



ONTARIO LABOUR RELATIONS BOARD

Labour Relations Act, 1995

OLRB Case No: 3472-19-R
Certification (Industrial)

United Food and Commercial Workers International Union, Local 175, Applicant
v Canada Royal Milk ULC, Responding Party

COVER LETTER

TO THE PARTIES LISTED ON APPENDIX A:

The Board is attaching the following document(s):

Decision - May 09, 2022

DATED: May 09, 2022

Catherine Gilbert
Registrar

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ONTARIO LABOUR RELATIONS BOARD

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LOCATIONS WHERE THEY ARE MOST LIKELY TO COME TO THE
ATTENTION OF EMPLOYEES OR OTHER INDIVIDUALS AFFECTED BY THE
APPLICATION) NEXT TO THE APPLICATION, THE BOARD'S NOTICE TO
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ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **3472-19-R**

United Food and Commercial Workers International Union, Local 175,
Applicant v **Canada Royal Milk ULC**, Responding Party

BEFORE: Patrick Kelly, Vice-Chair

APPEARANCES: Adam Veenendaal, Georgina Watts and Ricardo Bocanegra for the Applicant; Andrea Risk, Liam McMunagle and Carrie Bidtnes for the Responding Party

DECISION OF THE BOARD: May 9, 2022

1. This is an application for certification filed under the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"). It was filed with the Board on March 11, 2020.
2. At this stage in the proceeding, the Board has heard evidence about, and determined, the status of five individuals as well as the appropriate bargaining unit. There remains an issue concerning the status of three individuals. One of those individuals is Leena Tabaja, a Quality Control Officer, who the applicant (or "the union") challenges on the basis that she allegedly exercises managerial functions and is therefore excluded from the bargaining unit by virtue of subsection 1(3)(b), and not entitled to have her ballot from the representation vote counted. The responding party ("the employer") disagrees that Ms. Tabaja exercises managerial functions, and contends that her ballot should be counted.
3. At the commencement of the hearing on May 9, 2022, counsel for the employer brought a motion requesting that the Board declare

that the union waived its challenge to Ms. Tabaja. This decision deals with that motion.

4. As of the date of this application, March 11, 2020, Ms. Tabaja was on lengthy approved leave of absence, and had been away from the workplace since October 11, 2019. However, she attended the representation vote and cast a ballot.

5. In its status submissions of April 17, 2020, the union noted that, as of the application filing date, Ms. Tabaja was on a leave of absence, and further that Justine Doherty, General Lab Technician, was acting as the Quality Control Officer in Ms. Tabaja's absence. Ms. Doherty also cast a ballot in the representation vote, and her vote was counted.

6. The employer's motion may simply be summarized as follows. The union was aware that Ms. Doherty was temporarily acting in Ms. Tabaja's position, but the union did not challenge Ms. Doherty's right to cast a ballot on the basis of subsection 1(3)(b) of the Act. In other words, the union made no objection to the casting of a ballot by a person (Ms. Doherty) who was performing the same job as Ms. Tabaja in her absence. By failing to challenge Ms. Doherty, the union effectively waived its section 1(3)(b) challenge against Ms. Tabaja.

7. The employer was unable to uncover a Board decision that has dealt with this unusual factual circumstance. However, it takes some comfort from *Canadian Union of Public Employees v Peel Children's Aid Society*, 2015 CanLII 57037 (ON LRB). In that matter, one of the issues concerned the status of an individual who at the time of the application for certification was seconded temporarily from her position in the bargaining unit into a position that exercised managerial functions. The duration of her secondment was fixed, and she was scheduled to return to her bargaining unit position a few months after the application for certification was brought. The responding party argued that, because the individual would inevitably return to her bargaining unit position, and because there was no evidence of gerrymandering, her ballot ought to be counted. The Board disagreed. The Board observed that, at the point in time when the application for certification was filed, the individual in question exercised managerial functions. The Board's consistent approach in fashioning a voting constituency is to include "employees" who had an employment relationship with the responding party, including employees not at work on the application filing date so long as there is a reasonable expectation of their return to employment. The individual in question was not an employee within the meaning of

the Act on the application filing date because she exercised managerial functions. The Board observed that it was important to maintain the line of demarcation as of the application filing date to ensure reliability, uniformity and fairness, and to discourage prolonged litigation.

8. The employer submits that permitting the union to proceed with its challenge of Ms. Tabaja's right to cast a ballot in circumstances where another a person occupying the same position on an acting basis was permitted to cast a vote invites the very litigation "jockeying" that the Board in *Peel Children's Aid Society* was keen to curtail. The employer also claimed the unfairness of such a result is magnified in this case, where the application for certification was brought when the employer and the jobs performed by its employees were in transition between the commissioning of the employer's facility and full production of its milk powder formulae.

9. For the reasons advanced in argument by the union, I respectfully reject the argument of the employer. The fact of the matter is that Ms. Doherty was listed on the agreed employee list as a General Lab Technician and, as such, was entitled to cast a ballot. The Board does not go behind the agreement of the parties to inquire why they come to the arrangements they do. In this case the parties agreed Ms. Doherty could vote as a bargaining unit employee. Secondly, the union has not conceded that, merely because Ms. Doherty was acting in the Quality Control Officer position in Ms. Tabaja's absence, that she was exercising managerial functions. In fact, the union contends that, whatever aspects of the job of Quality Control Officer Ms. Doherty was assigned, she did not exercise any managerial functions.

10. The circumstances in the present matter are not analogous to the situation in *Peel Children's Aid Society*, where the parties agreed that the person in dispute exercised managerial functions as of the application filing date.

11. Accordingly, the employer's motion is denied.

12. As part of the employer's submissions, counsel requested guidance from the Board with respect to the relevant time frame for the evidence concerning the challenge to Ms. Tabaja in the event the Board denied the employer's motion. Generally, with respect to the other status disputes that the Board has already determined in this matter, the parties focussed on job duties and activities of the disputed individuals from January 1, 2020 until March 11, 2020. As indicated,

Ms. Tabaja was away throughout that period, and since October 11, 2019. Counsel for the union suggested that the parties confine themselves to an assessment of Ms. Tabaja's job duties and activities from September 1, 2019. Counsel for the employer resisted that suggestion, arguing that Ms. Tabaja was performing her duties during a very unstable period in the transition of the employer's operation.

13. While I appreciate the point made by employer counsel, it seems to me that there really is not much of a viable choice in the matter. The only other option is to consider what Ms. Tabaja was doing when she resumed her role as Quality Control Officer – but that would involve considering post-application evidence which the Board typically does not permit because of the risk that such evidence can be manipulated. And frankly, it seems improbable that whether or not Ms. Tabaja was exercising managerial functions was influenced by the state of the employer's operation in the fall of 2019. Accordingly, the relevant period for the assessment of Ms. Tabaja's (and, if necessary, Ms. Doherty's acting role's) job duties and activities is the period from September 1, 2019 until March 11, 2020.

"Patrick Kelly"
for the Board

APPENDIX A

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