Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Canadian Airport Workers Union,

applicant,

and

Garda Security Screening Inc.,

respondent,

and

International Association of Machinists and Aerospace Workers,

certified bargaining agent.

Board File: 31008-C
Neutral Citation: 2015 CIRB **793**
October 15, 2015

The Canada Industrial Relations Board (Board) was composed of Louise Fecteau, Judith MacPherson, Q.C. and Patric F. Whyte, Vice-Chairpersons.

Counsel of Record

Mr. Denis W. Ellickson, for the Canadian Airport Workers Union;

Mr. Michel A. Brisebois, for Garda Security Screening Inc.;

Ms. Amanda Pask, for the International Association of Machinists and Aerospace Workers.

These reasons for decision were written by Judith MacPherson, Q.C., Vice-Chairperson.

I. The Reconsideration Application

[1] On April 2, 2015, the Canadian Airport Workers Union (CAWU or applicant) filed an application under section 18 of the *Canada Labour Code (Part I–Industrial Relations)* (*Code*) seeking a reconsideration of the Board's decision in *Garda Security Screening Inc.*, 2015 CIRB 764 (*RD 764*) to dismiss the CAWU's certification application finding that it was not supported by valid and reliable membership evidence. In *RD 764*, the original panel based its finding on the results of the confidential investigation by the Board's Industrial Relations Officer (IRO) which had revealed numerous improprieties in the collection of the $5.00 membership fee and in the signed membership cards. The original panel found the extensive improprieties tainted all of the CAWU's membership evidence to the extent that the Board would not accept the veracity of any of the evidence nor rely on it to order a representation vote. The Board viewed the non-compliance of the membership evidence with the requirements of the *Code* and the *Canada Industrial Relations Board Regulations*, 2012 (*Regulations*) as a substantive deficiency, not merely a technical breach. The Board also found that the applicant had submitted an inaccurate Certificate of Accuracy signed by one of its representatives in support of its application.

[2] By way of background, the CAWU, on January 5, 2015, had filed its certification application seeking to displace the International Association of Machinists and Aerospace Workers (IAM) as bargaining agent at Garda Security Screening Inc. (employer) for a unit of employees providing pre-boarding security screening services at Pearson International Airport, Buttonville Airport and Toronto City Centre Airport. The collective agreement in force between the IAM and the employer was expiring on March 31, 2015.

[3] The applicant had previously been the certified bargaining agent for this unit. In January, 2012, the IAM filed an application to displace the applicant and was certified following a successful representation vote.

II. Issue

[4] The Board must determine whether to reconsider *RD 764* on the grounds that the Board committed an error of law or policy which casts serious doubt on the Board's interpretation of the *Code* or policy, and/or failed to respect the principles of natural justice or those related to procedural fairness.

III. The Parties' Positions

A. The CAWU

[5] In the instant application, the CAWU alleges that the Board committed an error of law or policy and denied it natural justice in dismissing its application based on the IRO's confidential report. The applicant submits that a vote or hearing should have been ordered because:

a. the history of the representation of the employees in the unit and the circumstances existing in the present dispute involve conflicting allegations that cast doubt on the reliability of the membership evidence;
b. the Board has a primary obligation to ascertain the true wishes of employees regarding the choice of a union, which is not relieved by its obligation to protect the confidentiality of employees who make statements to the IRO unless disclosure would further the objectives of the *Code* pursuant to section 35 of the *Regulations*;
c. the curative remedy for conflicting allegations regarding membership evidence is a representation vote under section 29(1) of the *Code* which contemplates that the Board may exercise its discretion to order a vote when it is unsure about the employees' true wishes regarding the choice of a particular union and when it cannot definitively determine the reliability of the membership evidence;
d. the Board should only rely on an IRO report in which allegations of impropriety are unsubstantiated; but not in matters, like that before the original panel, in which allegations of impropriety are substantiated as these raise significant credibility issues which must be determined by a hearing, or, if there are confidentiality concerns, by a vote.

[6] The applicant argues that, despite the Board's authority under section 16.1 of the *Code* to determine matters without holding an oral hearing, it must not do so where this would deny a party a reasonable opportunity to participate in the decision-making process and where the Board is faced with contradictory evidence, the resolution of which is essential to the outcome of the decision. The applicant submits that the Board denied it fairness by basing its findings on the confidential IRO report, which was not disclosed to the parties, as it had no opportunity to know the particulars of that evidence. The applicant claims that the Board was required to hold a vote or hearing which would have afforded the applicant the opportunity to cross-examine witnesses whose statements formed the basis of the allegations.

[7] The applicant argues that section 35 does not relieve the Board of its duty to hold a hearing into contradictory evidence. The applicant also argues the Board committed an error of law and policy when it improperly elevated section 35 above the duty of fairness and principles of natural justice by prioritizing the employees' privacy over their substantive right to support a union of their choice, and when it failed to consider whether the disclosure of the IRO report was consistent with this section. It submits that the Board erred in declining to use the exception for disclosure, in section 35, in order to allow the CAWU to properly assess the reliability and the validity of the membership evidence. The applicant argues that this is a fundamental objective of the *Code* and also of the *Canadian Charter of Rights and Freedoms* (*Charter*). Despite this mention of the *Charter*, the applicant did not make any substantive *Charter* arguments concerning *RD 764*.

[8] The applicant submits that the Board improperly fettered its discretion by declining to order a representation vote pursuant to section 29(1) of the *Code* or, in the alternative, hold an oral hearing into the allegations of impropriety in the membership evidence. The applicant argues that the dismissal of the application on the basis of unsubstantiated allegations in the IRO report prejudiced the employees involved as they have been effectively denied the right to determine a union of their own choosing.

[9] The CAWU seeks, by way of remedies, an order rescinding *RD 764*, directing the outstanding issues to a Board panel for a hearing, requiring the production of the allegations of impropriety and production of the IRO report as well as any other arguably relevant documents, and requests that the reconsideration panel hold an oral hearing to determine the merits of the reconsideration application.

B. The IAM

[10] The IAM submits that the CAWU's application should be dismissed as there are no valid grounds for reconsidering *RD 764*. It argues that the CAWU's raid application was properly dismissed on the basis of the numerous improprieties in the membership evidence identified in the Board's confidential investigation process.

[11] The IAM notes that the CAWU filed two previous unsuccessful reconsideration applications involving the same parties in which it also sought disclosure of the IRO report for the purpose of challenging the Board's findings concerning the membership evidence in a certification application.

[12] The IAM submits that the CAWU's arguments are contrary to the fundamental legal and labour relations principles and policies. It says that the CAWU's position that the Board should take a "curative" approach to defects in membership evidence identified in its investigation by ordering a vote is inconsistent with the jurisprudence, devoid of labour relations sense and incompatible with the Board's concern for preservation of industrial peace. The IAM submits that, with this approach, a raiding union would be able to obtain a vote either by having majority support or by filing evidence causing the Board to identify improprieties in it, which would only serve to encourage mischief and reward a raiding union for filing improper membership evidence.

[13] The IAM alleges that the CAWU unreasonably characterized *Garda Security Screening Inc.*, 2012 CIRB LD 2733 (*LD 2733*) as a case in which the Board took a curative path by directing a vote rather than the alternative approach it took in the present matter. The IAM submits that, in *LD 2733*, the allegations of improprieties in the membership evidence were resolved in the IRO's investigation, not in the results of the vote.

[14] The IAM submits that the CAWU's proposal to have the confidentiality of the Board's investigation depend on the outcome of the IRO's report would undermine the Board's investigations since the Board's IRO would never be in a position to provide assurance of confidentiality of the interview process that is critical to the efficacy of the investigations and fundamental to the *Code*'s objectives.

[15] The IAM argues that the Board's jurisprudence is consistent with that set out in *RD 764* which indicates that, in a raid, the Board must satisfy itself of majority support to order a vote; and, even in an original certification application, the kind of improprieties found in this case results in dismissal of a case, not in the ordering of a vote. The IAM submits that the CAWU did not have the requisite threshold majority support for the Board to order a representation vote as a number of employees had revoked any membership they may have applied for in the CAWU prior to the date of filing of the application. It also says that no order for a vote could be issued until after the Board had considered and ruled on the significance of the evidence of revocation and employee wishes as of the application date that was submitted to the Board by the IAM.

[16] The IAM submits that the CAWU's arguments that the Board should have held an oral hearing to resolve allegations of impropriety are misdirected as *RD 764* did not dismiss an application for certification on the basis of unsubstantiated allegations in the membership evidence, but rather on the basis of its confidential investigation, as it is authorized to do.

C. The CAWU's Reply

[17] In reply, the CAWU submits that the IAM's claims of labour relations mischief in the event that the Board decides to order a vote are unfounded as its argument for the ordering of a vote is specific to the particular facts in this matter. The CAWU argues that the Board has a broad discretion to order a vote as it sees fit and doing so, in the current dispute, would not restrict its discretionary authority in future matters.

[18] As to the IAM's submission that the Board's decision in *LD 2733* and *RD 764* are consistent, the CAWU argues that the Board's approach to allegations of improprieties in *LD 2733* was more flexible than in *RD 764*. It argues that the Board, in *Garda Security Screening Inc.*, 2012 CIRB LD 2748 (*LD 2748*), denied the CAWU's reconsideration application and stated that, in *LD 2733*, it had discounted all the disputed membership cards and assessed the remainder of the membership evidence, which it found to be reliable, before ordering a vote. The CAWU argues that by contrast, in *RD 764*, the Board held that a sample of the allegedly improper membership cards had the effect of tainting all of the evidence.

D. The Employer

[19] The employer did not file submissions nor did it take any position with respect to the application.

IV. Analysis and Decision

[20] In the present case, the CAWU requests an oral hearing. Section 16.1 of the *Code* gives the Board the discretionary power to decide any matter before it without holding an oral hearing, notwithstanding a party's request for same. Furthermore, the Board is not required to notify the parties of its intention to decide the matter without holding a hearing (*NAV CANADA*, 2000 CIRB 468, affirmed in *NAV Canada* v. *International Brotherhood of Electrical Workers*, 2001 FCA 30; and *Raymond* v. *Canadian Union of Postal Workers*, 2003 FCA 418). Parties are expected to put forward their entire case at the time the complaint or application is filed (*Oneida of the Thames EMS,* 2011 CIRB 564). Having reviewed all of the materials submitted in the instant case, the Board is satisfied that the documentation on file is sufficient for it to decide the matter without an oral hearing.

[21] After carefully considering the parties' submissions and documentation in the present matter, the Board has not been satisfied that the original panel, in *RD 764*, committed an error

of law or policy, or denied natural justice or procedural fairness in deciding to dismiss the CAWU's displacement application for certification for the reasons which follow.

A. The Law – Applications for Reconsideration

[22] Board decisions are final as provided for in section 22 of the *Code*. Although the Board has the power under section 18 of the *Code* to reconsider its decisions, it will only do so in exceptional circumstances. Its reconsideration power is not intended to be an appeal of an earlier decision, nor is it an opportunity to reargue a case, nor is it a forum to contest the facts and issues determined by an original panel. As such, on reconsideration, the Board will not substitute its opinion and assessment of the evidence for those of the original panel, nor will it second-guess how the original panel exercised its discretion. Moreover, a party's disagreement with respect to the conclusions of facts made by the original panel is not a ground for reconsideration. A reconsideration application is neither an opportunity for a party to obtain a new hearing nor to plead a new case before a new panel (*Williams* v. *Teamsters Local Union 938*, 2005 FCA 302).

[23] An applicant under section 18 has the onus to establish grounds that would justify the reconsideration of the decision in issue. A reconsideration panel does not decide whether it agrees with the original decision but whether the applicant has demonstrated a proper ground for reconsideration. In *Buckmire*, 2013 CIRB 700 (*Buckmire*), the Board summarized the main grounds for reconsideration:

> [45] In summary, the main grounds for reconsideration may be described as follows:
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> (*a*) New facts that the applicant could not have brought to the attention of the original panel and which would likely have caused the Board to arrive at a different conclusion;
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> (*b*) Any error of law or policy that casts serious doubt on the interpretation of the *Code* or policy;
>
> (*c*) A failure of the Board to respect a principle of natural justice or procedural fairness; and
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> (*d*) A decision made by a Registrar under section 3 of the *Regulations*.

[24] In the present application, the CAWU argues that the Board should reconsider *RD 764* on the grounds described in (*b*) and (*c*) above. In *Buckmire*, the Board set out the applicant's obligations when pleading an application for reconsideration on these grounds:

> [42] The minimum pleading requirements for an allegation raising an error of law or policy remain as set out in *Kies 413*, *supra*:
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> 1. A description of the law or policy in issue;
> 2. The precise error the original panel made in applying that law or policy; and
> 3. How that alleged error cast serious doubt on the original panel's interpretation of the *Code* or policy.
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> …
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> [44] As described in *Kies 413*, *supra*, a party's minimum pleading requirements would address the following issues:
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> 1. An identification of the particular principle of natural justice or procedural fairness in issue; and
> 2. A description of how the original panel allegedly failed to respect that principle.

[25] The Board will apply these principles and requirements to the CAWU's submissions and arguments for reconsideration.

B. Merits of the Application for Reconsideration

[26] In *RD 764*, the original panel explained the Board's reliance on the membership evidence in support of a certification application to establish employee wishes, citing section 30 of its *Regulations,* and the importance to the Board's process that this evidence fully comply with the requirements of section 31(1) of its *Regulations:*

> [10] When seized with any application for certification, the Board must first determine if the applicant has valid and sufficient membership evidence to support its application. Where the Board proposes to certify a bargaining agent on the basis of signed membership cards, or before it will order a representation vote, it is critically important that the membership evidence on which the Board will rely to make its decision be accurate and reliable. The standard that the Board applies in the verification of the membership evidence submitted in support of a certification application is very high.

[27] Notably, as of the date of filing of the CAWU's original displacement application on January 5, 2015, section 29(1) of the *Code* provided the Board with the discretion to order a representation vote. Hence, the original panel in *RD 764* stated the long standing policy that a union, in a displacement application, must show that it has the support of a majority of the members of the unit before a representation vote will be ordered:

> [7] It is a well established policy that in displacement applications, the Board will require that the applicant demonstrate majority support amongst the employees in the unit. If the applicant meets this threshold, the Board will, in almost every case, order a representation vote. The basis of this policy is based on the premise that once the Board has certified a trade union to represent the employees of a bargaining unit, it is presumed to have the continuing support of a majority of employees in the unit until this presumption is displaced

> by evidence to the contrary. The Board is also concerned with preserving industrial peace and, by adopting a policy requiring that the union seeking to displace another demonstrate support of 50% + 1, it ensures that the employees are serious about wanting a change of bargaining agent before the Board orders a vote (*Canadian Pacific Express and Transport* (1988), 73 di 183 (CLRB no. 682); and *Canadian Broadcasting Corporation* (1993), 91 di 165 (CLRB no. 1004) see page 172)

[28] Section 29(1) has since been repealed by the *Employees' Voting Rights Act*, (S.C. 2014, c. 40), which came into effect on June 16, 2015, and amended the *Code* by requiring the Board to hold a mandatory representation vote if at least 40% of the employees in the unit are members of the applicant union. Of course, this does not change the Board's obligation and responsibility to scrutinize the membership evidence in support of any certification application to ensure that it is valid and the Boards' reliance on its existing policies and practices in doing so.

[29] In *RD 764*, the original panel set out the main issue in the matter before it:

> [11] The key question for the Board in this matter is whether the application is accompanied by sufficient and valid membership evidence, as required by sections 30 and 31 of the *Regulations*, to establish that a majority of the employees in the unit wish to be represented by the applicant.

[30] The applicant, in the instant matter, is essentially arguing that the original panel in *RD 764* erred in Board policy or law, and breached natural justice and procedural fairness by not disclosing the IOR's report, not conducting a hearing to resolve issues of credibility or not ordering a representation vote to determine employee wishes.

[31] The original panel in *RD 764* noted the importance of keeping employee wishes confidential to the Board's process of investigating the membership evidence in support of certification applications including the IRO's role and report provided confidentially to the Board:

> [12] In order to satisfy itself, pursuant to section 28(*c*) of the *Code*, that the applicant has met the threshold required for a certification or for a representation vote, the Board has put in place a process by which it delegates its investigation powers to the Board's industrial relations officers (IROs) so they may verify and test the membership evidence that is submitted in support of a certification application.
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> [13] When allegations are made as to the validity of the membership evidence filed by an applicant, the IRO will investigate those allegations 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).

[14] 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 protected by section 35 of the *Regulations* (see *Maritime-Ontario Freight Lines Ltd.* v. *Teamsters Local Union 938*, 2001 FCA 252).

[32] The original panel in *RD 764* reviewed the confidential report of its IRO to whom a number of the employees confirmed that they neither paid the membership fee nor signed a card, and the Board's practice and jurisprudence in dealing with improprieties in the membership evidence:

[15] As part of her 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 both the CAWU and the IAMAW and taking into consideration the specific confidential information submitted to the Board. A number of the employees who were interviewed by the officer and for whom a signed membership card had been submitted confirmed that they had not paid the required $5.00 fee or that they had not signed a membership card.

[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.

[17] In *American Airlines Incorporated* (1981), 43 di 114; and [1981] 3 Can LRBR 90 (CLRB no. 301), the CLRB made a clear statement regarding this type of impropriety in membership evidence and its consequences:

> The Board again wishes to stress, as referred to in *City and Country Radio Ltd.*, supra, and *Canadian Imperial Bank of Commerce*, *Sioux Lookout*, *Ontario*, *supra*, that, in dealing with certification, it has developed a procedure to impress on the employee signing a card and on the union applying for certification the importance of their action. Concurrently with the important changes enacted by Parliament in 1978, which clearly indicated its preference in establishing the union's majority by documentary evidence, the Board raised from $2 to $5 the minimum required fee for an employee to join a union. We feel that an employee who has to disburse $5 to join a union will consider the seriousness of his action before disbursing the money. **The union must then certify to the Board that the money was personally paid by the employee who signed a membership card. If there is any impropriety in these procedures, the Board will dismiss the application for certification on that sole basis.**
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> (emphasis added; pages 129–130)

> [18] It went further in *K.D. Marine Transport Ltd*.(1982), 51 di 130; and 83 CLLC 16,009 (CLRB no. 400), when it indicated that consequences would be swift and severe in cases of this nature:
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> > The Board is fully cognizant of the importance of proof of union membership and the great weight and reliance placed upon the authenticity of such documentary evidence of employee wishes. Any fraud or tampering with membership cards or records such as signatures, backdated or updated cards, or falsehood in the method of payment of the required initiation fee, will result in swift and severe consequences. ...
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> > (pages 144; and 16,076)

[33] The reconsideration panel is not persuaded that the original panel erred in law or policy, or denied natural justice or procedural fairness, in citing the Board's law and policies regarding the confidentiality of its investigations into the membership evidence, the standard applied when scrutinizing this evidence nor the consequences for applications which are not supported by valid and reliable evidence.

[34] In *RD 764*, the original panel found that the many improprieties in the applicant's membership evidence tainted all of it, such that the panel would not accept its veracity or rely on it to order a vote:

> [19] In the present matter, the Board finds, on the basis of the results of the investigation by the IRO, that there were numerous improprieties in the membership evidence filed in support of the certification application. In the Board's view, the nature and the extent of the improprieties that were found have the effect of tainting all the membership evidence submitted in support of the application to the extent where the Board is not prepared to accept its veracity and to rely on it to order a representation vote.

[35] The original panel in *RD 764* further considered the CAWU's representations set out in its Certificate of Accuracy and stated:

> [20] It is also important to note that the Board requires the applicant to submit a Certificate of Accuracy in support of an application for certification. Paragraph 4 of the Certificate of Accuracy states as follows:
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> > 4. That the amounts shown as having been paid as union dues and / or initiation fees were actually paid by the employees concerned on their own behalf and on the dates indicated.
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> [21] In this case, the Certificate of Accuracy was signed by a representative of the applicant on January 9, 2015, and submitted to the Board. However, contrary to the statement contained in the certificate, the Board did find that there were improprieties in the collection of the $5.00 membership fee and with the signatures on some membership cards which amount to a substantive defect in the membership evidence submitted in support of the application. The Board therefore dismisses the application.

[36] The CAWU has not persuaded the Board that the original panel failed to exercise its discretion consistent with the Board's law and policy. Despite the CAWU's allegations that the Board, in *RD 764*, took an "alternative" approach from the "curative" one taken in prior matters involving these parties, the reconsideration panel finds that no grounds have been established to justify the reconsideration of the original panel's exercise of its discretion to dismiss the application in light of finding that the nature and extent of the improprieties had tainted all of the membership evidence. The Board also finds no errors or natural justice concerns have been established in the original panel having followed the long-established practice of relying on the confidential findings set out in the IRO's report provided confidentially to the Board, following its confidential investigation, in making its determination. In the Board's view, the original panel's finding that the non-compliance of the membership evidence with the *Code* and the *Regulations* amounted to a substantive deficiency, and not merely a technical breach, is consistent with the Board's jurisprudence in such circumstances which is to maintain the integrity of the Board's process (*North America Construction (1993) Ltd.*, 2014 CIRB 745).

[37] Contrary to the CAWU's allegations, the original panel in *RD 764* was not faced with the issue of determining which of the two unions the employees wished to have as their representative; rather, the issue was whether the certification application before it was supported by valid membership evidence in accordance with the requirements of sections 30 and 31 of the *Regulations*. Having found that the membership evidence accompanying the application was not reliable, the original panel in *RD 764* dismissed it on that basis. Consequently, the issue of which of the two unions before it the employees wished to have as their representative did not arise.

[38] With respect to the CAWU's argument that the Board's reliance on its IRO's confidential report is restricted to instances when allegations of impropriety in the membership evidence are unsubstantiated, the Board does not accept this, nor does it accept that a hearing must be held when allegations of impropriety are substantiated. The reconsideration panel finds that such an approach would not only undermine the requirement that an application be supported by valid membership evidence, but also the efficacy of the Board's investigation process in which the confidentiality of employee wishes must be protected.

[39] As to the applicant's submission that the Board dismissed its application on the basis of what, it alleges, are unsubstantiated allegations regarding its membership evidence without a hearing or a vote, the Board does not agree. In the Board's view, the original panel in *RD 764*

properly considered the importance of confidentiality in the Board's investigative process and relied on established jurisprudence (*K.D. Marine Transport Ltd.* (1982), 51 di 130; and 83 CLLC 16,009 (CLRB no. 400)). The original panel had an investigation conducted into the membership evidence and concluded that it would act on the results of that investigation. Despite the applicant's argument that the Board's actions in this regard amounted to an error of law or policy or a denial of natural justice, the applicant did not satisfy the reconsideration panel of any error or breach of natural justice by the Board.

[40] Moreover, the Board does not find that the original panel relied on "unsubstantiated allegations about membership evidence" in arriving at its decision, as the CAWU suggests. The original panel states, at paragraph 15 of *RD 764*, that the confidential investigation revealed that a number of employees on whose behalf a signed membership card was submitted had not paid the $5.00 fee or had not signed the membership card. The original panel found the membership evidence to be unreliable as a result of the numerous improprieties and decided to dismiss the application on that basis. The CAWU has not satisfied the Board that the original panel erred in law or policy nor that it denied the applicant natural justice in so finding.

[41] The applicant argues that the Board committed an error of law or policy by refusing to exercise its broad discretion under section 29(1) of the *Code* to order a representation vote based on the findings contained in the lRO's confidential report regarding allegations of improper membership evidence. In support of this, the CAWU relies on *TD Canada Trust in the City of Greater Sudbury, Ontario*, 2006 CIRB 363 (*TD Canada Trust*), upheld by the Federal Court of Appeal in *TD Canada Trust* v. *United Steel*, *Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union,* 2007 FCA 285, to argue that, when an lRO's confidential report substantiates allegations of impropriety, the Board should not accept those findings on face value but should use an alternate method to verify employee wishes, such as a representation vote. The reconsideration panel does not agree with the CAWU's interpretation of the *TD Canada Trust*, *supra*, decision.

[42] In *TD Canada Trust*, *supra*, the application was not made in the context of a raid situation and the alleged improprieties were not of a similar nature to those before the original panel in *RD 764*. In *RD 764*, as the original panel noted at paragraph 11, the question for the Board was to determine whether the application by the raiding union was supported by sufficient and valid membership evidence as required by the *Regulations* to establish that a majority of the employees wish to be represented by the applicant. That was not the situation in *TD Canada*

Trust, *supra*, where the Board was considering an original application for certification and was required to determine the wishes of the employees in a card-based system in which the allegations of impropriety were that the union had intimidated and coerced employees during its organizing campaign.

[43] As such, the *TD Canada Trust*, *supra*, is useful here only insofar as it states the principle that, ultimately, the discretion lies with the panel seized with an application for certification to determine how it will proceed when faced with substantiated improprieties in the membership evidence and that such a decision will depend on the specific facts in each case. The reconsideration panel has, therefore, not been persuaded that the original panel erred in exercising its discretion to rely on the results of the IRO's confidential report to base its finding that the nature and extent of the improprieties revealed in the report tainted all of the membership evidence and to consequently dismiss the application.

[44] The applicant further submits that the original panel erred in exercising its discretion not to hold an oral hearing in *RD 764* and breached a principle of natural justice by not affording it an opportunity to cross-examine the evidence before the Board. In the Board's view, the CAWU has not demonstrated that the original panel erred in procedural fairness or breached natural justice in its decision not to hold a hearing. The Board rarely holds a hearing in a certification application. Moreover the Board's January 6,2015 letter had advised the parties that:

> ... the Board is empowered under section 16.1 of the *Code* to decide any matter before it, including the determination of the appropriate bargaining unit, **without holding an oral hearing.** In such a case, the Board would determine the application on the basis of the written submissions of the parties and the letter of understanding/report of the investigating officer. It is therefore in the parties' best interests to file complete, accurate and detailed submissions in support of their respective positions and to cooperate fully in the investigation by the Board's officer.
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> (page 4; emphasis in original)

[45] In RD 764, the original panel found that it did not require a hearing to determine the application before it. Since the original panel concluded that it could rely on the IRO's confidential report, the Board has not been convinced that the applicant was denied natural justice when the original panel based its finding of invalid membership evidence on the results of its investigation report without first holding a hearing. As noted, the Board has the discretion to decide how it will deal with the findings of improprieties in the membership evidence taking into account the nature and extent of these, as well as the type of application before it. The

obligation remains on a union, including one in a displacement application, to support its application with reliable and accurate membership evidence.

[46] Additionally, the Board finds that the applicant did not demonstrate that the original panel in *RD 764* elevated the confidentiality of employee wishes over procedural fairness. The decision to dismiss the application is summarized at paragraphs 19, 20 and 21 of *RD 764*. The Board's policy of guarding its confidential investigation reports prepared by its IRO from disclosure is longstanding and courts have long held that the Board is entitled not to disclose such reports in the interest of encouraging workers to avail themselves of its certification procedures, as is consistent with section 35 of the *Regulations*.

[47] In *Maritime-Ontario Freight Lines Ltd.* v. *Teamsters Local Union 938*, 2001 FCA 252, the Federal Court of Appeal upheld the Board's objection to producing confidential membership evidence in the context of a judicial review proceeding. While the context differs from the present case and the reference is to section 25 of the *Regulations,* not to section 35, Chief Justice Richard, as he then was, explained the Court's support for the Board's process for safeguarding the confidentiality of membership evidence as follows:

> [9] The Tribunal objected to the applicant's request for material under Rule 318 (2) and gave its reasons for the objection.
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> [10] The Tribunal relied on section 25 of the *Canadian Industrial Relations Board Regulations, 1992,* SOR/91-622 (*Regulations*), which provides as follows:
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> |---|---|
> | 25. The Board shall not disclose to anyone evidence that could, in the Board's opinion, reveal membership in a trade union, opposition to the certification of a trade union or the wish of any employee to be represented by or not to be represented by a trade union, unless the Board considers that such disclosure would be in furtherance of the objectives of the Act. | 25. Le Conseil ne peut divulguer à qui que ce soit des éléments de preuve qui, à son avis, pourraient révéler l'adhésion à un syndicat, l'opposition à l'accréditation d'un syndicat ou la volonté de tout employé d'être ou de ne pas être représenté par un syndicat, à moins qu'il n'estime qu'une telle divulgation contribuerait à la réalisation des objectifs de la Loi. |
>
> [11] The Tribunal went on to state that under the *Canada Labour Code*, R.S.C. 1985, L-2, (*Code*), and in accordance with well established labour relations principles and policies, it is for the Board alone to use those documents to determine whether, in a given case, the applicant trade union represents a majority of the employees in a bargaining unit that the Board deems to be appropriate for purposes of collective bargaining.
>
> [12] The applicant's request under Rule 317 must be considered against the background of the scope of the Tribunal's privative clause and the public policy concerning the confidentiality of membership information in labour relations matters.

[13] George Adams notes in *Canadian Labour Law*, 2nd ed. (Aurora: Canada Law Book,1993) at ¶ 5.380,

> It has long been recognized that confidentiality of membership evidence is an essential guarantee which labour relations boards must offer if they wish to encourage workers to avail themselves of a board's certification procedures.

[14] In *Canada (Labour Relations Board)* v. *Transair Ltd.,* [1977] 1 S.C.R. 722 at 741-742, *(Transair)*, the Supreme Court of Canada had the opportunity to consider the disclosure of information protected by a similar provision of the *Regulations*. Chief Justice Laskin stated that,

> The Board was entitled to act on his report without disclosing it in this respect, having regard to s. 29(4) of the *Regulations*, once it was clear that [the Board's investigator] had made the required investigation. Of that there was no doubt in the present case...
>
> In my opinion, the Federal Court erred in its view as to the obligation of the Board to permit cross-examination as to numbers and, certainly, as to any further inquiries which could only involve identity. Section 29(4) of the *Regulations*, declaring that evidence submitted to the Board with respect to employee membership in the union was for the confidential use of the Board, is a reinforcement of the policy of the Act with respect to the authority of the Board in the determination of a union's membership position.

[48] In light of the above jurisprudence, the Board finds that no reason was established for it to reconsider the original panel's decision to adhere to the policy of non-disclosure in the circumstances of *RD 764*.

[49] Also, the Board notes that the original panel, in *RD 764*, properly confirmed the importance that is placed on the requirement for valid membership evidence since the Board relies on it to decide whether to grant certification or to order a vote, which can provide an applicant access to rights and privileges under the *Code*. Because of this, as *RD 764* set out, the Board has consistently applied a high standard when scrutinizing membership evidence submitted by an applicant. The privileges to be granted impose an obligation on every applicant to ensure the accuracy of the membership evidence it submits (*Genesee & Wyoming Inc., cob as Huron Central Railway HCRY*, 2007 CIRB 388). The Board's process requires fees to be paid and membership applications to be signed and completed in full compliance with the *Regulations* and for the applicant to certify to this in a Certificate of Accuracy, which must be witnessed and filed with the Board.

V. Conclusion

[50] For all of the above reasons, the applicant has not convinced the Board that the original panel in *RD 764* erred in law or policy, or breached natural justice or procedural fairness in

deciding to dismiss the CAWU's application on the basis of finding that it was not supported by valid membership evidence, relying on the results of the confidential investigation by the IRO. As the applicant has not demonstrated any grounds on which the reconsideration panel would reconsider *RD 764*, the application for reconsideration is dismissed.

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

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Louise Fecteau
Vice-Chairperson

_____
Judith MacPherson, Q.C.
Vice-Chairperson

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Patric Whyte
Vice-Chairperson