Saskatchewan
Labour Relations
Board

LRB File No. 102-21

IN THE MATTER OF

An application for reconsideration of LRB File No. 092-21 pursuant to *The Saskatchewan Employment Act*;

BETWEEN:

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers)

APPLICANT

- and -

JSN Motors Inc.

RESPONDENT

BEFORE:

Barbara Mysko, Vice-Chairperson)
Shawna Colpitts)
Mike Wainwright)

DATED at Regina, Saskatchewan, on the **21st** day of **January, 2022.**

ORDER

THE LABOUR RELATIONS BOARD, pursuant to Section 6-103 and 6-115(3) of *The Saskatchewan Employment Act,* **HEREBY ORDERS:**

a) that the Order, dated August 3, 2021, dismissing the certification application in LRB File No. 092-21 is rescinded;

b) that, as soon as practicable, the Board Agent shall complete the investigation into the support evidence filed on that application; and

c) that, if deemed appropriate upon completion of that investigation, a Direction for Vote may issue in the usual manner.

LABOUR RELATIONS BOARD

Barbara Mysko
Vice-Chairperson

Saskatchewan

Saskatchewan
Labour Relations Board

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS), Applicant v JSN MOTORS INC., Respondent

LRB File No. 102-21 and 092-21; January 21, 2022
Vice-Chairperson, Barbara Mysko; Board Members: Shawna Colpitts and Mike Wainwright

Counsel for the Applicant, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers): Heather M. Jensen

For the Respondent, JSN Motors Inc.: Amjad Saleem

Underlying Certification Application – Electronic Support Evidence – Certification Application Dismissed – Union Seeks Reconsideration of Dismissal – Second Stage of Reconsideration Application – Consideration of *Remai* Criterion #6.

Electronic Support Evidence Acceptable Pending Further Investigation – Board Rescinds Dismissal of Certification Application – Board Agent to Complete Investigation into Support Evidence – Certification Application to be Processed as Appropriate.

REASONS FOR DECISION

Background:

[1] Barbara Mysko, Vice-Chairperson: On July 22, 2021, the Union, the United Steelworkers, filed a certification application pursuant to section 6-9 of *The Saskatchewan Employment Act* [Act], seeking to certify an all-employee unit of employees working for JSN Motors Inc. [Employer] in Saskatoon, Saskatchewan. The Union filed electronic support evidence. The Employer filed a reply but raised no objections to the certification application.

[2] The Board dismissed the certification application without reasons. On August 17, 2021, the Union filed an application for reconsideration of the dismissal of the certification application. In *United Steelworkers v JSN Motors Inc.*, 2021 CanLII 119181 (SK LRB) [*United Steelworkers No. 1*], the Board decided that the Union had established sufficient grounds, pursuant to *Remai* criterion no. 6, to permit the Board to proceed to the second stage of the reconsideration matter. These are the Board's Reasons for Decision in relation to the second stage.

[3] In *United Steelworkers No. 1*, the Board provided additional, relevant background to this matter:

> *[2] When applying for certification pursuant to section 6-9 of the Act, a union is statutorily required to establish a minimum threshold of support by employees in the unit and file with the Board evidence of each employee's support. The Board requires that the evidence of support consist of a separate support card, which is personally signed and dated, from each employee. The Board accepts only those support cards the originals of which are physical rather than electronic. Originals must be delivered to the Board.*
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> *[3] In 2021, amendments were made to what are now The Saskatchewan Employment (Labour Relations Board) Regulations, 2021 [Regulations] to allow for the filing of forms or other documents by electronic means without the filing of a paper copy. With these amendments, the Board has permitted parties to file applications and replies by electronic means without the filing of a paper copy. Applicants for certification orders are permitted to file support evidence by electronic means at the time of application, to be followed by the filing of the original, physical support cards at a later date.*
>
> *[4] On the certification application in issue, the Union filed electronic support evidence. The Union took the position that the evidence met the statutory requirements and that the application should be processed by the Board. Upon receipt of the application, the Board Registrar wrote to the Union to advise that the Board does not accept electronic support evidence and suggested that the Union withdraw the application and refile to avoid a potential dismissal for failure to meet the support threshold. The Union proceeded with the certification application with electronic support evidence, and it was dismissed by the Board on August 3, 2021.*

[4] The second stage hearing took place on January 11, 2022. The Union presented evidence and made argument, including by filing a brief of law. The Employer's representative was present at the hearing but did not otherwise participate.

Evidence:

[5] The Union called four witnesses: Alvin Lukinchuk, Shane Ellis, Brett Barden, and Malik Draz. The witnesses testified about personal experience with this Board's requirement for a statement of employment on a certification application; various challenges with gathering physical support evidence; recent experience with electronic support evidence in other jurisdictions; and the nature of the support evidence filed in this application.

[6] Exhibited to the certification application is a description of the electronic cards and the process by which they were disseminated, completed, and returned to the organizer. That description closely matches the evidence presented during the hearing, and it is reproduced, here, in full:

The membership evidence relied upon in this Application was collected using electronic membership cards. The process by which each electronic membership card was completed and returned is described below.

1. The United Steelworkers' ("USW") electronic membership cards were created using Adobe Sign software. The electronic cards are almost identical to the USW's physical membership cards and contain the same fields to be completed by an applicant for membership.

2. The USW's Organizer, Malik Draz (the "Organizer"), provided the applicant for membership with a hyperlink containing access to a blank membership card.

3. The applicant for membership accessed the blank membership card through the hyperlink and filled in the mandatory fields (i.e. company name, date, email address, and signature).

4. The applicant for membership signed the electronic membership card using the Adobe "draw" function using either a mouse on non-touch screen devices or their finger or stylus on touch-screen devices.

5. Once the mandatory fields were filled in and the electronic membership card had been signed, the applicant for membership received an automatically generated email with a request to confirm his or her identity. The applicant for membership verified his or her identity by clicking on the hyperlink contained therein.

6. After the applicant for membership's identity was verified, the Organizer received an automatically generated email with the signed electronic membership card. The email contained a hyperlink for the Organizer to counter-sign the electronic membership card. The Organizer counter-signed the electronic membership cards using the same process described in paragraph 4 above.

7. Once the electronic membership card was signed by the Organizer, both the Organizer and the applicant for membership received an email with the fully completed and signed electronic membership card.

8. Signed electronic membership cards are encrypted and cannot be modified. The Adobe Sign system generates a unique transaction ID for each electronic membership card that provides for a digital certification of authenticity. This certificate of authenticity can be viewed by opening a copy of the signed PDF in Adobe Reader or Adobe Acrobat.

9. The Organizer also received an automatically generated email with the history of each completed electronic membership card, referred to as the "audit report". The audit report indicates the following:

(a) The date and time at which the document was created by the USW;

(b) The date and time that the document was filled in by the applicant for membership, as well as the IP address of the device which the document was filled out on (i.e. the applicant for membership's device);

(c) The date and time that the document was emailed to the applicant for membership in order to verify his or her identity;

(d) The date and time that the email containing the identity verification was viewed by the applicant for membership, as well as the IP address of the device which the email was viewed on (i.e. the applicant for membership's device);

> *(e) The date and time that the applicant for membership's identity was verified by him or her clicking the hyperlink in the email, as well as the IP address of the device which the document was verified on (i.e. the applicant for membership's device). This appears as "E-signature verified" in the audit report;*
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> *(f) The date and time at which the program generated an email to the Organizer enclosing the signed electronic membership card;*
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> *(g) The date and time that the email containing the signed electronic membership card was viewed by the Organizer, as well as the IP address of the device which the email was viewed on (i.e. the Organizer's device);*
>
> *(h) The date and time that the electronic membership card was counter-signed by the Organizer, as well as the IP address of the device which the document was counter-signed on; and*
>
> *(i) The date and time that the fully signed electronic membership card was automatically emailed to both the applicant for membership and the Organizer.*
>
> *10. The audit report for the electronic membership card is attached to the membership evidence provided in the Application. Please note that these audit reports also contain identifying information regarding membership in the USW.*

[7] Brett Barden is employed by the United Steelworkers, providing communications and technical support for the Union's organizing campaigns. He is based in Burnaby, British Columbia. Mr. Barden created the electronic support cards filed with this certification application, including the URL that was provided to potential supporters for the purpose of accessing the cards for signature. Consistent with the Union's usual practice, the support cards are applications for membership. They contain the following opening and closing statements:

> *I apply for and accept membership in the United Steelworkers. In applying for a membership, I understand that the Union intends to apply to be certified as my exclusive bargaining agent and to represent me in collective bargaining.*
>
> ...
>
> *The USW will use the information on this card for the purpose of representing you and assisting you in obtaining favourable terms and conditions of employment. The information you have provided on this card is for use only by the USW and is protected from unauthorized disclosure by Saskatchewan Employment Act and section 17 of the Personal Information and Protection of Privacy Act.*
>
> *Thank you for your support. We will mail important information to you.*

[8] Using the share screen function in Webex, Mr. Barden gave the Board a demonstration in which he filled out and signed an electronic support card, verified his email address, emailed the card to the receiver (himself), and then countersigned the card.

[9] Mr. Barden's evidence clarified that the date fields located next to the supporter's signature and next to the receiver's signature are auto-populated, and that the dates and times contained in the audit trail are automatically retrieved and recorded by the Adobe program. The times are based on Greenwich Mean Time (GMT).

[10] Malik Draz acted as the organizer for the employees of this Employer. Mr. Draz described some advantages of electronic, over physical, cards. Employees have greater control as to when and where they sign electronic cards, and for this reason, are less concerned that an employer is aware of their activities or will interfere with their support for the Union. There is also a range of methods for distributing the URL, including by text message or by email. This means that employees can receive a support card through a preferred method or device. This also means that employees can forward the link to their co-workers without explicitly stating that they are willing to collect and then disseminate additional cards.

[11] A copy of a support card that had been filed with the certification application, along with its audit trail, was entered into evidence. The card, including the audit trail, had been redacted to remove identifying information. To confirm that completed cards cannot be edited electronically, counsel for the Union clarified that the card had to be printed off and the redactions made on the printed version of the card.

Analysis and Decision:

[12] In *United Steelworkers No. 1*, the Board decided to move on to the second stage of the reconsideration process for the following reasons:

> *[28] Next, the Board will explain why it has decided to proceed to the second stage of the reconsideration application based on criterion no. 6. Criterion no. 6 allows for reconsideration if the original decision is precedential and amounts to a significant policy adjudication that the Board may wish to refine, expand upon, or otherwise change. The Board in Kennedy explained the rationale for this criterion:*
>
> > *[25] The final permissible ground for an application for reconsideration deals with circumstances where the original decision was precedential and amounted to a significant policy adjudication. Simply put, this ground permits the Board to take a "second look" when it makes major new policy adjudications or when it departures from past jurisprudence on a significant issue. However, in both cases, the matters in issue must have significant impact on the labour relations community in general. See: Construction Labour Relations Association v. Canadian Association of Industrial Mechanical and Allied Workers, Local 17, [1979] 3 Can. L.R.B.R. 153. See also: Saskatchewan Government Employees' Union v. Mary Banga, [1994] 1st Quarter Sask. Labour Rep. 291, LRB File No. 014-94.*
>
> *[29] To our knowledge, this is the first certification application before this Board in which the applicant has relied on electronic support evidence. This case presents a novel*

> *opportunity to consider a contemporary issue with a potentially significant impact on the labour relations community.*
>
> *[30] The recent past has given way to significant advancements in technology, some of which have resulted in major efficiencies in the Board's procedures. The Board is now willing to consider re-opening its existing policy of restricting original support evidence on certification applications to physical cards, and to determine whether it is appropriate to refine, expand upon, or otherwise change that policy.*
>
> *[31] Finally, shortly after issuing the order dismissing this certification application, the Board began consultations with respect to its policy. The Board has now suspended its consultations process to permit the current matter to proceed.*

[13] The questions before the Board are whether the Board should re-open its policy of restricting original support evidence on certification applications to physical cards, and whether the Board is satisfied that the electronic support evidence filed in LRB File No. 092-21 should be accepted and the application processed in the usual manner.

[14] The Honourable George W. Adams explains that labour boards across Canada are stringent in their requirements as to the form of support evidence on a certification application.[1] Whether in card-check or mandatory representation vote regimes, support evidence may determine the success of a certification application. Due to the potential for employer interference in the exercise of employees' rights, support evidence is treated as confidential, and is not subject to employer review. These factors require this Board to apply high standards to the form in which the evidence is to be filed:

> *Because membership evidence determines, in large measure, the success of an application, labour boards have been quite stringent in their requirements as to the form this evidence must take. The need for high standards of propriety is also reinforced by the confidential nature of membership evidence prescribed by statute which generally precludes respondent employers from examining the documents themselves. Aside possibly for the construction industry where a record of paying dues is the norm, union membership is proved by filing with a board documentary evidence of the equivocal signing of a membership card or application and, if also required, the paying of a specified initiation fee. That evidence is then carefully examined by a labour board officer using an investigatorial procedural to determine reliability and again reviewed by the board prior to any decision. Increasingly, labour boards are accepting membership evidence in an electronic format where the trade union can demonstrate, based on the e-sign program used, the reliability and authenticity of the dates and signatures placed electronically on the computer generated membership cards.*[2]

[15] Due to the potential for employer interference and the need to process certification applications quickly, the Board has developed administrative processes for assessing the integrity

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[1] *Canadian Labour Law,* loose-leaf (12/2021 - Rel 5) 2nd ed (Toronto: Thomson Reuters, 2021), at 7-109.
[2] Ibid.

of support evidence. Across the country, reliance on administrative processes in certification applications is commonplace:

> *Certification procedures have been sculpted to mitigate employer opposition in order to give employees meaningful access to collective bargaining. To avoid historic employer hostility to the formation of trade unions and collective bargaining being simply transformed into a litigation strategy aimed at the delay or derailment of certification applications, the application process has been designed to be primarily administrative in nature. [...] This has been so whether the certification regime was card-based or vote-based. [...] Secondary but related drivers of an administrative rather than an adjudicative process include the large number of certification applications; the need for expedition at this critical time of inception in labour relations; and the requirement of trade union membership confidentiality. [...]*[3]
>
> *[Citations removed]*

[16] In Saskatchewan, the process for establishing employee support for a union on a certification application consists of two stages: first, the filing of support evidence and, second, the conduct of a representation vote.

[17] The Act requires that a union establish a threshold of support of the employees in the unit, as indicated by the employees within the 90 days preceding the date of the certification application, by filing evidence of same:

> ***6-9****(1) A union may, at any time, apply to the board to be certified as bargaining agent for a unit of employees appropriate for collective bargaining if a certification order has not been issued for all or a portion of that unit.*
>
> *(2) When applying pursuant to subsection (1), a union shall:*
>
> > *(a) establish that 45% or more of the employees in the unit have within the 90 days preceding the date of the application indicated that the applicant union is their choice of bargaining agent; and*
> >
> > *(b) file with the board evidence of each employee's support that meets the prescribed requirements.*

[18] When a certification application is filed, the Board Agent reviews the support evidence filed and reports to the Board. Should the union establish the minimum level of support, the Board is required to direct a representation vote, pursuant to section 6-12:

> ***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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[3] *Canadian Labour Law*, *supra*, at 7-97 and 7-98.

(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:

(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.

[19] The Board has the authority to receive and accept any evidence that the Board considers appropriate and to determine the form in which "evidence of membership" is to be filed. Subsection 6-111 of the Act states:

6-111*(1) With respect to any matter before it, the board has the power:*

. . .

(e) to receive and accept any evidence and information on oath, affirmation, affidavit or otherwise that the board considers appropriate, whether admissible in a court of law or not;

(f) subject to the regulations made pursuant to this Part by the Lieutenant Governor in Council:

(i) to determine the form in which evidence of membership in a union or communication from employees that they no longer intend to be represented by a union is to be filed with the board on an application for certification or for cancellation; and

(ii) to refuse to accept any evidence that is not filed in the form mentioned in subclause (i);[4]

[20] This Board has traditionally accepted a wider range of support evidence than that which would come within a narrow definition of membership evidence. The Board has not prescribed a form for such evidence but has, instead, made its determination whether to receive and accept the evidence based on its established criteria.[5]

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[4] *The Trade Union Act* contained similar provisions at s.18(e) and (f).

[5] Nor was there a prescribed form for support evidence contained in the Regulations made pursuant to *The Trade Union Act*.

[21] This practice is expressed in the Board's Regulations. Section 5 simply directs an applicant union to file "the evidence of employees' support as required by subsection 6-9(2) or 6-10(2) of the Act, as the case may be":

> ***5**(1) A union that intends to apply to the board for a certification order pursuant to section 6-9 of the Act or an amendment to a certification order pursuant to section 6-10 of the Act shall file:*
>
> > *(a) an application in Form 2 (Application for Bargaining Rights or Change in Union Representation);*
> >
> > *(b) the evidence of employees' support as required by subsection 6-9(2) or 6-10(2) of the Act, as the case may be;*
> >
> > ...

[22] Form 2, the application for bargaining rights or change in representation, invites applicants to "submit your membership cards or other evidence of employee support".[6]

[23] The basic minimum requirements for support evidence have developed through the Board's case law and are well-established. In *Beaver Lumber Company and IWA*, [1977] May Sask Labour Report 30 [*Beaver Lumber*], the Board described the requirements within the context of what was then the card-check system:

> *5 However, disregarding the petition does not bring the matter to an end. The policy of the Board in declining to consider any evidence as to events which transpired after the date of filing of an application for Certification applies to evidence submitted by the Applicant. As in most cases, and as provided in form #1 of the Board's Regulations, the Applicant in this case used, as proof of support, a number of authorization cards signed by employees of the Respondent in the proposed appropriate unit. A comparison of the signatures on the cards compared with the signatures on the Statement of Employment enables the Board to determine whether or not the Applicant represents a majority of employees in an appropriate unit. In order to be considered such authorization cards must meet certain minimum requirements:*
>
> > *1. They must be signed by an employee within the appropriate unit.*
> >
> > *2. They must expressly, or by necessary implication, authorize the Union in question to bargain collectively on behalf of the employee.*
> >
> > *3. They must bear a date not earlier than six months before the date of the application by reason of the provisions of Section 6 (2) and (3) of The Trade Union Act. Although Section 6 (2) and (3) does not apply to all applications for Certification, it would be illogical to use one date for some cases and another date for other cases.*

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[6] Similar language was contained in the Regulations made pursuant to *The Trade Union Act*, at Form 1, which invited applicants to "submit your membership cards, authorization cards, check-off cards or other evidence of employee support".

[24] An additional requirement is that separate documents or cards be filed for each employee. For a time, the Board accepted as evidence of support in the construction industry a declaration of membership in the union, which listed the employees of the employer who were members in good standing of the applicant union: *International Woodworkers of America, Local 184 v the 77 Rogers Group Limited*, [1979] February Sask Labour Report 35. The Board ended this practice due to concerns that the fact of membership in the union did not necessarily reflect the reality of whether the employee supported the union as the bargaining representative in respect of the employer in question: *United Brotherhood of Carpenters and Joiners of America, Local 1990 v Work Force Construction Ltd (o/a Quadra Construction)*, [1988] Fall Sask Labour Report 42.

[25] The *Beaver Lumber* criteria have withstood the transition from the card-check to mandatory vote regime. Granted, the timeframe for indicating support has decreased from six months to within 90 days prior to the date that the application was filed with the Board. Otherwise, the Board continues to apply the *Beaver Lumber* criteria, and the requirement for separate cards, in assessing the support card evidence on certification applications.

[26] In *UFCW, Local 1400 v Canadian Salt Company Limited*, 2010 CanLII 65961 (SK LRB) [*Canadian Salt*], the Board relied on *Beaver Lumber* in assessing the minimum requirements for support evidence:

> *[101] In our opinion, the Union's evidence of support contained the minimum requirements expected by this Board, namely; that the evidence of support was contained in individual documents that were individually signed by supporting employees; that each document contained a written expression, or by necessary implication, authorization for the Union to bargain collectively on behalf of that employee; and that each document was signed not more than ninety (90) days prior to the date the application was filed with the Board. See: International Woodworkers of America v. Beaver Lumber Company Limited, [1977] May Sask. Labour Rep. 30, LRB File No. 112-77. While support evidence must correlate to a particular employer, the support cards are not the only means of establishing the necessary relationship and the Board may consider extrinsic evidence to find the requisite correlation. See: United Food and Commercial Workers, Local 1400 v. Dude Management Ltd., [1987] September Sask. Labour Rep. 31, LRB File No. 213-86.*

[27] In summary, the Board requires that support evidence consist of a separate card for each person; that the support cards be personally signed and dated by an employee within the proposed bargaining unit; that they expressly, or by necessary implication, authorize the Union to bargain collectively on behalf of the employee; and that they be signed no more than 90 days prior to the application being filed with the Board. These requirements are reflected in the Board's policy documents available online, in an article entitled, "How does the process work to secure a Union in the Workplace?" and are evident in the Board's current practice.

[28] Furthermore, the Board requires that the originals of the support evidence be filed. This permits the Board to conduct any necessary investigation for the purpose of assessing the integrity of the evidence.

[29] To date, the Board's requirements for support evidence, including the requirement that the cards be personally signed and dated, has meant that the "original" card is understood to be a "physical original". This interpretation has been supported by the Board's traditional and widespread reliance on paper and pen documents containing wet ink signatures.

[30] The recent amendments to the Regulations, in 2021, removed the requirement for an applicant to file a paper copy of the form or other document that had been filed by electronic means. Now, subsection 3(2) of the Regulations permits a document to be filed by electronic means if the "electronic copy" is in a "format satisfactory to the board":

> ***3****(1) Subject to subsection (2), if a Form or other document, other than a proof of service, is required to be filed with the board pursuant to these regulations, the completed original of the Form or document must be filed.*
>
> *(2) A Form or other document may be filed with the board by electronic means, but only if the electronic copy of the Form or other document is in a format satisfactory to the board.*
> ...

[31] Although the Board allows applicants to file certification applications and scanned versions of physical cards electronically, the Board also requires that applicants file the original, physical support cards either at the time of filing the application or shortly thereafter. This practice has been adopted to safeguard the Board's ability to assess the integrity of the support evidence.

[32] Neither the Act nor the Regulations explicitly prohibit reliance on electronic support evidence. Still, it is necessary to consider whether permitting electronic support evidence is consistent with the object of the Act. In considering this question, the Board is guided by section 6-4:

> ***6-4****(1) Employees have the right to organize in and to form, join or assist unions and to engage in collective bargaining through a union of their own choosing.*
>
> *(2) No employee shall unreasonably be denied membership in a union.*

[33] Indeed, permitting electronic support evidence is consistent with the Act's object to facilitate the wishes of a group of employees to come together for the purpose of bargaining their terms and conditions of employment. Employees are increasingly transient, now more than ever

there is greater reliance on smart phones to the detriment of other forms of communication, and contact information is no longer commonly available via publicly accessible hard copy phone books. These factors contribute to the difficulties in accessing employees and organizing modern workplaces through the traditional methods.

[34] Electronic support evidence addresses many of these concerns by improving access to employees, facilitating the dissemination and collection of support cards, and reducing physical impediments. In some cases, electronic support evidence may provide an additional layer of security and privacy from an employer who may be tempted to interfere with the exercise of employees' rights under the Act.

[35] The Board must also consider whether permitting electronic support evidence is consistent with the principle of employee choice. Compared to the card-check regime, the mandatory vote provides an additional layer of secrecy and autonomy to an employee in selecting their choice of bargaining agent. In the current regime, the cards do not necessarily determine the outcome of the application. The Board's practices have adapted to this reality. For example, the Regulations made pursuant to *The Trade Union Act* required that a statement of employment containing employees' "specimen signatures" be filed for the purpose of verifying the authenticity of the support card evidence, upon request by the then Board secretary.[7] The practice of requesting the statement of employment with specimen signatures was discontinued in or around 2011.

[36] This is not to suggest that the mandatory vote justifies dispensing with or revisiting the existing criteria for assessing support evidence. Pursuant to section 6-9, a union shall establish that a minimum number of employees have indicated that the applicant is their choice of bargaining agent. The existing criteria are consistent with this requirement. Nor is it to suggest that the integrity of the evidence cannot or should not be investigated, as appropriate. Rather, it alleviates some of the Board's concerns arising from its experience with the unpredictable glitches that are sometimes associated with complex electronic systems.

[37] Based on the foregoing, there is no statutory impediment to the Board permitting electronic support evidence on a certification application, whether in the Act or in the Regulations, provided that the evidence possesses sufficient indicia of integrity and satisfies the existing criteria.

[38] Nor are there any impediments arising from legislation of general application.

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[7] *Regulations and Forms of the Labour Relations Board*, Sask Reg 163/72, s. 21 and Form 12.

[39] To be sure, section 7 of *The Electronic Information and Documents Act, 2000,* SS 2000, c E-7.22 [*EIDA*] confirms that a public body is not presumed to consent to accept information or a document in an electronic form unless it expresses its consent in the manner described:

> ***7****(1) Nothing in this Part requires a person to provide, receive or retain any information or document in an electronic form.*
>
> *(2) Subject to subsection (3), a person's consent to provide, receive or retain any information or document in an electronic form may be inferred from the person's conduct.*
>
> *(3) A public body is not presumed to consent to accept information or a document in an electronic form unless it expresses its consent by communication accessible to the public or to those likely to communicate with the public body for particular purposes.*

[40] Sections 6, 8, 9, 10, 11, and 14 of the *EIDA* provide that if a public body consents to accept a document in an electronic form, a document is not denied legal effect or enforceability solely by reason that it is in an electronic form.[8] A requirement pursuant to any law for "writing", "originals", or a "signature" is satisfied provided that the electronic document meets the conditions set out in those provisions. Section 11, for instance, provides:

> ***11****(1) A requirement pursuant to any law that requires a person to provide any information or document in an original form is satisfied by the provision of the information or document in an electronic form if:*
>
> > *(a) there exists a reliable assurance as to the integrity of the information or document in the electronic form from the time it was first created, whether as a paper document or otherwise; and*
> >
> > *(b) the information or document in the electronic form is accessible by the person to whom it is provided and is capable of being retained by that person so as to be usable for subsequent reference.*

[41] While the *EIDA* does not require that the Board accept electronic documents or signatures, it does facilitate the use of and reliance on such documents and signatures for legal purposes.

[42] Therefore, the primary concerns of the Board are whether the electronic evidence possesses sufficient indicia of integrity and whether it satisfies the existing criteria. In considering these questions, the Board will proceed to review the decisions of those boards that have already determined these issues and to assess the evidence presented in this application.

[43] In recent years, labour boards across the country, including in B.C., Alberta, and Ontario, have begun accepting electronic support evidence. This trend is reflected in the cases relied upon

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[8] See also, *I.D.H. Diamonds NV v Embee Diamond Technologies Inc.*, 2017 SKQB 79. See full discussion of the intent of the *EIDA* at paras 33-44. Upheld at 2017 SKCA 79 (CanLII), at para 34.

by the Union: *Working Enterprises Consulting & Benefits Services Ltd v United Food and Commercial Workers International Union, Local 1518*, 2016 CanLII 29625 (BC LRB) [*Working Enterprises*]; *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) v Toronto and York Region Labour Council*, 2019 CanLII 123094 (ON LRB) [*Toronto and York Region Labour Council*]; *Laurentian University Faculty Association v Laurentian University*, [2020] OLRD No 1203 [*Laurentian University*]; *AUPE v Masterpiece Retirement*, 2020 CarswellAlta 1874 (Alta LRB) [*Masterpiece Retirement*]; *United Steelworkers v ConMed HealthCare Group*, 2021 CanLII 53293 (ON LRB) [*ConMed HealthCare*]; *Unifor v WestJet, an Alberta Partnership*, 2021 CIRB 985 [*WestJet*].

[44] Of these, a leading case is *Toronto and York Region Labour Council*. There, the Ontario Board examined membership evidence that had been created through Adobe Sign and filed in support of a displacement application for certification. The Board made the following observations about the security features used by the applicant through Adobe Sign:

> *14. While the Board does not have the benefit of submissions from other parties about the security features used by the applicant to protect the authenticity of the electronic membership evidence, these are arguably stronger protections than the traditional membership card in paper form that is usually filed with certification applications. In addition to providing the same information (e.g. name of individual, employer name, date and contact details), the individual is sent an automatic email to verify their identity by clicking on a hyperlink. The organizer is then required to do the same – electronically sign and verify their identity.*
>
> *15. Importantly, and unlike a paper membership card, the electronic membership card is encrypted and cannot be modified. The software generates a certificate of authenticity. The organizer then receives an email with an "audit trail" containing the dates and times that it was signed and verified by the individual and the organizer.*
>
> *16. After reviewing the security features of the electronic membership evidence as described by the applicant, the Board is persuaded that the evidence satisfies the requirements of the Act.*

[45] Both before and after *Toronto and York Region Labour Council*, multiple boards have considered the security features of the Adobe Sign software and found that the cards created, disseminated, and completed through that program were acceptable: *Masterpiece Retirement*, *Laurentian University*, *WestJet*, and *Working Enterprises*. One exception arose in *Working Enterprises,* where the B.C. Board declined to accept a card that was signed using the type, rather than draw, function.

[46] In *Working Enterprises*, the B.C. Board examined the signed cards and audit trail from the organizer's personal smart phone. In other cases, the boards received information about the cards through a confidential investigation conducted by a board officer: *WestJet* at para 47; *Masterpiece Retirement*, at para 51. In the current case, the Union has provided detailed evidence on the process followed in creating, disseminating, and completing the cards, and has filed one of the cards, fully redacted to remove any identifying information, with the Board as evidence.

[47] In *United Steelworkers v ConMed Health Care Group*, 2021 CanLII 53293 (ON LRB), the Board explained at paragraph 4 that, where electronic membership evidence is filed, it requires "a detailed explanation of the security and verification measures taken by the applicant to ensure the authenticity of the electronic membership evidence". The Board, in this case, has benefited both from the Union's detailed explanation of the security and verification measures it has utilized and from the case law expressing relatively consistent approval of similar methods undertaken through Adobe Sign, which is the same e-sign software as used in the present case.

[48] The Board is satisfied that the security features of the Adobe Sign program, as utilized by the applicant, provide a level of protection over the authenticity of the cards which is at least equal to that of physical cards. The organizer sent the URL to the potential supporters, providing access to what was, practically, a blank card. The potential supporters accessed the card through the URL. They were required to fill out the mandatory fields, sign the cards, and verify their email addresses. The cards were countersigned, they were encrypted following completion and cannot be modified electronically, and the audit trail provides very specific information about the date and time of creation, completion, verification, sending, and countersigning of the cards.

[49] Next, the Board will consider whether the cards meet its existing criteria for support evidence. To recap, the Board requires that support evidence consist of a separate card for each person; that the support cards be personally signed and dated by an employee within the proposed bargaining unit; that they expressly, or by necessary implication, authorize the Union to bargain collectively on behalf of the employee; and that they be signed no more than 90 days prior to the application being filed with the Board.

[50] To be clear, the Board has had an opportunity to review only one card, which consists of a membership application and an audit trail, and that card has been redacted to remove identifying information. The Board has not reviewed any of the information that has been redacted from that card.

[51] The first requirement is that the support evidence consist of a separate card for each person. Based on the whole of the evidence, the Board accepts that the cards filed with the application were separate cards.

[52] The next requirement is that the cards be personally signed and dated by an employee within the proposed bargaining unit. The Board has not reviewed the names or signatures of the individuals who have signed the cards. However, based on the testimony, there is no indication that the type function was used for any of the signatures. Therefore, it is not necessary for the Board to consider the question that arose in *Working Enterprises,* in which the B.C. Board declined to accept a card that was signed using that function.

[53] The Board Agent will need to confirm that the names and signatures correspond to members of the proposed bargaining unit. Furthermore, the verification process described by the Union does not confirm whether the employee in question is the only person with access to the email address at which the hyperlink is accessed. After reviewing the names and signatures, the Board Agent may, within the exercise of his discretion, choose to investigate this question.

[54] The sub-criterion that the cards be "personally dated" bears additional consideration. The purpose of this specific requirement is to ensure that the card has been signed within the statutory timeline. The fact that the date field is auto-populated, combined with the extensive date and time evidence contained in the audit trail, provides strong confirmation of the validity of the date on which the cards purport to have been signed. Given this evidence, the Board is satisfied that the date shown next to the signature field is the date that the card was signed.

[55] The next requirement is that the cards expressly, or by necessary implication, authorize the Union to bargain collectively on behalf of the employee. The opening and closing statement contained in the redacted card expressly authorizes the Union to bargain collectively on behalf of the signatory of the card. For this card, the requirement is met. The Board Agent will confirm that this requirement is met on any remaining cards.

[56] The last requirement is that the cards be signed no more than 90 days prior to the application being filed with the Board. The card filed as evidence was completed within the 90-day timeframe. Although the Board heard evidence that all cards were completed within that timeframe, the Board Agent may wish to confirm that this is the case, subject to the Board's finding that the electronic features of the cards are sufficient to meet the "personally dated" sub-criterion.

[57] In summary, the electronic support evidence is acceptable, subject to any further investigation that the Board Agent may wish to perform to ensure that the cards meet the *Beaver Lumber* criteria.

[58] For the preceding Reasons, the Board makes the following orders:

a. The Order, dated August 3, 2021, dismissing the certification application in LRB File No. 092-21 is rescinded;

b. As soon as practicable, the Board Agent shall complete the investigation into the support evidence filed on that application; and

c. If deemed appropriate upon completion of that investigation, a Direction for Vote may issue in the usual manner.

[59] Finally, this decision is based on the circumstances before the Board, as captured by the positions of the parties, the evidence presented, and the argument made. Any further re-examination of the Board's policy will benefit from the broader consultations process which was initiated and then suspended to permit this matter to proceed.

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

DATED at Regina, Saskatchewan, this **21st** day of **January, 2022.**

LABOUR RELATIONS BOARD



Barbara Mysko
Vice-Chairperson