

Manitoba Labour Board

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CERTIFICATE NO. MLB-6838

Case No. 105/11/LRA

IN THE MATTER OF: *THE LABOUR RELATIONS ACT*

- and -

IN THE MATTER OF: An application by

Public Service Alliance of Canada,

Applicant,

- and -

THE UNIVERSITY OF WINNIPEG,

Employer.

This Decision/Order has been edited to protect the personal information of individuals by removing personal identifiers.

WHEREAS:

1. On April 6, 2011, the Applicant filed an application (the “Application”) with the Manitoba Labour Board (the “Board”) requesting certification as bargaining agent for a unit described as:

“All employees of The University of Winnipeg employed primarily in an academic capacity as Teaching assistants, Research assistants, Markers, Lab demonstrators, Lab instructors, Tutors and Graduate student assistants, save and except those employees covered by existing Collective Agreements.”

2. On April 11, 2011, the Employer, through counsel, requested an extension of time to file its Return to the Application.
3. On April 11, 2011, the Board, following consideration of material filed, granted the extension sought and, in the particular circumstances of this case, was satisfied that exceptional circumstances existed, pursuant to Section 48(4) of *The Labour Relations Act* (the “Act”) warranting an extension of time for the conduct of a representation vote, if necessary.

4. Between April 11 and 15, 2011, the parties filed various written submissions respecting the granting of an extension to the Employer to file its Return.
5. On April 15, 2011, following an extension of time, the Employer, through counsel, filed its Return, asserting that the bargaining unit described in the Application is inappropriate for collective bargaining. For the reasons distilled by the Employer, the Employer's position is that ***Research Assistants, Lab Instructors and Graduate Student Assistants*** do not belong in the bargaining unit. Further, the bargaining unit description does not exclude managers or confidential employees. Accordingly, the Employer proposed an alternate bargaining unit description as follows:

“All employees of the University of Winnipeg who are employed primarily in an academic capacity as Teaching assistants, Markers, Marker/Demonstrators, Lab demonstrators, and Tutors, save and except those employees covered by current Collective Agreements and those excluded by the Act.”

6. On April 15, 2011, the parties were advised that the Board, following consideration of material filed, and in these particular circumstances, had directed that a representation vote be held with all individual ballots and the ballot box being sealed pending a final determination of the Board on all outstanding issues.
7. On April 18, 2011, the Employer, through counsel, filed documentation with the Board clarifying its position respecting the Employer's request for certain employee exceptions, pursuant to Rule 8(12) of the *Manitoba Labour Board Rules of Procedure* (the “Rules”).
8. On April 18, 2011, the Applicant, through counsel, filed correspondence with the Board in response to the Employer's Return, maintaining that the unit proposed in the Application is appropriate for collective bargaining.
9. Between April 19, and 21, 2011, the parties filed correspondence with the Board respecting the status of certain employees and their eligibility to cast a ballot in the representation vote.
10. On April 21, 27 and May 3, 2011, the Board conducted a representation vote in respect of the Application. At the conclusion of the vote, the parties signed a Fair Vote Certificate. Each individual ballot and the ballot box were sealed pending a final determination by the Board on all outstanding issues.
11. On May 10, 2011, the Applicant, through counsel, filed correspondence with the Board requesting a copy of the Nominal Roll pursuant to Rule 8(10) of the *Rules*, and further raising the issue that it may be necessary for the Board to modify the usual application of Rule 28.
12. On May 11, 2011, the Employer, through counsel, filed correspondence with the Board, objecting to the Applicant's request for release of the Nominal Roll.

13. On May 12, 2011, the Board, following consideration of material filed, denied the Applicant's request for the release of the Nominal Roll. The Board further advised that if the Applicant wished to submit that the Board modify the usual application of Rule 28, then it would be necessary to file a submission to that effect, together with details of the manner in which Rule 28 ought to be modified in the circumstances before the Board.
14. On May 19, 2011, the Applicant, through counsel, filed correspondence with the Board, outlining the joint submission on behalf of the Applicant and the Employer respecting the outstanding issues, as follows:
- “a) The parties agree to an amended bargaining unit description as follows:
- “All employees of the University of Winnipeg employed primarily in an academic capacity as teaching assistants, tutors, markers, and lab demonstrators excluding employees working exclusively as mentors, and excluding those employees covered exclusively by current collective agreements and those excluded by the Act.”***
- b) The ***research assistants, lab instructors and graduate student assistants*** are removed from the bargaining unit description by agreement of the parties.
- c) The parties have analyzed the list of voters and identified those who are outside of the above description and therefore not eligible to have their votes counted. All of the remaining votes would be counted.
- d) The parties have agreed that the employees on the attached list (the “List”) containing three hundred and fifty-seven (357) names are employees to the end of the academic semester.
- e) The employees on the attached List have worked in the included classifications in the 12 weeks preceding the Application and have the potential to work again prior to August 31, 2011. The parties have agreed that these criteria constitute a satisfactory modification of Rule 28 criteria for determining the number of members in support of the Application, and jointly request that the Board adopt these criteria for the purpose of this Application.”
15. On May 24, 2011, following consideration of material filed, and noting that the parties reached an agreement with respect to the bargaining unit description and exclusions from the unit, and further noting that the parties have put forward a modified version of Rule 28, the Board informed the parties that it is not satisfied, based on the current material filed, and in the absence of hearing argument or submissions from the parties directly, that a modification of Rule 28 is warranted. Accordingly, the Board directed that the matter proceed to hearing to address the issue of the modification of Rule 28.

16. On May 24, 2011, counsel for the Employer filed correspondence with the Board advising that both parties were requesting some guidance as to what issues the Board expected the parties to address at the hearing regarding the application of Rule 28.
17. On May 25, 2011, the Board, following consideration of the parties' joint request for clarification from the Board regarding its direction that the matter proceed to hearing to address the potential modification of Rule 28, advised the parties, as follows:
 - "1) On any application, the presumptive rule is that Section 28 of the *Manitoba Labour Board Rules of Procedure* applies, in accordance with its terms, for the purpose of determining the percentage of employees who support the application on the date the application was filed. This inquiry is necessary in order to enable the Board to satisfy itself of the level of support for the purposes of Section 40(1) of *The Labour Relations Act* (the "Act") in the first instance.
 - 2) While the Board recognizes that it may modify and has in limited circumstances modified Section 28 to accommodate a unique employment situation or the particular circumstances of an individual case, the Board itself must be satisfied that such a modification is warranted. While the agreement of the parties on criteria which constitute a "satisfactory modification" of Rule 28 is relevant consideration, an agreement between the parties themselves is not binding on the Board.
 - 3) The criteria which the parties have adopted in this case are that the 357 employees on the agreed upon list,
 - i) "... have worked in the included classifications in the 12 weeks preceding the application"...and
 - ii) "... have the potential to work again prior to August 31, 2011".

The Board wishes to hear submissions from Counsel on the rationale underlying the adoption of these criteria as a modification of Rule 28, including submissions on the following points:

- a) Was there a minimum amount of "work" used to determine whether an employee had worked in the 12 preceding weeks and, if so, what was the minimum benchmark? Was it one hour, one class, one day or some other benchmark?
- b) What do the parties mean when they assert that the individuals on the list have the "potential to work again prior to August 31, 2011" and why is the "potential" to work subsequent to the date of the filing of the application and the holding of the vote itself (currently sealed), viewed as a criterion for modifying Rule 28. Further does this criterion mean that the persons on the List still retain employment status or does it mean they are subject to being (re) hired?"

18. On May 27, 2011, counsel for the Employer filed correspondence with the Board jointly requesting, on behalf of the Employer and the Applicant, leave of the Board to proceed by way of a joint written submission on the issue of the modification of Rule 28 and the Board's request for submissions as summarized in its letter of May 25, 2011.
19. On May 27, 2011, the Board informed the parties that it would accept a joint written submission on the issue of the modification of Rule 28.
20. On June 8, 2011, counsel for the Employer submitted the joint written submission on behalf of the Employer and the Applicant respecting the issue of the modification of Rule 28.
21. On June 9, 2011, the Board, following consideration of the joint written submission of the parties, sought further clarification from the parties prior to making a definitive ruling on the proposed modification of Rule 28 in the circumstances of the case. The requests for clarification were as follows:
 - "1) The Board is requesting that the parties confirm that the relevant list of employees remains the list (the "List") which was submitted with Ms. McIlroy's letter of May 19, 2011. The List contains 357 names;
 - 2) The Board is assuming that the parties are in agreement that the 357 employees shown on the list were "employed" on the date of the Application, namely, April 6, 2011. Please confirm;
 - 3) As to the revised proposal to modify Rule 28, please confirm that the previous criterion of an individual having the "...potential to work again prior to August 31, 2011" is no longer being proposed as a criterion;
 - 4) The Board is assuming and would ask that the parties confirm that any work performed during three of the six pay periods in the twelve weeks prior to the date of filing of the Application is the relevant benchmark and it matters not that the work performed is comprised of, for example, one hour, one class or one day;
 - 5) The Board is assuming that the "Bi-weekly Time Sheets" previously submitted to the Board by the Employer accurately reflect both the hours actually worked and days upon which this work was actually performed by the individual employee(s). Please confirm. The Board is also seeking confirmation from the parties that the Bi-weekly Time Sheets which it now has in its possession reflect all hours actually worked by employees up to and including April 15, 2011, as this last payroll period would encompass the date on which the Application itself was filed; and
 - 6) Pursuant to Section 40(1) of *The Labour Relations Act* (the "Act"), the Board accepts that the List is to be used for the purposes of the Board satisfying itself of the level of support enjoyed by the Applicant on the date of the Application (i.e.

April 6, 2011). However, if the Board ultimately determines, pursuant to Section 40(1)2 of the *Act*, that a representation vote is warranted, then is the Board correct in assuming that it is the parties joint position that only those employees on the List who meet the parties' suggested modified criteria under Rule 28 are eligible to vote and have their ballots counted. Please advise."

22. On June 13, 2011, counsel for the Employer filed the joint response of the Employer and the Applicant to the issues raised in the Board's request of June 9, 2011.
23. On June 28, 2011, the Board, by way of Interim Order No. 1502, ruled as follows:

"As to the request by the parties to modify the application of Rule 28 in the circumstances of this case, the Board has considered the joint request of the parties, as reflected in the letter from counsel for the Applicant dated May 19, 2011; the joint response of the parties dated June 8, 2011 (filed in response to the Board's request for submissions in the Board's letter of May 25, 2011); and the parties' joint response dated June 13, 2011 to further inquiries made by the Board in its letter of June 9, 2011. In the Board's view, the factual context underlining this Application constitutes a unique employment situation where a modification of Rule 28 is warranted. In the result, given the unique and special circumstances relating to the employment relationship between the employees in the agreed upon bargaining unit and the University, this is a case when the application of Rule 28 ought to be modified for the purpose of calculating employee support for the Application on the date the Application itself was filed, namely April 6, 2011. In this regard, the Board,

RULES

- 1) That any employee on the agreed list of 357 names submitted by the parties (the "List") who was employed on the date of the application and who has performed any work during three of the six pay periods in the twelve-week period prior to the filing of the Application shall be included for the purpose of determining support for the Application. Employees on the List not meeting this modified formula are to be excluded for the purpose of determining support for the Application;
- 2) Applying the modified formula under Rule 28, as set forth above, to the agreed upon bargaining unit, the Board is satisfied that the requirements of Section 40(1) 2 of *The Labour Relations Act* (the "*Act*") have been met in that at least 40% but fewer than 65% of the employees in the unit found to be appropriate wish to have the Applicant represent them as their bargaining agent; and
- 3) Accordingly, the Board **ORDERS** that the ballots cast in the representation vote held on April 21, 27 and May 3, 2011, be counted, in accordance with the Board's normal practices and procedures. This order means that the parties' joint submission to count only those ballots cast by employees on the List and who meet the modified criteria under Rule 28 is not accepted by the Board. Rather, a majority of all ballots cast by employees on the List shall determine the issue."

24. On June 30, 2011, the ballots cast in the representation vote were counted in the presence of both parties in accordance with the Board's Ruling, with the following results:

Total Number of Affected Employees:		357
Ballots Cast For Applicant:	116	
Ballots Cast Against the Applicant:	15	
Spoiled Ballots:	0	
Chose Not to Vote:	226	
TOTALS:	<u>357</u>	<u>357</u>

25. The Board, following consideration of the agreement reached between the parties with respect to the description of the bargaining unit and the exclusions from the unit, and further noting the results of the representation vote held, has **DETERMINED** to its satisfaction that:

- a) the Applicant is a Union within the meaning of the *Act*;
- b) no allegations of impropriety pursuant to Section 45 of the *Act* have been raised;
- c) the majority of eligible employees in the bargaining unit who voted in the representation vote wished to have the Applicant Union represent them as their bargaining agent; and
- d) the unit hereinafter described is appropriate for collective bargaining.

Accordingly, the Board **HEREBY ORDERS** certification to issue.

T H E R E F O R E

The Manitoba Labour Board does **HEREBY CERTIFY** to all parties concerned that the Public Service Alliance of Canada is the properly chosen bargaining agent for a bargaining unit described as:

“All employees of the University of Winnipeg employed primarily in an academic capacity as teaching assistants, tutors, markers, and lab demonstrators excluding employees working exclusively as mentors, and excluding those employees covered exclusively by current collective agreements and those excluded by the Act.”

and such bargaining agent and Employer are entitled to exercise the rights conferred upon them and are subject to the provisions of the *Act*.

DATED at **WINNIPEG**, Manitoba, this 12th day of July, 2011, and signed on behalf of the Manitoba Labour Board by

“Original signed by”

W. D. Hamilton, CHAIRPERSON

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