Canada Industrial Relations Board Conseil canadien des relations industrielles

C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8
Édifice C.D. Howe, 240, rue Sparks, 4e étage Ouest, Ottawa (Ont.) K1A 0X8

Reasons for decision

WestJet Professional Pilots Association,

applicant,

and

WestJet, an Alberta Partnership,

employer,

and

WestJet Pilots Association,

intervenor.

Board File: 31149-C
Neutral Citation: 2015 CIRB **785**
August 5, 2015

The Canada Industrial Relations Board (the Board) was composed of Ms. Ginette Brazeau, Chairperson, and Messrs. Richard Brabander and Daniel Charbonneau, Members.

Counsel of Record

Mr. Jesse Kugler, for the WestJet Professional Pilots Association;
Mr. Geoffrey J. Litherland, for WestJet, an Alberta Partnership;
Mr. Michael D. A. Ford, Q.C., for the WestJet Pilots Association.

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

I. Background

[1] On June 22, 2015, the WestJet Professional Pilots Association (WPPA or the union) filed an application for certification seeking to be certified as the bargaining agent for a unit of pilots at WestJet Airlines Ltd. By letter decision dated June 26, 2015 (*WestJet, an Alberta Partnership*, 2015 CIRB LD 3443), the Board accepted the parties agreement to amend the description of the

bargaining unit sought and to modify the name of the employer to WestJet, an Alberta Partnership (WestJet or the employer). As a result of this amendment, the union is seeking to be certified for a unit composed of:

> all pilots employed by WestJet, an Alberta Partnership, excluding managers, S3, standards crew management, chief pilot, directors, supervisors and persons above the rank of supervisor.

[2] Two organizations that advocate on behalf of non-managerial employees at WestJet sought leave to intervene in the proceedings. The WestJet Proactive Communication Team (PACT) as well as a subgroup of PACT representing the specific interests of pilots, the WestJet Pilots Association (WJPA or the intervenor), both applied for intervenor status indicating that they had represented and advocated on behalf of pilots at WestJet for over 15 years and were directly affected by the outcome of the certification application.

[3] By letter decision dated July 8, 2015 (*WestJet, an Alberta Partnership*, 2015 CIRB LD 3453), the Board granted limited intervenor status to the WJPA and invited further submissions on the issue of the scope of the bargaining unit.

[4] On July 16, 2015, after reviewing and considering all the submissions of the parties, the Board ordered that a representation vote be conducted by electronic means.

[5] The Board's Order No. 769-NB reads as follows:

> **WHEREAS** the Canada Industrial Relations Board (the Board) has received an application from the WestJet Professional Pilots Association, pursuant to section 24(1) of the *Canada Labour Code (Part I–Industrial Relations)* (the *Code)*, seeking certification as bargaining agent for a unit of employees of WestJet, an Alberta Partnership comprising:
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> > all pilots employed by WestJet, an Alberta Partnership, **excluding**, managers, S3, standards crew management, chief pilot, directors, supervisors and persons above the rank of supervisor;
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> **AND WHEREAS**, following investigation of the application and consideration of the submissions of the parties concerned, the Board has determined that the applicant is a trade union within the meaning of the *Code*, that the aforementioned bargaining unit is appropriate for collective bargaining and is satisfied that, as of the date of filing of this application, at least forty per cent of the employees in the bargaining unit wished to be represented by the WestJet Professional Pilots Association;
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> **NOW, THEREFORE**, it is ordered by the Canada Industrial Relations Board that, pursuant to section 28(2) of the *Code*, a representation vote by electronic means be taken among the employees of the aforementioned unit;

AND FURTHERMORE, the Board directs that the employees eligible to cast a ballot are those employees in the aforementioned bargaining unit employed by the employer as at **June 22, 2015** and who remain so employed on the day of the vote;

AND FURTHERMORE, the Board directs the employer to immediately transmit, by email, a copy of the Board's Notice of Vote and the Voters' List to all eligible voters;

AND FURTHERMORE, the Board appoints Mr. Ken Chiang as the Returning Officer to supervise the conduct of the representation vote;

AND FURTHERMORE, the Board will provide written Reasons for this order in due course.

ISSUED at Ottawa, this 16th day of July, 2015, by the Canada Industrial Relations Board.

[6] These are the Reasons for the Board's Order.

II. Parties' Positions

A. The Employer

[7] WestJet urges the Board to dismiss the application for certification. WestJet argues that the Board must be satisfied that the union has the requisite support of 40% from employees in the bargaining unit prior to ordering a vote pursuant to section 28 of the *Canada Labour Code (Part I–Industrial Relations)* (the *Code*). It takes the position that the membership evidence that was submitted in support of the application is invalid because of the mechanisms used by the union to collect it. In particular, it submits that the membership applications were sent by mail and could not be witnessed by a union official. It also raises the fact that membership fees were paid using electronic means through PayPal. The employer claims, as a result, that the union's certificate of accuracy was falsely completed. It argues that these issues undermine the reliability of the evidence such that the Board cannot ascertain its veracity or accuracy. It submits that the membership evidence does not comply with the requirements in the *Canada Industrial Relations Board Regulations, 2012* (the *Regulations*) or with the Board's practices.

[8] The employer also raises concerns with the length of the certification campaign and questions whether the regulatory requirement to pay $5.00 to the union in the six months prior to filing the application has been met in this case. It relies on newsletters and messages posted on the WPPA web page and Facebook page which invited members to renew the membership cards without specifying that a new payment of $5.00 was also required.

[9] The employer submits that these are discrepancies that amount to more than technical defects, and should lead the Board to discard the membership evidence.

[10] The employer did not contest the appropriateness of the proposed bargaining unit description. After review and discussion with the Industrial Relations Officer (IRO), the employer and the union agreed to the list of employees in the proposed bargaining unit that encompasses 1260 employees.

[11] In response to the intervenor's submission on the scope of the bargaining unit, the employer submits that a unit composed only of WestJet pilots is appropriate. It submits that the pilots who fly Q400 aircraft are employed by WestJet Encore Ltd. (Encore), which is a separate employer, and that those pilots are governed by separate terms and conditions of employment. It submits that even though there is a flow-through agreement for Encore pilots to fill vacancies at WestJet, those pilots would be required to resign from their employment at Encore and then become employees of WestJet.

[12] The employer also argues that the pilots of WestJet and pilots of Encore do not share a community of interest. It submits that they operate different aircraft, work from different locations and operate on different routes. They also have different levels of remuneration, are governed by different terms and conditions of employment and do not transfer back-and-forth between the two corporate entities. It takes the position that the proposed unit is an appropriate bargaining unit.

B. The WJPA (Intervenor)

[13] The WJPA intervened on the issue of the scope of the bargaining unit. The WJPA is not a trade union and has no status under the *Code*. It was created in 1999 as a subgroup of the WestJet ProActive Communication Team to represent the interests of pilots to the employer's leadership.

[14] The WJPA submits that the bargaining unit should include pilots of both WestJet and Encore as they are currently represented by one association. The WJPA explains that Encore was established as a regional carrier by agreement between the WJPA and WestJet Airlines Ltd. and supported by a majority of the pilots of WestJet who voted in favour of the creation of a regional carrier. It further submits that in July 2014, a Memorandum of Agreement (MOA) was reached between the WJPA, WestJet and Encore to establish the WestJet Pilot Department List which lists all pilots by date of hire and is used to fill vacancies and to govern flow-through of Encore pilots to WestJet. It explains that this agreement was ratified by a

majority of all pilots at WestJet and Encore and submits that this demonstrates the desire of all pilots to continue with this representation structure.

[15] The WJPA argues that there exists a community of interest between the pilots at WestJet and those at Encore given the similarity in working conditions, qualifications, orientation and career progression. It submits that if the union is certified to represent a unit that encompasses only the pilots of WestJet, it will affect the mobility of pilots and destabilize the current structure given the integration between the pilots of WestJet and the pilots of Encore. In its view, the exclusion of the Encore pilots from the unit makes no industrial relations sense as the pilots themselves have established the current structure and have historically been represented as one group.

C. The Union

[16] On the issue of the appropriateness of the bargaining unit, the union submits that the pilots of Encore are employed by a separate employer, operate aircraft under a separate Operating Certificate, are governed by terms of employment that are separate from the MOA that governs the terms and conditions of employment of WestJet pilots and have a different compensation scheme. It argues that the proposed unit is appropriate and consistent with the community of interests shared by the WestJet pilots.

[17] The union refutes the allegations of irregularity with the membership evidence that are raised by the employer. It argues that there is no regulatory requirement for applications for membership in a trade union to be witnessed by an official of a trade union or for membership fees to be directly received by a union official in person. It reviews the case law submitted by the employer and submits that it is of no assistance to the Board in this case given the particular circumstances and facts at play in each case.

[18] The union further submits that members who made use of PayPal to pay their membership fee of $5.00 did make the minimal financial commitment as required by the *Regulations*. It asserts that the Board has repeatedly stated that the objective of the payment is to demonstrate a commitment on the part of the employee to join the trade union. It argues that the fact that the union has entered into a commercial relationship with a third-party service provider to process the payment who in turn charges a fee for the service does not alter the commitment made by the member when paying the five-dollar membership fee. It submits that there is no indication or suggestion in this case that the individuals did not make the payment personally.

III. Analysis and Decision

[19] The employer requested an oral hearing to determine the issues regarding the union's membership evidence. It is well established that the Board can make a determination based on the written record. Section 16.1 of the *Code* clearly provides that the Board may decide any matter before it without holding an oral hearing. As an administrative tribunal, the Board is master of its own procedures, it 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 affirmed in *NAV CANADA*, 2000 CIRB 468, affirmed in *NAV Canada* v. *International Brotherhood of Electrical Workers*, 2001 FCA 30

[20] 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*.

[21] After reviewing the extensive written submissions of the parties, the Board concluded that a hearing was not necessary. The Board therefore uses its discretion pursuant to section 16.1 to decide the matter without holding an oral hearing.

[22] On June 16, 2015, the certification provisions of the *Code* were amended by the *Employees' Voting Rights Act,* S.C. 2014, c. 40 (the *Act*). 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.

[23] 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.

[24] The Board has the discretion pursuant to section 16(*i*) of the *Code* to order that a representation vote be taken at anytime before a proceeding is finally disposed of, and can also order that the ballot boxes be sealed and not counted until directed by the Board. However, in this case, the Board made the order of vote pursuant to section 28(2) of the *Code*. In doing so, the Board considered whether the applicant was a trade union, it determined that the bargaining unit was appropriate for collective bargaining, and it was satisfied, based on the membership evidence, that at least 40% of employees in the unit wished to be represented by the trade union.

A. Application Filed by a Trade Union

[25] First, the Board must determine that the application has been filed by a trade union. In this case, the WPPA is a newly formed trade union and is filing an application with the Board for the first time. Therefore, the Board ascertained whether the WPPA could be granted status as a trade union within the meaning of the *Code*.

[26] The WPPA filed the minutes of the constituting meetings; it also provided copies of its constitution and its by-laws. Having reviewed the constituting documents, the Board is satisfied

that they meet the essential elements required and that the WPPA is a trade union within the meaning of the *Code*.

B. Appropriateness of Bargaining Unit

[27] Secondly, the Board must determine the scope of the unit that the Board considers appropriate for collective bargaining. The *Code* provides the Board with the exclusive authority to determine the appropriateness of a unit. The relevant portions of section 27 state:

> 27. (1) Where a trade union applies under section 24 for certification as the bargaining agent for a unit that the trade union considers appropriate for collective bargaining, the Board shall determine the unit that, in the opinion of the Board, is appropriate for collective bargaining.
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> (2) In determining whether a unit constitutes a unit that is appropriate for collective bargaining, the Board may include any employees in or exclude any employees from the unit proposed by the trade union.

[28] In its original application, the union named WestJet Airlines Ltd. as the employer and respondent to the application. In subsequent correspondence, the employer clarified that WestJet Airlines Ltd. is in fact a holding company that owns four subsidiaries, namely, WestJet Investment Corp. (WIC), WestJet Operations Corp. (WOC), WestJet Vacations Inc. and WestJet Encore Ltd. In turn, WIC and WOC own WestJet, an Alberta Partnership, which employs the pilots that operate the 737 aircraft. WestJet Encore Ltd. employs the pilots who operate the Q400 aircraft. After a request for clarification made by the employer, the union confirmed that the application for certification was for a unit of pilots who operate WestJet 737 aircraft and who are employed by WestJet, an Alberta Partnership. The application was amended accordingly.

[29] It is a well understood principle that in making its determination, the Board need not find the ideal or even the most appropriate bargaining unit. Rather, it will exercise its discretion to give employees a realistic opportunity to exercise their rights under the *Code*. In doing so, the Board weighs and considers a variety of factors, including the employer's organizational structure, community of interest and the viability of the unit. The Board described its approach in *Time Air Inc.*(1993), 91 di 34 (CLRB no. 991), as follows:

> When dealing with applications for certification, the Board has the power and the discretion to determine an appropriate bargaining unit. …
>
> …

> In the numerous decisions that the Board has issued dealing with the appropriateness of bargaining units, whether they be applications for certification or applications for review of bargaining units, the Board has always jealously guarded its discretion to find the unit appropriate for collective bargaining in the circumstances of the case before it. In so doing the Board has identified a large number of criteria it will consider when determining what is an appropriate bargaining unit. Needless to say, not all of these criteria are applied nor are they applicable to any single case. Some of the criteria favour smaller bargaining units while some favour broader bargaining units; some are more applicable to a first time certification while some apply more appropriately to a review of bargaining units. Moreover, the criteria finally applied in any given case may be weighted differently than when they are applied in another case. The Board has always maintained that it did not have to determine the ideal unit, but only one which is an appropriate unit. The whole determination always depends on the facts of each particular case.
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> (pages 38–39)

[30] Since the appropriateness of a bargaining unit is a question of fact, the weight given to each or any factor will depend on the circumstances of each case. In making its determination, the Board is guided by the fundamental purpose of the *Code*, which is to facilitate access to collective bargaining (see *Teleglobe Canada* (1979), 32 di 270; [1979] 3 Can LRBR 86; and 80 CLLC 16,025 (partial report) (CLRB no. 198)), affirmed by the Federal Court of Appeal, unreported October 3, 1980, file nos. A-487-79 and A-514-79). The Board also seeks to foster industrial stability in the workplace by establishing a viable structure for collective bargaining that also takes into consideration the wishes of the employees (see *AirBC Limited* (1990), 81 di 1; 13 CLRBR (2d) 276; and 90 CLLC 16,035 (CLRB no. 797) (*AirBC*).

[31] The Board is cognizant of the fact that there currently exists a structure of employee representation within WestJet. In its LD 3453, the Board described it as a unique employee voice structure that has been in place since 1999. The WJPA argues that the appropriate bargaining unit should encompass all the pilots at WestJet Airlines Inc., including those that work for Encore since that is the model that is currently in place and under which the WJPA has conducted its representation role for the past several years. It takes the position that this unified system of representation of all pilots has been chosen by the pilots themselves and that it is appropriate to have one association that represents all pilots across the corporate structure. It submits that the representation model that is currently in place is aligned with the objective and spirit of representation provided for in the *Code*.

[32] The Board disagrees. The right of employees to join a trade union of their choice and to exercise their rights under the *Code* is a fundamental value and is well articulated in the Preamble of the *Code*:

> Preamble
>
> WHEREAS there is a long tradition in Canada of labour legislation and policy designed for the promotion of the common wellbeing through the encouragement of free collective bargaining and the constructive settlement of disputes;
>
> AND WHEREAS Canadian workers, trade unions and employers recognize and support freedom of association and free collective bargaining as the bases of effective industrial relations for the determination of good working conditions and sound labour-management relations;
>
> AND WHEREAS the Government of Canada has ratified Convention No. 87 of the International Labour Organization concerning Freedom of Association and Protection of the Right to Organize and has assumed international reporting responsibilities in this regard;
>
> AND WHEREAS the Parliament of Canada desires to continue and extend its support to labour and management in their cooperative efforts to develop good relations and constructive collective bargaining practices, and deems the development of good industrial relations to be in the best interests of Canada in ensuring a just share of the fruits of progress to all;
>
> NOW THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows.

[33] As the Board stated in *G4S Secure Solutions (Canada) Ltd.*, 2012 CIRB 625:

> [46] The *Code* gives effect to the Charter guarantee of freedom of association and, in particular, articulates that it is the basic right of each employee to join the trade union of their choice and to participate in its lawful activities (see section 8(1) of the *Code*). In order to uphold these fundamental values, the *Code* provides for employees to be grouped together in a bargaining unit represented by the bargaining agent able to demonstrate that it has the support of a majority of the employees in the unit. ...

[34] In this case, the fact that the employees had chosen an alternative model to unionization and worked under that particular model for a number of years does not preclude a group of employees from seeking to join a trade union of their choice at any point in time and to seek to be represented by a bargaining agent for collective bargaining purposes.

[35] In the current circumstances, the WJPA has no status under the *Code* and cannot purport to have rights to represent the pilots in their wish to be collectively represented for negotiations of terms and conditions of employment. If a group of employees wish to avail themselves of their rights under the *Code*, they are free to do so and are afforded certain protections in the exercise of that right.

[36] When determining whether the bargaining unit sought is appropriate for collective bargaining, the Board has considerable latitude in defining what it considers to be an

appropriate unit in the circumstances before it. Again, the Board stated the following in *G4S Secure Solutions (Canada) Ltd.*, *supra*:

> [47] Numerous decisions of this Board and its predecessor, the Canada Labour Relations Board (CLRB), have affirmed the Board's absolute discretion to fashion the bargaining units that it considers appropriate for collective bargaining (see, for example, *The Royal Bank of Canada (Gibsons Branch)* (1977), 26 di 509; and [1978] 1 Can LRBR 326 (CLRB no. 111); upheld by the Federal Court of Appeal in *Royal Bank of Canada* v. *Service, Office and Retail Workers Union of Canada*, judgment rendered from the bench, October 4, 1978, file A 849-77, in which the employer argued for a district-wide bargaining unit and the Board certified a unit consisting of a single bank branch). The Board's longstanding jurisprudence with respect to its discretion to determine the scope of a bargaining unit is reviewed at pages 518–524 of CLRB no. 111. This jurisprudence has been consistently followed by both the CLRB and this Board.
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> [48] The Board uses a number of criteria when considering whether a unit is appropriate for collective bargaining, including community of interest, employee wishes, and the likely viability of the unit. While the Board has expressed a preference for wider-based units, there is no automatic presumption in favour of large units. **The Board will certify a smaller unit, if necessary to give effect to the employees' constitutionally guaranteed right to freedom of association.** To achieve this objective, the Board may certify a local rather than regional or national bargaining unit, even if this causes some administrative inconvenience to the employer. The Board's decision on the appropriateness of a bargaining unit will generally be upheld unless a court considers it clearly irrational (see *International Longshoremen's and Warehousemen's Union, Ship and Dock Foremen, Local 514* v. *Prince Rupert Grain Ltd.*, [1996] 2 S.C.R. 432).
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> (emphasis added)

[37] In this case, the intervenor takes the position that the pilots of Encore should be included in the unit as this would be consistent with the current model. It indicates that under the current model, the pilots enjoy mobility between the two corporate entities and suggests that the pilots will lose this flexibility if they are organized in a bargaining unit that separates the Encore pilots from the pilots at WestJet.

[38] The Board is not persuaded by the argument put forward by the WJPA. As submitted in evidence, the agreement reached in December 2014 between the WJPA and WestJet on terms and conditions of employment for pilots covers only the pilots of WestJet and was voted on by the pilots of WestJet. It does not cover the pilots at Encore, nor did they vote on the agreement. The evidence on file demonstrates that terms and conditions of employment that apply to pilots at Encore are determined separately from those pilots of WestJet. The employer points out that the employment relationship with Encore pilots is governed by separate employment contracts between the pilots and Encore and that when a pilot wishes to fly 737 aircraft with WestJet, they

resign from their employment with Encore and become employees of WestJet with terms of employment that are different from those at Encore.

[39] The Board is not convinced that the issues of mobility and the similarity of terms and conditions of employment between the Encore pilots and the WestJet pilots are factors that are determinative of the issue of the scope of the bargaining unit in this particular case. In the Board's view, the proposed bargaining unit is an appropriate unit for collective bargaining as it includes all the pilots that work for WestJet and who fly similar aircraft and currently share the same terms and conditions of employment. In this case, the Board will favour a unit that will provide these employees with the opportunity to decide, through a secret ballot vote, whether they want to be represented by the trade union. In the Board's view, the unit of pilots at WestJet that the union is seeking to represent is viable and appropriate for collective bargaining.

C. Membership Evidence

[40] Thirdly, the Board must satisfy itself that at least 40% of the employees in the proposed unit support the application.

[41] The employer argues that the language in section 28(1)(*c*) of the *Code* mirrors the language that was used in the previous version of section 28 of the *Code*. When words are continued from a previous version into an amended provision, that language should be given the same meaning as in the previous version when that language is used in the same context and for the same purpose. In this case, section 28(1)(*c*) describes the responsibility of the Board to scrutinize the membership evidence to ascertain that the appropriate level of support has been met before ordering a vote.

[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.

[44] The Board's requirements regarding the evidence of membership in a trade union are set out in section 31(1) of 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
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> (*a*) has signed an application for membership in the trade union; and
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> (*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.

[45] The key question for the Board 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.

[46] In order to satisfy itself, pursuant to section 28(1)(*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 Industrial Relations Officers (IRO) so they may verify and test the membership evidence that is submitted in support of a certification application. 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.

[47] 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).

[48] 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)*.

[49] As part of the investigation in the present application, the IRO designated by the Board contacted a significant number of employees and tested the information contained on the membership cards through a series of questions. The IRO conducted this investigation having full knowledge of the allegations raised by employer and taking into consideration the specific information submitted to the Board.

[50] The employer raises several concerns with certain aspects of the evidence. Each will be addressed separately.

1. Membership Cards

[51] The employer submits that the membership applications submitted by mail undermines the reliability of the membership evidence as the union cannot attest with any certainty that the employees have signed the membership applications that were submitted to the union by mail nor can it witness the signatures on the membership cards. It submits that the Certificate of accuracy signed by a representative of the WPPA was falsely completed and that all the membership information is therefore unreliable.

[52] The *Code* and the *Regulations* impose few formalities on the format of the cards and its content. Section 31 of the *Regulations* does not purport to exclusively set out what evidence would satisfy or meet the requirements of section 28 of the *Code* whereby the Board must be

satisfied that at least 40% of the employees in the unit wished to have the trade union represent them as their bargaining agent. As stated in *St. Croix Stevedores and Affiliates*, 2002 CIRB 189:

> [11] ... Read in its context, it is evident that section 31 of the *2001 Regulations* sets out only one of the ways in which membership in the trade union may be established. The Board may accept a signed application for membership and evidence of the payment of five dollars to establish this, but there is no indication that such an application and payment is the only proof that a majority of employees wish to have the trade union in question represent them as bargaining agent. ...

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

[54] What the Board is concerned about when reviewing the membership evidence, is whether 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.

[55] In the present case, the employees were invited to visit the WPPA website to obtain information on the union and the effect of certification. They were also invited to join the union as members by printing a membership adhesion card, signing it and returning it to the union by mail. There is no question that the membership forms submitted in this way were submitted voluntarily and freely when an employee decided to sign and return the form to the union by mail. What is critical to the Board is ensuring that the employees had the freedom to express their democratic right to join the union or not without interference, coercion or intimidation.

[56] In a majority of union organizing drives, the sign up of membership cards and payment is generally collected in person at a common site. However, in this case, given that the pilots are geographically dispersed, and by the nature of their work, are often away from their base location, they were invited to inform themselves through electronic means and to sign up by returning their membership form by mail.

[57] It is important to note that the employer has provided no concrete example of irregularity or any examples of fraud affecting particular individuals. The Board however, through its IRO, conducted an investigation of the membership evidence through confidential interviews with a number of individuals for whom membership evidence has been submitted. The Board has found no evidence of any irregularity with the evidence provided in support of the application.

[58] Contrary to the facts present in *Reimer Express Lines Ltd. et al.* (1979), 38 di 213; and [1981] 1 Can LRBR 336 (CLRB no. 226) (*Reimer*), in the present circumstances, there is no evidence of non payment or of cards that were falsified or were witnessed by persons who were not present at the time of signing. The Board was unable to find any evidence of fraudulent misrepresentations on the part of the union. The Board may question witnesses if the validity of the information submitted is in question. However, the Board can not conclude that *Reimer, supra*, stands for the proposition that there is an absolute requirement for a union official to witness signatures of individuals on all membership forms.

[59] The employer argues that the union's certificate of accuracy was falsely completed because a union official did not witness the signatures on the membership applications or the payment of the membership fees on PayPal.

[60] In *Technair Aviation Ltée* (1990), 81 di 146; and 14 CLRBR (2d) 68 (CLRB no. 812), the Board examined the scope of a certificate of accuracy in the context of an application for certification. In response to the union's argument that membership irregularities occurred without its knowledge, the Board noted the following:

> The reasons given by the union do not satisfy the Board. The allegation that the irregularities in question occurred without the knowledge of Local 1999 or its representatives does not constitute in the instant case a valid explanation or justification. Given the nature and number of irregularities noted, the applicant cannot merely argue, to explain the situation, that its principal representatives were not aware of what was happening. For the moment, the Board cannot dismiss this statement or question the facts and events alleged in the April 12 reply. However, it cannot help but note that it was one of the applicant's principal representatives, in this case the vice-president, who on February 27, 1990 signed the certificate of accuracy required by the Board. The record shows that this officer did not personally witness the signing of any membership cards. **The practice of having the certificate of accuracy signed by an authorized person who did not necessarily participate in recruiting members is a common one that makes sense in union organizing activities, particularly where large bargaining units are involved. However, in these circumstances, the union must be able to show that it properly instructed its agents and took effective measures to ensure that the whole process meets the legal requirements.**
>
> **However, the person signing the certificate of accuracy need not be required to personally vouch for all the signatures on the membership cards. This approach would place too much emphasis on formality and would needlessly impede the exercise of the right of association.** The person signing the certificate of accuracy must nevertheless ensure, by means that he deems appropriate but whose effectiveness is beyond question, that the membership cards, whose authenticity and compliance with the Board's *Regulations* he certifies, meet the established criteria.
>
> (emphasis added; pages 154–155)

[61] The Board is not convinced that the certificate of accuracy filed in this case was falsely completed. Requiring union officials to witness each signature on a membership card and witness the payment of a $5.00 fee would effectively prevent employees spread out across the country and overseas to exercise their right to join a union of their choice. In this case, the union established a process through its website to ensure that employees had the freedom to download, complete and sign a membership card, which was then mailed to the union, and to ensure that employees could make a $5.00 payment through electronic means. These measures were effective in ensuring that the membership evidence filed met the requirements of the *Regulations*.

2. Payment of Membership Fees

[62] In addition to the validity of the membership cards, the employer also objects to the method used for the payment of the $5.00 fee. It alleges that the use of PayPal as a method of payment cannot be accepted as proper payment of the fee. It provides evidence that the payment processing service charges a fee to the payee so that when employees paid the fee, they did not pay the full $5.00 to the union as required by the *Regulations*. The employer argues that the union has then failed to show the employees' financial commitment to the affairs of the union and that this is a substantive deficiency in the membership evidence.

[63] The Board notes that it has, in the past, accepted evidence of electronic payment made through PayPal, however, this is the first time that this method of payment is being raised as a potential deficiency in the membership evidence.

[64] The purpose of the $5.00 payment is to demonstrate the commitment on the part of the employee of joining the union and making a financial contribution towards its activities. The act of making the payment demonstrates that the employee accepts the significance of union membership and, as the Board stated in *Cape Breton Development Corporation* (1977), 20 di 301; [1977] 2 Can LRBR 148; and 77 CLLC 16,087 (CLRB no. 85), the membership evidence would be accepted only if the employees have voluntarily, and on their own behalf, taken further steps to establish their support of the trade union, namely, the making of a financial contribution to it. The Board went on to dismiss the application in that case because the union used funds from the social club to pay the initiation fees. The Board explained that it discovered this irregularity during its investigation and the failure of the union to disclose the nature and source of the payments led it to conclude that it may have been an attempt by the union to mislead the Board.

[65] In the case before us, the source of payment is not in question. It was clear from the application that some payments were made directly in person, others by cheque while others used PayPal to effect their payment online. The verifications that were made by the IRO confirm that this method of payment was available to members who wished to avail themselves of electronic payments and no evidence of irregularity in the use of this payment method was found through the investigation. There was no attempt by the union to mislead the Board.

[66] The Board rejects the argument that because a portion of the payment was a payment to the service provider, the member did not make a "payment of $5.00 to the trade union" in accordance with the *Regulations*. The act of making the payment in support of the membership application is sufficient to demonstrate the commitment of the individual to joining the union as a member. The Board will not look beyond the payment method to determine how the amount paid as a membership fee is being used or administered. That is not the role of the Board.

[67] The Board also rejects the argument that payment through a third party such as PayPal constitutes a breach of the employee's confidentiality. The Board points out that section 35 of the *Regulations* imposes an obligation on the Board not to disclose evidence of union membership. It does not, in our view, render evidence of payment invalid for the sole reason that payment was effected voluntarily by the employee through an electronic service provider.

3. Payment of Membership Fee Within Six Months

[68] The employer also submits that the membership evidence could be stale as it believes that the union did not ask its members to pay the $5.00 membership fee every six months. It argues that the *Regulations* require that the $5.00 payment be made in the six months preceding the application for certification and this has consistently been held by the Board to be a matter of substance and more than a mere technicality. It suggests that in such a case, the Board must conduct a thorough investigation into the validity of the membership evidence.

[69] It is a fact that the organizing campaign conducted by the union has been ongoing since the Fall of 2013. Despite the concerns raised by the employer, the Board, through its confidential investigation of the membership evidence, confirmed that all payments in support of membership applications were made in the six months preceding the filing of the application for certification.

[70] Although the forms and mechanism to sign up union members in this case deviate from the general practices of unions, the formalities usually used by unions are not a statutory

requirement. The Board was unable to find evidence of misrepresentation, fraud or irregularities that would render the evidence invalid or unreliable. The Board is satisfied, based on the documentary evidence that was filed in support of the application, that at least 40% of the employees in the bargaining unit wish to be represented by the WPPA.

IV. Conclusion

[71] The Board has determined that the WPPA is a trade union within the meaning of the *Code*. It also finds that the unit of pilots at WestJet that the union is seeking to represent as bargaining agent is an appropriate bargaining unit for collective bargaining. The Board has also satisfied itself, through a review and investigation of the membership evidence submitted with the application, that at least 40% of the employees in the bargaining unit wish to be represented by the WPPA. Based on these findings, the Board orders that a representation vote be taken among the employees in the bargaining unit. The Board also orders that the vote be conducted electronically during the period to be determined by the Returning Officer appointed by the Board.

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

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Ginette Brazeau
Chairperson

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Richard Brabander
Member

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Daniel Charbonneau
Member