Saskatchewan
Labour Relations Board

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400, Applicant v ATCO STRUCTURES & LOGISTICS LTD., Respondent and ATCO FRONTEC LTD., Respondent

UNITE HERE, LOCAL 47, Applicant v ATCO FRONTEC LTD., Respondent

LRB File Nos. 105-23 and 055-24; June 28, 2024

Chairperson, Kyle McCreary (sitting alone pursuant to subsection 6-95(3) of *The Saskatchewan Employment Act)*

For the Applicant, United Food and Commercial Workers, Local 1400:	Heath Smith
For the Respondent, ATCO Structures & Logistics Ltd.:	Daniel R. Bokenfohr
For the Respondent, ATCO Frontec Ltd.:	Steve Seiferling
For the Applicant, UNITE HERE, Local 47:	David B. Mercer

Sequencing Decision – Whether Common Employer Application or Certification Application Should Proceed First.

Board reviews test for sequencing – Most efficient and fair for certification application to proceed first considering the nature of the applications at issue.

REASONS FOR DECISION

Background:

[1] **Kyle McCreary, Chairperson:** The question before the Board is what order the common employer application in LRB File No. 105-23 and the certification application in LRB File No. 055-24 should be heard. In the circumstances of this case and for the reasons outlined below, it is the determination of the Board that the certification application in LRB File No. 055-24 should be heard first.

[2] The common employer application is based upon the facts that on November 12, 2015, the Labour Relations Board granted a certification order to United Food and Commercial Workers, Local 1400 [UFCW, Local 1400] in relation to certain employees of ATCO Structures & Logistics Ltd. [ATCO Structures] employed in specific rural municipalities.

[3] ATCO Structures ceased work that was subject of the certification order in 2015. The parties did not complete a Collective Bargaining Agreement prior to the cessation of work.

[4] In July 2023, UFCW, Local 1400 filed a common employer application against ATCO Frontec Ltd. [ATCO Frontec] alleging that ATCO Structures and ATCO Frontec are a common employer, and that ATCO Frontec is the employer of certain individuals at the BHP Jansen Discovery Lodge [the Site].

[5] On August 18, 2023, ATCO Frontec filed a reply in LRB File No. 105-23. ATCO Frontec denied meeting the definition of common employer and denied being the employer of the employees at the Site.

[6] Also on August, 18, 2023, ATCO Structures filed a reply in LRB File No. 105-23. ATCO Structures defended on several basis including that it and ATCO Frontec do not meet the definition of a common employer.

[7] In September 2023 ATCO Frontec filed a summary dismissal application against the common employer application of UFCW, Local 1400.

[8] On February 26, 2024, the Board dismissed an application to summarily dismiss the common employer application.[1]

[9] On March 8, 2024, UNITE HERE, Local 47 filed an application for bargaining rights of all employees of ATCO Frontec at the Site with specified exceptions.

[10] On March 27, 2024, the Board issued a direction for vote in relation to UNITE HERE, Local 47's application.

[11] On April 2, 2024, ATCO Frontec filed a reply to UNITE HERE, Local 47's application. In the reply, among other issues raised, ATCO Frontec denies that it is an employer of the employees at the Site.

[12] On April 9, 2024, the Board requested the parties' positions on sequencing and on April 30, 2024, set filing deadlines for written submissions on the issue. The Board has determined this matter can be determined based on the written submissions of the parties.

Argument on behalf of UFCW, Local 1400:

[1] *Atco Frontec Ltd. v United Food and Commercial Workers Union, Local 1400*, 2024 CanLII 13528 (SK LRB).

[13] UFCW, Local 1400 argues that the common employer application should proceed first. Relying on the factors set out by the Board, UFCW, Local 1400 states that they have moved quickly and that it would promote efficiency because the common employer could be determinative, and that the application is time sensitive. In support of this position, UFCW, Local 1400 also relies upon the "first in rule", that is an application filed first should be determined first.

[14] UFCW, Local 1400 cites *Port Transport Inc. v Unifor, Local Union No. VCTA*;[2] *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Saskatchewan Gaming Corporation - Casino Moose Jaw*;[3] and *Construction Workers Union, CLAC Local 151 v Woodland Constructors Ltd.*,[4] in support of its position.

Argument on behalf of ATCO Frontec:

[15] ATCO Frontec argues for the certification application to take precedence. It argues the application of the Woodland Constructors test favours the certification application and places particular emphasis on the concept of employee choice in arguing for the certification application to take precedence.

[16] ATCO Frontec cites *Woodland Constructors*; *Piett v Global Learning Group Inc*.;[5] *Crowder v SEIU-WEST*;[6] *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International, Local 2014 v United Cabs Limited*,;[7] and *International Association of Heat & Frost Insulators and Asbestos Workers, Local 119 v Book Insulations Ltd.*,[8] in support of its position.

Argument on behalf of ATCO Structures:

[17] ATCO Structures argues for the certification application to take precedence. It relies on the difference between certification and common employer hearings and in particular the impact of certification hearings on representational rights.

[18] ATCO Structures cites: *UFCW, Local 1400 v ATCO Structures & Logistics Ltd. and ATCO Frontec Ltd*.;[9] *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial*

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[2] 2016 CanLII 15104 (BC LRB)[*Port Transport*].
[3] 2002 CanLII 52918 (SK LRB).
[4] 2023 CanLII 58549 (SK LRB) [*Woodland Constructors*].
[5] 2018 SKQB 144 (CanLII).
[6] 2016 CanLII 156697 (SK LRB).
[7] 2017 CanLII 43858 (SK LRB).
[8] 2019 CanLII 98480 (SK LRB).
[9] 2023 CanLII 115175 (SK LRB).

and Service Works International Union v Comfort Cabs Ltd;[10] *International Union of Operating Engineers, Hoisting & Portable & Stationary, Local 870 v North American Construction Group Inc*;[11] and *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v. Saskatoon Co-operative Association Limited and United Food and Commercial Workers, Local 1400*,[12] in support of its position.

Argument on behalf of UNITE HERE, Local 47:

[19] UNITE HERE, Local 47 relies on the *Woodland Constructors* case. It argues that the certification application proceeding first meets the criteria of *Woodland Constructors* and that it would be inefficient to postpone the certification in favour of the common employer application.

Analysis and Decision:

[20] As cited by all the parties, the Board's leading case on sequencing is *Woodland Constructors*. In that case Chair Morris set out that the Board had the power to sequence applications and the factors to consider when determining sequencing:

> *[9] The Board is the master of its own schedule and is empowered under subsection 6-103(1) and clause 6-111(1)(k) of The Saskatchewan Employment Act to adjourn or postpone any proceeding if it considers postponement appropriate.*
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> *…*
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> *[13] In spite of the different forum and type of proceeding involved, the key considerations employed by the Court are also relevant when the Board is determining the sequencing of related applications. Paraphrasing from Piett, some of the questions when assessing the key considerations include:*
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> - *Has the party seeking postponement of any application(s) proceeded promptly with the application(s) it seeks to have determined first?*
> - *Will postponing the application(s) promote efficiency, in the circumstances?*
> - *Are any of the applications time sensitive, or needing to be heard promptly to ensure the proceeding is conducted fairly?*
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> *[14] In addition, the Board has generally prioritized certification applications to ensure that employees are not unduly delayed in the exercise of their rights, though successorship and recission applications could be prioritized based on similar reasoning. When determining sequencing, the Board will be mindful of making economical use of the time and resources of the parties and the Board. Ultimately, the list of factors which may impact sequencing in specific circumstances is not closed.*

[10] 2015 CanLII 19986 (SK LRB).
[11] 2013 CanLII 60719 (SK LRB).
[12] 2018 CanLII 68443 (SK LRB).

[21] *Woodland Constructors* relies on the analysis of Barrington-Foote J (as then was) in Piett. Piett has been affirmed as articled the underlying principles to consider in sequencing, as stated in *Hoedel v WestJet Airlines Ltd.*, 2023 SKCA 135 (CanLII) at para 36:

> *[36] As I see it, the test articulated in Jean Coutu is not markedly different from the one endorsed in Ventures Ltd. and in Cannon. The list of relevant considerations in each decision is non-exhaustive and canvasses the same broad themes and concerns: delay, cost, the prospect of multiple rounds of proceedings, judicial efficiency, and fairness. In Piett, Barrington-Foote J. (as he then was) put it this way: "Fairness to all parties, efficiency and judicial economy are the key considerations" (at para 15). In short, while each formulation of the test may be worded slightly differently, they all capture the same or similar points.*

[22] Thus, in considering the question of which application to proceed first, the framework from *Woodland Constructors* will be applied, however, it is just a framework, the guiding principles that the framework represents are to minimize delay and cost and to promote efficiency in the Board's hearings and fairness to those impacted by the proceedings which includes a consideration of the nature of the applications involved.

[23] UFCW, Local 1400 in arguing for the common employer application to proceed first place emphasis on "the First In Rule". The first in rule does not have application in this case. It is a rule on determination of questions between competing votes, it is not a determination of the general processing of all competing applications. Even if the first in rule previously stood for this broad application, its application is narrowed by the direction from this Board on the approach to determining sequencing in *Woodland Constructors*. To give a broad application to the first in rule would fetter the Board's discretion and turn the focus away from "delay, cost, the prospect of multiple rounds of proceedings, judicial efficiency, and fairness",[13] and towards solely a question of filing dates.

[24] In terms of the factors in *Woodland Constructors*, both Unions seeking to have their applications heard have proceeded promptly. The delay in the common employer application being heard relates to summary dismissal applications, and thus this factor weighs in favour of both applications proceeding.

[25] As both applications relate to the representational rights of employees, they are both are time sensitive. This factor also weighs in favour of both applications proceeding.

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[13] *Hoedel* at para 36.

[26] The promotion of efficiency and the prioritization of certification applications are the determining factors in this application.

[27] This case can be distinguished from the *Port Transport* case relied upon by UFCW, Local 1400. In that case the Common Employer application had already had an initial hearing and findings had been made. The certification was then consolidated with the common employer application. No party has requested that the hearings be consolidated. Further, consolidating the hearings would likely require significant evidence to be called about ATCO Structures and ATCO Group that is irrelevant to the certification issue reducing efficiency. There would be inefficiency in hearing the common employer application prior to certification as the discretionary nature of the common employer remedy may not be determinative of the certification application.

[28] The reasoning of the *Port Transport* case specifically distinguished itself from a previous decision of the British Columba Labour Relations Board in *West Coast Aggregates*.[14] In *West Coast Aggregates*, the BC Board decided to proceed first with certification applications and not to consolidate the certification matter with the common employer application, as stated as paras 22-24:

> *[22] In considering this issue, a number of points are evident from the above review of the cases. As noted in Richmond Cabs, supra, an application for certification involves the exercise of the fundamental right of representative choice under the Code. The Board's policy is to expedite the processing of such applications. A common employer application is of a remedial nature and is not normally expedited. In that manner it differs from an application seeking the right of representative choice. In making its argument, however, the Union also points out that Richmond Cabs articulates that the Code must be administered in a way that is as simple and clear as possible. It says if the certification application proceeds first, these principles will not be realized as the applications could lead to conflicting results with the certification ultimately being cancelled.*
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> *[23] While that argument has an initial attraction, one must not lose sight of the fact that the common employer declaration is effectively remedial in nature. A fundamental part of that application will be the question of amending and issuing a new certification if a remedy is granted. The fact that a certification may be cancelled or amended is not unusual and should not dictate the procedural question. Further, I do not see common issues being raised between the common employer and certification applications. Under Sections 18 and 28, the issues are the status of the applicant as a trade union, the membership support and the appropriateness of the bargaining unit. Under Section 38 the issue engaged here between the parties is the labour relations purpose behind the application.*
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> *[24] On balance, taking these principles into account in particular the fundamental right of representation, the expedition with which applications for certification are mandated and the time and resources that may well be expended in a common employer application, I*

[14] *West Coast Aggregates Ltd. v Teamsters Local Union No 213*, BCLRB no B39/99 [*West Coast Aggregates*].

> *find the certification applications of the Association and the Teamsters should proceed first and not be consolidated with the common employer application.*

[29] The Board finds that the reasoning in *West Coast Aggregates* is more applicable to this case than *Port Transport* as it focuses on the nature of the applications and rights at issue and no findings of fact had yet been made in *West Coast Aggregates*.

[30] The fairest and most efficient way to proceed is to determine the certification issue first. This hearing should allow the identification of the true employer, which may be determinative of both applications. The certification hearing would also respect the representational choice of the current employees at issue. Given the differing nature of certification and common employer applications, the certification application should take precedence. Once the certification application is determined, the common employer application can then be scheduled for hearing.

[31] As a result, with these Reasons, an Order will issue that the certification application in LRB File No. 055-24 will be heard first and the common employer application in LRB File No. 105-23 is held in abeyance pending the outcome of the certification application.

[32] The Board thanks the parties for the helpful submissions they provided, all of which were reviewed and considered.

[33] These matters are on appearance day on July 2, 2024 to speak to scheduling. At that time the parties to both matters, including ATCO Structures and UFCW, Local 1400, can raise issues related to any potential preliminary applications in LRB File No. 055-24.

[34] These reasons and decision are made in my capacity as the Board's executive officer, for the purposes of s. 6-97 of the Act.

DATED at Regina, Saskatchewan, this **28th** day of **June, 2024.**

LABOUR RELATIONS BOARD

Kyle McCreary
Chairperson