



Reasons for decision

WestJet, an Alberta Partnership,

applicant,

and

WestJet Professional Pilots Association,

respondent.

Board File: 31253-C

Neutral Citation: 2016 CIRB **806**

January 13, 2016

The Canada Industrial Relations Board (the Board) was composed of Mesdames Louise Fecteau and Annie G. Berthiaume and of Mr. Patric F. Whyte, Vice-Chairpersons.

Counsel of Record

Mr. Geoffrey J. Litherland, for WestJet, an Alberta Partnership;

Mr. Jesse Kugler, for the WestJet Professional Pilots Association.

Section 16.1 of the *Canada Labour Code (Part I—Industrial Relations)* (the *Code*) provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed all of the material on file, the Board is satisfied that the documentation before it is sufficient for it to determine this application for reconsideration without an oral hearing.

I. Nature of the Application

[1] On August 5, 2015, the Board issued its decision in *WestJet, an Alberta Partnership*, 2015 CIRB 785 (*WestJet 785*) (file no. 31149-C), in which it concluded that, based on the membership evidence submitted with the application for certification, the WestJet Professional Pilots Association (WPPA or the union) had the support of at least 40% of the employees in the bargaining unit, and ordered that a representation vote be taken.

[2] On August 24, 2015, WestJet, an Alberta Partnership (WestJet or the employer) filed an application for reconsideration of the decision in *WestJet 785*. The employer argues that the original panel committed an error of law or policy and exceeded its jurisdiction by ordering a vote on the basis of unverified membership evidence and on the basis of membership fees that did not adhere to section 31(1)(b) of the *Canada Industrial Board Regulations, 2012* (the *Regulations*).

[3] The employer is seeking a declaration, pursuant to section 15.1(2) of the *Code*, that the Board incorrectly decided *WestJet 785*. Specifically, it asks the Board to declare that membership applications sent to the WPPA by mail and membership fees paid online ought to have been verified by the union, and that membership fees paid online by PayPal (which included a service charge paid to PayPal), did not satisfy the requirement of section 31(1)(b) of the *Regulations*.

II. Positions of the Parties

A. The Union

[4] The WPPA argues that the application for reconsideration should be dismissed for three reasons. First, the union submits that the issues that give rise to the request for reconsideration are moot, by virtue of the fact that the representation vote was conducted; the WPPA did not secure majority support; and the application for certification has been dismissed. The question raised by the employer is therefore a hypothetical one, as any decision rendered by the reconsideration panel would not have the effect of resolving a live controversy between the parties.

[5] Second, the union argues that the employer's request for a declaratory opinion is improper. It argues that the Board should refuse to issue a declaratory opinion, as it did in *Ledcor Industries Limited*, 2003 CIRB 216, for the same reason that there is no solid evidentiary record upon which to render it and it therefore would not serve a valid labour relations purpose.

[6] Third, the union argues that WestJet has failed to provide any valid reason for the Board to reconsider its decision. The employer's assertion that the original panel committed errors of law or policy is merely a difference of opinion about the application of section 28 of the *Code*.

B. The Employer

[7] WestJet argues that the Board, in *WestJet 785*, mischaracterized its argument regarding the verification of membership evidence filed by the WPPA. Specifically, the employer claims that the Board committed an error of law and policy when it focussed exclusively on whether the WPPA was required to personally witness each signature and payment, while failing to address WestJet's submission that what was required of the WPPA, was, at the very least, to contact persons who submitted their membership applications by mail or who paid their membership fees online in order to confirm the validity of the application or payment.

[8] The employer draws the Board's attention to the recent amendments made to section 28(2)(c) of the *Code*. While previously, the provision stated "[w]here the Board is satisfied that, ... a majority of the employees in the unit wish to have the trade union represent them as their bargaining agent", the new provision requires the Board to be satisfied "**on the basis of evidence of membership in the trade union** that, ... at least 40% of the employees in the unit wish to have the trade union represent them as their bargaining agent".

[9] WestJet argues that these amendments introduced a substantive change as to the basis on which the Board is to satisfy itself of the requisite level of support. Therefore, the Board was required in this case to use the membership evidence as its determining consideration in finding that the WPPA had the support of at least 40% of the bargaining unit. The employer then argues that because of the union's failure to adequately verify the validity of the membership evidence it filed, it was not possible for the Board to be satisfied, on the basis of the WPPA's membership evidence, that 40% of employees in the bargaining unit supported being represented by the WPPA.

[10] The employer argues that the Board committed an error of law when it concluded that *Technair Aviation Ltée* (1990), 81 di 146; and 14 CLRBR (2d) 68 (CLRB no. 812) (*Technair Aviation*) stands for the proposition that a union is not obliged to demonstrate that its agents have verified the accuracy and reliability of the membership evidence. Rather, WestJet highlights the proposition in *Technair Aviation* that 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". Because the WPPA was not able to show that it witnessed or otherwise verified the signatures or payments, WestJet argues that there were two misrepresentations contained in the Certificate of Accuracy: (1) "[t]he membership application forms provided to the Board were in fact signed by the employees whose names appear on the

membership cards on the dates shown thereon”; and (2) “[t]he amounts shown as having been paid as union dues and/or initiation fees were actually paid by the employees concerned on their own behalf on the dates indicated”. In light of these deficiencies in the verification of the membership evidence, it was not possible for the Board to properly satisfy itself as to the requisite level of support needed to order a vote.

[11] Regarding the \$5.00 membership fee, WestJet argues that the Board’s decision was contrary to law or policy when it found that an individual’s act of making a \$5.00 payment by way of PayPal was sufficient to satisfy section 31(1)(b) of the *Regulations*. The employer argues this decision is inconsistent with section 31(1)(b) of the *Regulations* which specifies that in order to constitute evidence of membership support, an individual must have “paid at least five dollars to the trade union”. Payment by PayPal, where it is known that a service charge will be automatically deducted from the amount paid, does not satisfy the requirement that at least five dollars be paid **to the trade union** and thus constitutes a substantive deficiency. Furthermore, while the Board stated that it “will not look beyond the payment method to determine how the amount paid as a membership fee is being used or administered”, the real issue in this case is the fact that it was the persons paying by PayPal (not the union itself) who chose to pay a portion of the \$5.00 to a third party.

[12] In reply to the union’s objections to the reconsideration application, WestJet argues that a declaratory opinion is appropriate in situations where the Board is clarifying or interpreting newly revised legislation, as is the case here. It further argues that the issues of the application are not moot because the original panel’s decision failed to take into account this change in legislation.

III. Analysis and Decision

[13] The union submits that the issues that give rise to the request for reconsideration are moot. However, because this matter concerns the Board’s general process for determining applications for certification, the Board feels that it would serve a labour relations purpose to render a decision with reasons in this matter.

[14] The Board has decided to dismiss the application for reconsideration for the reasons set out below.

A. Reconsideration is Not an Appeal

[15] Although the Board has the discretion to review, rescind, alter or vary any of its decisions, under section 18 of the *Code*, it will only do so in exceptional circumstances. Pursuant to section 22 of the *Code*, decisions of the Board are final when issued.

[16] The Board has reiterated in its past decisions that the reconsideration process is markedly different from an appeal.

[17] Similarly, a reconsideration panel will not substitute its opinion and assessment of the evidence for those of the original panel and will not second-guess the original panel's exercise of discretion.

[18] The Board recently emphasized these points in *Ms. Z*, 2015 CIRB 752:

III. Reconsideration

[28] Reconsideration is not an appeal or a means of rearguing the original case. Despite the fact that section 44 of the *Canada Industrial Relations Board Regulations*, 2001 (the *Regulations*) was repealed on December 18, 2012, the following excerpt from *Kies*, 2008 CIRB 413, still applies:

[29] Section 44 of the *Regulations* is not drafted exhaustively and provides the Board with the flexibility to hear the rare case that does not fit within the enumerated grounds for reconsideration described above (see *Hurdman Bros. Ltd.* (1982), 51 di 104; and 83 CLLC 16,003 (CLRB no. 394)). **The enumerated grounds for reconsideration demonstrate that the reconsideration process is neither an appeal nor an opportunity for a party to reargue its case a second time before a differently constituted panel.**

(emphasis added)

[29] In *Williams v. Teamsters Local Union 938*, 2005 FCA 302, the Federal Court of Appeal noted the difference between an appeal and an application for reconsideration:

[7] I am unable to say that the Board's Reconsideration decision was patently unreasonable. **A request for reconsideration is neither an opportunity to obtain a new hearing nor is it an appeal. In conducting its review of the Initial decision, the reconsideration panel was not to substitute its own appreciation of the facts for that of the original panel.** In this case, based on the facts before it, the original panel concluded that the Union was within its right not to pursue the matter further and there are no new facts or grounds now advanced by the applicant that would alter this conclusion.

(emphasis added)

B. Section 28(2)(c) of the *Code*

[19] Section 28(2) of the *Code* states:

28.(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.

(emphasis added)

[20] WestJet submits that this change in the wording of the certification provision of the *Code* places a new obligation on the Board to use the membership evidence as **its determining consideration** in finding that it is satisfied of the 40% level of support for the union, before ordering that a representation vote be held.

[21] The Board accepts that there has been a change in the wording of the legislation. However, it is of the view that there has been no error by the original panel in its interpretation or application. It is evident from the decision itself that the membership evidence was the Board's "basis" or "determining consideration" in finding that at least 40% of the bargaining unit employees wished to be represented by the WPPA. In fact, the original panel explicitly stated, in *WestJet 785*, that:

[71] 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.

[22] What is at issue in this case is whether the membership evidence relied upon by the Board was verified and reliable. The Board's process for making that assessment is not changed. The original panel addressed this in *WestJet 785*, at paragraphs 41 and 42, where it stated that the amended legislation did not amend the Board's obligation and responsibility to scrutinize the membership evidence to satisfy itself that the requisite level of support has been met before ordering a vote, and concluded that it must rely on its existing policies and practices to assess and scrutinize the membership evidence.

[23] Accordingly, nothing in this case turns on the interpretation of the new language contained in the *Code*. Rather, the question at issue before the original panel was whether the application for certification was accompanied by sufficient and valid membership evidence as required by section 31 of the Board's *Regulations* to establish the requisite 40% level of support and, here on reconsideration, whether the original panel was properly able to reach the conclusion that it was.

C. Requirement of the Union to Verify the Validity of the Membership Evidence

[24] WestJet submits that the Board committed an error of law and policy by focusing its analysis exclusively on whether a WPPA agent personally witnessed the signing of the membership applications as a means of verifying their validity. It asserts that in doing so, it mischaracterized its argument and failed to address its real concern that the WPPA was required, at the very least, to contact persons who had mailed their applications or paid their membership fee online to confirm the validity of the application and payment.

[25] In support of this position, WestJet submits that the original panel misinterpreted *Technair Aviation* as standing for the proposition that a union is not obliged to demonstrate that its agents have verified the accuracy and reliability of the membership evidence, when in its view, it concludes the opposite.

[26] The reconsideration panel finds that the original panel neither misunderstood the employer's argument nor misinterpreted the Board's decision in *Technair Aviation* in conducting its analysis.

[27] The original panel discussed at some length the Board's approach to assessing the sufficiency and validity of the membership evidence filed by a trade union in support of a certification application. It discussed the investigation undertaken by the Board through its investigating officers to verify the validity of the membership evidence filed. It then cited *Technair Aviation* in describing the nature of the union's obligations as it concerned the signing of the Certificate of Accuracy. In that context, the cited passages from *Technair Aviation*, found at paragraph 60 of *WestJet 785*, describe the rationale for the practice that the union official who signs the certificate of accuracy need not be required to personally vouch for all the signatures on the membership cards. The rationale for this is that if there were such a requirement, the process would become too formal and would needlessly impede the exercise of the right of association, particularly in circumstances such as this, where the proposed

bargaining unit is large and employees are spread out across the country and overseas. However, the cited passages also included the statements that 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” and that the person signing the Certificate of Accuracy must nevertheless ensure that the cards meet the established criteria.

[28] Contrary to the employer’s submissions, the original panel did not conclude that *Technair Aviation* stands for the proposition that a union is not obliged to demonstrate that its agents have verified the accuracy and reliability of the membership evidence. Rather, although the original panel did note that witnessing the signing of membership applications was not an absolute requirement, it also acknowledged the broader obligation of the union to take effective measures to ensure the process of collecting membership evidence meets the legal requirements, as stated in *Technair Aviation*.

[29] The original panel then went on to apply those principles to the facts of the case before it and concluded that the union had established a process through its website that allowed the employees to freely complete, sign and pay for a membership card and that it was satisfied that those measures were effective in ensuring that the membership evidence filed met the requirements of the *Regulations*. The Board stated as follows:

[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.

[30] The Board went on to explain that it then took its own steps to investigate the membership evidence, pointing out that in this case, no concrete examples of fraud or irregularities in the membership evidence were alleged and none were found by the Board. It therefore concluded the following:

[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*.

[31] In light of the above, the reconsideration panel cannot conclude that the original panel either mischaracterized the employer's argument concerning the union's obligation to verify the membership evidence it files, or misinterpreted the sentiments of the Board in *Technair Aviation*. It is evident that the original panel understood that the union was under some duty to verify the membership evidence it filed. Neither the *Regulations* nor the Board's decision in *Technair Aviation* set out explicitly what steps the union is required to take in order to verify the validity of the membership evidence it files. The original panel considered the matter and was content that the process and measures put in place by the union in the circumstances were sufficient, and that given the results of its own investigation, it had no reason to believe they were not.

[32] Ultimately, it is the Board's role and obligation to ensure that the membership evidence filed by the union in support of its application is valid and reliable, in the sense that it reflects the employees' true wishes to have the union represent them. The original panel put its mind to that question and was ultimately satisfied that the membership evidence submitted was a reliable reflection of the employees' true wishes.

[33] Each case must be determined in the context of its own facts and circumstances. In this case, where there have been no allegations of improprieties and none found through the Board's investigation, the reconsideration panel finds that the original panel did not err in accepting the union's method of collecting and verifying membership evidence. Further, the Board was properly able to conclude that it was satisfied, on the basis of the membership evidence filed in support of the application, that 40% of the employees in the bargaining unit wished to be represented by the WPPA.

D. Payment of Five Dollars to the Union

[34] Section 31(1) of the *Regulations* states:

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

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

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

[35] The employer submits that the original panel made an error of law or policy by ignoring the wording of section 31(1) of the *Regulations* which requires \$5.00 to be paid “to the trade union”. Instead, it focussed on the fact that an individual had paid \$5.00 (even if part of that disbursement went to the service provider, PayPal).

[36] This very issue was raised by the employer in its response to the application for certification, and was considered by the original panel. As stated by the Board in *WestJet 785*:

[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...

[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.

(emphasis added)

[37] When asked to determine whether certain conduct is in compliance with the requirements of the *Regulations*, it is entirely appropriate for the Board to look at and consider the purpose of the requirement and view it in context. The original panel properly did so when it discussed the significance of the act of making the payment, or financial contribution, in support of the membership application.

[38] In addition to doing so, it is apparent that the original panel also considered the argument that the full amount of the \$5.00 payment was not being paid directly to the union. The original panel noted that it was confirmed, through its investigating officer, that the method of electronic payment by way of PayPal, was a method that was made available by the union to the employees as an acceptable method of payment of the membership fee. In this regard, the union can be seen to have understood and accepted that it would potentially be giving up the amount of any service fee from those employees who chose to avail themselves of the PayPal electronic method of payment.

[39] The reconsideration panel cannot conclude that the original panel made an error of law or policy in finding that payment of the \$5.00 membership fee by the employee to the union in this manner and in these circumstances, complied with the spirit and intent of the requirement set out in section 31(1)(b) of the *Regulations* and did not amount to a substantive deficiency, as argued by the employer.

IV. Conclusion

[40] WestJet has not convinced the reconsideration panel that the original panel erred in law or policy in its interpretation or application of section 28(2) of the *Code*, of 31(1)(b) of the *Regulations*, or of the Board's previous decision, *Technair Aviation*.

[41] The employer has not raised any substantive issues which warrant interfering with the Board's decision in *WestJet 785*. The fact that the employer may disagree with the original panel's conclusions is not a sufficient reason or an appropriate ground for reconsideration.

[42] For the foregoing reasons, the application for reconsideration filed by WestJet is dismissed.

[43] Before concluding, the Board notes that the applicant was asking the Board to issue a declaratory opinion pursuant to section 15.1(2) of the *Code*. Given that the Board has dismissed this application for reconsideration with reasons, it sees no need to issue a declaratory opinion and declines to do so.

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

Louise Fecteau
Vice-Chairperson

Annie G. Berthiaume
Vice-Chairperson

Patric F. Whyte
Vice-Chairperson