Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Cartage and Miscellaneous Employees' Union, Local 931,

applicant,

and

Canadian Union of Public Employees, Local 4930,

respondent,

and

Handlex Groundhandling Services Inc.,

employer.

Board File: 27701-C
Neutral Citation: 2009 CIRB 480
November 17, 2009

The Board was composed of Ms. Elizabeth MacPherson, Chairperson, and Messrs. Graham J. Clarke and William G. McMurray, Vice-Chairpersons.

Parties' Representatives of Record

Mr. Pierre-André Blanchard, for the Cartage and Miscellaneous Employees' Union, Local 931;

Mr. Ronald Cloutier, for the Canadian Union of Public Employees, Local 4930;

Mr. Jean-Luc Paiement, for Handlex Groundhandling Service Inc.

These reasons for decision were written by Mr. Graham J. Clarke, Vice-Chairperson.

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 without an oral hearing.

I - Nature of the Application

[1] On September 2, 2009, the Board received an application from the Cartage and Miscellaneous Employees' Union, Local 931 (Teamsters Québec) (Teamsters), seeking reconsideration of the Board's decision in *Handlex Groundhandling Services Inc.*, 2009 CIRB LD 2209 (*Handlex (LD 2209)*). In *Handlex (LD 2209)*, *supra*, the Board had provided reasons why a Teamsters' December 4, 2008 ratification vote did not render untimely a certification (raid) application filed that same day by the Canadian Union of Public Employees (CUPE).

[2] On October 2, 2009, pleadings closed and the file was sent to the Board for a decision.

[3] On reconsideration, the Board has determined that: i) the Teamsters ratified the proposed collective agreement, ii) the agreement came into force as of December 4, 2008 and iii) CUPE's certification application should have been found untimely.

II - Facts

[4] On January 14, 2009, the Board issued an order certifying CUPE as the bargaining agent for the Teamsters' existing bargaining unit at Handlex Groundhandling Services Inc. (Handlex). In accordance with its longstanding practice, the Board provided no written reasons for its decision beyond those contained in the certification order.

[5] The Teamsters asked the Board to reconsider that certification order. In *Handlex Groundhandling Services Inc.*, 2009 CIRB LD 2115 (*Handlex (LD 2115)*), the reconsideration panel returned the file to the original panel and requested, on an exceptional basis, that detailed reasons be drafted

explaining the CUPE certification order. Generally, the Board does not provide detailed written reasons when it grants a certification application (see *Coastal Shipping Limited*, 2005 CIRB 309).

[6] On August 18, 2009, the Board issued *Handlex (LD 2209)*, *supra*, giving the reasons for its January 14, 2009 certification order. Those reasons led to the Teamsters' current reconsideration application.

[7] The key issue concerns the Teamsters' negotiation, and later alleged ratification, of a new collective agreement with Handlex. The alleged ratification occurred on the same day that CUPE filed its raid application: December 4, 2008. The Board originally, therefore, had to decide whether CUPE's certification application was timely under section 24(2) of the *Code*.

[8] The Teamsters' previous collective agreement with Handlex had run from March 27, 2005, to March 26, 2008. The renewal negotiations included conciliation.

[9] On September 10, 2008, the Teamsters recommended to the bargaining unit that they accept the conciliator's recommendations for a proposed collective agreement. On September 26, 2008, the membership voted against the proposal.

[10] Handlex later improved its offer and the Teamsters scheduled a vote. The Teamsters held its ratification meeting on November 12, 2008, but no vote ended up being taken. Handlex later advised the Teamsters that its offer was final and would not be improved.

[11] On December 1, 2008, the Teamsters gave notice that another ratification vote on Handlex' final offer would take place on December 4, 2008.

[12] The Teamsters were clearly aware at the time of scheduling the December 4, 2008 meeting that CUPE was planning to file a raid application. The Teamsters' notice to the bargaining unit makes this apparent. The Fédération des travailleurs et travailleuses du Québec (FTQ) had apparently advised the Teamsters of CUPE's upcoming application and had proposed a procedure to follow. The Teamsters' notice read:

December 1, 2008

Dear Brothers and Sisters:

The FTQ has apprised us of a petition calling for a change of union. I have received a copy of the petition, referred to me by the FTQ in my capacity as the president of Teamsters, Local 931.

The FTQ has conducted an inquiry relating to this petition.

CUPE and the Teamsters Union are both members of the FTQ, the largest central labour body in Quebec, and the FTQ's constitution, more precisely Schedule 3 thereof, contains very strict member protocol rules that state that, in the event of a call for a change in union allegiance, the FTQ must conduct an inquiry and make recommendations or proposals to the incumbent union. CUPE has confirmed that it will comply with the protocol and, consequently, will not accept such a transfer of members.

In this case, the FTQ's recommendations are to maintain Teamsters, Local 931, as the incumbent union and to hold a general meeting as soon as possible to allow members to vote on the employer's final offers, which are still on the table.

However, Local 931's executive committee has also looked into the complaints set out in the petition. After conducting a complete review of the matter, in consultation with your shop committee, the federal conciliation service and the business agent concerned, we can say with confidence that the union has represented you in a very able and professional manner in recent years, whether it be in settling grievances (dismissals, claims) or in providing representation by permanent union staff members at a large number of meetings and formal and informal committee sessions.

You are therefore invited to attend a **general meeting** on Thursday, December 4, from 8:00 to 10:00 a.m., at 6500 Côte de Liesse, Montréal, Quebec, at which a vote by secret ballot will be held on the employer's final offers. This meeting will also be attended by the vice-president of Local 931.

In solidarity,

(s) Gerry Boutin
President

(translation)

[13] On the morning of December 4, 2008, roughly 26 members attended the ratification meeting. In *Handlex (LD 2209)*, *supra*, it is noted that the evidence was contradictory whether or not a majority of the members attending asked for the vote to be postponed. What is not in dispute is that, instead of voting for or against the proposed collective agreement, most of the members in attendance, some of whom advised the Teamsters that they wished to be represented in the future by CUPE, refused to vote and walked out. Only five members remained, including three members of the Teamsters' bargaining committee.

[14] The vote results were four to one in favour of accepting Handlex's final offer. On December 4, 2008, the Teamsters faxed a letter to Handlex informing it that the collective agreement had been ratified that morning. The Teamsters were accordingly ready to sign the collective agreement.

[15] Handlex, which had earlier sent a letter dated November 21, 2008, to employees asking them to vote in favour of the new collective agreement, was seemingly unavailable on December 4, 2008, to take the Teamsters' calls. Despite several efforts to meet with Handlex officials in person, the Teamsters were unable formally to sign the collective agreement on December 4, 2008.

[16] After the ratification vote, but still on December 4, 2008, the Board received CUPE's certification application.

[17] The Teamsters disputed the timeliness of CUPE's application under the *Code* given that its new collective agreement with Handlex was already in force.

[18] Despite its usual practice of holding votes for most raid applications, the Board certified CUPE without a vote on January 14, 2009, by order no. 9594-U:

> **WHEREAS** the Canada Industrial Relations Board, by order no. 7928-U dated November 3, 2000, certified the Cartage and Miscellaneous Employees' Union, Local 931, as the bargaining agent for a unit of employees of Handlex Groundhandling Services Inc.;
>
> **AND WHEREAS** the Canada Industrial Relations Board has received an application for certification from the applicant union as bargaining agent for a unit of employees of Handlex Groundhandling Services Inc., pursuant to section 24 of the *Canada Labour Code (Part I - Industrial Relations)*;
>
> **AND WHEREAS** the former bargaining agent and the employer were bound by a collective agreement which ended on March 26, 2008;
>
> **AND WHEREAS, following negotiations for the renewal of the collective agreement, the former bargaining agent concluded an agreement with the employer entitled "Recommandation de règlement" (settlement recommendation), dated September 10, 2008, which provided that the parties agreed to the full and complete collective agreement, on the condition that it be ratified by their "main" [at paragraph 5 of the agreement], and that "the word 'main,' for the union, means its members in good standing of the concerned bargaining unit" [see paragraph 9 of the agreement];**
>
> **AND WHEREAS the Board finds that the condition to the agreement was not met because, in light of the circumstances, the proposed collective agreement was not put to a vote as agreed to;**
>
> **AND WHEREAS** the Board finds that the application of the applicant union was filed within the prescribed time limits set out in the *Code*;

> **AND WHEREAS** the Board acknowledges that its conclusion that there is no collective agreement in place was based on the fact that the projected collective agreement was not ratified by the employees—contrary to the settlement recommendation agreed to by the former bargaining agent and the employer—and not on the fact that the employer had not signed the proposed agreement;
>
> **AND WHEREAS**, following investigation of the application and consideration of the submissions of the parties concerned, the Board has found the applicant to be a trade union within the meaning of the *Code* and has determined the unit described hereunder to be appropriate for collective bargaining, and is satisfied that a majority of the employees of the employer in the unit wish to have the applicant trade union represent them as their bargaining agent.
>
> **NOW, THEREFORE**, it is ordered by the Canada Industrial Relations Board that the Canadian Union of Public Employees, Local 4930, be, and it is hereby certified to be, the bargaining agent for a unit comprising:
>
> *"all in-flight service attendants of Handlex Groundhandling Services Inc. working at the Dorval and Mirabel airports, excluding supervisors, assistant supervisors and those above."*
>
> **ISSUED** at Ottawa, this 14th day of January, 2009, by the Canada Industrial Relations Board.
>
> (emphasis added)

[19] In *Handlex (LD 2115)*, *supra*, on an exceptional basis, the Board returned the matter to the panel seized of the certification application and asked for detailed reasons. *Handlex (LD 2209)*, *supra*, contained those reasons.

[20] In *Handlex (LD 2209)*, *supra*, the Board explained its decision to certify CUPE. The fact that Handlex had not formally signed the collective agreement was not a factor:

> The fact that the employer had not signed did not influence the Board's decision, as jurisprudence has established that that is not a crucial factor in determining whether a collective agreement exists where an agreement in principle has been entered into by the parties or they have begun to implement it (see *Canadian Corps of Commissionaires, N.B. & P.E.I. Division, Inc.*, 2008 CIRB 404; *S.G.T. 2000 Inc.*, 2000 CIRB 87; *Maritime Employers Association*, 2000 CIRB 77; *Worldways Canada Ltd.* (1985), 62 di 75 (CLRB no. 524); and *Giant Yellowknife Mines Limited* (1976), 13 di 54; [1976] 1 Can LRBR 314; and 76 CLLC 16,002 (CLRB no. 53)).
>
> The employer's failure to sign is but one factor among many in considering whether the tentative collective agreement was ratified, but the Board did not take it into account in its decision to certify the applicant.
>
> (page 7)

[21] However, as suggested by the original order certifying CUPE, the Board did find fault with the Teamsters' ratification vote. The Board found the vote did not respect the Teamsters' obligation to submit the settlement to the bargaining unit:

> However, a majority of employees asked for a deferral of the vote and left the room.
>
> The former bargaining agent decided to hold the ratification vote with only five members in attendance, including three who were on the bargaining committee. The final outcome was four votes in favour and one vote against the tentative collective agreement.
>
> It is true, as argued by the former bargaining agent, that there is no requirement under the *Code* for tentative collective agreements to be approved by means of an employee vote. However, when a union undertakes to have its members ratify a tentative collective agreement, the ratification must be at least reasonably acceptable and not a sham. The union knew that its members and the applicant were preparing to file an application for certification, which in fact was filed the same day, December 4, 2008. It therefore conducted the vote in accordance with the undertaking of September 10, 2008, as a contingency.
>
> That is when the agreement was breached. In the Board's view, the former bargaining agent did not submit the tentative agreement to its members. A majority of the employees who attended the meeting asked for a deferral of the vote and left the room. Only four people approved the tentative collective agreement.
>
> The Board cannot accept the former bargaining agent's contention that this ratification complied with the memorandum of settlement entered into with the employer on September 10, 2008. The mere fact that three of the four employees who voted in favour of the tentative agreement were on the bargaining committee leads the Board to conclude that the ratification did not meet the conditions agreed to by the parties in defining their "main" as "members in good standing of the concerned bargaining unit" (article 9).

(*Handlex (LD 2209)*, *supra*, pages 8-9)

[22] The panel seized of the certification application had concerns about the ratification process, including the fact that three of the employees who voted had been members of the Teamsters' negotiating committee. In *Handlex (LD 2209)*, *supra*, it came to the conclusion that the ratification vote had also not met the standards contained in the conciliator's September 10, 2008, recommendations.

[23] The Teamsters, in their reconsideration application, argued that the Board committed an error of law which cast serious doubt on its interpretation of the *Code* when it refused to accept the results of the ratification vote. In the Teamsters' view, most of the members who initially showed up at the ratification meeting left of their own accord. The Teamsters proceeded with the ratification vote in accordance with its December 1, 2008, notice and it passed.

[24] The Teamsters maintained that the *Code* does not oblige any trade union to carry out a ratification vote for a collective agreement. Moreover, the general rule for votes is that they pass if a majority of those in attendance vote in favour. This was the case for the December 4, 2008, vote.

[25] CUPE, in its submissions, reminded the Board that reconsideration is not an appeal. The Board in reconsideration should not substitute its own interpretation of the situation for that of the panel seized of the certification application. It also argued that the Teamsters' submissions repeated much of what it had already argued when asking for reconsideration of the original order which granted the certification.

[26] CUPE also argued that two of the five people were not Handlex employees and should not have voted.

[27] In reply, the Teamsters argued that CUPE's allegations regarding the two employees were new and were never raised before the panel seized of the certification application. Moreover, they argued that the two people in question were in fact Handlex employees, a reality which entitled them to vote.

III - Issues

[28] This case raises the following three issues:

i) What is the Board's jurisdiction to determine if a collective agreement is in force?

ii) Was a collective agreement in force on December 4, 2008?

iii) Was CUPE's certification application filed within the *Code*'s time limits?

IV - The Board's reconsideration process

[29] The Board does not sit in appeal when it considers a reconsideration application. Board decisions are meant to be final when issued. Reconsideration is instead an exceptional process as was recently described in *Ted Kies*, 2008 CIRB 413:

[3] Section 18 of the *Code* provides the Board with the authority to reconsider its past decisions:

"18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application."

[4] The *Code* also provides that Board decisions are expected to be final. The Board's extensive privative clause at section 22 of the *Code* makes this explicit:

"22.(1) Subject to this Part, **every order or decision of the Board is final** and shall not be questioned or reviewed in any court, except in accordance with the *Federal Courts Act* on the grounds referred to in paragraph 18.1(4)(a), (b) or (e) of that Act.

...

No review by *certiorari*, etc.

(2) Except as permitted by subsection (1), no order, decision or proceeding of the Board made or carried on under or purporting to be made or carried on under this Part shall

(a) be questioned, reviewed, prohibited or restrained, or

(b) be made the subject of any proceedings in or any process of any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise,

on any ground, including the ground that the order, decision or proceeding is beyond the jurisdiction of the Board to make or carry on or that, in the course of any proceeding, the Board for any reason exceeded or lost its jurisdiction.

(emphasis added)"

[5] Section 22 fulfills an important labour relations purpose by ensuring that Board decisions are final. Similarly, reconsiderations under section 18 are the exception rather than the rule as noted in *591992BC Ltd.*, [2001] CIRB no. 140:

"[20] The finality of its decisions is of primary concern to the Board. Thus, the rescinding of an original panel's decision remains the exception rather than the rule. The applicant has the burden of proving that there are serious reasons, or even exceptional circumstances, that would justify the reconsideration of a decision. ...

(page 9)"

[6] Sections 44 and 45 of the *Canada Industrial Relations Board Regulations, 2001* (the *Regulations*) set out the Board's policy with respect to the exercise of its reconsideration power:

"44. The circumstances under which an application shall be made to the Board exercising its power of reconsideration under section 18 of the *Code* include the following:

(a) the existence of facts that were not brought to the attention of the Board, that, had they been known before the Board rendered the decision or order under reconsideration, would likely have caused the Board to arrive at a different conclusion;

(b) any error of law or policy that casts serious doubt on the interpretation of the *Code* by the Board;

(c) a failure of the Board to respect a principle of natural justice; and

(d) a decision made by a Registrar under section 3.

...

45.(1) In addition to the information required for an application made under section 10, an application for a reconsideration must set out any arguments supporting the application that may address one or more of the circumstances referred to in section 44.

(2) The application must be filed within 21 days after the date the written reasons of the decision or order being reconsidered are issued.

(3) The application and the relevant documents must be served on all persons who were parties to the decision or order being reconsidered."

[7] Section 45(2) of the *Regulations* codifies the Board's prior policy that reconsideration applications must be filed within 21 days after the date the Board issued its written reasons for the decision or order. This reflects again the need for the Board's decisions to be final (see *Wholesale Delivery Service (1972) Ltd.* (1978), 32 di 239; and [1979] 1 Can LRBR 90 (CLRB no. 154)).

[8] Section 46 of the *Regulations* provides the Board with the authority to extend time limits set out in the *Regulations*, including the 21-day time limit for filing a reconsideration application:

"46. The Board may vary or exempt a person from complying with any rule of procedure under these Regulations—including any time limits imposed under them or any requirement relating to the expedited process—where the variation or exemption is necessary to ensure the proper administration of the *Code*."

[9] In keeping with the exceptional nature of reconsideration, and the need for final and binding decisions, the Board will exercise its power to extend time limits with restraint (see *Alex Robertson et al. and J.M. Clegg et al.*, [2004] CIRB no. 260; and 112 CLRBR (2d) 148).

[10] Section 45 of the *Regulations* requires that applicants requesting reconsideration expressly identify the grounds for reconsideration. A generic criticism of the decision under review does not meet this requirement. It is not up to the Board to determine if applications which fail to comply with the *Regulations*' requirements, might, if properly pleaded, raise one or more proper grounds for reconsideration.

[30] The Teamsters have argued that the conclusion reached in *Handlex (LD 2209)*, *supra*, that there was no collective agreement in force on December 4, 2008, constituted an error of law which cast serious doubt on the Board's interpretation of the *Code*.

V - Analysis and Decision

1. What is the Board's jurisdiction to determine if a collective agreement is in force?

A. Relevant *Code* Sections

[31] Section 24(2) of the *Code* governs the timeliness of certification and raid applications. One of the key elements for the Board to determine when considering the timeliness of the application is whether a collective agreement is "in force":

> Time of application
>
> 24.(2) Subject to subsection (3), an application by a trade union for certification as the bargaining agent for a unit may be made
>
> (a) **where no collective agreement applicable to the unit is in force** and no trade union has been certified under this Part as the bargaining agent for the unit, at any time;
>
> (b) **where no collective agreement applicable to the unit is in force** but a trade union has been certified under this Part as the bargaining agent for the unit, after the expiration of twelve months from the date of that certification or, with the consent of the Board, at any earlier time;
>
> (c) **where a collective agreement applicable to the unit is in force** and is for a term of not more than three years, only after the commencement of the last three months of its operation; and
>
> (d) **where a collective agreement applicable to the unit is in force** and is for a term of more than three years, only after the commencement of the thirty-fourth month of its operation and before the commencement of the thirty-seventh month of its operation and, thereafter, only
>
> (i) during the three month period immediately preceding the end of each year that the collective agreement continues to operate after the third year of its operation, and
>
> (ii) after the commencement of the last three months of its operation
>
> (emphasis added)

[32] Section 16(p) of the *Code* empowers the Board, in the course of a proceeding, to make determinations about the status of a collective agreement, including whether a collective agreement is in operation:

> 16. **The Board has**, in relation to any proceeding before it, **power**
>
> ...

> (p) **to decide for all purposes of this Part** any question that may arise in the proceeding, including, without restricting the generality of the foregoing, **any question as to whether**
>
> ...
>
> (vi) **a collective agreement has been entered into**,
> (vii) **any person or organization is a party to or bound by a collective agreement, and**
> (viii) **a collective agreement is in operation.**
>
> (emphasis added)

[33] During an arbitration proceeding under the *Code*, the parties can ask the Board to determine whether or not a collective agreement is in existence:

> 65.(1) Where any question arises in connection with a matter that has been referred to an arbitrator or arbitration board, **relating to the existence of a collective agreement** or the identification of the parties or employees bound by a collective agreement, the arbitrator or arbitration board, the Minister or any alleged party may refer the question to the Board for determination.
>
> (emphasis added)

[34] In order to carry out its mandate under the *Code*, the Board must necessarily determine in certain cases the status of the parties to the collective agreement. This is the lynchpin for determining the "open period" for a certification (raid) application.

[35] The Board in *Handlex (LD 2209)*, *supra*, correctly noted that the conclusion of a collective agreement in this case did not turn on whether Handlex formally signed the document on December 4, 2008. The Board has developed a significant body of case law interpreting the definition of "collective agreement" at section 3 of the *Code*:

> 3.(1) In this Part,
>
> "collective agreement" means an agreement in writing entered into between an employer and a bargaining agent containing provisions respecting terms and conditions of employment and related matters.

[36] The case law gives a strong preference to substance over formality. The existence of a collective agreement will depend on the parties' conduct, as opposed to the mere act of signing the actual document:

> [18] The Board has addressed the framework under which a collective agreement exists and operates in a number of previous decisions. Briefly put, a collective agreement will be found to exist where there has been a so-called "meeting of the minds" with respect to the contents of an agreement between the parties. As the agreement of the parties can take many shapes, the technical aspects of the written document between the parties are secondary to the parties' intention to conclude an agreement.
>
> (*Worldwide Flight Services, Inc.*, 2005 CIRB 330)

[37] The Board recognizes that it has a limited role over internal union affairs. It does not have a general supervisory power over a union's constitution or by-laws. Any Board involvement in internal union affairs requires the *Code* to be specific on the subject matter such as for certain types of internal union discipline (*Jim Saunders* (1988), 74 di 165 (CLRB no. 701)):

> The Board is far from being convinced that the local president, and the membership, on September 8 violated any of the union's rules–or anybody else's for that matter–in the treatment of Mr. Saunders. But even if they did, that would not necessarily mean that section 185(f) and (g) had been violated. The failure of a union to observe fully the terms of its own constitution and rules in the handling of a matter like this is not invariably tantamount to a breach of section 185(f) and (g). The Canada Labour Relations Board has no general mandate to supervise or police union observance of constitutions, by-laws and rules of order. There are other forums where non-observance of such may be challenged. The Board' s involvement in the internal affairs of a union is quite specific, restricted and specialized and in respect of section 185(f) and (g) it has to do with membership rules or disciplinary standards being applied in a "discriminatory" manner. Even if the union, in respect of the September 8 incident, did not cross all of the T's or dot all of the I's there is no evidence before the Board to support the view that there was anything "discriminatory" in the way Mr. Saunders was then treated. ...
>
> (pages 168-169)

[38] The Board also accepts that the *Code* does not oblige a trade union to follow the common practice of holding a ratification vote: see, for example, *Ledcor Industries et al.* (1998), 106 di 122; 41 CLRBR (2d) 145; and 99 CLLC 220-005 (CLRB no. 1225).

[39] Nonetheless, if a vote is held, and if the issue arises whether the vote resulted in a binding collective agreement, then the Board can examine that question as it did in *Handlex (LD 2209)*, *supra*. Such an analysis fits comfortably with all the other factors the Board may consider when determining the status of a collective agreement and the timeliness of a raid application under 24(2) of the *Code*: see, for example, *American Cartage Agencies Ltd.*, 2006 CIRB 354, at paragraphs 68-75.

[40] Accordingly, the Board in *Handlex (LD 2209)*, *supra*, in order to apply section 24(2) of the *Code*, was required to determine whether a collective agreement was in force when CUPE filed its certification application. The Board in *Handlex (LD 2209)*, *supra*, determined, and we agree, that Handlex's unavailability to sign the collective agreement was not a determining factor. The previous conduct of Handlex and the Teamsters clearly indicated that a vote in favour of Handlex's final offer would result in a binding collective agreement.

2. Was a collective agreement in force on December 4, 2008?

[41] In *Handlex (LD 2209)*, *supra*, the Board came to two conclusions why the Teamsters' ratification vote did not result in a collective agreement. Firstly, the Board concluded that the members of the Teamsters' negotiating team ought not to have voted.

[42] Secondly, the Board decided that a vote involving only five members, after most attending members at the meeting had walked out, did not meet a reasonableness standard. This standard was based in part on the Board's interpretation of the conciliator's September 10, 2008, recommendations.

[43] We will deal with each reason in turn.

A. The votes cast by the negotiating committee

[44] There was no evidence or suggestion that the three bargaining committee members who voted were not entitled to vote. Were the union constitution to suggest that negotiators in the bargaining unit could not vote, then this might be a factor to consider. However, there is no evidence to contradict the general practice that members, including those who negotiated on behalf of the union with the employer, can vote about their future. Indeed, the negotiating committee's members often vote in order to demonstrate their support for their own recommendation in favour of the employer's offer.

[45] This aspect of the vote was not sufficient to void it.

B. The holding of the vote

[46] The evidence diverged whether the Teamsters' members who attended the vote on December 4, 2008, asked for it to be postponed.

[47] The reconsideration panel agrees with the panel seized of the certification application that this issue does not need to be determined.

[48] We respectfully disagree, however, with the conclusion of the panel seized of the certification application that the Teamsters were not entitled to conduct the ratification vote merely because some voters in attendance asked for it to be postponed or because they walked out without voting.

[49] If the members in attendance entitled to vote had not wanted the Teamsters as their bargaining agent, then all they had to do was vote against Handlex's offer. That would have ensured that no collective agreement came into force. It would have ended any debate about the timeliness of CUPE's later certification application.

[50] The Board cannot speculate why a group of eligible voters would attend a ratification meeting, but decide not to vote. They no doubt had reasons which they considered valid. However, their decision not to vote did not prevent the Teamsters from holding the vote in accordance with its detailed notice.

[51] The Board also disagrees with the conclusion in *Handlex (LD 2209)*, *supra*, that the conciliator's September 10, 2008, recommendations somehow restricted the Teamsters' ability to hold a vote on Handlex's final offer.

[52] The vote on September 26, 2008, dealt with the protocol negotiated with the assistance of the conciliator. The December 4, 2008, vote, which apparently was conducted after the FTQ became involved in a raid situation, contained no such conditions.

[53] Accordingly, given that the Teamsters, whether required to or not, held a ratification vote, and given that any member who attended had the opportunity to vote, we respectfully disagree that the vote was somehow invalidated when a number of eligible voters refused to exercise their right to vote.

[54] In any vote of this type, if a majority of the eligible voters decide not to exercise their voting rights, then they have to accept, as a consequence, that their rights will be decided by those who do in fact vote.

[55] In this case, the four people who voted in favour of the collective agreement decided the matter for the bargaining unit as a whole. That is the consequence of a low turnout for a vote. It is not evidence of the vote being invalid.

3 - Was CUPE's certification application filed within the *Code*'s time limits?

[56] In the circumstances, given that the Teamsters gave proper notice and carried out the vote, it is our view that a collective agreement came into force on December 4, 2008. Accordingly, the Board has decided to grant this application for reconsideration of *Handlex (LD 2209)*, *supra*. The Board finds that the certification application filed by CUPE on December 4, 2008, was untimely under 24(2) of the *Code*. The Board is now required to rescind certification order 9594-U dated January 14, 2009.

[57] The Board will not determine the new issue CUPE raised for the first time in its response to the Teamsters' section 18 reconsideration application. CUPE had multiple occasions in previous proceedings to allege that certain people who voted were not Handlex employees. The Teamsters contested CUPE's allegation. This matter ought to have been raised before the panel seized of the certification application and not, for the first time, before the Board on reconsideration. It is now too late to raise this objection, given the narrow review role of a reconsideration panel.

VI - Labour Relations Consequences

[58] The Board is not unaware of the consequences of this decision. The Board certified CUPE for the Teamsters' bargaining unit on January 14, 2009. While CUPE has known about the Teamsters' reconsideration applications challenging that certification, the Board's January 14, 2009, order still authorized CUPE to represent the bargaining unit.

[59] This decision restores as of today the Teamsters' pre-existing certification for the bargaining unit and the collective agreement that its members ratified on December 4, 2008.

[60] Occasionally this Board, via the reconsideration process, will change one of its previous decisions with a resulting impact on bargaining rights. The failure to intervene, when necessary, would far outweigh the prejudice caused by reconsidering and rendering the decision that ought to have been made at first instance.

[61] This decision will only take effect from this date forward. Any actions taken in good faith by CUPE and Handlex between January 14, 2009, and today's date will not be impacted. From this date onward, however, the Board recognizes the Teamsters as the certified bargaining agent with all of the rights and responsibilities to which that status entitles it. Appropriate orders will be issued.

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

Certified Translation Communications

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Graham J. Clarke
Vice-Chairperson

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Elizabeth MacPherson
Chairperson

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William G. McMurray
Vice-Chairperson