Saskatchewan
Labour Relations Board

ICT INDUSTRIAL INC., Applicant v THE UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 179, Respondent

LRB File Nos.: 156-22 and 143-22; December 30, 2022
Vice-Chairperson, Barbara Mysko; Board Members: Allan Parenteau and Lori Sali

Counsel for the Applicant, ICT Industrial Inc.: Larry F. Seiferling, K.C.

Counsel for the Respondent, The United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 179: Greg D. Fingas

Objection to Conduct of Vote – Certification Application – Inclusions in Bargaining Unit – Eligibility to Vote – Construction Industry – Employment on Date of Application and Date of Vote – Reasonably Representative Time Period – Nature of the Work – Boilermakers and Pipefitters – Employees Performing Pipefitter Work Included in Bargaining Unit.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: These are the Board's Reasons for Decision in relation to an Objection to Conduct of Vote brought by an Employer, ICT Industrial Inc. The Union, the United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 179 [UA], has filed a certification application for a standard "Newbery" unit of employees performing work in the pipe trades at the site of the Great Plains Power Station project in Moose Jaw, Saskatchewan. The Union is the designated bargaining agent for the trade division pursuant to Part VI, Division 13 of *The Saskatchewan Employment Act* [Act].

[2] The main issue before the Board is the eligibility of certain employees to vote in the certification application.

[3] The Employer is constructing an Air-Cooled Condenser (ACC) system, which involves activities in the construction industry in accordance with section 6-65 of the Act. In or around May 23, 2022, the Employer launched this project with the intention of using an open shop to perform the work. In or around May and June 2022, the Employer hired three employees directly: Jemuel

Alaba, Rueben McDougall, and Awil Jama. McDougall is a Foreman on site and will be referred to as Foreman McDougall.

[4] It soon became apparent that it was going to be difficult to find boilermakers who were willing to work within an open shop model. Realizing this, the Employer reached out to the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Lodge 555 [Boilermakers' Union] to dispatch boilermakers for the job.

[5] Further to this, the Boilermakers' Union filed a certification application with the Board on July 4, 2022 for the following bargaining unit:

> *All boilermaker journeypersons, boilermaker welders, boilermaker apprentices, boilermaker forepersons and general forepersons engaged in the construction industry as defined in section 6-65 of The Saskatchewan Employment Act and employed by ICT Industrial Inc. within the boundaries of the Province of Saskatchewan*

[6] That certification application was uncontested. A Direction for Vote was issued on July 12, 2022. The Notice of Vote listed four eligible voters. The majority of votes cast favoured certification of the union. On August 12, 2022, the Board issued a certification order pursuant to section 6-13 of the Act.

[7] There is also a certification order for the Operating Engineers in relation to this Employer, dated July 25, 2022.

[8] In the meantime, the Employer hired additional workers, including three employees who were dispatched on permits from the UA Union to the Boilermakers' Union, and started work in or around July 20, 2022. These employees are Wayne Middleton, Charles Amey and Travis Brown.

[9] The UA's certification application was filed on August 30, 2022. A Direction for Vote was issued on September 12, 2022. The ballots were mailed to the individuals named on the voters' list on the same date.

[10] After the certification application was filed, the Employer had provided the Board with an employee list consisting of the three names of employees who were hired directly, prior to the certification of the Boilermakers' Union: Alaba, Foreman McDougall, and Jama.

[11] Through email correspondence to the Board Officer, the Union had asked the Board to add three names to the employee list, all of which were names of employees who were dispatched

with UA's permission through the Boilermakers' Union: Middleton, Amey and Brown. The Union also objected to one of the Employer's names (Jama).

[12] The Employer objects to Middleton, Amey and Brown being found to be eligible voters. The bases for the Employer's objection are outlined in the Objection to Conduct of the Vote:

> *The union … is asking for three people (Wayne Middleton, Charles Amey and Travis Brown) who were dispatched by the boilermakers as journeyman boilermakers to be added to the Voters' List. These employees are among a number of employees dispatched by the boilermakers' union to the employer and are paid under their Collective Bargaining Agreement and include welders (10) and apprentices (11) doing the same type of work and would also be added to the Voters' List to determine if these workers want to be part of the applicant union and removed from the boilermakers' union. The three named workers and the 21 have all been dispatched by the boilermakers' bargaining unit and have been paid under their Collective Agreement. They would have to be taken out of the boilermakers' bargaining unit to be added to the Voters List of the three names provided by the employer. If these people are included, there are others who were dispatched that may also have to be included, making a vote of the larger group necessary, once criteria is determined. The applicant says none of the three names the union wants to add should have a vote.*

[13] In its Reply to this Objection, the Union states its position that Middleton, Amey, and Brown are properly within the bargaining unit because they are "performing pipefitting work within the scope of the bargaining unit applied for, regardless of the dispatch and permitting process which resulted in their performing that work", adding:

> *. . .*
>
> *(b) Local 179 denies that the Employer's employees other than those on the existing voters' list, however dispatched, are performing bargaining unit work such as to be entitled to vote in the certification election.*
>
> *(c) Local 179 states that the application of another collective agreement to work outside the bargaining unit applied for does not preclude either a certification application, or the resulting application of the applicable provincial agreement upon certification.*

[14] A hearing of the matter was held on November 2 and 3, 2022. At the hearing, the Employer also argued that one of the three employees named by the Union, Brown, is ineligible to vote due to timing. The Employer stated that Brown, while employed on the date of the certification application, was not employed on the date of the vote.

[15] Initially, the parties disagreed about whether the issues of Jama's and Brown's eligibility were properly in dispute, but both parties ultimately took the position that these issues should be decided by the Board. To this end, the Union has sought, pursuant to section 6-112 of the Act, to amend its Reply to include its opposition to Jama's eligibility, having previously put this issue

before the Board through the aforementioned correspondence with the Board Officer. The Union's application to amend is granted and the Reply is deemed to have been amended accordingly.

[16] Therefore, the names in dispute are Middleton, Amey, Brown, and Jama.

[17] At the hearing, three witnesses testified for the Union: Middleton, Amey, and the Business Manager of the UA Union, Michael McLean. Middleton has been in the pipefitting trade for 37 years. Amey has been working in the trade for 35 years. McLean has been a journeyman steamfitter/pipefitter for approximately 32 years.

[18] One witness testified for the Employer: Wes McDougall, Project Manager [PM McDougall].

Evidence:

[19] The evidence establishes that there is some overlap between the work performed by boilermakers and performed by pipefitters. In recognition of this, the Boilermakers' Union and the UA have entered into a reciprocal agreement in which the Boilermakers' Union recognizes the work of the UA and agrees to supply UA members to an employer if otherwise unable to fulfill the employer's supply requirements, and vice versa.

[20] PM McDougall testified that the intention was to use boilermakers and ironworkers for the job. He stated that the majority of the project consists of ducting work and the installation of the modules and, in his opinion, ducting work is "always performed by boilermakers". He said that the Employer chose and asked for boilermakers because they are a hybrid tradesperson capable of performing rigging, fitting, and welding, including "exotic" welds, and are therefore able to perform all the activities associated with the module. "Pretty much" all of the welding on site was being performed by boilermaker welders.

[21] Middleton, Amey, and Brown were dispatched to the job through the Boilermakers' Union, reporting to work on July 20, 2022. The dispatch slips describe them as non-members and Journeymen Mechanics. Because they were dispatched through the Boilermakers' Union on permits from the UA, they pay dues to both unions. At the bottom of the dispatch slip is the following statement:

> *By accepting this dispatch slip I am confirming I am capable of performing my trade and hereby authorize and request the above named employer to deduct from my wages, on the first of each month, my monthly dues, in the amount of; $60.40 plus 4.25% of gross hourly wages.*

[22] Those employees who were dispatched by the Boilermakers' Union are working under both the provincial boilermakers' agreement and the field agreement. The boilermakers' hourly rate is $2 more than that of the pipefitters. The Employer drew to the Board's attention to Article 4.02 of the provincial agreement:

> ***4.02***
>
> *The Union agrees to furnish competent available workers to the Employer on request, provided however, that the Employer shall have the right to determine the competency and qualifications of its employees and to discharge any employee for any just and sufficient cause. The Employer shall not discriminate against any employee by reason of their membership in the Union or their participation in its lawful activities. The Company will provide written response to the Local Union upon refusal to hire.*
>
> *The parties recognize that we are in a highly competitive industry and to maintain and enhance our market share, Boilermakers and Supervisory Personnel must continuously train and upgrade to perform the diversified tasks required of them. The Parties will make every effort to provide the necessary training and education programs and will encourage full participation.*

[23] McLean testified that the UA had been shut out of the site; he saw the dispatch as the UA's opportunity to get on site. He agreed to send four workers as part of an organizing drive. He explained: "as soon as they put their hands on pipe on that job site then we'll put a certification in".

[24] Amey testified that he understood that he was being dispatched as a rigger (despite the dispatch classification), and that there was no mention of direct pipefitting until he arrived on site. A rigger is someone who performs heavy lifting of pipes, pumps, bases, spools, and other materials. Rigging can be done by either a pipefitter or a boilermaker. He testified that there has been some rigging on the site but there have also been many other tasks.

[25] Given that the project as launched on an open site, there was no pre-job mark-up meeting. When workers arrived, the superintendent would interview them to determine their appropriate crew placement. Placement was dependent on where the worker's skillset could be best put to use, considering the worker's experience, skills, and preference. As for worker preference, PM McDougall explained: "some people prefer doing pipefitting, or fitting, for instance, or boilermaker fitting". Generally speaking, the workers have been expected to cooperate to get the job done. Composite crews have been used.

[26] Foreman McDougall is a journeyman Red Seal pipefitter and PM McDougall's brother. According to PM McDougall, his brother directs all the activities "around the edges".

[27] Foreman McDougall has a core crew of people. Included within this core crew are Middleton, Amey, Brown (before his departure), and Alaba. According to Amey, these four individuals have consistently comprised the crew which, from day one, was known as the "pipefitting crew". According to Middleton, Foreman McDougall had explained that there were systems drawings to review and piping work to be done.

[28] There are other names on Foreman McDougall's crew list. In PM McDougall's words, everyone on the list was working on the crew "at one point or another". "At one point or another" could equate to as little as one day of work. PM McDougall explained that the welders, in particular, are assigned to a crew for one or two days to get the welds done and workers, in general, are assigned to a crew if support is needed for heavy rigging. Amey also explained that people come over to the crew depending on the work plan. He added that a worker might be added to the crew if there is not a spot for the person elsewhere.

[29] There are two rough time periods consisting of somewhat different activities on site. The first time period consists of the general preparatory work for the installation of the modules. The second consists of the work on the installation of the modules. The first time period began with the arrival of the workers on site and lasted until shortly before the first installation took place, which is also when the second time period began.

[30] The first module was installed in or around August 28 or 29. The second one was installed on September 15. PM McDougall testified that, as of the date of the hearing, six modules had been installed in eight or nine weeks of work. The intention was to do one per week, but progress has been slower than anticipated. In total, there are fourteen modules that need to be installed.

[31] In explaining the timing of the certification application, McLean stated that he was waiting for word as to when the UA members were going to be working just on pipe. It was not until the middle of August that he was able to meet up with workers to gather support.

[32] Conflicting evidence was provided about the activities that took place during the first time period. According to PM McDougall, during this time, the workers were doing "strictly boilermaker work", that is, rigging, ducting, and welding expansion joints to the ducting, as well as receiving materials. According to McLean, the UA members were working on the header systems.

[33] Conflicting evidence was also provided about the activities that took place during the second time period.

[34] It is common ground, however, that the materials for the modules arrive at the site in sea cans. The workers remove the materials from the sea cans, create modules on the ground, and then erect the modules. Each module installation takes about three weeks from start to finish but they are working on more than one module at a time.

[35] Middleton spoke to the work performed by himself, Amey, Brown, Alaba and an unnamed new pipefitter that started on the week of the hearing on this matter. According to Middleton, each of these workers performs the same job. It should be noted that Middleton's description was not restricted to the time prior to the certification application being filed; rather, his description was of the work performed to install the module generally and is taken to include the work that is presently being performed. However, there was no suggestion that his description did not represent the work that was performed to install the first module, prior to the application having been filed.

[36] According to Middleton, a skid is placed in the work area of the pipefitting crew, representing what the pipefitters need to sort through to prepare to install the module. There are roughly 172 pipe spools in the skid and approximately 700 welds to perform to put the pipe spools together. They remove the materials from the skid, sort and place them, confirm measurements, cut the pipe, and buff the paint off for welding. All of the pieces are numbered and have to be placed in the correct order. At times, they have to sort through the entire skid to ensure that the pipe is being installed in sequence. They also lay out the headers, install support brackets for headers, and, of course, install the piping.

[37] According to Middleton, about two-thirds of a week is spent doing this work, which he described as pipefitting work. Some days there is more work that falls into this category, but it averages out over each week. Middleton broke this estimate down. The installation of the piping consists of approximately one day per week. Prior to this, the crew will have prepped the piping, set the piping, and performed the tack welding – this all takes another day. He explained that, after the tack welding is done, the welders come in to perform the socket welds. The sorting of the piping material takes the best part of another day. Then, there is the sorting of all of the material for all of the project.

[38] Another crew comes in to erect the steel structure; yet another crew installs the radiators into the steel structure; after that crew has completed welding, Foreman McDougall's crew confirms the measurements from the coupling to the header to cut the pieces and hang the header in place. This latter work is considered piping work.

[39] Middleton explained that when they are caught up they are assigned other duties. For example, they lay out the pads for the next vessel, do rigging work, prepare the material for the pieces to go together, assemble some of the structure work, and set up cranes to unload materials.

[40] Middleton also explained that none of the non-permit boilermakers have suggested that they should be doing the piping work that the UA members have been performing. Furthermore, there have been instances in which the UA members have been told to set up tools or materials for a particular activity and have been removed from the activity only to be replaced with a full boilermaker crew.

[41] Middleton explained what he believes to be the distinction between boilermaker and pipefitting work. Boilermakers assemble the boilers, do the tubing, and are involved in the setting of the high-pressure steam vessels, the low-pressure ducting, the rads, the structure that the rads sit in, and the main frame. The pipe trades generally do the piping work from the first flange or first coupling from the vessel [piping work]. In this case, there is no flange, but there is a socket weld coupling, which is equivalent to the first connection point. On the other side of this coupling is the piping work. Middleton described this piping in detail. He believes that, jurisdictionally, the Boilermakers' Union would claim the first coupling, the rads, the structure the rads sit in, and the main frame.

[42] The installation of the modules also involves electrical systems. Middleton explained that the installation of the drive motors is being performed by a millwright.

[43] Amey also testified about the nature of the work. He stated that the core crew members have been doing all the work on the expansion joints but acknowledged that he was unsure whether expansion joints come within the pipefitters' jurisdiction. He claims that, directly or indirectly, 90% of the work performed by the UA members is piping work. For the rest of the time, they perform a variety of tasks to move the project forward.

[44] According to PM McDougall, out of three weeks of work, there is one day of fitting and welding. The pipe is placed on the module on the very last day before it is erected. There might be between a half day to a day of preparatory work in order for that work to be performed. PM McDougall explained that, after the pipes are fitted, whomever is available to weld will do so.

[45] PM McDougall clarified that there is more than one module being installed at a time. The intention is to have one module completed each week. This means that, out of a possible six days

per week, the UA members would spend a day and a half performing the pipefitting activities for the module. The rest of the time the UA members are doing other things.

[46] Out of a schedule of 3600 hours in a week (with 60 workers working 60 hours per week), PM McDougall associated 50 hours to the work on "the pipe coming out [of the module] and the pipes attached to it".

[47] He acknowledged that the workers have all done rigging on the site.

[48] Additional evidence was presented in relation to the work performed by Jama.

[49] Jama is a first-year apprentice who came to the project wanting to become an "indentured" pipefitter. He is listed on the pipefitting crew's sign-in sheet but does not work directly with the crew. The majority of his activities are in shipping and receiving. He looks after the laydown area. He was working with the crew for a couple of days, sometime in early September, but he had limited experience. After a couple of days, he was called back to the laydown area and has worked there ever since. According to PM McDougall, Jama knows "where everything is", and so he was asked to stick to his thing on the understanding that they would still "sign off on his card" for pipefitting hours. He is one of their best employees.

[50] McLean explained that if a certification order were issued, the UA would just re-dispatch its members to the site. He has two large binders with agreements between the Boilermakers' Union and the UA. In seven years in office there has never been a jurisdictional dispute between them.

Arguments:

Union:

[51] The leading case law on this matter is found in *K.A.C.R. v I.U.O.E., Local 870*, 1983 CarswellSask 1011, [1983] Sask Lab Rep 37 [*K.A.C.R.*] and *Re Daycon Mechanical Systems Ltd*., [1999] SLRBD No 13 [*Daycon*].[1] The holding in *K.A.C.R.* demonstrates that an employer cannot use its organizational choices to deny people their collective bargaining rights. The circumstances in that case are substantially similar to the facts in issue in the present case. There is no basis for the Board to defer to the Employer's unilateral exercise of its power.

[1] Upheld on judicial review in *Daycon Mechanical Systems Ltd. v C.J.A*., 1999 CarswellSask 631.

[52] What determines whether an employee belongs in a particular bargaining unit is the work that the employee is performing. In assessing the nature of the work there are two standards that may apply. The first is whether the majority of the employee's time is spent in the trade. The second is whether the primary focus of the employee's work is in the trade. Applying either test, Middleton, Amey, and Brown should be found to come within the proposed bargaining unit.

[53] It is important to consider what is not in dispute in this matter. The Employer does not dispute the appropriateness of the bargaining unit. The only issue before the Board is the composition of the bargaining unit and the eligibility of the voters. The Employer does not dispute that the pipefitter foreman and the welder are in the bargaining unit. The Employer asks the Board to accept that employees are eligible or not eligible based only on the nature of their hiring or dispatch. The trade division structure established pursuant to the Act should not be subject to the whim of an employer. Absent a good reason, the Board should treat employees performing like work in a similar fashion.

[54] The Board should prefer the evidence of the Union's witnesses over the evidence of the Employer's sole witness. The Employer chose to call the Project Manager. This is despite the fact that the Foreman would have been the most appropriate Employer-side witness to testify about the nature of the work being performed on site.

[55] In performing its assessment, it is necessary for the Board to determine the period of time that is reasonably representative of normal responsibilities. This period does not have to fall immediately prior to the certification application. In this case, the certification application was filed when the Employer had reached a state of normal workflow. The work performed prior to that time was preparatory for the overall project but the purpose of the overall project was clear.

[56] In considering the nature of the work being performed, the Board should consider what the workers did and how they were organized on site, which includes their having been organized into a pipefitters crew. The focus of the pipefitting crew is the piping that is performed outside of the main structure. The dividing line between pipefitter and boilermaker work is the first connection point after the module. Given that their work focuses on the piping outside of the main structure, the workers were and are clearly performing pipefitter work.

[57] There is a potential for overlap in the trades. This is a given. However, contrary to the Employer's argument, this matter does not raise a jurisdictional dispute. Nor does it lie in the mouth of the party that created the conflict to complain about it. The Employer expressly chose

not to consider the Act when assigning work to its workforce and it should not benefit from its own neglect. Furthermore, the Board provided notice to the Boilermakers' Union and they did not participate. The Employer cannot now argue that the potential for conflict over a theoretical jurisdictional issue should stand in the way of a certification order.

[58] With respect to Jama, his work in the pipe trades occurred after the certification application was filed and lasted only a period of days or hours. Other than this work he is engaged only in general shipping and receiving duties. He should be excluded from the bargaining unit.

Employer:

[59] This matter has come before the Board improperly. Although the UA Union has the ability to seek certification, the Boilermakers' Union is an active union with workers on site and the Union is seeking to include members of the Boilermakers' Union in its proposed bargaining unit. This Board is not the forum for resolving trade division jurisdictional disputes. The relevant provincial agreements contain provisions outlining the appropriate process and forum for resolving jurisdictional disputes. Given the Board's lack of jurisdiction over this dispute, no inference should be drawn from the decision of the Boilermakers' Union not to participate in these proceedings.

[60] *K.A.C.R.* sets out the principles to be applied in determining the appropriate bargaining unit.

[61] It is well established that the determinations as to the nature of the work and the appropriate bargaining unit are based on the type of work for which the employees are employed for a majority of the time or are based on the primary focus of the employees' work. Employees cannot be working within two bargaining units at the same time; even where there is an established overlap in the work performed by two trade divisions, the employees can only be found to be operating within one bargaining unit.

[62] In planning the project, the Employer decided that boilermakers were required for the job and were capable of performing the majority of the work and for these reasons specifically asked for boilermakers. It did not ask for pipefitters. The UA was aware of the nature of the project and provided the permits to allow the Boilermakers to dispatch its members to the job. Given the circumstances, when if ever, did the UA members ever cease to be boilermakers?

[63] According to *K.A.C.R.*, the Board's focus is the date of the application and the period leading up to the application, not after the certification application was filed. Prior to the filing of

the certification application, the workers were preparing for the installation of a module. When the module was installed, then it might have been accurate to suggest that they were performing some pipefitting work. But how much time did this pipefitting work comprise when compared to their entire work during the relevant period? According to PM McDougall, it was 5%. Such a marginal involvement in pipefitter work is not a sufficient basis for including these employees in a bargaining unit of pipefitters.

[64] If the employees were performing bargaining unit work in the timeframe preceding the application, then one wonders why the UA waited so long to apply for certification. The fact is, the UA provided permits for the purpose of organizing the site. In deciding when to file the application, the employees were waiting for pipefitting work to be performed. Their interest in the outcome of the application undermines their testimony. By contrast, PM McDougall's is solid: he has been involved in jurisdictional disputes, is aware of the work that is being performed, and understands the job.

[65] The Board should be alert to which trade is entitled to claim the duct work. If the Board determines that duct work is included in the pipefitter trade, then there will be many more workers included within the bargaining unit.

[66] If the Board finds that the permit members of the UA are included in the unit then the voters' list is underinclusive; in that event it should include all other staff, and in particular, everyone who is working on the same crew.

[67] This is not a case of anti-union animus. Nor have the employees been deprived of any benefits by working as boilermakers. To the contrary, they are being paid more as boilermakers than they would be as pipefitters. Moreover, if Amey, Middleton and Brown were found to be performing bargaining unit work, the Board would be converting a full-time job into a part-time job.

[68] It would be disingenuous to conclude that Jama is not in the bargaining unit. The bargaining unit description explicitly includes apprentices. Jama asked to be "indentured" to the pipefitting trade. He worked in shipping and receiving which gives him "indentured" hours and he worked in the trade. There is no evidence that by working in shipping and receiving, that is, "receiving the pipe", that he was not learning the trade and therefore not properly given training hours. Jama was not dispatched as a boilermaker and is not a member of the boilermaker trade. He has been working on the site since the project started. If the Board concludes that Jama is not in the bargaining unit, that could have a negative effect on his apprenticeship.

Analysis:

[69] The following are the issues before the Board:

1. During what timeframe must a person be employed to be found to be eligible to vote in the representation question? Is Brown an eligible voter?

2. Does the Board have jurisdiction to determine whether the work being performed is pipefitter work?

    a. If yes, what test applies to determine whether the remaining contested employees belong in the bargaining unit? Do they belong in the bargaining unit?

    b. Does Jama belong in the bargaining unit?

During what timeframe must a person be employed to be found to be eligible to vote in the representation question? Is Brown an eligible voter?

[70] The first issue is whether Brown is an eligible voter. For Brown to be found to be eligible, the Board must be satisfied that he was employed within the scope of the bargaining unit both on the date that the certification application was filed and on the date of the vote. In *Con-Force Structures Ltd. (Re)*, [1992] SLRBD No 40 [*Con-Force*], the Board described the principles underlying this rule, at 3 to 4:

> *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…*

[71] This rule was confirmed in *Northern Industrial Contracting Inc. and HFIAW, Local 119, Re (2014)*, 2014 CarswellSask 565 (Sask LRB) and more recently in *Amalgamated Transit Union, Local 615 v Battlefords Transit System*, 2022 CanLII 99434 (SK LRB).

[72] The date of the vote, in the context of a mail-in ballot vote, is deemed to be the date that the ballots are mailed to the employees.[2] In the absence of a compelling reason to find otherwise, a person must continue to be an employee on that date to be eligible to vote.

[73] The certification application was filed on August 30, 2022. The ballots were mailed to the employees on September 12, 2022. Brown was employed on the date of the certification application but was no longer employed on the date of the vote. The Union provided no reason for the Board to depart from its usual approach. Given these circumstances, it is clear that Brown was not eligible to vote in the representation question.

Does the Board have jurisdiction to determine whether the work being performed is pipefitter work?

[74] The Employer argues that this matter comes before the Board improperly. The Union may seek certification but it may not seek to include members of a different dispatched trade in its proposed bargaining unit. By seeking to include these members, the Union is asking the Board to tread into a jurisdictional dispute between the two unions.

[75] In support of this argument, the Employer relies on the provisions respecting jurisdictional disputes contained in the provincial collective agreements of both the Boilermakers' Union and the UA. The UA provincial agreement is not in evidence and so the Board has disregarded the Employer's argument on that point. The relevant provisions in the Boilermakers' agreement state:

> ***Article 6.00 - JURISDICTIONAL DISPUTES***
>
> ***6.01***
>
> *a) It is incumbent on all Contractors and Subcontractors to assign work in accordance with Contractors' responsibility set forth in procedural rules and regulations for the Plan for Settlement of Jurisdictional Disputes in the construction industry covering the United States and Canada as amended through December 2002.*
> *b) The Union shall utilize the procedural rules and regulations for the Plan for the settlement of Jurisdictional Disputes in the construction industry to the extent that it is sanctioned by the International Union.*
> *c) Subject to the above provisions and those set forth in 6.03, it is understood and agreed that jurisdictional disputes shall not be the subject of a grievance under this agreement, but shall be dealt with as provided herein.*
>
> ***6.02***
>
> *When a jurisdictional dispute exists between unions and upon request by the Union, the Employer shall furnish the International Officers of the Union, a signed letter on*

[2] *Northern Industrial Contracting Inc. and HFIAW, Local 119, Re (2014)*, 2014 CarswellSask 565 (Sask LRB) at para 22.

> *Employer stationery, stating that Boilermakers were employed on specific types of work on a given project.*
>
> *[…]*

[76] In considering whether the Board has jurisdiction, the Board is guided by the modern principle of statutory interpretation as adopted by the Legislature, in subsection 2-10(1) of *The Legislation Act*:

> ***2-10****(1) The words of an Act and regulations authorized pursuant to an Act are to be read in their entire context, and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of the Legislature.*

[77] The Board's primary role in relation to Part VI of the Act is to facilitate the exercise by employees of their "right to organize in and to form, join or assist unions and to engage in collective bargaining through a union of their own choosing" (see, s. 6-4). Section 6-11 of the Act states that if a union applies for certification, the Board shall determine if the unit of employees is appropriate for collective bargaining. Subsection 6-11(2) states that, in making this determination, the Board may include or exclude persons in the unit proposed by the union. Pursuant to section 6-12, the Board shall direct a vote of all employees eligible to vote.

[78] The Board is required by legislation to direct a vote of all eligible employees. By extension, the Board is required to determine whether the employees are eligible to vote if that issue is put before it. In the present case, the Board's decision on the Objection to Conduct of Vote will determine the voters' list. For the Board not to make this determination would be for the Board to neglect to perform one of its statutory functions.

[79] The cases confirm that the Board not only has jurisdiction to make a determination as to the nature of the work on a certification application but it must determine the nature of the work before deciding who is eligible to vote on the representation question. The Board has done so in *K.A.C.R.*; *International Association of Bridge, Structural and Ornamental Iron Workers, Local 771 & Construction Workers Association (CLAC), Local 151 v Salem Industries Canada Ltd.*, [1986] July Sask Lab Rep 40, LRB File No 038-86 and 042-86 [*Salem*][3]; *Construction and General Workers Union, Local 890 v Work Force Construction Ltd., operating as Quadra Construction*, [1988] Fall Sask Lab Rep 39, LRB File No 206-87 [*Work Force Construction*]; *Daycon* (1999); *H.F.I.A., Local 119 v Wilf's Oilfield Services (1987) Ltd.*, 2007 CarswellSask 840 [*Wilf's Oilfield*]; and *Canadian Association of Industrial, Mechanical and Allied Workers, Local No. 11 v*

[3] Upheld on a collateral judicial review in *Palmer v Sask Labour Relations Bd*., 1986 CarswellSask 339.

Refrigeration Installations, [1989] Spring Sask Lab Rep 58, LRB File No 172-88 [*Refrigeration Installations*].

[80] To be fair, none of the aforementioned cases explicitly involve a pre-existing dispatch through a then-certified union. In *Salem*, the employees had been dispatched through a voluntary recognition agreement with CLAC. The Board has found that a voluntary recognition agreement cannot defeat the ability of another union to seek, and to obtain, a certification order.[4] However, after the employees were dispatched as labourers, the Board certified CLAC to represent a craft unit of labourers to which the employees belonged, and then considered the application for a unit of ironworkers:

> *Although both Mike Balaski and Peter Balaski were originally dispatched to the jobsite as labourers, in the Board's view what they actually did rather than what they were intended to do must determine which craft they belonged to when the application was filed. If they could be categorized as belonging to any craft at that time, it would have been that of the ironworker.*
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> *Counsel for the employer points out that on LRB File Nos. 033-86 and 044-86 … both CLAC and the Construction and General Workers Union, Local 180 applied for certification to represent all labourers and labourer foremen employed by the respondent and the Statement of Employment filed by the employer included Peter Balaski and Mike Balaski in the labourers bargaining unit. He further points out that counsel for the Ironworkers Union was present at the hearing of those applications and assured the Board that he took no exception to the accuracy of the Statement of Employment. The Board accepted the proposition that Peter Balaski and Mike Balaski belonged to a craft unit of labourers and certified CLAC to represent them. Counsel for the employer therefore submits that the Ironworkers Union is now estopped from asserting that Peter Balaski and Mike Balaski belong in the ironworker bargaining unit.*
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> *The certification order on LRB File No. 033-86 was obviously based on the assumption that the Statement of Employment for labourers was accurate. By assuring the Board that it accepted the accuracy of that Statement, the Ironworkers Union may well have become estopped from advancing a position that would necessarily make the previous decision incorrect. However, bargaining units are rarely static on construction projects where the number of tradesmen on the job at any one time and the skills they possess change as the work progresses. The evidence in this case indicated that Peter Balaski and Mike Balaski performed the work of more than one craft at various times on the Salem project, and consequently a determination that they belonged in the labourers bargaining unit when LRB File Nos. 033-86 and 044-86 were filed would not necessarily be incompatible with a determination that they belonged to the ironworkers bargaining unit when these two applications were filed.*
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> *Underlined emphasis added*

[81] Although the Board had accepted that the employees had belonged to a unit that was then certified, it later considered the nature of the work on the project to determine if those same

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[4] *Canadian Union of Public Employees, Local 1486 v The Students' Union of the University of Regina Student Inc*., 2017 CanLII 44004 (SK LRB) at para 32.

employees then belonged to a different unit. These facts provide a compelling argument in support of the Board's jurisdiction in the present case. It should also be noted that, in the present case, there is no issue of disputed employees showing up on multiple employee lists; nor are the disputed employees members of the Boilermakers' Union.

[82] In *K.A.C.R.*, the Union sought to be certified as the bargaining agent for a craft unit of operating engineers. The employer listed 81 "construction workers" on its statement of employment with no indication as to whether any of those employees worked as operating engineers. The employer's explanation was that it had not operated according to the craft units established in the construction industry but had instead hired the employees as "multi-skilled workers". The employer asked the Board to find that an all-employee bargaining unit was appropriate.[5] The Board found that the craft unit of operating engineers was appropriate but then had to decide whether the applicant union represented a majority of employees in the bargaining unit. It explained: "To do that, it must first define what an operating engineer does and then decide which employees performed that kind of work on the date that the constituency is to be established."[6]

[83] The Employer suggests that in *K.A.C.R.*, the employer was motivated by anti-union animus and therefore the Board's analysis is distinguishable. We do not find this argument persuasive. Although there might have been anti-union animus present in *K.A.C.R*., the Board assessed the work that was being performed by the employees and made its determination about the inclusions in the bargaining unit on that basis. Besides, the Employer in the present case has acknowledged that the proposed craft unit is appropriate.

[84] In our view, the Employer's jurisdictional argument runs counter to the scheme and object of the Act and the intention of the Legislature. To accept its argument would be to allow employers the flexibility to shut a union out of a project by defining the work scope in terms that justify the hiring of employees of one trade division only. In the case of boilermakers and pipefitters, this would be easily accomplished on an open site where mark-up meetings are not required, and in particular, in labour market conditions that favour employers (ie, high labour supply). Employers who are motivated to achieve efficiencies and who are inclined to structure the workplace on an all-employee basis, or similar, would be motivated to ignore jurisdictional lines when engaged in work planning.

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[5] *K.A.C.R.* at paras 2, 3.
[6] *Ibid* at para 39.

[85] In the present case, McLean complains that the UA has been shut out of the site. The unions have reciprocal agreements recognizing each other's work and agreeing to supply members if otherwise unable to fulfill the supply requirements. For this project, the Employer expressly disregarded jurisdictional divisions in work planning, and then sought only boilermakers for the project. The labour supply shortage was unexpected. If no UA members had agreed to be dispatched through the Boilermakers' Union there is no guarantee that the UA would ever have had a presence on site.

[86] In summary, this matter did not come before the Board improperly. The Board's jurisdiction is established by the Act, as interpreted in accordance with the modern principle. The UA seeks certification and the Board is required to determine whether the disputed employees belong in the bargaining unit and are eligible to vote in the representation question. These decisions are basic statutory functions of the Board. If the Board finds that the circumstances of the dispatch are relevant to whether the employees belong in the unit, then it will consider those facts within that context.

What test applies to determine whether the remaining contested employees belong in the bargaining unit? Do they belong in the bargaining unit?

[87] The next issue is whether Middleton and Amey belong in the bargaining unit and are eligible to vote. To make this determination it is necessary for the Board to, first, identify the relevant timeframe and, second, identify the nature of the work that these employees were or are performing during that timeframe. The Board is guided by the decision in *K.A.C.R.*:

> *44 Where employees are engaged in the work of different crafts the Board will characterize the craft in which they were employed for a majority of their time as the one governing their status on an application for certification. In determining which type of work employees were employed at "for a majority of their time" the Board will look not to the date of the making of the application but, rather to a period of time leading up to the date of the application. Just how far back in time the Board will go depends on the particular circumstances of the individual case. See Teamsters Local Union No. 230 et al v. Johnson-Keiwit Subway Corporation, 66 C.L.L.C. 16,091 at page 912 and Chauffeurs, Teamsters & Helpers, Local 395 v. Western Caissons (Sask) Limited, 67 C.L.L.C. 16,015 at page 983.*
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> *45 The Board will attempt to review actual job duties over a reasonably representative period of time and will not permit either the union or the employer to confine the review to an arbitrarily established time frame which is not indicative of normal responsibilities. In this case, it was inappropriate to take a two week "window" immediately prior to the date of the filing of the application which was, of course, during the winter shut down, in order to determine what work the employees involved were performing the majority of their time.*

[88] An alternative formulation of the test is described as the prime or primary focus of work test. This test has been applied in *Work Force Construction* and *Refrigeration Installations*.

[89] In *Work Force Construction*, the Board considered the eligibility of certain employees to vote on a certification application. As in the current case, the unit applied for consisted of the standard bargaining unit description assigned to the union. Also, as in the current case, the employer had acknowledged that the proposed unit was appropriate for collective bargaining. The only dispute was with the employer's statement of employment. In considering the evidence, the Board applied a test which it described as the "prime focus of work" test. It found that the prime focus of the work done by some of the employees was of a craft other than labourers and that those employees should therefore be excluded from the bargaining unit.

[90] In *Refrigeration Installations*, the Board decided a reference of dispute related to an unfair labour practice allegation. The dispute pertained to whether the employer owed dues in respect of certain employees, whom the union claimed were performing work within the scope of the bargaining unit of refrigeration mechanics.

[91] The Board was required to determine the scope of the bargaining unit, which included interpreting the scope negotiated by the parties as reflected in their collective agreement. It also had to determine two additional issues – the accepted work jurisdiction and whether the employees were doing that work – and acknowledged the overlap between the accepted jurisdiction of a plumber and pipefitter and a refrigeration mechanic. To address the second issue, the Board considered the "primary focus of the work" of the employees in question.

[92] Although the Employer both filed *Refrigeration Installations* and relied on its articulation of the primary focus test, it argued that it should be distinguished on three bases: it came before the Board prior to the orders defining the trade divisions in Saskatchewan; it was decided as a reference of dispute; and the Board agreed to hear the matter as such "…even though it was apparent that to decide the dispute it would be necessary to consider and interpret certain provisions of the collective bargaining agreement between the parties".

[93] In our view, these features have no bearing on the relevance of *Refrigeration Installations* to the current matter. The parties are not asking the Board to interpret the scope clause of the collective agreement. The bargaining unit is a standard Newbery unit and it is acknowledged that this unit is appropriate. What remains contested are the inclusions and exclusions from that unit, an issue over which the Board has jurisdiction.

[94] The purpose of both the “majority of time” and the prime or primary focus tests is to assist the Board in characterizing the nature of the work being performed by the employees in dispute.

[95] Next, in defining the work the Board will not look to the date of the application but will, instead, look to a period of time leading up to the date of the application. The duration of this time period depends on the circumstances and should be reasonably representative of normal responsibilities.

[96] According to the Union, the reasonably representative time period is that period during which the employees were engaged in the performance of their normal responsibilities and those normal responsibilities were performed while the employees were engaged in the installation of the modules. The Employer, on the other hand, argues that the Board is limited to looking back, as opposed to forward, in time when deciding on the reasonably representative time period. According to the Employer, there is no doubt that, during the time period prior to the filing of the certification application, the employees were performing the work of boilermakers.

[97] The Board is to be discouraged from choosing an arbitrary time period that is not representative of normal responsibilities. The Board is required to use some discretion and common sense in choosing the appropriate time period. In *K.A.C.R*., for instance, the Board chose not to consider the two-week period immediately prior to the application because it corresponded with the winter shut down.

[98] The Board’s analysis is complicated by two factors: past cases have not provided detailed reasons for the time period chosen; cases have not provided detailed reasons for the time restriction described as “leading up to the date of the application”.

[99] In considering this issue, it is worthwhile to consider the Board’s usual approach to post-application evidence and the relevant principles that guide that approach. In particular, section 6-107 of the Act provides the Board with discretion to reject such evidence as follows:

> ***6-107*** *If an application is made to the board for a certification order, the board may, in its absolute discretion, reject any evidence or information tendered or submitted to it concerning any fact, event, matter or thing transpiring or occurring after the date on which that application is filed with the board in accordance with the regulations of the board.*

[100] The Board generally rejects evidence of employee support that has occurred after the application was filed.[7] The obvious rationale for this policy is to reduce the potential of a party attempting to manipulate the results of the application.

[101] The Board explained in *United Steelworkers of America v Impact Products*, [1996] Sask LRBR 766, at 767:

> *It has been the long-standing practice of the Board to reject evidence concerning events that occur after the date a certification application was filed with the Board. The rule is generally applied with respect to evidence of support or evidence of withdrawal of support for the trade union as was the case in Saskatchewan Government Employees' Union v. Regina Native Women's Association, [1986] Mar. Sask. Labour Rep. 19, LRB File No. 307-85. The reason for the evidentiary rule is to prevent manipulation of support, either for or against the trade union, after an application has been filed.*

[102] The Board found that similar logic applies where an employer ceases to operate after the application for certification is filed.

[103] Similarly, by choosing the time period leading up to the application, there is no opportunity for a party to alter the work being assigned to the subject employees and less opportunity for a party to manipulate the outcome of the certification application.

[104] In *K.A.C.R.*, the Board suggests that it should exercise some flexibility in determining the appropriate time period, but it does not suggest that it should go forward in time; it expressly indicates that it should look back in time. This orientation is confirmed upon a review of the cases relied upon by the Board in establishing the initial test. In particular, the Board relied on *I.B.T., Local 230 v Johnson-Kiewit Subway Corp*.,1966 CarswellOnt 246 [*Johnson-Kiewit*], where the Ontario Board explained:

> *It is clear on examining these and other cases that when the Board speaks of "employed for a majority of their time" reference is being made not to employment on the date of the making of the application but, rather, to a period of time leading up to the date of the application. The cases however do not refer to any fixed period such as two weeks or a month prior to the application. Just how far back the Board will go depends on the particular circumstances of the individual case.*

[105] It should be noted that, since *Johnson-Kiewit*, the Ontario Board has decided to eliminate its use of a representative period and, instead, looks to the date of the application to determine whether the work comes within the bargaining unit. The seminal case on point is *P.A.T., Local*

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[7] *Arain v United Steel and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union*, 2018 CanLII 38249 (SK LRB).

1891 v Gilvesy Enterprises Inc., 1987 CarswellOnt 1181.[8] A similar approach has been taken by the Newfoundland and New Brunswick Boards.[9]

[106] However, the Saskatchewan Board has not moved away from the representative period. Nor do the parties suggest that relying on a representative period is inappropriate. Finally, if there is any inconsistency between the test for voter eligibility and the retrospective limitation on the representative time period when defining the work, this argument has not been raised.

[107] In summary, the Board is not persuaded that there is a sufficient policy justification for including within the representative time period the events that occurred after the application was filed. As such, the Board will determine which time period, leading up to but not including the date of the application, is reasonably representative of normal responsibilities.

[108] In *Wilf's Oilfield*, the Board confirmed that the "'reasonably representative period of time' is not rigidly established, but depends on the circumstances of each case."[10] In our view, the reasonably representative time period, which is indicative of normal responsibilities, consisted of the week prior to the filing of the certification application, when the workers were engaged in the normal workflow involved in the installation of the modules. This is consistent with the witness testimony which repeatedly broke down the work being performed according to a six-day work week.

[109] The employees were hired to complete the installation of the modules. This is the purpose of the project. By taking this into account, the Board is not looking to the timeframe after the filing of the application but is looking to the purpose of the project which was defined by the Employer at the outset. Although the Board accepts that the Union had an interest in waiting to file the certification application until the preparatory period was substantially over, this decision on the part of the Union is not disingenuous or improperly scheming. There is nothing that the Union could have done at that point to change the overall scope of work. The general preparatory work that took place prior to this timeframe was obviously not representative of normal responsibilities.

[110] The certification application was filed on August 30, 2022. The installation of the first module occurred shortly before that date.

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[8] *P.A.T., Local 1891 v Gilvesy Enterprises Inc*., 1987 CarswellOnt 1181 at para 21.
[9] See, for example, *UA, Local 740 and Filtrum Inc., Re*, 2020 CarswellNfld 352 and *C.J.A., Local 1386 v United Contractors Ltd*., 2003 CarswellNB 632.
[10] *Wilf's Oilfied* at para 70.

[111] Next, it is necessary for the Board to assess the evidence about the work that the employees were performing during the representative time period.

[112] To do so, the Board has drawn conclusions about the reliability of the evidence before it. The majority of the evidence is comprised of the testimony of witnesses. Each of the witnesses gave a different estimate of the amount of time spent doing pipefitting work. However, the greatest similarity in the accounts is in the testimony of Middleton and Amey. The most credible and reliable testimony came from Middleton, for the following reasons.

[113] Although all of the witnesses have some interest in the outcome of this case, Middleton and then Amey have the least interest. PM McDougall admitted that, in his view, it is not to the Employer's benefit to have another certified trade on the work site. McLean admitted that he had responded to the dispatch request for the purpose of obtaining a certification. Although Middleton and Amey are long-time members of the UA, Middleton was a retired member who called the hiring hall looking for work during his retirement. Both employees are paid less as pipefitters.

[114] McLean is the UA Business Manager and an experienced steamfitter/pipefitter. However, he has not been on site, is not aware of the work schedule, and has not been able to observe the work first-hand.

[115] PM McDougall is the project manager. He does not have direct responsibility for supervising the UA members or any of the other trades people on site. He has never been a member of a building trade. There are general foremen and other management staff on site who report directly to him. There are foremen who report to the general foremen. Foreman McDougall, who supervises the pipefitting crew, is a hybrid foreman/general foreman who reports directly to the superintendent. PM McDougall makes suggestions to the superintendent on how to execute the work but does not supervise the pipefitting crew.

[116] Although PM McDougall develops the schedules and sequencing of work, he did not put any of the related documents (schedules, timesheets) in evidence. While the failure to present documentation is not necessarily fatal, it means that it cannot be used to fill in the gaps in the testimony or to assist in assessing his credibility.

[117] PM McDougall exhibited an air of overconfidence when describing his ability to discern the nature of the daily work that was being performed. He suggested that he was capable of assessing the nature of the work, in part, because he had "a" camera that he looked at every 15

minutes while performing his duties as a project manager, he walked the site a few times a day, and had experience with mark-ups on other jobs.

[118] Given his responsibilities as a project manager, the Board does not believe that he looked at the camera feed "every 15 minutes". Even if he did, the suggestion that he was able to decipher (by observing the images on one camera feed on 15-minute intervals for an undisclosed amount of time) whether the work performed throughout the day by two specific employees (out of a larger group of workers) is boilermaker or pipefitter work, is implausible. He may have a better view when walking the site, but the amount of information that he would be able to glean from a site walk taken a few times a day would be minimal.

[119] In our view, none of the factors relied upon by PM McDougall can substitute for the hands-on experience that comes from working in the pipefitter or boilermaker trades, generally, or personally doing the jobs on this project. For the Employer's part, foremen have the responsibilities to supervise and to track time; therefore, a foreman would have been in a better position to testify about the nature of the work.

[120] PM McDougall also admitted that he made no attempt to assign work in compliance with the jurisdiction of the trade divisions. He justified this by explaining that he believed that the boilermakers could easily do any of the piping work on site. Assuming that he would be dealing only with boilermakers, he did not turn his mind to whether some of the work was pipefitting work. He was focused on getting the job done and was not invested in determining the nature of the work being performed. It is not plausible that PM McDougall has given any objective consideration to whether the two employees in question were performing pipefitter work. The practical skillset of the boilermakers is not the issue before the Board.

[121] Finally, there were occasions in which PM McDougall appeared to be catering his testimony to the Employer's case before the Board. For instance, he suggested that the Employer considers the employees' preferences, stating, for example, that "some people prefer doing pipefitting, or fitting, for instance, or *boilermaker fitting*". He corrected his testimony twice to, presumably, minimize the implications of using the terminology "pipefitting". He emphasized the piping involved in shipping and receiving when describing Jama's work but downplayed the piping involved in the general preparatory activities when describing Middleton and Amey's work. He suggested that he did not realize that he had accepted the standard bargaining unit for plumbers and pipefitters in his own sworn reply to the certification application. Lastly, he claimed that when the certification application was filed all of the people listed on the pipefitter crew list were at the

same level of pipefitting activity and that all of the pipefitting activity occurred after the filing of the application, even though the first module was installed prior to the application date.

[122] Next, although the descriptions provided by Middleton and Amey were alike, Amey was less careful than Middleton in his estimate about the amount of pipefitting work being performed on site. This is because he included in his estimate work which he fully acknowledged might not be pipefitter work, that is, the ducting related to expansion joints and manways.

[123] Middleton, by contrast, was careful in his responses to questions both in examination-in-chief and cross examination. He moderated his estimate of the work. He did not include ducting in his estimate. Although he did not have notes of the work performed, he gave a very detailed description of the work being performed. In our view, he was capable of estimating the amount of time spent doing the work despite being subject to the normal interruptions that come with a dynamic workflow.

[124] The Board accepts the evidence of Middleton in relation to both the description of the work and the estimate of time associated with the work being performed.

[125] Having reviewed all of the evidence, the Board finds that the primary focus of the work performed by Middleton and Amey during the representative time period was pipefitter work.

[126] First, there is no question that the dividing line between boilermakers' work and pipefitters' work is the first connection point from the module. Although much was made of the fact that, in this case, that connection point is not a flange but a socket weld coupling, the evidence is clear that this is a distinction without a consequence for the purpose of determining the nature of the work.

[127] It should also be noted that welding work is performed by both pipefitters and boilermakers, although they perform different types of welds.

[128] According to Middleton, about two-thirds of a six-day week is spent doing pipefitting work. This estimate is made up of the following: most of one day is spent sorting the piping material; an additional day is spent on direct preparation of the piping (setting and performing tack welds); one day is spent installing the piping; and additional time is spent sorting all of the material for the entire project. Although Middleton testified about the work in general, we have no reason to believe that this estimate does not apply to the week leading up to and including the installation of the first module.

[129] If we accept that at least some of the general sorting duties included pipefitting work, then the majority of the work performed was obviously pipefitting work. The Employer has admitted that the shipping and receiving work included some pipefitting work, but only in relation to the apprentice.

[130] However, we do not accept that the sorting of all of the material for the entire project is pipefitting work. Generally speaking, this is the type of work that any trade could perform, or if not every trade, then the labourers.

[131] On the other hand, we do accept that the preparation of the piping, including the direct sorting of the piping materials from the sea can, is pipefitter work. As it was described, this work includes the review of drawings, the planning for the piping work, the sorting of roughly 172 pipe spools, the organizing of all of the pieces, the confirmation of the measurements, and the cutting and buffing of the pipe.

[132] The Employer aims to complete each module within a week but has taken a little longer than that on average (6 modules in 8 or 9 weeks). However, work is performed on more than one module at a time. The witnesses based their estimates on a one day per six-day ratio; they did not suggest that these estimates should be assessed against a longer timeframe.

[133] Therefore, excluding the general sorting work, Amey and Middleton were performing pipefitter work for at least half or close to half of their time during the week.

[134] We do not think that it is appropriate for us to exclude these employees from the bargaining unit due only to an inability to definitively determine that they performed pipefitting work for at least 50.1% of their time during the representative time period. This is particularly so given the arguments before the Board and the overall circumstances of the work, which included activities of a general nature supportive of both the pipefitting and boilermaker trades, other labourer-type work, and the work of the operating engineers.

[135] The Employer has insisted that the employees belong in the Boilermakers' unit. However, if we were to rely solely on the majority of time test, the denominator in our equation would include general or other work that does not necessarily come within either of the two primary trade divisions but still supports the overall project. While the employees may not have been performing pipefitting work for the majority of the time, they were not performing boilermaker work for the

majority of their time either. Therefore, it would be unhelpful to disregard the prime focus test which has been squarely put before the Board.

[136] In deciding that the prime focus of the employees' work was pipefitter work we considered the finding that at least half or close to half of their time during the week consisted of pipefitting work, as well as the following.

[137] Both Middleton and Amey suggested that they were assigned to do the same tasks. They were assigned the main piping work including the layout work. They suggested that they did other work when the pipefitting work was at a standstill.

[138] Both Middleton and Amey worked on a core crew of people supervised by a pipefitter (admitted by the Employer to be included in the bargaining unit) and known as the pipefitting crew. In his cross examination, PM McDougall even agreed that it was to the Employer's advantage to group all of the pipefitters together to perform pipefitting work. The fact that the Employer's crew lists are extensive and include people who were on the crew "at one point or another" only reinforces the fact that the core members of the crew possess specific skills that were being utilized on the pipefitting crew.

[139] Important pipefitting work has been left to Middleton and Amey. Middleton and Amey were put to the task of reviewing the drawings of the piping systems to understand the scope of the pipefitting job. They were expected to know what piping materials were missing and to ask for anything that was needed for installation. They were expected to plan out much of the job for the piping crew. These are particular responsibilities that are suited to pipefitters.

[140] All of these findings support the conclusion that the employees' prime focus was to perform pipefitting work.

[141] To be sure, the Board has reviewed the information contained on the dispatch slips, including the rate of pay information, the classification as J. Mechanic, the confirmation of the ability to perform "my trade", and the promise to pay dues. The Employer suggests that this information means that Amey and Middleton were performing boilermaker work. The Employer also made much of the fact that the boilermakers "took on" the scope of the project.

[142] In our view, none of these factors outweighs the combination of job duties, responsibilities, and functions of these employees. The dispatch slips were issued before the employees set foot on the site. Because a construction site is dynamic and complex, an initial job title may be an

approximation, not determinative of the nature of the work being performed. The employees who were dispatched were highly experienced and skilled pipefitters. As such, they bring value to the project. However, they are listed as “non-members” because they are members of the pipefitting trade. They are listed as permit workers on the clearance form. They are not boilermakers and are not members of the Boilermakers’ Union.

[143] Likewise, Article 4.02 of the Boilermakers’ agreement is not helpful to the Employer. The employees have not been capable of performing all of the boilermaker work, yet no issue has been raised about their competency. This only confirms that the employees provide value as pipefitters.

[144] The Employer suggests that the Board should consider the interests of the employees who were dispatched on permits through the Boilermakers’ Union, pointing to the fact that pipefitters are paid less than boilermakers under the respective provincial agreements and to the potential that a certification will transform full-time jobs into part-time jobs. In our view, the preferences of these employees are sufficiently well tested through the secret ballot vote process.

[145] Next, the Employer argues that if the Board finds that the dispatched members of the UA are properly included within the bargaining unit then the voters’ list is necessarily underinclusive and all other staff ought to be included. The Board does not accept this argument. There is no evidence that the other workers assigned to the pipefitting crew were so assigned on anything more than an intermittent basis. There is no evidence that any other employees, outside of those who were evaluated in these Reasons, were performing pipefitter work as described by Middleton.

[146] As a result of the foregoing, the Board finds that Amey and Middleton are included in the bargaining unit.

Does Jama belong in the bargaining unit?

[147] The next issue is whether Jama is properly included in the bargaining unit. To determine this issue, it is useful to revisit the description of the proposed bargaining unit, which is:

> *All journeymen plumbers, steamfitters, pipefitters, welders, gasfitters, refrigeration mechanics, instrumentation mechanics, sprinklerfitters, and all apprentices and foremen and general foremen connected with these trades employed by ICT Industrial Inc. within the Province of Saskatchewan*

[148] The majority of Jama’s time has been spent performing tasks in the shipping and receiving area. He is responsible for understanding the location of all materials, not only materials directly

related to pipefitting duties. Although he performed a small amount of work directly under the supervision of the UA members, he did so after the certification application was filed.

[149] The Employer's argument suggests, implicitly, that because Jama is an indentured apprentice in the pipe trades that the Board should consider a broader scope of work in determining whether he comes within the bargaining unit, as compared to the pipefitters. The Employer does not cite any case law to support this argument.

[150] There is some support in the case law for reviewing the statutory framework related to apprentices and assessing whether the placement of the position in the bargaining unit is consistent with that legislation. An example is found in *International Brotherhood of Electrical Workers, Local 2038 v Croft Electric Ltd*., 2007 CanLII 68772 (SK LRB) [*Croft*]:

> *[42] With respect to both Mr. McCall and Tyler McIvor, we have determined that neither of them should properly be on the statement of employment. Mr. McCall had worked for only a few days, had not done electrical trade work before and his timesheets indicate that he spent less than ten percent of his time doing so. Even if we were to accept that he had sufficiently declared an intention to apprentice in the trade, in our opinion, given the compulsory apprenticeship nature of the trade (at least in part for important reasons of public safety), to be included in the classification of "electrical worker" one must in fact also be primarily engaged in the work of the trade with appropriate supervision. We will not, however, comment on the apparent fact that there are an insufficient number of journeymen to legally oversee the work so performed. With respect to Tyler McIvor, while he may have been primarily engaged in the work of the trade, we accept that he had not made a sufficient declaration of an intention to become indentured as an apprentice to be included as an "electrical worker."*

[151] Pipefitting is not a compulsory trade.

[152] The Board in *Croft* suggests that the compulsory nature of an apprenticeship trade means that for an apprentice to be included in the bargaining unit, "one must in fact also be primarily engaged in the work of the trade".[11] However, it is our view that, in relation to a designated trade that is not compulsory, the apprentice must also be primarily engaged in the work of the trade or, at the very least, the Board should not be indifferent to the nature of the work that the apprentice is performing simply because the apprentice is working in a non-compulsory trade.

[153] With respect to Jama being "indentured", PM McDougall testified that "we indentured him as such" and that he was working as a "first year apprentice". According to section 2 of *The*

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[11] In *International Brotherhood of Electrical Workers Local Union 2038 v Clean Harbors Industrial Services Canada*, 2014 CanLII 76047 (SK LRB) [*Clean Harbors*], the Board found that, to be included in a Newbery unit, it is not necessary for an employee in a compulsory trade to be registered with the Saskatchewan Apprenticeship and Trade Certification Commission.

Apprenticeship and Trade Certification Regulations, 2020, RRS c A-22.3 Reg 2, "indentured" means:

> *"**indentured**", in the case of an apprentice, means to be party to a valid contract:*
>
> *(a) that is entered into with, as the case may be:*
>
> *(i) an employer;*
> *(ii) a joint training committee; or*
> *(iii) the commission; and*
>
> *(b) that is registered with the commission in accordance with the commission regulations;*

[154] Every apprentice, defined as "a person who enters into a contract of apprenticeship that is registered with the commission", must serve a period of apprenticeship "in the apprentice's designated trade, subtrade or occupation".[12] Every contract of apprenticeship must conform with the plan of apprenticeship for the designated trade.[13] To be clear, registration for the non-compulsory trades is not necessary[14]; however, if an apprentice is "indentured" that means that the contract was registered. However, no contract of apprenticeship was entered into evidence. If a broader scope of work was a part of the apprenticeship program, it stands to reason that said scope would be outlined or referred to within the contract.

[155] If, on the other hand, what PM McDougall meant to communicate is that Jama had only *intended* to become "indentured", it remains the case that there is insufficient evidence to find that he should be included in the bargaining unit. Had it been suggested that he was a "helper" and that helpers were included within the proposed scope, there would still be insufficient evidence to find that he was doing work sufficiently incidental to the bargaining unit work.[15]

[156] Even if the Board should consider a broader range of work for an apprentice in a non-compulsory apprenticeship trade as compared to a compulsory trade, it is still required to delineate the scope of the work of the bargaining unit and to determine whether the person's work comes within that scope. The Board cannot simply rely on the Employer's assertions that Jama was performing work as an apprentice in the pipefitting trade and that the Employer was signing off on his card. The Board has the responsibility to assess the inclusions in the bargaining unit. In

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[12] *The Apprenticeship and Trade Certification Act, 2019*, SS 2019, c A-22.3 [ATC Act], section 18.
[13] *Ibid*, sections 26 and 27.
[14] See, *Clean Harbors*.
[15] See, for example, *United Brotherhood of Carpenters and Joiners of America, (Millwrights Union, Local 1021) v Daycon Mechanical Systems Ltd*., [1999] Sask LRBR 127, LRB File No 338-97; *International Association of Heat and Frost Insulators and Asbestos Workers v Alberta Insulation Supply and Services Ltd*., [1999] Sask LRBR 91, LRB File No 368-97.

this case, this means assessing whether Jama was performing work connected with one of the trades listed in the unit description. The connected trade has been described as the pipefitter trade.

[157] Prior to the application date, Jama was not working with the pipefitting crew and was not performing any, or was performing minimal, pipefitting work. The only evidence on point is that Jama would have been receiving some piping materials in shipping and receiving. In the absence of more, the Board cannot conclude that the shipping and receiving work performed by Jama was the work of a pipefitting apprentice.

[158] Furthermore, the Employer's evidence on this issue lacks credibility. At first, PM McDougall admitted in examination-in-chief that Jama was not performing "journeyman pipefitter" work and that, instead, he was performing majority shipping and receiving work. Then, without stating the source of his knowledge, he agreed that an apprentice can do "a lot of different things" to get the hours for an apprenticeship. He agreed that, among those things are shipping and receiving, "if you are receiving pipe and being associated with that, then yes,… er, receiving welding rod or whatever else[.]" In reference to what happened after Jama's short time on the pipefitting crew, PM McDougall described an exchange with Jama:

> *…do you mind, kind of, sticking to your thing but we will still include you and still sign off on your card as, as…pipefitting hours, you know, because he is so, he is doing some pipefitting receiving?*

[159] The fluid nature of PM McDougall's answers leads the Board to conclude that he was attempting to adjust the evidence to meet the case before the Board. Answers such as "shipping and receiving" and "if you are receiving pipe", which are less favourable to the Employer's position, were adjusted to "pipefitting receiving" and "receiving welding rod or whatever else", both of which might be construed as being more favourable to the Employer's position.

[160] The Employer also states that the Board should consider the consequences for Jama of a decision finding that he was not performing pipefitting work. However, the case law is clear that the Board's task is to consider the nature of the work performed, not the personal circumstances of the individual performing it.

[161] In conclusion on this point, Jama should not be included in the bargaining unit.

Conclusion:

[162] For these reasons, the Board has found that Travis Brown and Awil Jama should be excluded from the bargaining unit and Wayne Middleton and Charles Amey should be included in the bargaining unit.

[163] 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 September 12, 2022 be tabulated in accordance with *The Saskatchewan Employment (Labour Relations Board) Regulations, 2021*;

b) If they voted, the ballots of Awil Jama and Travis Brown 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.

[164] The Board thanks the parties for the submissions they provided to assist the Board in making a determination in this matter, all of which the Board has reviewed and found helpful.

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

DATED at Regina, Saskatchewan, this **30th** day of **December, 2022.**

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson