit U9.

2021 to April 2022 indicate his last day of work to be November 26, 2021.[17] In cross-examination, when asked if he was on sick leave, Clinton testified that she just stopped scheduling him. She agreed he would be unavailable for an indeterminate period of time. She did not ask for any medical documentation from him, he just left, and she did not write anything down. Subsequent lists of employees do not include his name. Unlike Potts, the Employer did not disclose a Record of Employment or Medical Certificate for Lionel Boyer.

[17] Logan started working as a transit driver on January 31, 2022. His offer of employment and acceptance were dated January 25, 2022. Clinton sent a text to the drivers' group chat on January 25, 2022 at 10:11 am advising "Great news, everyone! We will have a new transit driver starting on Monday!"[18] Clinton indicated that she was desperate to hire another driver because they were so short-staffed. However, when he was hired, she removed hours of work from three drivers who were already only working part-time, and who were known to her to be Union supporters. Campbell testified that when he was hired, Clinton told him he would be working Monday to Friday, five hours/day. He started work on December 24, 2021. At the end of January 2022, after Logan was hired, he lost his Friday shift; Clinton gave it to Logan. At the same time, shifts were removed from two other drivers, and those hours were also given to Logan. Clinton denied Campbell's claim that she guaranteed him any particular hours, and his letter of offer indicates: "This is a part-time position with no set number of hours per week"[19].

[18] Logan's spouse, Debbie Logan, is a member of the Employer's board. Clinton regularly talks to Debbie Logan about work issues. She was evasive about whether she discussed the Union organizing drive with Debbie Logan. Though Clinton advised Medd that Logan had experience driving large vehicles, this did not turn out to be accurate information. There was conflicting evidence before the Board respecting when and why Logan decided to apply for this job.

Argument on behalf of Union:

Eligibility to vote:

[19] The Union relied on *Platinum Track Services Inc. v Construction and General Workers' Union*[20] ["*Platinum Track Services*"], which stated that to be eligible to participate in a certification vote, an individual must be an employee both on the date of the certification application and on

[17] Exhibit U7.
[18] Exhibits U5 and E5.
[19] Exhibit E1.
[20] 2020 CanLII 19807 (SK LRB).

the date of the vote. The Union acknowledged that, in *Platinum Track Services*, the Board went on to identify situations in which exceptions may be made to that general test. An employee may still be eligible to vote if they are absent due to reasons such as being on sick leave. However, in those cases, the Board must determine whether the employee has a continuing interest in the representation issue that is sufficient to justify their participation. Important factors to consider in this analysis are length and regularity of employment.

[20] The Union argues that three people were not employed by the Employer on the date the certification application was filed and on the date of the vote or did not possess a sufficiently tangible relationship and monetary connection to the Employer to render them eligible to vote: Lionel Boyer, Potts and Logan.

[21] The Union argues that Lionel Boyer is not eligible to vote because he is no longer employed by the Employer, as of November 26, 2021. In this regard it points to the following evidence. On November 9, 2021 Medd complained to Clinton about Boyer's misconduct. She advised Medd that she was keeping Boyer on for two more weeks, until the person she had hired that day to replace him was fully trained. A new driver began his first day of work and training on November 22nd; Boyer's last day of work was November 26th. Termination is consistent with her representations to Medd on November 9th. There is no evidence that Clinton requested medical information from Boyer with a return to work date at the time of his departure; there is no evidence that Clinton issued a Record of Employment indicating Boyer was on sick leave; Exhibit E48, confirming Boyer was scheduled for surgery more than three months after his last day of work, is undated, is not addressed to the Employer and does not provide the kind of information an employer would require to determine eligibility for sick leave. Clinton testified that Boyer remains a casual employee on sick leave. Even if the Board finds he is a casual employee, at the time of the certification application and the vote he did not have a sufficiently tangible relationship or monetary connection to the Employer to justify his participation in the vote.

[22] In *United Food and Commercial Workers, Local 1400 v 303567 Saskatchewan Ltd* [21] ["*303567 Sask*"], the Board noted that casual employees may be eligible to vote if they have a sufficiently tangible relationship and monetary connection with the Employer at the time the Union's certification application is filed with the Board. It noted that the Board has looked particularly at real employment connection and monetary interest in the outcome. The Board applied a test of working approximately ten percent of full-time hours in the two months preceding

[21] 2013 CanLII 98138 (SK LRB) at para 85.

the vote, to determine whether the disputed employees had a sufficiently tangible connection to the workplace. If they were working less than that, the Board stated: “their connection to the workplace is too tenuous to justify their participation in the vote”.

[23] The Union calculates that, over the course of 2021, Lionel Boyer worked eight percent of the hours of a full-time employee. He worked no hours in the four months preceding the vote; according to his time sheets, his last day of work was November 26, 2021. His connection to the workplace is weak and insubstantial. As a casual employee who is not working, he should be excluded.

[24] With respect to Potts, the Union argues that, since she worked one day in April 2022, for seven hours, this is evidence that she is no longer on sick leave. Medically, she is capable of working but she is not being scheduled. At best she is a casual employee. She is only called to work on an as-needed basis when the Employer needs to cover a shift. This constitutes an insufficient connection to the workplace to justify participation in the vote.

[25] Logan was not yet employed as of the date the certification application was filed, so he is not eligible to vote. His employment commenced on January 31, 2022, his first day of work. In support of this argument the Union relies on *Aebig v Henschel*[22]:

> *. . . the relationship of master and servant is constituted by virtue of an agreement between them respecting the service, coupled with the actual entering into the employment. Up until the time the servant actually enters the employment of the master, the agreement remains merely an agreement to create the relationship of master and servant.*

[26] It also relied on *Kidd Bros. Produce Ltd. and UFCW, Local 1518, Re*[23] [“*Kidd Bros Produce*”]:

> *Kelly May Penner, supra*, *says it may not be necessary in all cases that a person begin work to achieve employee status. In Brinco Coal Mining Corporation, supra*, *the Council found an individual not an employee as of the date of the application as he had not started work nor taken any action in accordance with an employment contract prior to the date of application. In this case, I find the commencement of work to be a requirement to achieve employee status under the certification provisions of the Act. To find otherwise would render illusory the union's right to organize the employees and file an application as of a date set in the legislation.*

[22] 1941 CarswellSask 21 (SK DC), at para 7.
[23] 1993 CarswellBC 3707 (BC LRB) at para 26.

[27] The Union cautioned that, if signing an employment contract is sufficient to trigger eligibility to vote, employers could artificially enlarge bargaining units. Logan was not employed until he started work on January 31, 2022. In the alternative, his hiring is fatally tainted by anti-union animus, as described more fully below.

Unfair labour practices:

[28] The Union argues that the Employer did not remain demonstrably neutral with respect to the organizing drive. Its communications with and treatment of employees were infused with anti-union animus.

[29] The Union relies on *International Brotherhood of Electrical Workers Local Union 2038 v Clean Harbors Industrial Services Canada*[24] ["*Clean Harbors*"], which held that threats of discipline motivated even in part by anti-union animus constitute an unfair labour practice.

[30] In *Legary v United Food and Commercial Workers Union*[25], the Board made it clear that, while an employer may communicate facts and its opinions, those communications may not contain an anti-union animus or amount to a campaign against a union.

[31] The Union argues that the Employer threatened to discipline employees for sharing contact information with Union organizers. It stripped pro-Union employees of hours of work. These actions constituted unlawful use of coercion and intimidation to discourage support for the Union, contrary to section 6-5 and clauses 6-62(1)(a), (b), (g) and (i) of the Act.

[32] In Clinton's evidence she said that Union organizers were harassing employees by giving out employee contact information in order for the Union to phone and text those employees. She characterized a simple phone call as harassment. The Employer's response to employees receiving these phone calls was to add a statement to the employee contact list threatening discipline for sharing information with third parties. This threat of discipline, the Union argues, was issued for the purpose of suppressing Union communications. Clinton's view that Union organizers communicating with employees constituted harassment that justified a threat of discipline constitutes an Employer action motivated by anti-union animus. The Employer banning the sharing of contact information with Union organizers is tantamount to the Employer banning all communication with Union organizers. Threatening to discipline employees for exercising their rights under the Act to assist the Union in conducting an organizing drive constitutes a blatant

[24] 2014 CanLII 76047 (SK LRB) at para 92.
[25] 2020 CanLII 95887 (SK LRB).

reprisal and an unfair labour practice contrary to subsection 6-4(1) and clause 6-62(1)(a) of the Act. Any argument that sharing the contact information with the Union representatives is contrary to the Oath of Confidentiality is also contrary to the Act. The Employer cannot require their employees to contract out of their statutory rights.

[33] The Union referred to the five factors that are to be considered in reviewing the Employer's communications, as set out in *United Food and Commercial Workers, Local 1400 v Saskatoon Co-operative Association Limited* [26]:

> *The Board in Securitas Canada provided a guide for assessing whether a communication is caught by clause 6-62(1)(a), consisting of the following factors:*
>
> 1. *Evidence, if any, of a particular vulnerability of the subject employees to the views and opinions of their employers. […]*
> 2. *The maturity of the bargaining relationship between the parties. […]*
> 3. *The context within which the impugned communication occurred. […]*
> 4. *The evidentiary basis for and value of the impugned communication. […]*
> 5. *The balance or neutrality demonstrated by an employer in communicating impugned information. […]*

[34] In applying those factors to this matter, the Union states:

1. A threat of discipline is more than just an opinion regarding the downsides of unionization. It is an action to which every employee is vulnerable.

2. The bargaining relationship between the parties here is at the earliest stage possible, it is unformed and immature. Employees are at the most sensitive stage. Communications of this kind are accordingly highly injurious.

3. In the middle of an organizing drive, veiled threats to job security have great impact.

4. The communication in issue here is explicitly in writing.

5. No neutrality was demonstrated.

[35] In *United Association of Journeyman and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada Local 179 v Yorkton Plumbing & Heating Ltd./yph Mechanical* [27], the Board emphasized that, during an organizing drive, employees are particularly vulnerable to an employer's threats of discipline:

> *The Union relies on a series of cases to demonstrate that an unfair labour practice can be made out on the basis of: veiled threats which would have caused employees to conclude*

[26] 2020 CanLII 10516 (SK LRB) at para 73.
[27] 2019 CanLII 107150 (SK LRB) at para 16.

> *that supporting a union would endanger their job security; threats that an employer would cease carrying on its business if the union was certified; and employer discrimination in the availability of work or promotions, in response to union activity. The Union argues further that taking steps to implement such threats in the absence of a valid business purpose is also impermissible. The Board agrees that all of the foregoing are legitimate examples of potential unfair labour practices. However, each case must be considered on the basis of the particular facts presented in evidence.*

[36] Threatening discipline for sharing employee contact information with the Union is more than a veiled threat to job security: it is a direct threat of suspension or termination for assisting the Union in the organizing drive. The threat was issued the day after the certification application was filed and after Clinton became aware of the organizing drive. There is no evidence that the threat of discipline was triggered by communication with any other third party. As such, the threat is tainted with anti-union animus and is a breach of section 6-5 and clauses 6-62(1)(a), (b), (g) and (i) of the Act.

[37] The Union also points to the evidence respecting Campbell's hours of work. He gave evidence that Clinton guaranteed him work of five hours a day, Monday to Friday. While Clinton denies this, he had those hours until Logan arrived. The Union referred to *Saskatchewan Government and General Employees' Union v Quint Development Corp.*[28]:

> *Part VI confers benefits on employees, and must accordingly be given a generous and purposive interpretation. The Board finds that the ordinary meaning of the clause, in the context of the labour relations rights protected under Part VI of the Act, extends beyond the specific text in an employee's contract of employment, and includes terms or conditions of employment beyond those which are explicitly embedded in an employment contract. Given this conclusion, the Board will consider both the explicit and implicit terms and conditions of employment.*

[38] The Union urged the Board to find that Campbell's evidence on this issue was more credible than Clinton's, relying on the factors for assessing trustworthiness of evidence adopted by the Board in *Hartmier*. In the Union's view, the purpose of the Employer's decision to hire Logan was to dilute the vote and negatively impact the conditions of employment of Union supporters, contrary to clause 6-62(1)(g) of the Act. Clinton's text messages disclosed that she found the Union organizing drive deeply irritating.

[39] Finally, the Union argues that the Employer offered various inducements during the organizing drive, specifically the possibility of a benefit plan. On January 27, 2022, one day after the certification application was filed, the Employer provided the employees with a questionnaire regarding what kind of benefits they would like covered in a potential health benefit plan. This, the

[28] 2019 CanLII 79286 (SK LRB) at para 177.

Union argues, constitutes an unlawful inducement contrary to section 6-5 and clauses 6-62(1)(a), (b) and (i) of the Act. The Employer knew that its employees greatly desired such a plan and as such, their views regarding the Employer in the context of an organizing drive were particularly vulnerable to this form of inducement. The offer of a highly sought-after health care plan would have a disproportionate impact on an employee's opinion regarding their need for the Union[29].

Argument on behalf of Employer:

Eligibility to vote:

[40] The Employer referred to *Sheet Metal Air Rail Transportation (SMART), Local 296 v Vent Pro Mechanical Inc.*[30] which establishes that the Board's standard approach to determining a person's eligibility to vote is that they must be employed both on the date the certification application is filed and on the date of the vote. When voting is conducted by mail-in ballot it is deemed to have commenced on the date that the ballots are mailed to the employees. This means that people who were employees on January 26, 2022, the date the application was filed, and on March 16, 2022, the date the ballots were mailed to employees, are eligible to vote.

[41] It relied on *Saint John Fire Fighters Assn., Local 771 v Saint John (City)*[31] ["*Saint John*"] to argue that an employee who has signed an employment contract with an employer before a certification application is filed has an interest in the vote. In that case, an arbitration board held that a person who was a party to a contract under which he was "in the service" of the employer was an employee, even though he had not yet begun rendering service for compensation.

[42] With respect to the question of whether a casual employee has a sufficient connection to the workplace to entitle them to vote, the Employer also relied on *303567 Sask*. The Employer argues that employees who work on a casual basis who have a reasonably tangible employment relationship and monetary connection to the Employer have a sufficient interest in the terms and conditions of employment to establish an interest in the representational question and an entitlement to vote.

[43] Employees who are temporarily away from the workplace for medical or other protected reasons can be eligible to vote. In *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Brown Industries (1976) Ltd., Pro-More Industries Ltd. and Lo Rider Industries*

[29] *Moose Jaw Firefighters' Association No. 553 v City of Moose Jaw*, 2019 CanLII 98484 (SK LRB).
[30] 2021 CanLII 13649 (SK LRB).
[31] 2003 CanLII 89647; 2003 CarswellNB 390 (NB LA) at para 57.

Inc.[32], an employee had been receiving benefits under the company long-term disability plan for over a year. At the time of the certification application his prognosis for returning to work was poor. The Board held that the employee was eligible to vote. To cease being an employee there must be a positive act or decision by the Employer.

[44] The Employer also argues that it is required by what it describes as the general principles of *The Saskatchewan Human Rights Code, 2018* to provide accommodation of disabilities to the point of undue hardship. This, it argues, can specifically include continuing employment during illness or injury.[33] This means that since the Employer would have a duty to accommodate an employee for a medical leave, the employee has a sufficient connection to the workplace to entitle them to vote while they are on that medical leave.

[45] Applying these principles to the people in question in this matter, the Employer argues that they all qualify to vote.

[46] Potts is eligible because she is on a medical leave with an expected return date of May 24, 2022 (No evidence was led to support the Employer's argument that her expected return date was May 24, 2022 or that she returned on that date); she worked a shift on April 6, 2022; and she received a Christmas bonus in 2021. She has a continuing connection to the workplace.

[47] Lionel Boyer is eligible because he is on a medical leave. The Employer calculated that he worked 52.75 hours in October 2021 and 64.75 hours in November 2021. He has been employed by the Employer since 2015. He received a Christmas bonus in 2021. He has a continuing employment relationship with the Employer.

[48] Logan is eligible because he signed an employment contract on January 25, 2022. On his acceptance and signing of the contract, he became an employee. The determination in *Cavanagh v Canadian Union of Public Employees, Local 1975 and University of Saskatchewan Students' Union*[34] should apply here to provide that the Board should not take into account, in its determination of his eligibility to vote, the fact that Logan's spouse is a member of the Employer's board. There is no evidence that her position affected the Employer's decision to hire him.

---

[32] [1995] 2nd Quarter Sask. Labour Rep. 71, at page 76.
[33] *Hydro-Québec v Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43 (CanLII), [2008] 2 SCR 561. See also section 2-40 of the Act.
[34] 2003 CanLII 62858 (SK LRB).

[49] The Employer argues that, since the Union has admitted that it only filed four support cards, and according to the Employer there are ten eligible employees, the Union has not satisfied the requirement in section 6-9 of the Act that it establish that 45 percent or more of the employees indicated their support for the Union. This, the Employer argues, means that the application should be dismissed, and the ballots destroyed. The Employer acknowledges that the Court of Appeal for Saskatchewan determined that this is not the appropriate procedure, in *United Food and Commercial Workers, Local 1400 v Affinity Credit Union*[35]:

> *[25] Finally, the Board's determination that s. 6(1.1) was not meant to apply retrospectively is reasonable. Once a vote is taken, it would serve no purpose to revisit the decision to order the vote. At that point, the employees have spoken and their wishes should be respected.*
>
> *[26] . . . The 45% threshold set out in s. 6(1.1) was meant to be determined at the time the application is made and on the basis of the evidence filed in support of the application, subject only to the Board's investigation. It was not meant to be determined after a full hearing.*

[50] The Employer argues that the Board should not follow that decision. It argues that the requirement in section 6-9 of the Act to establish 45 percent support is mandatory, whereas the requirement in subsection 6(1.1) of *The Trade Union Act* was not. It also argues that the Court of Appeal's concern with ensuring expediency and timeliness in the taking of the vote can be attained in this matter through the process it proposes.

Unfair labour practices:

[51] The Employer denies having committed any unfair labour practices. All of the Union's allegations, it argues, relate to actions taken by the Employer after January 20, 2022, the date the Union finalized its certification application. This means the alleged actions of the Employer after that date could not have impacted how many support cards the Union put in the mail on January 20, 2022. The majority of the alleged actions took place before the Board sent the certification application to the Employer on January 27, 2022 at 11:52 a.m., in other words, before the Employer was aware of the certification application.

[52] With respect to the sharing of contact information with the Union, Clinton testified that she did not investigate who provided the information to the Union and did not discipline any employees. All she did was clarify that this information was protected by the Oath of Confidentiality. The Employer argues that the evidence does not establish that the confidentiality

---

[35] 2015 SKCA 14 (CanLII).

reminder was added to the contact list to discourage support for the Union. It was added to remind employees about their obligations under an existing workplace policy. It was added in response to privacy concerns raised by other employees.

[53] With respect to the scheduling issue, the Employer relies on *Saskatchewan Government and General Employees' Union v Quint Development Corp.*[36] which, it says, stands for the proposition that if a casual employee who was not guaranteed set hours has those hours reduced, that reduction does not constitute an unfair labour practice contrary to clause 6-62(1)(g) of the Act:

> *[178] Hull was and is employed with Quint as a casual employee with hours which "vary based on workload and funding". These are the explicit terms of Hull's employment. As a casual employee, Hull has no guarantee of hours. The Employer has therefore not discriminated on the basis of an explicit term or condition of employment.*
>
> *[179] Furthermore, there is insufficient evidence to persuade the Board that an implicit term or condition of Hull's employment entitled her to placement on the monthly schedule. Perhaps it was an expectation, but it was not an implicit term or condition. Even if Hull was consistently "pre-scheduled" after January 2017, the hours were still variable and somewhat dependent on external circumstances. Even if the Board could so determine, there is insufficient evidence to persuade the Board that the omission of Hull from the September schedule was conducted with a view to discouraging membership in or activity in or for the Union or participation of any proceeding pursuant to Part VI.*

[54] The Employer argues that the same situation exists in this matter. The employees who lost hours to Logan were not entitled by contract to those hours or implicitly entitled to work those hours. The Employer argues that Logan was hired to address a legitimate operational need.

[55] With respect to the benefits plan, Clinton testified that this was something she had been working toward before the Union organizing drive commenced. She says she raised the issue with the Employer's board informally following their October 2021 meeting. She contacted the city of North Battleford for information about a potential plan and was redirected to the Chamber of Commerce. She communicated with an individual about that plan on January 25, 2022. His questions were sent to employees on the morning of January 27, 2022, before she received the certification application from the Board. Since then, it has not been pursued further.

[56] In *Moose Jaw Firefighters' Association No. 553 v City of Moose Jaw*[37], the Board set out the test for determining if clause 6-62(1)(a) of the Act has been contravened:

---

[36] *Supra* note 28.
[37] *Supra* note 29 at para 104; *International Brotherhood of Electrical Workers Local Union 2038 v Magna Electric Corporation*, 2013 CanLII 74458 (SK LRB).

> *To assess an allegation under clause 6-62(1)(a), the Board considers the likely or probable effect of the conduct on the employees, assuming that the employees are possessed of reasonable intelligence, resilience and fortitude. This is an objective test. The question is whether the City's conduct had the likely effect of interfering with, restraining, intimidating, or coercing an employee or employees in the exercise of a right conferred by Part VI. If the Board is satisfied that the likely effect of the conduct would have been to interfere with, restrain, intimidate, threaten or coerce an employee in the exercise of protected rights, a breach is established.*

[57] With respect to clause 6-62(1)(b), the Employer argues that the Union has not established that it did anything that could be characterized as adversely affecting the Union's independence, threatening its integrity as an organization, interfering with its administration or creating obstacles that make it difficult or impossible for the Union to carry on as an entity devoted to representing employees.[38]

[58] The Employer relies on the following comment of the Board respecting clause 6-62(1)(i), in *Saskatchewan Government and General Employees Union v Lac La Ronge Indian and Child Services Agency Inc.*[39]:

> *The Union correctly points out in its arguments that the test is an objective one which requires that there be evidence that conduct or actions of the employer would affect a reasonable employee in respect to his or her choice of a union. There is no such evidence.*

[59] It also points to *International Brotherhood of Electrical Workers Local Union 2038 v Magna Electric Corporation*[40] which stated:

> *Again, however, we have no objective evidence to show what the effect was on any other employees. The Union argues that the "chilling" effect of the terminations was ipso facto sufficient to demonstrate that employees would, in the face of terminations, continue to organize and rely upon their Section 3 rights. While inference could be drawn from the impact on the other employees of average intelligence and fortitude, we decline to do so absent any direct evidence from other employees as to how they were impacted by the terminations.*

Relevant Statutory Provisions:

[60] The parties referred to the following provisions as being relevant in this matter:

> *6-4(1) Employees have the right to organize in and to form, join or assist unions and to engage in collective bargaining through a union of their own choosing.*
>
> *6-5 No person shall use coercion or intimidation of any kind that could reasonably have*

---

[38] *Saskatchewan Government and General Employees' Union v Saskatoon Downtown Youth Centre Inc.*, 2021 CanLII 19681 (SK LRB).
[39] 2015 CanLII 80539 (SK LRB) at para 46.
[40] *Supra* note 37 at para 62.

the effect of compelling or inducing a person to become or to refrain from becoming or to continue to be or to cease to be a member of a union.

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.*

6-12(1) Before issuing a certification order on an application made in accordance with section 6-9 or amending an existing certification order on an application made in accordance with section 6-10, the board shall direct a vote of all employees eligible to vote to determine whether the union should be certified as the bargaining agent for the proposed bargaining unit.
(2) Notwithstanding that a union has not established the level of support required by subsection 6-9(2) or 6-10(2), the board shall make an order directing a vote to be taken to determine whether a certification order should be issued or amended if:

> *(a) the board finds that the employer or a person acting on behalf of the employer has committed an unfair labour practice or has otherwise contravened this Part;*
> *(b) there is insufficient evidence before the board to establish that 45% or more of the employees in the proposed bargaining unit support the application; and*
> *(c) the board finds that sufficient evidence of support mentioned in clause (b) would have been obtained but for the unfair labour practice or contravention of this Part.*

(3) Notwithstanding subsection (1), the board may refuse to direct the vote if the board has, within the 12 months preceding the date of the application, directed a vote of employees in the same unit or a substantially similar unit on the application of the same union.

6-62(1) It is an unfair labour practice for an employer, or any person acting on behalf of the employer, to do any of the following:

> *(a) subject to subsection (2), to interfere with, restrain, intimidate, threaten, or coerce an employee in the exercise of any right conferred by this Part;*
> *(b) subject to subsection (3), to discriminate respecting or interfere with the formation or administration of any labour organization or to contribute financial or other support to it;*
> *. . .*
> *(g) to discriminate with respect to hiring or tenure of employment or any term or condition of employment or to use coercion or intimidation of any kind, including termination or suspension or threat of termination or suspension of an employee, with a view to encouraging or discouraging membership in or activity in or for or selection of a labour organization or participation of any kind in a proceeding pursuant to this Part;*
> *. . .*
> *(i) to interfere in the selection of a union.*

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

> *. . .*
> *(v) to order, at any time before the hearing or proceeding has been finally disposed of by the board, that:*
>
> > *(i) a vote or an additional vote be taken among employees affected by the hearing or proceeding if the board considers that the taking of that*

> *vote would assist the board to decide any question that has arisen or is likely to arise in the hearing or proceeding, whether or not that vote is provided for elsewhere; and*
> *(ii) the ballots cast in any vote ordered by the board pursuant to subclause (i) be sealed in ballot boxes and not counted except as directed by the board.*

Analysis and Decision:

Onus of proof:

[61] The onus of proof in these matters is on the applicant, the Union.[41] The evidence must be sufficiently clear, convincing and cogent.

Eligibility to vote:

[62] As both parties noted, in determining whether Potts, Lionel Boyer and Logan were eligible to vote, the Board must be satisfied that they were employed both on the date the certification application was filed and on the date of the vote. When voting is conducted by mail-in ballot the Board has determined that it is deemed to have commenced on the date that the ballots are mailed to the employees. In this matter this means that people who were employees on January 26, 2022, the date the application was filed, and on March 16, 2022, the date the ballots were mailed to employees, are eligible to vote.

[63] The Board recently confirmed the test, and the rationale for the test, in *Platinum Track Services*:

> *[32] Before issuing a certification order in accordance with section 6-9, the Board shall direct a vote of all employees eligible to vote. The Board has developed its own criteria for determining voter eligibility, namely, that an individual must be an employee both on the date of the Certification Application and on the date of the vote. These two prerequisites are designed to encourage voting on behalf of those with a continuing interest in the representational question and a sense of ownership over the outcome of the vote. In this system, there is a degree of confidence that the results of the vote legitimize the union's representative status, solidify the relationship between the union and employer, and promote a constructive climate for collective bargaining negotiations. It is this panel's view that any departure from these criteria should be motivated by similar principles.*
>
> *[33] In Con-Force Structures Ltd. (Re), [1992] SLRBD No 40 ["Con-Force"], the Board had to consider whether to depart from the usual rule, and to take into account the existing recall rights, based in the collective bargaining agreement, of laid-off employees. In so considering, then Vice-Chairperson Hobbs outlined the principles that underlie the voter eligibility criteria, at 3 to 4:*

[41] *Button v United Food and Commercial Workers, Local 1400*, 2011 CanLII 100501 (SK LRB); *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Sakundiak Equipment*, 2011 CanLII 72774 (SK LRB).

> *The Board accepts that the rules it has developed achieve neither perfect predictability nor perfect democracy. They are necessarily, at best, a reasonable compromise intended to give effect to s. 3 [of The Trade Union Act, now subsections 6-4 and 6-13(2)(a) of the Act] by ensuring that the representation question is left in the hands of the people who have a legitimate interest in the issue while, at the same time, providing the direction these people require to convert s. 3 rights into a practical reality. These rules are not entirely inflexible, but there is a substantial onus upon any party who seeks to have the Board depart from them.*
>
> *In Saskatchewan, the general standard for determining voter eligibility when a representation vote is ordered, is that a person must be an employee on the date that the application is filed and on the date of the vote. In the construction industry, this rule is applied strictly and literally, in recognition of the transitory relationship between employers and employees in that industry. Outside the construction industry, there has been some softening of this rule. Some of the more common situations where the Board might make an exception to this rule are where an employee is on Workers' Compensation, maternity leave, sick leave, education leave, or on temporary lay-off. It is a factual question in each of these cases whether an employee's circumstances are such as to justify his participation…*

In *Clean Harbors* the Board made similar comments.

[64] Neither Potts nor Lionel Boyer was working on either January 26th or March 16th. Therefore the Board must determine whether their circumstances justify an exception to the standard rule for voter eligibility which requires that they be actually working for the Employer on both of those dates. The Board must determine whether they have a continuing interest in the representation issue that is sufficient to justify their participation in the vote.

[65] The Board is satisfied that Potts is on sick leave and has a sufficiently tangible employment relationship with the Employer to entitle her to vote. Her Record of Employment dated December 9, 2021 indicates that her last day of work was November 23, 2021 and that the reason for its issue is "illness or injury". She worked one day in April 2022 for seven hours and additional shifts since then. The Union urged the Board to interpret this as indicating a change in her status from sick leave to casual. Even if the Board was to accept that argument, there is no evidence that the alleged change in status occurred prior to March 16th. Another reasonable interpretation of this work is that it was an attempt to determine whether she was well enough to attempt a gradual return to work. This interpretation is more consistent with other evidence, including Clinton's testimony that Potts has worked additional shifts since then. The Board has determined that, on the dates in question, Potts was on sick leave and her intention, and the intention of the Employer, was that she would return to work. She continues to have a reasonably tangible employment relationship with the Employer, and a sufficient interest in the terms and conditions of employment. Accordingly, she is eligible to vote and, if she voted, her ballot will be counted.

[66] The Employer's evidence and argument was that Lionel Boyer was a casual employee who is now on sick leave. However, the Employer did not disclose to the Union or enter into evidence a Record of Employment or Medical Certificate indicating that Lionel Boyer is on sick leave, as it did with respect to Potts. His time sheets do not reflect that Lionel Boyer took any sick leave in 2021. The Board has no evidence that leads to a conclusion that Lionel Boyer is on sick leave. Even if the Employer's arguments respecting their obligations to him pursuant to *The Saskatchewan Human Rights Code, 2018* are accurate (an issue on which the Board makes no finding), that is not the question before the Board. Further, no evidence was provided to support the suggestion that Lionel Boyer has a disability that requires accommodation by the Employer.

[67] If Lionel Boyer was previously a casual employee (as can be deduced from his 2021 time sheets), the evidence before the Board indicates he ceased to be a casual employee as of November 26, 2021. Clinton gave evidence that she was desperate for drivers in December 2021 and January 2022, yet he does not appear on any time sheets or schedules after November 26, 2021. The evidence indicates that he was replaced by a new hire. While paperwork removing him from employment may be an expectation in some workplaces, in this workplace the Board does not consider its absence to be evidence of anything other than disorganization. Clinton testified that employees on leave are not on the contact list because they are not available to drive. Clinton testified that the list is shared to allow drivers to contact each other to trade shifts. The list is updated whenever there is a new hire or someone leaves. If Lionel Boyer was a casual employee, he would be available to drive and, following her logic, his name would have been on the list. It was not on the list she posted on January 26th. The Board is not satisfied that he continues to be a casual employee. Clinton agreed, in cross-examination, that she has no idea when or if he will return to work. He does not have the requisite sufficient and tangible continuing connection to the workplace to be entitled to vote in this matter. If he voted, his ballot will not be counted.

[68] The Employer filed as evidence a number of receipts, many of which were for the purpose of purchasing gift cards. Clinton testified that she provided a gift card as a Christmas bonus in 2021 to each of Potts and Lionel Boyer. There was no independent evidence to confirm this and no evidence about how a determination is made respecting who receives gift cards at Christmas, or even whether the gift cards were given to employees. The Board places no reliance on this evidence.

[69] The final employee at issue is Logan. In coming to a conclusion about his eligibility to vote, the Board considered the conflicting authorities relied on by the parties on the issue of when his employment commenced. In *Saint John*, the Board of Arbitration was interpreting the law

governing the creation of an employment relationship for the purpose of determining whether the grievor was covered by the collective agreement and entitled to its protection against unjust discharge. They reviewed several authorities that considered the question of when an employment relationship is created. They made a determination that, in the context of a decision respecting whether a person is entitled to the protection of a collective agreement, it was appropriate to use an expansive interpretation that did not require the person to have actually begun rendering services for compensation. However, they made several statements that emphasized that determining when a person becomes an employee depends on the context in which the question is being considered:

> *63 The first point here is that, as we stated above, Canadian law frequently treats those not actually rendering services, but engaged to do so, as employees. It is well recognized that the definition of "employee" may vary depending on the context in which the term is used. One who is not an employee at common law, for purposes of the law of vicarious liability for instance, may be an employee under a statute, such as The Industrial Relations Act, which has quite different purposes. In C.J.A., Local 27 v Calvano Lumber & Trim Co., [1989] O.L.R.B. Rep. 337 (Ont. L.R.B), the OLRB held that a casual labourer was an "employee" for purposes of a certification application, because he had exchanged his labour "for consideration in some form", while noting that under the Ontario Employment Standards Act one could be an employee "without any wages or remuneration in the ordinary sense at all." People on lay-off or suspension, for example, are commonly considered employees who can claim rights other than payment of wages under collective agreements.*
>
> *. . .*
>
> *109 As with University of Alberta v A.A.S.U.A, the facts and issues in Re Waterfront Foremen Employer's Association and I.L.W. U., Local 514 were quite different from those before us here. That award does, however, serve to emphasize that what constitutes "employment" or "hiring" for legal purposes must depend on the context and purposes for which the meaning is being sought. . .*

[70] The Union relied on *Kidd Bros Produce*, a decision of the British Columbia Labour Relations Board that considered this issue in the context of determining eligibility to vote on a certification application. The Board finds the rationale in that case most compelling in making this determination:

> *26 ...In this case, I find the commencement of work to be a requirement to achieve employee status under the certification provisions of the Act. To find otherwise would render illusory the union's right to organize the employees and file an application as of a date set in the legislation.*

[71] The context here is not a situation determining whether an individual is entitled to protection from the actions of an employer. The context here is determining who meets the tests respecting entitlement to vote on a certification application. As the Board stated in *Con-Force*

Structures Ltd.[42], the parameters of the bargaining unit may appear arbitrary in some situations, and they do not achieve either perfect predictability or perfect democracy: "The Board is fully aware that at some other point in time the voters' list would be different, but that is always the case, regardless of which point in time is selected for determining eligibility". In this situation, application of the standard rule protects the Union from any temptation by the Employer to artificially enlarge the bargaining unit. If the question before the Board had been whether, as between Logan and the Employer, he had a binding employment contract, the Board might well have come to a different conclusion based on these authorities. However, that is not the question before the Board. In this matter, the Board finds that the actual commencement of work on or before January 26, 2022 is required to make Logan eligible to vote.

[72] The Board has determined that John Logan was not yet an employee on January 26th, the date the certification application was filed. He became an employee on January 31st. This is the first day he was scheduled to work and the first day for which he was paid. Although he signed the offer of employment on January 25th, he did not sign any other commencement documents until his first day of work, January 31st. The Board finds that, for the purpose of determining entitlement to vote on the certification application, Logan did not become an employee of the Employer until he actually commenced work on January 31st. This means he is not entitled to vote. If he voted, his ballot will not be counted.

[73] Removing Lionel Boyer and Logan from the list of employees in the bargaining unit leaves eight employees entitled to vote. The Union disclosed that it filed four support cards. This means that they met the 45 percent threshold set out in section 6-9 of the Act. This makes the Employer's arguments, respecting whether the vote should be counted, irrelevant.

[74] In any event, the Board finds nothing in the change of wording from subsection 6(1.1) of *The Trade Union Act* to section 6-9 of the Act that would lead to a conclusion that the determination made by the Board in *United Food and Commercial Workers, Local 1400 v Affinity Credit Union (St Mary's Branch)*[43], and confirmed by the Court of Appeal, is no longer good law. The Board stated:

> *[21] In our opinion, it is both unnecessary and inappropriate to revisit the Executive Officer's decision to Order that a representational vote be conducted in the fashion suggested by the Employer. Simply put, we find that s. 6(1.1) was not intended by the*

[42] *Ennis v Con-Force Structures Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 1985*, [1992] 4th Quarter Sask Labour Rep. 117.
[43] 2014 CanLII 42400 (SK LRB).

Legislature to be applied retrospectively once a representational vote has been conducted.

[22] We find support for this conclusion in the express language of s. 6(1.1). This provision enjoins the Board from directing a representational vote if we are not satisfied that the subject application (i.e.: the application giving rise to the representational question) is accompanied by sufficient evidence of support. The operative time for this determination is when the application is filed with the Board. We note that the provision directs that the determination to conduct a representational vote is based on the applicant's application, together with any investigations conducted by the Board. While Board staff make reasonable attempts to verify the size of the bargaining unit and the names of the individuals who are entitled to participate in the representational question (i.e.: establish a list of eligible voters), s.6(1.1) anticipates that, at the time the determination is made to direct that a representational vote be conducted, the Board will not have the full spectrum of information that would normally be available at a hearing. Furthermore, at that point in time, the information available to the Board is not tested. In our opinion, s. 6(1.1) enjoins the Board from directing a representational vote only if the Board's initial examination of the applicant's application reveals that it is not accompanied by the prescribed threshold of support; it was not intended to be applied retrospectively in the fashion suggested by the Employer.

[23] Furthermore, if the Legislature had intended that employers must be contacted prior to a decision being made to conduct a representational vote, it would not have used the language that it did. While s. 6(1.1) requires the Board to review any application giving rise to the representational question to ensure that it is accompanied with evidence of sufficient support, the determination to conduct a representational vote is basis of the applicant's evidence and such investigations as may be conducted by the Board. The provision does not require the Board to wait for the subject employer to file a Reply or prepare a statement of employment or otherwise participate in the Board's investigation. Although the practice of the Board is to involve the employers in its investigations, it should be noted that the provision does not require that we contact the subject employer in every case. In fact, the provision does not even mention employers.

[24] In our opinion, once a representational vote has been conducted, little utility is served in disregarding the wishes of the employees through the retrospective application of s. 6(1.1) even if it is subsequently discovered that the requisite threshold of support was not filed with an application unless an obvious and overriding error is discovered. The purpose of s. 6(1.1) is to prevent employees from being asked to decide the representational questions if an applicant can not demonstrate that a sufficient threshold of employees in the workplace support the applicant's initiative. The provision is a shield to the disruption to the workplace associated with conducting a representational vote if the application does not, at least, have a reasonable chance of success. However, once a representational vote has been conducted, no labour relations purpose is served by ruminating on whether or not that vote should have occurred in the first place. Doing so, does not spare employers from the disruptions, the cost, the loss of productive, and the inconvenience of accommodating a representational vote. Nor does it spare employees from the conflicts and campaigns that typically accompany a vote on the representational question. The Trade Union Act was intended to be an anvil upon which employees could forge a collective bargaining relationship with their employer. While all labour relations regimes include various restrictions and/or limitations on the right of employees to organize if they desire to do so, each restriction and each limitation on the fundamental right of employees to decide the representational question serves a recognized labour relations purpose. The retrospective application of s. 6(1.1) in the fashion proposed by the Employer would strip employees of the right to decide the representational question without serving any valid labour relations purpose. In our opinion, absent evidence of an obvious and overriding error in directing that a representational vote occur, once that vote has been conducted, the decision to conduct that vote is not reviewable.

[75] It is not the role of the Registrar or the Executive Officer to make a final determination before a hearing as to which of the Employer and Union is correct when there is a dispute as to the eligibility of certain people to vote. In this matter, given the dispute over the names, there was an issue whether the Union had filed sufficient evidence of support to trigger a vote pursuant to section 6-12 of the Act. As a result, out of an abundance of caution, the Board directed that the vote be held pursuant to clause 6-111(1)(v) of the Act. Given the decision of the Court of Appeal in *United Food and Commercial Workers, Local 1400 v Affinity Credit Union*[44], that caution was unnecessary. Based on the information filed by the Union, it had provided sufficient evidence of support for a vote to be held. The 45 percent threshold is not meant to be determined after a full hearing. The operative time for making that determination is when the application is filed with the Board, based on the information provided by the Union. Time is of the essence in conducting a vote. *The Saskatchewan Employment (Labour Relations Board) Regulations, 2021* contemplate that a vote may be sealed, to allow for the Board to make a final determination respecting who was entitled to vote, after hearing full evidence. Once that determination is made, the votes can be counted. Once a vote is conducted, no labour relations purpose is served in reviewing whether it should have been conducted. The wishes of the employees can be determined most clearly by counting the ballots. The employees have spoken and their wishes should be respected.

Unfair labour practices:

[76] The Union argues that the Employer contravened section 6-5 and clauses 6-62(1)(a), (g) and (i) of the Act, by interfering with, restraining, intimidating, threatening or coercing its employees in the exercise of their right to support the Union. The test to establish the contravention is an objective test: that the likely effect of the Employer's actions, on employees in this workplace of reasonable intelligence, resilience and fortitude, would have been to interfere with, restrain, intimidate, threaten and/or coerce them in the exercise of their rights under Part VI of the Act. This requires a contextual analysis.

[77] The onus is on the Union to satisfy the Board that the Employer's actions were motivated, even in part, by anti-union animus. In *Clean Harbors*, the Board stated:

> *[92] However, even if the Board is satisfied that there were valid reasons for the actions that the employer took, the Board may nonetheless still find a violation has occurred if the Board is satisfied that the employer's actions were motivated, even in part, by an anti-union animus. See: The Newspaper Guild v. The Leader-Post, a Division of Armadale Co.*

[44] *Supra* note 35.

> *Ltd., [1994] 1 st Quarter Sask. Labour Rep. 242, LRB File Nos. 251-93, 252-93 & 253-93. Such is the case because there are few signals more intimidating for an employee or can send a more powerful message through the workplace than an indication that your employment relationship may be in jeopardy because of your support for a trade union. Therefore, even if an employer demonstrates a credible explanation for the actions it took, it is nonetheless a violation of the Act if we find that a component of the employer's decision-making process involved a desire to punish an employee because of his/her support for a trade union or to signal to other employees that unionization was undesirable. . . .*

[78] The first action complained of by the Union was Clinton adding a notice to the employee contact list indicating that disclosure of personal information will result in disciplinary action. Clinton testified that she added the notice in response to complaints she received from employees that their information had been disclosed. The Board accepts that evidence.

[79] The Board assessed the notice added to the contact list by considering it in light of the five factors established in *United Food and Commercial Workers, Local 1400 v Securitas Canada Limited*[45], and makes the following findings respecting their application in this matter.

[80] *Evidence, if any, of a particular vulnerability of the subject employees to the views and opinions of their employer:* There was no evidence that these employees were particularly vulnerable to Clinton's views and opinions. The Union did not provide evidence that leads to a conclusion that employees of reasonable intelligence, resilience and fortitude in this workplace would be intimidated by Clinton or her actions.

[81] *The maturity of the bargaining relationship between the parties:* There is no bargaining relationship between the parties at this point. The Board recognizes that there is an inherent insecurity in a prospective collective bargaining relationship, that does not exist in an established relationship. The Board must be vigilant, and was vigilant, in reviewing the evidence to determine the vulnerability of these employees to the Employer's views.

[82] *The context within which the impugned communication occurred:* The notice was added in the middle of the organizing drive, before the employees had voted. The Board does not agree with the Employer's argument that since many of the impugned communications occurred after the certification application was filed, they should be disregarded. Until the vote was held, the employees were potentially vulnerable to the Employer's actions and views. However, the Union's evidence does not convince the Board that the employees in this workplace would be affected by the notice.

---

[45] 2015 CanLII 43778 (SK LRB).

[83] *The evidentiary basis for and value of the impugned communication:* The impugned communication is in writing, so there is no confusion about what was said. Clinton decided to revise the Oath of Confidentiality to extend it to employees' information, in response to complaints she received from some employees after their contact information was shared with the Union. She chose this medium to alert employees to this change. She knew the employees' phone numbers had already been shared with the Union.

[84] *The balance or neutrality demonstrated by the Employer in communicating the impugned information*: There was no balance demonstrated by Clinton in the notice attached to the contact list. She was siding with the employees who had complained to her about their phone numbers being shared with the Union.

[85] Despite these findings, the Board is not persuaded that the Employer contravened section 6-5 or clause 6-62(1)(a), (g) or (i) when it added the notice to the employee contact list. The Board is not convinced that employees of reasonable intelligence, resilience and fortitude in this workplace would be restrained, intimidated, threatened or coerced by Clinton's actions in their consideration of whether to support the Union. Her actions and communications cannot reasonably be described as a campaign against the Union. While the Board must be particularly careful in the assessment of the actions of the Employer during the organizing drive, the Union provided no evidence that her actions could reasonably be interpreted by employees to mean that supporting the Union would endanger their job security. In the context of this workplace, the Board is not satisfied that the Union has met its onus of proof respecting this issue.

[86] The second action complained of was Clinton removing hours of work from Campbell and two other drivers and giving them to Logan. While Campbell's expectation was that he would work five days a week, the evidence made it clear that working those hours was not an explicit or implicit term of his employment. The Board is not satisfied that anti-union animus played any role in this decision. Clinton was anxious to hire another driver and did not clearly think through the implications of his hiring for the schedule or for the other drivers. The Board is of the view that she is inexperienced and not properly trained to carry out the duties of her role. She appeared frustrated and overwhelmed by the many challenges of her job. The Board does not interpret this as reflecting an anti-union animus. The Board does not find that the Union has proven a breach of section 6-5 or clauses 6-62(1)(a), (g) or (i).

[87] The third action complained of was Clinton requesting the employees to fill out a questionnaire respecting what kinds of health benefits they would be interested in receiving. The evidence indicated that at most one employee filled out the questionnaire. Even if the Board was to find that Clinton's intent was to offer an inducement, it did not work; the employees ignored her. The evidence does not disclose an intention to offer an inducement. Obtaining benefits for employees was a goal of Clinton's long before the Union organizing drive; she began taking steps to move the issue along before she became aware of the Union organizing drive.

[88] The Union's application and evidence indicated that they were quick to jump to conclusions about Clinton's actions and misinterpret what turned out to be actions irrelevant to this matter. Two other examples of alleged inducements by Clinton cited in the application were abandoned by the Union when it turned out that their assumptions about what had occurred were inaccurate. The Board is not satisfied that Clinton's actions respecting the questionnaire constitute an unfair labour practice contrary to section 6-5 or clause 6-62(1)(a), (g) or (i) of the Act.

[89] With respect to clause 6-62(1)(b), the Board finds that the test set out by the Board in *Saskatchewan Government and General Employees' Union v Saskatoon Downtown Youth Centre Inc.*[46] has not been met by the Union in this matter.

[46] *Supra* note 38 at para 41.

Conclusion:

[90] With respect to LRB File No. 010-22, with these Reasons, the Board will issue an Order that:

a) The ballots held in the possession of the Board Registrar pursuant to the Direction for Vote issued in this matter on March 15, 2022 be tabulated in accordance with *The Saskatchewan Employment (Labour Relations Board) Regulations, 2021*;

b) If they voted, the ballots of John Logan and Lionel Boyer be removed sealed and not counted in the tabulation;

c) The result of the vote be placed in Form 24 and that form be advanced to a panel of the Board for its review and consideration.

[91] With respect to LRB File No. 016-22, with these Reasons, an Order will issue indicating that the application is dismissed.

[92] The Board thanks the parties for the submissions they provided to assist the Board in making a determination in these matters. The Board has reviewed all of them and found them helpful.

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

DATED at Regina, Saskatchewan, this **28th** day of **October, 2022.**

LABOUR RELATIONS BOARD

Susan C. Amrud, K.C.
Chairperson