Saskatchewan
Labour Relations Board

CONSTRUCTION & GENERAL WORKERS' LOCAL UNION NO. 180, Applicant v PNR RAILWORKS INC., Respondent

LRB File No. 211-24; December 4, 2024
Chairperson, Kyle McCreary; Board Members: Linda Dennis and Don Ewart

Counsel for the Applicant, Construction & General Workers' Local Union No. 180: Greg Fingas

Counsel for the Respondent, PNR Railworks Inc.: Michael Vos

Certification – Discretionary bar of same or similar applications within 12 months – Considered factors in exercising discretion – Application not barred

REASONS FOR DECISION

Background:

[1] **Kyle McCreary, Chairperson:** The Construction & General Workers' Local Union No. 180 ("the Union") has applied for bargaining rights pursuant to s. 6-9 of *The Saskatchewan Employment Act*, SS 2013, c S-15.1 ("the Act"). PNR Railworks Inc. ("the Employer") asked the Board to exercise its discretion pursuant to s. 6-12(3) to not order a vote due to the previous applications for bargaining rights in LRB File No. 048-24 and LRB File No. 099-24. The Board directed a vote on November 29, 2024. These are the reasons for the Board's decision to direct a vote.

[2] In LRB File No. 048-24, the Union made an application for bargaining rights under the general division. That application was withdrawn on March 6, 2024, without a vote being directed.

[3] In LRB File No. 099-24, the Union applied pursuant to the construction division and the number of employees on the Employer's list was 33. The Union requested two further individuals be added to the list.

[4] The within Application in LRB File No. 211-24 is pursuant to the general division and the number of employees on the Employer's list is 41.

Relevant Statutory Provisions:

[5] The Board's jurisdiction in relation to votes on applications pursuant to s. 6-9 is set out in s. 6-12:

> ***Representation vote***
> ***6-12****(1) Before issuing a certification order on an application made in accordance with section 6-9 or amending an existing certification order on an application made in accordance with section 6-10, the board shall direct a vote of all employees eligible to vote to determine whether the union should be certified as the bargaining agent for the proposed bargaining unit.*
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> *(2) Notwithstanding that a union has not established the level of support required by subsection 6-9(2) or 6-10(2), the board shall make an order directing a vote to be taken to determine whether a certification order should be issued or amended if:*
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> > *(a) the board finds that the employer or a person acting on behalf of the employer has committed an unfair labour practice or has otherwise contravened this Part;*
> >
> > *(b) there is insufficient evidence before the board to establish that 45% or more of the employees in the proposed bargaining unit support the application; and*
> >
> > *(c) the board finds that sufficient evidence of support mentioned in clause (b) would have been obtained but for the unfair labour practice or contravention of this Part.*
>
> *(3) Notwithstanding subsection (1), the board may refuse to direct the vote if the board has, within the 12 months preceding the date of the application, directed a vote of employees in the same unit or a substantially similar unit on the application of the same union.*

Analysis and Decision:

[6] The question before this Board is whether to exercise its discretion to refuse to direct a vote on LRB File No. 211-24 pursuant to s. 6-12(3) of the Act.

[7] The Board set out the factors to consider in exercising this discretion under s. 5(b) of *The Trade Union Act*, RSS 1978, c T-17, the predecessor provision of s. 6-12(3), in *United Food and Commercial Workers, Local 1400 v. Affinity Credit Union,* 2009 CanLII 44419 (SK LRB) ("*Affinity Credit Union*"):

> *[25] Clause 5(b) precludes the Board from making any order under that provision if there has been a previous application "in respect of the same or a substantially similar unit of employees" within a period of six (6) months from the date the previous application was dismissed. This provision would certainly apply if these applications had been "in respect of the same or a substantially similar unit of employees" as these applications were brought well within the six (6) month period referenced in the Act.*
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> *[26] However, for the reasons given by the Board in Hotel Employees & Restaurant Employees Union Local 767 v. Regina Exhibition Association Ltd.[2] we find that the applications are not "in respect of the same or a substantially similar unit of employees." Here, the group of employees impacted by the applications is much smaller than the previous application filed with the Board in its April 30, 2009 decision. These applications*

> *were with respect to only approximately 7% of the previously impacted employees. (In the Regina Exhibition Association case, supra, the follow on group applied for was approximately 65% of the former group.)*
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> *[27] Also, the applications were much different in that the previous application was for an amendment to a previous certification Order under clause 5(j), whereas these applications are for a certification Order under clauses 5 (a), (b) & (c).*
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> *[28] Nor did the Board make a determination of the previous application on its merits. The applications were dismissed on procedural grounds, not on substantive grounds related to the matters normally considered by the Board on applications for certification. As outlined by the Board in United Steelworkers of America v. Vicwest Steel Inc.[3] "a second application for certification will not be barred, even when a first application is dismissed, unless the true wishes of the employees were determined as a result of the first application."*

[8] The Board in *International Union of Operating Engineers Hoisting & Portable & Stationary, Local 870 v. Rural Municipality of Meota No. 468*, 2002 CanLII 52905 (SK LRB), discussed the permissibility of withdrawing applications for certification if it is not an abuse of process:

> *[26] In the absence of evidence that the withdrawal of an application for certification constitutes an abuse of process, an applicant may withdraw the application before it has been determined by the Board. Even if the Union in the present case had had knowledge of the Employer's reply and the statement of employment when it withdrew the first application and used that knowledge to assist in its further organizing efforts to file the second application, without more, we would not find that there had been an abuse of process. As the Ontario Board stated in Highview Plumbing, supra, at para. 20:*
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> > *Obviously applicants will file their applications (whether it be a certification application or a termination of bargaining rights application) when it is most advantageous to the applicant. That is not a violation of the Act.*
>
> *[27] The Ontario cases also reveal that the Ontario Board routinely allows an applicant to transfer the evidence of support from the first application to the second and to add additional evidence of support to the second application. The fact that the applicant union may have relied on material in the employer's response in taking such action is generally immaterial. In Highview Plumbing, supra, at para. 22 the Ontario Board approved of the principle enunciated in Sara Lee, supra, that:*
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> > *. . . there is nothing improper in a union's subsequent application (after having withdrawn the first application) relying on information obtained in the first application through the employer's response.*

[9] The Employer relies on the Board's decision in *Saskatchewan Government and General Employees' Union v. Quint Development Corporation,* 2018 CanLII 68440 (SK LRB) ("*Quint Development*"). In that decision, a vote had been counted prior to the withdrawal and the new application within the barring period was denied. On reconsideration, the Board upheld the decision to dismiss the application and found that the legislature did not have an intention to make

a substantive change to the interpretation of clause 5(b) of *The Trade Union Act* other than in the length of the period:

> *[37] The purpose of subsection 6-12(3), like its predecessor, clause 5(b) of The Trade Union Act, is to prevent unnecessary or prolix applications for certification. If it was intended to have the same meaning as clauses 6-111(1)(m) and (n), there would have been no reason to include it. The only reasonable interpretation of subsection 6-12(3) is that, when the drafting was updated in the new Act, the only substantive change was to extend the six month cooling off period to 12 months.*

[10] The Employer relies on several Alberta cases related to section 57 of *The Labour Relations Code*, RSA 2000, c L-1, including *International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local Union No. 725 v Quolus Construction Services Ltd.*, 2019 CanLII 31605 (AB LRB); and *Health Sciences Association of Alberta v. Alberta Health Services – Board*, 2010 CanLII 27397 (AB LRB). The Alberta caselaw is of assistance to the Board in reaffirming that the purpose of the re-application bar is to prevent abuse of the Board's process and disruption of the workforce, and to foster respect for Board directed votes.

[11] The mischief s. 6-12(3) seeks to prevent are unnecessary and abusive applications that are disruptive to the Board's process and potentially an employer's workplace. The Board must balance preventing this mischief against the right to form a Union in s. 6-4 of the Act and the freedom of association enshrined in section 2(d) of the Charter. The Board finds that this balance can be achieved by considering the following factors when determining how to exercise its discretion under s. 6-12(3):

a. The similarity between the proposed bargaining units in terms of number of positions and classifications;
b. Whether there are any legal differences in what has been applied for;
c. Whether the expression of the employees' wishes has been made known to the parties; and
d. Whether there is evidence of an abuse of the Board's process related to the previous application(s).

[12] As a vote was not directed in LRB File No. 048-24, it is not relevant to the question before the Board. The comparison is between the within application and LRB File No. 099-24. At first glance, this comparison is problematic for the Union. The size of the proposed units is substantially similar 33 (or 35) compared to 41, and covering a similar range of job classifications.

[13] However, the Board finds that applying under the construction division and the general division are not substantially similar. The bargaining rights and the methods of collective bargaining differ between the two regimes. Further, the Employer had expressively objected to the application of Subdivision 13 in LRB File No. 099-24. While the Employer argues that subdivision 13 is nothing more than checking a box, the effect of that election on bargaining is not insignificant and the Board finds that a construction unit and a general unit are not substantially similar units.

[14] Finally, as noted in *Affinity Credit Union*, the practice of the Board has been not to bar a second application unless the true wishes of the employees were determined by the first application. The true wishes were known in *Quint Development* and that application was barred. While a vote was taken in this LRB File No. 099-24, it remained sealed, and the wishes of employees were never determined.

[15] The Employer's reply does not include any evidence of prejudice suffered other than the general prejudice suffered of a vote being conducted. The Union's application explains the process of trying to determine the appropriate bargaining unit. It may have been preferable if the Union had amended previous applications pursuant to s. 6-112 of the Act, but the Board does not find that this application for bargaining rights constitutes an abuse of process.

[16] It is for these reasons that the Board previously direct a vote in LRB File No. 211-24. This is a unanimous decision of the Board.

DATED at Regina, Saskatchewan, this **4th** day of **December 2024.**

LABOUR RELATIONS BOARD

Kyle McCreary
Chairperson