

Canada Industrial Relations Board



Conseil canadien des relations industrielles

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BY FAX

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Dear Sirs:


In the matter of the *Canada Labour Code (Part I-Industrial Relations)* and an application for certification filed pursuant to section 24 thereof by the Transport, Marine, Warehousing and Allied Workers Union, CLAC Local 66, applicant; Harbour Link Container Services Inc., employer; Unifor, certified bargaining agent. (31399-C)

The parties will find enclosed the Reasons for decision issued by a panel of the Canada Industrial Relations Board composed of Ms. Ginette Brazeau, Chairperson, and Messrs. André Lecavalier and Norman Rivard, Members.

The word "Canada" in a stylized font with a small Canadian flag above the letter 'a'.

To comply with section 20 of the *Official Languages Act*, the Reasons will be translated and published on the Board's website at www.cirb-ccri.gc.ca. A copy may be obtained upon written request to the undersigned.

Sincerely,



for Sylvie M.D. Guilbert
Executive Director and Senior
Registrar

Encl.

c.c.: Mr. Daniel De Santis (CIRB-CIRB)
ESDC-Labour Program (Fax: **819-997-1693**)

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Reasons for decision

Transport, Marine, Warehousing and Allied
Workers Union, CLAC Local 66,

applicant,

and

Harbour Link Container Services Inc.,

employer,

and

Unifor,

certified bargaining agent.

Board File: 31399-C

Neutral Citation: 2015 CIRB 804

December 10, 2015

The Canada Industrial Relations Board (the Board) was composed of Ms. Ginette Brazeau, Chairperson, and Messrs. André Lecavalier and Norman Rivard, Members.

For the reasons set out below, the Board has decided to dismiss the certification application. The Board's decision is dictated by the fact that the Industrial Relations Officer (IRO) of the Board, during his investigation of the application, discovered irregularities in the membership evidence filed by the applicant union in support of its application.

Parties' Representatives of Record

Mr. Tim Charron, for Transport, Marine, Warehousing and Allied Workers Union, CLAC Local 66;

Mr. Ryan Anderson, for Harbour Link Container Services Inc.;

Mr. Donald W. Bobert, for Unifor.

These reasons for decision were written by Ms. Ginette Brazeau, Chairperson.

Canada

I. Facts

[1] On November 27, 2015, the Transport, Marine, Warehousing and Allied Workers Union, CLAC Local 66 (CLAC Local 66 or the applicant) filed an application, pursuant to section 24(1) of the *Canada Labour Code (Part I—Industrial Relations)* (the *Code*), seeking to be certified as bargaining agent for a unit of all employees at Harbour Link Container Services Inc. (Harbour Link or the employer) in British Columbia, thereby displacing Unifor, the incumbent bargaining agent.

[2] Unifor was certified to represent the employees in the unit on June 10, 2014 (Order no. 10575-U). Unifor served a notice to bargain on Harbour Link on August 8, 2014. The parties have been engaged in collective bargaining for some time but have been unable to reach agreement.

[3] On November 13, 2015, an application for certification was filed by the Canadian Owner-Operator Workers' Association (COOWA). This application was dismissed on November 23, 2015, on the basis of the results of a representation vote conducted by the Board.

[4] Unifor served its 72-hour notice of strike on November 26, 2015. The next day, this application was filed with the Board. The strike commenced on November 30, 2015, and is ongoing at the time of this decision.

II. Analysis

[5] Section 16.1 of the *Code* clearly provides that the Board may decide any matter before it without holding an oral hearing. The Board has the discretion, on a case-by-case basis, to decide whether a particular matter warrants an oral hearing or whether the documents on file are sufficient to deal with a matter. The Board's authority to decide solely on the basis of written material filed was outlined in *NAV CANADA*, 2000 CIRB 468, affirmed in *NAV Canada v. International Brotherhood of Electrical Workers*, 2001 FCA 30.

[6] In addition, as the Board stated in *Coastal Shipping Limited*, 2005 CIRB 309, the Board's practice in certification applications is to make its determinations on the basis of the written material on file and to hold oral hearings only in exceptional circumstances. Despite the fact that the legislative provisions governing certification applications were recently amended, the Board

sees no reason to deviate from its procedure and policies as enunciated in *Coastal Shipping Limited, supra*.

[7] The Board concludes in this case that a hearing is not necessary. The Board therefore uses its discretion pursuant to section 16.1 of the *Code* to decide the matter without holding an oral hearing.

[8] This application was filed pursuant to the new certifications provisions of the *Code* that came into force on June 16, 2015. In particular, sections 28 and 29 of the *Code* were modified to require that the Board conduct a representation vote in order to satisfy itself that a majority of employees in a unit wish to be represented by a trade union, provided the required threshold level of support has been met. The amendments removed all discretion of the Board to rely solely on membership evidence when determining whether a majority of employees in the unit wish to be represented by a trade union.

[9] These amendments also had the effect of modifying the Board's established policy in displacement applications, which required that an applicant demonstrate majority support amongst the employees in the unit in order for the Board to proceed with the application and either certify the applicant or order a representation vote.

[10] The new provisions governing certification applications are as follows:

28. (1) If the Board is satisfied on the basis of the results of a secret ballot representation vote that a majority of the employees in a unit who have cast a ballot have voted to have a trade union represent them as their bargaining agent, the Board shall, subject to this Part, certify the trade union as the bargaining agent for the unit.

(2) The Board shall order that a secret ballot representation vote be taken among the employees in a unit if the Board

(a) has received from a trade union an application for certification as the bargaining agent for the unit;

(b) has determined that the unit constitutes a unit appropriate for collective bargaining; and

(c) is satisfied on the basis of evidence of membership in the trade union that, as of the date of the filing of the application, at least 40% of the employees in the unit wish to have the trade union represent them as their bargaining agent.

29. (1) [Repealed, 2014, c. 40, s. 3]

(1.1) Any person who was not an employee in the bargaining unit on the date on which notice to bargain collectively was given, and was hired or assigned after that date to perform

all or part of the duties of an employee in the bargaining unit on strike or locked out, is not an employee in the unit.

(2) [Repealed, 2014, c. 40, s. 3]

(3) Where the Board is satisfied that a trade union has an established practice of admitting persons to membership without regard to the eligibility requirements of its charter, constitution or by-laws, the Board may disregard those requirements in determining whether a person is a member of a trade union.

[11] In accordance with the new provisions, prior to ordering a vote pursuant to section 28(2), the Board must determine that the unit is appropriate for collective bargaining and must be satisfied, based on the membership evidence, that at least 40% of employees in the unit wish to be represented by the trade union.

[12] Despite these legislative changes, the Board recently reaffirmed the importance of scrutinizing the membership evidence to ascertain the level of support for the applicant union at the time the application is filed. In *WestJet, an Alberta Partnership*, 2015 CIRB 785, the Board stated the following:

[42] The Board agrees that despite the change in the legislation that removes the Board's discretion to certify a union on the basis of the membership evidence submitted at the time of the application, the *Act* did not amend the Board's obligation and responsibility to review the membership evidence to satisfy itself that the requisite support of employees in the proposed bargaining unit has been met. The Board therefore concludes that it must rely on its existing policies and practices to assess and scrutinize the membership evidence.

[43] The Board maintains that it is critically important that the membership evidence on which the Board will rely to make its decision be accurate and reliable. In assessing and verifying membership evidence, the Board has consistently maintained a very high standard. The Board recently restated the importance of these requirements in *Garda Security Screening Inc.*, 2015 CIRB 764:

[16] The Board takes the requirements regarding membership evidence seriously and has consistently held that non-compliance with the requirements of the *Code* and the *Regulations* are a substantive deficiency rather than merely a technical breach. This is particularly important because the Board relies on the membership evidence to decide whether to grant a certification or to order a representation vote, thereby giving to the applicant access to fundamental rights and privileges under the *Code*. This Board and its predecessor, the Canada Labour Relations Board (CLRB), have consistently applied a high standard when scrutinizing the membership evidence submitted by an applicant union.

[13] The Board's requirement regarding the evidence of membership in a trade union is codified in section 31(1) of the *Canada Industrial Relations Board Regulations, 2012 (the Regulations)*:

31. (1) In any application relating to bargaining rights, the Board may accept as evidence of membership in a trade union evidence that a person

(a) has signed an application for membership in the trade union; and

(b) has paid at least five dollars to the trade union for or within the six-month period immediately before the date on which the application was filed.

[14] The key question that the Board asked itself in this matter is whether the application is accompanied by sufficient and valid membership evidence, as required by section 31 of the *Regulations*, to establish that at least 40% of the employees in the unit wish to be represented by the applicant.

[15] In order to satisfy itself, pursuant to section 28(2)(c) of the *Code*, that the applicant has met the threshold required for a representation vote, the Board has in place a process by which it delegates its investigation powers to the Board's IRO so they may verify and test the membership evidence that is submitted in support of a certification application.

[16] The IRO investigates the membership evidence by way of confidential interviews with individual employees, taking into consideration all the information submitted by either party to the application. The IRO reports the findings of the investigation to the Board through a confidential report in order to protect the confidentiality of the employee wishes in accordance with section 35 of the *Regulations*. This process is well established and has been reviewed in previous decisions of the Board (see *IMS Marine Surveyors Ltd.*, 2001 CIRB 135 at paragraph 16; *TD Canada Trust in the City of Greater Sudbury, Ontario*, 2006 CIRB 363; and upheld on judicial review: *TD Canada Trust v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union*, 2007 FCA 285).

[17] In addition, the courts have consistently protected this process and the need to keep the results of the investigation confidential given the sensitive nature of employee wishes as per section 35 of the *Regulations* (see *Maritime-Ontario Freight Lines Ltd. v. Teamsters Local Union 938*, 2001 FCA 252).

[18] The Board also requires that the union file a Certificate of Accuracy. As indicated in *North America Construction (1993) Ltd.*, 2014 CIRB 745; and *North America Construction (1993) Ltd.*, 2014 CIRB 746, the Certificate of Accuracy corroborates the legitimate accomplishment of all the necessary steps taken to ensure that membership cards are collected in compliance with the *Regulations*:

[9] The combination of the card-based system and the Board's policy of keeping employee wishes confidential compels applicant trade unions to use a process that ensures that cards and membership applications are signed and completed in full compliance with the *Regulations*. To this end, the Board requires an investigation by its Industrial Relations Officers (IRO) to ensure that the evidence is complete and reliable. It also requires that the applicant file a Certificate of Accuracy to corroborate the legitimate accomplishment of all the necessary steps.

[19] As part of his investigation in this application, the IRO contacted a significant number of employees who had signed membership cards. Some employees who were interviewed by the IRO and who had submitted signed membership cards stated that they had not paid the minimum \$5.00 fee prescribed at section 31(1)(b) of the *Regulations*. The IRO further found that an individual offered to take care of the \$5.00 fee for a group of people. The cards provide no indication that the individuals paid any membership fee to the union and the receipts provided with the application are unsigned.

[20] The Board accepts the results of the investigation by the IRO and finds, therefore, that there were improprieties in the membership evidence filed in support of the certification application. The Board finds that some employees interviewed by the IRO confirmed that they had not personally paid the fee prescribed at section 31(1)(b) of the *Regulations*.

[21] In *North America Construction (1993) Ltd., supra*, the Board explained the expectations from the Board with respect to the payment of the membership fee and the importance of the process by which it is collected. The Board stated as follows:

[11] In the present application, there were no membership cards or application forms produced by the applicant with the filing of the application, nor are there records of active membership status offered as evidence of support. The *Regulations* are clear that cards must be signed and the individual must pay the \$5.00 fee to the union; there is no substitute for membership status and the \$5.00 payment cannot be made by someone else, even if there might be a suggestion of a later reimbursement. If someone else pays the required membership fee, then the card is defective.

[22] It is important to note that the Certificate of Accuracy signed by the applicant and submitted to the Board affirms that the amounts shown to have been paid as union membership fees have indeed been paid by the signatory employees themselves, on their own behalf. Paragraph 4 of the Certificate of Accuracy signed by the applicant on November 27, 2015, states as follows:

I, (NAME REMOVED) Organizer of the applicant, do hereby report and certify to the Canada Industrial Relations Board (the Board) as follows:

...

4. The amounts shown as having been paid as union dues and/or initiation fees were actually paid by the employees concerned on their own behalf and on the dates indicated.

[23] The Board holds the CLAC Local 66 responsible for full compliance with the requirements of the *Code* and the *Regulations*.

[24] In its review of the membership evidence submitted with an application for certification, the Board's objective is to ascertain the wishes of the employees as of the date of filing the application.

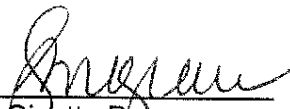
[25] When reviewing the membership evidence, the Board wants to ensure that it can rely on the evidence submitted as a true reflection of the wishes of employees. The Board will evaluate the circumstances of each case and the evidence submitted to determine whether it is satisfied that the membership evidence was collected freely and voluntarily.

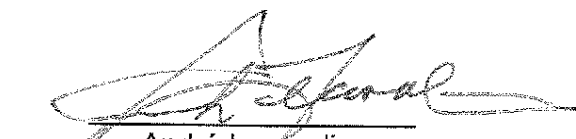
[26] In the present matter, the Board finds, on the basis of the results of the investigation by the IRO, that there were improprieties in the membership evidence filed in support of the certification application. In the Board's view, the nature and the extent of the improprieties that were found amount to a substantive defect and have the effect of tainting all the membership evidence submitted in support of the application such that the Board is not prepared to accept its veracity and to rely on it to order a representation vote.

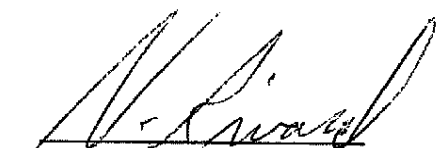
[27] On this basis, the Board dismisses the application.

[28] Given the Board's conclusion with respect to the membership evidence filed in support of the application, the Board does not need to address the timeliness issue raised by Unifor.

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


Ginette Brézéau
Chairperson


André Lecavalier
Member


Norman Rivard
Member