Saskatchewan
Labour Relations Board

UNITE HERE LOCAL 47, Applicant v ATCO FRONTEC LTD., Respondent and GEORGE GORDON DEVELOPMENTS LTD, Intervenor

LRB File Nos.159-24 and 160-24; October 29, 2024
Vice-Chairperson, Carol L. Kraft; Members: Aina Kagis and Curtis Talbot

Counsel for the Applicant, UNITE HERE Local 47:	David B. Mercer
Counsel for the Respondent, Atco Frontec Ltd.:	Steve Seiferling
Counsel for the Respondent, George Gordon Developments Ltd.	Michael A. MacDonald

Order of Proceedings – Union ordered to present evidence first in its application for certification

Pre-Hearing Production – Employer and Union applied for pre-hearing production of particulars or documents – No evidence filed in support of Applications as required by *Saskatchewan Employment (Labour Relations Board) 2021, Regulations* - Applications pre-mature – Both applications dismissed

REASONS FOR DECISION

Background:

[1] **Carol L. Kraft, Vice-Chairperson:** The Union UNITE HERE Local 47 **("UNITE HERE"** or the **"Union")** has applied under LRB File No. 055-24 (the **"Certification Application")** to be the certified bargaining agent for a group of individuals working at the Jansen Discovery Lodge.

[2] UNITE HERE has alleged that the individuals concerned are employed by Atco Frontec Ltd. **("Frontec").** Frontec has denied that these individuals are its employees, and asserts they are instead employed by Wicetowak Frontec Services (**"WFS").**

[3] Frontec has applied to the Board requesting an order that UNITE HERE:

(i) proceed first with its evidence during the Certification Hearing; and

(ii) produce documents and particulars that UNITE HERE relies upon to file its certification application as against Frontec, rather than WFS or GGDL.

[4] In its application, Frontec had also asked for documents and particulars which relate to UNITE HERE's attempts to contact WFS or George Gordon Development Ltd. **("GGDL")** in advance of filing the certification application; however, this request was abandoned.

[5] UNITE HERE has filed its own application requesting an order that Frontec:

(i) proceed first with evidence of its objection during the Certification Hearing; and

(ii) produce all documents and provide particulars related and relevant to Frontec's objection to UNITE HERE'S certification application.

[6] Both UNITE HERE and Frontec brought their applications pursuant to clause 6-103(2)(d) of *The Saskatchewan Employment Act* (the "Act"). This provision authorizes the Board to "make an interim order or decision pending the making of a final order or decision."

[7] However, as both parties are seeking production of documents and particulars, the sections of the Act relevant to those issues must be considered. Similarly, the case law relevant to production and disclosure, some of which has been relied upon in the parties' submissions, must be considered.

Issues:

a. The order of proceedings during certification applications and
b. Pre-hearing production orders

Analysis and Discussion:

a. The order of proceedings

[8] The ordinary order of proceedings during a certification application is for the Union to proceed first with the presentation of its case. This well-established principle is set out in, for example, *UFCW, Local 1400 v Verdient Foods Inc.,* 2019 CanLII 76957 (SK LRB):

> ***[62]*** *At the outset of the hearing, the Board addressed a disagreement between the parties about the appropriate order of evidence. The Union suggested that the Employer was required to proceed first, by laying the foundation for the exclusions that it was seeking. The Employer disagreed with the Union's suggested approach, citing Workers United Canada Council v Amenity Health Care LP, 2018 CanLII 8572 (SK LRB) ["Amenity Health Care"], at para 59, in support of its position that the Union should proceed first:*

> *[59] This Board concurs with the Board's analysis in Wheatland Regional Centre. It is important to clarify the difference between the burden of proof and the onus. It cannot be denied, as asserted by Amenity, that the Union bears the legal burden of proof to establish on a balance of probabilities the proposed unit is an appropriate one for collective bargaining purposes. However, if an employer contests the composition of a proposed unit on the basis for example, that some individuals function as managers or, as in this case, qualify as supervisory employees, then the evidential burden or onus, as opposed to the legal burden of proof, shifts to the employer to present evidence supporting its argument for exclusion. Notwithstanding this shift in the evidentiary onus, the over-arching burden of proof in a certification application remains upon the union.*

[9] The Board finds no reason to depart from the usual procedure in the circumstances of this case. Frontec's application to have UNITE HERE proceed first with its evidence is granted and UNITE HERE's application to have Frontec proceed first with its evidence is dismissed.

[10] Accordingly, the Board orders that UNITE HERE will proceed with its evidence first followed by Frontec and then GGDL.

b. Pre-hearing production orders

Principles Relating to Pre-hearing Disclosure:

[11] The Board's authority to order the production of documents and particulars is found at subsection 6-111(1) of *The Saskatchewan Employment Act (*the "Act"):

> ***6-111****(1) With respect to any matter before it, the board has the power:*
>
> *(a) to require any party to provide particulars before or during a hearing or proceeding;*
>
> *(b) to require any party to produce documents or things that may be relevant to a matter before it and to do so before or during a hearing or proceeding;*
>
> *(c) to do all or any of the following to the same extent as those powers are vested in the Court of Queen's Bench for the trial of civil actions:*
>
> *(i) to summon and enforce the attendance of witnesses;*
>
> *(ii) to compel witnesses to give evidence on oath or otherwise; and*
>
> *(iii) to compel witnesses to produce documents or things;*

[12] When making a determination under section 6-111(b) of the Act, this Board has adopted and applied the following criteria for pre-hearing document disclosure outlined in *Air Canada Pilots Association v Air Canada et al.*, [1999] CIRBD No. 3 ["*Air Canada*"]:

1. Requests for production are not automatic and must be assessed in each case;

2. The information requested must be arguably relevant to the issue to be decided;

3. The request must be sufficiently particularized so that the person on whom it is served can readily determine the nature of the request, the documents sought, the relevant time-frame and the content;

4. The production must not be in the nature of a fishing expedition; that is, the production must assist a complainant in uncovering something to support its existing case;

5. The applicant must demonstrate a probative nexus between its positions in the dispute and the material being requested;

6. The prejudicial aspect of introducing the evidence must not outweigh the probative value of the evidence itself, regardless of any possible "confidential" aspect of the document.

[13] The scope of particulars required by parties has been reviewed by this Board on numerous occasions and is well settled. For example, in *P.A. Bottlers Ltd. v United Food Commercial Workers, Local 1400*, LRB File No. 017-97, [1997] S.L.R.B.D. No. 22 ["*P.A. Bottlers Ltd.*"] the Board stated:

5. In [Saskatchewan Joint Board Retail, Wholesale and Department Store Union v WaterGroup Companies Inc., [1993] 1st Quarter Sask. Labour Rep. 252], the Board commented on the place of particulars in connection with the proceedings of the Board, at 257:

> *To this statement of the Board's long-standing practice on the issue, the Board would like to add that the need for particulars in the originating documents is especially important before tribunals like the Labour Relations Board which employ a summary procedure that does not provide for examinations for discovery or pre-hearing disclosure, and that permits relatively little time to prepare a defence. If the Board's hearings are to be conducted in accordance with the basic requirements of natural justice, a respondent is entitled to, and the Board must require, reasonable clarity and particularity in the originating documents.*
>
> *Failure to provide reasonable particulars in the initial application would justify the Board in dismissing the application, adjourning the application pending the provision of particulars, or proceeding with any part of the application which has been particularized and refusing to proceed with the remainder. It is absolutely no answer for an applicant to argue that the respondent "knows what the case is about." As part of a fair hearing, the respondent is entitled to have the allegations against it particularized in writing. It should not be forced to guess which of its interactions with the applicant are the subject of the application.*

6. The Board has thus made it clear that it is necessary for an applicant to state with some precision the nature of the accusations which are being made, both in terms of the specific events or instances of conduct which are considered objectionable, and of the provisions of the Act which have allegedly been violated. The Board has linked this requirement with the capacity to provide a fair hearing to a respondent.

7. On the other hand, the Board must balance the requirement for a fair hearing with other values which are also of pressing importance to the Board, including those of expedition of the hearing of applications, and maintaining relative informality in Board proceedings.

> *Whatever might be the case in a civil court, the nature of the proceedings before this Board cannot accommodate extensive pre-hearing or discovery processes without running the risk that the ability to respond in a flexible and timely way to issues which arise in the time-sensitive context of industrial relations will be seriously impaired.*
>
> *8. We do not interpret the requirement for the provision of sufficient particulars, in any case, to contemplate a complete rehearsal of evidence and argument in exchange between the parties prior to a hearing. What is necessary is that an applicant make it clear what conduct of the respondent is the subject of their complaint and how this conduct, in the view of the applicant, falls afoul of the Act. In assessing the degree to which an applicant has met this requirement, the Board must be guided not only by our desire to ensure a fair hearing but by the demands placed upon us by the objectives of efficacy and timeliness in our proceedings. [Emphasis added.]*

[14] In *Amalgamated Transit Union, Local 615 v Saskatchewan Abilities Council*, LRB File No. 335-97, [1998] S.L.R.B.D. No. 10 ["*Saskatchewan Abilities Council*"] the Board had before it an application by the Employer for further particulars respecting allegations made by the Union that a member of the Employer's management team had uttered "anti-union comments" to a Union member, and had "coerc[ed] and intimidat[ed]" one of its shop stewards. The Employer wanted better particulars of those alleged incidents. The Union opposed this application saying no further particulars were warranted. The Board stated in respect of the Employer's request as follows:

> *27 Given only the information contained in paragraph 4 of the application, it may not be possible for Mr. Jaspar to identify the material transactions or statements. The description of the statements as "anti-union" and "intimidating and coercive" with nothing further is simply too vague. What one person perceives to be intimidating may leave no impression on the memory of another, and further reasonable detail is required in order for the Employer to identify the crucial statements. With respect to paragraphs 4(d), 4(e) and 4(f) of the application, this must include the time when and place where the statements were made and the conversation took place with as much exactitude as possible, and a reasonably clear and concise description of the nature and content of the impugned statements themselves to the degree necessary to enable identification of the transactions in question.*

[15] The Board then cited its previous decision in *Saskatchewan Joint Board, Retail, Wholesale and Department Store Union v Westfair Foods Ltd.*, [1995] 2nd Quarter Sask. Labour Rep. 288, LRB File Nos. 246-94 and 291-94, ["*Westfair Foods*"] at 292:

> *We cannot accept the argument of counsel for the Union that his obligation is only to outline the general nature of his allegation to the Employer in response to a request for particulars. Such a response must make it clear exactly what case the opposing party has to meet, and this includes allusion to facts which will be used in support of that case. Counsel for the Union was not obliged to give a detailed rundown of the evidence he would call. He should, however, have indicated what basic facts he would use to make out his allegation of discrimination, including the identity of employees whose circumstances would form part of his case. In our view, it would be inconsistent with the rules of procedural fairness to provide anything less. [Emphasis added in original].*

Frontec's Request

[16] With respect to production, Frontec has applied under clause 6-103(2)(d) of the Act for an Order for Interim Relief seeking the following:

> *(i) documents and particulars of the Union's attempts (if any) to contact and include Wicetowak Frontec Services ("WFS") or George Gordon Development Ltd. ("GGDL") in the hearing, and*
>
> *(ii) documents and particulars that the Union relies upon to file its certification application as against Frontec, rather than WFS.*

[17] In support of its application, Frontec filed an Application for Interim Relief (Form 12) and Draft Interim Order (Form 13). A Brief of Law was also filed.

[18] In its Brief of Law, at paragraphs 23 and 24, Frontec expands its request: It states:

> *23. …There is also a live question of whether the Union truly reached the threshold of 45%, required under Part VI of the Saskatchewan Employment Act (the "Act") for the Board to order a vote, given the numeric discrepancies between the Union's application, and the voters list.*
>
> *24. Frontec's request is for relevant documentation and particulars which the Union relied upon for the following:*
>
> *(a) Filing the application as against Frontec, rather than as against WFS, which was awarded the work; and,*
>
> *(b) Documentation or particulars of how the number of employees contained in the application was determined, since that number did not turn out to be accurate.*

[19] First, Frontec's request in clause (b) above was not included in its application. A party cannot expand the scope of its application through submissions. This is, at the very least, procedurally unfair.

[20] Furthermore, Frontec's request in clause (b) above it is irrelevant. Frontec's basis for this request is its argument that there is a "live question of whether the Union truly reached the threshold of 45%". However, this is not, in fact a "live issue".

[21] This Board has most recently held in *Canadian Union of Public Employees v The Town of Preeceville LRB File 057-24, 065-24 and 076-24 ("Preeceville")* that the 45% threshold is not to be considered retrospectively once a vote is directed. In doing so, the Board relied upon the Saskatchewan Court of Appeal's decision in *United Food and Commercial Workers, Local 1400 v Affinity Credit Union,* 2015 SKCA 14 (CANLII).

[22] In *Preeceville,* the Board explained:

> *[21] The Board adopts the Board's reasoning from Amalgamated Transit Union that the Affinity Credit Union reasoning applies to the SEA. The wording of ss. 6-9 and 6-12 of the SEA do not contemplate a hearing in relation to the 45 percent issue. The 45 Per cent threshold is a "preliminary step" to be determined at the time of application that is not meant to be considered at a full hearing. The Town's position that it must be able to evaluate whether CUPE met the threshold for a direction to vote is contrary to the Court of Appeal's holding in Affinity Credit Union and the Board declines to depart from the Court of Appeal's jurisprudence.*
>
> *[22] As such, what information the Board received is not part of either party's case to meet and is not required to be disclosed as a matter of procedural fairness.*

[23] Accordingly, any request by Frontec for documentation and particulars solely related to its argument that the 45% threshold has not been met is inappropriate as it is not relevant to the issues to be decided.

[24] Frontec is entitled to know what documents or particulars UNITE HERE relies upon to support its position that Frontec is the employer. The identity of the employer is in issue in these proceedings. The Employer is entitled to know what the Union relies upon to support its claim that Frontec is the employer just as the Union is entitled to know what Frontec relies upon to support its claim that it is not the employer. This Board will need to decide this question based on the evidence.

[25] However, while Frontec in its written and oral submissions has indicated that it has made the request of UNITE HERE, there is no evidence before the Board on the matter.

[26] The applicable section of the Act for bringing an application for an order for production of documents and particulars is found at subsection 6-111(1) of the Act. As noted, Frontec brought its application for interim relief under clause 6-103(2)(d). However, evidence is still required to support an application under clause 6-103(2)(d) of the Act. Section 15(1) of *The Saskatchewan Employment (Labour Relations Board) 2021, Regulations,* provides:

> ***Application for an interim order***
> ***15****(1) An employer, union or other person that intends to apply to the board for an interim order or decision pursuant to clause 6-103(2)(d) of the Act shall file:*
>
> *(a) an application in Form 12 (Application for Interim Relief);*
>
> *(b) an affidavit of the applicant or other witness in which the applicant or witness identifies with reasonable particularity:*

> *(i) the facts on which the alleged contravention of Part VI of the Act, the regulations made pursuant to Part VI of the Act or an order or decision of the board is based, including referring to any provision of the Act or regulations that is alleged to have been contravened;*
>
> *(ii) the party against whom the interim relief is claimed; and*
>
> *(iii) any exigent circumstances associated with the application or the granting of the interim relief;*
>
> *(c) a draft of the order sought by the applicant in Form 13 (Draft Interim Order); and*
>
> *(d) any other material that the applicant considers necessary for the purposes of the application.*
>
> *(2) Subject to subsection (3), every affidavit filed pursuant to clause (1)(b) must be confined to those facts that the applicant or witness is able of the applicant's or witness's own knowledge to prove.*
>
> *(3) If the board is satisfied that it is appropriate to do so because of special circumstances, the board may admit an affidavit that is sworn or affirmed on the basis of information known to the person swearing or affirming the affidavit and that person's belief.*
>
> *(4) If an affidavit is sworn or affirmed on the basis of information and belief in accordance with subsection (3), the source of the information must be disclosed in the affidavit.*
> *(5) Before filing an application pursuant to this section, the applicant shall contact the registrar and, on being contacted, the registrar shall set a date, time and place for the hearing.*
>
> *(6) On being notified pursuant to subsection (5) of the date, time and place of the hearing, the applicant shall serve a copy of the application and all other material mentioned in subsection (1) on the party against whom the interim relief is claimed at least 3 business days before the date set for the hearing.*
>
> *(7) Before the hearing, the applicant shall file with the board proof of service of the application and the material mentioned in subsection (1) in accordance with subsection (6).*

Unite Here

[27] UNITE HERE has also applied for an order for production of documents and particulars under clause 6-103(2)(d) of the Act, rather than subsection 6-111(1) of the Act.

[28] UNITE HERE requests an order that Frontec produce all documents and provide particulars related and relevant to Frontec's objection to the certification application.

[29] UNITE HERE has similarly not filed any evidence as required by the *Regulations.*

[30] Frontec's Reply to UNITE HERE's application for certification clearly indicates that its position is that it is not the employer. As stated, UNITE HERE is entitled to know what documents or particulars Frontec relies upon for its position that it is not the employer. However, a blanket

request for ”all documents and particulars related and relevant to Frontec’s objection to the certification application” is not sufficiently particularized. If, after Frontec discloses its documents, UNITE HERE believes there is something more that ought to be disclosed, then it must sufficiently particularize its request to Frontec and explain its relevance.

[31] UNITE HERE has also requested copies of the information that the employer provided to the Board. The Board’s records indicate that on March 13, 2024, the Board provided the UNITE HERE and Frontec, through their counsel, copies of the employee information provided by the employer, redacted of personal address information. An email from the Board Office was also sent advising counsel for the UNITE HERE that they had until March 14, 2024, to inform the Board if they believe there are any discrepancies with the provided information.

Decision

[32] As noted earlier, clauses 6-111(1)(a) and (b) of the Act provide:

> ***Powers re hearings and proceedings***
> ***6-111****(1) With respect to any matter before it, the board has the power:*
>
> *(a) to require any party to provide particulars before or during a hearing or proceeding;*
>
> *(b) to require any party to produce documents or things that may be relevant to a matter before it and to do so before or during a hearing or proceeding;*

[33] Section 6-126 of the Act provides:

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

[34] Section 21 of *The Saskatchewan Employment (Labour Relations Board) Regulations, 2021,* c S-15.1 Reg 11, (the “Regulations”) prescribes rules of procedure for pre-hearing production of particulars or documents. It provides:

> ***Application re pre-hearing production***
> ***21****(1) In this section, "original application" means an application made to the board pursuant to the Act and these regulations that is the subject of an application for pre-hearing production of particulars or documents or things.*
>
> *(2) An employer, union or other person that intends to apply to the board for an order for pre-hearing production of particulars or documents or things pursuant to section 6-111 of the Act shall:*
>
> *. . .*
>
> *(b) file an application in Form 19 (Application for Pre-hearing Production of Particulars or Documents or Things**), including evidence** that the applicant has served the respondent with a sufficiently particularized request for production and that the respondent has failed refused or objected to comply with that request; and*
>
> *(c) serve a copy of the application on all other parties to the original application, at least 20 business days before the date set for hearing of the original application.*
>
> *(**emphasis added**)*

[35] Neither UNITE HERE nor Frontec have complied with Section 21 of the Regulations. There is no evidence before the Board that either applicant has served the respective respondent with a sufficiently particularized request for production and that the respondent has failed or refused to comply with such request. Both applications are premature. Accordingly, both applications are dismissed.

[36] Even if there was some confusion about whether to bring the applications under clause 6-103(2)(d) of the Act, rather than subsection 6-111(1) of the Act, the absence of evidence from the parties is what is fatal to their applications. As noted earlier, evidence is required in both instances.

[37] Before a party comes before the Board seeking an order for production of documents or particulars, it is incumbent upon the party to have first made diligent efforts to provide sufficient disclosure and particulars to the other party or parties to the proceedings. If a party fails to do so, another party may, after making the appropriate demands set out in section 21 of *The Saskatchewan Employment (Labour Relations Board) Regulations, 2021* (the "Regulations"), apply to the Board.

[38] Parties, particularly when represented by counsel, must fully engage in the disclosure process before resorting to the Board for resolution. Parties must make all reasonable efforts to resolve disclosure issues before resorting to the Board.

[39] If, after having regard to the comments included in these Reasons and the principles of disclosure outlined in the case law, concerns remain that proper disclosure has not been made, the parties may resort to section 21 of the Regulations and apply to the Board, but only after they have fully complied with section 21 of the Regulations.

[40] Accordingly, the Board urges the parties to exercise their best efforts to complete the disclosure process in accordance with the well-established jurisprudence and section 21 of the Regulations before seeking the Board's intervention.

[41] In summary, parties are obliged to make all reasonable efforts to disclose documents and particulars to enable the other party or parties to know the case they have to meet. Further, if a party objects to disclosing documents, it must provide sufficient explanation for its refusal, and the party receiving the objection must consider the merits of the objection. This is all a mandatory part of the process which must take place well before any hearing on the underlying application, and well before a party applies to the Board for an order for production of documents or particulars.

[42] Finally, UNITE HERE raises concerns that Frontec's request for particulars and disclosure goes beyond standard particularization and production in certification applications by its attempt to force UNITE HERE to disclose confidential and privileged communication that would have the result of possible identification of employees who support the Union. For example, UNITE HERE says that information from employees indicates that Frontec is the true employer. Disclosing these documents would reveal the identity of the employees and thus allow for the employer to know who supports the Union.

[43] If the documents include information that would reveal the identity of employees who support the union, the Union might seek the assistance of the Board to consider an order for redaction.

[44] With these Reasons, an Order will issue as follows:

1. That the Union, Unite Here Local 47, will proceed first in LRB File No. 055-24;

2. That Atco Frontec Ltd.'s application in LRB File No. 159-24 for an order that the Union, Unite Here Local 47, produce documents and particulars is dismissed; and

3. That Unite Here Local 47's application in LRB File No. 160-24 for an order that Atco Frontec Ltd. produce documents and particulars is dismissed.

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

DATED at Regina, Saskatchewan, this **29th** day of **October, 2024.**

LABOUR RELATIONS BOARD

Carol L. Kraft
Vice-Chairperson